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UNIT - I

WOMEN IN INDIA

Pre Independence Period

Inequality on the basis of sex is a staggering problem worldwide. India is hardly unique in this regard. Women in all nations- including the United States still suffer serious inequalities in at least some central areas of human life. In almost all the present and contemporary societies it is discriminatory and prejudicial. Nearly all human societies in different parts of the world are male-dominated. Males are active part and the females only passive part of the different societies, only a thing of enjoyment of males and in some societies they are only chattles contractible, saleable and endowed with the duty to serve males and elder females having no material and worthwhile rights. In theory they are respectable but in practice they are the subjects of cruelty, illtreatment and all sorts of misbehaviour of males. The status of women in the society has been a complicated one. It passed through fluctuations over the ages. Status of women was high during the Vedic period. It slumped in the post-Vedic period. Again, in the modern period it rose.

Social and Legal Inequalities of Women

Ancient period: In ancient India, which may be called the Aryan age of History, women were respected as mothers, sisters and daughters. Manu said in the code of Manu (Manusmriti) that Yatra Naaryastu Poojyante ramante tatra devatah (यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः) - Where women are respected, divine graces adore that home. Plato accorded women equal status while choosing the guardian for state

In another work of Plato i.e., "Laws" the status of woman was again reduced to that of housekeeper as the institution of family was restored. Aristotle and Rousseau regarded women's position from a functional perspective. The qualities like modesty, femininity and meekness were highlighted and were branded as womanly and natural for the female sex. Hobbes and Locke, the advocate for equality, did not assign women equality with men.

There has been no practical equality between man and woman in any society. Even under Mohammedan texts of theory and Shariat women are half of the male in status. Marriages are contracted for dower (Mehr) and women kept covered with Burka, almost devoid of personal liberty and gender equality.

Orthodox Hindu society still believes that the females have no right to personal liberty. Tulsi Das also in his world famous epic Ram Charit Manas declares that if women are liberated they shall become corrupt. Jimi swatantra bhaye bigarahin naari (जिमि स्वतन्त्र भये विगरहि नारी) He even declares the women to deserve beating for punishment like an animal. Dhol ganwar shoodra Pashu Naaree sakal taadana ke adhikaree (ढोल गवार शूद्र पशु नारी सकल ताड़ना के अधिकारी), Drum, rustics shudras, animals and women, all deserve beating.

Women's Education: In fact the rights enjoyed by the present day modern women are sparse compared to that of their Vedic counterparts. There was no discrimination between sexes. Women enjoyed equal educational opportunities. In the post Vedic period, that is after 300 B.C. a drastic deterioration took place in the women's position. The degradation of women lasted till the beginning of the twentieth century. They were denied access to educational opportunity. Since the girls were not educated, early marriages became common. The purdah also came into royal families. Sati Pratha was also revived. Thus women were

burdened with cumulative injustice and subjected to gross discrimination] in all spheres.

Marital Rights of Women: Marital relations regulate human behaviour between persons of opposite sexes. In pre legislation stage, amongst the Hindus, marriage was considered to be holy union and the purpose behind this union was to attain spiritual benefits. For that reason the marriage was a religious necessity. Even after the Marriage laws (Amendment) Act 1976, the Allahabad High Court in Gopal Krishna v. Mithilesh Kumari¹ observed that marriage amongst Hindus was a sacrament and holy union of man and woman while the marriage under Muslim law was a civil contract, and all duties and rights between the husband and the wife arise from the said contract. Ultimate loss was to the female sex. There was no restriction for a Hindu male relating to number of wives. Polygamy was allowed but polyandry rarely existed. Remarriage of widow was also condemned.

Women's Rights: The history of women's rights is not linear, with the religious and customary laws forming one extreme end of the scale and the statutory reforms slowly and steadily progressing towards the other, as it is popularly believed. In the period of smriti and post-smriti, there were certain protective measures built into laws and customs, which granted women certain significant rights over property. While these rights do not meet the modern concept of equality, they were governed by a notion of equality. Hindu women's rights over ornaments, valuables and movable and immovable property under a specific category called stridhana are indicative of this protectionist approach.

The women situated in the higher strata of the caste structure were governed by a strict code of sexual control to maintain caste purity and secure property devolution through legitimate children. The Islamic jurisprudence of the pre-colonial period sought to protect women's economic rights within the concept of contractual marriages.

Modern period: In the early part of the 19th century, due to the efforts of our social reformers some marginal adjustments were made in response to humanitarian considerations and social demands. Great saints like Swami Dayanand, the founder of Arya Samaj, fearlessly raised voice against all such ill-treatments and discriminations with women, which culminated in the basic law of the country.

Social reformers sought to eliminate a host of social practices, from sati, to the prohibition on widow remarriage, to child marriage. The position of women within Hindu tradition was symbolically deployed by the British to legitimize colonial rule.

Evils of Nineteenth Century

Sati: In the first half of the nineteenth century; social reformers such as Raja Rammohan Roy campaigned for the elimination of Sati. Rammohan Roy' arguments against sati were cast within the discourse of religion and scripture. He argued that sati was not prescribed by shastric text. The groundwork for this has been laid for a very long time and this was an example where legislative legitimacy was given to an accepted social norm. The then Governor General, Lord Bentinck, in referring to the proposed legislation, said that the government would be following and not going ahead of public opinion. The effect of the Sati campaign was contradictory. While the ordinance prohibiting sati was passed, the controversy has succeeded in mobilizing a resistant discourse that insisted on the cultural legitimacy of sati. The legislation condemned the practice of sati.

Child Marriage: The issue of child marriage was taken up in the later half of the century, led by reformers such as Behram and Ranade. The prevalence, in 18th and early 19th centuries, of child marriage leading

often to early widowhood was one of the major concerns of the social reformers. Their tireless efforts to curb this social evil finally resulted in 1956 in The Hindu Widows Remarriage Act'.

Towards the end of nineteenth century, the position of Indian women in society improved a lot. The social movements launched by Raja Ram Mohan Roy and his Brahmo Samaj, Iswarchandra Vidyasagar and Arya Samaj among the Hindus and similar movements in other communities to improve the status of women led to the enactment of several laws such as Sati abolition in 1829, banning child marriage, permitting remarriage of widows.

As the national movement gained in strength, the early 20th century showed some activity in the legislative field. The plight of widows without any means of their own, depending entirely on the family, led to the passing of the Hindu Women's Rights to Property Act in 1929 followed by another in 1937. These laws while they made the widow less dependent financially during her lifetime, stopped short of giving her any substantial rights of ownership since the right to property was only for life.

Women's Education: The recognition of equal right of women to education was recognized against all conservative opposition. The pernicious practice of purdah began to diminish, particularly among Hindus. The East India Company attached no significance to women education. There was not even a single government school for women. Missionaries and some institutions were privately running a few schools for girls. Glancing at the education of women from 1857 to 1902, the Indian Education commission declared that women's education was in deplorably backward state, and that it should be improved scientifically as much as possible. Between 1917 and 1947, women's education grew rapidly. In 1915 the National Council of Women was established.

Position of Muslim Women: The demands for changes in the Muslim law to improve the position of women were also building up. The reformers of the two communities didnot work together. The significant change that was made as a result of all the agitation for improvement among the Muslims was to give the right of divorce to Muslim Women in 1939.

A by-product of the Policy of non-intervention in family law had been the diversification (due to customs) among the major personal laws in different parts of the country and varied interpretations of the sacred texts. Among the Muslim schools of law- there were others besides the Sunnis and Shias. This was partially remedied by Muslims undue the Act and practically abrogated the customary practices which had grown over the years.

Among the Hindus where there were two major schools-

- a) Mitakshara
- b) Dayabhagas,

and other sub-schools. Lack of uniformity posed a serious problem.

The demand for major changes, no longer marginal ones, grew as a result of the untiring efforts of Gandhiji, who wanted women to suffer from no social or legal disabilities. The inferior position of women in all matters, guardianship, inheritance and divorce, had an effect on the personality of the women. Ultimately the Government was compelled to move. A Committee was constituted under the chairmanship of Sir B.N. Rau, whose terms of reference included the suggestions for change and the codification of Hindu law, so that all Hindus would be governed by the same.

Only after independence under the leadership of Pandit Nehru could this matter be taken up. It is significant that the same body, sitting as the Constituent Assembly, adopted the equal rights clauses in the constitution without any debate, while functioning in its capacity as the central legislature, blocked the Hindu Code Bill which attempted to provide only partial equality to women.

Post Independence Position

In post independence period of Indian life, much has been done for liberation of Indian women in all classes and religions of the country. The Constitution of India which declared equality of status and of opportunity provided in Article-16(2) that 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 of office under the State. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth, and the most prominent fundamental right as to equality before law has been provided in Article 14 that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Directed and guided by the constitution various revolutionary laws giving equal status to women with men have been enacted in order to remove all disparities, dissimilarities and discriminations against women. For instance, various protectional laws have been enacted and enforced such as-

- 1) The Equal Remuneration Act, 1976.
- 2) The National Commission for Women Act, 1990.
which has been entrusted with the task of presenting to the Central Government, the problems of women, the deprivation of their rights, and report as to their progress and development. This Commission has been given a constitutional status and certain judicial power as well.

Various protectional laws have been enacted and enforced such as-

- 3) The Commission of Sati Prevention Act, 1987,
- 4) Indecent Representation of Women (Prohibition) Act, 1986.
- 5) Dowry Prohibition Act, 1961.
- 6) Suppression of Immoral Traffic in Women and Girls Act 1956.
- 7) Muslim Women's (Protection of Rights on Divorce) Act, 1986.
- 8) The Family Courts Act 1984.
- 9) Protection of Human Rights Act, 1993, etc.

The reservation of women in Parliament and State legislations is in progress, to be brought as a most important Act for safeguarding the rights of women. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 has been brought and enacted by the Parliament to prevent the female foeticide and infanticide.

