Directorate of Distance Education
NALSAR University of Law, Hyderabad

Reading Material

Post-Graduate Diploma in Family Dispute Resolution

1.2 Law Governing Unfair Practices and Property Relations

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Introduction to Family System

Family is a union of various relationships and bonds which emerge generally out of matrimony. In matrimonial relations many issues such as divorce, privacy, parent-child relationships, custody, child support, alimony, and property disposition, parental abuse of children, marital rape, elder abuse, and NRI marriages lead to complex legal complications apart from economic, psychological and social consequences.

- **Family**

"Family" has originated from a Latin word *"Familia"* which means group of people either related by consanguinity[1] or by affinity[2] called as family members, and considered as social group developed by ties of either marriage, blood relation or by adoption sharing single household who interact and inter communicate.

Family, in modern times is a social, economic and legal institution. It includes community, nationhood, global family and humanism. All the civil societies of world recognize this institution. The sanctity of family institution showed success rate of healthy and wealthy living and is acknowledged by every society whether in the West or East. In so far as India is concerned, we in India recognize the concept of '*VasudhaikaKutumbam*' i.e., the entire world is a family. More importance is attached to the institution of family in India, owing to our rich culture, traditions and legacy. Joint Family system has been a unique feature of the Indian society irrespective of the religion practiced by that family. U.S recognized right to marriage as fundamental right by approving

[1] Relations when descended from same ancestor, also called blood relationship.
[2] Relations developed either by marriage or any other relationship.

interracial marriage in 1888[3]. In 1948, the California Supreme Court became the first State highest Court to declare a ban on interracial marriage as unconstitutional. In 1967, the U.S. Supreme Court struck down remaining interracial marriage laws nationwide[4]

In recent years in *Obergefell* v. *Hodges*[5], the Supreme Court of USA has recognized same-sex marriages as legally valid by observing that *"the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty is legalized. Family is the natural and fundamental unit of society and is entitled to protection by society and the state."*

- **Marriage**

Marriage is the fulcrum of the family. It is frequently theorized as the foundation of a family, and family the foundation of society[6]. A marriage is a sacred, eternal bond, an interpersonal relationship built by union of male and female with social, legal or religious recognition. Marriage enables usually intimate and sexual relationships and often created as a contract. The most frequently occurring form of marriage unites a man and a woman as husband and wife called 'monogamy' and beginning in the 21st century, the legal concept of marriage has been expanded to include same-sex marriage in western countries' jurisdictions and in India such a concept is yet to be recognized legally. However, on 6 September, 2018 the Supreme Court of India in *Navtej Singh Johar* v. *Union of India*[7] has decriminalized consensual sexual conduct between adults of the same sex, by holding the Section 377 of IPC as unconstitutional to that extent.

- **History of Marriage**

Institution of Marriage has a long history. In every Society Marriage of some kind is found virtually. Except in societies where post-marital residence is traditionally matrilocal[8], patrilocal[9], or avunculocal[10], married people typically form a household, which is most often subsequently extended biologically, through children. Among Western cultures, the nuclear family emerged during the late medieval period. Most Non-Western societies have a broader definition of family

[3] In *Maynard* v. *Hill*, 125 U.S. 190 (1888)
[4] In *Loving* v. *Virginia*, 388 U.S. 1 (1967)
[5] 576 U.S. (2015)
[6] Law Commission of India Consultation Paper on Reform of Family Law, 31 August 2018
[7] (2018) 10 SCC 791
[8] The societal system in which a married couple resides with or near the wife's parents.
[9] A pattern of marriage in which the couple settles in the husband's home or community.
[10] An avunculocal society is one in which a married couple traditionally lives with the man's mother's eldest brother, which most often occurs in matrilineal societies. The anthropological term "avunculocal residence" refers to this convention, which has been identified in about 4% of the world's societies.

that includes an extended family network. One universal and unique attribute of marriage is the creation of affinal ties[11] either by endogamy or exogamy etc. Historically, marriage existed as a private relationship, often an alliance between families, still practiced by tribes like *Santhal, Ho* and *Ghond* today, where neither the State nor the Church is involved. For Example marriages are either by purchase, service, exchange, capture, *levirate*[12], *anuloma*[13] or *pratiloma*[14].

o Reasons for Marriage

The reasons people marry vary widely, but usually include one or more of the following: the public declaration of love; the formation of a family unit; legitimizing sexual relations and for procreation of children to give them legal recognition, social and economic stability; and to educate and nurture them in turn to contribute to society and nation in an organized manner. The primary objective of family institution is to have healthy and wealthy community, continuance of society for development of nation and progression of human race. It's a mutual co-operation of restrains and constrains to grow & emerge by self-sacrifices by contributions to attain happiness to one self and whole family to utmost satisfaction of life.

o Performance of Marriage

A marriage is often declared by a wedding ceremony, which may be performed either by a religious officiator i.e., either by *Pandit* or *Kazi* or *Father* of Church or through a similar government-sanctioned secular officiator or *Registrar* as mentioned in Special Marriage Act or some other as per various religion. The act of marriage usually creates obligations like lifelong commitment, responsibility and welfare between the individuals involved, and in many societies and their extended families.

o Marriage as Contract

Marriage also constitutes a form of contract, although in the past it lacked enforcement by formal institutions and the terms of the marriage were heavily circumscribed by societal norms. Marriage is a system existent from time immemorial is an unwritten discipline or unbreakable

[11] It comes from affinity which means a liking or sympathy for someone or something, especially because of shared characteristics. In this context it includes creation of relations like mother in law, father in law, brother in law and sister in law.

[12] A custom of the ancient Hebrews and some other peoples by which a man may be obliged to marry his brother's widow.

[13] A social practice according to which a boy from upper Varna / caste / class can marry a girl from lower *varna* / caste / class

[14] A type of marital practice in which a man of lower class / caste / Varna marries a girl of higher class / caste / *varna*. See generally *www.studylecturenotes.com/basics-of-sociology/types-of-indian-tribal-marriages*

commitment, companionship of married couple who fulfill duties, sincerely contributing to social order and congenial society. Marriage Contract and Marriage Agreement entered into during the marriage, between prospective husband and wife, settled their respective rights and obligations as regards the marriage leading to formation of Family[15]. It is observed that, Marriage is the sanctioning by a society of a durable bond between one or more males and one or more females established to permit sexual intercourse for the implied purpose of parenthood.

According to Lundberg,[16] marriage consists of the *"rules and regulations which define the rights, duties, and privileges of husband and wife, with respect to each other."* Edward Westermarck in his "History of Human Marriage"[17] defines marriage as *"the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring."* Malinowski says that marriage is a *"contract for the production and maintenance of children."* According to Robert H. Lowie, *"Marriage is a relatively permanent bond between permissible mates."*

In *Maynard v. Hill*[18], the US Supreme Court opined that Marriage is *"the most important relation in life"* and *"the foundation of the family and society, without which there would be neither civilization nor progress."* The evolution and progression in society and State involvement in Marriage was well predicted in 1885 by Sir Henry Maine, who said that that the movement of the progressive societies has hitherto been a movement from Status to Contract. In one sense, all marriages involve a contract, although one with many hidden provisions unknown to the partners until the marriage breaks down and one or more of the parties seek redress for presumed wrongful behavior. At that point, the parties discover that the state has a third party interest.

Existence of the pre-status contractual marriage has been traced to the later days of the Roman Empire, where marriage was freely terminable by either one of the parties, strict controls exercised by family had impact on divorce and it was rare. When these controls broke down, the absence of any law created a vacuum of restraint, and it became common to change partners frequently, sometimes within a few days. The feudal doctrine of 'covertures' described by Blackstone (1854) as follows "The subordination of the wife, based in part on ancient notions of the unity of flesh of husband and wife, resulted in the married woman's loss of legal rights"

> "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the women is suspended during the marriage, or

[15] Duhaime, Lloyd, *Duhaime's Legal Dictionary*
[16] See https://www.sociologyguide.com/marriage-family-kinship/index.php
[17] Published by Harvard University in 1891
[18] 125 U.S. 190 (1888)

at least incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything."

In return for suspension of her legal rights in marriage, the husband was obliged to provide financial support to the family. Incorporation of the concept that the unity of marriage resided in the husband permeated laws affecting women's names, domicile, and rights to contract and to own and manage property. The harshness of the Common Law rules was somewhat alleviated by Courts of equity, which were granted substantial discretionary powers. Challenges to the basic principle were uncommon, but they were an important part of American history.

In the U.S.A., as early as 1855, legal disabilities imposed on married women by the Common Law were rejected by individuals such as Lucy Stone and her husband, Henry Blackwell. They expressed in their Marriage Protest, and declared that *"such laws confer the investing legal powers in husband which is injurious and unnatural superiority, which no honorable man would exercise, and which no man should possess."* Contract regime was set out by the couple deliberately to create an emancipated marriage that would allow the wife full freedom for a public career by signing a contract in which the husband renounced all legal rights to his wife's services and property and in which the wife contracted to keep her maiden name. But such individual contracts were rare indeed and could not sustain a legal challenge.[19] Scholars of World like Max Weber, Macfarlane, historians and sociologists coined modern marriage as religious-legal-cultural value system.

The right to marry is an implicit component of 'Right to Life' under Article 21 of the Constitution of India which says, *"No person shall be deprived of his life or personal liberty except according to the procedure established by law."* Universal Declaration of Human Rights 1948 (UDHR), recognized this right under the Art. 16, and the same states:

1. Men and Women of full age without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during the marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

[19] See Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States during the Twentieth Century* (Dec.2000) California Law Review, Volume 88, and Issue 66.

- **Challenges and Unfair Practices in Family Relations**:

In spite of globalization, urbanization, modernization and advent of nuclear families, the family system in vogue in India has a perennial appeal and life, though it faces multifaceted and multi-dimensional issues. The sanctified family system with bonded relations among different members of family has been experiencing certain issues challenges and also unfair practices in recent years. They include certain developments like Child Marriages, Dowry System in general, Dowry Deaths, Harassment Relating to Dowry, Commission and Glorification of Sati, Offences against Marriage more particularly Adultery, Bigamy and Mock Marriages, Domestic violence in its various manifestations, etc.

This collection of literature and study material makes an attempt to explain the aforementioned unfair practices in family relations.

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Part A: Unfair Practices

Module: I

Consideration for Marriage: Dowry an Evil Practice - Agreement for Giving and Taking Dowry - Dowry Prohibition Act, 1961 - Use and Misuse of Dower under Islamic Law - Relevant changes in Indian Penal Code and Evidence Act

Dowry

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Dowry

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Dowry – An Introduction

India has been a rich country in terms of natural resources and culture of giving gifts was and is very common between members of family and society. In the family system giving gifts to daughter, to express love and to create a feeling of security, has been in existence from the time immemorial. However, such a practice was purely voluntary and dependent on the capacity of the giver/donor. Ancient Indian literature did not have dowry practices during Vedic Period and women had rights of inheritance on property.[20] One of the evil practices that emerged in modern times has been the dowry system.

'Dowry' is derived from the ancient Hindu custom of "*kanyadan*", where the father presented his daughter, jewelry and clothes at the time of her marriage, and "*vardakshina*", where the father of

[20] Wetzel, Michael. Professor of Sanskrit in Harvard University *"Little Dowry, No Sati: The Lot of Women in the Vedic Period."* Journal of South Asia Women Studies 2, No. 4 (1996).

the bride presented the groom cash or kind. Both of these were done voluntarily and out of natural affection, love and gratitude. However, this consideration for marriage given by girl's parents turned into a regular practice, and got extended to demand of valuables, money and property at time of marriage and evolved into the present "Dowry System".

Dowry means *"any property or valuable security, given directly or indirectly by parents of one party to marriage to other party to marriage, parents or any other person"* as explained in case of *Ashok Kumar v. State of Haryana*[21]. When the dowry demand is not fulfilled by married woman and her parents, they are subjected to torture, cruelty and brutal harassment by husband and her in-laws leading to dowry deaths and dowry suicides. Dowry system has been an integral part of Hindu marriages for long and from there it has stepped into other communities too. The evil of dowry system has been a matter of serious concern to everyone in view of its ever increasing and disturbing proportions.

In order to prohibit the evil practice of giving and taking of dowry, the Parliament has passed the Dowry Prohibition Act, 1961. The Act has been substantially amended by the amending Acts in 1984 and 1986. However, this is not the first legislative effort to eradicate the pernicious dowry system. Number of steps have been taken by the Legislature even before the Act came into force, to tackle this issue.The Statement of Objects and Reasons to the Bill and the amendment Acts of 1984 clearly explain the intention of the legislature.

For the sake of convenience, the problem of dowry has been discussed under three heads namely, The Dowry Prohibition Act, Dowry Death and Suicide, and Cruelty by Husband for Dowry.

The Dowry Prohibition Act, 1961

The object of this Act is to prohibit the evil practice of giving and taking or demand dowry or additional dowry. The prevalence and severe nature of the problem affecting the society had drawn the attention of the Government for some time in the past, and one of the methods by which this problem, which is essentially an expanding and existing social one, was sought to be addressed and tackled by the conferment and improved property rights to women by the Hindu Succession Act, 1956. It was however, felt that a law which makes the practice punishable, and at the same time ensures that any dowry if given does ensure for the benefit of the wife, would go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside the Parliament. Hence, the present Act takes care to exclude presents in the form of clothes ornaments, etc., which are customary at marriages, provided the value

[21] 2010 (7) SCJ 274

thereof does not exceed a particular limit. Such a provision appears to be necessary to make the law workable.

To eradicate this evil leading to emotional abuse and crime causing even death, this legislation has been made. Very unfortunately, the practice of payment of dowry system has been viewed as factor of prestige in many Indian Families. The economic, social and religious factors influenced the continuance of this practice till date and this has been a matter of serious concern to everyone in view of its ever increasing and disturbing proportions.[22] The legislation on the subject enacted by the parliament i.e. the Dowry Prohibition Act, 1961(DPA) and the far-reaching amendments thereto, have been made to eradicate the evil as it's connected to the social structure of marriage. As pointed out by the Committee on the Status of Women in India, the educated youth who tag bride price is grossly insensitive to the evil of dowry and unashamedly contributes to its perpetuation. The Government has been making various efforts to deal with the problem. In addition to issuing instructions to the State Governments and the Union Territory Administrations with regard to the making of thorough and compulsory investigations into cases of dowry deaths and stepping up anti-dowry publicity, the Government referred the matter of dowry related offenses for consideration of a Joint Committee of both the Houses of the Parliament. The Committee went into the whole matter in great depth and its proceedings have helped in no small measure in focusing the attention of the public and rousing the consciousness of the public against this evil.

The following observations made by Pandit Jawaharlal Nehru which have been quoted by the Committee indicate the role, which legislation can play in dealing with the evil:

> *"Legislation cannot by itself normally solve deep-rooted, social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape."*

The recommendations made by the Joint Committee of the Houses to examine the question of working of the Dowry Prohibition Act, 1961 have been considered keeping in view these observations and after taking into consideration the comments received on the Report from the State Governments, Union Territory Administrations and the different Ministries of the Union Government concerned with the matter. One of the important recommendations of the Committee for dealing with cruelty to a married woman by the husband or the relatives of the husband on the ground of non-receipt of dowry or insufficient dowry has already been given effect to by the Criminal Law (Second Amendment) Act, 1983. This Act amended, *inter alia*, the Indian Penal Code to include therein a provision for

[22] Consequently, dowry has been prohibited by specific Indian Laws like the DPA, 1961 and the Indian Penal Code, 1860 under Sections 304-B and 498A.

punishment for cruelty to married women and was aimed at dealing directly with the problem of dowry suicides and dowry deaths.

The Joint Committee has recommended that the definition of 'dowry' contained in the 1961 Act should be modified by omitting the expression *"as consideration for the marriage"* used therein on the ground that it is well-nigh impossible to prove that anything given was a consideration for the marriage for the obvious and simple reason that the giver i.e. the parents of whom are usually the victims, would be reluctant and unwilling to set the law in motion. The omission of the words *"as consideration for the marriage"* would make the definition not only wide but also unworkable, for, if these words are omitted, anything given, whether before or after or at the time of marriage by any one, may-amount to dowry. The Supreme Court has also placed a liberal construction on the word 'dowry' as used in Section 4 of the Dowry Prohibition Act, 1961, relating to demanding of dowry. In the circumstances, it was proposed to substitute the words *"in connection with the marriage"* for the words *"as consideration for the marriage"* instead of omitting those words.

Section 3 of the Dowry Prohibition Act, 1961 relating to the offences of giving or taking of dowry has been amended in accordance with the recommendations of the Joint Committee to make the punishment for the offence more stringent. All presents given at the time of marriage to the bride, and certain types of presents given at the time of marriage to the bridegroom were proposed to be excluded from the purview of the offences under the section. However, the recommendation of the Committee for exempting the giver of dowry from punishment was not being given effect to; as such exemption may only prove to be counter-productive. Although, the Dowry Prohibition (Amendment) Act, 1984 was an improvement on the existing legislation, opinions have been expressed by representatives from women's voluntary organizations and others to the effect that amendments made are still inadequate and the Act needs to be further amended.

Judicial Cognizance of the Evil

The Supreme Court in *S.Gopal Reddy* v. *State of A.P.*[23] has explained the alarming increase in a number of dowry related offences as under:

> *"The alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides have always sent shock waves to the civilized society. Unfortunately, the evil has continued unabated. Awakening of the collective consciousness is the need of the day, change of heart and attitude is needed. A wider social movement not only of educating women of their rights but also of the men folk*

[23] AIR 1996 SC 2184

to respect and recognize the basic human values is essentially needed to bury this pernicious social evil. The role of the Courts, under the circumstances, assumes a great importance. The Courts are expected to deal with such casein a realistic manner so as to further the object of the legislation. However, the Courts must not lose sight of the fact that the Act, though a piece of social legislation, is a penal statute. One of the cardinal rules of interpretation in such cases is that a penal statute must be strictly construed. The Courts have, thus, to be watchful to see that emotions or sentiments are not allowed to influence their judgment, one way or the other and that they do not ignore the golden thread passing through criminal jurisprudence that an accused is presumed to be innocent till proved guilty and that the guilt of an accused must be established beyond a reasonable doubt. They must carefully assess the evidence and not allow either suspicion or surmise or conjectures to take the place of proof in their zeal to stamp out the evil from the society while at the same time not adopting the easy course of letting technicalities or minor discrepancies in the evidence result in acquitting an accused. They must critically analyze the evidence and decide the case in a realistic manner."

DPA is not a Complete Code

The Dowry Prohibition Act, 1961 is not a complete Code that deals with dowry prohibition. Apart from this Act, the Indian Penal Code contains Section 304B dealing with dowry death and section 498A dealing with cruelty relating to dowry. The Indian Evidence Act, 1872 contains presumption in Section 113-B as to a dowry death. Even the Protection of Women from Domestic Violence Act 2005, also treats the demand for dowry as an instance of domestic violence.

Definition of Dowry

It is quite common to misunderstand Dowry as given only by the Bride or her relatives to the bridegroom or his relatives. Legally speaking this narrow interpretation is wrong as could be seen from the following write-up. Section 2 of the Act defines 'dowry' as *"any property or valuable security, given or agreed to be given either directly or indirectly, by one party to a marriage to the other party or by the parents of either party to the other party, either at or before or any time after the marriage of the said parties."* This definition conclusively proves that dowry may flow from either bride to bridegroom or vice-versa.

By the 1986 Amendment, the words *"in connection with the marriage"* were substituted in place of *"as consideration for marriage"* to remove flaw of escapism from punishment by offenders.

A clear analysis of the definition makes it very clear that it is a comprehensive and wide definition which covers almost all forms of dowry and it covers the period before, at and after the marriage takes place.

What is not Dowry?

Every gift or property given by one party to the marriage to the other party may not be dowry under all the circumstances. The DPA recognizes two exceptions to the meaning of dowry. They are:

- **Traditional gifts:** The Dowry Prohibition Act, 1961, however, does not bar in any way, the traditional giving of presents at or about the time of wedding, which may be willing and affectionate gifts by parents and close relations of the bride to her. Thus, a voluntary and affectionate giving of dowry and traditional presents would be plainly out of the ambit of "dowry" as defined by the Act. Such gifts however shall be within the capacity of donor.

- **Dower (*Mahr*):** The definition does not include 'dower' or '*mahr*' given as per the Muslim Personal Law (Shariat). Dower is a provision accorded by law, but traditionally by a husband or his family, to a wife for her support in the event that she should become widowed. It was settled on the bride (being gifted into trust), by agreement at the time of the wedding, or as provided by law. In fact, it is an amount of money or property given or agreed to be given by the Muslim husband to his wife as a mark of respect to her personality. The dower may be given at the time of marriage or at the time of dissolution of marriage, as agreed by the parties to the marriage.

Salient Features of Dowry Prohibition Act

The following are the salient features of the DPA.

- **Dowry Agreements are Void (S.5):** Any agreement for the giving or taking of dowry is void and it shall not have any value in the eyes of law. Therefore, a suit for recovery of such amount agreed to be given as dowry is not maintainable and cannot be decreed. Similarly, money paid under such void agreement cannot be recovered, in spite of the fact that the marriage has not taken place. Even if all other essential conditions for entering in to a valid contract are satisfied, such agreements become void, as the object is opposed to the public policy.

  In *Shankar Prasad Shaw v. State*[24], there had been no agreement between either party to neither the marriage nor their relations to give any property or valuable security to the other party

[24] I (1992) DMC 30 Cal.

at or before or after the marriage. It was held that the demand of TV, refrigerator, gas connection, cash of Rs.50,000/- and 15 tolas of gold, will not amount to demand of dowry but demand of valuable security and the said offence does not attract section 4 of the Dowry Prohibition Act. However, the Court opined that the alleged offence as made out in the complaint petition may attract the penal provisions as contained in Section 498A of the Indian Penal Code.

- **Presents given without Demand- Not Dowry [S.3(2)]:** Presents, which are given at the time of marriage to the bride or bridegroom without any demand having been made in that behalf and which are customary in nature do not come under the purview of "giving or taking of dowry". In order to be excluded from meaning of dowry, such customary presents (i) should not be disproportionate to the financial status of the giver of those presents, and (ii)they should be entered in a list maintained in accordance with the Rules made under the Dowry Prohibition Act, 1961.

- **Penalty for taking Dowry (S.3):** Any person, who takes or gives or abets the giving or taking of dowry, is liable to be punished with a minimum imprisonment of 5 years and with a minimum fine of Rs.15,000/- or the amount of the value of such dowry, whichever is more. However, the Court is empowered to award sentence of imprisonment for a term less than 5 years, for adequate and special reasons to be recorded in the judgment. The very fact that a minimum imprisonment of five years has been provided for the offence of giving or taking the dowry speaks volumes about the intention of the legislature to eradicate this evil system.

- **Penalty for demanding Dowry (S.4):** The Act makes not only the giving or taking of dowry an offence but also mere demanding the dowry. Section 4 of the Act discourages the very demand for property or valuable security as consideration for a marriage between the parties. If any person demands, directly or indirectly any dowry from the parents, guardian or other relatives of a bride or bridegroom, he is liable to be punished with a minimum imprisonment of 6 months but it may also extend to 2 years and fine. In Case of *Madan lal* v. *Amarnath*[25] the brother of husband demanded dowry and husband was silent. The Delhi High Court imposed penalty equal to dowry and imprisoned the brother. However, mere demand in financial emergency cannot be termed as demand for dowry as decided by Supreme Court in *Appasaheb& others* v. *State of Maharastra*[26].

- **Time for demanding dowry:** The Act, in Section 4 is silent as to the time during which the demand should be made to constitute the offence. However, in a landmark decision[27], the

[25] 1984 (2) Crimes 584
[26] (2007) 9 SCC 721
[27] *S. Gopal Reddy* v. *State of Andhra Pradesh*, 1996 (4) SCC 596

Supreme Court has clarified that the demand, even if made before the marriage amounts to an offence under Section 4 of the Act. In this case, the Court held that under Section 4 of the Act, a mere demand of dowry is sufficient to bring home the offence to an accused and that any demand of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or vice versa would fall within the mischief of dowry under the Act. The noteworthy point laid down by the Supreme Court is that marriage in this context would include a proposed marriage, also more particularly where the non-fulfillment of the demand of dowry leads to the ugly consequence of the marriage not taking place at all.

- **Ban on Advertisements (S.4-A):** To discourage the dowry system any person who advertises through any media or mode offering a share in his property or money or both, as consideration for the marriage of his son or daughter or any other relative is liable to be punished with a minimum imprisonment of 6 months, which may extend to even 5 year or with fine. However, the Court may award a lesser punishment in a fit case, for the special reasons to be stated in the judgment. Thus, campaigning in any form the giving of dowry is a distinct offence which is punishable by itself, notwithstanding the fact that the dowry offered is not given at all.

- **Civil Consequences of Taking Dowry (S.6)**: Where any dowry is received by any person other than the woman, it is obligatory on the part of the person' who has received the dowry to transfer it to the women. The receiver of the dowry is under a legal obligation to transfer such dowry to the woman, generally within three months from the date of receipt of marriage, irrespective of the time of receipt. Thus the consequence of giving and taking dowry in violation of Sections 3, 4, and 5 of the Act is not that the transaction is invalid. The beneficial interest in the transaction is with the woman and the taker is only a trustee. He must hold it for the benefit of the woman and her legal heirs.

Thus, the dowry if given, shall be for the benefit of the wife or her heirs only. If any person fails to transfer the dowry as required by Section 6(1) of the Act, it is an offence which is punishable with imprisonment or with fine or with both, but such punishment shall not absolve the person from his obligation to transfer the property as required by the Act. Therefore, a suit for return of dowry articles would always be maintainable and the Dowry Prohibition Act will not stand in the way of maintaining the suit.[28] Where the woman, who is entitled to receive the dowry on transfer, dies within 7 years of her marriage, otherwise than due to natural causes, such dowry property, shall be transferred to her children and in their absence, to her parents.

[28] *Seariah Varghese* v. *Varghese Marykutty And Ors.*, II (1991) DMC 262

- **Non-bailable and Non-Compoundable Nature of offences [S.7(2)]**: Every offence under the Dowry Prohibition Act is a non-bailable and non-compoundable offence. Non-bailable offence doesn't mean that the bail cannot be granted, but that it may be granted at the discretion of the Court. Similarly, the offence cannot be compounded i.e., cannot be pardoned or settled outside the Court. The Criminal Procedure Code, 1973 defines "cognizable offence" as an offence for which a police officer may arrest the accused without any warrant and can start an investigation without the permission of the Court.

- **Burden of Proof (S.8-A):** Where any person is prosecuted forsaking or abetting the taking of any dowry under Section 3 or the demanding of dowry under Section 4, the burden of proving that he had not committed those offences shall be on the accused.

- **Cognizance and Trial of offences**: According to Section 7, only a Court of the Metropolitan Magistrate or a Judicial Magistrate of First Class and no other inferior Court have the jurisdiction to try the offences under the Act. The prosecution may be initiated either upon the own knowledge of the Court or on a police report or complaint. The compliant can be made by even a recognized welfare institution or organization. In this context, the expression "recognized welfare institution or organization" means a social welfare institution or organization recognized by the appropriate Government as such.

- **Dowry Prohibition Officers [S.8-B]:** The State Government is empowered appoint as many Dowry Prohibition Officers as it thinks fit and specify the areas in respect of which they shall exercise their jurisdiction and powers under this Act. Every Dowry Prohibition Officer has to perform the following powers and functions, namely: (a) to see that the provisions of this Act are complied with; (b) to prevent, as far as possible, the taking or abetting the taking of, or the demanding of, dowry; (c) to collect such evidence as may be necessary for the prosecution of persons committing offences under the Act; and (d) to perform such additional functions as may be assigned to him by the State Government, or as may be specified in the rules made under this Act. The State Government may, for the purpose of advising and assisting Dowry Prohibition Officers in the efficient performance of their functions under this Act, appoint an advisory board consisting of not more than five social welfare workers (out of whom at least two shall be women) from the area in respect of which such Dowry Prohibition Officer exercises jurisdiction.

- **Application of Cr.P.C. to the offences under the Act (S.8):** The Code of Criminal Procedure, 1973 is applicable to the offences under this Act, as if they are cognizable offences. Thus, demand and taking of dowry are cognizable offences by virtue of Section 8 of the Act. The offences are cognizable for the purposes of investigation of such offences.

Use and Misuse of Dower under Islamic Law

In Islam, *mahr* (in Arabic) is a mandatory payment, in the form of money or possessions paid by the groom, to the bride at the time of marriage or at the time of dissolution of marriage as agreed by the parties to the marriage. While the *mahr* is often money, it can also be anything agreed upon by the bride such as jewelry, home goods, furniture, a dwelling or some land. *Mahr* is typically specified in the marriage contract signed during an Islamic marriage. The *mahr* is one of the wife's rights that is sincerely given by the husband to the wife, without exception, as an expression of his love and responsibility.

In Islam, the concept of *mahr* is more effective, comprehensive, vital and sacred than any other religions. It is one of the fundamental rights of every woman. *Mahr* is not only considered to be a trust, a sacred responsibility, which is to be performed in conformity with the provisions of the Qur'an and Sunnah; but the dispensation of *mahr* also constitutes one of the most important acts of devotion. It is intended to please the wife, so that she feels appreciated and more willing to bring and share a new life with the husband. Nevertheless, Islam recommends moderation and not setting a rate that is too high or low[29].

"Dower" is the English translation that comes closest to Islamic meaning of *mahr*, as dower refers to the payment from the husband or his family to the wife, especially to support her in the event of his death. *Mahr* is undoubtedly a significant subject matter for the Muslim society. It is a sum of money or property on which the wife is entitled to receive from her husband in consideration of their marriage. The religion of Islam has maintained a balance in the society between men and women by giving its unequivocal endorsement to a practical division of responsibilities, whereby women are placed in charge of the domestic management of the household, while men are responsible for the maintenance of its victuals and livelihood in a matrimonial family. An investigation of the real philosophy of *mahr* brings out the physical and mental differences between men and women in the practice of discharging their respective familial responsibilities in the internal and external domestic spheres.

In the Islamic Law, *mahr* is a gift from the husband to his bride at the time of marriage. The terms 'dowry' and bride gift are sometimes used to translate *mahr*. In Islamic marriages, such assets brought into the union by the wife may only be accepted by the husband after the *mahr* has been paid by him to her. In the event that the marriage of the contract does not contain an exact or specified

[29] Syed SahidAhammad, *A Critical Analysis of Dower (Mahr) in Islam*, IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 21, Issue 7, Ver. V (July. 2016) PP 86-91 e-ISSN: 2279-0837, p-ISSN: 2279-0845. available at www.iosrjournals.org

mahr, the husband must still pay the wife an equitable sum of money. The requirement of a *mahr* is mentioned several times in the Qur'an and as a Sunnah[30].

There are two principal methods of payment of *mahr* according to Islamic scholars. They are:

- **By Specified *Mahr* or *Mahr-e-Musawamah*:** This method is agreed upon by the parties at the time of marriage. Specified *Mahr* (*Mahr-e-Musawamah*) can further be divided into two categories:
  - **Prompt or *Mahr-e-Mu'ajjal*:** This *mahr* is payable immediately upon the marriage, under the following conditions:
    - Only after the payment of dower can the husband enforce his conjugal rights and, if the marriage is consummated, then the wife cannot refuse cohabitation (intercourse) after that.
    - The wife has a right to refuse cohabitation (intercourse) with the husband until she is paid the *mahr*.
    - The period of limitation on demand and refusal of a dowry and any part of it is three years.
    - A Prompt dower (*mahr*) does not become deferred after consummation and the wife has the right to demand and sue (petition) for it any time.
    - If the wife is a minor, the guardian can refuse to allow the wife to be sent to the husband until the *mahr* is paid.

