

"LAW RELATING TO WOMEN AND CHILDREN"

Revised Syllabus

CHAPTER – I :
International Concerns and Conventions –
Specify conventions.

CHAPTER – II :
Women in India –
Pre-Independence period;
Social and legal inequality;
Social reform movement in India;
Karachi Congress – Fundamental Rights Resolution, Equality of Sexes.

CHAPTER – III :
Women in Post-Independence India –
Preamble of the Constitution : Equality provisions in Fundamental Rights and Directive Principles of State Policy;
Personal laws – unequal position of women;
Uniform Civil Code towards gender justice.

CHAPTER – IV :
Sex Inequality in Inheritance Rights –
Feudal institution of joint family – Women's inheritance position : Hindu Law, Muslim Law;
Matrimonial property;
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CHAPTER – V :
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Right of women to adopt a child;
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CHAPTER – IX :

Women and Employment –

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Exploitation and harassment in workplaces.

CHAPTER – X :

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Courts;
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CHAPTER – XI :

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Magnitude of the problem;
Special status of child – national policies;
Constitutional concern – Articles 15 (3), 24, and 45;
International concern and endeavour for the welfare of the children;
Minimum Age conventions;
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U.N. Declaration of the rights of the child, 1924 and 1959.

CHAPTER – XII :

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Legal status of child in work;
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Law relating to maternity benefit and relief;
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CHAPTER – XIII :

State responsibility for the education of children –

Evaluation of the efforts of the State towards the provision of education to children;
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CHAPTER – XIV :

Legal Control of Child Labour –

Regulation of the employment; Protection of the health and well-being;
International Conventions and recommendations of the ILO;

Recommendations of the National Commission of Labour.
Legislations relating to factories, plantation, labour, mines, merchant shipping, motor-transport workers, apprentices, shop and establishments and child labour.

CHAPTER – XV :
Family Relations and Child –

The status of a child in matters of marriage, legitimacy, guardianship, adoption, maintenance and custody;
Provisions in the statutes relating to Child Marriage Restraint Act, Guardians and Wards Act, Hindu Minority and Guardianship Act, Hindu Adoptions and Maintenance Act, and the provisions in the Indian Evidence Act, 1872.

CHAPTER – XVI :

Child and Contractual Liability –

Minor's agreements;
Testimony of children;
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CHAPTER – XVII :

Child and Criminal Liability –

Crimes committed by child; Crimes committed by others in relation to children;
Implementation of social policy through criminal sanctions in relation to child;
Variation of procedure in case of child offender;
Judicial proceedings in criminal cases relating to children;
Statutory provisions – Sections 82, 83, 299 Explanation 3, 363A, 372 and 376 of the Indian Penal Code, 1860 – Suppression of Immoral Traffic Act, 1956 (SITA) – Penal provisions contained in Child Marriage Restraint Act, 1929 as amended in 1978 – Young Persons Harmful Publications Act, 1956 – The Children Act, 1960 – Section 27 of the Criminal Procedure Code, 1973 – Reformatory Schools Act, 1897 – Juvenile Delinquency Act.

CHAPTER – XVIII :

Law and Offences Against Child –

Protection of neglected children;
Institutions for the protection of neglected children;
Juvenile Justice Act, 2000;
Juvenile delinquency – law and offences against child;
Contribution by parents – licensing;
Protection of girls from immoral traffic;
Prevention of vagrancy and beggary.

CHAPTER – XIX :

Discrimination Against Female Children –

Amniocentesis;
Deferred infanticide through based nutritional discrimination;
Termination of pregnancy.

Recommended Readings :

- 1) Flavia Agnes – “Law and Gender Inequality”.
- 2) S.N. Jain – “Child and the Law” (ILD).
- 3) Ajit Ray – “Widows Are Not Burning”.
- 4) A. S. Altekar – “Position of Women in Hindu Civilization”.
- 5) Flavia Agnes – “State, Gender and Rhetorics of Law Reform”.
- 6) Report of the Committee on the status of women – “Towards Equality”.
- 7) Ratna Kapur and Brenda Crossman – “Women, Equality and the Constitution”.
- 8) “Engendering Law” – Lectures in honour of Lotika Sarkar.
- 9) Shobha Saxena – “Crimes Against Women and Protective Laws”.
- 10) Asha Bajpai – “Child Rights in India : Law, Policy and Practice” (Oxford 2003, New Delhi)
- 11) S.P. Shaw – “Encyclopedia of Laws of the Child in India”. (Alia Law Agency).

LAW RELATING TO CHILDREN :

Children are being considered as “a supreme important national asset”; And the future of a Country depends on the welfare and well being of its Children. It is said that every nation is under a duty to protect and develop its biggest assets i.e. Human beings and development, should be such that, they should be able to contribute to their well being and welfare of humanity.

Carol Bellamy Executive Director of United Nations Children Fund put it –

“Governments, as well as, international organizations, must be held accountable for their leadership in putting the rights and well being of children above all concern, and those who fail to do so, must be made accountable”.

The United Nations Convention on Right of Child held in 1989 is being considered as a milestone, as far as, right and privileges of children are concerned for healthy and natural development of children, an atmosphere, suitable and conducive for their social and physical growth, should be created, otherwise, there can never be proper political growth and development, as they are the greatest gift. This status of a child is linked with future of nations, but in early society, care, affection and love was bestowed on child, but gradually with development of society, particularly after industrialization and Urbanization, the child related Programmes as a Part of social justice started pouring in urgent steps and welfare measures, both at National and International level, were planned by making legislation, but this will not solve the problem. For practical implementation of social and development policies, we have to go beyond law and look at it from socio-economic perspective.

At the International level, great concern has been raised for welfare of the child with the adoption of the Charter of the United Nations which reaffirmed its faith in fundamental human rights in dignity and worth of the human person, and also determined to promote social progress and better standard of living.

Convention on the Right of the Child, 1989 :

The Declaration of the Rights of Child adopted, by U. N. in the year 1989 which had 10 principles asserting the right of children. However, comprehensive and enforceable legal instrument was urged. This Convention on right of child, in the year 1989 has guided the Principle “First call for the children” i.e. essential needs of the children should be given highest priority in allocation of resources. The Convention consists of 54 Articles, the Convention emphasises on importance of family, and urged to create an environment that is conducive to healthy growth and development of children.

It consists of civil, political, economic, social and cultural rights of child, following are the basic human rights to which children are entitled to –

1. **Right to Survival** : Includes right to live highest attainable standard of health, nutrition, and adequate standard of living.
2. **Right to Protection** : Includes freedom from all forms of exploitation, abuses, inhuman or degrading treatment and neglect.
3. **Right to development** : Includes right to education, support for early childhood, development and care, social security, right to leisure, recreation and cultural activities, were also included.
4. **Right to participate** : Includes freedom of expression, access to appropriate information and freedom of thought, conscience and religion.

Main Provisions of the Convention :

Every child to be registered after birth and has a right to name, nationality and right to know and be cared by his parents. Right of the child to preserve his or her identity including nationality, name and

family, without interference. It was decided to take legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or maltreatment or exploitation. While in care of parent, legal guardian or anybody who is responsible for well-being of the child.

Since inception, UNICEF was trying its level best to see the promotion of child care by drawing attention of the whole world. Then several organizations came together and committed to build a Global Movement for Children with ten point agenda.

Global Movement for children :

- (1) Leave no child out;
- (2) Put children first;
- (3) Care for every child;
- (4) Fight HIV AIDS;
- (5) Stop harming and exploiting children;
- (6) Listen to children;
- (7) Educate every child;
- (8) Protect children from war;
- (9) Protect the Earth for children; and
- (10) Fight poverty,

UNICEF took a major role in carrying this message into village.

SAARC :

South Asia Association for Regional Co-operation (SAARC) consisting of seven South Asian countries came together to review what is being done and what need to be done to let children develop to their potential.

SAARC covered good health and nutrition of population, especially, children, adolescent and women, quality of education, improved drinking water, environmental sanitation; and protection of children from all kinds of discrimination, violence, exploitation, abuse trafficking and hazardous and exploitation of child labour.

Children and the Indian Constitution :

In civilized society, the welfare of the child is considered to be paramount, and the state can never overlook the most valuable assets of the nature of the child. Every necessary step is to be taken by the state for the proper growth and specific provision for the welfare of the children. Preamble of Indian Constitution declares all its citizens will secure social, economic and political, justice, liberty of thought, expression, belief, faith and worship along with equality of status and opportunity; From this, we can very well say that, "Children" are inherent included in the word citizen.

Fundamental Rights :

Fundamental Rights enumerated in Part III of the Constitution. **Article – 14** guarantees equality before law and equal protection of law to all persons in territory of India. **Article – 15 (3) :** Nothing in this Article prevents state from making special provisions for women and children. **Article – 23** speaks of prohibition of all forms of trafficking in human beings and other similar forms of forced labour. **Article – 24** specifically prohibits employment of children below age of 14 years in any factory, mine or any hazardous employment.

Directive Principles of State Policy :

While fundamental Rights are for enjoyment, Directive Principles of State Policy are in Part IV of the Constitution, are directions given to the State to direct its measures towards the welfare of people.

Important segment of the Constitution also clearly provides for policies directed towards welfare of the children -

Article 39 (e) and (f) specifically fixed certain Policy to be followed by the State for the welfare of the children.

Article 39 (e) states that, the health of worker, women and tender age children are not abused. **Article 39 (f)** directs the State to ensure that, children are given opportunity and facilities to develop in a healthy manner with freedom and dignity, and that, childhood and youth are protected against exploitation and against moral and material abandonment.

Articles 41 & 42 gives right to work and conditions of work for people, includes children by interpretation.

Article 45 endeavours to provide free and compulsory education for all children under the age group of 14 years.

Article 47 imposes duty on State to raise the level of nutrition and standard of living of its people and to improve public health. Thus, various Articles are directed towards the betterment of children who are ultimately the national wealth.

National policy for children :

Following measures to be adopted toward attainment of the objectives of providing adequate services to children, both, before and after birth:

- 1) All children shall be covered by comprehension health programmer.
- 2) Programme to provide nutrition service to remove deficiencies in diet of children.
- 3) Programme will be undertaken for general improvement of health-care, nutrition and education of expectant and nursing mother.
- 4) State to provide free and compulsory education for children up to age of 14. To provide other forms of education to suit their requirements. Physical educational, recreational, as well as, cultural activities to be promoted in schools.
- 5) Handicap children, who have become delinquents forced to take to begging, shall be provided facilities of education training and rehabilitation.
- 6) No child to be employed in hazardous occupation. Children shall be given priority for protection and relief in time of distress or natural calamity.
- 7) Interest of children are given paramount consideration, in case of dispute between the parents.

Priorities :

1. Priorities and primary aspect of child health.
 2. Nutrition for infant and children in pre-school, along with nutrition for nursing of expectant mother.
 3. Maintenance, education and training of orphan and destitute children.
 4. Crèches and other facilities for care of children of working or ailing mother.
 5. Care, education, training and rehabilitation of handicapped children.
- To achieve the above aims, necessary legislative and administrative support to be given by the government while facilities for research and training of personnel to be developed to meet the needs of expanding programmer.

Release on Probation of good conduct :

The convicted person can be released on probation of good conduct, if the Court is satisfied that, the offender should be released on probation of good conduct, in this case, regards has to be paid to the age, character or antecedent of the offender, in cases where the age of the offender is below the age group of 21 years.

The Child Marriage Restraint Act, 1929 :

The main purpose of the Act is to restrain the child marriage. The marriage itself has not been declared void. However, contracting, performing and facilitating such marriage, is considered an offence, hence, punishable as per the Amendment made to the Act in the year 1978, the age of the boy and the girl to be twenty one, and eighteen years, respectively. No doubt, this Act has reduced the number of child marriages but has not abolished child marriage.

Recently, the Supreme Court ruled that child marriage is to be treated as a void marriage.

Child Marriage:

Child Marriage was an ancient social custom. Little children of 5 to 10 years were being married. In the Vedic period, women could remain unmarried and continue their study of the Vedas, etc. She could study till she was married at the age of 16 or more. She also enjoyed the right of thread ceremony. Later on, in the Post-Vedic period, certain factors which led to lowering the age of marriage and encouraged child marriage, were as follows:

Factors leading to child marriage were -

1. Stoppage of Thread Ceremony and consequently (stoppage of education of girls) and substitution of that ceremony by marriage ceremony at the age of eight to twelve.
2. Stress on keeping the chastity and purity of girls intact by getting them married before the age of puberty.
3. Desire of the husbands to beget children, as early as possible, after marriage.
4. Emphasis on maintaining each caste's endogamic and exogamic customs (as the case may be) and keenness for refraining from breaking their customs.
5. Desire of the wards and foster parents of orphaned young girls to get them married till their chastity was intact.
6. Once the child marriage got started by higher castes, it was adopted by people of lower class. It further got degenerated into infant marriage.

In order to eradicate the evils of the child marriage, the measures to abolish Child Marriage were taken by various social reformers. The efforts made by and the dedicated role played by social reformers like - a) Raja Ram Mohan Roy, Ishwarchandra Vidyasagar and b) the leaders of the Brahmo Samaj, Arya Samaj and Prarthana Samaj namely, Keshav Chandra Sen, Swami Dayanand Saraswati, Justice M.G. Ranade and others condemned and criticized the custom of child marriage.

Their movement resulted in enactments restraining child marriage such as, - a) "The Child Marriage Restraint Act, 1872" fixing the age of marriage as 14 years. b) "The Child Marriage Restraint Act, 1929, initiated by Harbilas Sarada (known as 'Sarda Act') fixed marriageable age for girls as 14, and for boys as 18 years, respectively.

"The Hindu Marriage Act, 1955 raised the age to 18 for girls and 21 for boys. Section 5 clause (iii) prescribes the condition that, "the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage".

Section 2 (a) of The Child Marriage Restraint Act, 1929 defines "child" :

“Child means a person, who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age”.

Section 2 (b) of the Act defines “child marriage” :

“Child marriage means a marriage to which either of the contracting parties is child”.

The Child Marriage Restraint (Amendment) Act, 1978 (Section 2) raises the minimum age of marriage as 18 for girls and 21 for boys. However, marriage performed in contravention of this condition is valid. But the persons who perform, direct or promote such a child marriage, are liable to punishment unless they prove that they had reasons to believe that the marriage was not a child marriage. The Courts have power to issue injunctions to prohibit a child marriage from being performed.

Section 18 of the Hindu Marriage Act, 1955 lays down that, “Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clause (iii) of Section 5 (which stipulates the age of marriage), shall be punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both”.

In spite of these measures, the practice of child marriage still continues to prevail in rural areas of U.P. and M.P. though it is reported to have reduced in urban areas.

According to ‘UNICEF’ 2013 Report on the “State of the world’s Children” – 38% of the India’s women were married before the legal age of 18, and out of the total child marriages, 77% child marriages occurred in rural areas. The report also revealed that, in all 32% of the world’s child marriages occurred in India, in the year 2013.

Effect of child marriage :

Section 3 of the Child Marriage Restraint Act states that, the child marriage is *voidable* at the option of the contracting party who was a child at the time of the marriage. Such a marriage can be annulled by a decree of nullity passed by the District Court/Family Court.

Section 6 of the Act states that, even if the marriage has been annulled by a decree of nullity, the children of such marriage are deemed to be legitimate for all purposes.

Section 12 of the Act lays down that, a child marriage is *null* and *void* if the child –

- i) is taken or enticed out of the keeping of its lawful guardian; or
- ii) is, by force, compelled to go from any place; or
- iii) is, by any deceitful means, induced to go from any place; or
- iv) is sold for the purpose of marriage and is made to go through a form of marriage; or
- v) is sold or trafficked or used for immoral purposes after the marriage.

Punishment for child marriage :

- i) Male adult above 18 years contracting a child marriage = rigorous imprisonment upto 2 years or fine upto 1 lakh or both;
- ii) Any person performing, directing, conducting or abetting a child marriage knowing that it is a child marriage = rigorous imprisonment upto 2 years or fine upto 1 lakh;
- iii) Any person promoting or permitting the solemnization of a child marriage = rigorous imprisonment upto 2 years or fine upto 1 lakh;
- iv) Any person disobeying an order of injunction restraining a child marriage = simple or rigorous imprisonment upto 2 years or fine upto 1 lakh.

It may be noted here that, all offences under this Act are cognizable and non-bailable.

It is specifically provided under this Act that, a woman cannot be punished with imprisonment for any offence committed by her under the Act.

Question :

The Supreme Court has done a tremendous job for the upliftment of women and children in India - Elucidate.

OR

Discuss Human Rights and Atrocities Against Women and the role of Supreme Court for the upliftment of women.

OR

Discuss Human Rights and Child Abuse and Child Labour and the role of Supreme Court for the upliftment of Children.

Answer :

Submissive and Slavish :

Women is known as the "Better half of man", and despite comprising of half the population of the world, women are physically and sexually abused and exploited. Women face the denial of equal wages, equal rights, equal governance and always experienced the subordinate status in the family. The male dominance had made women submissive and slavish.

Elimination of Discrimination Against Women :

For the purpose of elimination of all lands of discrimination against women, the General Assembly adopted a Declaration on the Elimination of Discrimination Against Women on 7th November 1967. The term discrimination against women means, distinction, restriction or exclusion which is instrumental in discriminating the women.

Legislation concerning women :

Some of the landmark legislations concerning women are summarised as under:

- a) Abolition of Sati Act (Widow Burning) 1829;
- b) Widow Re-marriage Act, 1856;
- c) Female Infanticide Act, 1870 (murder of newborn female child);
- d) Inter-caste, Inter Community Marriage Act, 1872;
- e) Child Marriage Restraint Act, 1929;
- f) Special Marriage Act, 1954;
- g) Hindu Marriage Act, 1955;
- h) Suppression of Immoral Traffic in Women/Girls Act, 1956;
- i) Dowry Prohibition Act, 1961.

Rights of Women under the Constitution of India:

Article 14 i.e. Equality before Law and Equal protection of Law, Article 15 i.e. prohibition of discrimination on ground of religion, race, caste, sex or place of birth and Article 16 i.e. Equality of opportunity in matters of public employment of the Constitution of India grant fundamental Rights. Article 39 (d) of Part IV i.e. Directive Principles of State Policy also guarantee equal pay for equal work.

Role of judiciary in upliftment of women :

The Judiciary played an important role in upliftment of women in India. The Supreme Court by its various decisions, expanded and highlighted these constitutional guarantees :

- (i) The Supreme Court struck down a rule in Air India which made it compulsory for air-hostesses to resign when they get married. This rule was violative of the constitutional guarantee.
- (ii) The Supreme Court struck down rule, making senior women foreign service officers to resign from their posts when they get married. This rule was violative of the constitutional guarantee on the ground of gender discrimination.

(iii) Surinder Kumar v/s. State of Orissa :

In this case, the wife was ill treated by her husband for not bringing sufficient dowry. One night, she was found engulfed in flames and was taken to hospital. A dying declaration was given by her in presence of two doctors that her husband poured kerosene on her and set fire. The Appellant was punished by the High Court, even though the Dying declaration was not corroborated. The Supreme Court held in this case that, even an uncorroborated dying declaration is adequate or sufficient enough to procure the conviction in such case and the Supreme Court confirmed the punishment of life imprisonment awarded to the appellant.

(iv) Vazirchand v/s. State of Haryana :

In this case, the young daughter-in-law, while making tea was badly burnt at 6.00 a.m., and she was dead by 11 a.m. She was being harassed by her husband and his relatives for bringing insufficient dowry. There was purposeful delay in taking her to the hospital when she was badly burnt, her cries were drowned by raising the volume of the radio. Even the neighbours were prevented from entering the house. In this case, the Supreme Court rejected the plea of the Appellant of suicide and confirmed the punishment.

Child Labour and Child Abuse :

Child Labour :

Child Labour problem in India is of immense magnitude and has acquired a serious momentum. The fundamental rights of the children guaranteed under Article 24 of the Constitution of India are being grossly infringed or violated. The involvement of children in labour is so wide that the numbers of children involved in the labour is unbelievable and unimaginable. Every product we use has a child labour behind it. When we sit on a carpet, light a lamp, smoke a bidi, burst fire crackers in our festival, purchase any domestic articles, the house we use for dwelling constructed by bricks, cement, etc. has sweat and tears of children, it is unfortunate to know that all these products have child labour behind it. Illiteracy, economic condition and social status of the children make them victim.

Child Abuse :

The term "child abuse" means mistreatment of a child by parent or another adult. It is difficult to give a precise definition of child abuse in the absence of any standard definition of child abuse. Child abuse may refer to life threatening physical violence which includes severe beating. The instances of child abuse occur in the year are innumerable which are not noticed or not reported.

Causes of Child Abuse:

The causes of child abuse are summarised as under:

- (i) Proximity of Individual with adverse emotional problem: It is

important cause, or reason of child abuse. It is believed by many social scientists that people with adverse emotional problems, abuse the children. The Proximity of such individuals such as uncle, family friend, distant relatives, and neighbours have opportunity to abuse the children.

(ii) Concept of physical punishment: It is one of the reasons for child abuse. The society has developed a concept of physical punishment to improve the children or as a method of changing the behaviour of children. The adults who hurt them to correct never realise the injuries sustained by the children mentally and physically.

(iii) Existence of stress : One more reasons for child abuse is the existence of stress. Parents who are not employed, isolated are naturally under a great stress and such persons are more likely to abuse their children. If the child is handicapped, then, in such situation, the handicapped children are more likely to be abused comparatively than other children.

Sexual Abuse :

It is one of the major causes or reasons of child abuse. The proximity of individual around children, indulges in such abuse. Therefore, children should be taken into confidence to discuss anything that bothers them with the trustworthy person. They should also be warned not to let people touch them in ways that makes them feel uncomfortable.

Role of Supreme Court in upliftment of Child :

The role of Supreme Court in upliftment of child is commendable in expanding Human Rights with the use of Article 21 of the constitution.

- (i) The Supreme Court acted *suo-moto* when news about an unfortunate accident in one of the Sivakashi Cracker Factories appeared in the newspapers. In that factory, almost all workers were children, and due to accident, the death toll was 39. The Supreme Court took a *suo-moto* cognizance and directed the Tamil Nadu Government regarding payment of compensation to the accident victim.
- (ii) The Supreme Court also held the manufacturing process of matches and fire-works is hazardous which is instrumental for fatal accident, and therefore, given certain directions as to how the quality of life of children employed therein could be improved.
- (iii) The Supreme Court in *M. C. Mehta v/s. State of Tamil Nadu* observed that, the spirit of Constitution of India is that, children should be subjected to free and compulsory education till they complete 14 years of their age and they should not be employed in the factories in such tender age.

Different Legislative enactments beneficial to the Children :

1) The Juvenile Justice (Care and Protection of Children) Act, 2000 :

Objects of the Act –

We know that every child needs special care and protection which includes a variety of things, namely, fooding, clothing, shelter nutrition, education, and above all, suitable atmosphere to grow and develop to the fullest potential. Major chunk of children does not get these facilities.

"The Juvenile Justice Act, 2000" was enacted by the Parliament, and prior to the enactment of this Act, we had "The Juvenile Justice Act, 1986", which aimed to provide for the care, protection, treatment, development and rehabilitation of delinquent juveniles.

The 1986 Act created two types of children, namely, delinquent and neglected children and provided separate measures for their treatment.

But the present Act took broader view instead of two types of children as provided in earlier Act.

Although Juvenile in conflict with law, to a large extent, is similar with delinquent juvenile. The provisions for children in need of care and protection are very broad, and cover wide ranging aspects of neglects which the children are facing. This Act seeks to cover two types of children, "juvenile in conflict with law" and "children in need of care and protection".

The Act envisages the constitution of "Juvenile Justice Board" or Child Welfare Committees for every district. Both, the Board and Committee are to function as a Bench of Magistrate and enjoy the power conferred by the Code of Criminal Procedure, 1973.

Board shall consist of a Metropolitan Magistrate of First Class and two social workers of which one should have a special knowledge or training in child psychology or child welfare.

The Board and Committee have been empowered to have the power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law and relating to children in need of care and protection.

2) The Children (Pledging of Labour) Act, 1937 :

U./S. 4 of the Act, "an agreement, written or oral, express or implied, whereby a parent or guardian in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of child to be utilized in any employment, shall be void and will be punished with fine.

3) The Factories Act, 1948 :

S. 67 of Act, "No child who has not completed his 14 years shall be required or allowed to work in any factory (a) for more than 4 ½ hours in any day (b) during night.

4) Plantation Labour Act, 1951 :

S. 24 : No child, below 12 years, shall be required or allowed in any plantation.

S. 25 : Prohibits the employment of children at night.

S. 26 : No child, no adolescent, shall be required or allowed to work without fitness certificate.

5) Merchant Shipping Act, 1951 :

S. 109 : No person, below the age group of 15 years, to be engaged or carried to sea to work in any capacity in any ship.

6) Mines Act, 1952 :

S. 45 : No child, shall be employed in any mine.

7) Motor Transport Workers Act, 1961 :

S. 21 : No child, shall be required or allowed to work in any capacity in any motor transport undertaking.

S. 22 : of Act, debar any adolescent to work in motor transport undertaking without fitness certificate and the said certificate to remain with employer.

8) The Apprentice Act, 1961 :

S. 3 of the Act, states that, "A person shall not be qualified for being engaged as an Apprentice to undergo apprenticeship training in any trade, unless –

- a) is not less than 14 years.
- b) satisfies such standard of education and physical fitness, as may be prescribed".

9) Beedi and Cigar Workers Act, 1966 :

S. 24 Prohibits the employment of children in any industrial premise.

10) Shops and Commercial Establishment Act :

This Act applies to establishments, restaurants and hotels and places of amusement area and notified urban area where Factory Act does not apply.