But in post independence period it can not still be declared that women have got redemption from the clutches of male domination. Cruel treatment with the female sex including minor girls is a recognised social behaviour. Persons who lead animal or rather beastly life, are married with girls by their parents without obtaining any consent of the girls whether major or minor. Demand of dowry, dowry deaths, inhuman cruelties and what not are committed by uncivilised families and members thereof including

ladies. Today the parents seek such persons due to allurements of their posts, professions or trades or properties and press their daughters to such families where they are generally tortured and converted into tamed animals to be treated as they like.

- A. Polygamy:** Full equality of sexes, can hardly be possible in a legal system which permits polygamy and a social system which tolerates it. Though the institution of polygamy has prevailed traditionally in India, in the last five or more decades it is on the wane and most marriages are today monogamous. The Parsis Marriage and Divorce Act 1865 provided that any marriage during the lifetime of his or her wife or husband was void. The Indian Christian Marriage Act, 1872 lays down the condition that neither of the persons intending to be married shall have a wife or husband still living. With the enactment of the Hindu Marriage Act, 1955, which lays down the principle of monogamy for all Hindus, 88 percent of the Indian population are legally governed by the principle of monogamy. The only personal law, which has remained impervious to changing trend from polygamy to monogamy, is Muslim Law.
- B. Age of Marriage:** Another major social evil which was sought to be curbed by legislation is child marriage. The first legislation was the Civil Marriage Act which laid down the age of marriage to be 14 years. But as only a very small section of the people married under this Act, the problem continued. The Hindu Marriage Act lays down as one of the conditions the completion of 18 years and 15 years by the bride-groom and the bride respectively. Special Marriage Act, 1954 a postindependence legislation which provides for a secular marriage irrespective of the religious affiliation of the parties, contemplates the solemnisation of marriage between adults under its provisions, as it fixes the minimum age at 21 and 18 for males and females respectively.
- C. Dowry:** The Dowry Prohibition Act, 1961, passed with the ostensible purpose of curbing this evil, if not of eradicating it, has signally failed to achieve its purpose. In addition, two ancillary provisions should be incorporated in the Dowry Prohibition Act, 1961. It has been pointed out that one of the 'major loopholes' in the existing legislation is that anything is allowed in the name of gifts and presents.
- D. Divorce:** A monogamous marriage without the right of divorce would cause great hardship to both parties to the marriage. The concept of 'union for life' or the sacramental nature of the marriage which renders the marriage indissoluble has gradually been eroded and through legislation the right of divorce has been introduced in all legal systems in India, but the same various and unequal treatment of sexes is characteristic of this branch of law also.
- I. Hindu Law:** According to traditionalists, divorce was unknown in Hindu Law. Polygamy without the right of divorce, caused, in many cases, tremendous hardship.

Customary Divorce: Contrary to the general notion regarding the indissolubility of Hindu marriage, a large section of Hindus among the lower castes has traditionally practised divorce. These customary forms of divorce were recognised both socially and judicially. The usual customary forms are-

- 1) By mutual consent.
- 2) Unilaterally at the pleasure of the husband or by the abandonment of the wife.
- 3) By deed of divorce (Char-Chitti)

Usually, customary divorces are through the intervention of the traditional panchayats of caste

tribunals. Under customary law there is no waiting period after divorce to remarry. But if divorce is obtained under the Hindu Marriage Act, then either party to the marriage can lawfully remarry only after a lapse of one year after the decree of divorce (Section 15). With the enactment of the Hindu Marriage Act of 1955, divorce became a part of the law governing all Hindus. The grounds for this had been already prepared by the passing of the Hindu Women Right to Separate Residence and Maintenance Act in 1946, which inter alia permitted the wife to separate from her husband on the ground that he had married again.

Grounds of Divorce under the Hindu Marriage Act, 1955: The various grounds on which husband or a wife can win in divorce are-

- 1) living in adultery
- 2) conversion to other religion
- 3) Insanity
- 4) Incurable form of leprosy
- 5) Venereal disease
- 6) renunciation
- 7) Where the respondent has not been heard of as being alive for a period of seven years or more by persons who would naturally have heard of it.
- 8) failure to resume cohabitation for a period of two years after the decree of judicial separation.
- 9) failure to comply with a decree for restitution of conjugal rights.

Two additional grounds have been given to the wife-

- 1) to obtain a divorce if the husband has more than one wife living.
- 2) if he has been guilty of rape, sodomy or bestiality.

From the cases reported, it appears that many women have benefited from this provision.

II. Muslim Law: Under Muslim law a husband has an absolute and unlimited right to repudiate the marriage at his will. This is known as Talaq. A muslim wife has no such right to dissolve her marriage. Dissolution of Muslim Marriage Act, 1939 - by this Act muslim women have benefited. The provisions that have been resorted to most frequently are the 'option of puberty' and failure to provide maintenance by the husband. But the power of the husband to pronounce talaq unilaterally remains, and has in no way been curtailed either judicially or through legislation. As long as this absolute and unlimited right remains, the position of the Muslim wife will remain insecure and her status can not be raised.

III. Christian Law: All Christians are governed by the Indian Divorce Act, 1869. Under the Act both husband and wife can obtain a divorce, but there is a great difference between the rights of the husband and the wife. The husband can obtain a divorce if the wife has committed adultery. The wife has to prove two offences by the husband before she can obtain a divorce, but this law has been outdated and the Christian Marriage and Matrimonial causes Bill 1960, contains almost all the grounds included for divorce under the Special Marriage Act. 1954.

IV. Parsee Law: The Parsees are governed by the Parsee Marriage and Divorce Act. 1936. Both the parties to marriage can initiate divorce proceeding on same grounds.

E. Adoption: Adoption forms the subject matter of personal law. In India the only personal law which recognises adoption in the true sense of the term is Hindu Law which regarded adoption as the 'taking of a son as a substitute' in case there is no male issue.

So in post-independent India various changes in personal laws have been made to protect the rights of women and ensure their equality. While changes are needed in the substantive laws, specially in the areas of personal laws, a common civil code giving equal rights to women is urgently required.

CONSTITUTIONAL PROVISIONS TO WOMEN

According to a report of the United Nations published in 1980- "Women constitute half of the world population, perform nearly two thirds of works hours, receive one tenth of the world income and own less than one hundred percent of world property".

In view of the Supreme Court as observed in *Madhu Krishnan v. State of Bihar* (1956) 5 SCC 148 women from half of the Indian population have always been discriminated against men and have suffered denial and are suffering discrimination in silence.

After independence, the framers of the constitution realised the unequal status of women and assured that women get equal rights. The fundamental Rights enshrined in Article 14, 15 and 16 guarantee the principle of equality before law, equality of sexes and equal opportunities in all walks of life.

Article 14 of the Constitution guarantees equality before law, of females and males, castes and creeds, religions Hinduism, Aryanism Christianity, Mohammedanism, etc. It provides that the "State shall not deny to any person equality before law or the equal protection of the laws.

The constitution of India, under Article 253, provides that Parliament has power to make laws for the whole or any part of the territory of India for implementation of any treaty, agreement or convention with any other country or countries or any decision, made at any international conference, association or other bodies. Besides this, Indian Constitution makes also certain other provisions directly in relation to women and children. These provisions are of two types. Some have been included in Part-III on fundamental Rights which are enforceable in a court of law and others have been incorporated in Part-IV on Directive Principles of state policy which have been expressly made not enforceable in a court of law (Article-37).

Fundamental Rights of women: Constitution of India guarantees all the rights to women which are given to men. Part III of the constitution of India deals with the fundamental rights. The provisions regarding fundamental rights have been enshrined in Articles 12 to 35, which are applicable to all the citizens irrespective of sex. The special features of fundamental rights are as under-

1. Equality of status (14-18)
2. Right to freedom (19-22)
3. Right against exploitation (23-24)
4. Right to freedom of religion (25-28)
5. Cultural and educational rights (29-30)

6. Right to constitutional remedies (32) Provisions Relating to Women

Provisions Relating to Women

- 1) Equality of status:** Article 14 of the constitution of India enunciates the general principle of right to equality. Art. 14 of the Indian Constitution runs as follows: "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." However, equality secured under Article 14 of the constitution of India is not absolute. It is subject to certain reasonable exceptions and classification.

In *Bhagwati v. Union of India*, (AIR 1989 SC 2088) the Supreme Court struck down Rule 94 (14) (b) of Central Civil Services (Pension) Rules, 1972 as Violating Article 14 of the constitution and as such to be unconstitutional and void.

According to Article 15(2) women have equal rights with men, a right to use or access to public places. As per Article 15(3) of the constitution, discrimination on grounds of religion, race, caste sex and place of birth shall not prevent the state from making any special provisions for women and children. The Supreme Court, in *Government of A.P. v. P.B. Vijay Kumar* (AIR 1995 SC 1648), has lucidly explained the purpose of this clause, that the insertion of this clause in relation to women is a recognition of the fact that for centuries, women of this country, have been socially and economically handicapped. As a result they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate the socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that clause (3) is placed in Article 15. Its object is to strengthen and improve the status of women. Article 15(4) enables the state to make special provisions for the advancement of women.

Article 16 provides for equality of opportunity in matters of public employment. Clause (1) of Article 16 provides equality of opportunity in matters relating to employment or appointment to any office under the State Clause (2) of Article 16 of the Constitution lays down specific grounds (religion, sex, race, caste, descent, place of birth, residence or any of them) on which citizens are not to be discriminated against each other in matters of opportunity and office under the State.

- 2) Right to freedom:** Article 19-22 of the Constitution deal with the right to freedom. It includes right to freedom of speech, protection in respect of conviction for offences, protection of life and personal liberty, protection against arrest and detention etc. Under Article 21 protection of life and liberty of every person who may be male or female has been guaranteed that no person shall be deprived of his or her life or personal liberty except according to procedure established by law. Right to life guaranteed in Article 21 includes within its ambit the right to social security and protection of the family.

In a case of *Maneka Gandhi v. Union of India* (AIR 978 SC 597), the Supreme Court explained the phrase that the personal liberty used in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

- 3) Right against exploitation:** Fundamental Right against exploitation has been guaranteed in Articles 23 and 24. According to Article 23 of the Constitution traffic in human beings whether male or female and his or her forced labour is prohibited.