  - **Deferred or *Mahr-e-Muakkhar*:** This type of *mahr* is payable upon dissolution of a marriage either by divorce or by death of a husband. Its promise to pay does not make the full amount of *mahr* any less legally required. There are differences between the nature of *mahr*, definition of proper contract and conditions of enforceability depending on the regional custom and school of Islamic Jurisprudence.
- **Customary or *Mahr-e-Misil*:** This type of *mahr* is not fixed in the marriage contract, or even if the marriage has been contracted on the condition that the wife will not claim any *Mahr*, but the wife is legally entitled to a proper dower. The amount of monetary value of the dowry is to be settled based on the bride's father's family. It is regulated with reference to the following factors: (i) Age, beauty, fortune, understanding and virtue of an intended wife; (ii) Circumstances of the time; (iii) Economic condition of the intending husband; (iv) Social position of the intended wife's father; and (v) Female paternal relations.

Thus it could be concluded that, *mahr* is to be paid by the husband to his wife as early as possible and it is the pre-requisite for marriage as mentioned throughout the Qur'an and Sunnah. It should be

[30] Brown, Driver, Briggs, Gesenius (1952). *''The NAS Old Testament Herew Lexicon''.* Oxford University Press. ISBN -198-64301-2. Retrieved 2014-09-06 as quoted in Note 26 Supra.

equitable, and a woman's forfeiting on the dowry for the prophet does not atomically apply to other believers. The husband and wife can mutually make any adjustment to the dowry, however, the future owner of a *mahr* is only the wife, as it is a sort of protection for women. Although, one cannot find in the Qur'an any direct support for payment of *mahr* in cash only, *mahr* cannot be something that does not have a monetary value. It cannot be only love, honesty, being faithful, etc., which are anyway traits of righteous people.

Relevant Changes in Indian Penal Code and Evidence Act

Keeping in view the rapid spread of the evil of dowry system and inadequacy of the DPA to address it, the Parliament of India has made certain significant changes in relation to dowry related offences. First let us understand the changes made in the Indian Penal Code, 1860.

Dowry Death and Dowry Suicide

Increasing number incidents of Dowry death and dowry suicide are ominous disgrace and threat. The Indian society has been witnessing over years. The Parliament has taken a serious view of the increasing number of dowry deaths. India is losing more than 20 lives due to dowry death as per NCRB 2017 report. The Law Commission of India also suggested number of measures in its 91st report to eradicate the evil of dowry deaths. Consequently, the Indian Penal Code, 1860 has been amended and also the Indian Evidence Act, 1872 to create the special offences of dowry death. The Criminal Law (2nd Amendment) Act, 1983, which effected the relevant amendments, has explained the reasons for the same in its Statement of Objects and Reasons which is as under:

> *"The increasing number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the working of the Dowry Prohibition Act, 1961. Cases of cruelty by the husband and relatives of the husband which culminate in suicide by or murder of, the hapless woman concerned, constitute only a small fraction of the cases involving such cruelty. It is, therefore, proposed to amend the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in-laws."*

Thus, it is clear from the above Statement of Objects and Reasons that the amendment of the Indian Penal Code and the Indian Evidence Act has been made to curb the inhuman practice of dowry deaths and to bring the culprits of such offences to the book effectively. More than 90 % are charge sheeted but convicting rate is one third. The effective enforcement is a pertinent question regarding existing laws and the desirability of looking at legal solutions for social problems to tackle them at the ground level.

Frequently Asked Questions (FAQs)

1. What is Dowry?

2. What is Dower (Mahr)? Explain its purpose in modern times.

3. Who is/are punishable under the Dowry Prohibition Act?

4. When is a death presumed to be a Dowry Death under the Indian Evidence Act, 1872?

5. Define Dowry Death. Is it different from Dowry Suicide?

Multiple Choice Questions (MCQs)

1. Under the provisions of the Dowry Prohibition Act, 1961, Dowry is any property or valuable security, given or agreed to be given either directly or indirectly, by one party to a marriage to the other party or by the parents of either party to the other party

a) at the time of marriage

b) before the marriage

c) at any time after the marriage

d) at any of the above times

2. The words "in connection with the marriage" were substituted in place of "as consideration for marriage" in the definition of Dowry under the D.P.Act,1961 were substituted in the year

a) 1983 b) 1984 **c)** 1985 d) 1986

3. Any agreement for the giving or taking of dowry is

a) void b)valid c)Voidable d) valid if registered

4. Where any dowry is received by any person other than the woman, it is obligatory on the part of the person' who has received the dowry to transfer it to

a) the women b)to the Government c)to the children d)to the Court

5. Any person, who takes or gives or abets the giving or taking of dowry, is liable to be punished with a minimum imprisonment of …….years and with a minimum fine of Rs.15,000/- or the amount of the value of such dowry, whichever is more.

a)five b)seven c)ten d)two

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Module: II

Offences against Marriage: Bigamy - Matrimonial Rape - Dowry Death - Matrimonial Cruelty - Recent Developments

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Offences Relating to Marriage

Chapter XX of the Indian Penal Code in Sections 493 to 498 deals with the offences relating to marriage. They are:

- Cohabitation by a man with a woman who is not his wife by deceit. (Section 493);
- Bigamy during the life time of a spouse (Sections 494 and 495);
- Mock marriage with fraudulent intention (Section 496);
- Adultery (Section 497); and
- Enticing or taking away or detaining a married woman with criminal intention (Section 498).

Bigamy

Sections 494 and495 of IPC, punish the offence known to the English law as bigamy. It denotes marriage by either a man or woman for the second time during the continuance of the first marriage. Monogamy is the rule in all the personal laws, except in Islam[31]. Therefore, the Hindus, the Christians and the Parsis are not permitted to contract a second marriage while the first marriage is not dissolved. The Kerala High Court clarified that Section 494 IPC does not discriminate between Hindu/ Muslim/ Christian and can be proceeded against any citizen who commits the offence of bigamy irrespective of his/her personal law, provided that ingredients of Section 494 are made out[32].

The Supreme Court in *Lilly Thomas v. Union of India*[33] observed in paragraph 23 as under:

"We have already seen above that under the Hindu Marriage Act, one of the essential ingredients of a valid Hindu marriage is that neither party should have a spouse living at the time of marriage. If the marriage takes place in spite of the fact that a party to that marriage had a spouse living, such marriage would be void under S.11 of the Hindu Marriage Act. Such a marriage is also described as void under S.17 of the Hindu Marriage Act under which an offence of bigamy has been created. This offence has been created by reference. By providing in S.17 that provisions of S.494 and 495 would be applicable to such a marriage, the legislature has bodily lifted the provisions of S.494 and 495 IPC and placed them in S.17 of the Hindu Marriage Act. This is a well-known legislative device. The important words used in S.494 are "MARRIES IN ANY CASE IN WHICH SUCH MARRIAGE IS VOID BY REASON OF ITS TAKING PLACE DURING THE LIFE OF SUCH HUSBAND OR WIFE". These words indicate that before an

[31] Marrying more than one wife is permitted under certain stated circumstances in Islam.
[32] *Venugopal K.* v. *Union of India*, 2015 SCC Online Ker 798.
[33] 2000[6] SCC 224

offence under S.494 can be said to have been constituted, the second marriage should be shown to be void in a case where such a marriage would be void by reason of its taking place in the lifetime of such husband or wife. The words "husband or wife" are also important in the sense that they indicate the personal law applicable to them which would continue to be applicable to them so long as the marriage subsists and they remain "husband and wife".

It can be seen that all the personal and secular laws in India prohibit bigamy except in the case of Muslim husbands. Under Sec.17 of the Hindu Marriage Act 1955, a husband or wife shall be punished under IPC for bigamy,[34] the Parsi Marriage and Divorce Act 1936 under Section 5, describes bigamy as null and void. Christian Marriage Act1872 under Section 60(2) states that "neither of persons intending to be married shall have a wife nor husband still living" and making false oath or declaration is punishable under Sec.193 of IPC. More than one marriage is illegal, and Special Marriage Act 1954 under Sec. 44 states punishment for bigamy and imposes penalty under Sec .494 and 495 of IPC. The Court has specifically held that if Muslim contracts a civil marriage under the Special Marriage Act instead of his personal law the anti-bigamy provisions of the Act will apply to him[35]. Under the Foreign Marriage Act 1969, Sec.19 states punishment for bigamy as per IPC.

Abetment of Bigamous Marriage shall be Punishable under Sec.494 read with Sec.109 of IPC. The Priest or anyone who officiates would be an abettor and granting accommodation in house for such marriage, would *per se* not amount to abetment, but it depends on circumstances of case. No Court is authorized to permit a second marriage, even if it be at the application of the first wife. Such permission is illegal.

- **Non-applicability to Mohammedan Males**

Under the Mohammedan law, a male can marry four wives at a time. It is important to remember that, it is only permission but not a compulsion to have four wives at a time. Therefore, Section 494 which punishes bigamy is not applicable to a Muslim male contracting a bigamous marriage. However, the exception is only in respect of Muslim males. Section 494 makes the offence punishable with a maximum imprisonment of seven years and also fine.

The offence of bigamy has the following ingredients:

(1) Existence of the first wife or husband when the second marriage is performed.

(2) The second marriage being void due to the subsistence of the first marriage.

[34] Lalithadevi vs state of Bihar 1999, Femi Juris CC 465 ALT.14.2.

[35] *S. Radhika Sameena* v. *S.H.O., Habeeb Nagar Police Station, Hyderabad* 1997 CriLJ 1655 (AP)

Exceptions: A person can marry for the second time during the subsistence of the first marriage in the following cases:

(a) When the other spouse is continuously missing for a minimum period of seven years;

(b) The absent spouse not having been heard of, by the other party as being alive within that time; and

(c) The party marrying must inform the person with whom he or she marries of the above fact.

These exceptions are based on the presumption of death of a person, if he/she is unheard of for seven years by those who normally have heard of him/her under Section 108 of the Indian Evidence Act, 1872.

In *Pashaura Singh* v. *State of Punjab*[36], the Court declared that the prosecution must prove that the second marriage was valid. There is no limitation period for taking cognizance of the offence of bigamy[37]. That is, it does not matter how long ago the second marriage was contracted, the criminal process can be started at anytime[38].

- **Applicability of Sec.494 of IPC to Tribals**

In *Dr.Surajmani Stella Kujur vs Durga Charan Hansdah & Anr*[39], the Supreme Court held that -

> *"In view of the fact that parties admittedly belong to the Scheduled Tribes within the meaning of clause (25) of* ***Article 366*** *of the Constitution as notified by the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and* ***Scheduled Tribes Order (Amendment) Act****s 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990 passed in terms of* ***Article 342*** *and in the absence of specific pleadings, evidence and proof of the alleged custom making the second marriage void, no offence under* ***Section 494*** *of the Indian Penal Code can possibly be made out against the respondent. The Trial Magistrate and the High Court have rightly dismissed the complaint of the appellant."*

- **Aggravated form of Bigamy (Section 495, IPC):**

Section 495 of IPC dealing with this offence reads as under:

> *495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted*. —Whoever commits the offence defined in the

[36] (2010) 11 SCC 749
[37] *S. Nagalingam* v. *Sivagami*, (2001) 7 SCC 487
[38] *M. SaravanaPorselvi* v. *A.R. Chandrashekar*, (2008) 11 SCC 520
[39] AIR 2001 SC 938

last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 495 of Indian Penal Code provides for punishment for the aggravated form of bigamy. It provides that whoever contracts a subsequent marriage by concealing the former marriage is punishable with maximum imprisonment of ten years. The offence is compoundable by mutual consent of parties as seen from the judgment delivered by Justice Krishna Iyer, in *Narotam Singh* v. *State of Punjab*[40]. The relevant paragraph is reproduced hereunder:

> *"We incorporate the settlement as part of this judgment as an annexure. The solution reached by the compromise seems reasonable. The masculine offender pays Rs. 40,000/- to the victim 'wife'. This sum will clearly take care of her future and be a sufficient repatriation. We also award costs in a sum of Rs.5,000/-. The compensation for his sexual aberration and breaking up of the matrimonial home will instill a correctional responsibility on the man. At the same time, his acquittal, following upon the composition, will hopefully save his business, and avert the hurtful jail term. The consent to divorce by the complainant will put asunder in law the marital tie which in-fact has long ago sundered. Thus, the parties will be free to live in separate amity and form fresh alliances-lasting, not fleeting. This conspectus of consequences has persuaded us to grant leave to compound and do justice to the actors; in the tragedy and to society generally. The triumph won after necessary travail, as in this case, has our approval and also on the sad lady and the misguided man. Will this order open a better chapter for both? The book of life often has hopeful parts in the later sober pages."*

- **Conversion into Islam for Bigamy**

For a long time in the past, married men whose personal law does not allow bigamy have been resorting to the unhealthy and immoral practice of converting to Islam for the sake of contracting a second bigamous marriage, under a belief that such conversion would enable them to marry again without getting their first marriage dissolved.

[40] AIR 1978 SC 1542

According to Hindu Law an apostate, i.e. a person who gets converted from Hinduism is not absolved from all civil obligations. The matrimonial bond remains indissoluble in spite of such conversion. The Supreme Court held in the case of *Sarla Mudgal* v. *Union of India*[41] that a Hindu male whose first marriage was solemnized as per the Hindu rites and which is not dissolved cannot contract a second marriage by converting himself into Islam. The Supreme Court held that the second marriage is illegal and such a husband is punishable under Section 494 of Indian Penal Code. Similarly, a Hindu woman, who having a Hindu husband living, marries a Muslim or a Christian even after conversion into their religion would be guilty of bigamy. However, in the case of an apostate from Islam, the marriage tie is dissolved and the wife will not be guilty of bigamy if she marries again. Where a Hindu husband gets himself converted into Islam, while the first marriage is still subsisting, and marries for the second time, the first marriage is not affected. If the marital status is not affected on account of the marriage still subsisting, the husband's second marriage *qua* the existing marriage would be void and in spite of conversion, he would be liable to be prosecuted for the offence of bigamy under Section 494 of the Indian Penal Code. This principle was laid down by the Supreme Court of India, firstly in *Sarla Mudgal, President Kalyani v. Union of India*[42], and reiterated in a recent judgment in *Lily Thomas v. Union of India*[43].

- **Law Commission's Recommendations:**

The Law Commission of India Report No.227 submitted by its Chairman, Justice A.R Lakshmanan[44] deals with – *"Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings"*. The Supreme Court of India outlawed this practice by its decision in the case of *Sarla Mudgal v Union of India*[45]. The ruling was re-affirmed five years later in *Lily Thomas* v. *Union of India.* In view of the above, the Law Commission suo motu took up the subject to examine the existing legal position on Bigamy in India, along with judicial rulings on the subject and to suggest changes in various family law statutes. The Commission have recommended in this Report as under:

(i) *In the Hindu Marriage Act 1955, after Section 17 a new Section 17-A be inserted to the effect that a married person whose marriage is governed by this Act cannot marry again even after changing religion unless the first marriage is dissolved or declared null and void in accordance with law, and if such a marriage is contracted it will be null and void and shall attract application of Sections 494-495 of the Indian Penal Code 1860.*

[41] AIR 1995 SC 1531
[42] *ibid*
[43] 2000[6] SCC 224
[44] See Report No.227 (Aug.2009) available at **http://lawcommissionofindia.nic.in/reports/ report227.pdf**
[45] AIR 1995 SC 1531

(ii) *A similar provision be inserted at suitable places into the Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936 and the Dissolution of Muslim Marriages Act 1939.*

(iii) *The Proviso to Section 4 of the Dissolution of Muslim Marriages Act 1939 – saying that this Section would not apply to a married woman who was originally a non-Muslim if she reverts to her original faith – be deleted.*

(iv) *In the Special Marriage Act 1954 a provision be inserted to the effect that if an existing marriage, by whatever law it is governed, becomes inter-religious due to change of religion by either party it will thenceforth be governed by the provisions of the Special Marriage Act including its anti-bigamy provisions; and*

(v) *The offences relating to bigamy under Sections 494-495 of the Indian Penal Code 1860 be made cognizable by necessary amendment in the Code of Criminal Procedure 1973.*

It may be noted that though the above recommendations merit due consideration, the Government of India has initiated any action to implement the same so far.

Matrimonial Rape

One of the objectives of marriage is to legitimize sexual relations between the spouses. Conjugal rights play an important role in matrimonial relations. However, such conjugal relationship, cohabitation and sexual relations are supposed to be consensual. Marital rape refers to *"unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent."* It is a non- consensual act of violent perversion by a husband against the wife where she is abused physically and sexually[46]. Gujarat High Court identified the following three kinds of marital rape, generally prevalent in the society:[47]

- **Battering Rape:** In this type of marital rape, women experience both physical and sexual violence in the relationship and in many ways. Some instances are those where the wife is battered during the sexual violence, or the rape may follow a physical violent episode where the husband wants to make up and coerces his wife to have sex against her will. In most cases, the victims fall under this stated category.

[46] *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2017 SCC OnLine Guj 1386
[47] *Ibid*

- **Force only Rape:** In this type of marital rape, husbands use only that amount of force, as it is necessary to coerce their wives. In such cases, battering may not be a characteristic and women who refuse sexual intercourse usually face such assaults.

- **Obsessive Rape:** In obsessive rape, assaults involve brutal torture and/or perverse sexual acts and are most commonly violent in form. This type has also been labeled as sadistic rape.

Marital rape or matrimonial rape or spousal rape is the act of sexual intercourse with one's spouse without the spouse's consent. The lack of consent is the essential element and need not involve physical violence. Marital rape is considered a form of domestic violence and abuse. Now many say that, rape is rape. Be it stranger rape, date rape or marital rape. Although, historically, sexual intercourse within marriage was regarded as a right of spouses, engaging in the act without the spouse's consent is now widely recognized by law and society as a wrong and as a crime. It is recognized as rape by many societies around the world, repudiated by international conventions, and increasingly criminalized[48].

In majority or even in all the reported cases, the perpetrator of marital rape is the husband and the victim is the wife. Thus, marital rape takes the form of violence against women (VAW). Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.[49]

- **Position under the Indian Penal Code**

Section 375, 376, 376-A and 376-B which are relevant to this topic read as under:

Section 375 – Rape – A man is said to commit "rape" if he—

a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

[48] See https://en.wikipedia.org/wiki/Marital_rape

[49] Thornhill, R. & Thornhill, N., *The Evolution of Psychological Pain, in Sociology and Social Science*, Edn., Bell, R. & Bell, N. (Texas Tech University Press, 1989), as quoted in Saurabh Mishra & Sarvesh Singh, *Marital Rape — Myth, Reality and Need for Criminalization*, (2003) PL WebJour 12 available at http://www.ebc-india.com/lawyer/articles/645.htm. See also the 205th Report of Law Commission of India on *Proposal to Amend the Prohibition of Child Marriage*, available at www.lawcommissionofindia.nic.in

b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

Firstly, against her will; *Secondly*, without her consent; *Thirdly*, with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt; *Fourthly*, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; *Fifthly*, with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent; *Sixthly*, with or without her consent, when she is under eighteen years of age; and *Seventhly*, when she is unable to communicate consent.

Explanation-1: For the purposes of this section, "vagina" shall also include labia majora.

Explanation-2: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception-1: A medical procedure or intervention shall not constitute rape.

Exception-2: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 376 – Punishment for Rape —

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever, —

(a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation: For the purposes of this sub-section, —

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) “women's or children's institution” means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Section 376A – Punishment for causing death or resulting in persistent vegetative state of victim — Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

Section 376B – Sexual intercourse by husband upon his wife during separation – Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation: In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

An analysis of the above provisions shows that, only two classes of married women are covered by the rape legislation: *firstly*, those being under 15 years of age and *secondly*, those who are separated from their husbands. While the rape of a girl below 12 years of age may be punished with rigorous imprisonment for a period of 10 years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is married to the victim. Some progress towards criminalizing domestic violence against the wife took place in 1983 when a new Section after 376 was added in the Indian Penal Code, 1860, which criminalized the rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India. The Committee rejected the contention that marriage is a license to rape. Thus, a husband can now be indicted and imprisoned up to two years, if *firstly*, there is a sexual intercourse with his wife, *secondly*, without her consent and *thirdly*, she is living separately from him, whether under decree or custom or any usage. However, this is only a piecemeal legislation and much more needs to be done by Parliament as regards the issue of marital rape.

- **Challenge to Marital Rape – Exception from Criminal Liability**

In recent times certain PILs were filed before certain High Courts questioning the validity of the marital rape exceptions given to husbands in India under the IPC, as arbitrary and unconstitutional[50]. The petitions argue that the exception, by discriminating against married women, violates Articles 14 and 15 of the constitution, which prohibit discrimination without an intelligible basis, Article 21, which guarantees the right to life and personal liberty, and Article 19, which should guarantee the freedom to express or withhold sexual desire in all consensual contexts[51]. Their counsel raised the following questions-

> *"If a man rapes a woman, it's a crime. If a man marries a woman and rapes [her], he's exempted, it's legally acceptable,"*
>
> *"It's criminal to beat your wife, it's criminal to kill your wife, but if you rape your wife, that is legal?"*

Interestingly, there is a counter given to such arguments by certain organizations like "men's rights" activists from the Save Family Foundation[52] who say that –

> *"There is nothing called rape inside the marriage," .... "If you feel you're being raped, a man or a woman, you can simply walk out of the marriage."*
>
> *The 'men's rights' campaigners have a narrative of men being framed by rape laws and cite data like a report by the Delhi Commission for Women, which said 53% of rapes reported in the city in 2014 were false.*

The Supreme Court has addressed the issue 'whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?' in *Independent Thought* v.*Union of India*[53]. The Court read down Exception-2 to Section 375 of IPC though it had not dealt with the wider issue of "marital rape", in ordrer to bring it within the four corners of law and make it consistent with the Constitution of India. In his judgment, Justice Madan B. Lokur held that, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age; on the contrary, there is every reason to give a harmonious and purposive construction to

[50] The three petitions were filed before the Delhi High Court against the Union of India by an NGO, the RIT Foundation, the All India Democratic Women's Association (AIDWA) and marital rape victim Khusboo Saifi. They challenge Section 375, Exception-2 as unconstitutional, inhumane and out of sync with the world, where a range of countries from Nepal in South Asia to the United States and Britain criminalise marital rape.

[51] https://www.business-standard.com/article/news-ians/52-countries-criminalised-marital-rape-hc-told-118010201102_1.html, accessed on 20-08-2019

[52] https://thewire.in/gender/marital-rape-exception-high-Court, accessed on 20-08-2019

[53] 2017 (10) SCC 800

the pro-child statutes to preserve and protect the human rights of the married girl child. The learned justice has beautifully summarized the options before the Supreme Court as under[54].

> *"On a complete assessment of the law and the documentary material, it appears that there are really five options before us:*
>
> *(i) To let the incongruity remain as it is – this does not seem a viable option to us, given that the lives of thousands of young girls are at stake;*
> *(ii) To strike down as unconstitutional Exception-2 to Section 375 of the IPC – in the present case this is also not a viable option since this relief was given up and no such issue was raised;*
> *(iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide;*
> *(iv) To bring the POCSO Act in consonance with Exception-2 to Section 375 of the IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes;*
> *(v) To read Exception-2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available.*
>
> *Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception-2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus."*

Justice Deepak Gupta opined that Exception-2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;
(ii) it is discriminatory and violative of Article 14 of the Constitution of India; and

[54] *Ibid* para.105

(iii) it is inconsistent with the provisions of POCSO[55], which must prevail.

The Supreme Court observed that Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO[56].

- **Limited Impact of Judgment:**

It can be seen that this judgment does not declare all the marital rapes as unconstitutional and as crimes. It is confined only to marriage of a married woman by her husband only when she is below the age of 18 years. The Court made it clear that it has not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before it by the petitioner or the intervener. Probably the day is not far when the Courts might declare all kinds of marital rapes as punishable. Social workers and advocates stressed the importance of having a law on the books to legitimize the issue of marital rape, but emphasized that law alone is not enough to change society.

> *"The first step to break the silence is when you have the tool to validate,"* Ranjana Kumar[57] said *"Controlling women's sexuality and bodies is the last bastion of male power. To smash it is going to take time."*[58]

[55] The Protection of Children from Sexual Offences Act 2012 (POCSO) The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child.

[56] 2017 (10) SCC 800 para.80

[57] Director, Centre for Social Research at Delhi

- **Position under the Domestic Violence Law:**

There is no mention of Marital Rape in the Protection of Women from Domestic Violence Act 2005. However sexual violence against the wife is covered within the meaning of Domestic Violence. The Act defines Domestic Violence as:

Any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –

a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation-I: For the purposes of this section-

(i) *"physical abuse"* means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) ***"sexual abuse"* includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;**

(iii) *"verbal and emotional abuse"* includes- (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) *"economic abuse"* includes- (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, Stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has

[58] See: https://thewire.in/gender/marital-rape-exception-high-court

an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation-II: For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

An analysis of the above definition shows that even the sexual violence against a woman also amounts to domestic violence. It includes physical, sexual, or psychological abuse directed towards one's spouse, partner, or other family member within household. It is synonymous with intimate partner violence (IPV). The aggrieved woman can claim any of the remedies like: direction to undergo counseling[59]; Protection order[60]; Residence order[61]; Monetary relief[62]; Custody order[63], and Compensation order[64].

- **Position under Personal Laws**

Matrimonial rape though not recognized or defined expressly under any of the personal or secular laws, it can still be used as a ground for seeking certain matrimonial remedies under various personal laws like, the Hindu Marriage Act 1955, the Hindu Adoptions and Maintenance Act 1956, the Special Marriage Act 1954, The Muslim Women Dissolution of Marriages Act 1939, The Indian Divorce Act 1869 etc. Thus, depending on the facts and circumstances of each case, it may be used as a ground for seeking divorce, judicial separation or claiming maintenance by wife while living separately from the husband.

Dowry Death - Matrimonial Cruelty - Recent Developments

The Indian Penal Code, 1860 contains two specific provisions in the form of Section 304B and Section 498A to deal with two distinct offences, namely causing dowry death and subjecting a woman to cruelty for dowry respectively.

[59] Section 14 of The Protection of Women from Domestic Violence Act, 2005
[60] *Ibid* Section 18
[61] *Ibid* Section 19
[62] *Ibid* Section 20
[63] *Ibid* Section 21
[64] *Ibid* Section 22

- **Dowry Death**

Dowry death is both homicidal and suicidal. According to Section 304B of the IPC, where the death of the woman is caused by any burns or bodily injury, under abnormal circumstances within seven years of marriage, such death is called dowry death and the husband or relative of such deceased wife shall be deemed to have caused her death. The offence has the following ingredients:

(1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(4) Such cruelty or harassment should be for or in connection with demand for dowry.

If these conditions exist, it would constitute a dowry death and the husband and his relatives shall be deemed to have caused her death.

The traditional criminal law dictum that an accused is presumed to be innocent unless proved guilty of the offence he is charged with, is not applicable on account of the legal fiction embodied in the provisions of Section 304B, whereby he is deemed to have caused the death and the onus shifts on him to prove otherwise. Where there is evidence that the accused committed the murder of woman in terms of Section 300 defining the offence of murder, he will be charged with the commission of the offence of murder and liable to be proceeded against accordingly. If the conditions of Section 304B or, for that matter, any other section of the Penal Code is present in such a case, the accused will be charged with the commission of that offence also. The presence of such conditions pertaining to any other offence will not take out the case from the ambit of Section 300 dealing with the offence of murder.

In view of the aforesaid, the Law Commission of India considered the issue as to whether there is any warrant for appending capital punishment to Section 304B, for the reason that the offence of dowry deaths are highly despicable and shocks the conscience of the society[65]. The Commission did not recommend amendment of Section 304-B of the Indian Penal Code, 1860 to provide for death sentence as the maximum punishment in the case of a dowry death. It reiterated the rider enunciated by the Supreme Court in its judgment in the case of *K. Prema S.Rao Vs Yadla Srinivasa Rao*[66] to the effect that *"the Legislature has by amending the Penal Code and Evidence Act made Penal Law more strident for dealing with punishing offences against married women. Such strident laws would have a deterrent effect on the offenders only if they are so stridently implemented by the law Courts to*

[65] See the 202nd Report on proposal to amend Section 304-B of IPC available at **http://lawcommissionofindia.nic.in/reports/report202.pdf**

[66] AIR 2003 SC 11 at p.11 (Para 27)

achieve the legislative intention". The law Commission however added that the enforcement agencies too will have to be more sensitive and responsive to the needs of the situation arising from the incidents of dowry death. Dowry deaths are manifestation of socio-economic malady prevailing in the society. This has to be addressed at different levels so as to curb the menace of dowry deaths and not at the legal redressal level.

The Supreme Court had an occasion in *Santhi* v. *State of Haryana*[67] to explain the ingredients of Section 304B. Justice K. JayachandraReddy observed that the facts of the case revealed a saga of atrocities for a few items of by the way of dowry. The father and brother came to see her, but they were driven out and she was not permitted to go with them. The only question that required consideration was whether the death was natural or otherwise. Certain facts convinced the Court that she was not claimed by a natural death. Her parents and brothers were not even informed soon after her death and she was hurriedly cremated. This created the presumption of unnatural death under Section 113B of Evidence Act, 1872. The Court found no evidence for the projected theory of heart attack and said,

> *"if it was natural death, there was no need for the appellants to act in such unnatural manner and cremate the body in great and unholy haste without even informing the parents. Because of the cremation no post mortem could be conducted and the actual cause of death could not be established clearly. There is absolutely no material to indicate even-remotely that it was a case of natural death. It is no body's case that it was accidental death. In the result, it was an unnatural death, either homicidal or suicidal. But even assuming that it is a case of suicide, it would be death which had occurred in unnatural circumstances. Even in such a case section 304B is attracted and this position is not disputed. Therefore, the prosecution has established that the appellants have committed an offence punishable under Section 304B beyond all reasonable doubt."*

The prosecution was that of the brother-in-law and wife of the husband's brother. The latter was only of 20 years at the time of the trial. Cruelty by these two women was established, but there was no evidence to show what part was played by one or other in bringing about death. Both were women. The Court reduced the sentence of life imprisonment to 7 years of rigorous imprisonment for each of the accused.

Where the death occurred under unnatural circumstances, it is immaterial whether it was the result of suicide or homicide. Even assuming that it is a case of suicide even then it would be death amounting to dowry death under Section 304B. In a case, the deceased pregnant woman died due to 100% burns and the occurrence took place at midnight in the house of the accused husband. There

[67] AIR 1991 SC 1226

was a total absence of any cries or shouts of the deceased. The Supreme Court held in the case of *Prabhudayal* v. *State of Maharashtra*[68] that it was a case of homicide and not suicide. Abetment to commit suicide by dowry harassment amounts to dowry death. Where it was proved that the mother-in-law and sister-in-law of the deceased were taunting the bride for bringing less dowry and having given birth to a female child, thereby driving her to commit suicide, it would amount to causing dowry death.

As regards the dying declarations, where a woman, who was not in a position to speak at the time of giving dying declaration and as such her dying declaration was recorded by a Magistrate on the basis of some nods and gestures made by her, making it clear that she was burnt, not accidentally but by her husband, such a dying declaration was held to be admissible and relied upon for conviction of the accused.[69] Similarly, the Supreme Court has held in number of cases that the conviction of the accused can be based on dying declaration of the deceased, if they are voluntary and trustworthy[70].

- **Changes under the Indian Evidence Act 1872**

In order to prosecute the offenders of dowry related offences effectively, two important changes have been made to the Indian Evidence Act by way of the amendment Acts in 1983 and 1986[71]. They are:

Section 113A – Presumption as to abetment of suicide by a married woman – When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation – For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).