11) The Child Labour and Regulation Act, 1986 :

(April, 2005; November, 2007)

The engagement of children in certain employment is prohibited and to regulate the conditions of work in certain other employment of children below the age of 14 years.

Case Law :

Labourers working on Salal Hydro – Project v/s. State of Jammu & Kashmir AIR 1984 SC 177

(Constitution of India – Article 24)

Among the workmen on the site of the Salal Hydro-Project, where a number of minors who allegedly accompanied the male members of their family on their own, and demanded employment.

Held : It is accepted that child labour is a socio-economic problem that its prohibition would be socially and economically unacceptable to large masses of society. This is how Article 24 limits the prohibition against employment of child labour in hazardous undertakings construction been to be a hazardous occupation in AIR 1982 SC 1473, and hence, the children should not be permitted to work, but persuaded to go to schools.

M. C. Mehta v/s. State of Tamil Nadu & others J.T. 1990 SC 263 (Constitution of India – Article 32, 39 (f) & 45)

The petition under Article 32 of the Constitution, has been brought by way of a public interest litigation, and is connected with employment of children in Match Factories as Savakis.

Held : The Manufacturing process of matches and fireworks is hazardous one, directions are given that, children to be employed only in packaging and not in manufacturing operations Wages for children to be fixed. Employed children to be insured and welfare-fund to be created.

It Provides for setting an Advisory Committee by the Central Government, known as "Child Labour Technical Advisory Committee" for the purpose of addition of occupation and processes to the schedule. The Committee shall consist of chairman and ten other members appointed by Central Government.

Act provides that, no child should work for more than 6 hours a day, neither are they allowed to work at night. By taking the help of constitutional provisions, International commitments, Statutory provisions, and finally, the cause of failure, as to why the problem instead of being solved, continue despite statutory enactment, Court came up with the conclusion that, "Poverty is the basic reason which compel a parent of child, despite their unwillingness to get it employed."

Further, it is seen that, poverty as such, has not stood in the way of other developing countries from taking care of child labour, the cause which persisted in the existence of problem in our country, is not the dearth of resources but 'Lack of Zeal'.

"THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000"

Question :

Discuss the main objects of Juvenile Justice (Care and Protection to Children) Act, 2000.

OR

Discuss the protection given to children under the Juvenile Justice (Care & Protection of Children) Act, 2000.

Answer :

"The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006"

An Act to amend the Juvenile Justice (Care and Protection of Children) Act, 2000.

Be it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows :-

Statement of Objects and Reasons -

The Juvenile Justice (Care and Protection of Children) Act, 2000 (i.e. the Juvenile Justice Act) was brought into force on 1st April, 2001. The Juvenile Justice Act was aimed at providing a juvenile justice system for juveniles in conflict with law, and children in need of care and protection, by adopting a child friendly approach in the adjudication and disposition of matters in the best interests of children and for their rehabilitation keeping in view the developmental needs of the children.

In public interest litigation (Civil Writ Petition No. 3447 of 2001), certain provisions of the Juvenile Justice Act were challenged before the High Court of Delhi. During the course of hearings, the High Court observed that, some of the provisions of the Juvenile Justice Act merited reconsideration. Keeping in view these observations, it was proposed to carry out amendments in Sections 32, 33, 56, 57 and 59 of the Juvenile Justice Act. Accordingly, an Amendment Bill was introduced in the Lok Sabha on 24/7/2003. Meanwhile, taking cognizance of the said Bill, the High Court of Delhi disposed of the above said Civil Writ Petition on 28/7/2003. The Lok Sabha referred the said Bill to the Parliamentary Standing Committee on Labour and Welfare for examination and report. Before the Standing Committee submitted its report to the Lok Sabha, the Lok Sabha was dissolved and the said Bill lapsed.

Thereafter, before re-introducing a fresh Amendment Bill the Government considered it necessary to revisit the amendment proposals again, alongwith other suggestions received by the Standing Committee from various experts. In the process, further consultations were held and suggestions/views of all concerned were obtained. Based upon these consultations, it is proposed to make amendments in other provisions of the Juvenile Justice Act in addition to those contained in the earlier Bill. Modifications proposed in the Bill, *inter alia*, intend -

- i) to modify the long title of the Juvenile Justice Act, so as to convey a wider scope of rehabilitation of child in need of care and protection or a juveniles in conflict with law under the Act, through not only institutions, but also non-institutional approach;
- ii) to clarify that, the Juvenile Justice Act shall apply to all cases involving detention or criminal prosecution for juveniles under any other law;

- iii) to remove doubts regarding the relevant date in determining the juvenility of a person and applicability of the Juvenile Justice Act;
- iv) exclusion of the local authority from the provisions, authorizing them to discharge or transfer a child in need of care and protection or a juvenile from the children's home or special home or for sending a juveniles in conflict with law undergoing imprisonment, to a special home or a fit institution;
- v) to have a procedure laid down, where claim of juvenility is raised before any Court;
- vi) to have a minimum period of twenty-four hours, excluding a time necessary for the journey from the place where the juveniles in conflict with law was apprehended, within which he should be produced before the Board, and a similar provision with regard to production of a child before the Child Welfare Committee;
- vii) to provide for alternatives to detention in the observation home to achieve the intention of the Juvenile Justice Act;
- viii) to do away with the association of any police officer from the inquiry process, for the child in need of care and protection, as the work is assigned to the Child Welfare Committee, and to cover other cases where the child can remain in children/shelter home after completion of enquiry;
- ix) to extend the scope of adoption of a child to childless parents, and to limit the same under the Juvenile Justice Act to citizens of India only;
- x) to provide for a flexible period of leave that may be given to child on special occasions like examination, marriage of relatives, death of kith and kin or accident or serious illness of parent or any emergency of the like nature;
- xi) to ensure the applicability of model rules framed by the Central Government in the States/Union Territories who have not made their own rules, till the rules are framed in this regard by the respective States/Union Territories.

This Bill seeks to achieve the above objectives.

The State Government may –

- a) establish or recognize after care organization and provide for their function.
 - b) prepare a scheme of after care programmer to be followed by organization for taking case appointed by govt.
 - c) Provide for probation officer or any other officer appointed by the Government.
 - d) provide for the standard and the nature of service to be maintained by such after care organization.
 - e) provide for such other matter, as may be necessary, for the purpose of carrying out the scheme of aftercare programmer for the juvenile or the child.
- Act also provides for certain other welfare measures that can be taken for well being and rehabilitation of juvenile, such as, releasing them and placing them under the guidance of parent or guardian for education and training.

Apart from the constitutional safeguards provided as against the problem relating to children, there are several legislations which aim at prohibition of child labour. Starting from Children (Pledging of Labour) Act, 1933, till latest Child Labour (Prohibition and Regulation) Act, 1986 some of the existing labour legislations contain prohibition of employment of children.

"THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000"

as amended by

"Juvenile Justice (Care & Protection of Children) Amendment Act, 2006"

CHAPTER - I

"PRILLIMINARY"
(Sections 1 to 3)

S. 1 : Short title, extent, commencement and application -

1. This Act may be called "The Juvenile Justice (Care and Protection of Children) Act, 2000.
2. It extends to the whole of India, except the State of Jammu and Kashmir.
3. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
4. Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases of detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.

S. 2 : Definitions -

In this Act, unless the context otherwise requires -

(a) **"advisory board"** means a Central or State advisory board or a district and city level advisory board as the case may be, constituted under Section 62;

(aa) **"adoption"** means, the process through which the adopted child is permanently separated from his biological parents, and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship;

(b) **"begging"** means, -

- i) soliciting or receiving alms in a public place or entering into any private premises for the purpose of soliciting or receiving alms, whether under any pretence;
- ii) exposing or exhibiting with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

S. 24 : Employment of juvenile or child for begging -

- (1) Whoever, employs or uses any juvenile or the child for the purpose or causes any juvenile to beg, shall be punishable with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.
- (2) Whoever, having the actual charge of, or control over, a juvenile or the child, abets the commission of the offence punishable under sub-Section (1), shall be punishable with imprisonment for a term which may extend to 1 year, and shall also be liable to fine.

[University Examination Question on the above topics]

Write a short note on :

Employment of juvenile or child for begging (Answer - S. 2 (b) and S. 24).

- (c) "Board" means, a Juvenile Justice Board constituted under Section 4;
- (d) "child in need of care and protection" means, a child –
- i) who is found without any home or settled place or abode and without any ostensible means of subsistence,
 - ii) who is found begging, or who is either a street child or a working child,
 - iii) who resides with a person (whether a guardian of the child or not) and such person –
 - a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
 - b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,
 - iv) who is mentally or physically challenged or ill child or children suffering from terminal diseases or incurable diseases having no one to support or look after,
 - v) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
 - vi) who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
 - vii) who is being or likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
 - viii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
 - ix) who is being or is likely to be abused for unconscionable gains,
 - x) who is victim of any armed conflict, civil commotion or natural calamity;

[University Examination Question on the above topic]

Write a short note on :

“Child in need of care and protection”.

- (e) "children's home" means, an institution established by a State Government or by voluntary organization and certified by that Government under Section 34;
- (f) "Committee" means, a Child Welfare Committee constituted under Section 29;
- (g) " competent authority" means, in relation to children in need of care and protection, a Committee, and in relation to juveniles in conflict with law, a Board;
- (h) "fit institution" means, a governmental or a registered non-governmental organization or a voluntary organization prepared to own the responsibility of a child, and such organization is found fit by the State Government on the recommendation of the competent authority;

- (i) "fit person" means, a person, being a social worker or any other person, who is prepared to own the responsibility of a child, and is found fit by the competent authority to receive and take care of the child;
- (j) "guardian", in relation to a child, means his natural guardian or any other person having the actual charge or control over the child, and recognized by the competent authority, as a guardian in course of proceedings before that authority;
- (k) "juvenile" or "child" means, a person who has not completed eighteenth year of age;
- (l) "juveniles in conflict with law" means, a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;
- (m) *omitted.*
- (n) "narcotic drug" and "psychotropic substance" shall have the meanings, respectively, assigned to them in the Narcotic Drugs and Psychotropic Substances Act, 1985;
- (o) "observation home" means, a home established by a State Government or by a voluntary organization, and certified by that State Government under Section 8 as an observation home for the juveniles in conflict with law;
- (p) "offence" means, an offence punishable under any law for the time being in force;
- (q) "place of safety" means, any place or institution (not being a police lock-up or jail), the person in charge of which is willing temporarily to receive and take care of the juvenile and which, in the opinion of the competent authority, may be a place of safety for the juvenile;
- (r) "prescribed" means, prescribed by rules made under this Act;
- (s) "probation officer" means, an officer appointed by the State Government as a probation officer under the Probation of Offenders Act, 1958;
- (t) "public place" shall have the meaning assigned to it in the Immoral Traffic (Prevention) Act, 1956;
- (u) "shelter home" means, a home or a drop-in-centre set up under Section 37;
- (v) "special home" means, an institution established by a State Government or by a voluntary organisation and certified by that Government under Section 9;
- (w) "special juvenile police unit" means, a unit of the police force of a State designated for handling of juveniles or children under Section 63;
- (x) "State Government", in relation to a union Territory, means the Administrator of that union Territory appointed by the President under Article 239 of the Constitution;

(y) all words and expressions used, but not defined in this Act and defined in the Code of Criminal Procedure, 1973, shall have the meanings respectively assigned to them in that Code.

S. 3 : Continuation of inquiry in respect of juvenile who has ceased to be juvenile –

Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection, and during the course of such inquiry, the juvenile or child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person, as if such person had continued to be juvenile or a child.

CHAPTER - II

"JUVENILE IN CONFLICT OF LAW"

(Sections 4 to 28)

April 20 14, April 13

Question :

Discuss the protection given to children under the Juvenile Justice (Care and Protection to Children) Act, 2000.

OR

Discuss the main objects of the Juvenile Justice (Care & Protection of Children) Act, 2000.

Answer :

Section 2 (k) of the Act defines the term 'juvenile' or 'child'.
"juvenile" or "child" means, a person who has not completed eighteenth year of age;

Section 2 (l) of the Act defines the term 'juvenile in conflict with law'.
"juveniles in conflict with law" means, a juvenile who is alleged to have committed an offence, and has not completed eighteenth year of age as on the date of commission of such offence;

S. 4 : Juvenile Justice Board –

Establishment and constitution of Juvenile Justice Board:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government may, within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to juveniles in conflict with law under this Act.

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be, and two social workers of whom at least one shall be a woman, forming a bench and every such bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the Principal Magistrate.

Qualification/appointment of members, term of office of members and termination of members:

- (3) No Magistrate shall be appointed as a member of the Board, unless he has special knowledge or training in child psychology or child welfare, and no social worker shall be appointed as a member of the Board, unless he has been actively involved in health, education, or welfare activities pertaining to children for at least seven years.
- (4) The term of office of the members of the Board, and the manner in which such member may resign, shall be such as may be prescribed.
- (5) The appointment of any member of the Board, may be terminated after holding inquiry, by the State Government, if -
 - i) he has been found guilty of misuse of power vested under this Act,
 - ii) he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence,
 - iii) he fails to attend the proceedings of the Board for consecutive three months without any valid reason or he fails to attend less than three-fourth of the sittings in a year.

S. 5 : Meetings - Procedure and Functioning of the Board -

- (1) The Board shall meet at such times and shall observe such rules of procedure in regard to the transaction of business at its meetings, as may be prescribed.
- (2) A child in conflict with law may be produced before an individual member of the Board, when the Board is not sitting.
- (3) A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings:
Provided that, there shall be at least two members-including the Principal Magistrate present at the time of final disposal of the case.
- (4) In the event of any difference of opinion among the members of the Board in the interim or final disposition, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the principal Magistrate shall prevail.

S. 6 : Powers of Juvenile Justice Board -

- (1) Where a Board has been constituted for any district, such Board shall have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.
- (2) The powers conferred on the Board by or under this Act, may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

S. 12 : Power to grant bail -

Bail of juvenile :

- (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall be released on bail with or without surety or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person, but he shall not be so released, if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger, or that his release would defeat the ends of justice.
- (2) When such person having been arrested is not released on bail under sub-Section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner, until he can be brought before a Board.
- (3) When such person is not released on bail under sub-Section (1) by the Board, it shall, instead of committing him in prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him, as may be specified in the order.

S. 14 : Inquiry by Board regarding juvenile –

- 1) Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act, and may make such order in relation to the juvenile, as it deems fit:

Provided that, an inquiry under this Section shall be completed within a period of four months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case and in special cases, after recording the reasons in writing for such extension.

- 2) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board at every six months, and shall direct the Board to increase the frequency of its sittings or may cause the constitution of additional Boards.

S. 15 : Order that may be passed regarding juvenile –

- (1) Where a Board is satisfied on inquiry, that a juvenile has committed an offence, then, the Board may, if it so thinks fit –
 - a) allow the juvenile to go home after advice or admonition, following appropriate inquiry against and counseling to the parent or the guardian and the juvenile;
 - b) direct the juvenile to participate in group counseling and similar activities;
 - c) order the juvenile to perform community service;
 - d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
 - e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person executing bond with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile, for any period not exceeding three years;
 - f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile, for any period not exceeding three years;
 - g) make an order directing the juvenile to be sent to a special home, for a period of three years;

- 2) Who is juvenile in conflict with law ? State the provisions concerning release of such juvenile on bail. (Answer - S. 2 (l) and S. 12).
- 3) Define the term "Juvenile in conflict with law" and state when he may or may not be released on bail. (Answer - S. 2 (k), (l); S. 12 and S. 14.).
- 4) Write short notes on :
 - a) Powers of Juvenile Justice Board. (Answer - S. 6, S. 12, S. 14)
 - b) Bail of a juvenile. (Answer - S. 12).

CHAPTER - III

"CHILD IN NEED OF CARE AND PROTECTION"

(Sections 29 to 39)

S. 29 : Child Welfare Committee –

Under Section 2 (f) of this Act, "Committee means, a Child Welfare Committee constituted under Section 29 of this Act.

Establishment and constitution of Child Welfare Committee :

S. 29 :

- (1) The State Government may, within a period of one year from the commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district, one or more Child Welfare Committees for exercising the powers and discharge the duties conferred on such Committees in relation to child in need of care and protection under this Act.
- (2) The Committee shall consist of a Chairperson and four other members, as the State Government may think fit to appoint, of whom at least one shall be a woman, and another, an expert on matters concerning children.

Qualification/appointment of members, term of office of members and termination of members:

- (3) The qualifications of the Chairperson and the members, and the tenure for which they may be appointed, shall be such as may be prescribed.
- (4) The appointment of any member of the Committee, may be terminated after holding inquiry by the State Government, if –
 - i) he has been found guilty of misuse of power vested under this Act;
 - ii) he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

- iii) he fails to attend proceedings of the Committee for consecutive three months without any valid reason or he fails to attend less than three-fourth of the sittings in a year.
- (5) The Committee shall function as a Bench of Magistrates, and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, a Judicial Magistrate of the First Class.

Meetings – Procedure and Functioning of the Committee –

S. 30 :

- (1) The Committee shall meet at such time, and shall observe such rules of procedure in regard to the transaction of business at its meetings, as may be prescribed.
- (2) A child in need of care and protection, may be produced before an individual member for being placed in safe custody when the Committee is not in session.
- (3) In the event of any difference of opinion among the members of the Committee at the time of any interim decision, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Chairperson shall prevail.
- (4) Subject to the provisions of sub-Section (1), the Committee may act, in the absence of any member of the Committee, and no order made by the Committee shall be invalid by reason of the absence of any member during any stage of the proceeding.

S. 31: Powers of the Child Welfare Committee –

S. 31 :

- (1) The Committee shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children, as well as, to provide for their basic needs and protection of human rights.
- (2) Where a Committee has been constituted for any area, such Committee shall have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

S. 32 : Production of a child before Committee –

- (1) Any child in need of care and protection, may be produced before the Committee by one of the following persons –
- i) any police officer or special juvenile police unit or a designated police officer;
 - ii) any public servant;
 - iii) childline, a registered voluntary organization or by such other voluntary organization or an agency, as may be recognized by the State Government;
 - iv) any social worker or a public spirited citizen; or
 - v) by the child himself:

Provided that, the child shall be produced before the Committee without any loss of time, but within a period of twenty-four hours excluding the time necessary for the journey.

- (2) The State Government may make rules consistent with this Act to provide for the manner of making the report to the Committee and the manner of sending and entrusting the child to children's home pending the inquiry.

S. 33 : Power to hold inquiry and allow the child to stay at children's home or shelter home –

- (2) Where the State Government is of opinion that any institution other than a home established or maintained under sub-Section (1), is fit for the temporary reception of juveniles in conflict with law during the pendency of any inquiry regarding them under this Act, it may certify such institution as an observation home for the purposes of this Act.
- (3) The State Government may, by rules made under this Act, provide for the management of observation homes, including the standards and various types of services to be provided by them for rehabilitation and social integration of a juvenile, and the circumstances under which, and the manner in which the certification of an observation home may be granted or withdrawn.
- (4) Every juvenile who is not placed under the charge of parent or guardian and is sent to an observation home, shall be kept in a reception unit of the observation home for preliminary inquiries, care and classification for juveniles according to his age group, such as seven to twelve years, twelve to sixteen years, and sixteen to eighteen years, giving due consideration to physical and mental status and degree of the offence committed, for further induction into observation home.

S. 9 : Special Homes –

"Special home" means, an institution established by a State Government or by voluntary organization and certified by that Government under Section 9.

- (1) Any State Government may establish and maintain either by itself or under an agreement with voluntary organizations, special homes in every district or group of districts, as may be required for reception and rehabilitation of juvenile in conflict with law under this Act.
- (2) Where the State Government is of opinion that any institution other than a home established or maintained under sub-Section (1), is fit for the reception of juvenile in conflict with law, it may certify such institution as a special home for the purposes of this Act.
- (3) The State Government may, by rules made under this Act, provide for the management of special homes, including the standards and various types of services to be provided by them which are necessary for re-socialisation of a juvenile, and the circumstances under which, and the manner in which, the certification of a special home may be granted or withdrawn.
- (4) The rules made under sub-Section (3) may also provide for the classification and separation of juvenile in conflict with law on the basis of age and the nature of offences committed by them and his mental and physical status.

S. 34 : Children's Homes –

"Children's home" means, an institution established by a State Government or by voluntary organization and certified by that Government under Section 34.

- (1) The State Government may establish and maintain either by itself or in association with the voluntary organizations, children's homes, in every district or group of districts, as the case may be, for the reception of child in need of care and protection, during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation.
- (2) The State Government may, by rules made under this Act, provide for the management of children's homes including the standards and nature of services to be provided by them, and the circumstances under which, and the manner in which, the certification of a children's home or recognition to a voluntary organization may be granted or withdrawn.
- (3) All institutions, whether State Government run or those run by voluntary organizations for children in need of care and protection, shall, within a period of six months from the date of commencement of Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, be registered under this Act in such manner as may be prescribed.

S. 37 : Shelter Homes –

"Shelter homes" means, a home or a drop-in-centre set up under Section 37.

- (1) The State Government may recognize, reputed and capable voluntary organizations, and provide them assistance to set up and administer as many shelter homes for juveniles or children, as may be required.
- (2) The shelter homes referred in sub-Section (1), shall function as drop-in-centres for the children in need of urgent support who have been brought to such homes through such persons as are referred to in sub-Section (1) of Section 32.
- (3) As far as possible, the shelter homes shall have such facilities as may be prescribed by the rules.

S. 38 : Transfer from Shelter Home –

- (1) If during the inquiry it is found that the child is from the place which is outside the jurisdiction of the Child Welfare Committee, such Committee shall order the transfer of the child to the competent authority having jurisdiction over the place of residence of the child.
- (2) Such juvenile or the child shall be escorted by the staff of the shelter home in which he is lodged originally.
- (3) The State Government may make rules to provide for the traveling allowance to be paid to the child.

S. 39 : Restoration and protection of the child –

- (1) Restoration of the child (i.e. handing over the child to its parents, guardians, fit person or fit institution, etc.) and protection to the child is the prime objective of a shelter home.
- (2) A shelter home shall take such steps as are considered necessary for the restoration of and protection to a child deprived of his family environment.

[University Examination Questions on the above topic]

Write short notes on :

- a) Observation homes.
- b) Special home.
- c) Children's home.
- d) Shelter home.

Question (1):

Discuss the welfare and safety of children and women in the Factories Act, 1948.

Answer :

“The Factories Act, 1948”

An Act to consolidate and amend the law regulating labour in factories.
WHEREAS it is expedient to consolidate and amend the law regulating labour in factories;
It is here by enacted as follows : -

**CHAPTER - I
“PRILIMINARY”**

Section 1 : Short title, extent and commencement -

- (1) This Act may be called The factories Act, 1948.
- (2) It extends to the whole of India.
- (3) It shall come into force on the 1st day of April, 1948.

Section 2 : Interpretation -

In this Act, unless there is anything repugnant in the subject or context, -

- (a) “**adult**” means a person who has completed his 18th year of age;
- (b) “**adolescent**” means a person who has completed his 15th year of age but has not completed his 18th year;
- (bb) “**calendar year**” means the period of 12 months beginning with the first day of January in the year;
- (c) “**child**” means a person who has not completed his 15th year of age;
- (ca) “**competent person**”, in relation to any provision of this Act, means a person or an institution recognized as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to -
 - (i) the qualifications and experience of the person and facilities available at his disposal; or
 - (ii) the qualifications and experience of the persons employed in such institution and facilities available therein, with regard to the conduct of such tests, examinations and inspections, and more than one person or institution can be recognized as a competent person in relation to a factory;
- (cb) “**hazardous process**” means any process or activity in relation to an industry specified to the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes or effluents thereof would -
 - (i) cause material impairment to the health of the persons engaged in or connected therewith, or
 - (ii) result in the pollution of the general environment :Provided that the State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation, of any industry specified in the said Schedule.
- (d) “**young person**” means a person who is either a child or an adolescent;
- (e) “**day**” means a period of 24 hours beginning at midnight;

- (f) “**week**” means a period of 7 days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories;
- (g) “**power**” means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency;
- (h) “**prime mover**” means any engine, motor or other appliance which generates or otherwise provides power;
- (i) “**transmission machinery**” means any shaft, wheel, drum, pulley, system of pulleys, coupling, clutch, driving belt or other appliance or device by which the motion of a prime mover is transmitted to or received by any machinery or appliance;
- (j) “**machinery**” includes prime movers, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied;
- (k) “**manufacturing process**” means process for –
- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or
 - (ii) pumping oil, water, sewage, or any other substance; or
 - (iii) generating, transforming or transmitting power; or
 - (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book-binding; or
 - (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
 - (vi) preserving or storing any article in cold storage.
- (l) “**worker**” means a person employed, directly or by or through any agency including a contractor with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process, but does not include any member of the armed forces of the Union;
- (m) “**factory**” means any premises including the precincts thereof –
- (i) whereon 10 or more workers are working, or were working on any day of the preceding 12 months, or in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,
- But does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, a railway running shed, a hotel, restaurant or eating place, or a poly house or green house engaged in the activity of floriculture or pomology or High Value Crops.
- Explanation I* – For computing the number of workers for the purposes of this clause, all the workers in different groups and relays in a day shall be taken into account;
- Explanation II* – For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;
- Explanation III* – For the purposes of this clause, the term “High Value Crops” shall mean and include, –
- (i) Plantation of fruits, flowers and vegetables in a green house or shed-net house;
 - (ii) Plantation of exotic fruits, flowers and vegetables;
 - (iii) Plantation of crops by use of bio-technology;
 - (iv) Plantation of medical and aromatic plants and processing industry;

Section 23 : Employment of young persons on dangerous machines –

- (1) No young person shall be required or allowed to work at any machine to which this Section applies, unless he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed and –
- (a) has received sufficient training in work at the machine, or
 - (b) is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

Section 27 : Prohibition of employment of women and children near cotton-openers –

No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work :

Provided that if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed-end is situated.