Employment of children is prohibited under Article 24 of the Constitution. On the strength of Article 23(1) of the Constitution, the legislature has passed the Immoral Traffic (Prevention) Act 1956 which aims at abolishing the practice of prostitution and other forms of trafficking, including "Devadasi system".

- 4) **Right to freedom of Religion:** Article 25 guarantees freedom of conscience and free profession, practice and propagation of religion to every man or woman of any caste or creed-
- a) Subject to public order, morality and health and to the other provisions of this part all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
 - b) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-
 - a. Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.
 - b. Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Directive Principles of State Policy and Women: As per Article 39 of the Constitution the State shall, particularly, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood, that there is equal pay for equal work for both men and women, that health and strength of workers, men and women are not abused and that the citizens are not forced by economic necessity to enter vocations unsuited to their age and strength.

Article 39 (A) directs equal justice and free legal aid to every man and woman as a State Policy, that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 39 (d) directs the State to ensure equal pay for equal work for both men and women.

Equal pay for equal work: Pursuant to Article 39(d) Parliament has enacted the equal Remuneration Act 1976. The directive contained in Article 39(d) and the Act passed thereto can be judicially enforceable by the court. In *Randhir Singh v. Union of India* (A.I.R. 1982 SC 879) the Supreme Court has held that the principle of "Equal pay for equal work" though not a fundamental right is certainly a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32 of the constitution. The doctrine of 'equal pay for equal work' is equally applicable to persons employed on a daily wage basis.

The above principle of 'equal pay for equal work' has also been reiterated by the Supreme Court in *Bhagwan Das v. State of Haryana* (A.I.R. 1987 SC 2049) and *R.D. Gupta v. Lt. Governor, Delhi Administration* (AIR 1987 SC 2986). It has also been made clear by the Supreme Court that this principle has to be read in the light of Article 14 and Article 16 of the Constitution.

Article 39 (e) directs the State to ensure that the health and strength of workers-men and women are safeguarded and children of tender age are not abused and that they are not forced by economic necessity

to enter vocations unsuited to their age.

Under Article 42, a directive has been issued to the State to make provision for securing just and humane conditions of work and for maternity relief.

Article 44 directs for a uniform civil code for all citizens whether of any sex, caste or religion, that the state shall endeavour to secure to the citizens a uniform civil code throughout the territory of India.

Prevention of sexual harassment of working women: According to Article 39 (e) of the Constitution the health and strength of workers i.e., men and women and that of the children of under age to be protected equally. They should not be forced to work under inhuman and hazardous conditions. In view of this Article the state shall direct its policy towards encouraging the health and strength of workers (men and women) and the children are not forced by economic necessity to enter a vocation unsuited to their age and strength.

In *M.C. Mehta v. State of Tamil Nadu* (1991) it has been held that in view of Article 39 the employment of children within the match factories directly connected with the manufacturing process of matches and fire works can not be allowed as it is hazardous. Children can however, be employed in the process of packing etc. away from the place of manufacturing. In a public interest litigation filed before the Supreme Court the need for effective legislation to curb sexual harassment of working women was emphasised. In *Vishaka v. State of Rajasthan* (1997) 6 SCC 24 the Supreme Court observed that in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse more particularly against sexual harassment at work places, the court lays down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution in the enforcement of the fundamental rights and it is further emphasised that they would be treated under the law declared by this court order Article 141 of the Constitution.

For this purpose sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as-

- a. physical contact and advances.
- b. a demand or request for sexual favours
- c. sexually coloured remarks
- d. showing pornography
- e. any other unwelcome physical overtures.

The guidelines and norms prescribed herein are as under-

1. Duty of the employer or other responsible persons in work places and other institutions.
2. Preventive steps
3. Criminal proceedings
4. Disciplinary Action
5. Complaint Mechanism
6. Complaints committee
7. Workers' Initiative
8. Awareness

9. Third party harassment

10. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, the Supreme Court directed that the above guidelines and norms would be strictly observed in all work places for the protection and enforcement of the right to gender equality of the working women. The Supreme Court has exhibited great judicial activism while providing rescue measures to the working women by resorting to judicial activism under Article 141 of the Constitution of India, 1950.

As the Supreme Court observed in *Vishaka v. State of Rajasthan* (1997), in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International conventions and norms are significant for purpose of interpretation of the guarantee of gender equality, right to work within human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. This is implicit in Article 51 (c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with entry 14 of the Union list in 7th Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.

The power of Supreme Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical commitment of the Constitutional scheme.

As regards the provisions under Labour Law, Section 5 of the Equal Remuneration Act, 1976 prevents the employer from making any discrimination against females while recruiting for the same or similar work and in "conditions or work" subsequent to recruitment.

One may contend that the term "condition of work" would take within its fold harassment at work place and the complaint procedures provided under the Act would be sufficient to deal with sexual and gender based harassment claims. This however cannot be accepted because it requires special attention. It cannot be dealt with as one among many issues.

Thus, existing laws do not serve the purpose. Actually, the employers must have a duty to provide a suitable working environment. It can be observed that-

- 1) A certain and detailed company policy regarding sexual and gender based harassment should be adopted and such policy must be well publicised.
- 2) An institutionalised but informal complaint procedure should be set up with high ranking female officials to hear complaints.
- 3) Secrecy must be ensured to the victim.

- 4) Special investigating agency must exist comprising both male and female officials to investigate the complaint.
- 5) Appropriate disciplinary action must be taken against the offender.
- 6) Immediate action must be taken on every complaint in this regard.

Employers must be liable for sexual or gender based harassment caused to female employees by supervisors with or without actual delegated authority, with or without knowledge of the employer. However, the employer may be discharged from such liability if she or he, as the case may be, had (i) created a real and responsive avenue of complaint; (ii) an express policy against harassment at work place; and (iii) meticulously implemented it.

Fundamental Duty to Renounce Practices

Derogatory to the dignity of women: Article 51-A lays down fundamental duties of men and women citizens of the country, clause (a) of which relates particularly to women.

Women's Reservation in Election to Local Bodies Employment: In 1992 by the 73rd and 74th constitutional amendments the reservation of seats for women in panchayat and in the municipal bodies have been incorporated by inserting Article 243(d) and 243(t). According to the mandate of Article 243 (b) (t), the Government on the strength of the constitutional powers made a successful reservation of 33% seats for women in the local bodies which is considered a pioneer legislative endeavour.

Article 243 of the Constitution and Reservation for SC/ST/BC Women: Wherein Gujarat Municipalities (Reservation of scheduled caste/scheduled Tribe/Backward class women for office of President) Rules 1994; Rules 2 and 3 read with schedule Rule 5; reservation of office of President of Municipality for SC/ST/BC when by roster, all the members of the municipality belonging to specific reserved category irrespective of whether they were elected as members of reserved seats or not, would be eligible to stand for the office of president.

By providing for the office of the president to be filled from different categories of persons by rotation the effect is that as per the roster the office of the president is required to be filled by a specified or particular class e.g. the Scheduled caste or Scheduled Tribe or Backward Class or women then all other members of the municipality who do not fall under that category, are excluded from contesting the election. The eligibility and the corresponding exclusion of others is determined on the basis of the candidate answering to the description of the category or caste for whom the post is reserved as per the roster and not the nature of constituency from which the person is elected. For example-when as per roster the candidate for the president's post has to be a Scheduled Caste then the Act and the Rules do not provide that it is only the Scheduled Caste candidate who has been elected from Scheduled Caste ward who can stand for election and the other Scheduled Caste candidates are not eligible even though they were popular enough to get elected from unreserved wards.

Constitutional Validity of section 497 of the I.P.C.: Section 497 of I.P.C. provides that 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 of or connivance of that person (husband), such sexual intercourse, not

amounting to offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment of either description for a term which may extend to five years or with fine or with both. In such a case the wife shall not be punishable as an abettor. The Constitutional validity of section 497, I.P.C. was challenged on the ground that it is violative of Article 14 and 15 (1) of the constitution.

In Abdul Aziz v. State of Bombay (AIR 1994 SC) The Apex Court upheld the validity of the provision on the ground that the classification was not based on the ground of sex alone. The court relied upon the mandate of Article 15(3) of the constitution to uphold the validity of the said proviso of the code.

Constitutional validity of Section 437 of the Code of Criminal Procedure 1973: The mandate of Section 437 of Cr.P.C. permits distinction in favour of women even if there appears to be reasonable grounds for believing that they have been guilty of an offence punishable with death or punishment for life (Suresh Kumari v. State of Haryana 1995 CU) crimes 643 C.P.C. 14).

This section prohibits release of a person accused of a capital offence on bail except women and children under 16 years of age or sick or infirm person. In a case of Chopi v. State of Rajasthan (1971) the Rajasthan High Court has held that it is valid on the ground that it makes special provision for women and therefore it is protected under Article 15(3) of the Constitution.

Prevention of sexual harassment of working women: In a landmark judgement of Vishaka v. State of Rajasthan (AIR 1997 SC) the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women.

UNEQUAL STATUS OF WOMAN IN DIFFERENT PERSONAL LAWS

Introduction: India is a country with composite culture and rich heritage. India is a secular country wherein state has no religion. Under the constitution of India, 1950 the State has an important constitutional obligation to protect all religions but it interferes with none. Citizens are free to follow any religion of their choice. In respect of personal matters like marriage, divorce, succession, adoption and maintenance, different personal laws are in force, and which personal law is to be followed depends upon the religion of the person. This is the sole reason that there are different marriage laws, divorce laws and succession laws having applicability to different religions like Hinduism, Islam etc. As regards their personal matters, there is no common civil code.