Section 113B – Presumption as to dowry death – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

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[68] AIR 1993 SC 2164
[69] *Meesala Ramakrishnan* v. *State of A.P.*, 1994 SCC (4) 182
[70] *Lakhan* v. *State of M.P.*, (2010) 8 SCC 514; *Ranjit Singh & others* v. *State of Punjab,* (2006) 13 SCC 130
[71] By Act 46 of 1983, S.7; By Act 43 of 1986, S.12 (w.e.f. 5-1-1986)

Explanation – For the purposes of this section, "dowry death" shall have the same meaning as in section 304-B of the Indian Penal Code (45 of 1860).

- **Burden of Proof on the family**

Every member of the family of the deceased, with whom she had been living before her death has the burden to prove his or her innocence. This burden of proof is imposed by Section 113-B of the Indian Evidence Act, 1872.

In the case of State of *Punjab v. Iqbal Singh*[72] a woman set herself and her three children ablaze. She was working as a teacher. Soon after her marriage, there were disputes between the husband and the wife on the question of dowry. The demand for extra dowry strained the relations between them and as a result the husband began to ill-treat the deceased wife. She also lodged police complaint but could not pursue the same due to some understanding. In spite of the same, the situation did not improve and she was compelled to take the extreme step of putting an end to her own life and of her three children. The Supreme Court convicted the accused husband under Sections 304B and 306 of IPC.

What are abnormal circumstances of death?

The Courts in India have held that death by drowning, by poisoning, due to burns, by hanging, by strangulation etc., are instances of abnormal circumstances of death of a woman, if it takes place within seven years of her marriage. Where the death is unnatural, it is immaterial whether it was caused due to suicide or homicide and Section 304B will be attracted in either case[73]. In a recent judgment, the Supreme Court held that even circumstantial evidence also may be the basis for punishing a person for causing dowry death[74]. In *Baldev Krishan* v. *State of Punjab*[75] the Supreme Court Division Bench held that where a young house wife died due to burn injuries in her matrimonial home and her dead body was found in the kitchen and the husband, the only other person staying in the house could not give proper explanation for the burn injuries, the circumstances under which the deceased sustained burn injuries show that it was a dowry death, especially when the physical and mental ill-treatment and harassment of the deceased by her in-laws on account of insufficiency of dowry and also squint in her eyes was thorough.

[72] AIR 1991 SC 1532
[73] *Shanti and another* v. *State of Haryana*, (1991) 1 SCC 371; *Kans Raj* v. *State of Punjab and others*, (2000) 5 SCC 207; *Bhupendra* v. *State of Madhya Pradesh* (2014) 2 SCC 106
[74] *Baldev Krishan* v. *State of Punjab* (1997) 4 SCC 486
[75] *Ibid*

Causing Dowry Death, not "rarest of the rare"

In an earlier decision[19], the Supreme Court has held that dowry death has ceased to belong to the species of "rarest of the rare". In the instant case, a wife was brutally murdered by her husband, and her head was severed, and her body was cut into nine pieces for causing disappearance of the evidence relating toher murder. The murder was caused in relation to dowry, but, unless a dowry death is considered as the "rarest of rare" case, death penalty cannot be imposed. Thus, if dowry death is proven and the case is also covered under Section 300 IPC, then death penalty may be awarded in that case subject to the judicial dictum of rarest of rare cases.

The Supreme Court, taking this anology into consideration in *Rajbir @ Raju & another* v. *State of Haryana*[76], directed all trial Courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Further, the Apex Court in *Jasvinder Saini* v. *State Govt. of NCT of Delhi*[77]gave clarification in this aspect and observed that,

> *"The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable underSection 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients.*"

[76] AIR 2011 SC 568
[77] (2013) 7 SCC 256

Moreover, in *Alamgir Sani* v. *State of Assam*[78] the Supreme Court observed that, acquittal under 302 IPC will not lead to automatic acquittal under Section 304-B IPC, and if there is evidence to satisfy the ingredients of 304-B IPC, the accused can still be convicted under that section.

Section 498A of IPC –Husband or relative of Husband subjecting the woman to cruelty

Section 498A of Indian Penal Code 1860, governs the offence of subjecting the woman to harassment and cruelty by the husband and his relatives. In *Smt. Shanti* v. *State of Haryana*[79], Justice K. Jayachandra Reddy J observed that *"Sections 304B and 498A cannot be held to be mutually exclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved. The Explanation to Section 498A gives the meaning of 'cruelty'. In Section 304B there is no such Explanation about the meaning of 'cruelty'. But having regard to the common back ground to these offences, we have to take that the meaning of 'cruelty or harassment' to be the same as we find in the Explanation to Section 498A under which 'cruelty' by itself amounts to an offence. Under Section 304B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498A. Further, it must also be borne in mind that a person charged and acquitted under Section 304Bcan be convicted under Section 498A without that charge being there, if such a case is made out…"* If the case is established, there can be a conviction under both the sections, but no separate sentence would be necessary under Section 498A in view of the substantive sentence being awarded for the major offence under Section 304B.When dowry death is proven and the case is covered under Section 300, the judicial dictum to pronounce death penalty is rare.

The Section 498A was introduced in IPC in the year 1983 by the Criminal Law (Amendment) Act 1983, to protect married women from being subjected to cruelty by the husband or his relatives. A punishment extending to 3 years and fine has been prescribed. The expression 'cruelty' has been defined in wide terms so as to include inflicting physical or mental harm to the body or health of the woman and indulging in acts of harassment with a view to coerce her or her relations to meet any unlawful demand for any property or valuable security. Harassment for dowry falls within the sweep of latter limb of the section. Creating a situation driving the woman to commit suicide is also one of the ingredients of 'cruelty'. The offence under S.498A is cognizable, non-compoundable and non-bailable. The section is extracted below:

[78] 2002 (10) SCC 277
[79] AIR 1991 SC 1226

Section 498A – Husband or relative of husband of a woman subjecting her to cruelty–Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation – For the purpose of this section, "cruelty" means-

a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of woman; or

b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Several enactments and provisions have been brought on the statute book during the last two or three decades to address the concerns of liberty, dignity and equal respect for women founded on the community perception that women suffer violence or deprived of their constitutional rights owing to several social and cultural factors. Meaningful debates and persuasions have led to these enactments. The insertion of Section 498A IPC is one such move and it penalizes offensive conduct of the husband and his relatives towards the married woman. The provision together with allied provisions in Cr. P.C. is so designed as to impart an element of deterrence.

In course of time, a spate of reports of misuse of the section by means of false / exaggerated allegations and implication of several relatives of the husband has been pouring in. Though there are widespread complaints and even the judiciary has taken cognizance of large scale misuse, there is no reliable data based on empirical study as regards the extent of the alleged misuse. There are different versions about it and the percentage of misuse given by them is based on their experience or *ipse dixit*[80], rather than ground level study[81].

- **Demand for Dowry and Cruelty**

The Supreme Court has held that the demand for dowry, prohibited under the Act, amounts to cruelty and the same entitles the wife to get a decree for dissolution of marriage. In the case of *Shoba Rani v. Madhuhar Reddi*[82], the Court had an occasion to pronounce on the concept of cruelty.

[80] A dogmatic and unproven statement
[81] See the 243rd Report of Law Commission of India on Section 498A IPC (august 2012) for a detailed discussion on Sec.498-A, IPC.
[82] AIR 1988 SC 121

Interwoven concept of Dowry and cruelty have been discussed in *Shanti v. State of Haryana*[83] where it was declared that the offences under Sections 304B and 498A are interwoven, though acquitted under 304B can be convicted under 498A. New dimension has been given to the concept of cruelty while granting a divorce to the woman on the grounds of demand for dowry. In brief, the persistent demands for dowry are considered tantamount to a ground for the purpose of granting matrimonial relief including divorce under the relevant personal law.

The Criminal Law (Amendment) Act, 1983 has also added Section 113A to the Indian Evidence Act to raise a presumption regarding abetment of suicide by a married woman to the following effect:

> **Section 113A:** When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had, committed, suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had. subjected her to cruelty, the Court may presume having regard to all the other circumstances of the case, that such suicide had been abetted, by her husband or by such relative of her husband.
>
> *Explanation*: For the purpose of this section 'cruelty' shall have the same meaning as in Section 498A of the Indian Penal Code.

Drinking and late-coming habits of the husband, coupled with beating and demanding dowry have been taken to amount to cruelty within the meaning of this section. But, the section has been held not to include a husband who merely drinks as a matter of routine and comes home late. The provisions of criminal law entirely rely on prosecution to discharge the initial burden of ruling out the possibility of a natural death and adducing evidence of link between the death of the woman and cruelty related to dowry demand. The onus shifts onto the accused to prove his innocence. Another difference is regarding punishment prescribed. Ordinarily in crimes, the law prescribes the maximum punishment and the discretion lies with the judge to award a lesser or higher sentence where the circumstances of case are taken into account.

The Calcutta High Court has expressed the opinion that by virtue of clause (b) of the Explanation to Section 498A, mere demand of dowry would be an offence. But for the purpose of Section 4, 2(1) of the Dowry Prohibition Act, 1961, it is necessary that dowry should have been given or agreed to be given.[84] In a subsequent case under the section, it was on record that the husband accompanied his deceased wife to his in-laws to ask not only for unpaid balance of the agreed dowry but also for additional dowry. This was held to be sufficient to constitute an offense under this section.

[83] 1991(1) SCC 371
[84] *Shankar Prasad* v. *State*, 1991 Cr. LJ 639 Cal.

It is not every harassment or every type of cruelty that would attract Section 498A. The complainant has to conclusively establish that the beating and harassment in question was with a view to force her to commit suicide or to fulfil illegal demand of dowry. Eventhough there might have been a previous history of harassment for those purposes, if at the moment of complaint those urges were not proved to be figuring in the harassment, then the case would not stand.

Recently, on 30th March 2019 in a case of starvation death a 27-year-old woman Thushara, a native of Karunagapally, married Chanthu Lal in 2013. Her relatives told the police that Thushara's in-laws repeatedly demanded an additional Rs.2 lakh as a "post marriage gift." Her family was hard-pressed financially and could not meet the demand in Kerala was reduced to bag of bones weighed to mere 20kgs.The in-laws admitted to have fed her only rice and sugar soaked in water as dowry demand of 2 lakhs was not met by confining her to tin barriers to prevent neighbours from happenings of inside[85].

A wife, maltreated for dowry, was sent back to her father where she became ill because of shock and after effects of cruelty. The Court having jurisdiction at the place was held competent to entertain a complaint both under Section 498A in respect and also under Section 181(4) of Cr.P.C. 1973 in respect of misappropriation of Stridhan.[86] Further, even if the cruelty or harassment of the kind described in the Act is meted out to a mistress, which leads to her suicide, Section 304B and 498A would also cover such cases.[87]

A dowry harassment which had ended in March 1983 by the husband deserting his wife before the new provision came into force in 1983 was held to be not covered by it. The new provision of Section 498A does not have retrospective effect[31]. Where the relationship of marriage is still continuing, the events of cruelty taking place prior to the amendment can be taken into account. That does not have the effect of giving a retrospective operation to the provision.

Where the wife had condoned the matrimonial cruelty of which she was the victim and had resumed consortium with her husband, the Court found no obstruction in the provisions of the section 498A in permitting them to compound the complaint and therefore, ordered accordingly[88]. In a similar case, similar approach was not adopted by the Andhra Pradesh High Court which pointed that the wife cannot be permitted to withdraw the charge-sheet if it is filed by the police[89].

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[85] *Visit www.thehindu.com/news/national/kerala/investigation-into-dowry-killing-by-forced-starvation/article26686554.ece*
[86] *Vijay Rathan Sharma* v. *State of U.P.*, 1988 Cr. L J 1581
[87] *Polavarapu Satyanarayana* v. *Soundaravalli*, 1988 Cr. LJ 1538 (AP)
[88] *State of Rajasthan* v. *Gopilal*, 1992 Crl. L J 273
[89] *Thathapadi Venkatalakshmi* v. *State of Andhra Pradesh*, 1991 Crl. L J 749

- **Misuse of Section 498A**

Even though Section 498A of the IPC is a provision meant for the family security of married women, it has also been misused by certain unscrupulous persons. Sometimes, the high-handed behaviour of the in-laws and the break-up of the marriage have another side. Filing of cases with the Women Protection Cell may not be genuine at all. In *Ch.Narender Reddy* v. *State of Andhra Pradesh*[90], the wife was suffering from throat cancer and the husband who desired to marry again, no longer wanted to live with her. On this point, there was tension between them which was apparent. Unhappy with the developments, the wife filed a case under Section 498 of IPC against the husband on the ground of torturing her for more dowry and cruelty. The A.P. High Court found the charges to be baseless and rejected them. This is one of the incidents reported widely. There are other instances also where the provision has been misused for extraneous purposes.

In another case *Benjamin Doming Cardoza* v. *Mrs. Gladys Benjamin Cardoza*[91], the wife had an operation before her marriage to the petitioner/husband, by which her fallopian tubes had been removed and she could, therefore, not conceive a child. The petitioner filed for divorce on the ground that his consent to the marriage was obtained by *suppressio veri* i.e. suppression of fact. The Bombay High Court granted the husband a decree of nullity under section 19 of the Indian Divorce Act, 1869.

In *Dasrath* v. *State of M.P*[92], the appellant was married to Pinki. After 6 years of marriage, Pinki's brother went to her house on occasion of Rakhi where he came to know that the Pinki got burnt and died of injuries in hospital and deceased body was burnt without informing her family. During the trial facts came out that, there were demands for a big size TV and buffalo for which accused used to beat Pinki. Dasrath was held guilty and was convicted under 304B of IPC and Sec. 201 and imposed 10 years imprisonment. The appeal was dismissed by Supreme Court, which upheld the decision of High Court and Trial Court.

In *Rajbir @ Raju* v. *State of Haryana*[93], the Petitioner murdered his wife Sunita within 6 months of marriage. Deceased was harassed for dowry when his demands were not met he hit her on head and strangulated her. Case was registered against petitioner and mother in law. Trial Court found both petitioner and mother in law guilty under sec 304B IPC and sentenced to life Imprisonment. On appeal, HC reduced from life to 10 years of imprisonment and imposed 2 years of rigorous imprisonment to mother. Supreme Court asked trial Court to impose Section 302 along with Section 304B, so that death sentence is passed against offenders for such barbaric act.

[90] 2000 Crl. L J 4068 (AP)
[91] AIR 1997 Bom 175
[92] *(2010) 12 SCC 198*
[93] *AIR 2011 SC 568*

A woman, who is forced to leave her matrimonial home due to harassment, can file a case against her estranged husband and in-laws at the place where she resides thereafter, the Supreme Court recently ruled in *Rupali Devi* v. *State of U.P*.[94]. A bench headed by Chief Justice Ranjan Gogoi said that a woman, who is forced to leave her in-laws' home due to commission of cruelty on her, is allowed to initiate criminal proceedings under Section 498A of the Indian Penal Code from any place she sought shelter in -- be it a temporary arrangement or from the residence of her parents. The judgment, which comes as a big relief for the victims of dowry harassment, settles the debate on the issue regarding the place of filing of the case under the above section.

Earlier, criminal proceedings could only be initiated by complainant from the place where the offence occurred as Section 177 of the Code of Criminal Procedure (CrPC) made it compulsory that a criminal case shall be filed and the trial should have conducted in Courts which had jurisdiction over where a crime occurred. Because the view of the Court then was that, if on account of cruelty committed to a wife in a matrimonial home she takes shelter in the parental home and if no specific act of commission of cruelty in the parental home can be attributed to the husband or his relatives, the initiation of proceedings under Section 498A in the courts having jurisdiction in the area where the parental home is situated will not be permissible.[95]

There are also number of cases wherein the misuse of Section 498-A has been witnessed. In *Saritha* v. *R. Ramachandra*[96] the High Court lamented on the misuse of this provision as under:

> *This Court would like to go on record that for nothing the educated women are approaching the Courts for divorce and resorting to proceedings against their in-laws under Section 498-A IPC implicating not only the husbands but also their family members whether they are in India or abroad. This is nothing but abuse of beneficial provisions intended to save the women from unscrupulous husbands. But it has taken a reverse trend now. In some cases, this type of action is coming as a formidable hurdle in reconciliation efforts made by either well-meaning people or the Courts and the sanctity attached to the mandate that the Courts shall always try to save the marriage through conciliatory efforts till the last, are being buried deep-neck.* (Para 6)
>
> *It is for the Law Commission and the Parliament either to continue that provision (Section 498 IPC) in the same form or to make the offence a non-cognizable one and*

[94] (2019) SCC OnLIne SC 493
[95] *Y. Abraham Ajith and Others* v. *Inspector of Police, Chennai and Another* (2004) 8 SCC 100; *Ramesh and Others* v. *State of Tamil Nadu* (2005) 3 SCC 507; *Manish Ratan and Others* v. *State of Madhya Pradesh and Another* (2007) 1 SCC 262; *Amarendu Jyoti and Others* v. *State of Chhattisgarh and Others* (2014) 12 SCC 362
[96] 2002 (6) ALD 319, 2002 (4) ALT 592

a bailable one so that the ill-educated women of this country and their parents do not misuse the provision, to harass innocent people for the sin of contacting marriage with egoistic women. We have no hesitation to hold that if this situation is continued any longer the institution of marriage and the principle one man for women will vanish into thin air. (Para 7)

The Supreme Court of India has addressed this issue and the arrest of the accused in cases filed under Section 498-A in the case of *Arnesh Kumar v. State of Bihar*[97]. The Court made the following observations:

"There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested. Crime in India 2012 Statistics published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depict those mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police have not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence; it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of

[97] (2014) 8 SCC 273

the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short Cr.PC), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest."

The Court further observed that from a plain reading of the aforesaid provision that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the Court whenever required cannot be ensured.

Consequently, the Court directed all State Governments to instruct its police officers not to automatically arrest when a case under S.498-A of IPC is registered, but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 of Cr.P.C. It is

apt to quote Justice Krishna Iyer as to the limits of law on evil social practices in this context[98]. The learned judge observed as under:

> *"It is distressing that dowry or bride price should mar married felicity with feudal cruelty in India, largely because, the anti-dowry law sleeps on the statute book and social consciousness is not mobilized to ban effectually its vicious survival. Law, hanging limp, is a slur on the executive charged with its enforcement and the traumatic consequences are illustrated by this very case. Will the Administration awake to the urgency of a campaign so that the people may become participants in the observance of social welfare legislation."*

Other Offences against Marriage

- **Cohabitation by Deceitful Means**

Section 493 of the Indian Penal Code states as under:

> **Section 493** – **Cohabitation caused by a man deceitfully inducing a belief of lawful marriage** – Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

According to Section 493, a man whether married or not, who by inducing a woman to believe that there is a lawful marriage between him and her cohabits with her, is punishable with a maximum imprisonment of ten years. This offence may also be punished as rape under Section 375(4). The offence has two ingredients: (i) Deceit, causing a false believe in the existence of lawful marriage; and (ii) Cohabitation or sexual intercourse with the person causing such belief.

This offence is made punishable to prevent deception of vulnerable women by men who may induce them to have sexual intercourse by falsely inducing them to believe that there is a lawful marriage. Section 496 punishes a person who contracts a fraudulent or mock marriage and it is similar to Section 493. The only difference is that under Section 394, it is essential that there must be deception and sexual intercourse subsequent on such deception. But under Section 496 no deception or sexual intercourse is essential but only a dishonest or fraudulent abuse of marriage ceremony.

In *Ram Chandra Bhagat* v. *State of Jharkhand*[99] prosecution was able to prove that the appellant and the victim woman had been living for a period of nine years like a husband and wife,

[98] *Narotam Singh* v. *State of Punjab* AIR 1978 SC 1542

had two children from that relationship. Application was made by the accused/appellant for information to the Special Marriage Officer, Lohardaga regarding his marriage with the victim woman on 13.4.1982. An agreement was executed for marriage certificate on 4.6.1982, wherein the accused admitted that he was living a normal family life as a married couple with Sunita Kumari (complainant) for the last one year and Sunita Kumari was his wife. Voters' list of the Assembly electoral list of the year 1984, Voters' list for the year 1988 and another Voters' List year 1993 indicated that victim woman was shown as wife of the accused. The appellant and the victim lived together as a normal couple at different places of posting in course of service and the appellant had practiced deception on the complainant causing a false belief of existence of lawful marriage and making her cohabit with him in that belief. Thus, the ingredients of Section 493 IPC have been fully established by the prosecution. The offence under the said Section was made out beyond any reasonable doubt. In view of the above, the appeal was liable to be dismissed and was dismissed.

- **Mock Marriages**

Under Section 496 of IPC, whoever, dishonestly, or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. This section punishes fraudulent or mock marriages. It applies to cases in which a ceremony is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does not constitute marriage, or in which effect is sought to be given by the proceeding to soma collateral fraudulent purpose. Where the ceremony gone through does, but for the previous marriage, constitutes a valid marriage, and both parties are aware of the circumstances of the previous marriage, S.494 applies.

- **Ingredients**: The section requires two essentials i.e. *firstly*, dishonestly or with fraudulent intention going through the ceremony of marriage; and *secondly*, knowledge on the part of the person going through the ceremony that he is not thereby lawfully married.

Sections 403 and 496 appear to be somewhat similar. The difference appears to be that under section 493 deceptions is requisite on the part of the man and cohabitation or sexual intercourse consequent on such deception. On the other hand, the offence under Section 496 requires no deception, cohabitation, or sexual intercourse as a sine qua non, but a dishonest or fraudulent abuse of the marriage ceremony. In the latter case the offence can be committed baa man or woman, in the former only by a man.

[99] (2013) 1 SCC 562; initially there was a difference of opinion between Justice M. Katzu and Justice Gyan Sudha Mishra. The latter's opinion was affirmed by a different bench.

- **Adultery**

At the outset it may be stated that Adultery is no more an offence under Section 497 of IPC. The Supreme Court of India has declared Section 497 as unconstitutional in the year 2018 in the case of *Joseph Shine* v. *Union of India*[100]. Thus, it was an offence against marriage. In England it is not an offence but only a tort. Adultery is considered illegal in several American states, including New York, although surveys show that while most Americans disapprove of adultery, they don't think of it as a crime. Adultery is prohibited in Shari or Islamic Law, so it is a criminal offence in Islamic countries such as Iran, Saudi Arabia, Afghanistan, Pakistan, Bangladesh and Somalia.

- **Law Before 2018 in reference to Adultery**:

Section 497 of the Indian Penal code punished a man having sexual intercourse with a woman knowing that she is the wife connivance of another man of such other man and without the consent of such other man.

- **Ingredients**: The section required the following essentials i.e *firstly*, sexual intercourse by a man with a woman who is and whom he knows or he has reason to believe to be the wife of another man; *secondly*, such sexual intercourse must be without consent or connivance of the husband; and such sexual intercourse must not amount to rape.

- **Husband – As the Aggrieved Party**

In the offence of adultery, law considered only the husband as the aggrieved party and not the wife of the adulterer. In other words, only the husband of the adulteress and not the wife of the adulterer was the aggrieved party. This is because only the husband has right over conjugation with his wife and no other person has any such right. This position seemed to be discriminatory and the validity of Section 497 has been challenged number of times and the Courts have held that this position is valid and constitutional.

Before Joseph Shine, the Apex Court has previously considered challenges to Section 497 inter alia on the ground that the impugned Section was violative of Articles 14 and 15 of the Constitution. In *Yusuf Abdul Aziz* v. *State of Bombay* [101], Section 497 was challenged before this Court inter alia on the ground that it contravened Articles 14 and 15 of the Constitution, since the wife who is pari delicto with the adulterous man, is not punishable even as an "abettor". A Constitution Bench

[100] (2019) 3 SCC 39
[101] 1954 SCR 930

of the Court took the view that since Section 497 was a special provision for the benefit of women, it was saved by Article 15(3) which is an enabling provision providing for protective discrimination. In Yusuf Aziz (supra), the Court noted that both Articles 14 and 15 read together validated Section 497.

Later, in *Sowmithri Vishnu* v. *Union of India & Anr.*[102] a three-judge bench of the Supreme Court addressed a challenge to Section 497 as being unreasonable and arbitrary in the classification made between men and women, unjustifiably denied women the right to prosecute her husband under Section 497. It was contended that Section 497 conferred a right only upon the husband of the adulterous woman to prosecute the adulterer; however, no such right was bestowed upon the wife of an adulterous man. The petitioners therein submitted that Section 497 was a flagrant violation of gender discrimination against women. The Court opined that the challenge had no legal basis to rest upon. The Court observed that the argument really centered on the definition, which was required to be re-cast to punish both the male and female offender for the offence of adultery. After referring to the recommendations contained in the 42nd Report of the Law Commission of India, the Court noted that there were two opinions on the desirability of retaining Section 497. However, it concluded by stating that Section 497 could not be struck down on the ground that it would be desirable to delete it from the statute books. The Court repelled the plea on the ground that it is commonly accepted that it is the man who is the "seducer", and not the woman. The Court recognized that this position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone.

In *V. Revathi v. Union of India*47[103], a two-judge bench of the Apex Court upheld the constitutional validity of Section 497 of I.P.C. and Section 198(2) of the Cr.P.C. The petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Cr.P.C. operates as a fetter on the wife in prosecuting her adulterous husband. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination. The Court held that Section 497 I.P.C. and Section 198(2) Cr.P.C. together form a legislative package. In essence, the former being substantive, and the latter are largely procedural. Women, under these provisions, neither have the right to prosecute, as in case of a wife whose husband has an adulterous relationship with another woman; nor can they be prosecuted as the *in pari delicto* (in equal fault).

The view taken by the two-judge bench in *Revathi* (supra), that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to

[102] (1985) Supp SCC 137
[103] (1988) 2 SCC 72

prosecute her husband and his paramour should be equated with husband's ability to prosecute wife's paramour.

- **Impact of Joseph Shine Judgment**

In the instant case i.e. *Joseph Shine*[104], the constitutionality of Section 497 was assailed by the Petitioners on the specific grounds that Section 497 is violative of Articles 14, 15 and 21 of the Constitution. The Court in its judgment emphasized the principle that a law which could have been justified at the time of its enactment with the passage of time may become outdated and discriminatory with the evolution of society and changed circumstances. What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic. The Court also made the following significant observations which are self-explanatory.

> *"Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860"s. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.55 This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background, in which Section 497 was framed, is no longer relevant in contemporary society. It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a "victim", and the male offender is the "seducer"."*

The Court also dispelled the justification of invoking Article 15(3) of the Constitution to uphold the validity of Sec.497 of IPC by observing that Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens. Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution. The following are other pertinent observations made by the Apex Court:

- It is true that boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Art.21.

[104] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39

- The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

- The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction; the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

Consequently, the Court in view of the aforesaid discussion, and the anomalies in Section 497, declared that:

(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution of India.

(iii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iv) The decisions in Sowmithri Vishnu (supra), V. Revathi (supra) and W. Kalyani (supra) hereby stand overruled.

The offence of adultery under IPC being rendered a relic of the past by this judgment is no more a crime. By way of abundant precaution, it may be stated that the act of 'adultery' denoting extra-marital physical relationship continues to be a ground for matrimonial reliefs like divorce, maintenance and judicial separation etc. The sanctity of marriage would be protected and preserved only when such devious acts are avoided in the families and marriages.

- **Enticing or taking away a married woman with criminal intention**

Section 498 of the Indian Penal Code punishes a person who takes or entices away a married woman for the purpose of illicit intercourse etc. The section is intended for the protection of husbands, who alone can institute prosecutions against such offenders. It is a minor offence compared to the offence of kidnapping or adopting a woman to compel her to marriage etc., as under Section

366. The wife who is taken away cannot be punished as abettor under section and also under Section 497.

- **Live in Relationships**

People all over the world appear to be slowly and gradually opening their minds towards the idea of pre-marital sex and live-in relationships. Though this change has been continuously criticized and highly discussed, there is clarity as to its legality and acceptance by the society.

Justice M Y Eqbal and Amitava Roy of the Supreme Court in the case of *Dhannulal and Ors.* v. *Ganeshram and Ors.*[105]observed that *"where it is proved that man and woman have lived together as husband and wife, the law will presume, unless contrary is clearly proved, that they were living together in consequence of valid marriage and not in a state of concubinage"* and that *"It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence".*

For the very first time in Protection of Women from Domestic Violence Act, 2005 (PWDVA), the legislature has acknowledged live-in relationships by giving rights and protection to those females who are not legally married, but rather are living with a male individual in a relationship, which is in the idea of marriage, additionally akin to wife, however not equivalent to wife. Section 2(*f*) of the Domestic Violence Act, 2005 defines: *"**Domestic relationship** means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or **through a relationship in the nature of marriage**, adoption or are family members living together as a joint family."*

In *D. Velusamy* v. *D. Patchaiammal*[106], Supreme Court observed that ssome countries in the world recognize common law marriages. A common law marriage, sometimes called *de facto* marriage, or informal marriage is recognized in some countries as a marriage though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry. The apex Court opined that a *"relationship in the nature of marriage"* is akin to a common law marriage. Common law marriages require that although not being formally married:

- The couple must hold themselves out to society as being akin to spouses.
- They must be of legal age to marry.
- They must be otherwise qualified to enter into a legal marriage, including being unmarried.

[105] AIR 2015 SC 2382
[106] (2010) 10 SCC 469 : AIR 2011 SC 479

- They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In its opinion a "relationship in the nature of marriage" under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a "shared household" as defined in **Section 2(s)** of the Act. Merely spending weekends together or a one-night stand would not make it a "domestic relationship". In the Court's opinion, not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose, and/or as a servant it would not be a relationship in the nature of marriage. No doubt the view would exclude many women, who have had a live in relationship from the benefit of the 2005 Act.

Live-in relationship has always been the focus of debates as it possesses threats to our basic societal framework. It is not considered as an offense as there is no law until the date that prohibits this kind of relationship. In order to bring justice to those female who are the victims of live-in relationships Indian judiciary took a step, brought interpretations and made such arrangements valid. Still India has not legalized it, legalizing means having special legislation for it.

Frequently Asked Questions (FAQs)

1. What is Bigamy? Who is liable for committing the offence of Bigamy?

2. What is the aggravated form of bigamy?

3. Can a non-Muslim contact more than one marriage by converting himself into Islam?

4. Is matrimonial rape an offence in India? If so, under what circumstances ?

5. When is the death of a married woman presumed to be a dowry death?

6. What amounts to cruelty and harassment under Section 498-A of IPC?

Multiple Choice Questions (MCQs)

1. Whoever commits the offence of bigamy having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment

a) up to ten years imprisonment , and shall also be liable to fine.
b) up to seven years imprisonment , and shall also be liable to fine
c) up to five years imprisonment , and shall also be liable to fine
d) up to three years imprisonment , and shall also be liable to fine

2. According to Section 304B of the IPC, where the death of the woman is caused by any burns or bodily injury, under abnormal circumstances within ……. years of marriage, such death is called dowry death.

a) three b) five **c)** seven d)ten

3.Which provision of the Indian Evidence Act deals with the presumption of dowry death?

a) Section 113-A **b)**Section 113-B c)Section 113-C d)Section 113-D

4.Which provision of the Indian Evidence Act deals with the presumption of abetment of suicide by a married woman?

a) Section 113-A b)Section 113-B c)Section 113-C d)Section 113-D

5.In which case had the Supreme Court directed all State Governments to instruct its police officers not to automatically arrest when a case under S.498-A of IPC is registered, but to satisfy themselves about the necessity for arrest under the parameters flowing from Section 41 of Cr.P.C.?

a) Arnesh Kumar v. State of Bihar
b) Saritha v. R. Ramachandra
c) Rupali Devi v. State of U.P.
d) Rajbir @ Raju v. State of Haryana

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Module: III

Family Violence: Violence between Spouses - Woman as a Victim of Domestic Violence - Physical, Psychological and Sexual Harassment - The Protection of Women from Domestic Violence Act, 2005 - Cruelty - Battery - Forced Prostitution - Kidnapping of Own Child - Forced Abortion - Unwanted Pregnancy - Female Infanticide - Sex Determination Tests

Family Violence

Introduction to Family Violence

The Protection of Women from Domestic Violence Act, 2005

- Important Definitions
- Domestic Violence
- Scope of the PWDV Act:
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Forced Prostitution:

- Position under IPC:
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- Social Reform Legislations to eradicate Devadasi and Jogini System etc:

Assault and Battery

Female Foeticide & Law

- Causes of Foeticide
- Misuse of Techniques
- Regulations of Pre-Natal Diagnostic Techniques
- Scheme of legislation
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- Prohibition of Determination of Sex

Termination of Pregnancy

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- Circumstances in which pregnancy may be terminated

Introduction to Family Violence

Domestic violence is physical, sexual or psychological abuse directed towards one's spouse, partner, or other family member within the household who is in a very intimate relation. Domestic violence occurs when a family member, partner or ex-partner attempts to physically or psychologically dominate or harm the other. The term “intimate partner violence” (IPV) is often used synonymously with other terms such as ‘wife beating’, ‘wife battering’, ‘man beating’, ‘husband battering’, ‘relationship violence’, ‘domestic abuse’, ‘spousal abuse’ and ‘family violence’, with some legal jurisdictions having specific definitions. Domestic violence occurs in all cultures. People of all races, ethnicities, and religions can be perpetrators of domestic violence. Domestic violence is perpetrated by and on, both men and women, and occurs in same sex and opposite sex relationships.