Section 34 : Excessive weights –

- (1) No person shall be employed in any factory to lift, carry or move any load so heavy as to be likely to cause him injury.
- (2) The State Government may make rules prescribing the maximum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

Section 48 : Creches –

- (1) In every factory wherein more than 30 women workers are ordinarily employed, there shall be provided and maintained a suitable room or rooms for the use of children under the age of 6 years of such women.
- (2) Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.
- (3) The State Government may make rules –
 - (a) prescribing the location and standards in respect of construction, accommodation, furniture and other equipment of rooms to be provided under this Section;
 - (b) requiring the provision in factories to which this Section applies of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;
 - (c) requiring the provision in any factory of free milk or refreshment or both for such children;
 - (d) requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.

Section 51 : Weekly hours –

No adult worker shall be required or allowed to work in a factory for more than 48 hours in any week.

Law Relating to Women & Children.**Section 54 : Daily hours -**

Subject to the provisions of Section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day.

Provided that, subject to the previous approval of the Chief Inspector, the daily maximum hours specified in this Section may be exceeded in order to facilitate the change of shifts.

Section 66 : Further restrictions on employment of women -

- (1) The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely -
- (a) no exemption from the provisions of Section 54 may be granted in respect of any woman;
 - (b) no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p. m.

Provided that the State Government may, by notification in the Official Gazette in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 p. m. and 5 a. m.

Question (2) :

What are the restrictions on the employment of children in factory ?

Answer :

The main restrictive provisions of the Act about the employment of children are as follows -

- (a) The employment of a child below the age of 14 years is totally prohibited. [S. 67].
- (b) A child who has completed the age of 14 years but has not completed the age of 15 years can be employed for a maximum period of 4 ½ hours in a day.
- (c) Such child cannot be employed during the night time i.e. from 10p.m. to 6a.m. [S. 71].
- (d) Such child must have a certificate of fitness granted by the Certifying Surgeon. [S. 68].
- (e) The Manager must maintain a register of child workers in the prescribed form. [S. 73].
- (f) A child who has completed the age of 15 years but has not completed the age of 18 years can be employed as an adult if he has a certificate of fitness for a full day's work. [Ss. 68 & 69].

These provisions given above, are discussed in detail as follows -

Section 67 : Employment of young children -

No child who has not completed his 14th year shall be required or allowed to work in any factory.

Section 68 : Non-adult workers to carry tokens -

A child who has completed his 14th year or an adolescent shall not be required or allowed to work in any factory unless -

- (a) A certificate of fitness granted with reference to him under Section 69 is in the custody of the manager of the factory, and
- (b) Such child or adolescent carried while he is at work a token giving a reference to such certificate.

he may serve on the manager of the factory a notice requiring that such person or young person, as the case may be, shall be examined by a certifying surgeon, and such person or young person shall not, if the Inspector so directs, be employed, or permitted to work, in any factory until he has been so examined and has been granted a certificate of fitness or a fresh certificate of fitness, as the case may be, under Section 69, or has been certified by the certifying surgeon examining him not to be a young person.

Section 99 : Penalty for permitting double employment of child –

If a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to Rs. 1,000/- unless it appears to the Court that the child so worked without the consent or connivance of such parent, guardian or person.

Facilities & Conveniencies to workers/women/children:

Question (3):

What are the measures to be taken by a factory in respect of the health of the workers ?

Answer :

Every factory must take appropriate measures as per the provisions of the Act –

- a) to keep its premises in clean state;
- b) to dispose of wastes and effluents;
- c) to maintain adequate ventilation and reasonable temperature;
- d) to prevent accumulation of dust and fume;
- e) to avoid over-crowding;
- f) to provide sufficient lighting, drinking water, latrines and urinals, and spittoons. [Ss. 11 to 20].

Question (4):

What are the measures to be taken by a factory in respect of the safety of the workers ?

Answer :

Every factory must take appropriate measures as per the provisions of the Act –

- a) to fence certain machinery;
- b) to protect workers repairing machinery in motion;
- c) to protect young persons working on dangerous machines;
- d) to maintain hoists and lifts in good condition;
- e) to protect workers from injury to their eyes;
- f) to protect workers from dangerous dust, gas, fumes and vapours;
- g) to protect workers from fire, etc. [Sections 21 to 41].

Question (5):

What are the measures required to be taken by a factory in respect of the welfare of the

workers ?

Answer :

Every factory must take appropriate measures as per the provisions of the Act to provide –

- a) facilities for washing;
- b) facilities for sitting workers while they are on work;
- c) facilities for storing clothing not worn during working hours and the drying of wet clothing (in the case of bigger factories only);
- d) first aid boxes and coupboards;
- e) canteens (in the case of bigger factories only);
- f) rest rooms and lunch rooms (in the case of bigger factories only);
- g) crèches (in the case of factories employing more than 30 women workers only). [Sections 42 to 50].

Question (6):

What are the restrictions on the employment of children in factory ?

Answer :

The main restrictive provisions about the employment of children are as follows –

- a) The employment of a child below the age of 14 years is totally prohibited. [S. 67].
- b) A child who has completed the age of 14 years but has not completed the age of 15 years can be employed for a maximum period of 4 ½ hours a day.
- c) Such child cannot be employed during the night time i.e. from 10pm. To 6am. [S. 71].
- d) Such child must have a certificate of fitness granted by the Certifying Surgeon. [S. 68].
- e) The Manager must maintain a register of child workers in the prescribed form. [S. 73].
- f) A child who has completed the age of 15 years but has not completed the age of 18 years can be employed as an adult if he has a certificate of fitness for a full day's work. Ss. 68-69].

HUMAN RIGHTS AND WOMEN :

Human Rights denotes all those rights which are inherent in their nature, and without which we cannot live as human beings. The human rights being eternal part of the nature of human beings, are essential for development of individual personality and human qualities, the intelligence, talent and conscience, and to enable them to satisfy the spiritual and other higher demands. There are certain groups of human beings, which either by nature or because of deep rooted customs, are weak and vulnerable, such as a children, women, disabled persons, migrant workers or persons belonging to a particular race. However, they being human beings do possess Human Rights and fundamental freedoms. But their rights have been violated by very privileged and deprived sections for securing a place for themselves. The number of Conventions have been concluded under the auspices of the United Nations to protect their Rights.

HUMAN RIGHTS UNDER THE CHARTER OF THE UNITED NATIONS :

Charter of the United Nations signed at San Francisco on 26 June 1945 came into force 24 October, 1945.

[A] PREAMBLE :

We the people of the United Nations determined **i)** to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and **ii)** to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations, large and small, and **iii)** to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law, can be maintained.

[B] PURPOSES AND PRINCIPLES :

Article 1 : The purposes of the United Nations are :

- a) To maintain international peace and security;
- b) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

Article 8 : The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

UNIVERSAL DECLARATION OF HUMAN RIGHTS :

[A] PREAMBLE :-

The Preamble of the Declaration proclaims the Universal Declaration of Human Rights as a common standard of achievement for all people and for all nations, to the end that every individual and every organ of the society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the people of territories under their jurisdiction. Thus, the General Assembly recommends to every individual and every organ of the society, to do something with respect to Human Rights laid down in the Declaration.

[B] Enumeration of rights in the Declaration :-

The Universal Declaration enumerates the basic postulates and principles of human rights, in a most comprehensive manner –

i) Civil and Political Rights :- Articles 2 to 21 deal with these rights generally recognized throughout the World. These are as follows :-

- Article 3: Right to life, liberty and security of persons.
- Article 4: Freedom from slavery or servitude.
- Article 5: Prohibition against torture, inhuman or punishment.
- Article 6: Recognition as person before the law.
- Article 7: Equality before the law and equal protection of law without any discrimination.
- Article 8: Effective remedy before the national tribunals.

ii) Economic and Social Rights :- Article 22 to 27 of the Declaration, deal with economic-social rights, they are :-

- Article 22 :- Right to social security.
- Article 23:- Right to work and free choice of employment.
- Article 24:- Right to rest and leisure.
- Article 25:- Right to standard living adequate for health of himself and of his family.
- Article 26:- Right to education.
- Article 27: - Right to participate in cultural life.

COVENANT ON CIVIL AND POLITICAL RIGHTS :

Many rights enshrined in the Covenant on Civil and Political Rights have been recognized specially in the Indian Constitution as 'Fundamental Rights'. The Covenant on Civil and Political Rights consists of 53 Articles and is divided into six parts – while in Parts I, II and III, various rights and freedoms are enumerated, the other three Parts are devoted with implementation procedures for effective realization of these Rights along with the final clauses.

Substantive Rights : Part III deals with specific Rights of the individual and the obligation of the States Parties.

The States Parties to the present Covenant, undertake to ensure the equal right of men and women to the enjoyment of all Civil and Political rights set forth in the present Covenant. [Article 3]. Following are the substantive rights –

- 1) Right to life [Article 6].
- 2) Freedom from slavery, servitude and forced labour [Article 8].
- 3) Right to liberty and security [Article 9].
- 4) Right to fair trial [Article 14].
- 5) Right to recognition as a person before the law. [Article 16].
- 6) Right to marry and form a family [Article 23].
- 7) Right of the child [Article 24].
- 8) Equality before the law [Article 26].
- 9) Rights of minorities [Article 27].

The above rights set in the Covenant are not absolute, and are subject to certain limitation –

COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS :

The International Covenant on Economic, Social and Cultural Rights is consisted of 31 Articles which are divided in five Parts.

Part I deals with the Rights of people to self-determination as provided in Article 1 of the Covenant on Civil and Political Rights.

Other rights are enumerated in Part III of the Covenant, which include the following Rights :-

- 1) Right to work [Article 6].
- 2) Right to just and favourable conditions of work [Article 7].
- 3) Right to form and join trade union [Article 8].
- 4) Right to social security [Article 9].
- 5) Rights relating to motherhood and childhood, marriage and family [Article 10].
- 6) Right to physical and mental health. [Article 12].

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION

AGAINST WOMEN :

[CEDAW] :

Convention on Elimination of Discrimination Against Women [CEDAW], adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a Preamble and 30 Articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Convention came into force in 1981 presently the Convention has 163 States Parties.

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the Political, Economic, Social, Cultural, Civil or any other field."

Principles to condemn Discrimination Against Women :-

By accepting the Convention, States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake :

- g) To embody the principle of the equality of men and women in their national Constitutions or other appropriate Legislations if not yet incorporated therein, and to ensure, through law and other appropriate means, the practical realization of this principle;
- h) To adopt appropriate legislative and other measures, including sanction wherever appropriate, prohibiting all discrimination against women;
- i) To establish legal protection of the rights of women on an equal basis with men, and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;
- j) To refrain from engaging in any act or practice of discrimination against women, and to ensure that public authorities and institutions shall act in conformity with this obligation;
- k) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- l) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- m) To repeal all national penal provisions which constitute discrimination against women.

Thus, the Convention is the only human rights treaty, which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the

household work. Motherhood was universally respected and the devotion of Indian woman to her husband, children and home was proverbial.

The attitude, behavior and living pattern of Hindu society changed drastically during the British regime due to education and western impact on the socio-cultural life of India. The most important event after independence has been the drafting of the Constitution of India, enshrining the principles of equality, liberty and social justice. The framers of the Constitution were aware of the sociology of the problem of emancipation of the female sex. They realized that equality was important for the development of the Nation. It was evident in order to eliminate inequality and to provide opportunities for the exercise of human rights. It was necessary to promote education and economic interests of women. It became the objective of the State to protect women from exploitation and provide social justice. All these ideas were enshrined in the Preamble of the Constitution of India.

The Preamble of the Constitution of India resolved to secure to all citizens – Justice : social, economic and political; Liberty – of thought, expression, belief, faith and worship; Equality – of status and opportunity; and to promote amongst them – fraternity assuring the dignity of an individual and the unity of the Nation. To attain these objectives, the Constitution of India guarantees certain Fundamental Rights and Freedom, such as, freedom of speech and expression, protection of life and personal liberty. Indian women were beneficiaries of these rights in the same manner on the basis, *inter alia* of sex.

Pursuant to the request by the United Nations General Assembly to prepare a report on the status of women in India, a Committee on the Status of Women in India (CSWI) was constituted in the year 1971. The Committee submitted its Report entitled "Towards Equality", the Report has been a landmark in the social history of India heralding a conscious change in attitudes, behavior, law establishment of special institutions and creating both, infrastructure, and environment for equality for women.

CONSTITUTIONAL Provisions to safeguard women's interests :

Question (2) :

★ Dec 2017 Nov 2015 April 2013

Discuss the Constitutional provisions for the benefit of the women and explain how does it safeguard the interests and rights of women.

OR

Discuss the provisions with respect to the protection against discrimination of women guaranteed under the Constitution of India.

Answer :

The provisions regarding women in the Constitution of India are contained in Articles 14, 15 (1), 15 (3), 16 (1), 16 (3), 23, 24, 39 (D), 42, 51A and 243 (T). They are as under –

Article 14 : Equality before law :

"The State shall not deny to any person, equality before the law or the equal protection of the laws within the territory of India".

Article 15 : Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth :

- 1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- 2) Nothing in this Article shall prevent the State from making any special provision for women and children.

Article 16 : Equality of opportunity in matters of public employment :

- 1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- 2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against, in respect of any employment or office under the State.
- 3) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory, prior to such employment or appointment.
- 4) Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
- 4-A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
- 5) Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof, shall be a person professing a particular religion or belonging to a particular denomination.

Article 23 & 24 : Prohibition of traffic in human beings and forced labour :

- 1) Traffic in human beings and beggar, are similar forms of forced labour, are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
- 2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service, the State shall not make any discrimination on ground only of religion, race, caste or class or any of them.

Article 39 : Certain principles of policy to be followed by the State :

- The State shall, in particular, direct its policy towards securing that
- a) the citizen, men and women equally, have the right to an adequate means of livelihood;
 - b) there is equal pay for equal work, for both, men and women
 - c) the health and strength of workers, men and women, and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 42 : Provision for just and humane conditions of work and maternity relief :

The State shall make provision for securing just and humane conditions of work and for maternity relief.

Dignity of women –

Since women also have the right to life and liberty, they also have the right to be respected and treated as equal citizens. They also have right to lead an honourable and peaceful life.

Article 51A : Fundamental duties :

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.

Article 243 (T) : Reservation of Seats –

The 73rd Constitutional Amendment 1992 has been enacted to give constitutional status to the Panchayat Raj. It seeks to provide democracy of grassroots as it intends to give power to the people. Reservation of seats to women – One third seats are to be reserved for women, whether they are reserved for Scheduled Castes and Scheduled Tribes, respectively, and one third of open seats shall be reserved for women of all castes. It further required that not less than 1/3rd of the total number of offices of Chairpersons in the Panchayat at each level shall be reserved for women. The number of offices reserved shall allotted by rotation to different Panchayat at each level.

Question (3):

Write a short note on :

Need for Uniform Civil Code.

Answer :

The Uniform Civil Code is one of the Directive Principles of the Constitution of India. The wordings of clause 39 were identical to Article 44. Sub-committee has recommended that clause 39 should be drafted in a manner that while the Uniform Code was highly desirable for its citizens, it ought to be made applicable on a voluntary basis.

The main objections were raised against this provision in the Constituent Assembly, viz. that it would impinge upon the fundamental right to freedom of religion guaranteed under Article 25 in the name of culture under Article 29 of the Constitution of India, and secondly, it would be tyrannical to the minorities. While Article 25 guarantees freedom of conscience and religion, the Uniform Civil Code divests religion from personal law and laws governing marriage, succession, inheritance, etc. It must be emphasized that the object of the Uniform Civil Code is not to impinge upon religious liberties.

The idea of a Uniform Civil Code has two aspects – uniformity of law between all the communities, as well as, uniformity within the communities without any discrimination between the rights of men and women. The reply to the second objection was given by Shri K. M. Munshi, the Member of the Drafting Committee in the Constituent Assembly. He said – “Nowhere in the advanced Muslim countries the personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a Civil Code”.

Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of the Constitution, while supporting the need of a Uniform Civil Code, stated – “We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country The only province the civil law has not been able to

invade so far is marriage and succession, etc., and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about the change. He further added that even Muslim Law was not uniformly applied throughout the country till 1935. For instance, the Hindu Law, and not the Shariat Law applied in the matters of Succession in the North West Frontier Provinces. Similarly, in North Malabar, the matriarchal Marumkattayam Law applied to both, Hindus, and Muslims.

However, since the entire issue of a common civil code was politically sensitive, the framers of the Constitution arrived at a compromise by placing it as a Directive Principle of State Policy in Article 44.

Under Article 44, the State is bound by the Constitutional Mandate to secularise and hogenize family laws. The need for Uniform Civil Code is felt for acquiring gender justice, national integration and modernity.

Article 44 requires the State to secure for the citizens a Uniform Civil Code throughout the territory of India.

In a historic Judgement in *Sarla Mudgal v/s. Union of India*, [(1995) 3 SCC 635], the Supreme Court has directed the Prime Minister to take a fresh look at Article 44 which enjoins the State to secure a Uniform Civil Code which according to the Court is imperative for both, protection of the oppressed, and promotion of national unity and integrity. The Court directed the Union Government through the Secretary to Ministry of Law and Justice to file an affidavit by August, 1995 indicating the steps taken and efforts made, by the Government, towards securing a Uniform Civil Code.

The above direction was given by the Court while dealing with case where a Hindu husband married under Hindu Law, after conversion to Islam, without dissolving the first marriage, can solemnize a second marriage. The Court held that such a marriage will be illegal, and the husband can be prosecuted for the offence of bigamy under Section 494 of the Indian Penal Code, 1860.

PROTECTION OF WOMEN AGAINST VIOLENCE :

The violence against women includes sati, dowry, rape, etc. In order to protect women from getting exploited, various Acts have been enacted.

They are as follows :-

I] The Commission of Sati (Prevention) Act, 1987

This Act provides for more effective prevention of ^{Commission} conviction of Sati. This Act prescribes punishments, as under –

Punishments :

- i) Attempt to commit Sati - 1 year imprisonment of fine or both.
- ii) Abatement of Sati – Life imprisonment and fine.
- iii) Glorification of Sati – Imprisonment not less than 1 year up to 7 years, and fine not less than Rs 5000/- up to Rs 30,000/-.

Sati:

Sati system was recognized since the Vedic period. It has its origin in the idea of 'Pativradya' associated with marriage. As per the ideal 'pativradya' popularized by the puranic writers, the wife is expected to be devoted to her husband alone. It implies that, fidelity and modest service to the

husband, are the sole duties and main purposes in her life. As a river merging itself in the ocean, loses its identity, so a wife is supposed to merge her individuality with that of her husband. Her only concern in life, is to provide all services to the husband; Satisfaction of her husband is her sole joy in life. The wife is expected to prove herself as a real "Sati" with all dedication and reverence to her husband.

The ideal of *Pativratya* was stretched too much. It made the wife to be not only attached to the husband as long as he lived, but even after his death, because a "Sati" could never conceive of a second marriage or a second husband. Hence, on the death of the husband, the wife had either to live chastely, renouncing all the joys of life, or to follow her husband by jumping into the funeral pyre. The ideal of *Pativratya* gave rise to and glorified the practice of Sati" or self immolation. With the passing of time, the ideal of *Pativratya* became so deeprooted in the mind of the Hindu woman that immolation became not only customary, but a woman's highest aspiration.

Raja Ram Mohan Roy and the followers of Brahma Samaj worked for the abolition of cruel Sati practice. It was at this time that, Lord William Bentinck studied the matter, and finally, British Government in 1829 passed, "Abolition of Sati Practice, Act, 1829".

In order to take more effective measures to prevent the commission of *Sati* and its glorification, "The Commission of Sati (Prevention) Act, 1987" was passed by the Indian Government.

Definition of 'sati' :

This Act, defines 'Sati' under Section 2 (c) as follows –

"Sati means, the burning or burying alive of :

- i) Any widow along with the body of her deceased husband or any other relative or any article, object or thing associated with the husband or such relative;
- ii) Any woman along with the body of any of her relative, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the woman or otherwise".

The act of attempt to commit Sati has been made punishable under this Act with imprisonment for a term which may extend to six months or with fine or with both (S. 3).

If any person attempts to commit Sati, then whoever abets such attempt, either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine [S. 4 (2)].

In case where a person commits Sati, then whoever abets the commission of such Sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable for fine [S. 4 (1)].

The Act also provides punishment for any act of **glorification of Sati.**

Section 5 of the Act lays down that, "Whoever does any act for the glorification of Sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees, but which may extend to thirty thousand rupees.

Attempt to commit 'sati' :

The act of attempt to commit Sati has been made punishable under this Act with imprisonment for a term which may extend to six months or with fine or with both [S. 3].

If any person attempts to commit Sati, then whoever abets such attempt, either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine [S. 4 (2)].

Abetment of 'sati' :

In case where a person commits Sati, then whoever abets the commission of such Sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable for fine [S. 4 (1)].

Glorification of 'sati' :

The Act also provides punishment for any act of glorification of Sati. Section 5 of the Act lays down that,

“Whoever does any act for the glorification of Sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees, but which may extend to thirty thousand rupees.”

Explain the term 'Sati' –

Like 'self immolation' by a widow either on pyre of her deceased husband or separately – so called custom presumed the act of glory or sacred act, etc. – Role of Raja Ram Mohan Roy – Bengal Sati Regulation Act, 1829 – Tamilnadu Regulation Act of 1830, etc. – Recent incidence in Deoralal village in Rajasthan – attempts to justify and various attempts to construct the Sati temple, etc. Pressure by various women's organizations, activist inside and outside the Parliament, etc. – To prevent this devil – IPC, Section 309 – Attempt to commit suicide, etc. – No deterrent punishment which will set an example – Hence, requirement of special Legislation of 1987, etc.

II] The Commission of Dowry Prohibition Act, 1961 :

Dec 2017 (LA)

Write short notes on :

- a) Dowry.
- b) Dowry Death.

The 'Dowry' is a deep rooted in our society. It started as customary presents with love and affection, but later on it become a social problem.

In order to eliminate this evil practice, the Parliament of India enacted the dowry Prohibition Act 1961

Punishments :

Section 3 of the Act provides for the punishment with :

- i) imprisonment for a term which shall not be less than 5 years, and
- ii) fine which shall not be less than Rs. 15000/-, or
- iii) the amount of the value of such dowry, whichever is more.

Dowry:

“Dowry” means, the payment in cash or kind or both to the bridegroom or bridegroom's guardians by the bride's parents. This custom can be traced to the traditional practice of giving *Stridhan* to the girl at the time of marriage. Thus, all that the bride receives from her parents and marriage-gifts become the “*Stridhana*”, her precious treasure of which, no one, in theory can deprive her. But in practice, it forms a part of the dowry which her husband or in-laws may use or confiscate for their own purpose.

The *Atharvaveda* refers to a royal bride bringing with her a dowry of 100 cows. Draupadi, Subhadra and Uttara also brought with them rich presents of horses, elephants and jewels from their parents.

imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that, the Court may for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than six months”.

Agreement Relating to Dowry Void:

Section 5 of the Act lays down that, any agreement relating to the giving or taking dowry shall be void.

Dowry to be for the Benefit of the Wife or her Heirs:

Section 6 of the Act deals with restoration of dowry.

If any person other than the bride has received the dowry, then that person should transfer the same to bride within three months of marriage if it was received before marriage; If it was received at the time of marriage or after marriage, within three months of the receipt. If that person fails to transfer then, he or she, as the case may be, shall be punishable with imprisonment for minimum period of six months but, not more than two years, and shall also be liable to fine which may extend to ten thousand rupees.

A person who denies a woman her dowry – property, shall be guilty of the offence of criminal breach of trust under Section 406 of the Indian Penal Code, 1860.

In order to prevent dowry deaths, Section 304-B has been inserted in the Indian Penal Code. It is as follows –

Dowry Law may be Amended –

In the wake of growing complaints about the misuse of anti-dowry laws by women, the Law Commission is studying the possibility of making Section 498A of the Indian Penal Code, a bailable offence for the relatives of the husband. Currently, the law mandates that any accused will be arrested and jailed during the pendency of the case.

A consultation paper prepared by the Commission seeking opinions from experts and the general public feels that, “It is pleaded..... that the offence under Section 498A should be made bailable at least with regard to the husband’s relations”. But as far as the husband is concerned, the paper notes that, “there is a sharp divergence of views on it”.

The move comes after the Supreme Court directed the Union Government on two occasions to review these laws following instances of false cases and abysmal conviction rate of 5%, suggesting that most of the cases registered, were not genuine.

According to experts, the idea probably is to protect the in-laws of the women who file complaints under this Section without any evidence of dowry harassment.

Under the Section, offenders, including the husband or his family members are liable for imprisonment without even an investigation. The offence is non-bailable, non-compoundable and cognizable on a complaint made to the police officer by the victim (wife) or by designated relatives. Furthermore, the Section does not include any provision for a compromise.

The Law Commission is examining three aspects : whether it is feasible to a) categorise the offence as bailable; b) allow the complainant to withdraw a complaint in case of a compromise with the court’s permission; and c) should the police retain power to make arrests on their own.

The law Commission has sought opinion in this regard and has put up a list of 14 questions to study what people expect from this law, how to make it effective, and prevent its misuse. [14/8/2011].

S. 304-B “Dowry Death”:

S. 304-B (1) “Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage, and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death”.