The position of women in their respective personal laws can be studied under following heads-

1. **Position of Hindu Women:** The position of Hindu women under Hindu law stands improved now. She has acquired a new status and position in the society. This is the natural incident of the rule of monogamy. A Hindu now can not have more than one wife living at a time. Hindu Marriage which was considered to be a religious duty and a sacrament has undergone a change and it has lost its religious sanctity under the Hindu Marriage Act, 1955 which came into force on 18th May 1955. The Hindu Marriage Act makes elaborate provisions regarding conditions for a valid Hindu Marriage, regulation of marriage, legitimacy of children, nullity of marriage, divorce etc. Most of the provisions of the Hindu Marriage Act are equally applicable to Hindu husband and wife. A few provisions of the said Act are discussed in brief, as under-

Marriage:

- I. Rule of monogamy:** A marriage in violation of Section 5 clause (i) of Hindu Marriage Act, 1955 is void. A Hindu can not have more than one wife. Polygamy has been abolished.
- II. Age of Marriage:** Another important ground of marriage is age. However, a marriage performed in violation of the age requirements is still valid, it is neither void nor voidable. The only special provision applicable to women is the option of puberty. That is according to Section 13(2) (iv) of Hindu Marriage Act, 1955 the woman if married when a minor, can repudiate the marriage before she reached 18 years. irrespective of whether the marriage is consummated or not. Section 18 of the Act provides that anyone who procures a marriage for himself or herself in contravention of Section 5(iii) of Hindu Marriage Act, 1955 may be punished with simple imprisonment of upto 15 days or fine extending upto Rs. 1,000 or both.
- III. Abolition of Guardianship in Marriage:** In view of the child marriage restraint (Amendment) Act, 1976 Section 6 of the Hindu Marriage Act as before 1978 has been deleted. Now the consent of guardian for the bride is not necessary. The age of bride should be at least 18 years at the time of marriage, this is a mandatory condition. Thus, when the bride has already attained 18 years of age, the taking of consent of guardian would not arise because bride would be a major.
- IV. Ceremonies in view of Section 7 of the Hindu Marriage Act:** In accordance with Section 7 of the Hindu Marriage Act there is no discrimination between bridegroom and bride with regard to performance of ceremonies.
- V. Restitution of Conjugal Rights:** Section 9 of the Act provides restitution of conjugal rights. It is a matrimonial right which husband and wife have to each other's society. When there is desertion of spouse, without any reasonable cause, restitution of conjugal rights is a remedy provided to a spouse aggrieved.
- VI. Judicial Separation:** The right of judicial separation among Hindu spouses is a statutory right as contemplated in section 10 of the Hindu Marriage Act, 1955. The decree of judicial separation may be obtained on the grounds as follows-
- a) that the other party, after solemnisation of marriage, had voluntary sexual intercourse with any person other than his or her spouse, or
 - b) other party treated the petitioner with cruelty, or
 - c) other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition, or
 - d) other party has ceased to be Hindu by conversion to another religion, or
 - e) other party 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 can not reasonably be expected to live with the respondent.
 - f) other party has been suffering from a virulent and incurable form of leprosy, or

- g) other party has renounced the world by entering any religious order, or
- h) other party has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard if it had that party been alive.

A Hindu wife may invoke special grounds for judicial separation. By the marriage (Amendment) Act, 1976 which amended Sections 10 and 13 of the Hindu Marriage Act, now a Hindu wife may invoke special grounds exclusively available to her for seeking decree of judicial separation. These are as under-

- 1) remarriage by husband,
- 2) husband found guilty of rape, sodomy or bestiality,
- 3) cohabitation between the parties has not been resumed for one year or upward,
- 4) that her marriage (whether consummated or not) was solemnised before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years. This provision called option of puberty.

Undoubtedly, these provisions put a Hindu wife in a better legal position compared to the Muslim and Christian wives, as there are no such special grounds available to the Muslim wife and also to Christian wife.

VII. Inter-caste Marriage: The Hindu Marriage Act, 1955 extends recognition to inter-caste marriage among Hindus and it is valid; sagotra and sapravara marriages are also allowed under the Act. Such marriages will be valid under the Special Marriage Act 1954.

2. **Divorce:** Section 13 of the Hindu Marriage Act, 1955 provides grounds for seeking decree of divorce such as-

- a. Adultery,
- b. Cruelty,
- c. Desertion,
- d. Change of religion,
- e. Incurable unsoundness of mind,
- f. Laprosy,
- g. Venereal disease,
- h. Renunciation of the world,
- i. Iresumed death,
- j. Non-resumption of cohabitation after passing of a decree of judicial separation or restitution of conjugal rights.
- k. Non-compliance with the decree of restitution of conjugal rights.

It is to be noted these are common grounds available to the husband as well as to wife under Section 13(1) of the Hindu Marriage Act, 1955.

Special grounds for divorce - A Hindu wife: In accordance with Section 13 (2) of the Hindu

Marriage Act there are 4 grounds available to a Hindu wife for the purpose of obtaining the decree of divorce. These are as under-

- i. Remarriage by husband,
- ii. Husband guilty of rape, sodomy or bestiality,
- iii. Non resumption of co-habitation,
- iv. Repudiation of marriage.

Divorce by Mutual Consent: As added by the Marriage Laws Act. 1976 Section 13-B provides for divorce by mutual consent where there is total break down of the matrimonial relationship, which is irretrievable in nature and parties to marriage are living separately for a period of one year or more on mutual agreement. This provision seems to be progressive law because it treats the Hindu wife on equal status with the Hindu husband.

Divorced wife or husband can remarry if the above condition is satisfied.

3. Position under the Hindu Succession Act, 1956

Property Rights of Women: As to property of a Hindu woman, it is of the following types-

- i. **Stridhana :** It is an exclusive own property which she gets in marriage as gift from inlaws and others and other property received from her father, mother, etc. or in succession from her father or other lineal paternal or maternal ascendants.
- ii. **Property received by succession from her in-laws:** This property formerly before the enforcement of the Hindu Succession Act. 1956 was her limited estate which she could use and be benefited by it and on her death it was to revert to the coparcenary of her husband. Now under Section-14 of the Hindu Succession Act. 1956 the conception of limited estate has been finished and she becomes full owner of all properties got by her in succession from any body.

Right of Daughters: Daughters have equal rights as sons to their parents' property. When unmarried, they have rights to shelter in the parental home. A married daughter has no right to shelter in her parents' house nor maintenance, charge for her being passed on to her husband. However, a married daughter has a right of residence in the dwelling house if she is deserted, divorced or widowed.

Section 6 of the Hindu Succession Act. 1956 deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of Devolution by survivorship among the members of coparcenary. The retention of the Mitakshara coparcenary property without including the females in it shows that the females can not inherit an ancestral property as their male counterparts. But after the amendment of Hindu Succession Act 2005, in a joint Hindu family governed by the Mitakshara Law, the daughter has a coparcenary right by birth in coparcenary property, and shall be subject to the same liabilities in respect of such coparcenary property as that of a son. And any reference to a Hindu Mitakshara coparcener to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

According to Section 6(1) of the Hindu Succession Act 1956, on and from the commencement of the Hindu Succession (Amendment) Act. 2005, in a joint Hindu family governed by the Mita kshara Law,

the daughter of a coparcener shall-

- a) by birth become a coparcener in her own right in the same manner as the son;
- b) have the same rights in the coparcenary property as she would have had if she had been a son;
- c) be subject to the same liabilities in respect of such coparcenary property as that of a son;

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

According to sub-section (2) of Section 6, any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidence of coparcenary ownership and shall be regarded as property capable of being disposed of by her by testamentary disposition.

Sub-section (3) of Section 6 of the Act provides that where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and -

- a) the daughter is allotted the same share as is allotted to a son;
- b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and
- c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a predeceased daughter, as the case may be.

In accordance with the Amendment Act 2005, in the Schedule to the principal Act under subheading "Class I", after the words "widow of a pre-deceased son of a pre-deceased son", the words 'son of a pre-deceased daughter of a pre-deceased daughter, daughter of a predeceased son of a pre-deceased daughter, daughter of a pre-deceased daughter of a pre-deceased son' have been added.

Maintenance pendente title and expense of proceedings: In a case of-

Smt. Jasbir Kaur Sehgal v. District Judge, Dehradun and others (AIR 1997 SC 3397 (3398), the Hon'ble Supreme Court observed that "under the Hindu Adoptions and Maintenance Act, 1956, it is the obligation of a person to maintain his unmarried daughter if she is unable to maintain herself.

Section 24 of the Hindu Marriage Act, no doubt, talks of maintenance of wife during the pendency of the proceedings but this section cannot be read in isolation and cannot be given restricted meaning to hold that it is the maintenance of the wife alone and no one else. Since the wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter.

Rights of Wife: A married woman has exclusive right over her individual property. Unless she gifts it in part or wholly to anyone, she is the sole owner and manager of her assets whether earned, inherited or gifted to her.

Regardless of her income the wife is entitled to maintenance, support and shelter from her husband, or if her husband belongs to a joint family, then from the family.

On partition of a joint family estate, she is entitled to a share equal to any other heir. Similarly, upon the death of her husband, she is entitled to an equal share or his portion, together with her children and his mother.

In *Balkrishna Ramchandra Kadam v. Sangeeta Balkrishna Kadam*², the Hon'ble Supreme Court observed that "the property, as contemplated by Section 27 of Hindu Marriage Act 1955 is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their 'Joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Hindu Marriage Act, 1955.

Rights of Mothers: Mother is entitled to maintenance by children. She is also a class I heir. All property owned by her may be disposed by sale, will or gift as she chooses, because she is a full owner of her property under section 14(1) of the Hindu Succession Act 1956. In case she dies intestate, her children, inherit equally, regardless of their sex under Section 15(1) and 16 of the Hindu Succession Act, 1956.

4. **Adoption by Hindu Female:** While passing Hindu Adoption and Maintenance Act 1956 the legislature had accepted the secular object of adoption. Under this act the daughter could also be adopted even when she is not competent to look after funeral obligation and perform last rites of deceased, although, she can only continue the family line of adopted family.

A Hindu unmarried woman, widow, or divorcee has capacity to adopt. But a married woman can not adopt except where her husband-

- i) has ceased to be a Hindu, or
- ii) has renounced the world, or
- iii) has been declared to be of unsound mind by a court of competent jurisdiction.