Domestic violence indicates patterns of behaviour characterized by the misuse of power and control by one person over another, who are or have been, in intimate relationships and has profound consequences for the lives of children, individuals, families and communities. It may be physical, emotional and/or psychological abuse. Physical violence is the intentional use of physical force with the potential for causing injury, harm, disability or death, for example, hitting, shoving, which included, strangulation, beating, threatening by use of weapons and sexual biting, restraint, kicking, or use of a weapon. This may include intimidation, harassment, and damage to property, threats and financial abuse.

Sexual violence and incest are divided into three categories: *firstly*, use of physical force to compel a Person to engage in a sexual act against his or her will, whether or not the act is completed; *secondly*, attempted or completed sexual act involving a person who is unable to understand the nature or condition of the act, to decline participation, or to communicate unwillingness to engage in the sexual act, e.g., because of illness, disability, or the influence of alcohol or other drugs, or because of intimidation or Pressure; and *thirdly*, abusive sexual contact.

Economic abuse occurs when the abuser has complete control over the victim’s money and other economic resources. Usually, this involves putting the victim on a strict ‘allowance’, withholding money at will and forcing the victim to beg for the money until the abuser gives them some money. It is common for the victim to receive less money as the abuse continues. This also includes, but is not limited to preventing the victim from finishing education or obtaining employment. Psychologically, emotional violence involves violence to the victim caused by acts, threats of acts, or coercive tactics.

Psychological/emotional abuse can include, but is not limited to humiliating the victim, controlling what the victim can and cannot do, withholding information from the victim, deliberately

doing something to make the victim feel diminished or embarrassed, isolating the victim from friends and family, and denying the victim access to money or other basic resources, degrading, defaming, blaming and stalking. It is considered psychological/emotional violence when there has been prior physical or sexual violence or prior threat of physical or sexual violence. Psychological violence threats of physical, psychological or sexual or social violence that use words, gestures, or weapons to communicate the intent to cause death, disability, injury, physical, or psychological harm.

Reasons for Domestic violence can be due to financial stress like poverty, frustration to meet expectations of life, inadequate sense or dissatisfaction, social disapproval. Popular emphasis has tended to be on women as the victims of domestic violence, although with the rise of the men's movement, and particularly men's rights, there is now advocacy for men as victims. However, the statistics concerning the number of male victims are strongly contested by many groups active in research on or working in the field of domestic violence. Manu observed that the home where there is respect for women is like the abode of gods but where that is not so, all other forms of worship are fruitless. In spite of such categorical assertion, even by the ancient law givers, women continue to be harassed and victimized, irrespective of their economic, educational, social or religious background.

Domestic violence manifesting in the form of physical, sexual, psychological and religious practices, derogatory and prejudicial to women takes place at all stages of their life. The violence generally starts even before a girl child comes in to this world in the form female foeticide, if the gender of the foetus is determined. If the girl is allowed to take birth alive, she faces the danger of female infanticide. If she survives it, there is always a danger of her becoming a victim of the most uncivilized and inhuman practice of incest, unfortunately perpetrated by her own near and dear. She may also become a victim of child marriage and also trafficking. These are the different dangers faced by a girl even before her marriage.

When a girl gets married, she is subjected to different kind of domestic violence related to dowry and property. Even though, dowry is an old practice in the Hindu society it has assumed monstrous proportions in recent times. The Dowry Prohibition Act, 1961 has had little or no effect due to various reasons including the lacunae in the law and its enforcement. As regards the dowry related domestic violence, it has been recognized as an offence only after 1983, when provisions relating to dowry death, dowry harassment and cruelty were included in the criminal law. Similarly, presumption as to dowry death in case of death of a married woman was added in the Indian Evidence Act, 1872 in 1986. Another form of violence that often takes place particularly in North India is *Sati*, i.e., the practice of a widow burning herself on the funeral pyre of her deceased husband. The Commission of Sati Prevention Act, 1987 was passed by the Parliament to stop this evil practice.

Even the elderly women also face domestic violence, which includes physical, psychological, and material violence. They become victims of either active neglect or passive neglect. Unfortunately, the persons responsible for neglecting women of elderly age are mostly women themselves. For instance, refusal or failure to maintain the in-laws during their old age, which warrants the intervention of Courts under Section 125 of Criminal Procedure Code. During the widowhood also, the women are subjected to varied kinds of domestic violence including deprivation of residence, property and sometimes even the right to remarriage. Thus, it could be seen that the woman is always an easy target and victim of domestic violence at all stages of her life.

The measures are for the upliftment of status of women and to protect them from exploitation at the hands of men. Depending on the gravity of situation, their impact is felt. However, if these measures especially the provisions in criminal law are misused, it would cause havoc in the life of men and their other dependants. It is in this context that the decision of the A.P.High Court in *Saritha* v. *R. Ramachandra*[107] is relevant. The A.P. High Court came across an incident in which Section 498A of the Indian Penal Code dealing with cruelty and harassment by husband and relatives, was misused by a wife to obtain divorce, from her innocent husband. The Division Bench lamented on the misuse of such a beneficial provision and suggested that Section 498A of I.P.C. should be made non-cognizable and bailable. It was also recommended to the Law commission of India and the Parliament to make the necessary changes in the law. This may be an isolated incident, but should not be lost sight of. As the saying goes, one who seeks equity must do equity and one who comes to equity must come with clean hands.

The above stated facts and propositions show that women in India need not only a stronger and effective legal regime and its enforcement, but also the willingness of other sections of society to concede some of their advantages in favour of women, who thoroughly deserve them. However, there are not many male social reformers in the mould of Swami Dayananda Saraswati and RajaRam Mohan Roy at present, who can advance the cause of the women. It is the women alone who should assert themselves. As rightly said, though the history of women and the law has been admixed bag, the brighter side shows that an increasing number of women from all classes are coming out to assert their rights by effectively using the law. Vienna Accord in 1994 and Beijing declaration welcomed Domestic violence law and U.N committee declared CEDAW to curb domestic violence. Dowry death statistics have gone up to 7600 per year from 2005 to 2016. Victims of domestic violence rarely come out to get their issue addressed.

[107] 2002 (6) ALD 319

The Protection of Women from Domestic Violence Act, 2005

This Act aims to provide effective protection of women which right is guaranteed under the constitution. The women who are victims of violence occurring within family or incidental thereto are the intended beneficiaries under the Act. Domestic violence is undoubtedly a human rights issue and a serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged it. The convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women and it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The phenomenon of domestic violence is widely prevalent, but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety. It has been, therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

The Act, *inter alia*, seeks to provide for the following:

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single woman living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a work place or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.; and

(v) It provides for appointment of Protection Officers and registration of non-governmental organizations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

- **Important Definitions**

  - **Aggrieved Person**[108] *means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subject to any act of domestic violence by the respondent.*
  - **Domestic Incident Report**[109] *means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person.*
  - **Domestic Relationship**[110] *means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.*
  - **Magistrate**[111] *means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973(2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place.*
  - **Monetary Relief**[112] *means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved person as a result of the domestic violence.*
  - **Respondent**[113] *means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act.*

[108] Section 2(a) of DV Act, 2005
[109] Section 2(e) of DV Act, 2005
[110] Section 2(f) of DV Act, 2005
[111] Section 2(i) of DV Act, 2005
[112] Section 2(k) of DV Act, 2005
[113] Section 2(q) of DV Act, 2005

Supreme Court in *Sandhya Wankhede* v. *Manoj Bhimrao Wankhede*[114] clarified from the above definition that it would be apparent that although Section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage.

It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

Shared Household[115] means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

Thus the Act defines the various expressions occurring in the legislation. The definitions of "aggrieved person", "domestic relationship", "monetary relief", "respondent" and "shared household" are some of them. As per the legislation, any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to act of domestic violence by the respondent is an aggrieved person. The expression "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in a nature of marriage, adoption or are members of a family living together as a joint family. The word "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the proposed legislation provided that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint under the proposed legislation against a relative of the husband or male partner.

[114] (2011) 3 SCC 650
[115] Section 2(s) of DV Act

- **Domestic Violence**

The expression Domestic Violence has been defined as under:

Section-3 Definition of Domestic violence - For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –
Any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –

a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation-I: For the purposes of this section-

(i) *"physical abuse"* means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) *"sexual abuse"* includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) *"verbal and emotional abuse"* includes- (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) *"economic abuse"* includes- (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, Stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic

relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation-II: For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

In determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence", the overall facts and circumstances of the case shall be the guiding factor.

- **Scope of the PWDV Act:**

The domestic violence in this Country is rampant and several women encounter violence in some form or the other or almost everyday. However, it is the least reported form of cruel behaviour. A woman resigns her fate to the never ending cycle of enduring violence and discrimination as a daughter, a sister, a wife, a mother, a partner, a single woman in her lifetime. This non-retaliation by women coupled with the absence of laws addressing women's issues, ignorance of existing laws enacted for women and societal attitude makes the women vulnerable. The reason why most cases of domestic violence are never reported is due to the social stigma and the attitude of the women themselves, where women are expected to be subservient, not just to their male counterparts but also to the male relatives.

The PWDV Act 2005 has been enacted for protecting the rights of women. The men are not entitled to any relief under the Act. The scope of this piece of legislation has been expounded in plethora of judgments by the higher Courts in India. The Delhi High Court in the case of *Smt. Preeti Satija* v. *Smt. Raj Kumari and Anr*[116] has correctly clarified that it is also well-recognized principle of law that while interpreting a provision in statute, it is the duty of the Court to give effect to all provisions. When aforesaid provisions are read conjointly keeping the scheme of the PWDV Act, it becomes abundantly clear that the legislator intended female relatives also to be Respondents in the proceedings initiated by wife or female living in relationship in the nature of marriage.

While deciding on this issue the Court at length dealt with the object and purport of the Domestic Violence Act 2005 to hold that the main object of the Act is protection of women from violence inflicted by a man and/or a woman. It is a progressive Act; whose sole intention is to protect

[116] 2014 (1) RCR (Criminal) 1035

the women irrespective of the relationship she shares with the accused. The definition of an aggrieved person under the Act is so wide that it takes within its purview even women who are living with their partners in a live in relationship.

In context of proceedings under the Domestic Violence Act 2005 against mother-in-law the Court relied on plethora of cases and opined that in the Domestic Violence Act 2005 the definition of 'Respondent' was read with the Proviso to give a logical meaning to the definition of Respondent by the Supreme Court in the case of *Sandhya Wankhade Vs. Manoj Bhimrao Wankhade*[117], wherein the Court has held that the proviso to Section 2(q) does not exclude female relatives of the husband or make partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act. Therefore, complaints are not just maintainable against the adult male person, but also, the female relatives of such adult male.

- **Reliefs under the Act:**

The Act provides number of reliefs to the victims of domestic violence. They include the following:

- **Protection Orders** (u/s 18)

The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from:

- committing any act of domestic violence;
- aiding or abetting in the commission of acts of domestic violence;
- entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent; or
- singly by the respondent, including her Stridhan or any other property held either jointly by the parries or separately by them without the leave of the Magistrate;
- Causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;
- Committing any other act as specified in the protection order.

[117] (2011) 3 SCC 650

This clause provides that the Magistrate may after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, may pass a protection order in favour of the aggrieved person.

A protection order may contain an order prohibiting the respondent from committing any act of domestic violence or aiding or abetting therein, entering the place of employment of the aggrieved person or if the person aggrieved is a child its school, or any other place frequented by the aggrieved person or attempting to communicate in any form whatsoever with the aggrieved person without the leave of the Magistrate, alienating any assets, operating bank lockers or bank accounts belonging to both the parties jointly or to the respondent singly, including her *Stridhan* or any other property held jointly or separately by them, causing violence to the dependents, other relatives or any person giving the aggrieved person assistance from domestic violence or committing any other act as specified in the protection order.

- **Residence Orders** (u/s 19)

While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -

- restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
- directing the respondent to remove himself from the shared household;
- restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
- restraining the respondent from alienating or disposing of the shared household or encumbering the same;
- restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or
- directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require.

However, no order shall be passed against any person who is a woman.

While passing residence orders, the Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person. The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

While passing such an order, the Court may also pass an order directing the officer-in-charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order. Further while making an order, the Magistrate may impose on the respondent obligations relating to the discharge of rent and other Payments, having regard to the financial needs and resources of the parties. The Magistrate may direct the officer-in-charge of the police station in whose jurisdiction the Magistrate has-been approached to assist in the implementation of the protection order. The Magistrate may direct the respondent to return to the possession of the aggrieved person her *Stridhan* or any other property or valuable security to which she is entitled to.

- **Monetary Reliefs** (u/s 20)

While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to:

- the loss of earnings;
- the medical expenses;
- caused due to the destruction, damage or removal of any property from the control of the aggrieved person and;
- the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section125 of the Code of Criminal Procedure 1973 (2 of1974) or any other law for the time being in force.

The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. The Magistrate may also pass an order to pay an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require. The Magistrate shall send a copy of the order for monetary relief to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides. Upon the failure on the part of the respondent to make payment in terms of the order, the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

- **Custody Orders** (u/s 21)

Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary the arrangements for visit of such child or children by the respondent. If the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, he shall refuse to allow such visit.

This clause lays down that notwithstanding anything contained in any other law for the time being in force the Magistrate may, at any stage of hearing of the application for grant of any relief, grant temporary custody of any child to the aggrieved person or to the Person making an application on her behalf and specify the arrangements for visit of such child by the respondent. However, the Magistrate may refuse to allow such visits if in his opinion such visits may be harmful to the interests of the child.

- **Right to Reside in a Shared Household** (u/s 17)

Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

This clause lays down that irrespective of any contrary provision in any other law, everywoman in a domestic relationship shall have the right to reside in the shared household and the aggrieved person shall not be evicted or excluded from the Shared Household by the respondent except in accordance with the procedure established by law.

In *S.R. Batra* v. *Tarun Batra*[118], the Supreme Court interpreted the word "shared household". As per, Markandeya Katju J.

> *U/s 17(1) of the Act, the wife is only entitled to claim a right to residence in a shared household and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra (husband) nor was it taken on rent by him nor is it a joint family property*

[118] (2007) 3 SCC 169

of which the husband (Amit Batra) is a member. It is the exclusive property of Appellant 2, mother of Amit Batra. Hence it cannot be called a 'shared household'. No doubt, the definition of 'shared household' in section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society.

The Court referred to the decision of the Supreme Court in *B.R. Mehta v. Atma Devi*[119] where it was held that in England, the rights of the spouses to the matrimonial home are governed by the Matrimonial Homes Act, 1967 no such right exists in India. In the same decision it was observed:

"it may be that with change of situation and complex problems arising it is high time to give the wife m the spouse aright of occupation in a truly matrimonial home, in case of marriage breaking-up or in case of strained relationship between the husband and the wife." (para15)

"In our opinion the above observation is merely an expression of hope and it does not lay down any law. It is only the legislative which can create a law and not the Court. The Courts do not legislate and whatever may be the personal, view of a judge, he cannot create or amend the law, and must maintain judicial restraint." (para 16)

- **Compensation Orders** (u/S 22)

In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent. This clause lays down that in addition to other reliefs which may be granted under the proposed legislation, the Magistrate may, on an application by the aggrieved person, pass an order directing the respondent to pay compensation or damages or both to the aggrieved person for the injuries including forth mental torture and emotional distress caused to her by domestic violence by the respondent.

- **Power to grant interim and ex parte orders** (u/s 23)

- In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
- If the Magistrate is satisfied that an application prime facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the

[119] [1987] 4 SCC 183

respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, 19, 20 and 21 or as the case may be, section 22 against the respondent. This clause provides for grant of interim orders by the Magistrate. He may also pass ex parte orders on the basis of affidavits given by the aggrieved person.

Forced Prostitution

Forced prostitution, also known as involuntary prostitution, is prostitution or sexual slavery that takes place as a result of coercion by a third party. The terms "forced prostitution" or "enforced prostitution" appear in international and humanitarian conventions such as the Rome Statute of the International Criminal Court but have been insufficiently understood and inconsistently applied. "Forced prostitution" refers to conditions of control over a person who is coerced by another to engage in sexual activity. It is a crime against the person because of the violation of the victim's rights of movement through coercion and because of their commercial exploitation[120].Other expressions such as *Flesh Trade*, *Sex work* etc. are used as synonymous with prostitution in modern times.

Article 7 of the Rome Statute of the International Criminal Court[121] refers to Crimes against Humanity and mentions that for the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack including "*Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"*

Forced prostitution is illegal under customary or national law in all countries. However, voluntary prostitution may have a different legal status in different countries, which range from being fully illegal and punishable by death[122] to being legal and regulated as an occupation. While the legality of adult prostitution varies between jurisdictions, the prostitution of children is illegal almost everywhere in the world.

In India there are certain provisions in the Indian Penal Code 1860 dealing with kidnapping and abduction which cover the forced prostitution also. They are:

[120] https://en.wikipedia.org/wiki/Forced_prostitution
[121] Done at Rome on 17 July 1998, in force on 1 July 2002
[122] In Iran

Section 365 – Kidnapping or abducting with intent secretly and wrongfully to confine person. —Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 366 – Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid .

Section 366A – Procuration of minor girl —Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Section 366B – Importation of girl from foreign country —Whoever imports into [India] from any country outside India or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Section 367 – Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.— Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 368 – Wrongfully concealing or keeping in confinement, kidnapped or abducted person — Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Section 370 – Trafficking of person — (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbors, (d) transfers, or (e) receives, a person or persons, by—

Firstly —using threats, or

Secondly —using force, or any other form of coercion, or

Thirdly —by abduction, or

Fourthly —by practicing fraud, or deception, or

Fifthly —by abuse of power, or

Sixthly —by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking.

Explanation-1 —The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation-2 — (1) the consent of the victim is immaterial in determination of the offence of trafficking. (2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine. (3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine. (4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. (5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine. (6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. (7) When a public servant or a police officer is involved in the trafficking of any person

then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 370A – Exploitation of a trafficked person —

(1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

Section 371 – Habitual dealing in slaves — Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Section 372 – Selling minor for purposes of prostitution, etc.—Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation-1—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation-2—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

Section 373 – Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation-1—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation-2 — "Illicit intercourse" has the same meaning as in section 372.

The above 11 provisions can be invoked in case of forced prostitution depending on the facts and circumstances of each case.

Position under Other Laws

- **The Immoral Traffic (Prevention) Act, 1956:**

Under this Act, Prostitution means the sexual exploitation or abuse of persons for commercial purpose, and the expression "prostitute" shall be construed accordingly.

- It imposes punishment for keeping a brothel or allowing premises to be used as a brothel.
- It also imposes punishment for living on the earnings of prostitution
- It also makes punishable the procuring, inducing or taking [person] for the sake of prostitution
- It also provides punishment for detaining a person in premises where prostitution is carried on
- Punishes prostitution in or in the vicinity of public places
- Punishes seducing or soliciting for purpose of prostitution and etc.
- Punishes seduction of a person in custody.

- **Recent initiatives**

Recently the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 was introduced in and passed by the Lok Sabha on July 26,2018. This Bill aims to:

- Create a law for investigation of all types of trafficking, and rescue, protection and rehabilitation of trafficked victims.

- Provide for the establishment of investigation and rehabilitation authorities at the district, state and national level. Anti-Trafficking Units will be established to rescue victims and investigate cases of trafficking. Rehabilitation Committees will provide care and rehabilitation to the rescued victims.

- Classify certain purposes of trafficking as 'aggravated' forms of trafficking. These include trafficking for forced labor, bearing children, begging, or for inducing early sexual maturity. Aggravated trafficking attracts a higher punishment.

- Set out penalties for several offences connected with trafficking. In most cases, the penalties set out are higher than the punishment provided under prevailing laws.

However, this Bill is yet to become a law.

- **Social Reform Legislations to eradicate Devadasi and Jogini System**

The Constitution of India while guaranteeing the right to freedom of religion under Article 25 also provided that social welfare and reform may be introduced through legislation eve if it is contrary to the freedom of religion. Similarly, the Constitution also imposes a fundamental duty on every citizen to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; *to renounce practices derogatory to the dignity of women*.

Prostitution in the name of Goddesses and religious practices has been in vogue in India from the time immemorial. Dedication of girls to Gods and Goddesses which is a superstitious practice is seen in the States like Telangana, Andhra Pradesh and Karnataka etc. The tradition of marrying a woman to a deity – which initially started out as a religious practice of a woman devotee willingly tying herself to God and His temple, and taking upon the responsibility of a caretaker of sorts, has degenerated into a heinous practice wherein the '*Joginie/Devdasi'*, as she is called, is forced into prostitution to serve the local village elders of higher castes.[123] They include:

- The Karnataka *Devadasis* (Prohibition of Dedication) Act 1982, he Andhra Pradesh *Devadasis* (Prohibition of Dedication) Act, 1988,
- The Andhra Pradesh (Andhra Area) *Devadasis* (Prohibition of Dedication) Act, 1947; and
- The Maharashtra *Devadasi* Protection and Rehabilitation Act 2005

[123] http://ncw.nic.in/node/1761

- **Assault and Battery**

Assault and Battery are the expressions generally used by the law of crimes and torts. As part of the violence against women, these two methods are employed by unscrupulous persons to target the woman. It is therefore necessary to understand both the concepts. The IPC 1860 defines Assault and Battery as under:

> **Section – 351 Assault –** Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
>
> *Explanation* – Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.
>
> *Illustrations:*
>
> (a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z, A has committed an assault.
>
> (b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause dog to attack Z. A has committed an assault upon Z.
>
> (c) A takes up a stick, saying to Z, "I will give you a beating". Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

It can be understood that assault is any gesture or act which causes or is likely to cause an apprehension in the mind of the victim that he or she is going to be the victim of criminal force. In majority of the cases it is the women who are victims of such an assault. There are three essential ingredients of assult-1) Intention, 2) Reasonable Apprehension, and 3) Hurt. Assault is less grievous than the criminal force. In the case of woman, the IPC recognises Assault to outrage their modesty as an offence under section 354. It reads as under-

> **Section – 354 Assault or criminal force to woman with intent to outrage her modesty –** Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished

with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

In law of torts, Assault denotes intentional application of force to another person with unlawful intent. It has two essential ingredients namely 1) use of force, and 2) without lawful justification. Since many women and sometimes men become victims of battering, they require to know the civil and criminal remedies for the same.

Female Foeticide & Law

> *When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasised on the individualism of woman. John Milton treated her to be the best of all God's work……*The Supreme Court in *Voluntary Health Association of Punjab* v. *Union of India and Others*[124]

In India the tradition of dowry cost the life of girl child, in view of cultural preference for sons. It is baffling to know that in Bibipur in the State of Haryana, the sex ratio is 871females/1000 males as per 2011 census. It is reported that doctors in Haryana and Rajasthan doctors indulge in hassle free abortions. They use crude methods for causing automatic abortion. Government of India says that sex-selective abortion is a "problem of affluence".[125]

India is one of the countries where the female foeticide and infanticide are on the rise. In the good old days, when scientific techniques were not advanced, it was impossible to determine the sex of the child being carried in the womb of mother until it was delivered.

- **Causes of Foeticide**

Discrimination against girl children, parents' neglect of the girl child, illegal abortions and female infanticide are clear instances of an unhealthy society. The practice of female foeticide, which is illegal, is still prevalent in our country. However, with the advent of modern techniques developed

[124] (2016) 10 SCC 265
[125] See: https://www.aljazeera.com/indepth/features/2015/06/female-foeticide-india-ticking-bomb-150629090758927.html

in recent times; it has become quite possible to ascertain the sex of the child in the womb even in the early stages of pregnancy. The technique used to diagnose the condition, and sex of the foetus is medically called “amniocentesis” which is one of the many pre-natal diagnostic techniques. Female foeticide leads to skewed sex ratio, girl shortage, trafficking of girls, increases child marriages, increases maternal deaths, and leads to rise in polyandry.

The pre-natal diagnostic techniques are actually intended to test or analyze the amniotic fluids, blood or any tissue of a pregnant woman for the purpose of detecting any genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or sex linked diseases. The procedures used for conducting any pre-natal diagnostic tests include all gynaecological or obstetrical or medical procedures such as ultra-sonography, foetoscopy, taking or removing samples of blood or any tissue of pregnant woman etc.

- **Misuse of Techniques**

The above-mentioned techniques which were actually devised by the medical fraternity for preventing the genetic, chromosomal disorders of the child in the womb and also for detecting the sex linked diseases came to be misused for other extraneous purposes by medical practitioners who were prompted by certain sections of the society. Instead of using these techniques for the intended medical purposes, the medical practitioners started using them most probably on the insistence of family members of the women only for the purpose of determining the sex of the child in the womb. In most of the cases, once it was determined that the foetus was female, it was miscarried deliberately so as to prevent the birth of a female child. These advanced medical techniques were misused to serve the purpose of female foeticide, i.e. killing or aborting the foetus, in a society dominated by male chauvinistic sections.

- **Regulations of Pre-Natal Diagnostic Techniques**

The Medical Termination of Pregnancy Act of 1971 makes abortion legal in most states, but specified legally acceptable reasons for abortion such as medical risk to mother and rape. The Parliament has realized the grave implications arising out of the misuse of the pre-natal diagnostic techniques and intended to regulate and restrict the same only for certain medical purposes. The Government has realized that abuse of techniques for determination of sex of the foetus leading to female foeticide is discriminatory against the female sex and also affects the dignity and status of women. With the above objectives, the Parliament has passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, which came into force from 01.01.1996.

This Act provided for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal or certain congenital malfunctions or sex-linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide. The legislation sought to achieve the following objectives:

- Prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide.
- Prohibition of advertisement of the techniques for detection or determination of sex.
- Regulation of the use of techniques only for the specific purposes of detecting genetic abnormalities or disorders.
- Permission to use such techniques only under certain conditions by the registered institutions.
- punishment for violation of the provisions of the Act;
- Provide deterrent punishment to stop such inhuman acts of female foeticide.

This Act was amended in 2003 to as Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994[126]. This amendment provides for the prohibition of sex-selection, before or after conception; and regulates the use of pre-natal diagnostic techniques for detecting genetic abnormalities or other sex-linked disorders in the foetus. This amendment has introduced the following important changes as compared to the original Act:

- New definitions of Conceptus, Embryo, Foetus, Pre-natal Diagnostic Procedures and Sex-selection have been added;
- Sex-Selection is specifically prohibited under the new Section 3-A;
- Sale of ultra sound machine, imaging machine, scanner or any other equipment capable of detecting sex of foetus to any Genetic counselling centre, Genetic Laboratory, Genetic clinic or any other person not registered under the Act is prohibited under Section 3-B; and
- Presumption in the case of conduct of pre-natal diagnostic techniques on a woman, has been added under Section.

As a result, the Court shall now presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative to undergo prenatal diagnostic technique for the purpose of sex-selection of foetus. Such person shall be liable for abetment of offence and is punishable with imprisonment up to 3 years and with fine which may extend to fifty thousand rupees for the first offence; and for any subsequent offence with imprisonment up to five years and fine up to one lakh rupees.

[126] Hereinafter referred to as the P.C.P.N.D.T. Act

In *Centre for Enquiry into Health & Allied Themes (CEHAT) and Others v. Union of India and Others,*[127] the Supreme Court gave a directive to State Governments to enforce the law banning the use of sex determination technologies, the Ministry set up a National Inspection and Monitoring Committee (NIMC). Dr. Rattan Chand, Director (PNDT) was made the convenor of the NIMC. The NIMC under the guidance of Dr. Rattan Chand conducted raids in some of the districts in Maharashtra, Punjab, Haryana, Himachal Pradesh, Delhi and Gujarat. In April, it conducted raids on three clinics in Delhi. In its reports sent to the Chief Secretaries of the respective States, the committee observed that the Authorities had failed to monitor or supervise the registered clinics.[128] The Mumbai High Court ruled that prenatal sex determination implied female foeticide. Sex determination violated a woman's right to live and was against India's Constitution[129]. Futher, in *Vinod Soni & another* v. *Union of India*[130], the Mumbai High Court answering to an interesting question about inclusion of right of sex determination under Article 21 observed that, *"The right to personal liberty cannot expand by any stretch of imagination,to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India."*

Scheme of legislation

The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 consists of 34 Sections spread over 8 Chapters. The Act regulates the use of such techniques and prevents their misuse for sex-determination, not only by individuals such as gynaecologists, medical geneticists, and paediatricians but also by any genetic counselling centre, genetic laboratory or genetic clinic.

Regulation of Techniques and Permitted Use

According to Section 4 of the Act, the pre-diagnostic techniques may be conducted only for the purpose of detecting any abnormality like chromosomal abnormality, genetic metabolic disease, sex-linked genetic disease, or congenital. Thus, if a woman is pregnant and is tested HIV positive, pre-natal diagnostic technique maybe legally applied to determine whether her child in the womb also is HIV positive. Similarly, if the pregnant mother is suffering from venereal disease, the technique may

[127] (2003) 8 SCC 406
[128] https://frontline.thehindu.com/static/html/fl2308/stories/20060505001910100.htm
[129] *Vijay Sharma* v. *Union of Inida*, AIR 2008 Bom 29
[130] 2005 Crl. L J 3408; 2005 (3) MhLJ 1131

be applied to test whether the child in the womb also is afflicted with such disease. These techniques may be used or conducted only when any of the following conditions is satisfied:

- when the pregnant woman is above 35 years of age;
- where the pregnant woman has already undergone 2 or more abortions or foetal loss;
- where the pregnant woman has been exposed to potentially dangerous agents like drugs, radiation, infection or chemicals;
- where the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or another genetic disease etc.

Therefore, no relative or husband of the pregnant woman can seek or encourage the conduct of any pre-natal diagnostic techniques except when any one of the above conditions is fulfilled.

In *Chethna Legal Advisory WCD Society* v. *Union of India*,[131] the Supreme Court took note of the reported National programme of Action for Education of female foeticide and infanticide by the Department of Women and Child Development, Ministry of Human Resources Development, and Government of India. This programme takes note of NGO's concerned with this kind of work. The Court observed that in order to implement the National Programme properly, the assistance of the National Human Rights Commission also may be solicited. This is a welcome development, as it would go a long way in discouraging female foeticide and infanticide.

In *Centre For Enquiry Into Health & Allied Themes (CEHAT) and Others v. Union of India and Others*[132] the Supreme Court observed that it is an admitted fact that in Indian Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

[131] (1998) 2 SCC 158
[132] (2003) 8 SCC 406

Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organizations are required to approach this Court for implementation of the The Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, which is the normal function of the Executive.