Explanation – For the purposes of this sub-section, “dowry” shall have the same meaning as in Section 2 of the “Dowry Prohibition Act, 1961”.

S. 304-B (2) : “Whoever commits dowry death, shall be punished with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life”.

III] The Indian Penal Code, 1860.

Offence of Rape :

Rape is perhaps one of the most serious sexual offences, and is defined by **Section 375** as:-

A man is said to commit ‘rape’ who has sexual intercourse with a woman –

- a) against her will, or
- b) without her consent, or
- c) with her consent obtained by putting her in fear of death or hurt, or with or without her consent when she is under 16 years of age.

Punishment for Rape :

Section 376 provides punishment for various categories of rape :-

- 1) Rigorous imprisonment for not less than 10 years, and life imprisonment and fine for the following persons –
Whoever being a police officer, a public servant, takes advantage of his official position and commits rape.
- 2) Simple imprisonment for not less than 7 years, and life imprisonment and fine in all other cases.

*** Phul Singh v/s. State of Haryana**

The Supreme Court described the offence of rape as “Violation, with violence of the private person of a woman”. However, the Supreme Court reduced the sentence of Phul Singh from 4 years to 2 years on the ground that he was not a habitual offender, and had no vicious antecedents.

*** Gautama v/s. Subaru Chakraborty**

The Supreme Court awarded an interim compensation of Rs, 1000/- to the victim of rape until her charge of rape was decided by the trial court.

Question :

Discuss the need of prohibition of immoral traffic in women, and also discuss the main provisions of the Immoral Traffic in Women Act, 1956.

Answer :

May 2017 ★

★ NOV 2016 LA

IV] The Immoral Traffic (prevention) Act 1956 :

Sexual urge is a natural instinct in both, men, and women. Those who could not have a sex relation with life partner, or an unmarried person, they attempt to get sex satisfaction by illegal means.

This has created a business of prostitution by the prostitute women. This has been in existence from the ancient times. This system was in existence in India by the name of *Devdasi*, *Matangi*, etc. Some people with vested interest, have turned this situation into trade and business and they ran brothel houses.

The reason for this immoral traffic in women, is due to poverty, caste system, caste discrimination, dowry system, overpopulation, unemployment, illiteracy, moral degradation, lure of luxury, unaware of sex diseases, etc. Because of all these reasons, there was need of prevention of immoral traffic of women.

For a long time it has felt that immoral traffic is a great problem of our society. Suggestions regarding this problem have been made to Government by several voluntary organizations working for women, to suppress all forms of traffic in women and exploitation of women.

Thus, the Immoral Traffic Act, 1956 came to be enacted which prohibited any kind of immoral activities against women.

Important provisions of this Act are as follows -

Definition of 'brothel' under Section 2 (a) :

"Brothel includes any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for the purposes of sexual exploitation or abuse or gain of another person or for the mutual gain of two or more prostitutes".

Definition of 'prostitutes' :

The 'prostitutes' is defined as - "The sexual exploitation or abuse of persons for commercial purposes, and the expression 'prostitutes' shall be construed accordingly".

Definition of 'major person' :

Major person is defined as - "a person who has completed the age of 16 years but not completed the age of 18 years.

Definition of 'child' :

Child means a person who has not completed the age of 16 years.

Definition of 'protective home' :

Protective home according to the Act means an institution by whatever name called (being an institution established or licensed as such under Section 21), in which persons, who are in need of care and protection, may be kept under this Act, and where appropriate technically qualified persons, equipment and other facilities have been provided, but does not include -

- (i) A shelter where undertrial may be kept in pursuance of this Act; or
- (ii) A corrective institution.

Other provisions are briefly discussed as under -

Section 3 : Punishment for keeping a brothel or allowing premises to be used as a brothel;

Section 4 : Punishment for living on the earnings of prostitution;

Section 5 : Procuring, inducing, taking person for the sake of prostitution;

Section 6 : Detaining a person in premises where prostitution is carried on;

Section 7 : Prostitution in or in the vicinity of public place;

Section 8 : Seducing or soliciting for the purposes of prostitution;

Section 9 : Seduction of person in custody;

Section 10A : Detention in a corrective institution;

- Section 11 : Notification of address of previously convicted offenders;
- Section 13 : Special Police Officer and Advisory Body;
- Section 14 : Offence to be cognizable;
- Section 15 : Search without warrant;
- Section 16 : Rescue of persons;
- Section 17 : Intermediate custody of persons removed under Section 15 or rescue under Section 16;
- Section 18 : Closure of brothel and eviction of offenders from the premises;
- Section 19 : Application for being kept in protective home provided care and protection by Court;
- Section 20 : Removal of prostitutes from any place;
- Section 21 : Protective homes;
- Section 22 : Trials.

Punishment :-

- Section 3: Provides punishment for keeping brothel or allowing premises to be used as brothel
- Section 4 : Provides punishment for living on the earnings of prostitution.

V] The Pre-Natal Diagnostic Technique (Regulation & Prevention of Misuse) Act, 1994 :

“THE PRE-NATAL DIAGNOSTIC TECHNIQUES

(Regulation and Prevention of Misuse) ACT, 1994”

Question :

Discuss the regulation of pre-natal diagnostic techniques under the Pre-natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994.

OR

Explain the provisions of The Pre-Natal Diagnostic Technique (Regulation & Prevention of Misuse) Act, 1994.

OR

Write a short note on :

Regulation of pre-natal diagnostic techniques.

Answer :

PREAMBLE :

An Act to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations 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; and, for matters connected therewith or incidental thereto.

1) The pre-natal diagnostic techniques can be conducted only for the purpose of detection of any of the following abnormalities –

- a) Abnormalities of the chromosomes.
- a) Any genetic metabolic disease.
- b) Any sex linked genetic disease.
- c) Any congenital anomalies.
- d) Any other abnormalities or disease that may be specified by the Central Supervisory Board.

Pre-natal diagnostic techniques are also permitted under Section 4 (2) of the Act, when a person doing it is satisfied that the following conditions of the pregnant woman are fulfilled.

2) Before conducting pre-natal diagnostic techniques following conditions should be fulfilled –

- a) The age of the pregnant woman, should be above 35 years.
- b) There must be two or more spontaneous abortions or foetal loss by the pregnant woman.
- c) The pregnant woman must have been exposed to terratogenic agents, such as, drugs, radiations, infection or hazardous chemicals.
- d) The pregnant woman have a family history of mental retardation.
- e) The pregnant woman is having any physical deformity, such as, spasticity or any other genetic disease.
- f) Any other condition, as may be specified by the Central Supervisory Board.

3) Any person who is, either a relative or the husband of the pregnant woman, shall not encourage the pregnant woman to undergo the conduct of any pre-natal diagnostic techniques, except for the above-mentioned purposes.

4) The pre-natal diagnostic procedures should not be conducted unless,

- a) The all known side-effects and after-effects of such procedures are explained to the pregnant woman.
- b) A written consent in the language, which the pregnant woman understands, is obtained.
- c) A copy of written consent so obtained, must be given to pregnant woman.

5) When the pre-natal diagnostic procedures are conducted, the sex of the foetus should not be informed either to the pregnant woman or her relatives.

6) The determination of the sex of foetus is prohibited, hence, any person, Genetic Counseling Centre, genetic laboratory or genetic clinic, should not conduct any pre-natal diagnostic techniques for the purpose of determination of sex of the foetus.

These are the Regulations under the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

CHAPTER – I
“PRELIMINARY”
(Sections 1 – 2)

S. 1 : Short title, extent and commencement –

- (1) This Act may be called, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
- (2) It shall extend to the whole of India, except the State of Jammu and Kashmir.
- (3) It shall come into force on such date, as the Central Government may, by notification in the Official Gazette, appoint.

S. 2 : Definitions –

In this Act, unless the context otherwise requires, –

- (a) “**Appropriate Authority**” means, Appropriate Authority appointed under Section 17;
- (b) “**Board**” means, the Central Supervisory Board constituted under Section 7;
- (c) “**Genetic Counselling Centre**” means, an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counseling to patients;
- (d) “**Genetic Clinic**” means, a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures;
- (e) “**Genetic Laboratory**” means, a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test;
- (f) “**gynaecologist**” means, a person who possesses a post-graduate qualification in gynaecology and obstetrics;
- (g) “**medical geneticist**” means, a person who possesses a degree or diploma or certificate in medical genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining –
 - i) any of the medical qualifications recognised under the Indian Medical Council Act, 1956; or
 - ii) a post-graduate degree in biological sciences;
- (h) “**paediatrician**” means, a person who possesses a post-graduate qualification in paediatrics;
- (i) “**pre-natal diagnostic procedures**” means, all gynaecological or obstetrical or medical procedures, such as, ultra-sonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test;
- (j) “**pre-natal diagnostic techniques**” includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;
- (k) “**pre-natal diagnostic test**” means, ultra-sonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;
- (l) “**prescribed**” means prescribed by rules made under this Act;
- (m) “**registered medical practitioner**” means, a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, and whose name has been entered in a State Medical Register;
- (n) “**regulations**” means, regulations framed by the Board under this Act.

CHAPTER – II**“REGULATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS”****(Section 3)****S. 3 : Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics on and from the commencement of this Act –**

- (1) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques;

- (2) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, shall employ or cause to be employed any person who does not possess the prescribed qualifications;
- (3) No medical geneticist, gynaecologist, pediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

CHAPTER – III

“REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES”

(Sections 4 to 6)

उत्पादकीचि

S. 4 : Regulation of pre-natal diagnostic techniques –

On and from commencement of this Act, –

- (1) No place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic, shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);
- (2) No pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely: –
 - i) chromosomal abnormalities;
 - ii) genetic metabolic diseases;
 - iii) haemoglobinopathies;
 - iv) sex-linked genetic diseases;
 - v) congenital anomalies;
 - vi) any other abnormalities or diseases, as may be specified by the Central Supervisory Board;
- (3) No pre-natal diagnostic techniques shall be used or conducted, unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely: –
 - i) age of the pregnant woman is above 35 years;
 - ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
 - iii) the pregnant woman had been exposed to potentially teratogenic agents, such as, drugs, radiation, infection or chemicals;
 - iv) the pregnant woman has a family history of mental retardation, of physical deformities, such as, spasticity or any other genetic disease;
 - v) any other condition as may be specified by the Central Supervisory Board;
- (4) No person, being a relative or the husband of the pregnant woman, shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purpose specified in clause (2).

S. 5 : Written consent of pregnant woman and prohibition of communicating the sex of foetus –

- (1) No person referred to in clause (2) of Section 3, shall conduct pre-natal diagnostic procedures unless –
 - a) he has explained all known side-effects and after-effects of such procedures to the pregnant woman concerned;
 - b) he has obtained in the prescribed form, her written consent to undergo such procedures in the language which she understands; and,
 - c) a copy of her written consent obtained under clause b) is given to the pregnant woman.

- (2) No person conducting pre-natal diagnostic procedures, shall communicate to the pregnant woman concerned or her relatives, the sex of the foetus by words, signs or in any other manner.

S. 6 : Determination of sex prohibited -

On and from the commencement of this Act, -

- a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic, shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultra-sonography, for the purpose of determining the sex of a foetus;
- b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultra-sonography for the purpose of determining the sex of a foetus.

VI] The Medical Termination of Pregnancy Act.

Question :

Write a short note on :

Objects of the Medical Termination of Pregnancy Act.

Answer :

The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago, were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for the mother, as well as, the abortionist and could be punished except where it had to be induced in order to save the life of the mother.

It has been stated that this very strict law has been observed in the breach in a very large number of cases in all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.

In recent years when health services have expanded and hospitals are availed of to the fullest extent by all the classes of society, doctors have often been confronted with gravely ill or dying pregnant woman whose pregnant uterus has been tampered with a view to causing an abortion, and consequently, suffered very severely. This is thus, avoidable wastage of the mother's health, strength, and sometimes, life.

The present Act provides the measures to liberalise certain existing provisions relating to termination of pregnancy which have been conceived to be -

- 1) As a health measure - when there is a danger to the life or risk to physical or mental health of the woman;
- 2) On humanitarian grounds - such as, when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and
- 3) Eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases.

VII] Protection of Women in the work place :

Question :

Write a short note on :

* **Vishaka v/s State of Rajasthan** (AIR 1997, SC 3011) laid down exhaustive guidelines to prevent this harassment.

Held :-

In this case, the Court held that, it is the duty of employer to prevent the sexual harassment within his premises.

A writ was filed by Vishaka, the NGO, working for 'gender equality'. It was filed by way of public interest litigation (PIL) seeking enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Indian Constitution.

The Supreme Court has demonstrated great judicial activism while coming to the rescue of the working women even at the cost of resorting to judicial activism under Article 141 of the Constitution of India.

It is gratifying to note that the broad guidelines laid down in Vishaka were applied by the Bombay High Court in 1998. In the Mrs. Shehnaz Sani case, the High Court speaking through Justice B.N. Shrikrishna, directed the employer of Mrs. Shehnaz Sani, who worked as a ground hostess in Saudi Arabian Airlines, at Bombay, to reinstate her with full backwages for 13 years during which she rendered unemployed due to the wrongful termination of her services by her boss. The first ever Judgement of a High Court on sexual harassment at workplace, has set a new trend in the protection of the human rights to dignity of working women in India.

VIII The Maternity Benefit Act, 1961 :

Question :

Discuss fully the provisions of the Maternity Benefit Act, 1961.

OR

Discuss the right to payment of maternity benefit under the Maternity Benefit Act, 1961.

Answer :

An Act to regulate the employment of women in certain establishments for certain periods before and after child birth, and to provide for maternity benefit and certain other benefits. In order to prevent discrimination against women on the grounds of marriage or maternity, and to ensure their effective right to work, the State shall take appropriate measures:

- a) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- b) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
- c) Payment of maternity benefit in case of death of a woman.
- d) Payment of medical bonus, leave for miscarriage, nursing, etc.

Punishment : Provided by this Act is -

- i) Imprisonment for 3 months, but which may extend to 1 year, and
- ii) With fine not less than Rs. 1000/-, but which may extend to Rs. 5000/-.

Section 5 of the Maternity Benefit Act, 1961 provides right to payment of maternity benefit – which confers the right of maternity benefit on a woman entitled to it. It also casts a corresponding duty on her employer. According to it –

Every woman shall be entitled to, and her employer shall be liable for payment of maternity benefit at the rate of average daily wage for the period of her actual absence, that is to say, the period immediately following that day.

Here, the average daily wage means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rates of wages fixed or revised under the Minimum Wages Act, 1948 or ten rupees, whichever is highest.

But a woman shall not be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than 80 days in the twelve months immediately preceding the date of her expected delivery.

This period of 80 days will be inclusive of the days for which she has been laid-off or was on holidays with wages during the period of twelve months immediately preceding the date of her expected delivery :

However, the qualifying period of 80 days aforesaid, shall not apply to a woman who has immigrated into the State of Assam, and was pregnant at the time of the immigration.

The maximum period for which any woman shall be entitled to maternity benefit shall be 12 weeks of which not more than 6 weeks shall precede the date of her expected delivery. But where a woman dies during this period, the maternity benefit shall be payable only for the days upto and including the day of her death :

Death of mother and child –

Where a woman, having been delivered a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for maternity benefit for that entire period, but if the child also dies during the said period, then, for the days upto and including the date of the death of the child.

Section 6 of the Maternity Benefit Act, 1961 provides –

- (1) Any woman employed in an establishment, and entitled to maternity benefit under the provisions of this Act, may give notice in writing in such form as may be prescribed, to her employer, stating that her maternity benefit and any other amount to which she may nominate in the notice, and that she receives maternity benefit.
- (2) In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery.
- (3) Any woman has not given the notice when she was pregnant, may give such notice as soon as possible after the delivery.
- (4) On receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.
- (5) The amount of maternity benefit for the period preceding the date of her expected delivery, shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant, and the amount due for the subsequent period shall be paid by the employer to the woman within 48 hours of production of such proof as may be prescribed that the woman has delivered a child.
- (6) The failure to give notice under this Section, shall not disentitle a woman to maternity benefit or any other amount under this Act. The Inspector may, either of his own motion or on an

application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

Prohibition of dismissal during absence of pregnancy :

Section 12 of the Maternity Benefit Act, 1961 provides that -

- (1) When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.
- (2) The discharge or dismissal of a woman at any time during her pregnancy, if the woman but for such discharge or dismissal, would have been entitled to maternity benefit or medical bonus referred to in Section 8, shall not have the effect of depriving her of the maternity benefit or medical bonus, provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus, or both. However, in these cases, she may be prescribed against the order of deprivation of maternity benefit or medical bonus within 60 days from the date of communication of such order to her, and the decision of the authority on such appeal, whether the woman should or should not be deprived of maternity benefit or medical bonus, or both, shall be final. However, the provisions of Section 12 (2) shall not affect the provisions of Section 12 (1) of the Act.

IX] Indecent Representation of Women (Prohibition) Act, 1986 :

This Act prohibits indecent representation of women through advertisement or in publication, or in writing, paintings, figures or in any other manners and for the matters connected therewith.

Punishments :

First conviction - Imprisonment up to 2 years and fine up to Rs 2000/-;

Second and subsequent conviction - With imprisonment for a term not less than 6 months, but which may extend to 5 years, or a fine not less than Rs 10,000/-, but which may extend to Rs 1,00,000/-

X] The National Commission for Women Act, 1990 :

An act to constitute a National Commission for women and to provide for matters connected therewith, or incidental thereto, was enacted by the Parliament in the forty-first year of the Republic of India. The Central Government shall constitute a body to be known as "National Commission for Women" to exercise the powers conferred on, and to perform the functions assigned to it under this Act.

Human Rights of Women :

- i) Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of Governments.
- ii) Governments must not only refrain from violating the human rights of all women, but must work actively to promote and protect these rights. Recognition of the importance of the human rights of women, is reflected in the fact that three quarters of the State Members of the United Nations have become parties to the Convention on the Elimination of all Forms of Discrimination against women.
- iii) The World Conference on Human Rights, reaffirmed clearly that the human rights of women throughout the life cycle, are an inalienable, integral and indivisible part of universal human rights.

Conclusion : -

The term “violence against women” means, any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty either occurring in public or in private life, which have led to domination over and discrimination against women by men, and to the prevention of the full advancement of women.

Some groups of women, belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women in institutions or in detention, female children, etc. are especially vulnerable to violence. Affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, many provisions or Sections are made in IPC relating the offences related to women by which they are respected and protected. For example :- Offences relating to marriage, Criminal elopement of a woman, etc. Section 125 of Cr. P.C – maintenance to wife, etc.

In short, CEDAW establishes Women’s Right to Non-Discrimination on the basis of sex, and affirms equality in international law. It provides that, women and men are entitled to the equal enjoyment, human rights and fundamental freedoms in civil, cultural, economic, political and social fields.

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THE NATIONAL COMMISSION FOR WOMEN

(2001/03-2)

Question : Discuss fully the provisions of the National Commission for Women.
Answer :

“The National Commission For Women Act, 1990”
[No. 20 of 1990]

An Act to consolidate a National Commission for Women and to provide for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Forty-first Year of the Republic of India as follows : -

CHAPTER : I

PRELIMINARY
(Sections 1 - 2)

1. **Short title, extent and commencement** – 1) This Act may be called the National Commission For Women Act, 1990. 2) It extends to the whole of India except the State of Jammu and Kashmir. 3) It shall come into force on such date as the Central Government may by notification in the Official Gazette, appoint.
2. **Definitions** – In this Act, unless the context otherwise requires –
 - a) ‘**Commission**’ means, the National Commission for Women constituted under Section 3.
 - b) ‘**Member**’ means, a member of the Commission and includes the Member-Secretary.
 - c) ‘**Prescribed**’ means, prescribed by rules made under this Act.

May 2017

CHAPTER : II

THE NATIONAL COMMISSION FOR WOMEN
(Section 3 - 9)

3. **Constitution of the National Commission for Women**
 - 1) The Central Government shall constitute a body be know as the National Commission for Women to exercise the powers conferred on, and to perform the function assigned to, it under this Act.
 - 2) The Commission shall consist of –
 - a) a Chairperson committed to the cause of women, to be nominated by the Central Government;
 - b) five Members to be nominated by the Central Government from amongst persons of ability integrity and standing who have had experience in law or legislation, trade unionism, management of an industry or Organisation committed to increasing the employment potential of women, women’s voluntary organisations (including women activists) administration, economic development, health, education or social welfare: Provided that at least one Member each shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes respectively;
 - c) a Member-Secretary to be nominated by the Central Government, who shall be –
 - i) an expert in the field of management, organisational structure or sociological movement, or

ii) An officer who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union with appropriate experience.

4. Term of office and conditions of service of Chairperson and Members –

- 1) The Chairperson and every Member shall hold office for such period not exceeding three years as may be specified by the Central Government this behalf.
- 2) The Chairperson or a Member (other than the Member-Secretary who is a member of a civil service in the Union or of an all-India service or holds a civil post under the Union) may, by writing and addressed to the Central Government, resign from the office of Chairperson or, as the case may be, of the Member at any time.
- 3) The Central Government shall remove a person from the office of Chairperson or a Member referred in sub-section (2) if that person –
 - a) becomes an undischarged insolvent;
 - b) gets convicted and sentenced to imprisonment for an offence which in the opinion of the Central Government involves moral turpitude;
 - c) becomes of unsound mind and stands so declared by a competent court;
 - d) refuses to act or becomes incapable of acting;
 - e) is, without obtaining leave of absence from the Commission, absent from three consecutive meetings of the Commission; or
 - f) in the opinion of the Central Government, has so abused the position of Chairperson or Member as to render that person's continuance in office detrimental to the public interest Provided that no person shall be removed under this clause until that person has been given a reasonable opportunity of being heard in the matter.
- 4) A vacancy caused under sub-section (2) or otherwise shall be filled by fresh nomination.
- 5) The salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and Members shall be such as may be prescribed.

5. Officers and other employees of the Commission –

- 1) The Central Government shall provide the Commission with such officers and employees as may be necessary for the efficient performance of the function of the Commission under this Act.
- 2) The salaries and allowances payable to, and the other terms and conditions of service of the officer and other employees appointed for the purpose of the Commission shall be such as may be prescribed.

6. Salaries and allowances to be paid out of grants –

The salaries and allowances payable to the Chairperson Members and the administrative expenses including salaries, allowances and pensions payable the officers and other employees referred to in section 5, shall be paid out of the grants referred to the sub-section (1) of section 5.

7. Vacancies, etc., not to invalidate proceedings of the Commission –

No act or proceeding of the Commission shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Commission.

8. Committees of the Commission –

- 1) The Commissioner may appoint such committees as may be necessary dealing with such special issues as may be taken up the Commission from time to time.
- 2) The Commission shall have the power to co-opt as members of any committee appointed under sub-section such number of persons, who are not Members of the Commission, as it may think fit and the persons so co-opt shall have the right to attend the meetings of the committee and take part in its proceedings but shall not have the to vote.
- 3) The persons so co-opted shall be entitled to receive such allowances for attending the meetings of the com as may be prescribed.

9. Procedure to be regulated by the Commission -

- 1) The Commission or a committee thereof shall meet as and when necessary and shall meet at such time and place as the Chairperson may think fit.
- 2) The Commission shall regulate its own procedure and the procedure of the Committees thereof.
- 3) All orders and decisions of the Commission shall be authorised by the Member-Secretary or any other officer of the Commission duly authorised by the Member-Secretary in this behalf.

CHAPTER : III

FUNCTIONS OF THE COMMISSION

(Section 10)

10. Functions of the Commission -

- 1) The Commission shall perform all or any of the following functions, namely, -
 - a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;
 - b) present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
 - c) make in such reports, recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any State;
 - d) review, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations;
 - e) take up the cases of violation of the provisions of the constitution and of other laws relating to women with the appropriate authorities;
 - f) look into complaints and take *suo moto* notice of matters relating to -
 - (i) deprivation of women's rights;
 - (ii) non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;
 - (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities;
 - g) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal;
 - h) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all-spheres and identify factors responsible for impending their

advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity;

- i) participate and advise on the planning process of socioeconomic development of women;
- j) evaluate the process of the development of women;
- k) inspect or cause to be inspected a jail, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action, if found necessary;
- l) fund litigation involving issues affecting a large body of women;
- m) make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil;
- n) any other matter which may be referred to it by Central Government.

2) The Central Government shall cause all the reports referred to in clause b) of sub-section 1, to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

3) Where any such report or any part thereof relates to any matter with which any State Government is concerned the Commission shall forward a copy of such report or part to such State Government who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

4) The Commission shall, while investigating any matter referred to in clause (a) or sub-clause (i) of clause sub-section 1), have all the powers of a Civil Court trying a suit and, in particular in respect of the following matter namely,

- a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;
- b) requiring the discovery and production of any document;
- c) receiving evidence on affidavits;
- d) requisitioning any public record or copy thereof from any court or office;
- e) issuing commissions for the examination of witnesses and documents; and,
- f) any other matter which may be prescribed.

Law relating to minors and women under the Indian Contract Act, 1872 :

Who is a Minor ? :

Minor is a person who has not attained the age of majority. In other words, minor is a person who has not completed 18 years of his or her age, except -

- 1) when the guardian of a minor's property or person, is appointed by the Court or,
- 2) when the minor's property is taken over by the Court of Wards for management. In both these cases, the age of majority is 21 years.

"AGREEMENT BY MINORS":

Law relating to an agreement by a minor (some important points) :

i) An agreement by minor is void:

Under Section 11, a minor is not competent to contract, because, the minor has no capacity to enter into contract. Therefore, a contract by or with minor is, *void ab-initio*.