Under Shastric law a requisite of adoption by widow is that the widow should have an express authority given by the husband during his lifetime in this regard. In the absence of such authority the adoption of a child by a widow for her husband is illegal. (*Rajender Kumar v. Kalyan (dead) IRS (2000) & SCC 99*).

When an adoption is made by a Hindu female during the life time of her husband it is always taken to be an adoption for the husband because the female could adopt only when the husband suffers from any disability as pointed out in Section 8 (c) of the Act. If a female adopts a child before her marriage or after her marital relations have come to an end either on account of her husband's death, or dissolution of marriage or after the marriage has been declared null, then under these

conditions any adoption made by her would be personal. Under void marriage, as the marriage is void ab initio the wife enjoys a right to adopt a child without the authority of her husband. But during the continuance of a void marriage, if a child is born, the child under Section 16 of the Hindu Marriage Act 1955 and the wife would be incompetent to adopt any child.

Position of Muslim Women in Personal Laws: The fundamentalist abhors equality between men and women. The concept of inequality of sexes is based on the scriptures and the traditions of the Prophet Muhammad. Therefore, the dominance of men over women is Allah's verdict. The Muslim Personal Law maintains this superiority of man. In the Indian situation the Muslim Law can safely maintain status quo to the disadvantage of the Muslim women. As Muslim women are ruled by Islamic personal laws our traditional right to equality with men has been eroded. The Muslim law has not yet been codified. In a modern society where at least in theory, the position of women is accepted as equal, the provisions in Muslim law appear to be grossly inadequate.

There are two major provisions of Muslim Personal Law viz, the Dissolution of Muslim Marriage Act 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 in India. These two acts are not the reformed or modified laws. The Muslim Personal Laws of inheritance are not of much importance for women, for there is nothing to inherit from the father, husband and other relatives. The law of marriage may be a bargain in a civil contract wherein the women may have upper hand while negotiating the value of mehr (dower) in consideration of her marriage. But since there are no statutes to fix the amount of mehr, the valuable provision for women loses its merit. The woman remains simply a household worker throughout her life only with the maintenance available with her husband. In procedure of divorce if the husband wishes to breakdown the marital contract and has sufficient means to make payment of mehr or other properties of his wife to be given to her at the time of divorce, within a stipulated period of iddat, she may be thrown out and put into disgrace. The husband can effect divorce whenever he desires. Even if he divorces his wife under compulsion or in jest or in anger, that is considered perfectly valid. No special form is necessary for effecting divorce under Hanfi Law/. The presence of the wife is not necessary at the time of dissolving it. Talaq is dissolution of marriage effected by husband by repudiation. The husband can effect it by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge.

In a case of *Shamin itra v. State of U.P. and another* (2002) the Hon'ble Supreme Court observed that the correct law of talaq as ordained by the holy Quran was that it must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters one from the wife's family and the other from the husband. If the attempts failed, talaq could be effected. On the other hand, the Dissolution of Muslim Marriage Act 1939 under Section 2 (i-ix) gives rights to woman married under Muslim law, who shall be entitled to obtain a decree for dissolution of her marriage on proving some grounds in a court of law.

These versions of Muslim Personal Law disturb the modern reformist mind. A movement is gaining momentum that in the Islamic law, those provisions may be discovered which do not prohibit the Muslims to reform their State of law. But this is only a move to find out consensus before the Legislative or judicial activity may step in a positive manner.

Position of Christian Women: I shall now discuss the various provisions of personal law relating to Christian women in India. Divorce laws safeguard the interests of a divorced wife. The Indian Divorce Act, 1969 deals with dissolution of a Christian marriage. The Indian Divorce Act, 1869 and

the Indian Christian Marriage Act, 1872 thus should be read together treating the Indian Divorce Act, 1869 as a supplement to the Indian Christian Marriage Act, 1872. In the 15th Report Law Commission recommended some changes in these two Acts.

Under the Indian Divorce Act, 1869 both husband and wife can obtain a divorce, but there is a great difference between the rights of the husband and the wife. The husband can obtain a divorce if the wife has committed adultery. The wife can seek a divorce on the following grounds-

- a) husband's conversion from Christianity and marriage with another woman.
- b) incestuous adultery
- c) bigamy with adultery
- d) marriage with another woman with adultery
- e) rape, sodomy or bestiality
- f) adultery with cruelty
- g) adultery with desertion.

Thus the wife has to prove two offences by the husband before she can obtain a divorce.

But this law has been outdated. And the Christian Marriage and Matrimonial clause Bill, 1960 contains almost all the grounds included for divorce under the special Marriage Act 1954 such as desertion, cruelty, adulterate leprosy, venereal disease, conversion to another religion, and willful refusal to consummate the marriage. Further, either party to a marriage can also obtain a decree of judicial separation on any of the grounds mentioned for divorce.

Parsee Law: The Parsees are governed by the Parsee Marriage and Divorce Act 1936. Both the parties to the marriage can initiate divorce proceeding on the following grounds-

- 1) continuous absence for 7 years without information to those persons who would naturally have heard of him or her.
- 2) non-consummation
- 3) insanity
- 4) adultery, bigamy, rape or an unnatural offence
- 5) causing grievous hurt or venereal disease.
- 6) imprisonment for 7 years or more,
- 7) desertion for three years.
- 8) non-resumption of co-habitation following a decree of judicial separation or restitution of conjugal rights.
- 9) Conversion

in addition to these common grounds, the wife can obtain a divorce if she has been compelled by her husband to prostitution. The husband has the right to dissolve the marriage if the wife was pregnant by some other person at the time of marriage. There is no law of adoption as such or is adoption recognised by custom.

Jewish Law: The Jews in India are not governed by statutory law but by their customary law. In India, however, dissolution of the marriage can be done through the court on grounds of adultery or

cruelty. The marriages are generally monogamous excepting in certain specific cases.

As a general principle we recommend parity of rights regarding grounds for both husband and wife. This already exists in some of the personal laws, and in our view is essential to guarantee equality of status for both partners.

There are many situations in which women and children belonging to a particular community are discriminated. Hindu, Muslim, Christian, Parsi and Jew women and children can not be treated alike in the matters of marriage, divorce, inheritance, maintenance, adoption etc. Only for the reason that they belong to a particular community the objectives enshrined in the preamble to our Constitution can not be achieved.

Article 44 of the constitution requires that state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. But women still experience inequalities and injustice. The founding fathers of the constitution were aware of the gender injustice and sexual inequality of women and they incorporated Article 44 of the constitution with the aim that it may be exercised in future at appropriate time.

Sarla Mudgal Case³: In a historic judgement in Sarla Mudgal v. Union of India the Supreme Court has directed the Prime Minister Narsimha Rao to take fresh look at Article 44 of the constitution which enjoins the State to secure a uniform civil code which accordingly to the court is imperative for both protection of the oppressed and promotion of national unity and integrity. The above direction was given by the court while dealing with a case where the question for consideration was whether a Hindu husband married under Hindu Law, after conversion to Islam, without dissolving the first marriage, can solemnise a second marriage. The court has held that such a marriage will be illegal and the husband can be prosecuted for bigamy under Section 494 of the Indian Penal Code. In the present case the court further held that a Hindu marriage continues to exist even after one of the spouses converted to Islam. There is no automatic dissolution of Hindu marriage. It can only be dissolved by a decree of divorce on any of the grounds mentioned in Section 13 of the Hindu Marriage Act. Accordingly the second marriage of a Hindu, after his conversion to Islam was void in terms of Section 494, IPC and the husband was liable to be prosecuted for bigamy.

As regards the question of "uniform civil code" the division bench (Kuldip Singh and R.M. Sahai JJ), in their separate but concurrent judgements said that since (1950) a number of governments have come and gone but they have failed to make any efforts towards implementing the constitutional mandate under Article 44 of the constitution, the problem today is that many Hindus have changed their religion and have converted to Islam only for the purpose of escaping the consequence of bigamy. This is so because Muslim law permits more than one wife and to the extent of four. Justice Kuldip Singh said that Article 44 of the constitution is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Marriage, succession and like matters are of a secular nature and therefore they can be regulated by law. No religion permits deliberate distortions. Much apprehension prevails about bigamy in Islam itself. But unfortunately the court, while hearing an appeal filed by one of the accused in the above case, clarified that its direction was only an obiter dicta and not legally binding on the Government.

In Pragati Varghese v Cyril George Varghese (AIR 1997 Bom) the full bench of the Bombay High Court has struck down Section 10 of the Indian Divorce Act under which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the ground that it violates the fundamental right of a Christian woman to live with human dignity under Article 21 of the

constitution.

Noor Sobo Khatoon v, Mohd, Quasin⁴: In this case the Supreme Court has held that a divorced Muslim woman is entitled to claim maintenance for her children till they become major. The court held that both under the Muslim Personal law and under Section 125 of the Criminal Procedure Code 1973 the obligation of the father was absolute when the children were living with the divorced wife. The court said, "we have opted for a secular republic, secularism under the law means that the state does not owe loyalty to any particular religion and there is no state religion. The constitution give equal freedom to all religions and everyone has the freedom to follow and propagate his own religion. But the religion of individual or denomination has nothing to do in the matter of socio-economic laws of the State. The freedom of religion under the constitution does not allow religion to infringe adversely on the secular rights of the citizens and the power of the State to regulate the socio economic relations.

The above decisions of the court will make the job of introducing the common civil code much easier.

Mohd, Ahmad Khan v, Shah Bano Begum⁵: It is restated that in India the Supreme Court has taken note of injustice faced by the women particularly in matters of personal laws. In this case the Supreme Court held in the matter relating to the Muslim husband "Iddar. who is not able to maintain herself. The court held that section 125 of the Code of Criminal Procedure 1973 which imposes such legal obligation on all the husbands is secular in character and is applicable to all religions. In this case the Supreme Court emphasised the need for codifying a Common Civil Code and said-

"A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

After attaining Independence, the following laws have been framed, some of the provisions of which are against the personal laws, but they are applicable to all citizens. They are-

- 1) Dowry Prohibition Act 1961
- 2) Criminal Procedure Code 1973
- 3) Code of Civil Procedure, 1908 as amended by 1976 Act.