In the case of *Voluntary Health Association of Punjab* v.*Union of India & Others*[133], the Supreme Court issued additional directions to curb female foeticide by effective implementation of the PCPNDT Act. Justices Dipak Misra and Shiva Kirti Singh observed that it needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have, and went on to state that *"The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of."*

Prohibition of Determination of Sex[134]

The PCPNDT Act absolutely prohibits the determination of the sex of a foetus and communication thereof by any genetic centre, laboratory or clinic. Therefore, techniques like ultrasonography can be used only for detecting the genetic disorders or abnormalities and not for determination of sex of the foetus. The Bombay High Court Court in case of *Vijay Sharma v. Union of India*[135]that the MTP Act does not permit the sex selection test. The fact of the case is that, the Writ Petition filed by Mr. Vijay Sharma and other challenging the validity of PCPNDT Act by saying that, it is violating Article 14 of the Constitution. The fact of the case is that, the couple was married couple having two female children and they were desirous to having a male child. According to them if, they have a son and a daughter, then they can enjoy love and affection of both children of opposite Sex and their daughters can also enjoy company of their brother in future.

Therefore, it was contended by them in Court of Law that the couple, who is having children of same-sex they should be allowed to determine the sex of child by using ultra sound Sonography Technique, so that they can give birth to opposite sex child. It means that, if they are having a girl child then, they can get male child. It was further argued that, under provisions of MTP Act, termination of pregnancy is allowed under certain circumstances. The Court rejected their argument stating that the provisions of the Act have to be made applicable without any distinction.

Before using or conducting a pre-natal diagnostic technique, on a pregnant woman the concerned genetic counselling centre, laboratory or clinic must fulfil the following conditions. It must

[133] (2016) 10 SCC 265
[134] Section 6
[135] AIR 2008 Bom 29

(i) explain the possible side effects and consequences of using the techniques to the pregnant woman; (ii) obtain her written consent to undergo such procedure in the prescribed form, in the language she understands and (iii) give her a copy of her written consent. Under no circumstances, the sex of the foetus should be communicated to the woman concerned or her relatives by words, signs or in any other manner.

The Act provides that, no person, organization or Genetic centre should advertise in any form regarding the facility of the pre-natal determination of sex available at such centre or laboratory. Therefore, no publicity can be given as to the existence or availability of the facility. If advertisement is given in contravention of the above provision the same is punishable with imprisonment up to 3 years or with fine. Any contravention of the provisions of this Act is made an offence. The guilty individual is liable to be punished with various punishments depending on the nature of the contravention. If a company commits such an offence, any person who is the in charge of such company at the time of offence shall be deemed to be guilty of the offence. Thus vicarious liability is imposed on the individuals heading the companies or organizations violating the provisions of the Act. The law views the offences committed under this Act as very serious. This could be seen from Sec.27 of the Act which makes every offence under the Act, a cognizable, non-bailable and non-compoundable.

Recently, in *Federation of Obstetrics and Gynecological Societies of India (FOGSI) v. Union of India and others*[136], refusing to strike down Section 23 of the PCPNDT Act, the bench of Arun Mishra and Vineet Saran, JJ held, *"dilution of the provisions of the Act or the Rules would only defeat the purpose of the Act to prevent female foeticide and relegate the right to life of the girl child under Article 21 of the Constitution, to a mere formality."* The Court held that non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error. Considering the Fundamental Duties under Article 51A(e) and considering that female foeticide is most inhumane act and results in reduction in sex ratio, such provisions cannot be said to be illegal and arbitrary in any manner besides there are various safeguards provided in the Act to prevent arbitrary actions.[137]

Termination of Pregnancy

- **Introduction**

In India, Termination of Pregnancy by unregistered medical practitioners and quacks is common place. The reasons for such abortions are many which include superstitions and carrying illegitimate children etc. Prior to 1971 a termination of pregnancy was not regulated by any law.

[136] 2019 SCC OnLine SC 650

[137] See: https://www.scconline.com/blog/post/2019/05/04/non-maintenance-of-record-not-just-a-clerical-error-but-the-spring-board-for-commission-of-offence-of-foeticide/

However, the Indian Penal Code provides for many provisions to punish the persons responsible for miscarriage. Sections 312 to 316 of the Indian Penal Code punish the persons causing miscarriage, preventing a child being born life or causing the death of quick unborn child. In spite of these penal provisions the practice of causing miscarriage continued in India for various social and medical reasons. Therefore, the Parliament has decided to provide for the termination of certain pregnancy by registered medical practitioners.

The termination of pregnancy by quacks, and unregistered and unqualified medical practitioners caused irreparable damage to the woman concerned and also caused death in many cases. The practice has been found to be hazardous to the health of the woman who is pregnant. In most of the cases the abortion was forcefully carried out to prevent the birth of a female child and in the process most of the women also lost their lives besides certain other medical damages. These were the main reasons that prompted the Parliament to make a law to regulate termination of pregnancy only in certain cases, by registered medical practitioners, which led to enactment of the Medical Termination of Pregnancy Act, 1971.

- **The Medical Termination of Pregnancy Act, 1971**

The main purpose of the Legislation called the Medical Termination of Pregnancy Act, 1971 is to provide for the termination of pregnancy by registered medical practitioners where it continuance would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if child were born, it suffered from such physical or mental abnormalities as to be serious handicapped.

Medical Termination of Pregnancy Regulation 2003 has enacted by the Government. It contained that every registered medical practitioner who terminates the pregnancy should within three hours certified the Form-I.1pregnant woman, as per Section 3 and 5 of the MTP Act. Therefore, it is a primary duty of every medical practitioner who terminates the pregnancy shall seal the Form-I into envelope and send it to the Government and Chief Medical Officer. If it is not possible, then it has to keep into safe custody. It is further mentioned that the envelope shall contain the name of the registered medical practitioner who terminate the pregnancy as well, as name and detail of woman whose pregnancy terminated and it should be marked with name ‘SECRET”.

The Parliament has passed this enactment to provide for the termination of certain pregnancies by registered medical practitioners and other matters connected with such termination. The Act consists of 8 sections dealing with various aspects like the time, place and circumstances in which a pregnancy may be terminated by medical practitioners legally. Here the medical practitioner means the persons who possess any recognized medical qualifications as defined in the Indian

Medical Council Act, 1956 and whose name has been entered in State Medical Register. Such person must have experience or training in gynaecology and obstetrics.

- **Circumstances in which pregnancy may be terminated[138]**

A pregnancy may be terminated by a medical practitioner only when any of the following conditions is fulfilled: -

a) where the length of pregnancy does not exceed 12 weeks that is three months, it may be terminated by a single registered medical practitioner; or
b) where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, it may be terminated by not less than two medical practitioners. Such termination can take place only when such medical practitioner(s) form(s) an opinion in good faith that:
   (i) the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
   (ii) there is substantial risk that if child were born, it would suffer from such physical or mental abnormalities as to be serious handicapped.

The Supreme Court in a landmark decision observed that, therefore it is clear that termination of pregnancy can take place only on medical grounds that too when the registered medical practitioner has formed the above opinion in good faith.[139]

In, *Anusha Ravindra* v. *Union of India*[140] the 3-judge bench of Supreme Court, comprising Dipak Misra, CJ and AM Khanwilkar and Dr. DY Chandrachud, JJ issued notice to the Central Government on petition seeking framing of appropriate medico legal guidelines for urgent and safe termination of pregnancy under safe medical facilities including termination of pregnancies beyond 20 weeks in the exceptional cases. Further, in the case of *Ms.Z* v. *State of Bihar*[141] where a 35-year-old woman was not allowed to abort her foetus by the Patna High Court as her foetus was 24-weeks-old at the time when the High Court was deciding the matter, the 3-judge bench of Dipak Misra, Amitava Roy and AM Khanwilkar, JJ directed the State of Bihar to pay a compensation of Rs.10,00,000 to the appellant as it was due to the laxity of the authorities in terminating her pregnancy as she was 18 weeks pregnant, a rape surivior rejected by her husband and family, living in a shelter home, when she expressed her desire to terminate her pregnancy. The Court said that the appellant has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind.

However, in certain circumstances, the Court has allowed for the termination of pregnancy even if the length of the pregnancy exceeds 20 weeks. In

[138] Section 3 of Medical Termination of Pregnancy Act, 1971
[139] *Suchita Srivastava & Anr.* v. *Chandigarh Administration*, (2009) 11 SCC 409
[140] Writ Petition (Civil) No.934/2017, Order dated 13.10.2017
[141] 2017 SCC OnLine SC 943

Murugan Nayakkar v. *Union of India*[142], the Supreme Court granted termination of pregnancy to a 13-year-old girl who was a victim of rape and sexual abuse. The Supreme Court had held that, "*Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed*."

In *Geeta Devi* v. *State of H.P.*[143], although the pregnancy was at an advance stage of 32 weeks, however, having regard to the danger to the life of the petitioner and expert opinion that the foetus may not survive to extra uterine life, the High Court granted permission to the petitioner to terminate the pregnancy. The High Court of Himachal Pradesh observed that the petitioner had every right to take all steps necessary to preserve her own life against the avoidable dangers to it. Recently, taking in view the foetal anomalies, the Bombay High Court in *Vaishali Pramod Sonawane* v. *Union of India*[144] allowed for the termination of pregnancy of 24-weeks The Bombay High Court observed that, "*Although, sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971 put a cap of 20 weeks for permitting the pregnant woman to terminate the pregnancy, on consideration of Section 5, it would be logical to conclude that the contingencies referred in clauses* (i) *&* (ii) *of sub-section 2*(b) *of Section 3 will have to be read in Section 5 of the Act and as such in an exceptional case, the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks can be considered.*"

The Medical Termination Pregnancy Act, 1971, has been given overriding effect over the Indian Penal Code, 1860 which deals with the offences leading to miscarriage. This Act creates a specific offence where the pregnancy is terminated by an unregistered medical practitioner. This is an independent offence and shall not affect the provisions of the Indian Penal Code dealing with the offence of causing miscarriage. From the above discussion, it becomes clear that the Act of 1971 is a welfare legislation aimed at protecting the physical and mental health of a pregnant woman and also of the child being carried in the womb of the mother.

Frequently Asked Questions (FAQs)

1. Define Domestic Violence?
2. Who is entitled to protection under the PWDV Act 2005?
3. Who can be the respondent under the PWDV Act? Can the woman also be a respondent?
4. What is Battery?
5. What is a Sex Determination Test? Is it legal?
6. What is a Protection Order under the PWDV Act?

[142] 2017 SCC OnLine SC 1902
[143] 2017 SCC OnLine HP 1574
[144] 2019 SCC OnLine Bom 932

Multiple Choice Questions (MCQs)

1. Who is protected under the PWDV Act?

a) Only married women

b) Only the daughters

c) Only aged women members of the family

d) Any woman in a domestic relationship irrespective of age

2. DIR under the PWDV Act denotes

a) Domestic Investigation Report

b) Domestic Incident Report

c) Domestic Inquiry Report

d) Domestic Inquest Report

3. "a relationship in the nature of marriage" in the definition of Domestic Relationship denotes

a) Live-in Relationship

b) Cocubinage

c) Bigamy

d) Contract marriage

4. Who among the following can be a Respondent under the PWDV Act?

a) aggrieved wife

b) aggrieved daughter in law

c) cruel Mother in Law

d) aggrieved daughter

5. Which of the following reliefs cannot be granted in a domestic violence case?

a) Residence Order

b) Protection Order

c) Judicial separation

d) Custody Order

6. Which among the following courts has jurisdiction to entertain DV cases?

a) Sessions Court

b) Judicial Magistrate of First Class

c) Judicial Magistrate of Second Class

d) Executive Magistrates' Court

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Part B: Property Relations

Module: I

Hindu Joint Family: Mitakshara - Dayabhaga - Coparcenary - Ancestral Property - Self-acquired Property - The Hindu Gains of Learning Act, 1930 - Partition - Alienation of Joint Family Property - Powers of Coparcener - Manager's Authority - Legal necessity - Remedies against Alienator - Maintenance and Welfare of Parents and Senior Citizens Act, 2007

Hindu Joint Family

- Hindu Schools of Thought
- Coparcenary and the Property
- Ancestral Property
- Self-acquired Property
- Gains of Learning and Hindu Law

Partition:

- What can be Partitioned?
- Properties which are not capable of Division
- Deductions and Provisions
- Who can seek partition?
- Reopening of Partition

Alienation of Joint Family Property

- Father's power of alienation
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- Coparcener's power of alienation
- Sole Surviving Coparcener's Power of Alienation
- Alienee's rights and remedies

The Maintenance and Welfare of Parents

and Senior Citizens Act, 2007

- Maintenance Laws in India
- Personal Laws and Maintenance
- Secular Laws and Maintenance
- The Code of Criminal Procedure, 1973
- Government's response to Problems of Senior Citizens
- The Maintenance and Welfare of Parents and Senior Citizens Act, 2007
- Salient Features of the Act
- Demerits of the Act

- **Hindu Joint Family**

A Hindu Joint Family setup is an extended family arrangement prevalent which has an enormous legal significance in India. Simply, a Hindu Joint Family would at best be described as, the lineal descendants and their dependants where, the former trace their origin to one common ancestor. A joint family or undivided family is an extended family arrangement prevalent throughout the Indian subcontinent**,** particularly in India, consisting of many generations living in the same household, all bound by the common relationship. A joint family consists of a husband and wife; their sons; their daughters, and so on up-to generations. Any number of these people may without impacting the legal existence of the family, be decreased. The underlying importance of a joint family is that it checks its origin back to one common ancestor. Moreover, with the births and deaths of members, joint families can continue till eternity[145].

The family is headed by a senior person called a 'Karta', is usually a male or a female, who makes decisions on economic and social matters on behalf of the entire family. The patriarch's wife generally exerts control over the household and minor religious practices and often wields considerable influence in domestic matters. Family income flows into a common pool, from which resources are drawn to meet the needs of all members, which are regulated by the heads of the family. However, with urbanization and economic development, India has witnessed a break up of traditional joint family into more nuclear families and traditional joint family in India account for small number of Indian households[146].

- **Hindu Schools of Thought**

The Ancient Schools of Hindu laws are of two types. These were in existence even prior to the codification of Hindu law with the Hindu Succession Act, 1956. The ancient Schools of Hindu laws are believed to be of two types and were in existence before the Hindu law was codified with the Hindu Succession Act of 1956 i.e. *firstly*, the Mithakshara School, and *Secondly*, the Dayabhaga School or Bengal School. In Bengal and Assam the Dayabagha School was established and in the entire of India apart from in Bengal and Assam Mitakshara School was broaden. The two main interpreters who wrote on Mitakshara and Dayabagha Schools were Vijnaneshwar and Jeemutavahana respectively.

In the Mitakshara School, the allocation of inherited property was based on the law of possession by birth and a man could leave his self-acquired property to which he willed. The joint family property went to the group known as coparceners, i.e. those who belonged to next three

[145] https://www.toppr.com/guides/legal-aptitude/family-law-II/joint-family-and-coparcenary/
[146] https://en.wikipedia.org/wiki/Hindu_joint_family

generations and also the joint family property by partition could be, at any time, converted into separate property. Therefore, in Mitakshara School, Sons had an exclusive right by birth in joint family property. The property is inherited in the Dayabhaga School after the death of the person who was in possession of it. The doctrine of son's birth right and the devolution of property by survivorship had limited space in Dayabagha School. It is established that in the Mitakshara School neither the father nor any other coparcener could normally disaffect the joint family property.

Under the Dayabhaga School there is no such constraint and each coparcener has complete right of separation of his exclusive share in the joint family property. To put it simply, Mitakshara was based on the "principle of ownership by birth, and Dayabagha on principle of ownership by death". In the Dayabhaga Scheme the division of property was very simple. If a man died intestate, his supposed the property was divided uniformly between his sons. If he has share in the common property with the brothers, then the property (a share equal to his own) of the brothers would be put apart and his share would be separated between the sons. And in the Mitakshara School, a family was also joint because property was assumed equally by all the male members.

A female cannot be a member of Mitakshara coparcenary i.e. by birth she has no right in the joint family property. If a division took place only certain females were permitted to a share, usually she had no right of partition. Under the Act, the Hindu Women's Right to Property Act, 1937, the undivided interest of a coparcener on his death did not go by survivorship to coparceners, but his widow took it as heir, though she took it as a limited succession his interest in the joint family property. The law of succession in the Dayabhaga School was based on the principle of religious value or divine profit. The law of inheritance in the Mitakshara School was based on the rule of blood-relationship. The Mitakshara School did not give complete result to the principle, and restricted it by two supplementary rules: (1) females are excluded from inheritance and (2) importance of agnates over cognates. This means that in case of a death of a Hindu man leaving behind a son and a daughter, the latter would be excluded totally and the former would get the entire property. In case he leaves behind a son's son and a daughter's son, the former should succeed to the entire property and the latter would be excluded[147].

- **Coparcenary and the Property**

Coparcenary is a term which is generally used in matters related to the Hindu succession law. Coparcener is a term used for a person who assumes a legal right in his parental property by birth only. To understand this in a better way, we need to first understand the term Hindu Undivided Family (HUF). In the eyes of the law, a HUF is a group of family people, who are the lineal

[147] See https://shodhganga.inflibnet.ac.in/bitstream/10603/189726/6/chapter%202.pdf

descendants of a common ancestor. This group includes the eldest member and three generations of a family. Moreover, all these members are known as coparceners.

According to the law, all coparceners get a legal right over the coparcenary property by birth. But their share in the property keeps on changing with new births and deaths in the family. This law apart from Hindus controls the people from other religious backgrounds like Jainism, Sikhism, and Buddhist. It is essential to note here that coparcenary applies to both ancestral and the self-acquired property[148]. However, unlike ancestral property where all coparceners have equal rights over the property, a person is free to manage his self-acquired property with his will. Under the Hindu law, property is divided into two types: ancestral and self-acquired.

- **Ancestral Property**

An ancestral property is a self-acquired and undivided property of a person's grandfather. The property inherited up to four generations of male lineage (i.e. father, grandfather, etc.) is called an ancestral property. The right to a share in such a property accrues by birth itself, unlike other forms of inheritance, where inheritance opens only on the death of the owner Any property acquired by the Hindu great grandfather, which then passes undivided down the next three generations up to the present generation of great grandson/daughter. It should have the following characteristics:

- This property should be four generations old.
- It should not have been divided by the users in the joint Hindu family as once a division of the property takes place, the share or portion which each Coparcener gets after the division becomes his or her self-acquired property.
- The right to a share in ancestral or coparcenary property accrues by birth itself, unlike other forms of inheritance, where inheritance opens only on the death of the owner.
- The rights in ancestral property are determined per stripes and not per capita. Share of each generation is first determined and the successive generations in turn sub divide what has been inherited by their respective predecessor.
- Properties inherited from mother, grandmother, uncle and even brother is not ancestral property. Property inherited by will and gift are not ancestral properties.

Self-acquired property can become ancestral property if it is thrown into the pool of ancestral properties and enjoyed in common. At the same time, Property gifted by a father to his son could not become ancestral property in the hands of the son simply by reason of the fact that he got it from his father.

[148] https://www.toppr.com/guides/legal-aptitude/family-law-II/joint-family-and-coparcenary/

- **Self-acquired Property**

Self-acquired property is any property purchased by an individual from his resources or any property he acquired as a part of division of any Ancestral/ Coparcenary property or acquired as a legal heir or by any Testamentary document such as 'Will' etc. A property acquired by a person through following modes:

- Purchased with own resources;
- As a gift;
- Through a testamentary document, Ex: Will;
- Received as legal heir i.e. share of ancestral property received after partition or share of any other property acquired as a legal heir or
- Property which comes in the hands of a legal heir by virtue of succession as per Section 8 of the Hindu Succession Act;

becomes his self-acquired property[149]. This self-acquired property may be through gains of learning also even when the person continues to be a member of joint Hindu family.

- **Gains of Learning and Hindu Law**

There were many doubts as to the status of the earnings made by a member of a joint Hindu family by using his skill or expertise. In order to remove doubt as to the right of a member of a Hindu undivided family in property acquired by him by means of his learning, the Hindu Gains of Learning Act 1930 was enacted. The Hindu Gains of Learning Act, 1930 extends to whole of India. In this Act, there are some of the important definitions:

- **"Acquirer"** means a member of a Hindu undivided family, who acquires gains or learning;
- **"gains of learning"** means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and
- "**Learning**" means education, whether elementary, technical, scientific, special or general, and training or every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

Under Section 3 of the Act, the gains of learning shall be the separate property of acquirer merely for certain reasons. Respective of any custom, rule or interpretation of the Hindu Law, no gains shall be held not to be the exclusive and separate property of the acquirer merely by reason of**:**

[149] https://www.quora.com/What-is-a-self-acquired-property-in-India-How-can-someone-claim-it

- his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof, or
- Himself, or his family having, while he was acquiring his learning been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

Simply stated, any member of the joint Hindu family by virtue of "learning" which means education, whether elementary, technical, scientific, special or general, and training or every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life, can earn for himself while continuing as a member of such family. Such earning would amount to his “gains of learning” which means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning. This Act therefore recognises the principle “to each his own”.

- **Partition**

A partition is a term used in the law of real property to describe an act, by a Court order or otherwise, to divide up a concurrent estate into separate portions representing the proportionate interests of the owners of property. A partition is a term used in the law of real property to describe an act, by a Court order or otherwise, to divide up a concurrent estate into separate portions representing the proportionate interests of the owners of property. It is sometimes described as a forced sale. Partition of Property effectively helps to protect the interests of the co-owners who own immovable assets and are entitled to undivided share each. After division, each person becomes the owner of his/her share and also needs to transfer as well as surrender the rights of the property. Each divided property gets a new title, and each shareholder gives up his interest in the property for other sharers. This helps avoid problems in transfer, taxation, inheritance and alienation.

Under the common law, any owner of property who owns an undivided concurrent interest in land can seek such a division. In some cases, the parties agree to a specific division of the land; if they are unable to do so, the Court will determine an appropriate division. A sole owner, or several owners, of a piece of land may partition their land by entering a deed poll (sometimes referred to as "carving out")[150]. Thus, the partition means bringing the joint status to an end.

[150] https://en.wikipedia.org/wiki/Partition_(law)

Under the Mitakshara School, partition means two things: (i) Severance of status or interest, and (ii) Actual division of property in accordance with the shares specified, known as partition by *metes and bounds*. Under Dayabhaga law, partition means only division of property by *metes and bounds.* The severance of status is quite distinct from the *de facto* divisions into specific shares of the joint property. The former is a matter of individual decision, the desire to sever him and enjoy his hitherto undefined and unspecified share separately from others, while the latter is a consequence of his declaration of intention to sever but which essentially a bilateral action is. It may be arrived at by agreement, by arbitration or by suit. The subject may be discussed under the following heads:[151]

- subject-matter of partition, *i.e.,* the property to be divided;
- Persons who have a right to partition and who are entitled to a share on partition;
- how partition is effected and mode of partition;
- rules relating to the allotment of shares;
- reopening of partition, and
- reunion.

Now-a-days everyone likes to be independent and take his/her own decisions especially in relation to what they own such as Property. Settlements of issues about a Partition of property that has been inherited or is jointly owned by two or more persons sometimes involve a lot of legal issues. The parties concerned find hard to complete these problems by themselves in the absence of expert guidance, examples, and legal help. Therefore, a partition deed helps execute a smooth division of property. The new shareholder is the independent owner and thus can dispose of the property at his/her free will. This means he/she can sell, gift, transfer, or exchange the property.

- **Methods of Partition**

The Partition of the Property can be done in two ways:

- **By Mutual Consent**:
  - When the division takes place with the agreement of the co-owners i.e. each party involved has no problem and wants the partition to take place; the co-owners execute a Deed of Partition.
  - Irrespective of the fact that the estate is being divided between family members or business partners or friends or others, a Deed of Partition must be signed between the co-owners irrespective of the number of co-owners.

[151] Paras Diwan, Family Law, Allahabad Agency (10th Edn,2013) Pp.430

- The Partition Deed has to be registered at the office of the sub-registrar of the place where the property is situated. In such a case the stamp duty payable is 2% of the value of the property partitioned.
- The share of each owner depends on the amount of investment as in the purchase document or as per the law applicable. Hence it is not necessary that the proportion of all the owners will be equal.
- In case the share of investment is absent in the purchase document it is assumed as per the law that all the co-owners have an equal undivided share of interest, right, and title in the property.

- **Without Mutual Consent**

- In case all the parties involved do not agree, a partition suit is required to be filed in the appropriate Court of law.
- In this case one must have the ownership papers, transfer papers and all other original documents to have an easy and smooth process.
- It is important that the partition deed is executed on a stamp paper and drafted in a clear and explicit manner i.e. the share of each person should be specified with their respective names.
- This deed should be recorded at the office of the sub-registrar to give it a legally binding effect.
- It should mention in particular the date from which the partition will be effective.
- A Partition Deed is a legally binding document which ensures that the partition of property takes place as per law.
- Therefore, execution of such a deed makes certain that each party involved gets his/her fair share.[152]

- **What can be Partitioned?**

As a general rule, the entire joint family property is, and the separate property of coparceners is not, subject of partition. If the joint family is in possession of property held by it as a permanent lease, such property is also available for partition, even though lease may be liable to cancellation in certain circumstances.

[152] https://www.nrilegalservices.com/partition-of-property/

- **Properties which are not capable of Division**

There may be certain species of joint property which are, by their way nature, incapable of division. Such properties cannot be divided. Thus, as Vijnaneshwara said: *"Water or a reservoir of it, as a well or the like not being divisible must not be distributed by means of the value, but is to be used by them in turns. The common way, road of ingress and egress to and from the house, garden or the like are also indivisible."* Thus, wearing apparel carriages, riding horses, ornaments, cooked-food, water, pastures, road, dwelling house, garden, utensils, documents, implements, right to way, staircases, wells, tanks, etc. have been considered as indivisible. Some of these items are indivisible by their very nature, such as staircases, right to way, wells, while there are others which are, in certain circumstances, capable of division or some adjustment among the coparceners. In respect of these properties, three methods of adjustment are available:

- Some of these properties may be enjoyed by the coparceners jointly, or by turns; or
- Some of these properties may be allotted to the share of a coparcener and its value adjusted with the other property allotted to other coparcener and its value adjusted with the other property allotted to other coparceners; or
- Some of these properties may be sold and sale proceeds distributed among the coparceners.

We may discuss some illustrative cases.

- **Dwelling House**

The Smritikars were of the view that ordinarily' the dwelling house should not be partitioned. But the modern law does not consider the rule as sacrosanct[153]. Ordinarily, in a partition, the Court will, if possible, try to effect an arrangement which will leave the dwelling house entirely in the hands of one or more coparceners or kept for common use. In *Ashnula* v. *Kalli*[154], *the* Court explained the principle: *"If the property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made, without destroying the intrinsic value, money compensation should be given instead of the share which would fall to the plaintiff by partition."*

If no arrangement, which is agreeable to the parties, or which is equitable can be possibly made, the dwelling house may be sold and sale proceeds divided among the coparceners. This alternative is available with respect to any property, the division of which cannot be made equitably and coparceners fail to arrive at a satisfactory arrangement among them.

This has been facilitated by the Partition Act, 1893. Section 2 of the Partition Act runs: *"Whenever in my suit for partition in which...it appears to the Court by reason of the nature of*

[153] L *Nirupama* v. *Baidyanath*, AIR 1985 Cal 406
[154] (1884) 10 Cal 875

the property to which suit of partition relates, or of the number of the shareholders therein or for any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of the property and distribution of the proceeds would be more beneficial for all are holders interested individually or collectively to the extent of one moiety r upward, direct a sale of property and a distribution of the proceeds."

The Act thus empowers the Court, in its discretion to order the sale of property instead of dividing it at the request of any coparcener where the former course is more convenient and beneficial. At such a sale, any coparcener may take the leave of the Court to buy the property at a valuation ordered by the Court. If a coparcener has, where he has a right to do so, sold his interest in dwelling house, any coparcener may get that interest valued by the Court and purchase it at the Court valuation. Apart from the Partition Act, 1893, the Court has inherent power to divide any property and adopt any other course, may appear equitable and just in the circumstances of a case.

In the case of *Batokrishna Ghose* v. *Akhoy Kumar Ghose*[155], it was observed that 'undivided family' means simply a family not divided qua, the dwelling house. In other words, a family which owns a dwelling house and has not divided it. It does not mean a Hindu joint family or even a joint family. The members need not be joint in a mess. The essence of the matter is that the house itself should be undivided among the members of the family who are its owners. The emphasis is really on the undivided character of the house and it is this attribute of the house which imparts to the family its character of an undivided family. It was further observed that so long as the dwelling house has not been completely alienated to stranger-, successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have a right to hold exclusive possession to the exclusion of the stranger's alienees. So long as that situation lasts, the dwelling house continues to be a dwelling house belonging to an undivided family.

In the case of *Satyendu Kundu* v. *Amar Nath*[156] it was observed that the provisions contained in Section 4(1) of Partition Act[157] have been introduced in order to maintain privacy and to prevent intrusion of stranger into the dwelling house belonging to an undivided family. As long as there is a dwelling house which has not been divided qua family it might be said to be a dwelling

[155] AIR 1950 Cal 111
[156] AIR 1964 Cal 52
[157] Section-4: Partition suit by transferee of share in dwelling-house.—(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf. (2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

house belonging to an undivided-family for the purpose of Section 4(1). It was also observed that if some of the members of the family have transferred their interest to strangers that will not by itself take the case out of operation of Section 4. Until the dwelling house is completely alienated to strangers, it is still undivided dwelling house within the meaning of Section 4.

- **Family shrines, temples and idols**
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The family shrines, temples and idols cannot be divided nor sold. Similarly, stair cases, courtyards, wells, tanks and roads etc. are those species of property which are by their nature considered as incapable of division or valuation. In respect of them an arrangement has to be made so that they remain in the common use of coparceners.

- **Deductions and Provisions**

Before any partition can take place out of the joint family properties, provisions should be made for the liabilities like debts, maintenance, marriage expenses of daughters, and performance of certain ceremonies.

- **Who can seek partition?**

Generally, all the coparceners in both the schools are entitled to seek partition of joint family property. They include even a minor coparcener. Apart from the coparceners none else has the right to seek partition. No females have e a right to partition. However, if partition takes place certain females have a right to share. They include father's wife, mother and grandmother. The Hindu Womens' Right to Property Act 1937 gives a Mitakshara coparcener's widow right to claim the share due to her husband at the time of his death.

Under Sec.6 of the Hindu Succession Act 1956, a widow, daughter, mother, pre-deceased son's daughter and widow, widow and daughter of predeceased son of predeceased son etc. have the right to shares. Father, under the Mitakshara law has not merely a right to partition but between himself and his sons but he also has the power to affect the partition among the sons *inter se*. A son conceived at time of partition but born after partition also has a right to share on partition. General rule is that if the pregnancy is known at the time of partition, it should be postponed till the birth of the child or termination of pregnancy as the case may be. If it is not known, the son born after the partition though conceived at the time of partition can seek reopening of partition. However, this rule applies in case of partition between father and sons. After the Hindu Adoptions and Maintenance Act 1956 came into force, the adopted son has equal right to seek partition like the natural son.

Reopening of Partition:

A partition can be reopened on the following grounds:

- Fraud
- Son in the womb
- Adoption of son
- Disqualification of coparceners
- Son conceived and born after partition
- Absentee coparcener
- Minor coparcener etc.

- **Alienation of Joint Family Property**

Joint family property may not remain intact or joint forever. Circumstances may arise, which demand alienation or sale of property for certain purposes. Alienation means transfer of property, such as gifts, sales and mortgages. Alienation of separate property by a Hindu, whether governed by the Mitakshara School or any of its sub-schools or the Dayabhaga School, has full and absolute powers over it. The Transfer of Property Act governs such alienations.