Leading Case Law:

Mohari Bibee v/s. Dharmodas Ghosh-

In this case, the Privy Council made a categorical declaration that, a minor's agreement under Indian Law is absolutely void, and the minor cannot ratify the contract on attaining the age of majority.

Facts of the case:

The minor in this case, had executed a mortgage of his immovable property for the amount of Rs.20,000/-. Out of this amount the mortgagee had paid the minor only Rs.8000/-. The minor consequently, filed a suit to recover remaining Rs.12,000/-. The mortgagee refused to pay and demanded a refund of the amount of Rs.8000/- paid by him to the minor.

It was held by Privy Council that, the minor's contract was absolutely void, and therefore, the question of the refund of amount of mortgage money, did not arise.

ii) A minor can become a promisee or a beneficiary :

A minor cannot bind himself by a contract, but he can make the other party to contract to be bound to him under the contract. A minor can become a promisee or a payee or endorsee of a negotiable instrument or transferee of the property, provided that, the contract imposes no obligation on him. That is to say, he can derive a benefit under a contract, but no obligation can be enforced against him.

A promissory note executed in favour of a minor, is enforceable.

iii) A minor's contract cannot be ratified :

A minor's contract is *void ab initio* i.e. void from the beginning, and therefore, it cannot be ratified by the minor on attaining the age of majority. An agreement which was *void ab initio*, cannot be validated by subsequent ratification.

iv) A minor is not liable personally for necessaries :

If minor is supplied with the necessaries suited to his condition in life, by any one who is legally bound to support, in such case, the minor is not personally liable for the supply of necessaries, but the minor's property is liable for necessaries. That means, the person who supplies such necessaries, is entitled to be reimbursed from the property of such minor.

v) Liability of a minor in tort:

An infant or a minor can be held liable independent of contract.

Burnard v/s. Haggis, 1873 England Reporter

A, an infant, hired a horse from B, expressly for the purpose of lending it to his friend who jumped it a lot for a long time.

In this case, it was rightly held that, though the contract was void, A is liable for damages caused to B for the tort of negligence.

The general principle is that, if a tort is done in the same transaction, the minor is not liable in tort but in contract. Hence, minor is held liable in the above case.

vi) There can be no estoppel against a minor

The rule of *estoppel* means, if a person by words or conduct (expressly or impliedly) induces another person to believe that certain state of thing exists and he (the person so induced) is prevented) from denying the existence of that thing. Hence, a minor cannot be estopped from pleading his minority. If a minor falsely represents or misrepresents himself to another person to enter into a contract with him, he can avoid the contract.

Therefore, the settled law on this point is that, a contract entered into by a minor is void *ab initio* i.e. totally void or void from the beginning). Even if a minor borrows money by falsely representing that he has attained the age of majority, he cannot plead his minority as a defence. In such a case, a minor cannot be held liable in contract or for tort. The good reason of the law is, the injured party should not be held liable for enforcing a void contract.

The following Case is an illustration of the abovesaid point:

Leslie v/s. Sheill (1914) :

This case relates to the liability of a minor for his false fraudulent representation. In this case, a minor Sheill borrowed 400 Pounds from Leslie, a money lender, by falsely representing that he was of the full age i.e. he was of age of majority. Leslie, the money lender, could not recover 400 Pounds from the minor, as the contract was void *ab initio*, and minor can plead his minority as a defence, or in other words, he can avoid the contract by pleading minority as a defence.

vii) There can be no specific performance of minor's contract

A minor is not competent to enter into contract. In other words, the contract entered into by a minor is void from the beginning. Therefore, the contract cannot be specifically performed. Therefore, neither the minor, nor the other party to the contract can sue for specific performance of a minor's agreement.

viii) A minor can be admitted to benefits of Partnership:

A minor cannot enter into a contract of partnership, and cannot become a partner in a firm, however, he can be admitted to the benefits of the partnership with other partners. He can enjoy the profits of the firm, but he will not be held liable for the debts of the firm.

ix) A minor can be appointed as an agent :

A minor can become an agent. A minor as an agent, can bind the principal by act done by him on behalf of the principal. But, such a minor agent is not personally liable or responsible.

x) A minor can hold property :

A minor has a right to hold property, and can have an interest in the property. Therefore, a transfer of property or mortgage made in favour of a minor is valid.

Pardanishin Woman :

A pardanishin woman is one, who by the custom of the country or by the usages of particular community, does not appear in public and observes the custom of parda. That means, a complete seclusion from contact with people outside her own family. But a woman cannot be regarded as a "Pardanishin Woman", if she is not known to live in complete seclusion, if she has business or other dealings with outsiders or she can give evidence in the court of law.

Special Protection to the Prdanishin woman:

The law extends a special protection on "Pardanishin Woman" for the reason that, they are easily exposed to, or they are easily susceptible to undue influence. The courts are required to be satisfied by the party entering into contract with "Pardanishin woman" that, **i)** the terms of contract or conditions were explained to her, and such terms and conditions were understood by her; **ii)** that she had full knowledge of the nature, effect and extent of transaction; **iii)** she had independent and free legal advice in the matter; **iv)** the bargain must be fair.

If the court is not satisfied about the four requirements stated above, the court will set aside the bargain on the ground of undue influence.

Criminal Law relating to Children and Women under the I.P.C., 1860 :**Acts of children (Infancy as a defence) -**

Sections 82 and 83 deal with cases of "non-mentality due to immaturity".

S.82: Act of a child under seven years of age:

"Nothing is an offence, which is done by a child under seven years of age".

Children of tender age must be protected from penal liability of their acts. Tender age is a natural disability of distinguishing between good and evil. There is a presumption under the law that, they are "*doli incapax*", meaning incapable of distinguishing good and evil. Therefore, children under seven years of age, cannot be held guilty.

Coke and *Hawkins* observed: "Infancy is the defect of understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever". S.82 provides an absolute immunity from criminal liability. Therefore, if the accused is proved to be the child under seven years of age, then by the proof of that fact itself i.e. *ipso facto*, it can be an answer to the prosecution.

S.83: Act of a child above 7 and under 12 of immature understanding:

"Nothing is an offence, which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion".

What is required under S.83 is that, the child should not know the nature and physical consequences of his conduct. In this connection, there is a maxim "*malitia supplet octatam*" which means, the circumstances of a case may disclose the malice. For example: Eleven years accused boy picked up a knife and threatened the man that he would cut him to pieces, and did actually cut him. In the present circumstances, the only inference that can be drawn is that, he did what he intended to do and he also knew that the blow inflicted with knife would effectuate his intention. So, his malicious intention is proved by the circumstances of the case, therefore, he was held liable, and was sentenced to Reformatory School for five years: *Ulla Mahapatra*, (1950) Cuttuck 293.

Legal provisions under S.82 and 83: (summary):-

- a) Child under 7 years = Not liable;
- b) Child between 7&12 years = i) Liable if he is of mature understanding;
ii) Not liable if he is not of mature understanding;
- c) Child above 12 years = Liable.

Dowry death – S.304-B:

1) "Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage, and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death".

Explanation: For the purposes of this sub-section, “dowry” shall have the same meaning as in S.2 of the Dowry Prohibition Act, 1961.

2) *“Whoever commits dowry death, shall be punished with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life”.*

Ingredients of the offence of dowry death:

- 1) the death of a woman 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.

S. 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 five years, and shall also be liable to fine.

The Criminal Law (Amendment) Act, 2013 :

The following Sections 354A, 354B, 354C, and Section 354D have been inserted by the above Criminal Law (Amendment) Act, 2013.

S. 354A : Sexual harassment and punishment for sexual harassment :

- (1) A man committing any of the following acts –
 - (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
 - (ii) a demand or request for sexual favours; or
 - (iii) showing pornography against the will of a woman; or
 - (iv) making sexually coloured remarks,Shall be guilty of the offence of sexual harassment.
- (2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
- (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

S. 354B : Assault or use of criminal force to woman with intent to disrobe :

- (4) Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

S. 354C : Voyeurism :

Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first

conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1. – For the purpose of this Section, “private act” includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim’s genitals, posterior or breasts are exposed or covered only in underwear, or the victim is using lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2. – Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this Section.

S. 354D : Stalking :

(1) Any man who –

(i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication or disinterest by such woman; or

(ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking :

Provided that such conduct shall not amount to stalking if the man who pursued it proves that –

(i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Aggravated forms of assault or criminal force and their punishments:

i. Assault or use of criminal force to deter or prevent a public servant from discharging his duty: Imprisonment upto 2 years, or with fine, or with both (S.353). (*Amendment is suggested by the State Govt. of Maharashtra to enhance punishment, still awaiting Centre's nod.*)

ii. Assault or use of criminal force to woman with intention or knowledge to outrage her modesty: Imprisonment upto 5 years, and shall also be liable to fine. (S.354).

iii. Assault or use of criminal force with intent to dishonour a person: Imprisonment upto 2 years, or with fine, or with both (S.355).

iv. Assault or use of criminal force in attempting to commit theft of which that person is wearing or carrying: Imprisonment upto 2 years, or with fine, or with both (S.356).

v. Assault or use of criminal force in attempting to wrongfully confine a person: Imprisonment upto 1 year, or with fine upto Rs.1000, or with both (S.357).

vi. Assault or use of criminal force on grave and sudden provocation given by that person: simple imprisonment upto 1 month, or with fine upto Rs.200, or with both (S.358).

“Kidnapping”:

(S.359-361, 363, 363-A).

The word kidnapping is derived from the word kid (child) + nab (steal). Therefore, kidnapping generally means child stealing or taking away a child. But the word kidnapping is not used in the same sense u/s. 360 which defines the offence of ‘kidnapping from India’. Under this Section, the offence of kidnapping from India can be committed in respect of grown up person also.

S.359 says that:

“Kidnapping’ is of two kinds:

- i) Kidnapping from India, and
- ii) Kidnapping from lawful guardianship”

S.360 defines “Kidnapping from India”

“Kidnapping from India”:

“Whoever –

- i) conveys
 - ii) any person
 - iii) beyond the limits of India
 - iv) without the consent of that person, or of some person legally authorised to consent on behalf of that person,
- is said to kidnap that person from India”.

Ingredients:

- i) A person must be conveyed beyond the limits of India;
- ii) A person must be so conveyed without his consent.

‘convey’ –

The word ‘convey’ means to take or carry away a person.

‘any person’ –

The offence of kidnapping from India can be committed in respect of any person male or female, sound or unsound, minor or major, Indian or foreigner.

‘beyond the limits of India’ –

Means, outside the territorial limits of India. Therefore, the moment frontier line of India (boundary of India) is crossed, the offence is complete. The victim need not be taken to the destination intended by the offender.

‘without the consent.....’ –

If the person kidnapped is above 16 years in case of male, and above 18 years in case of a female and has given consent to his conveying beyond the limits of India, this offence is not committed. But the consent given should not be such as defined in S.90 of the I.P.C., therefore, consent given

- i) by a person under fear of injury,
- ii) by a person under misconception of fact,
- iii) by a person of unsound mind,
- iv) by a person who is intoxicated,
- v) by a person under 12 years of age is no consent.

Case Law:

Regina v/s. Periaswami Kangani, (II Cr.4 J. 368) – In this case, the accused Periaswami induced certain women from India to leave India and come along him to Ceylon (in Sri Lanka) by telling that, they would be married to his sons in Ceylon. They gave their consent and went with him to Ceylon. But he made them work as coolies on a tea estate in Ceylon. The court held that, the consent given by them was given under misconception of the fact, and therefore, accused was guilty of kidnapping from India.

“Kidnapping from lawful guardianship”:

S.361 defines ‘Kidnapping from lawful guardianship’:

“Whoever,

- i) takes or entices
 - ii) any minor under 16 years of age if a male, or under 18 years of age if a female, or any person of unsound mind,
 - iii) out of the keeping of the lawful guardian of such minor or person of unsound mind,
 - iv) without the consent of such guardian,
- is said to kidnap such minor or person from lawful guardianship”.

Explanation:

“The words ‘lawful guardian’ in this Section, include any person lawfully entrusted with the care or custody of such minor or other person”.

Exception:

“This Section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purposed”.

The object of this Section is two fold:

- a) to protect the children or unsound persons, and
 - b) to protect the rights of parents and guardians to keep their wards under their care and custody.
- But the more important object of the offence under this Section and other cognate sections undoubtedly is to afford security and protection to the wards themselves.

‘takes or entices any minor’ –

To take means, to cause to go, to escort, to accept, to receive, to remove, or to get into possession. Taking of a minor need not be by force. It is immaterial whether the minor consents or not. Enticing is one of the modes of taking the minor. To entice means to allure, or to excite hope or desire. A person who shows a chocolate, ice-cream or attractive toy to a child and thereby causes that boy (minor) to follow him, is said to have enticed the minor. The moment accused actually takes a child from lawful guardianship, the offence is complete. To what distance a minor is taken away is immaterial.

Case Law:

Varadarajan v/s. State of Madras, (AIR 1965 SC 942) –

In this case, a minor girl Savitri aged 17 years was kept at her uncle’s house by her own father, in order to prevent her from talking on telephone with her boyfriend Varadarajan. However, she left her uncle’s house on her own and from outside she telephoned Varadarajan asking him to come at a

particular place. Thereafter, both of them went to different places and stayed there. Varadarajan was prosecuted for the offence of kidnapping from lawful guardianship. The Supreme Court observed that Varadarajan has 'allowed a minor girl to accompany him'. Therefore, he cannot be said to have taken her away or enticed her in any way. Hence, Supreme Court acquitted Varadarajan.

'any minor.....' -

If the age of a boy or girl is proved to be below 16 or 18 years, the accused can be held liable. He cannot defend himself by saying that,

- a) he did not know the girl to be below the age of majority, or
- b) the girl physically appeared to be quite major and therefore, was honestly misled the accused, or
- c) the girl herself has overstated her age to the accused, is no defence.

Any person who deals with such a minor girl, does so at his own peril, and if she turns out to be below 18 he can be liable for this offence though he bon-fide believed and had sufficient reason to believe that she was above 18 years of age.

Case Law:

Regina v/s. Prince, (1875) -

In this case, Prince the accused took Philips a girl Annie of 14 years of age out of the possession and against the will of her father. Annie told him that she was of 18 years of age and in fact she appeared to be so. Therefore, his defence was that he *bonafide* believed on her statement. This defence was not granted and he was held guilty for kidnapping out of the keeping of lawful guardianship.

'out of the keeping of the lawful guardian' -

It is not necessary that the child should be in the physical possession or physical custody of the guardian. The word 'keeping' is of wide import than the word 'possession'. The word 'keeping' means, not only physical possession of the guardian, but it also implies maintenance, protection and control over the minor. So, even if the minor who goes out of the house, goes to the play-ground, school, market or street, such a minor is deemed to be in the keeping of the lawful guardian.

'lawful guardian' -

The term 'lawful guardian' and 'legal guardian' are different. The parents of the minor are 'legal guardians'. But the term 'lawful guardian' is wider than 'legal guardian'. The term 'lawful guardian' includes - a) Legal guardian, b) Natural guardian, c) Testamentary guardian, d) Guardian appointed by the Court, e) Any person lawfully entrusted with the care and custody of the minor. Therefore, a school master or principal, warden of the orphanage or hostel, any relative, neighbour, friend who is lawfully (by the consent of the parent) entrusted with care and custody of the minor, is also a 'lawful guardian' (see Explanation to S.361).

'without consent of such guardian' -

The consent of the minor is immaterial. The minor must be taken without the consent of the lawful guardian. The consent given by the guardian after the commission of an offence, is not a legal consent, therefore, it will not be taken into consideration.

Difference between 'kidnapping from India' and 'kidnapping from the lawful guardianship' -

	Kidnapping from India	Kidnapping from the lawful guardianship
1.	Offence can be committed in respect of the person of any age.	1. This offence can be committed in respect of a girl below 18, a boy below 16, and a lunatic person.

2.	If the consent is given by the person concerned, this offence is not committed.	2.The consent of the person kidnapped is immaterial.
3.	The moment Indian frontier line (boundary of India) is crossed, the offence is complete.	3.If the minor or lunatic is actually taken away, the offence is complete.

‘Abduction’ (S.362):

“Whoever –

- i) by force compels, or by any deceitful means induces,
 - ii) any person,
 - iii) to go from any place,
- is said to abduct that person”.

This Section merely defines the word ‘abduction’. It is unlawful taking away a person by force or by fraud. Abduction by itself is not an offence. But abduction with certain intention or unlawful purpose is made punishable u/s. 364 to 369. Therefore, if A tells B that he will serve him a sumptuous lunch and thus, induces B to go alongwith him to the restaurant and leaves B there without serving him a food. A commits no offence, since A’s intention was not unlawful and it does not fall under any of the Sections from Ss.364 to 369.

‘by force compels’ –

The word ‘by force’ connotes the actual force and not merely a threat of force.

‘by any deceitful means’ –

It may be by misleading statements. There may not be any force used, even if a person is misled by the statement used by the accused so to go from one place to another, then the accused can be said to have abducted that person by deceitful means.

If a man gives a promise of marriage to a woman and thus, induces her to leave her house, but does not marry her, he is said to have abducted the woman by deceiving her.

But bare abduction in such cases without requisite intention mentioned u/s. 364 to 369 is not an offence *per se* (is not an offence by itself).

Difference between Kidnapping and Abduction:

Kidnapping	Abduction
1) Kidnapping is committed in respect of a minor person, if male-below 16 years, if female-below 18 years, or a lunatic person of any age. Kidnapping from India can be committed in respect of a person of any age.	1) Abduction can be committed in respect of a person of any age i.e. minor or major.
2) Kidnapping is a substantive offence i.e. Kidnapping itself is an offence, therefore bare kidnapping (without any unlawful intention) amounts to an offence and is made punishable u/s. 363.	2) Abduction is an auxiliary act and not an offence by itself. Therefore, bare abduction, without any unlawful intention does not amount to an offence.
3) In kidnapping from lawful guardianship, a minor or lunatic person must be removed out of the keeping of a lawful guardian.	3) In abduction, there is no question of guardianship. Abduction has reference exclusively to the person abducted. Therefore, an

Therefore, if a minor or lunatic person has no guardian, there is no kidnapping.	abduction can be committed in respect of a person who has no guardian.
4) The means or methods used in kidnapping are immaterial. The minor or lunatic person may be simply taken away without using force i.e. means used may be innocent.	4) In abduction the force, compulsion or deceitful means must be used.
5) In kidnapping, the consent of a minor or a lunatic person is immaterial.	5) In abduction, consent of the person abducted becomes relevant. Therefore, if the person abducted gives consent freely or voluntarily, there is no abduction.
6) In kidnapping, intention of the offender is irrelevant. Even, if the minor or lunatic is taken away for a lawful purpose, still it will amount to kidnapping.	6) In abduction, the intention of the offender is relevant factor. i.e., if the intention is not unlawful it will not amount to abduction.

Aggravated forms of Kidnapping and Abduction:

- a) Kidnapping or Abduction in order to murder = Imprisonment for life, or rigorous imprisonment upto 10 years and fine (S.364).
- b) Kidnapping or Abduction with intent secretly and wrongfully to confine a person = Imprisonment upto 7 years or fine (S.365).
- c) Kidnapping, Abduction or inducing a woman to compel her to marry any person or knowing that she may be forced to illicit intercourse = Imprisonment upto 10 years and fine (S.366).
- d) Kidnapping or Abduction in order to subject that person to grievous hurt, slavery or unnatural lust = Imprisonment upto 10 years and fine (S.367).
- e) Wrongfully concealing or confining a kidnapped person = Same punishment as that of wrongful confinement (S.368).
- f) Kidnapping or Abduction of a child under the age of 10 years with intent to steal movable property from the person of such child = Imprisonment upto 7 years and fine (S.369).

Buying and Selling a slave; Buying and Selling a Minor for Prostitution; and Forced Labour (Ss. 370 to 374):

Buying and Habitually dealing in slaves:
Ss. 370 and 371 makes slavery punishable.

term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

S.371: Habitually buying, selling or disposing, importing, exporting or dealing in slaves: Imprisonment upto 10 years and fine.

Buying and selling minor for the purpose of prostitution:

S.372: Selling, or letting on hire, or disposing a minor under 18 years of age, for the purposes of prostitution, illicit intercourse or for any unlawful and immoral purpose: Imprisonment upto 10 years and fine.

S.373: Buying, hiring, or obtaining possession of a minor under 18 years of age, for the purposes of prostitution, illicit intercourse or for any unlawful and immoral purpose: Imprisonment upto 10 years and fine.

Forced labour:

S.374: Unlawfully compelling any person against the will of that person to labour: Imprisonment upto 1 year, or with fine, or with both.

"Sexual Offences":

(Ss.375 to 377)

Following four sexual offences are discussed under Ss.375 to 377:

- 1) Rape by a man S.375 – Punishment for Rape S.376 (1);
- 2) Rape by a man who is:
 - A) i. Police officer, ii. Public servant, iii. Jail staff, iv. Hospital staff,
 - B) i. Rape on a pregnant woman, ii. Rape on a woman under 12 years of age S.376 (2)
- A) Gang Rape;
- 3) Sexual intercourse not amounting to rape by persons holding different positions, and offices – S.376-A,B,C,D;
- 4) Unnatural Offences – S.377.

The offence of rape u/s.375 and the offence of rape u/s.376 (2) and sexual intercourse not amounting to rape u/s. 376-A to D, can only be committed by a man. The unnatural offence i.e. the carnal intercourse against the order of the nature, can be committed by a man or woman also. For Sections 375, 376, 376A, 376B, 376C and 376D of the Indian Penal Code, the following Sections have been substituted by the Criminal Law (Amendment) 2013 :

“Rape” (S. 375) :

Definition:

“A man is said to commit ‘rape’ if he –

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

Sections 370 and 370A given as under have been added by the Criminal Law (Amendment) Act, 2013 –

S.370 : Trafficking of person :

(1) Whoever, for the purpose of exploitation, (i) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by –
First – using threats, or
Secondly – using force, or any other form of coercion, or
Thirdly – by abduction, or
Fourthly – by practising 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, harboured, 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. – 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.

S. 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.

S.371: Habitually buying, selling or disposing, importing, exporting or dealing in slaves; Imprisonment upto 10 years and fine.

Buying and selling minor for the purpose of prostitution:

S.372: Selling, or letting on hire, or disposing a minor under 18 years of age, for the purposes of prostitution, illicit intercourse or for any unlawful and immoral purpose: Imprisonment upto 10 years and fine.

S.373: Buying, hiring, or obtaining possession of a minor under 18 years of age, for the purposes of prostitution, illicit intercourse or for any unlawful and immoral purpose: Imprisonment upto 10 years and fine.

Forced labour:

S.374: Unlawfully compelling any person against the will of that person to labour: Imprisonment upto 1 year, or with fine, or with both.

"Sexual Offences":

(Ss.375 to 377)

Following four sexual offences are discussed under Ss.375 to 377:

- 1) Rape by a man S.375 – Punishment for Rape S.376 (1);
- 2) Rape by a man who is:
 - A) i. Police officer, ii. Public servant, iii. Jail staff, iv. Hospital staff,
 - B) i. Rape on a pregnant woman, ii. Rape on a woman under 12 years of age S.376 (2)
- A) Gang Rape;
- 3) Sexual intercourse not amounting to rape by persons holding different positions, and offices – S.376-A,B,C,D;
- 4) Unnatural Offences – S.377.

The offence of rape u/s.375 and the offence of rape u/s.376 (2) and sexual intercourse not amounting to rape u/s. 376-A to D, can only be committed by a man. The unnatural offence i.e. the carnal intercourse against the order of the nature, can be committed by a man or woman also.

For Sections 375, 376, 376A, 376B, 376C and 376D of the Indian Penal Code, the following Sections have been substituted by the Criminal Law (Amendment) 2013 :

“Rape” (S. 375) :

Definition:

“A man is said to commit ‘rape’ if he –

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

- (b) inserts, to any extent, any object or 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 or 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 : –

First. – 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.

Seventhly. – When she is unable to communicate consent.

(When a man has sexual intercourse with a woman who is below sixteen years of age, irrespective of whether the act is done with or without her consent, it would constitute the offence of rape. This is called as "Statutory Rape").

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.

Ingredients of the offence of rape:

1) A man must have sexual intercourse with a woman.

2) The sexual intercourse must be committed under any of the circumstances described in clause one to seven of the Section.

'A man is said to commit rape who has..... sexual intercourse with a woman' –

Rape is an act of having sexual intercourse with a woman. S.10 of the Code defines the word 'man' and 'woman'. It says, "The word 'man' denotes a male human being of any age; the word 'woman' denotes a female human being of any age". Any male human being of any age can be held criminally

liable for the offence of rape, subject to the exceptions u/s. 82 and 83 or 84 of the Code. Therefore, the offender may be a male human being above 12 years of age and the victim of the offence may be any female human being of any age.

'against her will' (clause first) –

These words refer to a woman who is fully conscious normal person, who is capable of exercising her own volition or will. Therefore, when she is not willing to have sexual intercourse or strongly opposes sexual intercourse, it is said to be 'against her will'. The term 'against her will' includes 'without her consent' also, when she is unconscious or fast asleep, a man who commits sexual intercourse with her is said to commit it against her will, and therefore, he is guilty of rape. Even after getting up from her sleep the woman gives consent, that subsequent consent shall not be taken into consideration under this clause.

'without her consent' (clause second) –

Mere act of submission does not amount to consent. There must be voluntary participation in the sexual intercourse with due thought. This clause refers to a woman who though does not oppose sexual intercourse, is incapable of knowing the nature of the act of the offender.

If the consent given by the woman is not free, it is 'without her consent. (see S.90 and clause first to fourth of this Section).

In cases where there is no resistance from the woman, the consent can be presumed unless the case falls u/s.90.