The laws operate and are continuing to operate and can be amended. In the case of Sarla Mudgal the Hon'ble Supreme Court has observed that "The legislation- no religion being the authority under which personal laws were permitted to operate and is continuing to operate the same can be superseded/ supplemented by introducing the Uniform Civil Code."

It is unfortunate to note that there is no Uniform Civil Code in India. However there is a Uniform Criminal Code which is very much in existence. Consequently, the criminal law is applicable to all citizens irrespective of the fact also what religion they belong to there is no uniformity in civil laws pertaining to divorce, maintenance, marriage, adoption and succession governing the Hindus, Muslims, Christians Parsi etc. There are different laws like the-

Personal Laws : The Hindu Marriage Act.

The Hindu Minority and Guardianship Act.
The Hindu Succession Act.
The Hindu Adoption and Maintenance Act.

governing the personal matters of Hindus. Whereas Muslims are governed by their personal laws like the Shariat Act, the Dissolution of Muslim Marriage Act and the Muslim Women (Protection of Rights on Divorce) Act etc. Similarly, the Christians in India are governed by the Indian Christian Marriage Act, the Indian Divorce Act and Cochin Christian Succession Act etc. Parsis are governed by a different set of their personal laws.

Thus, it can be said that there is no uniformity in these personal laws based on different religions.

Article 44 of the constitution of India, in its part IV directs the state to make a Uniform Civil Code throughout the territory of India.

The Government framed the Muslim Women (Protection of Rights on Divorce) Act 1986, which deprives Muslim divorced women of the benefits arising out of the above decision in Mohd. Ahmad Khan v. Shah Bano Begum. This law does not give any benefit to the divorced Muslim woman, but on the contrary is unconstitutional, due to following amongst many other reasons-

- i. It discriminates divorced women on the ground of religion.
- ii. Article 15(3) of the Constitution enjoins that the special law made for women must be beneficial to them, but at the same time does not permit such law to be framed for the women of a particular religion.
- iii. Dignity of woman and equality of status and equal opportunity for all and fraternity of the Preamble of the Indian Constitution are not saved.
- iv. It is inconsistent with the provisions of Article 39-A of the Indian Constitution.

The framing of Uniform Civil Code cannot be done voluntarily. State has to do it, as it has done in the matter of Hindu Code, which was opposed Vigorously by Hindus. Justice Tulzapurkar writes "A Voluntary Uniform Civil Code is a contradiction in terms.

Conclusion: On the basis of the study it may suggest a draft model of the law of succession which could be debated and the future statutory regime could embody these features. Uniform law of succession has to accept the equality of sexes as the bedrock of the new law. Adoption of this equality norm necessitates trimming of the provisions of the Muslim law mainly and other laws to some extent. The basic norm of Muslim law of succession which allots a male double the share of the female has to be laid to rest, for such a principle reflects the superiority of a male and the medieval mindset of the duty of the male 'to project' the female. Some changes are essential in the Hindu Succession Act for conforming to the principle of equality of sexes. Whereas Christian law as laid down under the Indian Succession Act does not require any drastic change, the Parsi law has to be modified a little bit. This is a modest attempt to probe a mass of materials relating to succession under Indian personal laws with special reference to women heirs. We have in the process suggested a statutory regime which could be a model in arriving at a consensus relating to the area of succession under Article 44 of the constitution.

IMPORTANT QUESTIONS

- Q.1. Discuss the social status of women in pre-independence India.
- Q.2. Discuss the constitutional position of the women in India.
- Q.3. Discuss the legal protection available to women against sexual harassment at work places.

References :

1. AIR 1979 All 316 at 323
2. AIR 1997 SC 3562 (3564)
3. (1995) 3 SCC 635.
4. AIR 1997 SC 3280 (3283-3285)
5. AIR 1995 SC 945.

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UNIT - II

SEX INEQUALITY IN INHERITANCE RIGHTS

Hindu Law: Constitution is rightly the most significant touchstone for determining the scope of women's rights in the post independence period. Equality and non-discrimination became fundamental and enforceable legal rights. The scope of Article 21 could be expanded to read into it issues of social and economic justice. Although the reformed Hindu law is projected as the ideal piece of legislation which liberated Hindu women, the underlying motive of the reform as consolidating the powers of the state and building an integrated nation, this crucial objective could be achieved only by diluting women's rights to arrive at a level of minimum consensus so that the agenda of reform could be effected without much opposition.

Before passing the Hindu Succession Act 1956, property of a Hindu woman is of the following types-

- 1) Strachan
- 2) Property received by succession from her in laws.

Strachan was an exclusive own property which she gets in marriage as gift from in-laws and others, and other property received from her father, mother etc. or in succession from her father or other lineal Daternal or maternal ascendants.

Second type of property was formerly, before the enforcement of the Hindu Succession Act, 1956, her limited estate which she could use and be benefited by it and on her death it was to revert to the coparcenary of her husband.

Position of women under the Hindu Succession Act 1956: The history of Hindu Law reform spans a period of fifteen years from 1941 to 1956 and finally, a diluted version in the form of four separate Acts could be passed in 1956. This Hindu Succession Act 1956 extends to the whole of India except the State of Jammu and Kashmir. It brings a drastic change in the law of succession applicable to Hindus. It is inclined to finish coparcenary conception of joint Hindu Families, and given a line of succession found in European societies. It has limited the conception of Hindu family, i.e. self, wife and minor sons and parents dependant on the self. It has given the right to inherit to daughters and sisters, which was alien to Hindu Law.

Devolution of interest in coparcenary property: According to section 6, when a male Hindu dies after the commencement of this Act, having at the time of his death, an interest in the 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. But if the deceased had left after him surviving a female relative specified in class I of the schedule or a male relative specified in that class 1\1"10 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.

But after the amendment of the year 2005, according to section 6(1) of the Hindu Succession Act, 1956 in and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family

governed by the Mitakshara Law, the daughter of a coparcener shall –

- a) by birth become a coparcener in her own right in the same manner as the son;
- b) have the same rights in the coparcenary property as she would have had if she had been a son;
- c) be Subject to the same liabilities in respect of such coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

General rules of succession in case of males: Have been provided in Section 8 that the property of the male Hindu dying intestate shall devolve according to the provisions of Chapter II of this Act, -

- a) **firstly**, upon the heirs, being the relatives specified in Class I of the Schedule;
- b) **secondly**, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;
- c) **thirdly**, if there is no heir of any of the two classes, then upon the agnates, then upon the cognates of the deceased.

Order of succession among heirs in the Schedule: According to Section .9, among the heirs specified in the Schedule, those in Class I, shall take simultaneously and to the exclusion of the other heirs; those in the first entry in Class II shall be preferred to those in the second entry, those in the second entry shall be preferred to those in the third entry, and so on in succession.

Heirs in Class I and Class II are as follows-

Class I : Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

Class II:

- 1) Father;
- 2) (1) Son's daughter's son; (2) son's daughter's daughter; (3) brother; (4) sister.
- 3) (1) Daughter's son's son; (2) daughter's son's daughter, (3) daughter's daughter's son; (4) daughter's daughter's daughter.
- 4) (1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.
- 5) Father's father, father's mother.
- 6) Father's widow; brother's widow.
- 7) Father's brother; father's sister.
- 8) Mother's father; mother's mother.
- 9) Mother's brother; mother's sister.

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

Distribution of property among heirs in Class I of the Schedule: According to Section 10, the property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules-

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

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

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

Rule 4: The distribution of the share referred to in Rule 3-

- 1) Among the heirs of the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions and the branch of his predeceased sons get the same portion;
- 2) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

Distribution of property among heirs in Class II of the Schedule: Under Section 11, the property of an intestate shall be divided between the heirs specified in anyone entry in Class II of the Schedule so that they share equally.

Property of a female Hindu to be her absolute Property: According to Section 14 of a Hindu Succession Act. 1956 any property possessed by a female Hindu, whether acquired before or after the commencement of this Act. shall be held by her as full owner thereof and not as a limited owner.

Explanation appended to Section 14(1) of the said Act reads as under-

'In this sub-section "property" includes both moveable and immovable property acquired by a female Hindu by inheritance as devised or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not before or after her marriage or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as 'Stridhana' immediately before the commencement of the Act.'

Further Section 14 (2) of the Hindu Succession Act. 1956 provides that-

'Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award, where the terms of the gift. will or other instrument or the decree or award prescribe a restricted estate in such property.'

The above provisions show that the property whether movable or immovable may be inherited by succession or partition, or in lieu of maintenance or arrears of maintenance or by way of gift by a female

Hindu. Even any other property acquired whether after or before marriage by her own skill or exertion or purchase, is to be treated as stridhan' which is the absolute of property of such a female Hindu.

The Apex Court in Raghbir Singh and others v. Gulab Singh and others (2000 (1) CW 436 (Mad) has held that for enlargement of limited interest possessed by a Hindu widow, provisions of Section 14 of the Act must be liberally construed.

The Andhra Pradesh High Court in Smt. Mongamma (dead) and another V.M.S. Subbramappa Nagamimvaru and other (AIR 1994 AP 147) observed that since the compromise decree incorporated the pre-existing right of maintenance for the permanent kept mistress of late Hindu Male, Section 14(2) of the Act is therefore not attracted.

Order of Succession and Manner of Distribution among heirs of a female Hindu: According to Section 16 of the Hindu Succession Act 1956 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 entry No. one shall be preferred to those in any succeeding entry and those including in the same entry and 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 time of 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 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 that of 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".

Who are heirs of a female Hindu: According to Section 15 (1) of the Hindu Succession Act 1956 there are five categories (Entries) of the heirs of a female Hindu. If there is no heirs as such falling under these categories then the property of the deceased female Hindu will be vested to the Government by escheat.

Heirs of the deceased female Hindu are: The heirs of the first entry are-

- a. Sons,
- b. Daughters,
- c. Children of a predeceased son,
- d. Children of a predeceased daughter,
- e. Husband.