Under the Hindu Law, generally alienations have an added significance Ordinarily, neither the Karta nor any other coparceners alone, possess(es) full power of alienation over the joint family property or over his interest in the joint family property, though under the Dayabhaga School a coparcener has the right of alienation over his interest in the joint family property. This is distinct from alienation of separate property by a Hindu, whether governed by the Mitakshara School or any of its sub-schools or the Dayabhaga School, has full and absolute powers over it. The Transfer of Property Act governs such alienations.

The alienation power was traditionally given only to the father or the Karta and that, but the power itself is near autocratic as it allows them to sell, gift or mortgage the whole joint family property without the consent of any coparcener. Consequently, the ancient texts have imposed several conditions which to justify such acts of the manager and such conditions have changed over the centuries to keep in pace with the changing in accordance with the principles of equity, justice and good conscience. Alienation power may be discussed under following heads:

- **Father's power of alienation**

A father possesses more power even than Karta as there are situations in which only the father has the authority to make alienation. Under Dayabhaga School, father is provided with the

absolute powers regarding alienation, i.e. he can alienate separate as well as ancestral property, including movable and immovable on his wish. As the sons don't get a right over the property by birth under Dayabhaga School, father doesn't need the consent of his sons for the purpose of alienation.[158] Under Mitakshara Law, while it has been a settled law that the father had full power disposal of his separate movable property, the Courts held conflicting views as to father's power of alienation over his separate immovable properties. The controversy was set at rest by the Privy Council in1898 in the case of *Rao Balwant Singh* v. *Rani Kishori*[159] , wherein it held that father had full power of alienation over his separate property, both movable and immovable.

As regards, Joint or Undivided property it has been held that the father can alienate undivided joint family property only in following two cases viz., Gifts out of Love and Affection, and Alienation for discharge of his personal debts.

- **Gifts out of Love and Affection**

The father has power to make a gift out of love and affection of a small portion of movable joint family property. Such gifts may be made by him to his own wife, son-in-law, daughter etc. Two necessary conditions for that validity of such gifts are, *firstly* it should be a gift of love and affection, i.e., father should stand in some relationship of affection to done; and *secondly* the gift should be of a small portion of movable joint family property. In the case of *Subbarami vs. Rammamma*[160]**,** an important principle was laid down that such gifts cannot be made by a will, since as soon as a coparcener dies; he loses his interest in the joint property, which he cannot subsequently alienate. Gifts of immovable property to daughter made by father after her marriage were held to be valid.

- **Alienation for discharge of Personal Debts**

Similarly, the father has the power to alienate the family property for the discharge of his antecedent debts, which not being immoral or illegal, the sons are under a pious obligation to discharge. He can alienate family property to pay his personal debts if the following two conditions are fulfilled, *firstly* the debt is antecedent, and *secondly* the debt should not be *Avyavaharika* i.e. for unethical or immoral purposes[161].

[158] See for an excellent analysis: Ria Jain, *Alienation of Property,* available at https://www.lawctopus.com/academike/alienation-of-property
[159] (1898) 25 I.A. 54 278
[160] (1928) 30 BOMLR 1331
[161] *Brij Narain* v. *Mangla Prasad* (1924) 26 BOMLR 500

- **Karta's power of alienation**

Although no individual coparcener, including Karta has any power to dispose of the joint family property without the consent of all other, it is a recognized concept that in certain circumstance, any member of family has power to alienate the joint family property. Vijnaneshwara recognized three exceptional cases in which alienation of the joint family property could be made by the Karta:

  - Legal Necessity (*Apatkale*): In time of distress such as famine, epidemic, etc. and not otherwise, however, it has been recognized under the modern law that necessity may extend beyond that.

  - Benefit of estate (*Kutumbarthe*): The "preservation," of the estate from extinction, the defense against the hostile litigation affecting it, the protection of it or its portion from injury or deterioration by inundation, these and such like things would obviously be the benefits.

  - Acts of indispensable duty (*Dharamarthe*): Implies the performance of those acts which are religious, pious or charitable like obsequies of the father and added "or the like".

- **Coparcener's power of alienation**

The subject may be divided under two heads:

  - Involuntary Alienation- means the Alienation of the undivided interest in execution proceedings.
  - Voluntary Alienation- when the owner of property transfers it willingly. Voluntary Alienation may be made in the form of gifts, Sale, Mortgage, and Renunciation etc.

- **Sole Surviving Coparcener's Power of Alienation**

When the joint family property passes into the hands of the sole surviving coparcener, it assumes the character of separate property, so long as he doesn't have a son, with the only duty on him being that of maintenance of the female members (the widows) of the family. Thus barring the share of the widows he can alienate the other property as his separate property. However, this is not valid if another coparcener is present in the wombat the time of the alienation. But if the son is born subsequent to the transaction then he cannot challenge the alienation.

- **Alienee's rights and remedies**

In case the alienation is valid then there would be no problem as the alienee would automatically get all the rights of a mortgagee against the mortgager. However, if the alienation is

pronounced as invalid his situation is very unclear. Where the sale of coparcenary property or an interest therein is within the authority of the alienator, it cannot be set aside and the alienee gets certain rights in respect of that property. If the whole of the coparcenary property is sold, the position of the vendee is governed by the general law. He is full owner of the property, entitled to the possession thereof and to the ejectment of the members of the joint family. No question of Hindu law arises here. But where a person purchases an undivided interest of a coparcener in the joint family property, some important issues of personal Hindu law crop up. Here ordinarily the rule of Hindu law is that the vendee whether at a private sale or at an auction sale by Court stands in the shoes of vendor, but it does not mean that he becomes a member of joint family property like his vendor. Subject to the above circumstances, the alienee may exercise right to partition, right to mesne profits, right to impeach previous alienation, right of joint possession, and right to share in partition.

Maintenance Laws in India

In India, there are two sets of laws governing the matter of maintenance viz., personal laws and secular laws. Since we have no Uniform Civil Code with regard to the personal matters including maintenance, the persons practicing different religions are governed by their respective personal laws in the matter of maintenance. Simultaneously there are certain secular laws also which deal with the matter of maintenance, encompassing all the religions.

- **Personal Laws and Maintenance**

  - **Hindus**

    Maintenance is right to livelihood when one is incapable of sustaining oneself. Hindu law, one of the most ancient systems of law, recognizes the right of any dependent person including wife, children, aged parents and widowed daughter or daughter in law to maintenance under the Hindu Adoptions and Maintenance Act, 1956. This Act applies to any person, who is a Hindu by religion in any of its forms or developments. Under Section 3(b) of the Act, "maintenance" includes (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;(ii) in the case of an unmarried daughter also the reasonable expenses of an incident to her marriage. An analysis of the Act shows that Sections 20 to 28 have a bearing on the maintenance of aged or infirm maintenance.

Under Sec.20(3)[162] , every Hindu, whether male or female has an obligation to maintain his or her aged or infirm parent in so far as the parent is unable to maintain himself or herself out of his or her own earnings or other property. For this purpose parent includes a childless stepmother. Under Sec.21 "dependents" include the father, mother or widow of a deceased person. Under Sec.22 (1), the heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased. However such maintenance could be claimed only when the dependant has not obtained any share in the estate of the deceased Hindu either by testamentary or intestate succession.[163] Further, the obligation to maintain depends on the estate inherited and the quantum of maintenance. If the quantum of maintenance is more than the extent of property inherited, no maintenance could be claimed. In other words the liability of each of the persons who take the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded, and in doing so, the Court shall have due regard to the:

- Position and status of the parties;
- Reasonable wants of the claimant;
- If claimant is living separately, whether the claimant is justified in doing so;
- Value of the claimant's property and any income derived from such property, or from the claimant's own earning or from any other source; and
- Number of persons entitled to maintenance under this Act[164].

A perusal of the legal provisions shows that the older or the aged persons can claim maintenance under this law subject to many conditions like having the status of a Hindu, and the person liable to maintain having inherited the property. The right of an aged person to claim maintenance from his/her children under the Act of 1956 is not an independent and absolute right.

- **Muslims**

Under the Muslim law, children have a duty to maintain their aged parents. According to Mulla[165], *"Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves."* A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm. A son, who though poor, is earning something, is bound to support his father who earns nothing.

162 Sec. 20(3) of HAM Act,1956 reads as follows: " The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property."

163 Under Sec.22(2) of the Act

164 Sec.22(3) of the Act

165 See generally *Mulla's Principles of Mahommedan Law* by M. Hidayatullah & Arshad Hidayadullah

According to Tyabji[166], parents and grandparents in indigent circumstances are entitled, under Hanafi law, to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood. Both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so.

- **Christians and Parsis**

The Christians and Parsis have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code. Therefore by implication they have to invoke the provisions of laws like the Code of Criminal Procedure and the new law of 2007.

- **Secular Laws and Maintenance**

As has been pointed out in the beginning of this paper there are two sets of laws governing maintenance in India. The second set of laws is secular laws. They are discussed hereunder.

- **Constitution of India**

The Constitution of India envisages under Article 41 that the State shall, within the limits of its economic capacity and development, make effective provision for…old age, sickness and disablement, and in other cases of undeserved want. Unfortunately this provision is only a directive principle and it is not justifiable per se. In other words the Constitution envisages social security to the needy in case of certain individuals. All these years, in the absence of any particular law, the appropriate governments in India have been providing Old Age Pensions and other benefits to the old persons through different government schemes.

- **The Code of Criminal Procedure, 1973**

Prior to 1973, there was no provision for maintenance of parents under the code[167]. The provision, however, was introduced for the first time in Sec. 125 of the Code of Criminal Procedure in 1973[168]. It is an essential condition for seeking maintenance under this provision that the person from whom such maintenance is sought must possess sufficient means and that he/she must have neglected or refused to maintain his/her the parent, who is unable to maintain himself.

[166] Faiz Badruddin Tyabji, *Muhammadan law: The Personal law of Muslims* p.99
[167] Section 488(1) of the old Code spoke of neglecting or refusing to maintain the "wife" or "child" only and not of the parents.
[168] Sec.125 (1) (d) of the Code provides for award of maintenance to father or mother unable to maintain himself.

It is important to note that Cr.P.C 1973 is a secular law and governs persons belonging to all religions and communities.

Prior to 2001, there was a maximum limit on the quantum of maintenance payable per head per month. Considering the inadequacy of this limit of Rs. 500/-, permissible under the 1973 Code, it has been done away with[169], and now there is no ceiling on the amount that can be granted as maintenance to the wife or other eligible person. However the sufficiency of the means of the person who is required to provide maintenance will have to be taken into account by the Courts while awarding maintenance.

- **The Maintenance and Welfare of Parents and Senior Citizens Act, 2007**

In the natural cycle of human beings, there are certain things which cannot be avoided. They are aging and death. Every human being, unless dies at a young age has to undergo this process. However, every person may not be very fortunate to experience a safe, healthy and secure twilight of his or her life. According to the National Policy on Older Persons, formulated by the Ministry of Social Justice and Empowerment, Government of India in 1999 demographic ageing, a global phenomenon, has hit India as well. People are living longer and expectation of life has shown a steady rise from 42 years in 1951-60 to 58 years in 1986-90. It is projected to be 67 years in case of males and 69 years in case of females in 2011-16[170]. The population of the elderly persons has been increasing over the years. As per the UNESCO estimates, the number of the aged (60+) is likely to 590 million in 2005. The figure will double by 2025. By 2025, the world will have more elderly than young people and cross two billion mark by 2050. In India also, the population of elder persons has increased form nearly 2 crores in 1951 to 7.2 crores in 2001. In other words, about 8% of the total population is above 60 years. The figure will cross 18 % mark by 2025[171].Though demographic ageing of population is to be welcomed, it has many implications at the macro and micro i.e., household levels. On the positive side it would contribute to increase of the huge human reserve and would enrich the society and family with the experience and wisdom of the old. On the negative side, it would also necessitate provision of social services and social security to the older persons.

It is pertinent to note that the United Nations Principles of Older Persons were adopted by the UN General Assembly[172] on 16 December 1991. The Governments of the member States are encouraged there under to incorporate them into their national programmes whenever possible. These guidelines highlight the rights of older persons to independence, participation, care, self-fulfillment,

[169] By Act No. 50 of 2001, effective from 24.9.2001
[170] See: http://socialjustice.nic.in/social/sdcop/npop.pdf last visited on 24 May 2009.

[171] http://www.legalserviceindia.com/article/l170-Rights-Of-Senior-Citizen.html
[172] Resolution 46/91

and dignity toward promoting a positive image of ageing.[173] Some of the areas of concern regarding the older persons are lack of family security, social security, economic security, emotional security and heath security. This is in spite of the fact that family ties in India are very strong and a sizable number of families prefer joint family system. There are number of pressures and fissures in living arrangement of older persons. This is mainly due to disintegration of joint family system, emergence of nuclear families, and impact of liberalization, privatization and globalization on the institution of family. This list is only illustrative in nature. The reasons include social, psychological, and economic. Due to operation of several forces; the position of large number of older persons has become vulnerable and sometimes even pathetic. Many of them cannot take it for granted that their children will take care of them when they need care and attention.

Recently, a national newspaper has highlighted the plight of a well known legal scholar Lotika Sarkar[174], who unfortunately has been compelled to live in an old age home in spite of owning a huge bungalow in the capital city of India. She is best known as the mother of feminist jurisprudence in India. An eminent professor of law, Lotika Sarkar stood tall behind several path-breaking legislations for gender justice. Yet, at 87, she is a frail shadow of herself, vulnerable both physically and emotionally. Alone, widowed and childless, she has suddenly been rendered homeless and penniless. An old friend's son has usurped her house, claiming that she gifted it to his wife.

The Government of India has launched number of programmes and schemes for taking care of senior citizens. They include concessions and facilities given to Senior Citizens by different Ministries/Departments of the Government such as "Assistance to Voluntary Organizations for Programmes relating to the Welfare of the Aged", "Scheme of Assistance to Panchayat Raj Institutions/ Voluntary Organizations/Self Help Groups for Construction of Old Age Homes/Multi-Service Centers for older persons"," Income tax rebate"," Higher rates of interest on saving schemes of senior citizens, "Reservation of two seats for senior citizens in front row of the buses of the State Road Transport Undertakings"," giving fare concession to senior citizens"," Separate queues for older persons in hospitals for registration and clinical examination", and " Providing 30% fare concession in all Mail/Express services run by Railways"[175].It may be noted that the participating central Government Departments include Ministry of Social Justice & Empowerment, Ministry of Finance, Ministry of Road Transport and Highways , Ministry of Health & Family Welfare, Department of Telecommunications, Ministry of Railways, Ministry of Civil Aviation, and Ministry of Consumer Affairs, Food and Public Distribution.

[173] http://www.un.org/NewLinks/older/99/principles.htm
[174] See http://www.hindu.com/mag/2009/04/05/stories/2009040550010100.htm
[175] See the official website of the Ministry of Social Justice & Empowerment at http://www.socialjustice.nic.in/consd.htm last visited on 22 September 2009 for the details.

According to an Older Persons Property Victimization Survey carried out by Help Age India in 2007[176], many elderly people living with their children in Delhi face intense pressure to either sell off their property or transfer ownership to their sons or daughters. Every second elderly person in the city faces harassment over property or admits to knowing another senior citizen who is being harassed. Children are not the only ones. Property brokers, dealers, lawyers and criminals prey on the old, browbeating or cheating them into parting with valuable properties. Widows are especially vulnerable as they are unfamiliar with financial and property matters and many are rendered destitute.

The only exclusive law for seniors came as late as 2007 when Parliament passed the Maintenance and Welfare of Parents and Senior Citizens Act (MWP). This law focuses on the maintenance and puts the responsibility squarely on the family, with children, grandchildren and other relatives liable for paying a living allowance to the elderly. Abandonment of the old is punishable by imprisonment and fine. In view of the inadequacies of existing laws to address the problems of senior citizens, the Parliament has made an earnest attempt to render justice to them by enacting the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. The Act has to be enforced by the State government concerned. The date on which the Act will come into force will be notified by the State government concerned in the Official Gazette. Out of 28 States and seven Union Territories in the country, according to the ministry, only 10 States and National Capital Territory of Delhi so far have notified the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 since it came into effect[177].

- **Salient Features of the Act**

  The Act proposes to make it obligatory on the persons who inherit the property of their aged relatives to maintain them. It also aims to make provisions for setting up old age homes to take care of indigent older persons. It aims to set up an appropriate mechanism for need-based maintenance to parents and senior citizens, better medical facilities and old age homes in every district. It seeks for institutionalization of a suitable mechanism for the protection of the life and property of older persons. Describing ageing as a major challenge and the need to give more attention to the care and protection of the older person, the statement of objects and reasons said many older persons, particularly widowed women, are now forced to spend their twilight years all alone and face emotional neglect and lack physical and financial support. Some of the salient features of the act are:

[176] See "Alone and Vulnerable" by Sujata Madhok, the Hindu dated April 05 2009

[177] Apart from Delhi, states having notified the Act so far are Andhra Pradesh, Assam, Goa, Jharkhand, Karnataka, Madhya Pradesh, Nagaland, Rajasthan and Tripura.

- **Summary Proceedings:** It provides for summary proceedings within a period of 90 days from the date of filing a petition in a specially constituted Tribunal for this purpose. The Tribunal is manned by an officer not below the rank of a Sub- Divisional Officer[178]. This time bound disposal of applications is really a welcome feature in the Act.

- **Convenience of Senior Citizens:** The senior citizen can either apply to a Tribunal where he resides or where his son or daughter or his near relative resides from whom he or she claims maintenance[179].

- **Protection of Senior Citizens with property but without income:** An uncared for or a childless senior citizen, though he or she possess property but does not derive any income from it, can seek maintenance from his son or daughter or from his relative or relatives, who will inherit his or her property after his or her death.

- **Provision for Application through others:** The senior citizen can either apply in person or through a person authorized by him or through a voluntary organization registered under the Societies Registration Act. However he or she cannot be represented by a legal practitioner which appears to be a lacuna in the law.

- **Provision for Suo Motu action by Tribunal:** The Tribunal may take cognizance *suo motu* under Section 5 (c) of the Act. The Tribunal on receipt of a petition will suo motu takes it on file and refers it for conciliation by a conciliation officer within a period of one month.

- **Adequate powers of Tribunals:** The Tribunal enjoys the power of a first class magistrate for enforcing and summoning the attendance of persons against whom the petition has been filed. The Tribunal follows the same procedure of a civil Court to adduce evidence from the petitioner and the respondent. The Tribunal can pass an order granting a maximum sum of Rs. 10,000/- as maintenance to the senior citizens. The maximum amount is subject to the regulation of the concerned state government. If a person who has been looking after a senior citizen forsakes him or her, he or she will be punished by the Tribunal[180]. The Tribunals can also pass orders granting interim orders of maintenance.[181]

[178] S.8 of MWP Act
[179] Ibid
[180] See S.11
[181] See S.5(2)

- **Penal powers of Tribunals:** The person against whom an order for maintenance has been passed has to comply with the order within one month, failing which the Tribunal can imprison him or her up to a period of one month[182].
- **Option regarding maintenance in certain cases:** Where a senior citizen or a parent is entitled for maintenance under the Chapter IX of the Code of Criminal Procedure, 1973 and also entitled for maintenance under this Act, he or she may, without prejudice to the provisions of the said Code, claim such maintenance under either of those Acts but not under both[183].

- **Role of Maintenance Officers:** The act provides for the District Welfare Officer to act as maintenance officer and even to conduct the proceedings for and on behalf of the senior citizens[184].

- **Establishment of Old Age Homes & Provision of other facilities:** The Act provides for the establishment of old age homes for the senior citizens by the concerned state governments. Preferential treatment should be given to the senior citizens in the hospitals like separate queues, treatment, offering medicines and also promotion of research in the geriatric medicine[185].

- **Exclusion of Jurisdiction of Civil Courts:** Civil Courts have no jurisdiction to interfere with the proceedings of the Tribunals like grant of stay, ordering transfer etc.[186]

- **Exclusion of Representation by Legal Practitioners:** Senior citizens cannot be represented by any legal practitioner.[187]

- **Rule making power of State Governments:** State governments are empowered to enact rules for the effective implementation of the Act.[188]

- **Provision for Appeals:** Appeal can be preferred against the order of a Tribunal to an Appellate Tribunal to be constituted in each district headed by the District Magistrate and the appeal should be disposed of within one month.[189]

182 Ss.11, 24 and 25

183 Section 12

184 S.18

185 S.19

186 S.27

187 S.17

188 S.32

189 S.15 & S.16

- **Provision for adequate and qualitative maintenance:** A senior citizen can seek maintenance for the purpose of his or her food, shelter, clothes, medical facilities and recreation etc. The maximum maintenance allowance which may be ordered by Maintenance Tribunal shall be such as may be prescribed by the State Government which shall not exceed ten thousand rupees per month[190]. It may be noted that the Act defines "Welfare" as provision for food, health care, recreation centers and other amenities necessary for the senior citizens[191].

- **Provision for cancellation of earlier Wills/Gifts made by senior Citizen:** A senior citizen who has transferred his property either to his son or daughter or near relative, by virtue of a will or gift, can now get it cancelled by applying to the Tribunal, if he or she is neglected by the legatee or the donee.[192]

- **Overriding effect of the Act:** The provisions of the act have overriding effect. If any provision of any other act is inconsistent with the provisions of this act, it will prevail over others.

▪ Shortcomings of the Act

Though the genuine concern for the senior citizen in the Act cannot be overlooked, the Act has certain shortcomings also. They are:

- The biggest lacuna in the Act appears to be the nexus between the possession of property by senior citizen and his right to maintenance. What happens to those without any property? Why should they be driven to follow the cumbersome procedure laid down under the Code of Criminal procedure Act, 1973 if they are poor?

- Under the Act, the Tribunal is not presided by a person with a judicial qualification or acumen or experience. It is not known how they will adjudicate into the matter in accordance with the procedure followed by a Civil Court.

- Exclusion of the professional lawyers from the purview of the Tribunal simply defies logic and reasoning. It is true that formalism may be counterproductive in implementation of welfare laws like this Act. But exclusion of lawyers altogether is a matter of concern as their services can be invaluable.

[190] S.9, S.19 & S.20
[191] See S.2(k)
[192] S.23

- The presiding officer of the Tribunal appears to have no power of discretion in awarding the maintenance amount and the power is vested with the State Government.

- Imposing liability on a person who happens to be a relative of the senior citizen on the ground that he will inherit the property of the senior citizen is illogical and unreasonable because the senior citizen may sell his property to any third party before his death and there is no guarantee that the relative will definitely inherit the property of the senior citizen.

- The exclusion of jurisdiction of Civil Court is not justified, since Tribunals are not manned by legally qualified or experienced persons. It would be better if at least the Family Courts are empowered to deal with the appeals.

- The Act contains certain provisions where the chances of misuse are greater than beneficial use. They include the liability of children living abroad, the enforcement of orders passed under the Act against them on foreign soil, and liability of the son-in-law in case the senior citizen has only child in the form of daughter.

- There is some strength in the argument that the law is designed simply to avoid the State's responsibility to provide a better social security system for its citizen and putting the onus on the citizen for such responsibility.

- **Judicial Position**

In *Uttar Kumar Bhoi* v. *Surekha Bhoi*[193] the Chhattisgarh High Court observed: *"The Act of 2007 has been enacted to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognized under the Constitution and for matters connected therewith or incidental thereto."* It was also noted that "parent" as defined in Section 2*(d)* includes step-parents. In *Dattatrey Shivaji Mane* v. *Lilabai Shivaji Mane*[194], the Bombay High Court by highlighting the essence of Section 4 of the MWP Act, upheld the order of the Tribunal granting maintenance and eviction of the son from the self-acquired property of the Parents, on grounds of ill-treatment and non-maintenance.

[193] 2019 SCC OnLine Chh 23
[194] 2018 SCC OnLine Bom 2246

Recently, in *Ashwani Kumar* v. *Union of India*[195] the Supreme Court dealing with the rights of elderly persons/senion citizens observed that, Art. 21 in its expansive meaning encompasses various rights of elderly persons/senior citizens such as right to dignity, right to health, right to adequate pension and right to shelter. The Court emphasized that, there is need to continuously monitor implementation of rights of elderly persons/senior citizens, and a continuing mandamus is required to be issued in present case also as it is a well-recognised practice for enforcing social justice postulated by Preamble. Further, the Court issued specific directions for enforcement of statutory rights under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and other welfare schemes.

Therefore, in order to implement the act more effectively and render justice speedily, the Central government should come forward to remove the above mentioned drawbacks. Otherwise, the real purpose of enacting the above act to rescue the senior citizens may not be fulfilled. It is said that *'ignorantia juris non-excusat'*. The Act also requires the Governments to give wide publicity to the Act and the rights of senior citizens. There is no ample proof so far to show that this task has been taken up by the appropriate Governments so far. In the absence of adequate publicity, the law may not be implemented adequately.

Frequently Asked Questions (FAQs)

1. What is Mitakshara School of Hindu Law? How does it differ from Dayabhagha School?
2. What is Coparcenary? How is it different from Joint Family Property?
3. What is Self-Acquired Property? Is it the same as Gains of Learning?
4. When can the joint family property be alienated by its Karta?
5. Who is a Senior Citizen?
6. Explain the remedies available to a senior citizen who is neglected by his children or wards.

Multiple Choice Questions (MCQs)

1. When was the Hindu Gains of Learning Act enacted?

   a) 1949 b) 1955 **c)**1930 d)1956

2. Actual division of property in accordance with the shares specified is known as partition

   a) Partition by metes and bounds

   b) Partition De Jure

   c) Partition De facto

   d) Notional Partition

[195] (2019) 2 SCC 636

3. A Karta can alienate the joint family property under the following circumstances

a) during legal necessity (Apatkale)

b) For benefit of estate (Kutumbarthe)

c) For acts of indispensable duty (Dharamarthe)

d) any or all of the above

4. Which of the following landmark cases is about the maintenance of a married Muslim woman who is divorced?

a) Mohammed Ahmed Khan v. Shah Bano Begum

b) Shayara Bano v.Union of India

c) Jordan Deingdeh v.Uniojn of India

d) None of the above

* * *

Module: II

Intestate Succession: Succession to Property of Hindu Male Dying without Will under the provision of Hindu Succession Act, 1956 - Devolution of Interest in *Mitakshara* Coparcency under Hindu Succession Act, 1956 - Woman's Estate - *Stridhana* - Succession to Property of Hindu Female under the Act of 1956 - Hindu Succession (A.P. Amendment) Act, 1986 - Hindu Succession (Amendment) Act, 2005

Intestate Succession

Succession

- Testamentary Succession
- Intestate Succession

Succession in case of Hindu Male Dying Intestate:

Position under the Hindu Succession Act 1956

- Rules of Succession
- General Rules of Succession

Devolution of Interest in *Mitakshara* Coparcenary

Under Hindu Succession Act, 1956:

- Coparcenary
- Coparcener:

The Hindu Women's Right to Property Act, 1937

- Position under the Original HSA 1956:
- Women's Estate
- Meaning of Woman's Estate and its Nature:
- Incidents of Women's Estate:

Stridhana

- Stridhana & succession under Hindu Succession Act, 1956

The Hindu Succession (A.P. Amendment) Act, 1986 &

Its impact on Property Rights of Hindu Women

- Equal rights to daughter in coparcenary property
- Interest to devolve by survivorship on death:
- Preferential right to acquire property in certain cases

Hindu Succession (Amendment) Act, 2005 and its Impact:

- Amendment of Section 6 of the principal Act

Succession:

It is the process of inheriting the property by a human being from some other person. It also denotes the transfer of title to property under the law of descent and distribution. It also means the transfer of legal or official powers from an individual who formerly held them to another who undertakes current responsibilities to execute those powers. There are three sorts of successions, testamentary succession; legal succession; and irregular succession.

Testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. Legal succession is that which is established in favour of the nearest relations of the deceased. Irregular succession is that which is established by law in favour of certain persons or of the state in default of heirs either legal or instituted by a testament. A person having certain estate or property may write a will or testament as to devolution of property after his death. It is equally possible that he or she may die without writing any will.

In India generally two kinds of succession are noted. *Firstly*, Testamentary Succession- i.e. succeeding to the property under a Will; or *Secondly*, Intestate Succession i.e. succeeding to a property without a will and as per the personal law of succession. Intestacy is the condition of the estate of a person who dies without having made a valid will or other binding declaration. Intestacy law, also referred to as the law of descent and distribution, refers to the body of law (statutory and case law) that determines who is entitled to the property from the estate under the rules of inheritance.

In the absence of a Common/Uniform Civil Code in India, the persons following different religions are governed by different personal laws like the Shariat Law among Muslims, the Hindu Succession Act for Hindus, Indian Succession Act for Christians etc. for the purpose of intestate succession.

- **Succession in case of Hindu Male Dying Intestate – Position under the Hindu Succession Act 1956**

The Hindu Succession Act 1956 codified the law relating to intestate succession among the Hindus. Sections 8 to 13 of the Act lay down the general rules as to the order of succession when a Hindu male dies intestate. Section 8 of the Act reads as under:

Section 8 – General rules of succession in the case of males – The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:

a) Firstly, upon the heirs, being the relatives specified in class I of the Schedule;
b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
d) Lastly, if there is no agnate, then upon the cognates of the deceased.

It is necessary to know that Class-I legal heirs are mentioned in Schedule-I of the Act. They are –

1. Son;
2. Daughter;
3. Widow;
4. Mother;
5. Son of a pre-deceased son;
6. Daughter of a pre-deceased son;
7. Son of a pre-deceased daughter;
8. Daughter of a pre-deceased daughter;
9. Widow of a pre-deceased son;
10. Son of a pre-deceased son of a pre-deceased son;
11. Daughter of a pre-deceased son of a pre-deceased son;
12. Widow of a pre-deceased son of a pre-deceased son
13. Son of a predeceased daughter of a pre-deceased daughter;
14. Daughter of a pre-deceased daughter of a pre-deceased daughter;
15. Daughter of a pre-deceased son of a pre-deceased daughter;
16. Daughter of a pre-deceased daughter of a pre-deceased son.

It may be noted that originally there were only 12 Class-I heirs. Four more were added by the Hindu Succession (Amendment) Act, 2005 which recognized even daughters as coparceners on par with sons all over the country. They are arrayed at S.Nos.13 to 16 above. Further, it has to be understood that primarily there are four Class-I legal heirs namely one ascendant i.e. Mother, one collateral i.e., Wife and two descendants i.e. Son(s) and daughter(s). All the remaining legal heirs claimed through the predeceased sons or daughters.

The Class-II legal heirs are mentioned in the same Schedule-I to the Act. They are:

I. Father
II. (1) Son's daughter's son, (2) Son's daughter's daughter, (3) brother,

(4) Sister

III. (1) Daughter's son's son, (2) Daughter's son's daughter,
(3) Daughter's daughter's son, (4) Daughter's daughter's daughter

IV. (1) Brother's son, (2) Sister's son, (3) Brother's daughter,
(4) 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.

Explanation **—** In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

Section 3(1) (a) defines – "**agnate**"**—**one person is said to be an "agnate" of another if the two are related by blood or adoption **wholly through males**;

Section 3 (1) (c) defines "**cognate**"**—**one person is said to be a "cognate" of another if the two are related by blood or adoption **but not wholly through males;**

Section 3 (1) (e) – two persons are said to be related to each other by **full blood** when they are **descended from a common ancestor by the same wife**, and by **half-blood** when they are **descended from a common ancestor but by different wives**; - two persons are said to be related to each other by **uterine blood** when they are **descended from a common ancestress** but **by different husbands**;

Explanation **—** In this clause "ancestor" includes the father and "ancestress" the mother;

(f) "**heir**" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(g) "**intestate**" **—** a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

- **Rules of Succession**

An analysis of the relevant provisions shows that property of a male Hindu dying intestate devolves according to the provisions.