Case Law:

Koli Jagu Rane v/s. State of Gujrat, 1992 Cr.L.J. 2080 (Guj.) – In this case, a young girl of 18 years doing labour work was raped by the accused. Sessions Court convicted him of rape. In an appeal before the Gujarat High Court, the Court observed that, since there was no evidence of resistance by her, the accused could not be convicted for rape. Thus, conviction for rape was set aside by the High Court.

Young's Case:

The accused young had sexual intercourse with a woman while she was fast asleep. He was held guilty for committing rape without her consent.

'with her consent, when....she believes herself to be lawfully married' (Clause-4) –

This clause refers to the consent under mistaken belief. This clause deals with the consent obtained by fraud or misconception of facts, for example, when there is no opportunity for a victim woman to identify the accused and she is made to believe that he is her husband. Therefore, a man who induces a married woman to have sexual intercourse with him by impersonating as her husband, he can be held liable for rape under this clause. A man having sexual intercourse with a married woman in the dark by speaking in the style and sound of her husband, and thus, making her believe that he is her husband.

Sixthly – With or without her consent, when she is under eighteen years of age –

In a landmark judgment delivered by the Lucknow bench of the Allahabad High Court [on 1st August, 2009, even before the 2013 Criminal Law Amendment came into force, i.e. at that time the qualifying age was sixteen years] has observed that, the consent of a girl below 18 years for sexual intercourse is invalid, saying that as the girl is not mentally and physically fit to give such consent, it can't be considered out of her will. The court's observations came during the hearing of a criminal appeal filed by a rape convict, who claimed that as a 17 year old had given her consent for physical relations, his conviction for rape was not proper.

The court dismissed his appeal and said : "It's an irony of law that, on one hand, a person below 18 is not considered fit for marriage, but, on the other, a girl of 16 years is considered fit to give her consent for sexual intercourse".

Explanation:

'Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape' –

Generally, in case of sexual intercourse a male organ enters into the private parts of the female to complete the act of the sexual intercourse by discharging the semen. There is complete penetration of the penis with emission of semen and rupture of hymen (maiden-head). However, for the purpose of the offence of rape, under this explanation, following things are necessary –

- 1) The private parts of accused should enter into the vaginal parts of the woman i.e. penetration is necessary to constitute sexual intercourse i.e. male organ had the power of erection.
- 2) It is not necessary that there was complete or full penetration. Even a partial slight penetration in the vulva or labia major of the vulva is sufficient.
- 3) Hymen need not be ruptured.
- 4) Emission of semen is not necessary.

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

'sexual intercourse by man with his own wife...is not rape' –

Can a man commit a rape with his own wife?

Husband cannot be held liable of rape on his wife who is above 15 years of age though she is below 16 years of age. But, if she is below 15 years of age, he can be held liable, because he has no right to his marital right prematurely, or enjoy her person by harming her when she is below 15 years of age.

S.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 a 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; [*convalescence means gradual recovery of health and strength*];
- (c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 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 and children.

Custodial Rape [(S. 376 (2))]:

Custodial rape is a rape in the situations referred to in sub-section (2) (a) to (f) of Section 376 of the I.P.C.

It refers to rape -

- (a) by a police officer commits rape on a woman within the limits of the police station; or in the premises of any station house, where he is appointed; or in his custody or in the custody of a police officer subordinate to him;
- (b) by a public servant commits rape on a woman in his custody or in the custody of a public servant subordinate to him;
- (c) by member of the armed forces deployed in an area by the Central or a State Government commits rape in such area;
- (d) by a person 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;
- (e) by a person on the management or on the staff of a hospital, commits rape on a woman in that hospital;

- (f) by a person who is a relative, guardian or teacher of, or by a person in a position of trust or authority towards the woman, commits rape on such woman.

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 a 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; [*convalescence means gradual recovery of health and strength*];
- (c) “police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 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 and children.

The punishment prescribed for the custodial rape under Section 376 (2) above is rigorous imprisonment for a term which shall not be less than 10 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.

In cases of custodial rape, since it is almost impossible to get any other independent evidence to corroborate the testimony of the victim, Section 114A was inserted into the Indian Evidence Act, whereby the onus of proof is shifted from the prosecution on to the defence by laying down that in cases of custodial rape, absence of consent of the woman shall be presumed.

S. 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.

S. 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.

S. 376C. : Sexual intercourse by a person in authority :

Whoever, being –

- (g) in a position of authority or in a fiduciary relationship; or
- (h) a public servant; or

- (i) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- (j) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1 : In this Section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

Explanation 2 : For the purposes of this Section, Explanation 1 to Section 375 shall also be applicable.

Explanation 3 : "Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4 : The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of Section 376.

[S. 376D] : Gang Rape :

Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine :

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim :

Provided further that any fine imposed under this Section shall be paid to the victim.

"Gang Rape" :

When a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape. Gang Rape is an offence of Rape primarily; But it is committed by number of persons together with their common intention to do the same. The Court can take a serious cognisance of the same while considering the quantum of punishment for the offence. Maximum punishment of life imprisonment can be awarded to all the offenders involved in such a heinous crime, as it adversely affects the victim in body and mind. Such an offence has great health and psychological impact on a victim and her relations too. Also, such an offence creates great sensations and uproar in the entire society.

S. 376E : Punishment for repeat offenders :

Whoever has been previously convicted of an offence punishable under Section 376 or Section 376A or Section 376D and is subsequently convicted of an offence punishable under any of the said Sections, shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

"Sexual Offences":
(Ss.375 to 377)

Question : Write short notes on :

- a) Adultery.
- b) Distinction between Adultery and rape.

Question : Discuss fully 'Adultery' under Section 497 of the Indian Penal Code, 1860.

OR

Write a short note on :
Distinction between Adultery and Rape.

Answer :

4) **Adultery (S.497):** *★ Dec 17 LA*

Definition:

"Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment or either description for a term which may extend to 5 years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor".

Ingredients:

- 1) **Sexual intercourse** by a married or unmarried man **with a woman** a) **who is married** or b) **man knows** or he has reason to believe **that she is the wife of another man;**
- 2) Such sexual intercourse must be committed **without the consent or connivance of her husband;**
- 3) Such sexual intercourse **must not amount to rape** (i.e. must not fall under S.375).

Important points to be noted in case of adultery:

- 1. This offence is committed by a man alone. Therefore, he alone is liable to punishment, and a woman with whom adultery is committed is not liable to punishment.
- 2. This offence is committed against the husband of that woman, therefore, the husband must be the complainant (husband must complain about the same).
- 3. It is not necessary that the adulterer should know as to who is the husband of that woman. It is sufficient, if the adulterer knows that she is married woman/wife of someone.
- 4. The wife who is the party to the adultery, cannot be punished or cannot be held liable as an abettor. So also, this Section does not allow the wife (of the adulterer) to prosecute her husband for adultery; though she may file a suit for dissolution of her marriage under the personal law to which she is subject.
- 5) Taking or enticing away the wife of another man or detaining such woman with intent that she may have illicit intercourse with any person - S.498 .

Offence of criminal elopement:**Definition:**

"Whoever takes or entices away a woman who is, and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine, or with both".

If Section 361 (kidnapping from lawful guardianship) or Section 366 (kidnapping, abducting or inducing a woman to compel her marriage) of the Penal Code fail to apply in respect of a married woman, this Section can be made applicable. The husband can institute prosecution for the offence of criminal elopement of his wife under this Section, because the husband who is entitled to the custody and control over his wife, is deprived of his right.

Ingredients:

- 1) Taking or enticing away or concealing or detaining the wife of another man, from that man, or from any person (may be her parents) having the care of her on behalf of that man.
- 2) Such taking away, etc. must be done with an intent that she may have illicit intercourse with any person (e.g. with intent to make her prostitute).
- 3) The person taking away, must have the knowledge or reason to believe that the woman is the wife of another man.

6) **Husband or relative of husband of a woman subjecting her to cruelty i.e. mental or physical cruelty with a view to coercing her to bring property or dowry :**

Cruelty for Dowry (S.498-A) :**Definition:**

"Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine".

Explanation:

For the purpose of this Section, cruelty means –

- a) **any wilful conduct** which is of such 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 the 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.

**Hindu Law (relating to Children and Women) of Marriage, Divorce,
Maintenance and Guardianship :**

CHAPTER – III
RESTITUTION OF CONJUGAL RIGHTS
AND
JUDICIAL SEPARATION

S. 9: Restitution of conjugal rights –

When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights, accordingly.

Explanation –

Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

The expression “withdrawal from society” means cessation of cohabitation by a voluntary act of the respondent. It means, withdrawal from conjugal relationship. Such as, refusal to live together, refusal to have marital intercourse and refusal to give company for a long time. In other words, it is total refusal to perform marital obligations necessary for the purpose of marriage. The word “society” means, the same thing as cohabitation. In withdrawal from the society, there is an element of desertion also. Desertion by one spouse of the other, would obviously amount to withdrawal from the society. However, to establish withdrawal from the society, it is not necessary to prove legal desertion (i.e. continuous period of not less than two years – [Section 13 (i) (i-b)]).

S. 10: Judicial separation –

- (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also, on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.
- (2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party, and on being satisfied of the truth of the statements made in such petition rescind the decree if it considers it just and reasonable to do so.

S. 13: Divorce –

- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party –
- (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

- (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (ii) has ceased to be a Hindu by conversion to another religion; or
- (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation -

In this clause, -

- (a) the expression "mental disorder" means, mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression "psychopathic disorder" means, a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of other party and whether or not it required or is susceptible to medical treatment; or
- (iv) has been suffering from a virulent and incurable form of leprosy; or
- (v) has been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

Explanation -

In this sub-section, the expression "desertion" means, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree on the ground -

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

Thus, it may be noted here that, under sub-section (1) of Section 13 of this Act, in all there are 11 grounds on which either of the party can apply for divorce against the other party to the marriage.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, -

- (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner.
- (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or
- (iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (or under the corresponding

Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years, and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation –

This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

S. 13 (2) :

In addition to the 11 grounds of divorce stated in Section 13 (1) above, Sub-section (2) of Section 13 also provides 4 more grounds of divorce which are available only to the wife.

These 4 grounds available to the Hindu wife to obtain Divorce, are summarised as under :-

1. "Bigamy" [(S. 13 (2) (i))]:

The wife can obtain divorce on the ground of bigamy, in case, where the marriage was solemnized between the husband and the petitioner wife before the commencement of this Act (i.e. before 18th May, 1955), and a) the husband had married again before such commencement or that b) any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner.

2. "Rape, sodomy or bestiality" [(S. 13 (2) (ii))]:

The wife can obtain divorce on the ground that the husband is guilty of rape, sodomy or bestiality after the solemnization of his marriage with the petitioner wife.

Rape relates to the ravishing of a woman, and sodomy and bestiality relates to carnal intercourse by a man against the order of the nature with another man or with animal. (See S. 375 and 377 IPC by the author).

3. "No cohabitation after awarding the order of maintenance" [(S. 13 (2) (iii))]:

When in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, a decree or order, has been passed against the husband awarding maintenance to the wife though the wife was living separately and since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards, in such situation, the Hindu wife can obtain divorce.

4. "Repudiation of marriage" [(S. 13 (2) (iv))]:

If the marriage of a Hindu wife was solemnized before she had attained the age of 15 years (whether the marriage was consummated or not), then, in such a case, she can get her marriage repudiated after she attains the age of 15 years and before she attains the age of 18 years. In other words, when the wife is between the age of 15 and 18 any time she can repudiate the marriage and obtain the decree of divorce under S. 13 (2) (iv).

S. 16: Legitimacy of children of void and voidable marriages –

- (1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.
- (2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
- (3) Nothing contained in sub-section (1) or sub-section (2), shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Maintenance :

S. 24: Maintenance pendent lite and expenses of proceedings –

Where in any proceeding under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable:

S. 25: Permanent alimony and maintenance –

- (1) Any Court exercising jurisdiction under this Act, may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, as having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
- (2) If the Court is satisfied that, there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner, as the Court may deem just.
- (3) If the Court is satisfied that the party in whose favour an order has been made under this Section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.

Custody of Children :

S. 26: Custody of children –

In any proceeding under this Act, the Court may from time to time, pass such interim orders and make such provisions in the decree, as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children, as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

Provided that, the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

“MAINTENANCE OF WIFE” Under the Adoptions and Maintenance Act, 1956 :

S. 18: Maintenance of wife –

- (1) Subject to the provisions of this Section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life-time.
- (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance –
 - (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;
 - (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
 - (c) if he is suffering from a virulent form of leprosy,
 - (d) if he has any other wife living;
 - (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
 - (f) if he has ceased to be a Hindu by conversion to another religion;
 - (g) if there is any other cause justifying her living separately.
- (3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

NOTES: Husband living with another woman. Wife is entitled to live separately and claim maintenance even if she failed to prove second marriage. *Rajatni v/s. C. Ganesh, (1999) 6 SCC 326.: AIR 1999 SC 2374.*

S. 19: Maintenance of widowed daughter-in-law –

- (1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband, by her father-in-law:

Provided that, to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance –

 - (a) from the estate of her husband or her father or mother, or
 - (b) from her son or daughter, if any, or his or her estate.
- (2) Any obligation under sub-Section (1), shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession, out of which the daughter-in-law

has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

S. 20: Maintenance of children and aged parents –

- (1) Subject to the provisions of this Section, a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.
- (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother, so long as the child is a minor.
- (3) 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 out of his or her earnings or other property.

Explanation :

In this Section “parent” includes a childless step mother.

S. 23: Amount of maintenance –

- (1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the Court shall have due regard to the considerations set out in sub-Section (2) or sub-Section (3), as the case may be, so far as they are applicable.
- (2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to –
- the position and status of the parties;
 - the reasonable wants of the claimant;
 - if the claimant is living separately, whether the claimant is justified in doing so;
 - the value of the claimant’s property and any income derived from such property, or from the claimant’s own earnings or from any other source;
 - the number of persons entitled to maintenance under this Act.
- (3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to –
- the net value of the estate of the deceased after providing for the payment of his debts;
 - the provision, if any, made under a will of the deceased in respect of the dependant;
 - the degree of relationship between the two;
 - the reasonable wants of the dependant;
 - the past relations between the dependant and the deceased;
 - the value of the property of the dependant and any income derived from such property; or from his or her earning or from any other source;
 - the number of dependants entitled to maintenance under this Act.

Maintenance of wife under Section 36, and Custody of children under Section 38 of the Special Marriage Act, 1954 :-

Alimony pendent lite :

Section 36 of the Act provides –

- (1) The District Court, in any proceeding under the suit for restitution of conjugal rights and judicial separation or nullity of marriage and divorce, may, at the time of passing any decree or at time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband’s

property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, as it may seem to the Court to be just.

However, the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding, shall, as far as possible, be disposed of within 60 days from the date of service of notice on the husband.

- (2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the Court to be just.
- (3) If the District Court is satisfied that the wife in whose favour an order has been made under this Section, has remarried or is leading an unchaste life, it may, at the instance of the husband, vary, modify or rescind any such order and in such manner as the Court may deem just.

Custody of Children :

Section 38 of the Act provides in any proceeding for restitution of conjugal rights and judicial separation or nullity of marriage and divorce that the District Court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon an application by petition for the purpose, make, revoke, suspend or vary, from time to time, all of such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree, were still pending.

However, the application with respect to the maintenance and education of the minor children during the proceeding, shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent.

Maintenance under Section 125 of the Criminal Procedure Code :-

A Muslim wife can apply for her maintenance to the Court under S.125 of Criminal Procedure Code. And the Court may order the husband to pay a monthly maintenance allowance her.

In *Bai Tahira v/s. Ali Hussain*, 1979 S.C 175, the Supreme Court has held that, a 'divorced Muslim Wife' is entitled to apply for maintenance under the Criminal Procedure Code.

Again the Supreme court in 1985, in *Shah Bano's Case* observed. "These provisions (Cr.P.C.) are too clear and precise to admit of any doubt or refinement. The religion professed by the spouse or spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heatens, is wholly irrelevant in the application of these provisions".

The wife, who is unable to maintain herself, is entitled to claim maintenance. The term 'wife' includes a woman who has been divorced by, or has obtained divorce from her husband and has not remarried – [Explanation (b) to S.125 (1)].

It is on the basis of the above provision that, the Supreme Court granted maintenance to Shah Banu in the year 1985. The decision was welcomed by many rationalists in the country. But, unfortunately and ironically, several orthodox Muslim organizations protested against the decisions. And in order to nullify the effect of the judgement of Shah Banu's Case, the then Government came with the enactment "Muslim Women (Protection of Rights on Divorce) Act, 1986". Still the divorced Muslim wife can prefer to opt to be governed by Section 125 of the Cr.P.C. according to the provisions of the

any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the other heirs referred to in sub-Section (1) in the order specified therein, but upon the heirs of the husband.

S. 16: Order of succession and manner of distribution among heirs of a female Hindu –

The order of succession among the heirs referred to in Section 15, shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:-

Rule 1. – Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2. – If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3. – The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of Section 15, shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

Coparcenary and inheritance right of Hindu child : –

The traditional age-old concept of a Hindu coparcenary was a male dominated concept where only sons, grandsons and great grandsons acquired by birth, an interest in the coparcenary property by birth, and where females cannot be coparceners (Mitakshara Law); and where sons do not acquire any interest in the coparcenary property by birth and females can be coparceners (Dayabhaga Law).

A Hindu joint family was a wider expression than a coparcenary; and the following three important features of a Hindu joint family distinguished it from a coparcenary –

- (1) The indefinite number of members in a Hindu joint family;
- (2) The inequality of the rights of such members, some having an interest in the joint family property and others having only a right to be maintained; and
- (3) The inclusion of females in the joint family.

It is also to be remembered that, although, every coparcenary must have a common ancestor to start with, it is not necessary that every coparcenary is limited to four degrees from the common ancestor, i.e. the original holder of the coparcenary property. Such a person would be a coparcener if he can demand a partition of coparcenary property; If he cannot demand partition, he cannot be reckoned as a coparcener. The general rule of Hindu law is that, the partition can be demanded by any member of a joint family who is not removed more than four degrees from the last holder of the property, however remote he may be from the last holder of the property i.e. the common ancestor.

Thus, only sons, grandsons and great grandsons of the holder of the property, took an interest therein by birth, and any other descendant who was further than three degrees from him. In other words, so long as the common ancestor was alive at the time of the death of such an ancestor. If no such person is alive at the time, the undivided interest of the common ancestor would pass by survivorship to his brothers, nephews, etc.

S. 6: Devolution of interest in coparcenary property –

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 purpose 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 this 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.

S. 10: 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 rule :-

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 predeceased son or each predeceased 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 predeceased son, shall be so made that his widow (or widows together) and the surviving sons and daughters gets equal portions; and to the branch of his predeceased sons get the same portion.

(ii) among the heirs in the branch of the predeceased daughter, shall be so made, that the surviving sons and daughters get equal portions.

S. 20: Right of child in womb –

Child who was in the womb at the time of the date of an intestate and who is subsequently born alive, shall have the same right to inherit to 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.

Law of Guardianship under the Hindu Minority and Guardianship Act, 1956 :

S. 6: Natural guardians of a Hindu minor –

The natural guardians of a Hindu minor, in respect of the minor's person, as well as, in respect of the minor's property (excluding his or her undivided interest in joint-family property), are –

- (a) in the case of a boy or an unmarried girl – The father, and after him, the mother, provided that, the custody of a minor who has not completed the age of five year, shall ordinarily be with the mother;
- (b) In the case of an illegitimate boy or an illegitimate unmarried girl the mother, and after her the father.
- (c) in the case of married girl, the husband:

Provided that, no person shall be entitled to act as the natural guardian of a minor under the provision of this Section –

- i)* if he has ceased to be a Hindu, or
- ii)* if he has completely and finally renounced the world by becoming a hermit (vanaprashtha) or an ascetic (yati or sanyasi).

Explanation –

In this Section, the expressions “father” and the “mother” do not include a step-father and a step-mother.

S. 7: Natural guardianship of adopted son –

The natural guardianship of an adopted son who is minor, passes on adoption, to the adoptive father, and after him, to the adoptive mother.

S. 8: Powers of natural guardians –

- (1)* The natural guardian of a Hindu minor has power, subject to the provisions of this Section, to do all acts which are necessary or reasonable, and proper for the benefit of the minor or for the realization, protection or benefit of the minor’s estate; but the guardian can in no case bind the minor by a personal covenant.
- (2)* The natural guardian shall not, without previous permission of the Court,-
 - (a)* mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or
 - (b)* lease any part of such property for a term exceeding five years or for term extending more than one year beyond the date on which the minor will attain majority.
- (3)* Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.
- (4)* No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.
- (5)* The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the Court under sub-section (2) in all respects as if it were an application for obtaining the permission of the Court under Section 29 of the Act, and in particular, –
 - (a)* proceedings in connection with the application shall be deemed to be proceedings under the Act within the meaning of Section 4-A thereof.
 - (b)* the Court shall observe the procedure and have the powers specified in sub-sections (2), (3), and (4) of Section 31 of the Act: and
 - (c)* an appeal shall lie from an order of the Court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this Section to the Court to which appeals ordinarily lie from the decisions of that Court.
- (6)* In this Section, “Court” means, the city Civil Court or a District Court or a Court employed under Section 4-A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such Court means, the Court with the Local limits of whose jurisdiction any portion of the property is situate.

S. 9: Testamentary guardians and their powers:

(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.

(2) An appointment made under sub-section (1), shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by Will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children, may, by Will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by Will, has the right to act as the minor's guardian after the death of the minor's father, or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by Will, shall, where the minor is a girl, cease on her marriage.

S. 10: Incapacity of minor to act as guardian of property -

A minor shall be incompetent to act as guardian of the property of any minor.

S. 11: Defacto guardian not to deal with minor's property -

After the commencement of this Act, no person shall be entitled to dispose of, or deal with the property of a Hindu minor merely on the ground of his or her being the defacto guardian of the minor.

Transfer by defacto guardian -

Defacto guardian leased out minor's agricultural lands to his uncle N. Uncle N being in possession of land as lessee, applied under Ss 46 and 49 (A) of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 for conferment of ownership of the land. It is held that, grant of lease was hit by S. 11, and hence, application of Uncle N was liable to be dismissed - *Ganayya v/s. Radhabai*, 1997, (11) S.C. 332.

S.12: Guardian not to be appointed for minor's undivided interest in joint family property -

Where a minor has an undivided interest in joint-family property, and the property is under the management of an adult member of the family, no guardian shall be appointed for minor in respect of such undivided interest:

Provided that, nothing in this Section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

Muslim Law (relating to Children and Women) of Marriage, Dower, Divorce, Maintenance and Guardianship :

DEFINITION OF MARRIAGE:

"Marriage or *Nikah* is a contract, which has for its object, the procreation and the legalisation of children" - Mulla.

Justice Mahmood in *Abdul Kadir v/s. Salima* (1886), 8 All. 149-154, observed "Marriage among Mahomedans is not a sacrament, but purely a civil contract".

A marriage may be valid (*sahih*), or irregular (*fasid*), or void (*batil*).

ESSENTIALS OF A VALID MARRIAGE :

Following are the essentials of Muslim Marriage :

1) PROPOSAL AND ACCEPTANCE (*Ejab-o-qubul*) :

There should be a proposal (*ejab* or declaration) made by one party to the marriage and acceptance (*qubul*) of such proposal by the other party to the marriage. This proposal and its acceptance, must be expressed at one meeting and in the presence of two male witnesses, or one male and two female witnesses who must be sane and adult Mahomedans (Hanafi Law).

The words or language of the proposal must be clear and unambiguous. Words must show clear cut intention to establish conjugal relation. The usual form of proposal is, "I have married myself to you" the acceptance is 'I have consented'. Not like, 'I will marry', or "I may marry", etc.

When consent to a contract of marriage is obtained by force or fraud, the marriage is invalid, unless ratified. The marriage becomes irregular and it can be regularised by subsequent consent.

Neither writing, nor any religious ceremony, is essential for a valid Muslim marriage. The presence of witnesses, however, is nothing more than a mere matter of evidence; for, a marriage without witness is *fasid* (irregular) only, and not *batil* (void) under Sunni law. Under Shia law, the presence of witnesses is not even necessary.

Which of the following statement is correct:

- a. Under Shia law, the presence of witnesses is not necessary.
- b. Under Shia law, the presence of two witnesses is necessary.
- c. Under Shia law, the presence of atleast one male witness is necessary.
- d. Under Shia law, the absence of witnesses renders the marriage as *fasid* but not *batil* (void).

2) CAPACITY TO CONTRACT MARRIAGE :

A) Competent parties:

Every Mahomedan of sound mind and who has attained puberty, may enter into a contract of marriage.

A Mahomedan girl of 15 years who has attained the age of puberty is competent to marry without the consent of her parents. - *Mohd. Idris v/s. State of Bihar*, 1890, Cr. L.J. 764.

1. Puberty : (bulugh):

- i) Puberty is a physical phenomenon to be ascertained by evidence.
- ii) In the absence of evidence, it is generally presumed that a person who has completed 15 years of age has attained puberty.
- iii) The Judicial Committee of the Privy Council has observed that, the earliest age of puberty in case of a girl is 9 years - *Sadiq Ali Khan v/s. Taj Kishori*, (1928), 30 B.L.R. 1346. There Lordships were

arranged by a father or grandfather, has been abolished, and u/s. 2 (vii) of this Act, a wife is entitled to the dissolution of her marriage if she proves the following facts, namely,

- i) the marriage has not been consummated;
- ii) the marriage took place before she attained the age of 15 years, and
- iii) she has repudiated the marriage before attaining the age of 18 years.

(Situation based problem can be asked on the above underlined portion).