The heirs of the second entry are the husband's heirs, these are as under-

- a. The heirs specified in class I of the Schedule.
- b. The heirs specified in Class" of the Schedule,
- c. Agnates,

d. Cognates.

The heirs of third Entry are as under-

a. Mother, but step mother excluded.

The heirs of the fourth entry are the heirs of her father, these are as follows-

a. The heirs of class I of the Schedule.

b. The heirs of class II of the Schedule.

c. Agnates.

d. Cognates.

The heirs of the fifth entry are the heirs of her mother, these are as under-

a. Her son, daughter (including sons and daughter of a predeceased son and daughter) and husband,

b. Heirs of husband,

c. Father and mother,

d. Heirs of father,

e. Heirs of mother.

Section 15 (2) of the Hindu Succession Act, 1956 provides an exception to the general rule of succession laid down in Section 15 (1) of the said Act. This provision would apply when a female Hindu does not leave behind a son or daughter or children of a predeceased Son or daughter.

In such cases property inherited by a female Hindu from her father or mother does not devolve in the order specified in sub-section (1). Similar would be the case when she inherits the property from her husband or father-in-law viz., such property also would not devolve according to the order specified in sub-section (1).

Mode of Succession of two or more heirs: According to Section 19 if two or more heirs succeed together to the property of an intestate, they shall take the property-

a. same as otherwise expressly provided in this Act, per capita and not per stirpes; and

b. as tenant-in-common and not as joint tenants,

Certain widows remarrying may not inherit as widow: Section 24 lays down that any heir who is related to an intestate or the widow of a predeceased son or the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date of the succession, opens she has re-married.

In last I want to say that now daughters have equal rights as sons to their parents' property. They have share in the ancestral property under Section 60 of the Hindu Succession Act. And a married woman has exclusive right over her individual property. Unless she gifts it in part or wholly to anyone, she is the sole owner and manager of her assets whether earned, inherited or gifted to her. Mother is also entitled to maintenance from children. She is also a class I heir. But unfortunately, the anomalies and anti-women bias within the Hindu code were not discussed widely in public forum. The Acts were neither Hindu in character nor based on modern principles of equality but reflected the worst tendencies of both.

Muslim Law

The fundamentalist abhors equality between men and women. The concept of inequality of sexes is based on the scriptures and the traditions of the Prophet Muhammad. Therefore, the dominance of men over

women is Allah's verdict and the Muslim personal law maintains this superiority of men. In the Indian situation the Muslim Law can safely maintain status to the disadvantage of the Muslim women.

Succession under Muslim Law: Under the Muslim Law, full attention has been paid to the law of succession and blood relationships are entitled to the succession. The Muslim Law of succession is not similar to the Hindu law of succession. The right of inheritance by birth is recognised by the Hindu law, but the Muslim law does not provide such recognition. Under the Muslim Law as well as under the Hindu Law the women have been given absolute rights of ownership.

The rights of Muslim women in respect of property are or following-

a) **Daughters:** In inheritance, the daughter's share is equal to one half the son's in keeping with the concept that a woman is worth half a man. However, she has always full control over this property. It is legally her to manage control and to dispose of, as she wishes in life or death.

Though she may receive gifts from those whom she would inherit from, there should be no doubt that the gift is a means of circumventing the inheritance laws of one third of a man's share, since, under Muslim law, the shares of inheritance are very strict.

Daughters have rights of residence in parent's houses, as well as right to maintenance, until they are married. In case of divorce, charge for maintenance reverts to her parental family after the iddat period. In case she has children capable of supporting her, the charge falls upon them.

b) **Wives:** In Islamic law a woman's identity, though inferior in status to a man's is not extinguished in him when she marries. Thus she retains control over her goods and properties. The rule of equality is applicable to them. She has a right to the same maintenance he gives to his other wives, if any, and may take action against him in case he discriminates against her.

She has a right to 'mehr' according to the terms of the contract agreed to at the time of marriage. Under the Muslim Women (Protection of Rights on Divorce) Act, 1986, a divorced Muslim woman is not entitled to claim maintenance from her former husband. She is entitled to such maintenance from the persons referred to in Section 4 of the said Act.

She will inherit from him to the extent of one eighth if there are children or one fourth if there are none. If there is more than one wife, the share may diminish to one sixteenth. In circumstances, where there are no shares in the estate as prescribed by law, the wife may inherit a greater amount by will. A Muslim may dispose of one third of his property by will, though not to a sharer in the inheritance.

c) **Mothers:** In case of divorce or widowhood, she is entitled to maintenance from her children. Her property is to be divided according to the rules of Muslim law. She is entitled to inherit one sixth of her deceased child's estate.

However, special characteristics of the Muslim law of succession are as under-

- 1) No distinction between males and females.
- 2) Non-recognition of joint family system.
- 3) Absolute ownership.

- 4) A child in mother's womb-right of inheritance.
- 5) Non-recognition of birth right.
- 6) Non-recognition of the doctrine of representation.
- 7) Mere spes successionis is not recognised under the Muslim Law.
- 8) Life estate is not recognised.
- 9) No distinction between real and personal or ancestral and acquired property.
- 10) Non-recognition of undivided family system-

According to M.A. Qureshi- "Indian Muslims are also living jointly. It has been observed that in many cases after the death of a Muslim father or another ancestor his heirs do not divide his property and continue to keep it in their joint possession. The parties live like a joint family. It has also been seen that they some times make addition and alterations to the joint property of the deceased. They also carry on business jointly.

Christian Law: An important aspect to be considered while dealing with the legal status of Christian women is, no doubt, the succession laws applicable to Indian Christians. The Christians in India are governed by the Indian Succession Act, 1925 with regard to the matters of intestate and testamentary succession. As per Sections 15 and 16 of the Indian Succession Act, 1925, by marriage a woman acquires the domicile of her husband if she had not the same domicile before and a wife's domicile during marriage follows the domicile of her husband. In Section 20 it is clearly stated that no person shall, by marriage acquire any interest in the property of the person whom he or she marries or becomes incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. According to Section 33 of the Indian Succession Act, if the intestate has left the widow and lineal descendants, 1/3 of his property shall belong to his widow and the remaining 2/3 shall go to his lineal descendants. If the intestate has left his widow and has no lineal descendants but has left persons who are of kindred to his, 1/2 of his property shall belong to his widow and the other half to his kindred. If he has left none but his widow, the whole property shall belong to his widow.

Under the Indian Succession Act, 1925 there is no discrimination between sons and daughters with regard to the distribution of the intestate father's property.

Though, with the amendment of Indian Divorce Act, 1869, the status of Christian Women in India has been improved to some extent, yet in spite of this amendment Christian Laws of India, in its various aspects, have become too outdated and irrelevant to meet the needs of the present century.

Women's Right to property and Succession under Law Applicable to Parsis: Section 50 to 56 of the Indian Succession Act 1925 provide for special rules for Parsi Intestates.

GUARDIANSHIP

Introduction: The ancient Hindu Law does not provide an instance of highly developed system on minority and guardianship. The minors generally lived in a joint family and were always under the protection of the Karta. The Karta of the joint family was under a legal obligation to protect the minors and the women and to maintain them, even after the death of the father or the husband, as the case may be. During the British period, the law of guardianship was developed by the courts.

The Modern Law of Guardianship has its basis in the incapacity which law attributes to minor and persons

deficient in mental capacity in the matter of looking after themselves, their property or entering into contracts. (Mohri Bibi v. Dharmodas Ghosh). But later when reappraisal of texts was made, the court held that the father is the natural guardian of the children and after his death mother is the natural guardian, and no one else can be the natural guardian of minor children (Kristo v. Kedar). The Guardians and Wards Act was passed in 1890 and conferred on the District Courts power of appointing guardians of minor children belonging to any community.

The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act 1956.

Changes made by the Act: The Hindu Minority and Guardianship Act 1956 has brought about certain significant changes in the position and status of guardians. Firstly, the Act has improved the status of the mother as one of the natural guardians. Under old Hindu Law the father could deprive the mother of natural guardianship.

In fact the Minority and Guardianship Act 1956 is not a complete legislation, it is only a supplemental law. The laws contained in the Guardianship and Wards Act 1890 have to be relied on in all those cases where the Minority and Guardianship Act 1956 is silent. There are several sections in the Act of 1956 where the provisions of the Guardianship and Wards Act 1890 have been referred to and applied. This Act extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends.

Age of Majority: According to Manu, minority ends at the age of 16 years. According to Section 3 of the Indian Majority Act every minor of whose person and property a guardian has been appointed by any court and every minor of whose property the superintendence has been or shall be assumed by any court of wards, is deemed to have attained his majority at the completion of twenty first year. In all other cases the minor is deemed to have attained his majority at the completion of the eighteenth year.

According to Section 4 of the Hindu Minority and Guardianship Act 1956, the minor is a person who has not completed the age of eighteen years. The provisions of the Indian Majority Act regarding the age of majority in certain cases fixed as twenty one years stands abrogated by the present Act of 1956. According to Section 4(a) of the Act completion of eighteen year will apply in all cases.

It is important to note that the age of majority in case of a guardian appointed by the court or by the court of wards would be twenty one years rather than eighteen years.

Meaning of Guardian: A guardian means a person who owns the responsibility to take care of the person of another or of his property, or of both. Section 4 of the Guardian and Wards Act also defines the term 'guardian' in the same sense. Section 4(b) of the Hindu Minority and Guardianship Act defines the word guardian as follows -

"Guardian means a person having the care of the person of a minor, or of his property, or of both his person and property and includes –

- 1) a natural guardian,
- 2) a guardian appointed by the will of the minor's father or mother.
- 3) a guardian appointed or declared by a court,

4) a person empowered to act as such by or under any enactment relating to any court of wards.

Besides the above, there are two more types of guardian namely-

- a. de facto guardian
- b. ad hoc guardian

The former has been mentioned in the Act while the latter does not find any place.