- Firstly, upon the Class-I of the Schedule;
- In absence of Class-I legal heirs, property devolves on Class-II legal heirs.
- In absence of both Class-I and Class-II legal heirs, property devolves upon the Cognates who come through the father's side.
- In absence of Class-I, Class-II legal heirs and Agnates, property devolves on Cognates who may not come only through the males like father.
- In the absence of any of the above four classes of legal heirs, the property will devolve upon the State as per the doctrine of Escheat.[196]

Further as per Section 9 of the Act, dealing with the Order of succession among heirs in the Schedule:

- Among the heirs specified in the Schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs.
- Those in the first entry in Class-II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession. For Ex: in the absence of any Class-I legal heirs, the Father if alive will exclude all other Class-II legal heirs.

As per Section 10 dealing with distribution of property among heirs in Class-I of the Schedule.—The property of an intestate shall be divided among the heirs in Class-I of the Schedule in accordance with the following rules:

- Rule 1.—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.
- Rule 2.—The surviving sons and daughters and the mother of the intestate shall each take one share.
- Rule 3.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.
- Rule 4.—The distribution of the share referred to in Rule 3— (i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion; (ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions

According to Section 11 dealing with distribution of property among heirs in class II of the Schedule, the property of an intestate shall **be divided between the heirs specified in any one entry**

[196] As per Section 29 – Failure of heirs — If an interstate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take property subject to obligations and liabilities to which an heir would have been subject

in class II of the Schedule so that they, share **equally**. Under Section 12 governing the order of succession among agnates and cognates, it shall be determined in accordance with the rules of preference laid down hereunder:

- Rule 1—Of two heirs, the **one who has fewer or no degrees of ascent is preferred**.
- Rule 2—**Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent**.
- Rule 3—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

For computation of degrees, Section 13 provides that —

- For determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.
- Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.
- Every generation constitutes a degree either ascending or descending

The succession will also be governed by the following general rules incorporated in the Act.

- **Full blood preferred to half blood**.(Sec.18)
- If two or more heirs succeed together to the property of an intestate, they shall take the property,— (a) save as otherwise expressly provided in this Act, *per capita*[197] and not *per stirpes*[198]; and (b) as *tenants-in-common*[199] and not as *joint tenants*[200].(Sec.19)
- **Right of child in womb**.—A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate (Sec.20)
- **Presumption in cases of simultaneous deaths**.—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.(Sec.21)
- **Recognition of limited preferential right of Class –I legal heirs** (Sec.22)

[197] for each person; in relation to people taken individually.
[198] An estate of a decedent is distributed per stirpes if each branch of the family is to receive an equal share of an estate.
[199] This means that each party has the right to alienate, or transfer the ownership of, her ownership interest. (legal heirs of dying tenant get his share)
[200] a person who holds an estate or property jointly with one or more parties, the share of each passing to the other or others on death. (surviving tenant gets all)

- **Even dwelling house** also can be **inherited and partitioned by female legal heirs** (Sec.23 repealed by 2005 amendment)
- **No disentitlement of certain widows who remarry** ,from inheriting the property (Sec.24 repealed by 2005 amendment)
- **Murderer or abettor of Murder disqualified** from inheriting the property of the murdered (victim)-if the murderer/abettor commit the murder for inheriting such property.(Sec.25)
- **Convert's descendants disqualified** – a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens (Sec.26)
- **Impact of disqualification**- property shall devolve as if such person had died before the intestate (Sec.27);and
- **Disease, defect, etc., not to disqualify** (Sec.28)

- **Devolution of Interest in *Mitakshara* Coparcency**

This topic can be discussed under three heads: 1) Under the Original HSA 1956, 2) as amended by certain States, and 3) after the 2005 Central amendment to the HSA. Before we discuss the rule position it is necessary to acquaint ourselves with certain expressions and concepts.

- **Coparcenary**

Coparcenary property refers to property inherited up to four generations of members of a Hindu joint family.[201] Till 2005, the Hindu coparcenary was a narrow body within a Hindu Joint Family consisting one common ancestor ad three generations of descending male members (1+3). On the other ancestral property refers to that property inherited by the ancestors of a person who is a member of Hindu joint family irrespective of number of generations. Coparcenary is a term often used in matters related to the Hindu succession law, and coparcener is a term used for a person assumes a legal right in his ancestral property by birth. To understand this better, we have to first understand the term Hindu Undivided Family (HUF).

[201] Read more at: http://www.lawyersclubindia.com/forum/difference-between-coparcenary-property-ancestral-property-13027.asp

According to the law, an HUF is a group of people, who are the lineal descendants of a common ancestor. This group would include the eldest member and three generations of a family and all these members are recognized as coparceners. According to the law, all coparceners acquire a right over the coparcenary property by birth, while their share in the property keeps on changing with new additions or deletions into the family.

- **Coparcener**

Coparcener is a term used for a person assumes a legal right in his ancestral property by birth. Before an amendment was made in the Hindu Succession Act, 1956, in 2005, women did not enjoy a right on their ancestral property post their marriage as they were not considered coparceners. However, after the amendment to the Hindu Succession (Amendment) Act, 2005, the women have been accepted as coparceners.

Before the Hindu Succession Act 1956 came into force, the position of Hindu women in relation to her property rights was pathetic. As the country is vast and communications and social interactions in the past were difficult, it led to diversity in the law. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even mere complex.[202]

A woman in a joint Hindu family, consisting both of man and woman, had a right to sustenance, but the control and ownership of property did not vest in her. In a patrilineal system, like the Mitakshara School of Hindu law, a woman, was not given a birth right in the family property like a son. Under the Mithakshara Law, on birth, the son acquired a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of coparceners, based on birth in the family. No female was a member of the coparcenary in Mitakshara law. Under the Mitakshara system, joint family property devolves by survivorship within the coparcenary. This means that with every birth or death of a male in the family, the share of every other surviving male either gets diminished or enlarged. If a coparcenary consists of a father and two sons, each would own one third of the property. If another son is born in the family, automatically the share of each male is reduced to one fourth.

[202] 174th Report on *Property Rights of Women: Proposed Reforms under the Hindu Law* by the Law Commission of India. Available at http://www.lawcommissionofindia.nic.in/kerala.htm

The Mitakshara law also recognized inheritance by succession but only to the property separately owned by an individual, male or female. Females are included as heirs to this kind of property by Mitakshara law. Before the Hindu Law of Inheritance (Amendment) Act 1929, the Bengal, Benares and Mithila sub schools of Mitakshara recognized only five female relations as being entitled to inherit namely - widow, daughter, mother, paternal grandmother, and paternal great-grand mother. The Madras sub-school recognized the heritable capacity of a larger number of female's heirs that are of the son's daughter, daughter's daughter and the sister, as heirs who are expressly named as heirs in Hindu Law of Inheritance (Amendment) Act, 1929. The son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. The Bombay School which is most liberal to women, recognized a number of other female heirs, including a half-sister, father's sister and women married into the family such as stepmother, son's widow, brother's widow and also many other females classified as bandhus.

On the other hand, the Dayabhaga School neither accords a right by birth nor by survivorship though a joint family and joint property is recognized. It lays down only one mode of succession and the same rules of inheritance apply whether the family is divided or undivided and whether the property is ancestral or self-acquired. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's life time. However, on his death, they inherit as tenants-in-common. It is a notable feature of the Dayabhaga School that the daughters also get equal shares along with their brothers. Since this ownership arises only on the extinction of the father's ownership none of them can compel the father to partition the property in his lifetime and the latter is free to give or sell the property without their consent. Therefore, under Dayabhaga law, succession rather than survivorship is the rule. If one of the male heirs dies, his heirs, including females such as his wife and daughter would become members of the joint property, not in their own right, but representing him. Since females could be coparceners, they could also act as Kartas, and manage the property on behalf of the other members in the Dayabhaga School.

In the Marumakkattayam law, which prevailed in Kerala wherein the family was joint, a household consisted of the mother and her children with joint rights in property. The lineage was traced through the female line. Daughters and their children were thus an integral part of the household and of the property ownership as the family were matrilineal. However, during the British regime, the country became politically and socially integrated, but the British Government did not venture to interfere with the personal laws of Hindus or of other communities. During this period, however, social reform movements raised the issue of amelioration of the woman's position in society. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act conferred

inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister, thereby creating a limited restriction on the rule of survivorship.

- **The Hindu Women's Right to Property Act, 1937**

Another landmark legislation conferring ownership rights on woman was the Hindu Women's Right to Property Act, 1937. This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition, alienation of property, inheritance and adoption. The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. But, the widow did not become a coparcener even though she possessed a right akin to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights. Despite these enactments having brought important changes in the law of succession by conferring new rights of succession on certain females, these were still found to be incoherent and defective in many respects and gave rise to a number of anomalies and left untouched the basic features of discrimination against women. These enactments now stand repealed.

Keeping in view the mandate of Articles 14, 15(1), (2) and (3) of the Constitution, Pandit Jawaharlal Nehru, the first Prime Minister of India expressed his unequivocal commitment to carry out reforms to remove the disparities and disabilities suffered by Hindu women. As a consequence, despite the resistance of the orthodox section of the Hindus, the Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956. It applies to all the Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to those governed both by the Mitakshara and the Dayabahaga Schools and also to those in South India governed by the Murumakkattayam, Aliyasantana, Nambudri and other systems of Hindu Law. Many changes were brought about giving women greater rights, yet in Section 6 the Mitakshara Coparcenary was retained. The discrimination was inherent in the Mitakshara Coparcenary under Section 6 of the Hindu Succession Act, as it only consisted of male members.

It is interesting to note that certain States like Andhra Pradesh (United) amended the Hindu Succession Act to give equal property rights to women in ancestral and coparcenary property.[203]

[203] See the amendment Acts in Andhra Pradesh (1986), Tamil Nadu (1989), Maharashtra (1994) and Karnataka (1994) and the Kerala Joint Family System (Abolition) Act, 1975.

- **Position under the Original HSA 1956**

  Section 6 of the HSA dealing with devolution of interest to coparcenary property stated:

  When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

  Provided that, if the deceased had left him surviving a female relative specified in Class-I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara Coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

  Explanation-1: For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

  Explanation-2: Nothing contained in the proviso to his section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Section 6 contemplated the existence of coparcenary property and more than one coparcener for the application of the rule of devolution by survivorship. The head note of the section reads "devolution of interest in coparcenary property". The language of the main provision to the effect that "his interest in the property shall devolve by survivorship upon the surviving members" indicates that the devolution by survivorship is with reference to the deceased coparcener's interest alone; this coupled with the notional partition contemplated in *Explanation-1* in this section for the ascertainment of the interest of the deceased coparcener in a Mitakshara coparcenary property indicates that there is no disruption of the entire coparcenary. It follows that the other coparceners, would continue to be joint in respect of the other coparcenary property till a partition is effected.

It has already been pointed out above that the main provision of this section deals with the devolution of the interest of a coparcener dying intestate by the rule of survivorship and the proviso speaks of the interest of the deceased in the Mitakshara Coparcenary Property.

- **Women's Estate**

Under the old Hindu law woman's estates were of two types, *firstly* Stridhan, of which she was the absolute owner, and *secondly* women's estate over which she had limited ownership. There were two sources of acquisition of property viz., properties inherited from males, and property inherited by female from females. Properties thus inherited, according to Bengal, Banaras, Mithila and Madras schools gave the woman limited rights and after her death, it did not go to her own heirs but to the heirs of absolute owner.

The chief exponents of woman's estate were Katyayana and Brihaspati. According to Brihaspati, *"after husband's death the widow who looked after the family was to get his share, but she did not have the right to mortgage, or sell the property. Katyayana was of the view that issueless widows should use the property of her husband after his death along with other elders living together with them throughout her life and after her death, husband's heirs should inherit the property."*

- **Meaning of Woman's Estate and its Nature**

During the British Period, one of the landmark legislations conferring ownership right on a woman was the Hindu Women's Right to Property Act of 1937. This Act brought about revolutionary changes in the Hindu Law of all schools, and affected not only the law of coparcenary but also the law of partition, alienation of property, inheritance and adoption.

The Act of 1937 enabled the widow to succeed along with the son and to take the same share as the son. This widow is not a coparcener even though she possesses a right akin to coparcenary interest in the property and is a member of the Joint Family. However, under the Act, the widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights at all. But, both enactments largely left untouched the basic features of discrimination against women and were subsequently repealed.

Widow, who was a limited heir, did not acquire the property for her life time but she was the owner of the property thus inherited. But her right of alienation was limited and after her death the property did not pass to her heirs rather to heirs of the last owner thereof. The Privy Council has held that "her right to property is like that of a limited owner. Although her status is like that of an owner, yet the rights are limited but no other person possesses any vested interest in it during her lifetime.

- **Incidents of Women's Estate**

Some of the incidents of women's estate are as under:

- She was owner of the properties inherited by her from her husband, but except under the following conditions, she could neither sell the property nor could she mortgage it nor could she alienate it—
  (a) For legal necessity;
  (b) For benefit to the estate;
  (c) With the consent of the next reversionary;
  (d) For religious and charitable purposes.

- She absolutely represented the estate; she could institute a suit herself relating to the estate and could defend it. Decrees passed against the estate were not only binding upon her but also against the reversionary.

- She could also institute a suit against third persons for possession of the estate, but if she had allowed the adverse possession of third persons, then the reversionary were not bound by such adverse possessions.

- She had the rights over the estate as a prudent owner; being the owners of the properties acquired as limited owner, she was entitled to administer the property as a reasonable person and she had the power to exercise her rights over the property liberally as that of the Karta of the joint Hindu family.

- The restrictions upon the right of disposition of the estate were neither qualified nor dependent upon the existence or non-existence of the reversionary.

- She could alienate her life interest in the estate through mortgage, sale or gift.

- She could spend the whole income; she was not bound to share the income.

- She could claim partition from the collaterals.

- She was not under the control of her relatives.

- Her right over the estate came to an end upon remarriage or on adoption a child.

- She could not transform the woman's estate into some other form so as to change its nature either by some declaration or by some act.

In *Moni Ram* v. *Kerry*[204] the Privy Council correctly stated that: the whole estate is for the time vested in her absolutely for some purpose, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the people who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate."

- **Stridhana**

The word stridhan is composed of two words: *Stri* (woman) and *Dhana* (Property). The word means the property belonging to a woman or woman's property. This is the etymological sense but the word has a technical meaning given in law.[205] As observed in *Rajamma* v. *Varidarajula Chetti*[206], a gift given to a Hindu woman before and after her marriage constitute woman's property. Thus conjunctively these two words imply that property over which a woman has an absolute ownership.

By authors of different schools and sects, *stridhan* has been used in different senses, yet it connotes a meaning which comes out from the word itself. This term was used for first time in Smritis and in Dharmasutra of Baudhayan which meant 'woman's absolute property'. Under modern Hindu law *stridhan* does not represent any specific property but includes all those properties of a Hindu Woman over which she has absolute ownership and which is inherited by her Successors.

The two important differences between the term woman's estate and *stridhan* are: (a) A Woman has a limited right of alienation with respect to the properties coming under term woman's estate. The right of alienation can be exercised by her only in dire necessity, legal necessity, or in the interest of the estate itself; however, with respect to stridhan she has an absolute right of voluntary alienation of the property coming under it. (b) In case of woman's estate the property after the death of the woman owner, is inherited by the descendants of the male known as reversioners and not by the descendants of the woman but in case of stridhan the property is inherited by the descendants of the woman herself as was the rule under the old Hindu law.

[204] (1889) 7 I.A.115
[205] B.M. Gandhi, Hindu Law, 1999 p. 178
[206] AIR 1957 Mad 198.

The commentators of Vijnaneshwar i.e., Mitakshara and of Jimutavahana i.e., Dayabhaga are important in this respect. According to Vijnaneshwara, the author of Mitakshara Stridhan includes - a) Gifts given by the father, mother, husband and brothers; b) Gifts given by the mother and other persons at the time of nuptial fire; c) Gifts given at the time of 2nd marriage or gifts given to earlier wife when the 2nd wife was brought in; d) The property which is obtained through gifts, sale, partition, acquisition and other means.

- **Stridhan & Succession under Hindu Succession Act, 1956**

The Hindu Succession Act, 1956 has abrogated the law relating to Stridhan which existed prior to the incorporation of Section 14 in the Act. Section 14 provided that every property which was in possession of a Hindu female at the time of the enforcement of the Act, whether acquired prior to or subsequent to the Act, became her absolute property. The old law relating to the order of succession to such property has been done away with and a new order of succession has been introduced in its place, which included females as well.

A uniform law relating to various categories of heirs has been contained in Section 15 of the Act Since every property validly in her possession became her stridhan, a full uniform law of succession to such property had become essential. The old Act *i.e.* Hindu Women's Rights to Property Act of 1937 and *stridhan* system totally changed in lieu of the properties possessed by the Hindu women. The main provision viz. Section 14(1) of the Hindu Succession Act, 1956 spells that "any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Therefore, there is no relevance of Women's' Estate or Strachan in view of the abolition of limited estate under Section 14 of the HAS 1956.

- **The Hindu Succession (A.P. Amendment) Act, 1986 & its impact on Property Rights of Hindu Women**

The erstwhile Andhra Pradesh Legislative Assembly passed an Amendment to the Hindu Succession Act, 1956 in its application to the State of Andhra Pradesh and the Amendment be deemed to have come into force on the 5th September, 1985. The Amendment refereed to the Constitution of India which has proclaimed equality before the law as a Fundamental Right; noted that the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto; and that such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social ills. Therefore in order to eradicate this baneful system of dowry by positive measures which will simultaneously ameliorate the condition of

women in the Hindu society, the amendment was passed. The Act inserted a new Chapter-II in Central Act 30 of 1956 (HAS) entitled *"Succession by survivorship-Equal rights to daughter in coparcenary property"*. This new chapter consisted of three sections which are extracted hereunder for ready reference.

- **Equal rights to daughter in coparcenary property**

Section-29A -Notwithstanding anything contained in Section 6

(i) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son;
(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allocable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

Section 29-B Interest to devolve by survivorship on death

When a female Hindu dies after the commencement of the Hindu Succession (Andhra Pradesh Amendment)Act, 1986 having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance this Act.

Provided that if the deceased had left any child or child of a pre-deceased child the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship.

Explanation-1- For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death irrespective of whether she was entitled to claim partition or not.

Explanation-2- Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of deceased, had separated himself or herself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

Section 29-C -Preferential right to acquire property in certain cases

(1) Where, after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others devolves, under section 29A or section 29-B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of any agreement between the parties, be determined by the Court, on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs, proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation: In this section 'Court' means the Court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other Court which the State Government may, by notification in the official Gazette, specify in this behalf.

An analysis of the above amendment shows that it was well intentioned and also practical. It removed the age old discrimination against daughters in Hindu Coparcenary by making the coparceners on par with the sons. In view of the practical difficulties involved in giving retrospective effect it categorically made the amendment effective from the date of notifying the amendment Act i.e. 5th September 1985. It was made applicable only to those Hindu daughters who got married on or after the above date. It provided that, 1) equal rights to daughters in coparcenary property, 2) Devolving of interest by survivorship on death, and 3) Preferential right to acquire property in certain cases. Thanks to the efforts of Mr. N. T. Rama Rao, the then Chief Minister it certainly made a sincere effort to ensure gender justice Hindu women in the united State of A.P.

- **Hindu Succession (Amendment) Act, 2005 and its Impact**

The Hindu Succession (Amendment) Act, 2005, an amendment to the Hindu Succession Act, 1956, received the assent from President of India on 5 September 2005 and was given effect from 9 September 2005. It was essentially meant for removing gender discriminatory provisions regarding property rights in the Hindu Succession Act, 1956. It was a revolutionary step in the field of Indian legislation regarding rights of women in India[207]. It introduced equal property rights for Hindu daughters in the Coparcenary property throughout the country.

- **Amendment of Section 6 of the principal Act**

Section 6 in the principal act has been substituted by the amended provision. The amended provision under sec.6 of the principal act in essence defines as follows:

- Daughter shall have the same rights in the coparcenary property as she would have had she been a son;
- The daughter shall be subject to the same liability in the said coparcenary property as that of a son;
- The daughter shall be allotted the same share as is allotted to a son;

[207] https://en.wikipedia.org/wiki/The_Hindu_Succession_(Amendment)_Act,_2005

- The share of the per-deceased son or a per-deceased daughter shall be allotted to the surviving child of such per-deceased son or of such per-deceased daughter;
- The share of the per-deceased child of a per-deceased son or of a per-deceased daughter shall be allotted to the child of such per-deceased child of the per-deceased son or a per-deceased daughter.

Though it has not made any classification of daughters in terms of their marriage date as in the case of A.P. amendment, it has restricted the application of the amended Act only to those properties which were not partitioned through a registered partition deed which has been effected before the 20th day of December, 2004.

The Hindu Succession (Amendment) Act, 2005 was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956. Under the amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. The daughter shall now have the same rights in the coparcenary property (ancestral property of the Hindu undivided family) as a son. This amendment also repeals Section 23 of the Hindu Succession Act which disentitled a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares. Section 24 of the Act which denied rights of a widow to inherit her husband's property upon her re-marriage has been repealed. This Act has brought about a central amendment which is applicable to all the state governments.[208]

Frequently Asked Questions (FAQs)

1. What was the position of Hindu women before the Hindu Succession Act 1956 with regard to their right to property?
2. What is a Hindu Coparcenary? Is a daughter Coparcener at present?
3. How is the property of a Hindu male dying without writing a Will, devolved on his legal heirs?
4. Who are Class-I heirs?
5. Explain the impact of the Amendment made in 2005 by the Parliament to the Hindu Succession Act, 1955?
6. Distinguish Stridhana from Womens' Estate.

Multiple Choice Questions (MCQs)

1. Who among the following is not a Class-I legal heir?

a) Daughter b)Son **c)**Father d)Mother

[208] http://evaw-global-database.unwomen.org/en/countries/asia/india/2005/the-hindu-succession-amendment-act-2005

2. The Hindu daughters were given equal property rights in the Coparcenary for the first time in the State of

a) Andhra Pradesh

b) Karnataka

c) Maharashtra

d) West Bengal

3) Which of the following statements is wrong?

a) The married Hindu daughters can claim right to partition a dwelling house that belonged to their deceased father

b) Equal property rights in joint family property of a Hindu are given only to those who got married after 2006

c) Brother is a Class-II legal heir

d) Heir-less property goes to the State by Escheat

4. Coparcenary consists of Common ancestor along with.... generations of successors (sons and daughters etc)

a) three b) four c)five d)two

5. Who among the following is not entitled to succeed to the property of a deceased Hindu?

a) His murderer who killed for his property

b) Children of his son who converted from Hinduism

c) Both a) and b) above

d) None of the above

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Module: III

Succession under Muslim Law: Concept of Succession under Islam -Sharers - Residuary and Distant Kindred - Disqualification of Heirs - Objects of Islamic Scheme of Inheritance

Succession among Christians: Indian Succession Act, 1925 - Right to Maintenance under: Code of Criminal Procedure - Religious Personal laws

Succession under Muslim and Christian Laws

Succession under Muslim Law

- Position in Pre-Islamic Arabia:
- Islamic Principles of succession.
- The Hanafi law: General principles
- Ithana Ashari law: general principles
- Doctrine of Representation and Stripital Succession

Hanafi Law of Inheritance:

- The Sharers
- The Residuaries
- Distant Kindred
- Collaterals
- State

The Shia Law of Inheritance

- Classification of Heirs

Disqualifications of Heirs

Succession among Christians

- The Indian Succession Act, 1925:

Right to Maintenance

- Maintenance under Code of Criminal Procedure, 1973:
- Maintenance under the Protection of Women from Domestic Violence Act, 2005
- Maintenance under the personal laws
- Maintenance under Hindu Law
- Maintenance under Muslim Law
- Maintenance under other laws

Succession under Muslim Law

The Muslim law of inheritance is not codified in the modern sense. Rather it is a superstructure constructed on the foundation of pre-Islamic customary law of succession. In Islamic law, distinction between the joint family property and the separate property has never existed, and in India, Muslim law does not recognize the joint family property, though prevalent among the South Indians. The institution of joint family is a foreign concept in Muslim law. Since under Muslim law, all properties devolve by succession, the right of heir-apparent does not come into existence till the death of the ancestor. Succession opens only on the death of the ancestor, and then alone the property vests in the heirs.

In this sense it is totally different from the concept of coparcenary under Hindu law. Muslim jurists gave a great deal of importance to the laws of inheritance, and they would repeat the saying of the Prophet: *Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge* and modern authors have admired the system for its utility and formal excellence.[209]

- **Position in Pre-Islamic Arabia**

In the pre-Islamic Arabia, the four basic principles of the pre-Islamic law of succession were:

- *Firstly*, the nearest male agnates or agnates succeeded to the total exclusion of remoter agnates. Thus, if a Muslim died leaving behind a son, and a son of a predeceased son, then the son inherited the entire property and the grandson was totally excluded.
- *Secondly*, females were excluded from inheritance; so were cognates. Thus, a daughter or a sister or a daughter's son or sister's son could never succeed to the property.
- *Thirdly*, the descendants were preferred over the ascendants and ascendants over the collaterals. For instance, in the presence of a son, father could not succeed. Similarly, in the presence of father, brother could not inherit.
- *Fourthly,* where there were more than one male agnates of equal degree, all of them inherited the property and shared it equally, taking *per capita.* For example, if a person died leaving behind three brothers, all of them succeeded and each took one-third of the estate.

- **Islamic Principles of Succession**

Taking a broad view, the Islamic scheme of inheritance discloses three peculiarities, the Quran gives specific shares to certain individuals; the residue goes to agnatic heirs, and failing them

[209] Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, Oxford (Fourth edition), p.387.

to uterine heirs; and bequests are limited to one-third of the estate. The fundamental principles of the Muhammadan law of inheritance are well explained by that mastermind, Mahmood J., in the leading case on preemption, *Gobind Dayal* v. *Inayatullah*[210] as under:

> *"I may observe that pre-emption is closely connected with the Muhammadan law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modem democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defect the law of inheritance, but that the heirs, having become owners of that property, could deal with it as they liked, and could therefore ratify the act. of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property".*

The Prophet introduced the new principles on the aforesaid principles of customary law of succession. It was observed by the Privy Council in *Murtaia Hussain Khan* v. *Mohammad Ali Khan*[211] that the Quran did not sweep away the then existing laws of succession, but made a great number of amendments. These new principles helped in ensuring gender justice and removing certain anomalies that existed in the customary law of succession before advent of Islam. The Islamic principles are:

- *Firstly*, the husband and the wife, being equal, are entitled to inherit to each other;
- *Secondly*, some near females and cognates are also recognized and enumerated as heirs;
- *Thirdly*, the parents and certain other ascendants are made heirs even when there are descendants;
- *Fourthly*, the newly created heirs (those who were not entitled to inherit under customary law) are given specified shares; and
- *Fifthly*, the newly created heirs inherit the specified shares along with customary heirs, and not to their exclusion.

After allotting the specified share to the newly created heirs, who are called sharers, whatever is left (the residue)--and the scheme is so laid down that something is usually left-goes to the customary heirs who are called Residuaries.

It may be noted that the *Koran* did not create a new structure of law of succession, but merely amended and modified the customary law of succession so as to bring it in conformity with the Islamic philosophy. What has happened is this that those persons who were not heirs under the

[210] (1885) 7 All at pp 782-3
[211] 33 All 532.

customary law have been made heirs (called Sharers or the Koranic heirs) and specific shares have been allotted to them. For instance, if A, a Muslim, died leaving behind a widow and two sons A and A1, then he will take 1/8 as a specified share and A and A1 will take the residue, *i.e., 7/8.* This superimposition of the Koranic principles on the customary law of inheritance has led to divergence of opinion among the Shias and Sunnis resulting in the propagation of two different rules of inheritance. *Firstly,* the Hanafis allow the framework or principles of the pre-Islamic customs to stand; they develop or alter those rules in the specific manner mentioned in the *Koran,* and by the Prophet. *Secondly,* the Shias deduce certain principles, which they hold to underlie the amendments expressed in the *Koran* and fuse the principles so deduced with the principles underlying the pre-existing customary law, and thus raise up a completely altered set of principles and rules derived from them.[212]

Joint family property not being recognized, the principle of survivorship is also not known to Muslim law. The heirs of the deceased take their shares· as tenant in common, and not as joint tenants with rights of survivorship. They are separate co-sharers.

- **The Hanafi law: General principles**

The Hanafis interpret the principles of customary law and Islamic law in such a manner, as to blend them together in a harmonious manner; the customary heirs are not deprive of their right of inheritance in the estate of the deceased, but only a portion out of the estate is taken out and given to the heirs enumerated in the Koran. This means that the basic structure of customary succession, *i.e.*, the rule agnatic preference, is retained-the agnates are still preferred over cognates. The Koranic succession takes the agnatic principles further by recognizing the right of female agnates.

Thus, if there is a female agnate (as specified in the *Koran)* nearer to a male agnate (as specified under the customary law), then by virtue of nearness of her claim to take a share in the estate of the deceased, she is allowed to take a share. But thereby, the male agnate is not deprived of a share, and the male agnate takes the residue. Or, where the female agnate and the male agnate are equally near to the deceased, then the male heir takes twice the share of the female heir. It is submitted that this principle implies not only to the female agnates but also to the male agnate *i.e.,* those heirs who are made heirs by the *Koran).* It is wrong to generalize that the male heir as such always takes double share of a female heir. Thus, uterine brother and father as sharers do not take more than the uterine - sister and mother respectively. It should also be noticed that most of the newly created heirs are the near blood relations of the deceased who were ignored in the customary law.

[212] See Paras Diwan Supra Pp.496

The Koranic imposition of new heirs does not deprive the male agnates of their inheritance, but their rights are liable to be affected if there exists Koranic heir. If we examine the rights of the Koranic heirs *vis-a-vis* the customary heirs, we find two situations: (i) the Koranic heir may be nearer to the customary heir. In such a case, a specified portion of the estate is given to the Koranic heir at the first instance and then whatever .is left to be given to the customary heir. If there is more than one Koranic heir, 'then all of them take their specified portions, and the residue goes to the customary heirs. For instance, when a deceased has left a daughter and a brother, the former will take 1/2 (as specified .by the Koran) and the brother will take the residue which is 1/2. If the deceased had left two daughters and a brother, then the daughters together will take 2/3 (as specified by the Koran) and the brother will take the residue which is 1/3. (ii) The Koranic heirs and the customary heirs may be equally near to the deceased. In such a case, double portion is given to the customary heir. In this situation, the Koranic heir is a female of equal proximity with the customary heir, but she was disqualified under the customary law on account of her sex. Now she has been made to rank equally with the customary heirs in respect of the residue of the estate after the prior claim of the Koranic heirs are satisfied, As to the rights of heirs *vis-a-vis* each other, if the heirs of the same class differ from each other in their sex, they inherit equally (here the principle of male taking twice the share of a female does not apply). For instance, if a Muslim dies leaving behind father and' mother, then each takes 1/6 of the estate. In this case, neither can claim priority over the other on the basis of greater proximity or on the basis of customary law.

The modifications thus made by the *Koran* as interpreted by the Hanafis are restricted to agnates, with a few exceptions where under some cognates, such as uterine brother and uterine sister, are also included. The modifications do not go to any collateral remoter than sisters. Further, these modifications in their application to relations other than descendants are hedged with exceptions. The Hanafis have so interpreted the Koranic rules that the customary heirs' right to inheritance is not affected, though a slice of the estate is taken away for the Koranic heirs. Sometimes customary heirs are also required to share the residuary estate with the Koranic heirs, and in that process, sometimes, no residue of the estate is left for them. (But this happens in a very few cases).Under the Hanafi law, the general rule of distribution of the estate is *per capita* and *not per stirpes.*

- **Ithana Ashari Law: General Principles**

The basic differences between the Ithana Ashari law and the Hanafi law arise on account of the fact that the latter interpret the Koranic rules strictly and hold that the Koranic rules are nothing but transposition of certain rules on the customary law of succession, while the former interpret the Koranic rules so widely as if they lay down an independent scheme of succession. Thus, the Ithana Ashari interpretation of the Koranic rules does not recognize the prior rights of agnates over cognates,

or of males over females. With the exception of the rights of husband and wife, the Shia law lays down that the estate of the deceased devolves on the blood relations equally, though among themselves, they take *per stirpes* i.e. the females are allotted half the share allotted to the males in each grade. This also results in descendants, ascendants and collaterals inheriting side by side.