Effect of repudiation:

The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or her, as the case may be.

3) ABSENCE OF IMPEDIMENTS :

The third essential of a Muslim marriage is that, there should be no impediments or prohibitions to the marriage of the parties. These impediments are of two kinds :

- A) Absolute prohibitions : Which render the marriage void (batil), and
- B) Relative prohibitions : which render the marriage merely invalid or irregular (fasid), but not void.

A) Absolute Prohibitions :

i) Prohibition on the ground of Plurality of Husbands (polyandry): It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void.

A Mahomedan woman marrying again in the life time of her husband is liable to be punished u/s. 494 of the Indian Penal code. The off-spring of such marriage is illegitimate and cannot be legitimated by acknowledgement.

(See Chapter VII "Acknowledgement of Paternity" given in "Family Law - I" Book by the Author).

ii) Prohibition on the ground of Consanguinity:

A man is prohibited from marrying - 1) his mother or grandmother how highsoever; 2) his daughter how lowsoever; 3) his sister whether full, consanguine or uterine; 4) his niece or great niece how lowsoever; and 5) his aunt or great aunt how highsoever, whether paternal or maternal.

A marriage with a woman prohibited by reason of consanguinity is void.

iii) Prohibition on the ground of Affinity:

A man is prohibited from marrying - 1) his wife's mother or grandmother how highsoever; 2) his wife's daughter or grandmother, how lowsoever; 3) the wife of his father or paternal grandfather how highsoever; and 4) the wife of his son, or his son's son or daughter's son, how lowsoever.

A marriage with a woman prohibited by reason of affinity, is void.

iv) Prohibition on the ground of Fosterage:

Where the relationship of fosterage is established, Mahomedan law prohibits the marriage within certain limits. A man may not, for instance marry his foster mother (care taker mother in the absence of real mother, because suckling is regarded as equal to the act of procreation), or her daughter i.e. his foster sister.

A marriage prohibited by reason of fosterage, is void.

B) Relative Prohibitions:

of difference sexes. Thus, a man cannot marry two real sisters, or an aunt and her niece at the same time. But nothing prevents a man from marrying a real sister of his wife after the death of his wife.

The bar of unlawful conjunction renders a marriage irregular, not void. (This point includes consanguinity, affinity or fosterage discussed above).

v) Difference of Religion:

A Mahomedan male may contract a valid marriage not only with Mahomedan woman, but also with a 'Kitabia' (a woman who refers to a Kitab i.e. Bible or Taurat), that is a Christian or Jewess, but not with idolatress (Hindu woman) or a fire worshiper (Parsi woman). A marriage, however, with an idolatress or fire-worshiper, is not void, but merely irregular.

A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a Kitabi, that is, a Christian man or Jew man. A marriage, however, with a non-muslim whether he is a Kitabi or non-kitabi, that is, idolator or fire worshiper, is irregular, not void.

vi) Divorce:

After the husband has pronounced three Talaks against his wife, their marriage is irrevocably dissolved, and they are prohibited from remarrying each other, unless and until,

- 1) The woman is lawfully married to a second man,
- 2) that second marriage is actually consummated,
- 3) that second marriage has been lawfully dissolved and
- 4) the woman has observed the iddat.

EFFECTS OF VALID (Sahih) MARRIAGE :

A valid marriage confers upon the wife the right to dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him, to admit him to sexual intercourse, and to observe the iddat. It creates between parties prohibited degrees of relationship. It creates between parties reciprocal rights of inheritance. Ballie, 13.

It may be noted that, a Mahomedan husband does not by marriage, acquire any interest in his wife's property - A v/s. B (1896), 21 Bom. 77, 84.

EFFECTS OF VOID (batil) MARRIAGE :

A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offsprings of a void marriage are illegitimate.

EFFECTS OF IRREGULAR (FASID) MARRIAGE :

An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other, "I have relinquished you".

- a) An irregular marriage has no legal effect before consummation.
- b) If consummation has taken place -
 - i) the wife is entitled to dower, proper or specified, whichever is less.
 - ii) she is bound to observe iddat, but the duration of iddat both on death or divorce, is three menstrual courses.
 - iii) the issues of the marriage are legitimate. But an irregular marriage though consummated, does not create mutual rights of inheritance between husband and wife.

(Situation based problem can be asked on the above underlined portion).

If the bridegroom is minor, his father may settle the amount of dower. Sunni law (Hanafi law) says that the father is not personally liable for the dower, but according to Shai law, he will be so liable: *Sabir Hussain v/s. Farzand Khan*, 1937, 65IA. 119.

The husband is bound to pay the amount of specified dower, however excessive or beyond his reach it may be. However, excessive amount may be, curtailed to a reasonable amount.

“Dower is often high among Mahomedans to prevent the husband from divorcing his wife, in which case he would have to pay the amount stipulated” : *Zakeri Begum v/s. Sakina Begum*, 1892 I.A. Calcutta.

a) Prompt Dower and b) Deferred Dower :

- i) The amount of dower is usually split into two parts, one called “prompt”, which is payable on demand, and the other called “deferred” which is payable on dissolution of marriage by death or divorce.
- ii) The prompt portion of dower may be realised by the wife at any time before or after consummation. But the deferred dower could not be so demanded. The wife can refuse to live with her husband and admit him to sexual intercourse, so long as, the prompt dower is not paid to her.
- iii) In the cases where it is not settled how much of the dower is prompt and what part of it is deferred, the Shia law holds that the whole of the dower is prompt; the Sunni law, however, holds that only a part is prompt. And this part is to be fixed with reference to i) custom, or ii) the status of the parties, and iii) the total amount of settled dower.
- iv) Suit for dower and limitation — If the dower is not paid, the wife, and after her death, her heirs, may sue for it. The period of limitation for a suit to recover “prompt” dower is three years from the date when the dower is demanded; and limitation for a suit to recover “deferred” dower is three years from the date when the marriage is dissolved by death or divorce.

2) Unspecified Dower or Proper Dower :

If the amount of dower is not fixed, the wife is entitled to ‘proper’ dower (Mahr-ul-misl), even if the marriage was contracted on the express condition that she should not claim any dower.

In determining what is ‘proper’ dower, following points are taken into consideration:

- i) amount of dower settled upon other female members of her father’s family. Such as, her father’s sisters;
- ii) it is fixed with reference to the social position of the wife’s family and her own personal qualification, such as, her age, intellect and virtues, will also be considered (Hedaya).

The ‘Proper’ dower, under the Shia law should not exceed 500 dirhams (This law does not hold good in the present context).

Question : Explain in detail the divorce of women under the Muslim Law.

Answer :

**“DISSOLUTION OF MUSLIM MARRIAGE”
(DIVORCE / 'TALAK')**

Following topics are Discussed in this Chapter :

Classification of divorce.

- a) By the death of the husband or wife.
- b) By the act of the parties.
- c) By the judicial process.

CLASSIFICATION OF DIVORCE :

a) **By the Death of Spouse;**

b) **By the Act of Parties:**

i) **By the Husband -**

- a) Talak,
- b) Ila,
- c) Zihar.

ii) **By the Wife-**

- a) Talak-e-tafweez.

iii) **By Mutual or Common Consent -**

- a) Khula,
- b) Mubara'at

c) **By Judicial Process:**

- a) Lian,
- b) Faskh

(u/s. 2 of the Dissolution of Muslim Marriages Act, 1939 - stated below).

A) By the Death of Husband or Wife:

It is clear and natural that with the death of husband or wife the marriage tie comes to an end. When the wife dies, husband may marry immediately, but in case of husband's death, widow has to wait till the expiry of iddat, which is four months and ten days, or if pregnant, till delivery.

Situation based problem -

A marriage party was returning from Pune to Mumbai after marriage, on the way their bus met with an accident and unfortunately the bride-groom died in an accident. -

- g) Should wife observe iddat ? If not, why ? If yes, why ?
- h) What do you mean by the term iddat ?
- i) Under what circumstances wife has to observe iddat ?
- j) What is the period of iddat in case of divorce ?

B) By the Act of Parties:

I) **By the husband -**

(a) TALAK - (Repudiation):

In its literal sense, this Arabic word means, "taking off any tie or restraint", and in law, it signifies the dissolution of marriage.

Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause: *Ahmad Kasim v/s. Khatun Bibi*, 1932, 59. Cal.833.

Talak how effected ? -

Talak may be effected i) orally (by spoken words) or 2) by a written document called a *talaknama*. No particular form of words is prescribed for effecting a talak. If the words are expressed (*saheeh*) or well understood as implying divorce, no proof of intention is required. If the words are ambiguous (*Kinayat*), the intention must be proved. It is not necessary that the talak should be pronounced in the presence of the wife. It may be pronounced in her absence; When it comes to her knowledge, it is binding on her, and she is supposed to observe 'iddat'.

Different modes/kinds of talak -

A talak may be effected in any of the following ways:

1) Talak-us-sunnat :

That is talak which carries the approval of the Prophet Muhammad. It may be in the most approved form (*ahasan*), or simply an approved form (*hasan*).

Talak ahasan (most proper talak):

This consists of single pronouncement of divorce made during a 'tuhr' (i.e. purity, when wife is free from her menstrual courses), during which husband did not have intercourse with her, and then leaves her to the observance of Iddat.

According to Hedaya, this method of divorce is the most approved because, firstly, the companions of the Prophet Muhammad approved of it, and secondly, because, it remains within the power of the husband to revoke the divorce during Iddat. And it becomes irrevocable and complete on the expiration of the period of iddat.

Talak hasan (proper talak) :

This consists of three pronouncements made during successive tuhrs, intercourse should not have taken place during any of the three tuhrs. Talak hasan becomes irrevocable and complete, on the third pronouncement, irrespective of the iddat.

2) Talak-ul-biddat :

This consists of a) three pronouncements made during a single tuhr, either in one sentence, e.g. "I divorce thee thrice", or in separate sentences, e.g. "I divorce you, I divorce you, I divorce you" or b) a single pronouncement made during a tuhr, clearly indicating an intention to dissolve the marriage, e.g. "I divorce you irrevocably". Talak-ul-biddat becomes irrevocable, immediately it is pronounced irrespective of iddat. As the talak becomes irrevocable at once, it is called talak-i-bain, i.e. irrevocable talak. This kind of talak is common in India.

(b) ILA - (vow of continence):

In this form of Talak, the husband swears in the name of Allah that he will not have sexual intercourse with his wife, and abstains from it for four months, the divorce is effected. Such abstinence should be in pursuance to vow. It means, first he must swear, and secondly, he must abstain from having a sexual intercourse with his wife for a period of four months. Ila may be revoked by the husband within the said period of four months, if he desires to do so.

Ila has been criticised by the rationalists, as according to them no logical explanation can be given to this provision of divorce. The only possible logical reasoning according to us, can be that, when a person swears over something in the name of Allah, then he must stick to that swearing, and thus, respect the Allah. Another reason is that, the husband under one pretext or the other, possesses wide, vivid powers of divorcing his wife, and therefore, Ila form of divorce as a matter of pretext, might have been recognised during those times, when husbands, the male element dominated their wives in all matters which were of their interest. The customs of 'ila' is, however, more or less obsolete now.

(c) ZIHAR – (Injurious assimilation or comparison):

In this form, husband compares his wife to his mother or any other female within prohibited degrees of relationship. The wife has right to refuse herself to him until he has performed penance. Cases of Zihar are unknown in India. But the law of Zihar has now received statutory recognition in Section 2 of Shariat Act, 1937 .

(see S.2 of the Shariat Act, 1937 in “Family Law – I” Book by the Author).

Zihar acts as a moral restraint on the husband when he compares his wife with his mother, sister or any of the female relations. By moral sense, she no more remains his wife for the purposes of sexual intercourse. Thus, she may refuse herself to him until he repents and pays some money to her.

II) By the wife –

(a) TALAK - E - TAFWEEZ: (Delegated divorce):

Although the power to give divorce belongs primarily to the husband, he may delegate the power to the wife or to a third person, either absolutely or conditionally.

When the husband says to his wife, “repudiate yourself”, she can repudiate herself at the time so specified by her husband. She may exercise the option at any time within the given period.

It has been held that, an agreement between a husband and his wife at the time of their marriage under which the husband authorizes the wife to divorce him, in the event of his marrying a second wife is a valid agreement - *Maharam Ali v/s. Ayesha Khatum*, 1915, 19 CWN 1226.

The power of divorce may be delegated by the husband to the wife either before or immediately after the marriage by entering into agreement with the wife that, in case if husband fails to fulfill his matrimonial duties towards his wife, she may give him Talak-e-tafweez.

There are three forms of tafweez : i) ikhtiar = choice, ii) amr-biyad = the affair is in your hands, iii) mashia't = at your pleasure.

III) By mutual Consent –

a) KHULA (Redemption) –

If the mutual relationship between the husband and wife is not good, the wife, if she so desires, may seek a Khula divorce, e.g. by relinquishing her claim to the dower. The husband may accept it or refuse it upon the consideration of dower and grant the divorce to her.

A husband may similarly seek a Khula divorce, the wife may accept it or refuse it. If she accepts, it means that, she has relinquished the right to get dower from her husband. Khula may be for any consideration – dower, money, property, etc.

Mulla, the authority on Mahomedan law says that, Khula is at the instance of the wife only, and the husband cannot propose Khula.

Wife's failure to pay the consideration agreed upon in a Khula divorce, does not invalidate the divorce, so as to enable the husband to sue for restitution of conjugal rights, but only entitles him a) to claim the release of dower, or b) to sue for any money or property due under the agreement of Khula.

The leading case on Khula divorce is *Moonshee Buzul Rahim v/s. Huteefut-oon-Nissa*, 1886, 8, MIA 379 (Lord Kingsdown). In this Case, it was observed that, a divorce by Khula is at once complete from the moment when the husband repudiates the wife. There is no period during which such a divorce can be repudiated.

b) **MUBARA'AT** (Mutual Freeing) –

When the divorce is effected by mutual consent of the husband and wife, it is known as mubara'at i.e. freeing one another mutually.

It has been held in a Pakistani case of *Sayeeda Khanum v/s. Muhammad Sami*, PLD 1952, (WP) Lah. 113 that, such matters as, incompatibility of temperaments, aversion or dislike, cannot form a ground for a wife to seek dissolution of her marriage at the hands of a Kazi or Court, but only they fall to be dealt with under the power possessed by the husband, as well as, the wife under Muslim law, that is, "the capacity of making a Khula or Mubara'at divorce".

Difference between Khula and Mubara'at is that, when the aversion is on the side of the wife, and she desires a separation, the transaction is called Khula. When the aversion is mutual, and both the sides desire a separation, the transaction is called mubara'at.

Khula and mubara'at are irrevocable divorce. Iddat becomes necessary for wife, and she is entitled to maintenance during the period of iddat.

C) **By Judicial Process :**

I) **LIAN** (Mutual Imprecation):

The wife is entitled to sue her husband for a divorce on the ground that her husband has falsely charged her with adultery. At the hearing of the sui, the husband had two alternatives :

- i) he may retract the charge before the end of the trial, in which case the wife could not get divorce, or
- ii) he may persist in his attitude, whereby he will be required to accuse his wife on oath. This is followed by oath of innocence made by the wife.

After these "mutual imprecations", Court dissolves the marriage.

If the husband's charge of adultery against his wife proved to be correct, the wife's action for divorce fails.

II) **FASKH** (Judicial Annulment):

Faskh means, 'annulment'. It refers to the power of 'Kazi'. In India, it refers to the power of the law courts to annul a marriage on the application of the wife. In India, such judicial annulments are governed by Section 2 of the Dissolution of Muslim Marriage Act, 1939. It is as follows :-

- The Act came into force on the 17th March, 1939, and lays down the following grounds of divorce on which only wife can seek a decree of divorce, that the –
- i) whereabouts of the husband have not been known for a period of 4 years.
 - ii) failure of the husband to provide maintenance of the wife for a period of 2 years.
 - iii) imprisonment of husband for 7 years or more.
 - iv) failure of the husband to perform without reasonable cause his marital obligations for a period of 3 years.

- v) impotency of the husband at the time of marriage, and continues to be so, after the marriage.
- vi) insanity of the husband for a period of 2 years or is suffering from leprosy or a virulent venereal disease.
- vii) repudiation of the marriage by the wife before she attains the age of 18 years, if she was married by her father or other guardian before she was fifteen, provided, the marriage is not consummated.
- viii) if the husband treats her with cruelty, that is to say - a) habitually assaults her or makes her life miserable by cruelty or conduct, even if such conduct does not amount to physical ill-treatment, b) associates with a woman of evil repute or leads an infamous life, or c) attempts to force her to lead an immoral life, or d) disposes of her property or prevents her from exercising her legal rights over it, or e) obstructs her in the observance of her religious profession or practice, or f) if he has more wives than one, does not treat her equally in accordance with the injunctions of the Quran.
- ix) any other grounds recognized by Muslim Law. Section 2 of the Shariat Act, expressly refers to Talak, Ila, Zihar and Mubara'at and Talak-a-tafweed. Courts are entitled to grant divorce on the old grounds recognized by Shariat.

"MAINTENANCE" ('NAFQA')

The obligation to maintain under Mahomedan Law arises in two circumstances:

Firstly, obligation arises on marriage. It is obligatory to maintain the wife and children.

Secondly, obligation arises out of blood-relationship. It is obligatory to maintain parents and poor dependants.

Maintenance includes food, raiment (i.e. clothing) and lodging. It also includes other necessary expenses for mental and physical well-being of minor children and educational expenses of minor children.

Mahomedan Law provides for the maintenance of the following persons :- **A) Wife.** **B) Descendants (children).** **C) Ascendants (parents)** **D) Other relations.**

A) MAINTENANCE OF WIFE :

The law of maintenance is often developed in a course of time in favour of a wife. In this context, it is necessary to discuss the old law and the newly developed law.

Under the ancient Mahomedan law, it is the duty of the husband to maintain his wife, whether she be Muslim or Kitabiya, poor or rich, enjoyed or unenjoyed, young or old. However, if the wife is too young for matrimonial intercourse, she has no right to maintenance from her husband.

But the husband is not bound to maintain his wife, if she is not obedient, and if she refuses herself to him. If the husband has not paid prompt part of the dower or if she refuses to live with her husband because of his cruelty, the husband is bound to maintain her. ★

It was held by the Allahabad High Court in *Badruddin v/s. Aisha Begum*, (1957) that, where husband has married a second wife or keeps a mistress, the wife may refuse to live with the husband and still claim maintenance from him.

" GUARDIANSHIP "

A guardian of a minor is recognised not only in respect of his person but also in respect of his property also.

Quran considers misappropriation of minor's properties as a serious crime, and advises to return their properties to them when they attain majority. Guardians are also advised not to waste minor's properties. Quran declares that, guardians should protect minors properties for which they should take only reasonable and moderate gratuity.

Who is a minor ?:

According to the Mahomedan law, minor is a person who has not attained puberty. A person is presumed to have attained puberty on completion of 15 years (Hanafi and Shia Law). But, this age of puberty or majority is applicable only in matters of marriage, dower and divorce. For the purpose of guardianship and all the matters, the age of majority is now regulated by the Indian Majority Act, IX of 1875. Section 3 of the Act states that, a person shall be deemed to have attained majority when he completes 18 years of age. Until then, the Court has power to appoint a guardian of minor's person (body, physical care of the minor) or minor's property, or of both, under the Guardians and Wards Act VIII of 1890.

Guardianship:

Abdur Rahim defines guardianship as, "A right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs; for example, an infant, an idiot, a lunatic. It extends to the custody of the person and power to deal with the property of the ward".

According to the Mahomedan law, a person who has attained the age of 18 years and who is of sound mind, can act as a guardian. Such a person may be a father or mother or any other relation. Any such person who is entitled to be a guardian can act as a guardian and prior permission of the Court is not necessary.

Appointment of a guardian:

A guardian may also be appointed under the Guardians and Wards Act, 1890 on application made in this regard. Application may be made not only by a person desirous of being, or claiming to be, the guardian of the minor, but also by any relative or friend of the minor, and in some cases by the Collector of the district. Application should be made in the form prescribed by Section 10 of the Act, and no order should be made unless notice of the application is given to person interested in the minor (S.11 of the Guardians and Wards Act).

Even though the Court (under Guardians and Wards Act, 1890) is empowered to appoint a guardian, the application of Muslim law of guardianship has been by and large preserved in the Act. Section 17 of the Act provides that, - "In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor".

And for the purposes of the welfare of the minor, the Court shall consider : **i)** the age, sex and religion of the minor; **ii)** the character and capacity of the proposed guardian, and his nearness of kin to the minor; **iii)** the wishes, if any of a deceased parent; **iv)** any existing or previous relations of the proposed guardian with minor or his property; and **v)** preference of the minor, if he is old enough to form an intelligent preference.

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Kinds of Guardianship :

- A) Guardianship of person of a minor;
- B) Guardianship of property of a minor;
- C) Guardianship in marriage (This is discussed in chapter "Marriage" (Nikah).

A) GUARDIANSHIP OF PERSON OF A MINOR :

Guardianship of the person of minor belongs to,

- 1) the mother; and in the absence or disqualification of the mother,
- 2) other female relations; and in their absence,
- 3) male relations.

1) Mother as a guardian of person of a minor:

Mother is entitled to the custody (Hizana) of : a) A male child till 7 years, b) A female child till puberty, (Hanafi law).

This right of a mother (to have the custody of the child) continues though she is divorced by the father of the child - Mt. Haidri v/s. Jawed Ali, (1934) All. L.J. 399, unless she marries a second husband in which case, the custody belongs to the father - Ulfat Bibi v/s. Baifati, (1927) 49 All. 773.

Nature of mother's right of custody :

Privy Council in *Imambandi v/s. Mutsandi*, (1918) 45 Indian Appeal, 73 observed, "It is perfectly clear that, under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child upto a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian". Therefore, father is the primary and natural guardian and the legal guardian of his minor children and the father's supervision over the child continues in spite of the child being under the care and custody of the mother or other female relations, because the burden of providing maintenance to the child rests exclusively on the father.

2) Other female relations as a guardian of person of a minor:

In the absence or disqualification of the mother, the custody of a) A male child till 7 years, b) A female child till puberty, belongs to following persons in the order of priority; i) Mothers' mother, ii) Father's mother, iii) Full sister, iv) uterine sister, v) Full sister's daughter, vi) Uterine sister's daughter, vii) Full maternal aunt, viii) Uterine maternal aunt, ix) Full paternal aunt, x) Uterine paternal aunt.

Disqualifications of guardianship of person of a minor:

Mother and other female relations become disqualified to act as a guardians of a person of a minor: i) if she marries a person not related to the child within the prohibited degrees, but the right revives on the dissolution of marriage by death or divorce; or ii) if she leads an immoral life, as where she is a prostitute; or iii) if she resides, during the subsistence of the marriage, at a distance from the father's place of residence or, iv) if she neglects to take proper care of the child.

3) Male relations as a guardian of person of a minor:

In absence of the mother and other female relations mentioned above, the custody of : a) A male child till 7 years, b) A female child till puberty, belongs to the following male relations in the order of priority :
i) Father, ii) Nearest paternal grandfather, iii) Full brother, iv) Consanguine brother, v) Full brother's son, vi) Consanguine brother's son, vii) Full brother of the father, viii) Consanguine brother of the father, ix) Son of father's full brother, x) Son of father's consanguine brother.

Provided that, the Board may, if it is satisfied that, having regard to the nature of the offence and circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

- (2) The Board shall obtain the social investigation report on juvenile, either through a probation officer, or a recognized voluntary organization or otherwise, and shall take into consideration the findings of such report, before passing an order.
- (3) Where an order under clause (d), (e) or (f) of sub-Section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition, make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer during such period not exceeding three years, and may, in such supervision order, impose such conditions, as it deems necessary for the due supervision of the juvenile in conflict with law:

Provided that, if at any time afterwards, it appears to the Board on receiving report from the probation officer or otherwise, that the juvenile in conflict with law, has not been of good behaviour during the period of supervision of the probation officer, or the fit institution, is no longer able or willing to ensure good behaviour and well-being of the juvenile, the Board may, order the juvenile in conflict with law to be sent to a special home.

- (4) The Board shall, while making a supervision order under sub-Section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution under whose care the juvenile has been placed, the terms and conditions of the order, and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, sureties and the probation officer.

S. 16 : Order that may not be passed against juvenile –

- (1) No juvenile in conflict with law, shall be sentenced to death or imprisonment for life, or committed to prison in default of fine or in default of furnishing security.

Where a juvenile who has attained sixteen years of age, has committed an offence of a serious nature or his conduct and behaviour is such that sending him to a special home would not be in his interest or in the interest of other juveniles in that special home, in such case, the Board may order the juvenile in conflict with law, to be kept in such place of safety, as it thinks fit, and shall report the case for the order of the State Government.

- (2) On receipt of a report from a Board under sub-Section (1), the State Government may make such arrangement in respect of the juvenile, as it deems proper, and may order such juvenile to be kept under protective custody at such place and on such conditions, as it thinks fit. A period of such custody/detention shall not exceed three years.

S. 23 : Punishment for cruelty to juvenile or child –

Whoever, having the actual charge of or control over a juvenile or the child, assaults, abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child, unnecessary mental or physical suffering, shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.

[University Examination Questions on the above topic]

- 1) Discuss the provisions regarding Juvenile Justice Board and state the procedure and powers of Juvenile Justice Board.

Court may grant permission to such a guardian where such alienation is necessary and advantageous to the minor. (Guardians and Wards Act, 1890 Ss. 29 - 31).