- **Doctrine of Representation and Stripital Succession**

Under Hindu law, the doctrine of representation is utilized for two purposes: (i) for determining the heirs, and (ii) for determining the quantum of share of an heir or a group of heirs. The *per stirpes* rule means that when there are branches, the division of property takes place according to the stock *i.e.* at the places where branches bifurcate. Thus, suppose P dies leaving behind a son S and a grandson SS, who is a son of a predeceased son. By the application of the doctrine of representation, SS, representing his father will be an heir and will take the same share which his father would have taken had he been alive. This means that S will take 1/2 and SS will 1/2. Under the Hanafi law, no aspect of the doctrine of representation is recognized, with the result that in the above illustration, the son will take the entire property and no grandson will take any share. The result under the Shia law is also the same. But the Shia law recognized the doctrine of representation for the second purpose, *viz.* for determining the quantum of shares in certain case.

For instance, if P dies leaving behind three grandsons, A, B and C from a son S and two grandsons, X and Y from a predeceased son S1, and a grandson Q from a predeceased son S2, then the distribution of assets will take place not in accordance with grandsons, but in accordance with sons. In this example the share of S, S1 and S2 will come to 1/3 each. S's 1/3 will go to A. B and C - each taking 1/9; S1's 1/3 will go to X and Y each taking 1/6 and S2's 1/3 will go to Q. Under the Hanafi law, each grandson will take *per capita, i.e.*. A, B,C, X, Y and Q, each will take 1/6 share in the assets.

The doctrine of representation and the Stripital succession for the purpose of calculating the shares of certain heirs is the basic principle of the Shia law and is applied throughout. This is not confined to the descendants but is also applied to the ascendants. Thus, the descendants for the deceased son, deceased uncle, deceased aunt, deceased daughter, deceased brother, deceased sister, if they are heirs are all covered by the doctrine of Representation. Similarly, the rule is applied to great grandparents who would take the same share which grandparents would have taken had they been alive. The father's uncles and aunts are also covered by the rule.

For the purpose of Islamic succession, an **Agnate** is a relation who is related to the deceased who through males. Thus, the following are the examples of agnates, son, son’s son, son's son's son,

son's daughter, son's son's daughter, father's father's father's Mother, father's father's father, father's father's mother.

A **Cognate** is a relation who is related to the deceased through one or more females. For example, the following are cognates-daughter's son, daughter's daughter, mother's father. father's mother's father. **Collaterals** are descendants in the parallel lines from the common ancestor or ancestress. Collaterals may be agnates or cognates. Thus consanguine brothers and sisters, paternal aunts and uncles are agnate collaterals. Maternal uncles and aunts, uterine brothers and sisters are cognate collaterals. **Heir** is a person who is entitled to inherit the estate of another after his death.

A male ancestor between whom and the deceased, no female intervenes is known as the **true grandfather**. For instance, the father's father, father's father's father and his father how high so ever are all the true grandfathers. A male ancestor between whom and the deceased, a female Intervenes is known as the **false grandfather**. For instance, mother's father, mother's mother's father, father's mother's father are false grandfathers. A female ancestor between whom and the deceased, no false grandfather intervenes is known as the **true grandmother**. Thus, father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother are all true grandmothers. A female ancestor between whom and the deceased, a false grandfather intervenes is a **false grandmother**. Thus, mother's father's mother is a false grandmother. Lineal male descendants are known as **son's son how low so ever**. For instance, son's son, son's son's son and so on are all son's son how low so ever. The female children of lineal male descendants are known as **son's daughter how low so ever**. Therefore, son's daughter, son's son's daughter and so on are also son's daughter how low so ever.

- **Hanafi Law of Inheritance**

Under any law of intestate succession, two questions that arise are: (i) Who are the heirs of the deceased, and (ii) to what share the heirs are entitled. Muslim law-givers have gone into details in laying down the categories of the persons who are entitled to participate in the inheritance, and the respective shares to which each category of heirs are entitled to receive.

- **Heirs**

They are certain blood relations who are either equally near or more near, to the deceased than the customary heirs. Among these new heirs are certain females. and some ascendants and collaterals. The spouse of the deceased is allowed to take a share in the inheritance, as a relation by affinity. Looked at in this perspective, apart from the spouse (husband or wife of the deceased, the other heirs specifically mentioned in the *Koran* are at par with customary heirs.) Thus, son, or son's son how low so ever, is entitled to inherit under the customary law.

- **Sharers**

The *Koran* superimposed daughter, son's daughter or son's son's daughter how low so ever, and gave her a specified share. It may be noted that daughter's daughter, who is a cognate, and therefore remoter than the son or son's son, is not included. Since son and daughter were included, it was logical to include mother and father. Similarly, since son's son and son's daughter were included, it was logical to include true grandfather and true grandmother. It was equally logical to include certain collaterals. Thus, were included full and consanguine sisters, since full and consanguine brothers were heirs under customary law, For the same reason, were included uterine brothers and sisters. To these newly created heirs, the *Koran* allots a specific share. These new heirs are commonly called "sharers". It is noteworthy that the fractional shares that are specified by the *Koran* are only six. namely 1/2, 1/4, 1/8, 2/3, 1/3 and 1/5.

The sharers are allotted their specified shares. Then whatever is left after allotting share to the sharers, the rest-residue-is divided among the customary heirs. These heirs are commonly called "residuaries". This term came into vogue on the assumption that after giving specified shares to the sharers, whatever is left is given to them. In the scheme of heirs, certain sharers become residuaries on account of the existence of certain other near relations. Thus, when the deceased has no child or child of a son how low so ever, the father and the true grandfather become the residuaries. Similarly, daughter becomes a residuary when the deceased has left behind a son, and the full sister becomes residuary when the deceased is survived by a full brother. This also applies to consanguine sister, when the deceased is survived by a consanguine brother.

The Hanafi law lays down that in the absence of the sharers and the residuaries, the estate passed to other relations who are culled "distant kindred". The distant kindred are those relations of the deceased who are neither sharers nor residuaries. On the failure of distant kindred, in modern India, the estate of the deceased goes to the State by Escheat. Thus, under the Hanafi law, the heirs of a deceased Muslim, male or female, fall under the following classes:

(I) The sharers,
(II) The residuaries,
(III) The distant kindred, and
(IV) The State by escheat.

The sharers are twelve in number. They are given specific shares. In the case of some sharers, their shares vary under certain circumstances. Some sharers under certain circumstances do not inherit as sharers, but as residuaries. The following are the Sharers: Wife (1/8), Husband (1/8), Daughter ((1/2), Son’s Daughter (1/2), Full Sister (1/2), Consanguine Sister (1/2), Uterine Sister

(1/6), Uterine Sister (1/6), Mother (1/6), True Grandfather h.h.s.(1/6), Father (1/6) and True Grand Mother (1/6). The above sharers will take the shares mentioned in the parenthesis next to them unless the said shares are altered by certain circumstances like presence or absence of children, grandchildren, grandparents, and mother.

- **Residuaries**

When there are sharers and a residue of estate is left after allotting them their shares or when there are no sharers, then whatever is left in the former case, and the entire estate in the latter case, goes to the residuaries.

- **Distant Kindred**

In the absence of the sharers and the rosiduarics, the estate devolves on the distant kindred. There is only one case in which the distant kindred inherits along with a sharer. When the only surviving sharer is a husband or a wife and there is no residuary, then the husband or wife takes his or her share. and the rest of the estate goes to the distant kindred. In the class of distant kindred are all those blood relation of the deceased who have not found a place either among the sharers or residuarios, there are: (a) female agnates, and (b) cognate. both male and females

These two classes of relations constitute the distant kindred.For the purpose of distribution of assets among them, the better classification of distant kindred would be into: (i) descendants, (ii) ascendants and (iii) collaterals. The classification of the distant kindred may be worked out thus:

I. ***Descendants*** of the deceased.

II. **Ascendants** of the deceased.

III. **Collaterals**- The collaterals may be further divided as under:

(a) *Descendants of parents*.

(b) *Descendants of immediate grandparents*

- **Collaterals**

They may be grouped under three categories. In the first, nephews and nieces, second uncles, aunts and their descendants, and third descendants of remote ancestors and grandparents how high so ever.

- **State**

In the absence of any of the legal heirs mentioned above, the property of the deceased Muslim will go to the State by Escheat of course subject to charge, liability or trust etc. attached to the estate of the deceased.

- **The Shia Law of Inheritance**

The Shias base the right of succession to the property on two principles:(a) *Nasab*, or blood relationship, and (b) *sabab*, or special cause. The *Nasab* is sub-divided into: (i) *dhu fard*, the Koranic heirs or sharers, and (ii) *dhu quarabt*, or blood relations. The *sabab* is also sub-divided into two: (1) *Zawjiyyat* or status of a spouse, and (2) *wala*, special legal relationship. Under *wala* comes right of emancipation, obligation for delicts committed by deceased, and *wala* of *Immamate*. The first two have become obsolete in India and the third has been replaced by law of escheat.[213]

- **Classification of Heirs**

In modern India, the heirs of a Shia Muslim fall under the following classes, *firstly*, **heirs by marriage**, who are husband and wife; *secondly* **heirs by consanguinity** who are further sub-divided into the parents, children and other lineal descendants how low so ever, Grandparents (true as well as false) how high so ever, Brothers and sisters and their descendants, how low so ever, Paternal uncles and aunts of the deceased and of his parents and grandparents how high so ever and their descendants how lowsoever, Maternal uncles and aunts of the deceased, and of parents and grandparents how high so ever and their descendants, how low so ever. The heirs in an earlier group exclude heirs in the latter group. Heirs in both categories of a group inherit simultaneously. *Thirdly*, the **State by Escheat**.

From the point of distribution of assets, the Shia law divides the heirs into two categories: (i) The sharers and the descendants of the sharers, how low so ever, and (ii) The residuaries and the descendants of the residuaries how low so ever. The Shia law does not recognize distant kindred's as a separate class of heirs. All those blood relations who are not sharers are the residuaries.

- **Disqualifications of Heirs**

Prof. Paras Diwan has explained the disqualifications attached to inheritance of property by Muslim legal heirs as under[214].Under Muslim law, just as in any other system of law, there are certain persons who are, though heirs, not entitled to a share in the inheritance on account of certain disqualifications. Such disqualified heirs are as under:

1) **Non-Muslim**: Under the Islamic law, a non-Muslim was not entitled to inherit the property from a Muslim. In India, this is not so. A Muslim who has renounced Islam, or had in any manner

[213] See Paras Diwan Supra
[214] Paras Diwan Supra

ceased to be a Muslim, will, nonetheless, be entitled to inheritance in the property of his deceased Muslim relation whose heir he is. 1 But his non-Muslim descendants will not be entitled to inherit the property of the deceased Muslim. The inheritance to the property of a convert to Islam is governed by the Muslim law.

2) **Murderer**: Under the Hanafi law, an heir who has caused the death of the deceased intentionally, inadvertently, by accident, mistake, or negligence is excluded from inheritance. Under the Shia law, the heir is disqualified only if the death is caused intentionally. This is a principle of general policy, and is followed in most systems of law that an heir who has caused the murder of the deceased is disqualified from inheritance.

3) **Child in the womb**: Under Muslim law, a child in the womb of her mother is entitled to inherit, if it is born alive. A stillborn child is treated as having been born alive if its mother was treated with violence as a consequence of which she gave birth to it. The law among the Shias and the Sunnis in this regard is the same.

4) **Illegitimate children**: Under the Hanafi law, an illegitimate child is not entitled to inherit from its father, but it is allowed to inherit from its mother. The mother can also inherit the property of her illegitimate children. The illegitimate child inherits not merely the property of its mother but also the property of all other relations with whom it is related through the mother. Under the Ithana Ashari school, an illegitimate child is treated as *nullius filius,* and cannot inherit the property of any of its parents, or any other person through its parents.

5) **Daughters**: Daughters as a rule are entitled to inheritance. But sometimes they are excluded from inheritance by custom or statute. In such a case, the shares of other heirs are calculated as if daughter did not exist. Among the Gujars of Punjab and Jammu and Kashmir, daughters are excluded from inheritance by custom. They succeed to the property only in default of agnates.

6) **Eldest son**: Under Ithana Ashari law, the eldest son who is of sound mind is exclusively entitled to wearing apparel of his father, his copy of *Koran,* his sword and ring, provided the father had left some other property besides these.

7) **Childless widow**: Under the Ithana Ashari law, a childless widow is not entitled to a share in her husband's land, both agricultural as well as urban. It has been held that a childless widow, in the absence of other heirs, is entitled to inherit not merely her share but also rest of the property including the land of her husband by the application of the doctrine of return.

8) **Step-Parent**: Since step-parents are not related to their stepchildren, they are not entitled to inherit the property of their stepchildren.

9) **Absent heir**: If an heir is absent at the time of the distribution of assets, then his share has to be kept apart for him until such time as he is presumed to be dead[215].

10) **Succession to the property to eunuch**: In *Illyas* v. *Badshah*[216] the question before the Court was whether eunuch who is Muslims by religion is governed by the Muslim law or customary law. The Court held that they were governed by the customary law.

Succession among Christians- The Indian Succession Act, 1925

The Laws governing Inheritance among the Christians in India have been discussed in this article. The Indian Succession Act, 1925 provides for the inheritance laws for all other religions, including Christians. Christians have varied laws on succession and familial relations. The rules for succession among the Christians has been codified under the Indian Succession Act, 1925, while on the other hand customary practices also have an influence on the principles of inheritance. The British Indian Government enacted the Indian Succession Act, 1865 which was to apply in the case of Christians. This Act was later replaced by the Indian Succession Act, 1925, which currently governs the inheritance in case of Christians. Certain customary practices also influence the principles of inheritance in case of Christians and have also been considered by the Courts in India.

In India, the Christian law of succession is governed by the provisions in the Indian Succession Act, 1925. However, with respect to Indian Christians, the diversity in inheritance laws is greatly intensified by making domicile a criterion for determining the application of laws. Till January 1986, Christians in the State of Kerala were governed by two different Acts – those domiciled in Cochin were subject to the application of the Cochin Christian Succession Act, 1921, while the Travancore Christians were governed by the Travancore Christian Succession Act, 1916. These two Acts have now been repealed and the Christians following these laws earlier are now governed by the general scheme of inheritance under the Indian Succession Act, 1925. However, Protestant and Tamil Christians, for example, living in certain taluks, are still governed by their respective customary laws. Christians in the State of Goa and the Union Territories of Daman and Diu are governed by the Portuguese Civil Code, 1867, while those in Pondicherry could be governed by the French Civil

[215] The Presumption under the Indian Evidence Act 1872 that a person continuously absent for seven years and not seen by those who would have seen him had he been alive is presumed dead. -has to be followed in such cases.
[216] AIR 1990 MP 334

Code, 1804 (such Christians are known as "Renocants"), customary Hindu law, or the Indian Succession Act[217].

- **Rules of Succession for Indian Christians**

Despite these variances, the overall law for Indian Christians in effect is the Indian Succession Act of 1925. This Act recognizes three types of heirs for Christians: the spouse, the lineal descendants, and the kindred. As per the Act "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion[218]. A person is deemed to die intestate in respect of all property of which he has not made a testamentary dispossession which is capable of taking effect[219]. Thus, any property which has not already been bequeathed or allocated as per legal process, will, upon the death of the owner, in so far, as he is an Indian Christian, devolve as per the Rules contained in Chapter II of the Act. If a person has not made a testamentary disposition of his property which is capable of taking effect, he is deemed to have died intestate in respect of his entire estate. Intestacy is either total or partial. There is a total intestacy where the deceased does not effectively dispose of any beneficial interest in any of his property by will. There is a partial intestacy where the deceased effectively dispossess of some, but not all, of the beneficial interest in his property by will.

Succession to the movable property of the deceased will be governed by the *lex loci* as per where he had his domicile at the time of his death; whereas succession to his immovable property will be governed by the law of India (*lex loci rei sital*), no matter where he was domiciled at the time of his death[220]. Also, a person can have only one domicile for succession to his movable property[221].

- **Consanguinity**

The connection or relation of persons descended from the same stock or common ancestor is related by consanguinity[222], and lineal consanguinity with regard to descent is in a direct line[223]. Under this head fall those relations who are descendants from one another or both from the same common ancestor. Now, succession can be either 'per capita' (one share to each heir, when they are all of the same degree of relationship) or 'per stirpes' (division according to branches when degrees of relationship are discrete). For Christians, if one were to claim through a relative who

[217] https://www.lawteacher.net/free-law-essays/property-trusts/christian-law-of-succession.php
[218] S.2(d) of Indian Succession Act, 1925
[219] *Ibid* S.30
[220] *Ibid* S.5
[221] *Ibid* S.6
[222] *Ibid* S.24
[223] *Ibid* S.25

was of same degree as the nearest kindred to the deceased, one would be deemed to stand in the shoes of such relative and claim 'per stirpes.'

Collateral consanguinity is occurring when persons are descended from the same stock or common ancestor, but not in a direct line (for example, two brothers)[224]. It is interesting to note that the law for Christians does not make any distinction between relations through the father or the mother. If the relations from the paternal and maternal sides are equally related to the intestate, they are all entitled to succeed and will take equal share among themselves. Also, no distinction is made between full-blood/half-blood/uterine relations; and a posthumous child is treated as a child who was present when the intestate died, so long as the child has been born alive and was in the womb when the intestate died.

Christian law does not recognize children born out of wedlock; it only deals with legitimate marriages. Furthermore it does not recognize polygamous marriages either. However, a decision has been made to the effect that it does recognize adoption and an adopted child is deemed to have all the rights of a child natural-born, although the law does not expressly say so.

The property of an intestate devolves upon the wife or husband or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter. However, as aforementioned, the Act recognizes three types of heirs for Christians: the spouse, the lineal descendants, and the kindred.[225]

- **Succession of Widow**

Sections 33, S. 33-A, S. 34 of the Act govern succession to the widow. Together they lay down that if the deceased has left behind both a widow and lineal descendants, she will get one-third share in his estate while the remaining two-thirds will go to the latter. If no lineal descendants have been left but other kindred are alive, one-half of the estate passes to the widow and the rest to the kindred. And if no kindred are left either, the whole of the estate shall belong to his widow. Where, however, the intestate has left a widow but no lineal descendants, and the net value of his property does not exceed five thousand rupees, the whole of the property will go to the widow, but this provision does not apply to Indian Christians. Simlarly, with respect to the rights of the widower of the deceased, he shall have the same rights in respect of her property as she would in the event that he predeceased her (intestate)[226].

[224] *Ibid* S.26
[225] *Ibid* S.32
[226] *Ibid* S.35

The widow of the deceased Christian is firmly secured in the matter of succession. If the widow is still alive, the lineal descendants will take two-thirds of the estate; if not, they will take it in whole. *Per capita* (equal division of shares) applies if they stand in the same degree of relationship to the deceased[227]. Importantly, the heirs to a Christian shall take his property as tenants-in-common and not as joint tenants.

The religion of the heirs will not act as estoppels with regard to succession. Even the Hindu father of a son who had converted to Christianity was held entitled to inherit from him after his death.Where the intestate has left neither lineal descendant, nor parent, nor sibling, his property shall be divided equally among those of his relatives who are in the nearest degree of kin to him. If there are no heirs whatsoever to the intestate, the doctrine of escheat can be invoked by the Government, whereupon the estate of the deceased will revert to the State.[228]

Testamentary Succession

Testamentary Succession is dealt with under Part VI of the Indian Succession Act, 1925. Every person of sound mind, not being a minor, may dispose of his property by will[229]. Further, married women as also deaf/dumb/blind persons who are not thereby incapacitated to make a will are all entitled to disposing their property by will. Soundness of mind and freedom from intoxication or any illness that render a person incapable of knowing what he is doing are also laid down as prerequisites to the process.

In the landmark case *John Vallamattom and another* v. *Union of India*[230] before the Supreme Court, the first petitioner was an Indian citizen and is a Roman Catholic Priest and the second was also a Christian. The petitioners claimed that under the Indian Succession Act 1925 (the Act) they are prevented from bequeathing property for religious and charitable purposes. They petitioned that the relevant s. 118 of the Act in unconstitutional. The Supreme Court relying on Article 14 and 25 of the Constitution held that:

> *".....The underlying principle contained in Section 118 of the Act indisputably was to prevent persons from making ill-considered death-bed bequest under religious influence ... restrictions imposed thereby have a great impact on a person who desires to dispose of his property in a particular manner which would take effect upon or after his death. The concept of ownership of a person over a property or a right although is a varying one*

[227] *Ibid* S.36 to S.40
[228] *Ibid* S.48
[229] *Ibid* S.59
[230] AIR 2003 SC 2902

includes right to dispose of his property by Will. The Indian Succession Act confers such a right upon all persons irrespective of caste, creed or religion he belongs to."

also that:

"It is difficult to appreciate as to why a testator would, although, be entitled to bequeath his property by way of charitable and religious disposition if he has a wife but he would be precluded from doing so in the event that he has a nephew or a niece."

Finally speaking through J Chief Justice Khare the Court said:

"... [T]here is no justification in restricting testamentary disposition of property for charitable purpose. Charitable purpose includes relief to poor, education, medical relief, advancement of objects of public utility, etc. As the aforesaid charitable purposes are philanthropic and since a person's freedom to dispose of property for such purposes has nothing to do with religious influence, the impugned provision treating bequests for both religious and charitable purposes is discriminatory and violative of Article 14 of the Constitution."

The Court allowed the petition by a unanimous decision of the Court and declared S.118 of the Indian Succession Act to be unconstitutional as violating of Article 14 of the Constitution.

Right to Maintenance – Position under the Code of Criminal Procedure & Religious Personal Laws

In every family, there will be members who are in need of maintenance that is the basic amenities required for their dignified life. They may be children, spouses, and other dependants. Marriage ties the parties with mutual obligations to be fulfilled during the subsistence of marriage and at times even after the dissolution of the marriage. The prime obligation that arises out of marriage is maintenance[231] of the spouse and children. The inferior and dependent position of woman historically, led to the evolution of the concept of maintenance.

Law requires a woman to be provided for maintenance by her relations or family at various stages of her life as a child, wife, mother, daughter-in-law and widow. Maintenance is the amount which she is entitled to claim from certain identified relatives in her family. It is not only a legal right but also a human right. Being a member of the family, sometimes even when they are not living together they are entitled to be maintained under different circumstances and subject to different conditions and laws applicable. In India, maintenance is governed by secular law as well as the relevant personal laws as it is a personal matter. The secular laws are the Code of Criminal Procedure, 1973, and the Protection of Women from Domestic Violence Act, 2005.

[231]Also known as alimony

- **Maintenance under Code of Criminal Procedure, 1973**

Sections 125 of CrPC deals with maintenance of all divorced or neglected wives, abandoned children and aged parents of any religion. This right is available only against the husband or father or son. A minor girl who is married may be entitled to claim maintenance from her husband or father subject to certain conditions. On an application being made to the Magistrate, maintenance is granted to the affected party according to her needs. If the wife is found entitled to grant of maintenance within the parameters of Section 125 CrPC, such maintenance should be adequate so that she can live with dignity as she would have lived in her matrimonial home[232]. Fine or imprisonment may be ordered to compel the payment of maintenance amount. However the wife is not granted with this right if she commits adultery or refuses to stay with the husband without any sufficient reasons or they are living separately by mutual consent. Thus we see that a wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right.

- **Maintenance under the PWDV Act, 2005**[233]

This is an additional protective measure to women on secular lines. Under the Act, the Magistrate can direct the respondent to pay monetary relief to meet expenses and losses of aggrieved person and children of the aggrieved person[234].

- **Maintenance under the personal laws**

Except for the Muslim law the other personal laws provide for two kinds of maintenance viz., *interim maintenance* and *permanent maintenance*. The interim maintenance[235] is paid to meet the immediate needs of the petitioner which covers the expenses of the proceedings as well as the other expenses of the spouse during the course of the proceedings[236]. Permanent maintenance is the maintenance that is paid after the judicial proceedings that has resulted either in dissolution of the marriage or a judicial separation[237]. Maintenance can be claimed either by the husband or the wife under the Hindu law and the Parsi law. Under all other statutes, the wife is the only spouse who can

[232] *ShamimaFarooqui* v. *Shahid Khan*, (2015) 5 SCC 705
[233] The object of the Act is to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for connected matters
[234] Section 20 of the Act of 2005
[235] Also known as Maintenance pendente lite
[236]Interim maintenance is provided for by section 24 of the Hindu Marriage Act, Section 39 of the Parsi Marriage and Divorce Act, 1936, section 36 of the Divorce Act, 1869 and section 36 of the Special Marriage Act, 1954
[237]Permanent alimony is provided under section 25 of the Hindu Marriage Act, section 40 and 41 of the Parsi Marriage and Divorce Act, 1936, section 37 and 38 of the Divorce Act, 1869 and section 37 of the Special Marriage Act, 1954

claim it. While deciding the quantum of maintenance to be awarded, the Court takes into account the income and status of both parties.

- **Maintenance under Hindu Law**

Under Hindu law, provisions for maintenance are laid down under the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956. Additionally, the Hindu woman also has a secular option to claim maintenance under CrPC. The Act of 1955 provides maintenance as an ancillary relief in matrimonial proceedings. A wife can claim maintenance to herself and for her children too. She also may have to provide maintenance to the husband subject to the orders of the Court. On remarriage of the petitioner, the maintenance order may be rescinded.

Under the Act of 1956, wife can claim maintenance while the marriage is still subsisting. Not only the wife, even a widowed daughter-in-law as long as she does not remarry, children, unmarried daughter, widow as long as she does not remarry and mother are entitled to maintenance under this Act. A wife is entitled to live separately from her husband without forfeiting her right to claim maintenance on certain grounds like adultery, cruelty, etc. But her unchastely or her conversion to another religion disentitles her to this right.

Thus a Hindu woman has a right and obligation in relation to maintenance: on the one hand is required to be maintained by her husband or parents or father-in-law or children as she progresses in her life, and on the other hand is required to maintain her children, husband, and parents. Hindu Adoption Act aids the wife only during the subsistence of the marriage, and does not cover post the divorce. However the Hindu Marriage Act supports the wife only when the marriage is in a troubled state and post the divorce. A Hindu woman has three options to choose from for her maintenance unlike other woman: the Act of 1955, Act of 1956 and CrPC.

- **Maintenance under Muslim Law**

A Muslim female i.e. a wife or a child or a mother is entitled to maintenance known as Nafaqa. A Muslim minor girl is to be maintained by her father before marriage. The Muslim law on maintenance is contained in Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Muslim Women (Protection of Rights on Divorce) Rules, 1986. Prior to the Act a divorced Muslim wife was entitled to be maintained only up to the period of Iddat. But this practice was overturned in *Mohammed Ahmed Khan* v.*Shah Bano Begum*[238]. In this case the Supreme Court concluded that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of Iddat, but if she is unable to maintain herself after the period of

[238]AIR 1985 SC 945

Iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure. This decision led to a controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife.

To undo the effect of this case, the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed which provides that a Muslim divorced woman shall be entitled for a reasonable and fair provision and maintenance within the period of Iddat by her former husband and in case she maintains the children born to her, such maintenance would be extended to a certain further limited periods. But if she is unable to maintain herself after Iddat the Magistrate may make an order for the payment of maintenance by her relatives or by the Waqf Board, if she has no relatives. However the Supreme Court has held that, provision for post-divorce maintenance shall be made by the husband before the Iddat is completed, else she can claim maintenance even post Iddat. The same principles applicable under Sec 125 also govern a petition under the 1986 Act[239]. She is also entitled to unpaid dower and all such properties[240] which were given to her during her marriage by her husband or relatives. The Act also gives an option to the husband and wife to settle the matter under section 125 to 128 of CrPC and not under section 5 of the Act of 1986[241].

It is pertinent to note that the apex Court has held in *Daniel Latifi* v.*Union of India*[242] that –

i) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
ii) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

Her right to maintenance during marriage remains unprejudiced even if she has property or income of her own and the husband is poor. A husband is bound to maintain his wife though a non-Muslim. In addition to this maintenance she may also be paid certain special allowances like *Kharch-i-pandan*, *guzara*, *mewa-khori*, etc. However, the Muslim wife's right of maintenance that is absolute during the subsistence of marriage, ceases on the death of her husband i.e. the widow is not entitled to maintenance during the Iddat of death.

- **Maintenance under other laws**

Maintenance is well provided under the other personal laws like the Parsis, Christians and under the Special Marriage Act, 1954[243].The provisions are same under the Parsi, Christian laws

[239] *Shamim Bano* v. *Asraf Khan* (2014) 12 SCC 636
[240] Section 3 of the Act of 1986
[241] Section 5 of the Act of 1986
[242] (2001) 7 SCC 740; decided on 28 September, 2001 by a Constitution Bench of 5-judges

and the Act of 1954 and the same considerations are applied in granting maintenance that are quite similar to the Hindu Marriage Act, 1955. The Christian and Parsi woman can claim maintenance from her spouse through criminal or civil proceedings.

Frequently Asked Questions (FAQs)

1. What are the primary Schools of Muslim Law?
2. How does the property of Sunni male devolve after his death?
3. Define Sharers, Residuaries and Distant Kindred.
4. What are the disqualifications of Muslim heirs?
5. Explain the rules of succession among the Christians?
6. Discuss the scope and application of Section 125 of the Code of Criminal Procedure, 1973.

Multiple Choice Questions (MCQs)

1. What is the maximum quantum of maintenance that can be awarded under Sec.125 of Cr.P.C.?

   a) Rs.500/- b) Rs.5000/- **c)** there is no limit d)Rs.20000/-

2. Who is/are entitled to maintenance under the Cr.P.C.?

   a)Wife b) Children c) Aged parents **d)** All the above

3. The Christian Succession in India is governed by

   a)The Christian Succession Act

   b)The Indian Succession Act

   c)The Hindu Succession Act

   d)The Kerala Succession Act

4. The Indian Succession Act of 1925 recognizes the following legal heirs for Christians

   a) the spouse

   b) the lineal descendants

   c) the kindred.

   d) All the three above.

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[243]Section 37 of the Divorce Act, 1869, section 40 of the Parsi Marriage and Divorce Act,1936 and section37 of the Special Marriage Act, 1954

Suggested Readings:

1. B. Sivaramayya, "Coparcenary Rights to Daughters Constitutional and Interpretational Issues" (1997) 3 SCC (J), page 25.
2. Paras Diwan, Family Law, Allahabad Law Agency, 10th Edn, 2013
3. G. B. Reddy, Women and Law, Gogia Law Agency (5th Edn, 2015)
4. 174th Report of the Law Commission of India
5. Asaf A.A.Fyzee, Outlines of Muhammadan Law, Oxford (Fourth edition)
6. Syed Sahid Ahammad, A Critical Analysis of Dower (*Mahr*) in Islam, IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 21, Issue 7, Ver. V (July. 2016) PP 86-91 e-ISSN: 2279-0837
7. Law commission of India Report No.227 submitted by its Chairman Justice A.R. Lakshmanan[244] deals with – "Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings".
8. 202nd Report on proposal to amend Section 304-B of IPC available at http://lawcommissionofindia.nic.in/reports/report202.pdf
9. 243rd Report of Law Commission of India on Section 498A IPC (august 2012) for a detailed discussion on Sec.498-A, IPC.

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[244] See Report No.227 (Aug.2009) available at http://lawcommissionofindia.nic.in/reports/report227.pdf