Alienation of minor's property by 'de-facto' guardian :

Legal guardians and guardians appointed by the Court (as stated above), are called '*de-jure*' guardians i.e. guardians in law. But those guardians who place themselves, in the position of a guardian by intermeddling with the property of the minor, are called '*de-facto*' guardians i.e. guardians by circumstances, for example, mother, brother, sister, uncle, etc. can be *de facto* guardians.

Movable properties:

Same powers as that of 'legal guardian' referred above.

Immovable properties:

A de-facto guardian has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is void. The question of benefit or necessity of the minor, is altogether immaterial.

Law relating to Christian Children and Women under –

“ THE DIVORCE ACT, 1869 ”

The Indian Divorce (Amendment) Act, 2001 (51 of 2001)

&

The Marriage Laws (Amendment) Act, 2001 (49 of 2001)

INTRODUCTION :

(Act, IV of 1869) Received the assent of the Governor General on the 26th February, 1869. This Act lays down primarily the law of divorce i.e dissolution of marriage, nullity of marriage, judicial separation and provides for other constructive reliefs like protection orders, restitution of conjugal rights, alimony, and custody of children etc.

This Act is made applicable only to Christians.

This is “an Act to amend the law relating to Divorce and Matrimonial Causes” in the manner, more particularly described in the Act.

“ PRELIMINARY ”

(Ss.1 & 2)

S.1: Short Title Commencement of the Act:

“This Act may be called “THE DIVORCE ACT”, and shall come into operation on the first day of April, 1869”.

S.2: Extent of the Act:

“This Act extends to the whole of India except the state of Jammu and Kashmir”.

Extent of power to grant relief generally –

"Nothing hereinafter contained, shall authorise any Court to grant relief under this Act, except where the petitioner or respondent professes the Christian religion,

and to make decrees of dissolution -

or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

and to make decrees of nullity -

or to make decrees of nullity of marriage except where the marriage has been solemnized in India, and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition".

Jurisdiction of the Courts :

A petitioner is **not entitled to any relief under this Act** unless he or she: **i) professes the Christian religion;** and **ii)** in addition that, either of the parties to the marriage are Christians, the Section further provides that, unless either of the parties to the marriage are **domiciled in India** at the time while the petition is presented, the Courts have no jurisdiction to **dissolve the marriage;** (Where, either of the parties to a petition for divorce, is a Christian, it would be sufficient to invoke the jurisdiction of the Court under S. 2).

iii) in addition that either of the parties to the marriage are Christians, the Section further provides that, unless either of the parties to the marriage as regards **decree for nullity of marriage,** two conditions are necessary that, **a) the marriage should have been solemnized in India** and **b) the petitioner should be resident of India** at the time when petition is presented.

S. 3: Interpretation clause -

"Minor children" - "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of native fathers, girls who have not completed the age of thirteen years; in other cases, it means, unmarried children who have not completed the age of eighteen years".

"Dissolution of Christian Marriage"

(Ss. 10 - 17)

S.10: Grounds for dissolution of marriage:

The Amendment of 2001 has made drastic changes in the grounds of divorce available to the Christian husband and wife under this Section. Before this amendment, the husband was provided with only one ground i.e. the adultery of his wife. The wife on the other hand, was made available of as many as seven grounds. However, those grounds seem to be extremely difficult for wife to prove against her husband. Thus, these grounds became out-dated and impracticable in the present modern context. Therefore, the need was felt to make suitable changes in the grounds of divorce.

In order to understand the situation, it would be interesting to see the grounds of divorce which were previously available to the wife.

Grounds for dissolution of marriage by wife :

A wife may present a petition for dissolution to the District court or to the High Court on anyone of the following seven grounds under section 10 of the Act :

- 1) **Change of religion and marriage with another woman;**
- 2) **Incestuous adultery;**
- 3) **Bigamy with adultery;**
- 4) **Marriage with adultery;**
- 5) **Rape, sodomy or bestiality**
- 6) **Adultery with cruelty;**
- 7) **Adultery with desertion.**

It can be seen from the above grounds that, the divorce becomes extremely difficult on these grounds as the same cannot be proved by the husband or the wife. Therefore, the drastic changes were necessary to bring the Christian law of divorce at par with Hindu law and Parsi law of divorce.

The grounds on which a Christian marriage may be dissolved either by the husband or the wife, are now set out in Section 10 of the Amendment Act of 2001.

They are as follows –

Grounds of Divorce (S. 10)

- 1) “Any marriage solemnised, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent –
 - i) has committed adultery; or
 - ii) has ceased to be Christian by conversion to another religion; or
 - iii) has been of incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or
 - iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or
 - v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a venereal disease in a communicable form; or
 - vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or
 - vii) has willfully refused to consummate the marriage and the marriage has not, therefore, been consummated; or
 - viii) has failed to comply with the decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or
 - ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or
 - x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent”.
- 2) “A wife may also present a petition for the dissolution of her marriage on the ground that, the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality”.

Contents of petition :

“Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded”.

Halsbury's "Laws of England" defines cruelty as, "the conduct of such a character as to cause danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger".

The question of cruelty must be considered in the light of the whole matrimonial relationships. Regard must be had to the physical and mental conditions of the parties, social status, the impact of the personality and conduct of the spouse on the mind of the other, and all incidents and quarrels must be weighed from that point of view : *Valerie Persich v/s. Mervya Persich*, AIR 1975 Mad. 322.

The term 'cruelty' includes physical cruelty, and mental cruelty as well.

The tests of cruelty are :

- 1) the conduct complained of, must be sufficiently grave and weighty to warrant the description of being cruel,
- 2) the conduct complained of, must cause injury to health or reasonable apprehension of such injury.

(See S.22 for further information on adultery, desertion and cruelty).

Rape: S.375 (IPC 1860) :

The offence of 'rape' is a sexual intercourse by a man with a woman –

i) against her will; **ii)** without her consent; **iii)** with her consent, when her consent has been obtained by putting her in the fear of death, or of hurt, **iv)** with her consent, when a man knows that he is not her husband, and that her consent is given because she believes herself to be lawfully married to him; **v)** with or without her consent, when she is under 16 years of age. Explanation : Mere penetration is sufficient to constitute the offence of rape. Exception : Sexual intercourse by a man with his own wife, the wife being not under 13 years of age, is not rape.

Sodomy and bestiality: S.377 (IPC 1860) :

The offence of 'unnatural offence' means, sodomy and bestiality means, having voluntarily carnal intercourse against the order of nature with any man, woman or animal.

Section 10-A :

Dissolution of marriage by mutual consent –

- 1) "Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that, i) they have been living separately for a period of two years or more, ii) that they have not been able to live together and iii) they have mutually agreed that the marriage should be dissolved".
- 2) "On the motion of both the parties, made not earlier than six months after the date of presentation of the petition referred to in sub-section (1), and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree".

The Amendment of 2001 has introduced the concept of divorce by mutual consent. This vital change makes the Christian law of divorce nearly at par with the Hindu law and Parsi law of divorce. Now, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, on the ground –

- i) that they have been living separately for a period of two years or more;
- ii) that they have not been able to live together; and
- iii) they have mutually agreed that the marriage should be dissolved.

Section 11 : Adulterer or adulteress to be co-respondent -

This Section states that,

"On a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the petitioner is excused from doing so on any one of the following three grounds, namely -

- a) that the wife, being the respondent, is leading a life of a prostitute, or the husband being the respondent, is leading an immoral life (for instance, habitually visits the brothel) and therefore, the petitioner does not know the person with whom the adultery has been committed;
- b) that the name of the alleged adulterer or adulteress is unknown to the petitioner, although the petitioner has made due efforts to discover it;
- c) that the alleged adulterer or adulteress is dead".

Thus, on a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent. This amendment is consequential to the amendments made in the grounds of divorce under S.10.

This Section makes it obligatory on a husband or wife who files a petition u/s. 10, for dissolution of marriage on the ground of adultery of his wife, or her husband, to make the alleged adulterer or adulteress a co-respondent unless the petitioner is excused from doing so on any one of the following three grounds, namely -

- i) that the respondent wife is leading a life of a prostitute, or the respondent husband is leading an immoral life (for instance, he habitually visits the brothel), and therefore, the petitioner husband/wife does not know the person with whom the adultery has been committed;
- ii) that the name of the alleged adulterer (a man with whom wife had sexual intercourse) or adulteress (a woman with whom the husband had sexual intercourse) is unknown to the petitioner, although the petitioner has made due efforts to discover it;
- iii) that the alleged adulterer or adulteress is dead.

Define 'desertion':

Answer : "Desertion implies an abandonment against the wish of the person charging it".

Under the Divorce Act, when the adulterer or adulteress need not be named as a co-respondent?

Answer : When the respondent wife is living the life of the prostitute, or the name of the alleged adulterer or adulteress is unknown or the alleged adulterer or adulteress is dead.

"CUSTODY OF CHILDREN"

(Ss. 41 to 44)

Section 41 : Power to make orders as to custody of children in suit for separation -

“In any suit for obtaining a judicial separation, the Court may, from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the said Court :

Provided that, the application with respect to the maintenance and education of the minor children pending the suit, shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent”.

Section 42 : Power to make such orders after decree –

“The Court after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending”.

Section 43 : Power to make orders as to custody of children in suits for dissolution or nullity -

“In any suit for obtaining a dissolution of marriage or a decree of nullity marriage instituted in a District Court, the Court may, from time to time, before making its decree make such interim orders as it may deem proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may make such provision in the decree absolute or decree, as the case may be, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the Court”.

Section 44 : power to make such orders after decree or confirmation –

“Where a decree of dissolution of marriage or a decree of nullity of marriage has been passed, the District Court may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or such interim orders as aforesaid”.

Important points or summary of Ss. 41 to 44 :

- 1) These four sections empower the Courts to make a suitable provision for the custody, maintenance and education of the infant children of a marriage which is the subject of a decree, for judicial separation, dissolution or nullity of marriage, and may, therefore, be considered together.
- 2) Sections 41 and 43 deal with interim orders to be passed during the pendency of the suit.
- 3) Sections 42 and 44 deal with final orders to be passed after the final decree in the suit is passed.
- 4) Section 41 gives the court a very wide discretion to fix such maintenance as it thinks fit. The order passed by the District Judge about maintenance under this Section terminates, when a final order is passed under section 43.
- 5) The Court which dissolves or annuls the marriage, alone, has jurisdiction to pass orders for the custody of the children and for their maintenance and education.
- 6) The Court is given widest possible power in making any orders that it may deem just and proper. The welfare of the children is the first consideration. The Common law rights of the father and the claims of an innocent spouse rank next in importance.

7) Under Sections 41 to 44, the Court has power to make any order regarding the child, so long as the child remains a minor child, the marriage of whose parents is the subject of the proceeding. The person to whom the custody of a child is given of a marriage which has been dissolved, can be directed not to remove such child outside the jurisdiction of the court.

"THE INDIAN CHRISTIAN MARRIAGE ACT, 1872"

"The persons by whom marriages may be solemnized"

(Ss. 4 - 9)

Sections 4 to 9 of this Part deal with the persons who can solemnise the marriages.

Section 4: Marriage must be solemnized by any of the persons mentioned in Section 5:

Section 4 lays down that, if one or both parties to the marriage are Christian or Christians, then the marriage shall be solemnized in accordance with the provisions of S.5. If, it is not so solemnized, then such marriage would become void. And the Act makes it criminal for a person to solemnize a marriage, who is not authorised by Section 5 to do so - *Maha Ram v/s. Emperor*, AIR, 1918, All. 168 at P.173.

Section 5: Marriages may be solemnized in India by following persons:

- 1) By any person who has received episcopal ordination, provided that, the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister. This clause provides for the solemnization of marriage by the ordained priest (Bishop in England). Such solemnization of marriage should be in accordance with rules, rites, ceremonies and customs of the Church of England as per clause 3 of S.60 of this Act. Ordained priests learning in the Church, are completely detached from their family and attached to the Church for the purpose.
- 2) By any clergyman of the Church of Scotland, provided that, such marriage is solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;
- 3) By any Minister of Religion, licensed under this Act, to solemnize marriages;
- 4) By, or in the presence of a Marriage Registrar appointed under the Act;
- 5) By any person licensed under this Act to grant certificates of marriage between Indian Christians.

" Marriage of Indian Christians "

(Sections 60 to 65)

This part consisting of sections 60 to 65, lays down the formalities for marriages among Indian Christians. These are separate provisions for marriages among Indian Christians. The expression "Christians" means, persons professing the Christian religion; and the expression "Indian Christians" includes the Christian descendants of natives of India converted to Christianity, as well as, such converts (See S.3 of the Act). There are no preliminaries prescribed to the marriage of Indian Christians. No notice (as required under Part III) of intended marriage is required to be given.

Solemnization of marriage among the Indian Christians (Section 60) :

A marriage between Indian Christians may be solemnized on the fulfillment of the following conditions :

- 1) The age of the man intending to be married shall not be under 21 years, and the age of the woman intending to be married shall not be under 18 years;
- 2) Neither of the persons intending to be married shall have a wife or husband living;
- 3) Each of the parties to the marriage shall, in the presence of a person licensed under S.9, and two credible witnesses, say to the others:- "I call upon the persons here present to witness that I, A.B, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C.D, to be my lawful wedded wife/husband" (S.60). Licenses may be issued to any Christian for the solemnization of marriage among Indian Christians. The parties are free to say the aforesaid (S.60 clause 3 above) in substance, not necessarily in literal translation, in any of the regional language understood by them.

Certificate of Marriage :

The Christian who has been licensed to perform the marriage, and before whom, the marriage has been solemnized is required to grant a certificate of marriage on application of either party to the marriage on payment of a fee of 4 annas. Such certificate should be considered as a conclusive proof of the solemnization of the marriage (S.61).

A Christian, licensed for the solemnization of the marriages among the Indian Christians is required to keep a Marriage Register Book, in which, all entries of marriage solemnized, are to be made. A copy of the same is to be sent to the Registrar General of Births, Deaths and Marriages.

Section 62 lays down that, such a person shall, keep in English or the language in ordinary use in the district, a Register Book of all Marriages in accordance with a Form prescribed by the State Government and he shall deposit true and duly authenticated extracts from his Register Book, in the office of the Registrar General of Births, Deaths and Marriages.

Section 63 : Such a person (licensed Christian), shall allow a search to be made in such Register Book and shall give a copy on payment of the proper fee.

Section 64 provides for Books in which marriages of Indian Christians under part I or Part III are registered. This Section says that, "The provisions of Sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under Section 37".

Section 65 lays down that, the provisions of Sections 60 and 61 shall not apply to marriage between Roman Catholics.

There are no preliminaries prescribed for a Parsi marriage. The Registration of Parsi marriage is compulsory, though non-registration does not affect the validity of the marriage. Even if it is not certified, it remains valid.

By amending Act of 1988, it has been laid down that, no male below the age of twenty one years, and no female below the age of eighteen years, can marry. Marriage of a person below the requisite age is null and void. The provision for guardianship has been abolished by the Amendment of 1988.

Sub-Section (2) of S. 3 states that, the children of a Parsi Marriage are legitimate children irrespective of the fact whether the marriage has or has to been declared null and void, after the Amendment of 1988 this Sub-Section states that, –

"Notwithstanding that, a marriage is invalid under any one of the provisions of sub-section (1) (which gives the grounds of void marriage), any child of such marriage, who would have been legitimate if the marriage has been valid, shall be legitimate".

Section 4 :

Section 4 Sub-Section (1) states that, – A Parsi husband or wife cannot remarry in the lifetime of his wife or her husband until,

- i) lawful divorce is obtained,
- ii) their marriage has been declared null and void or dissolved, although he or she may have become convert to any other faith.

Thus, this sub-section prohibits the remarriage of Parsis except under certain circumstances mentioned above.

Section 4 Sub-Section (2) lays down that, every marriage contracted contrary to the provisions of Sub-Section (1) shall be void.

Section 11 :

Section 11 lays down the punishment for solemnizing the marriage in violation of the provisions of S.4. If a priest solemnizes a marriage in violation of S. 4, he shall be liable to punishment of imprisonment for six months, or with fine of Rs.200, or with both.

Section 5 :

Section 5 further lays down that, every Parsi who contracts a marriage in violation of Section 4 (1) shall be subject to the penalties provided in Ss. 494 and 495 of the Indian Penal Code, 1860, for the offence of bigamy i.e. offence of marrying again during the lifetime of a husband or wife.

Under S.494 the punishment (for bare bigamy) may extend to a term of imprisonment which may extend to seven years as well as fine. Under S.495 the punishment for bigamy by concealment of former marriage is for a term of imprisonment which may extend to 10 years and also fine. The offence of bigamy can be committed only if the requisite ceremonies of marriage (Ashirwad) are performed - *Modi v/s. Modi*, 1975 Cal. L.J. 298.

The second marriage cannot be taken to be proved by mere admission of the parties, essential ceremonies and rites must be proved to have taken place - *Priya v/s. Suresh*, AIR 1971, SC 1153.

If the first marriage is not proved, the second marriage is not bigamous - *Katri Subbha Rao v/s. Katri Sethe*, AIR 1994 A.P. 364.

Section 6 :

- Section 6 states that, every marriage contracted under this Act shall be
- a) certified by the officiating priest in the form contained in Schedule II,
 - b) such certificate shall be signed by the officiating priest, parties to the marriage and two witnesses present at the marriage,
 - c) the officiating priest shall send such certificate to the Registrar of the place where marriage was solemnized;
 - d) the Registrar, thereafter, shall enter the certificate in a register to be kept by him for that purpose.

Section 7 states that, the marriage is not considered invalid, merely because, the provisions of Section 6 are not complied with.

Where there is no certificate and no entry in the marriage register, any other relevant evidence is admissible as proof of the marriage having taken place - *Bai Awabai v/s. Khodadad Ardesher*, 22 Bom. I.R.913.

University Examination Questions for Short Answers

1. Under which Article of the Constitution of India, women education and employment are protected ?
Answer : The reservation made for women in educational institutions and public employment are protected by Article 15 (3) of the Constitution of India.
2. State the long form of SAARC.
Answer : South Asia Association for Regional Co-operation.
3. State any two factors which led to child marriage.
Answer : i) Stoppage of Thread Ceremony and consequently stoppage of education of girls and substitution of that ceremony by marriage ceremony at the age of eight to twelve. ii) Stress on keeping the chastity and purity of girls intact by getting them married before the age of puberty;
4. Define 'child marriage' under the Child Marriage Restraint Act, 1978.
Answer : Child marriage means, a marriage to which either of the contracting parties is a child.
5. What is the punishment for solemnizing a child marriage under the Child Marriage Restraint Act, 1929 ?
Answer : Simple imprisonment of 3 months and fine.
6. What is the effect of the marriage which is in contravention of the marriageable age ?
Answer : Marriage performed in contravention of the condition of the age is valid; But the persons who perform, direct or promote such child marriage, are liable to punishment.
7. What is the punishment for contravention of the condition specified in clause iii) of Section 5 of the Hindu Marriage Act, 1955 ?
Answer : Simple imprisonment which may extend to 15 days, or with fine which may extend to Rs. 1000/- or with both.
8. Define 'sati' ?
Answer : "Sati means, the burning or burying alive of i) any widow along with the body of her deceased husband or any other relative; or ii) any article, object or thing associated with the husband or such relative.
9. State the punishment for the act of attempt to commit Sati.
Answer : With imprisonment for a term which may extend to six months or with fine or with both.
10. State the punishment for abetment to commit sati.
Answer : With imprisonment for life, and shall also be liable to fine.
11. State the punishment for an act of glorification of Sati.
Answer : With imprisonment for a term which shall not be less than 1 year but which may extend to 7 years and with fine not less than Rs. 5000/- but which may extend to Rs. 30,000/-.

12. What is 'dowry' ?

Answer : "Dowry" means, the payment in cash or kind or both, to the bridegroom or bridegroom's parents/guardians by the bride' parents/guardian.

13. State the punishment for giving or taking dowry.

Answer : With imprisonment for a term not less than 5 years, and with fine not less than 5 years, or with fine not less than Rs. 15,000/- or the amount of the value of such dowry, whichever is more.

14. State punishment for demanding dowry.

Answer : With imprisonment for a term not less than 6 months but which may extend to 2 years and with fine which may extend to Rs. 10,000/-.

15. Define "dowry death" as defined under the IPC.

Answer : Where a death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage, when soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry, such death shall be called "dowry death".

16. State the punishment for dowry death.

Answer : With imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life.

17. Define 'adoption' under the Juvenile Justice (Care and Protection to Children) Act, 2000.

Answer : Adoption means, the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges, and responsibilities that are attached to the relationship.

18. What is begging under the Juvenile Justice (Care and Protection to Children) Act, 2000.

Answer : Begging means, i) soliciting or receiving alms in a public place or entering into any private premises for the purpose of soliciting or receiving alms; ii) exposing or exhibiting any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal with the object of obtaining or extorting alms.

19. What is "competent authority" under the Juvenile Justice (Care and Protection to Children) Act, 2000 ?

Answer : Competent authority means, in relation to children in need of care and protection, a Committee, and in relation to juveniles in conflict with law, Board.

20. Define "fit institution" as defined under the Juvenile Justice (Care and Protection to Children) Act, 2000.

Answer : Fit institution means, a governmental or a registered non-governmental organization or a voluntary organization prepared to own the responsibility of a child and such organization is found fit by the State Government on the recommendation of the competent authority.

21. Define "guardian" as defined under the Juvenile Justice (Care and Protection to Children) Act, 2000.

Answer : Guardian in relation to a child, means, his natural guardian or any other person having the actual charge or control over the child and recognized by the Competent Authority as a guardian in course of proceedings before that authority.

22. Who are the natural guardians of a Hindu child under the Hindu Minority and Guardianship Act, 1956 ?

Answer : Father/Mother/In case of minor wife, married woman, the husband.

23. What will the Court consider while appointing a guardian under the Guardians and Wards Act, 1890 ?

Answer : The welfare of the minor is the paramount consideration while appointing the guardian of the minor.

The person desirous of being or claiming to be the guardian of the minor, any relative or friend of the minor, the Collector of the district or other local area in which the minor ordinarily resides, the minor holds property, if the minor belongs to a class, the Collector who has authority with respect to that class.

24. Define the term 'women's estate'.

Answer : The term 'women's estate' in its larger connotation means all property which has come to a woman by any means and from any source whatsoever, and includes both property in which she has absolute interest (streedhan) and property in which she has limited interest or qualified interest.

25. Who is "juvenile" or "child" under the Juvenile Justice (Care and Protection to Children) Act, 2000 ?

Answer : Juvenile or child means, a person who has not completed eighteenth years of age.

26. Who is "juvenile in conflict with law" under the Juvenile Justice (Care and Protection to Children) Act, 2000 ?

Answer : A juvenile in conflict with law means, a juvenile who is alleged to have committed an offence and has not completed eighteenth years of age as on the date of commission of such offence.

27. What is the prime object of the Children Home/Shelter Home under Section 39 of the Juvenile Justice (Care and Protection to Children) Act, 2000 ?

Answer : Restoration of the child (i.e. handing over the child to its parents, guardians, fit person or fit institution, etc.) and protection to the child, is the prime objective of the children home/shelter home.

28. Define 'child' according to the Immoral Traffic Act, 1956.

Answer : Child means a person who has not completed the age of 16 years. Minor means a person who has completed the age of 16 years but has not completed the age of 18 years.

29. What is the term 'prostitution' means under the Immoral Traffic (Prevention) Act, 1956 ?

Answer : Prostitution means sexual exploitation or abuse of person for commercial purpose and the expression prostitute shall be construed accordingly.

Answer : Under Section 82 of the IPC, the child under 7 years of age is not liable for any offence; and under Section 83 a child above 7 years and below 21 years is not liable for any offence if he has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.

41. State any two offences relating to marriage under the IPC.

Answer : i) A man deceitfully inducing a woman to have cohabitation or sexual intercourse with him. ii) Fraudulent or mock marriage. iii) Criminal elopement, etc.

42. In case of adultery, who can take an action ?

Answer : In case of adultery, husband of the wife with whom adultery is committed can file a complaint and take action against a concerned man.

43. What are the requirements of valid marriage under the Muslim Law ?

Answer : i) There should be proposal or offer (ijab) and acceptance (qubul); ii) The parties should have the capacity to marry (attaining puberty) or to be married (marriage through guardians); iii) There should be no impediments in the way of marriage/no matrimonial prohibitions.

44. Give any two grounds of divorce available to a Muslim wife under the Dissolution of Muslim Marriages Act, 1939.

Answer : i) Whereabouts of the husband have not been known for a period of 4 years; ii) Failure of the husband to provide maintenance to the wife for a period of 2 years.

45. Define 'Talaq-ul-biddat'.

Answer : Talaq-ul-biddat is a pronouncement of talaq in a single tuhr and is irrevocable in nature. In Talaq-ul-biddat or talaq-ul-bain, the talaq or divorce takes effect forthwith or immediately.

46. When can a married Hindu adopt a child ?

Answer : Under the Hindu Adoptions and Maintenance Act, 1956, he can adopt a child with the consent of his wife. If he wants to adopt a son, then he must not have a Hindu son, son's son or son's son's son living at the time of adoption; If he wants to adopt a daughter, then he must not have a Hindu daughter, or son's daughter living at the time of adoption. So also he must be at least 21 years older than the daughter to be adopted.

47. When can a female Hindu adopt a child ?

Answer : Under the Hindu Adoptions and Maintenance Act, 1956, any female Hindu – a) who is of sound mind; b) who is not a minor; and c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind, has a capacity to take a son or daughter in adoption.

48. In which case the Supreme Court decided that right to life includes right to education ?

Answer : Unni Krishnan v/s. State of Andhra Pradesh.

49. Which landmark case lays down the principles relating to sexual harassment at workplace

Answer : Vishakha v/s. State of Rajasthan.