Natural Guardian: In Hindu Law, only three persons are recognized as natural guardians -

- 1) Father
- 2) Mother
- 3) Husband.

Hindu Minority and Guardianship Act (Section 6):

Father: "Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. Before 1956, the father could prevent mother from assuming the guardianship of her minor children even after his death by appointing a testamentary guardian. This cannot be done now. The Act lays down that if father appoints a testamentary guardian and mother survives him, the appointment of testamentary guardian will be ineffective so long as the mother is alive. If mother dies without appointing a testamentary guardian, the father's appointee will become the guardian. But if mother dies after appointing a testamentary guardian, the mother's appointee will take over the guardianship of the child and the father's appointment will be ineffective.

Where the father is alive but he is non-functioning natural guardian, the mother can act as the natural guardian. Where the father and mother of a minor child had fallen out and the mother was living separately from the father for over twenty years, the mother had been looking after the affairs of her minor daughter and managing her properties. The child was all along under her protection and care.

An inroad of sorts has been made by the Supreme Court in *Githa Hariharan v. Reserve Bank of India and Vandana Shiva v. Jayanta Bandhopadhyaya*, where under certain circumstances mother has been held to be the natural guardian of the minor under certain circumstances and the word "after" has been interpreted to mean "in the absence of" rather than "after the life time". It is further held that absence would mean absence of father from the care of minor's person or property for whatever reason.

Mother: The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian. Proviso to clause (a) of Section 6, Hindu Minority and Guardianship Act lays down that the 'custody of a minor who has not completed the age of five shall ordinarily be with the mother'. Thus, mother is entitled to the custody of the child below five years, unless the welfare of the minor requires otherwise. But this does not mean that she is not entitled to custody thereafter.

Mother's right of guardianship is not lost on her conversion to another religion so long as she is able to provide a congenial, comfortable and happy home.

The position of mother's guardianship of her adopted children is the same as that of her natural born children.

It is submitted that it would be a better proposition of law if it is laid down that parents are equal and co-ordinate guardians of their minor children.

Step-parents are not entitled to guardianship, unless they are specifically appointed by the court. Once child goes in adoption, natural parents cease to be natural guardians of the child. Natural parents could be guardians of the child only if so appointed by the adoptive parents or by the court.

Husband: In some systems of law, it is a curious development that husband is considered to be the natural guardian of his minor wife. This has been so under Hindu Law. The Hindu Minority and Guardianship Act 1956, also lays down that husband is the natural guardian of the person and property of the minor wife. It is submitted that it is open to the Courts not to give custody of a minor wife to a husband, if they are satisfied that it will not be for the welfare of the minor wife. This is the importance of Section 13 of the Act which lays down that welfare of the minor is of paramount consideration.

Section 6 also provides four disqualifications, which would prevent a person from acting as a natural guardian of a Hindu minor. These four disqualifications are -

- a. If such person has ceased to be a Hindu.
- b. If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).
- c. If such person is the step-father.
- d. If such person is the step-mother.

It may be noted that under the Act if a person ceases to be a Hindu, he cannot act as a natural guardian.

Section 7 of the Act lays down the rule of Hindu Law that guardianship of an adopted son, who is a minor, passes on his adoption, from the natural father and mother to the adoptive father and mother.

This section speaks only of an adopted son, but makes no mention of an adopted daughter. The uncodified Hindu Law also did not recognise the adoption of a daughter. However, it may be noted that the Act came into force before the passing of the Hindu Adoptions and Maintenance Act 1956, which now recognises adoption of a daughter also, and confers that right both upon a male and female Hindu. Section 12 of that Act provides that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption. The effect of this Section would be that the adoptive father and mother would be regarded as the natural guardians of the adopted child, in keeping with the rules relating to the law of adoption laid down in that Act.

Power of a Natural Guardian (Section 8): Section 8 deals with the powers of a natural guardian, with special reference to immovable property. Prior to the passing of the Act, a natural guardian of a minor had very wide rights, and he could sell, mortgage, charge or otherwise dispose of the minor's property, without the sanction of a Court, provided such an alienation was in the minor's interest.

After the passing of the Act, it is now provided, by Section 8 of the Act, that the natural guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper-

- a. for the benefit of the minor; or
- b. for the realization, protection or benefit of the minor's estate.

However, the previous permission of the Court is required in the following two cases, viz.-

- a. Cases where the guardian wishes to mortgage or charge, or transfer by sale, gift, exchange (or otherwise), any part of the immoveable property of the minor; and
- b. Cases where that guardian wishes to lease any part of the immoveable property of the minor-
 - a. for a term exceeding five years; or
 - b. for a term exceeding more than one year beyond the date on which the minor would attain majority.

The Act expressly provides that any disposal of immoveable property of a minor by his natural guardian in contravention of what is stated above, is voidable at the instance of the minor or any person claiming under him. This rule is obviously for the protection and benefit of the minor. Such a transfer, it may be noted, is not void, but merely voidable at the minor's instance, 'which means he can repudiate it, or adopt it. if he so chooses.

Section 8 also clarifies that in no case can the natural guardian bind the minor by a personal covenant. The position under the Guardians and Wards Act is also the same.

It may also be noted that although the Court's permission is necessary for an alienation of the minor's property, no such permission is necessary for purchase of property for a minor.

Testamentary Guardians and Their Powers (Section 9): Section 9 of the Act has introduced some important changes in the law relating to testamentary guardians of a Hindu minor. Prior to the passing of the Act, a Hindu father could nominate a guardian of his children, so as to exclude even the mother from guardianship. Even in cases where the father was dead, the mother did not have the power to appoint a testamentary guardian, i.e., a guardian appointed under a will.

Section 9 now provides that a Hindu father, who is entitled to act as the natural guardian of his minor legitimate children, may, by will, appoint a guardian for the person or property (or both) of such children. However, no such testamentary guardian can be appointed by the father of the undivided interest of the minor in joint family property.

An appointment of a testamentary guardian under the above provisions has no effect if the father dies before the mother (because, in that case, the mother automatically becomes the natural guardian under Section 6). However, such an appointment would revive if the mother dies thereafter, without appointing a guardian under her will. Thus, the Act ensures that a father cannot appoint a testamentary guardian, so as to exclude the mother from her right to act as the natural guardian of her children under Section 6.

Under the earlier uncodified law, the mother had no right to appoint a testamentary guardian. However, the present Section also confers the right to appoint a testamentary guardian of minor children on the mother in certain circumstances. It provides that a Hindu widow, who is entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother, who is 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 the natural

guardian), may, by will, appoint a guardian for the person or property (or both) of such minor children,- but not in respect of the undivided interest of the minor in the joint family property.

Likewise, a Hindu mother who is entitled to act as the natural guardian of her minor illegitimate children, can also, by will, appoint a guardian for the person or property (or both) of such children. It will thus be seen that the father-does not-have the right to appoint a testamentary guardian of his illegitimate Children, as the mother is the natural guardian of such children, and it is only after her death that the father can act as the natural guardian of his illegitimate children.

It has also been expressly provided that when a testamentary guardian is appointed in the case of minor girl, the rights of such a guardian cease when the girl gets married. This is so because after her marriage, her husband would become her natural guardian.

Powers of a Testamentary Guardian: Under the old, uncodified law, a testamentary guardian nominated by the father had very wide powers, and could deal with the minor's property only Subject to the restrictions, if any, contained in the father's will. Thus, in the absence of any such restriction, he could mortgage, sell or otherwise dispose of the minor's property without the sanction of the Court.

Now, under Section 9 of the Act, the powers of such a guardian are considerably curtailed, and he can exercise only the rights of a natural guardian, subject to the restriction, contained in Section 8 (above), and also subject to the restriction, if any, contained in the will appointing him as such guardian. Thus, for instance, under the earlier law, a testamentary guardian could sell a considerable portion of the minor's immoveable property, if circumstances warranted such a sale. Now, the guardian would (as a result of the combined effect of section 8 and Section 9 of the Act) require the previous permission of the Court before doing so.

Incompetency of a Minor to Act as Guardian of Another Minor's Property (Section 10): The Guardians and Wards Act recognises, by implication, that a minor may act as the guardian of the property of his minor wife or child. This rule is now superseded (as far as Hindus are concerned) by Section 10 of the Act, which provide that a minor is incompetent to act as the guardian of the property of any Hindu minor.

It is to be noted that this Section only prohibits a minor from being the guardian of the property of any other minor. Thus, his right to act as the natural guardian of the person of say, his minor wife and children, is still preserved.

De Facto Guardians (Section 11): Section 11 brings about a material change in the law relating to de facto guardian, by providing that, after the commencement of the Act, no person can dispose of. or deal with, a Hindu minor's property, merely on the ground that he (or she) is a de facto guardian of the minor.

It has rightly been observed that in the eyes of the law, there is nothing like a de facto guardian. Undoubtedly, the term is used in Section 11 to refer to a person who has taken upon himself the general management of a minor. However, it is better to describe such a person as a de facto manager. This term would thus cover relatives and friends who are interested in a minor who has no legal guardian, and who, therefore, take upon themselves, the management of his estate, out of their love and affection for him.

In Hunooman Prasad Pandey's case¹, the Privy Council had held the a de facto guardian has the same power as a natural guardian as far as alienating the minor's property is concerned. Section 11 now does away with the authority of any person to deal with or dispose of a minor's property on the ground that he IS the de facto guardian of such a minor.

The Patna High Court has held that Section 11 of the Act cannot be pleaded as a bar to the disposal of the joint family property by the Karta (manager) of a joint family for legal necessity. (Nathuni Mishra v Mahesh²).

Guardian not to be Appointed for Minor's Undivided Interest in Joint Family Property (Section 12):

In cases 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, it has been provided (by Section 12) that no guardian is to be appointed for the minor in respect of such undivided interest. However, this provision does not affect the jurisdiction of the High Court to appoint a guardian in respect of such interest.

Section 12 substantially confirms the law on this point which prevailed before the passing of this Act. If the minor is a member of a joint Mitakshara family, the father, as Karta, is entitled to the management of the whole coparcenary property, including the minor's interest. After his death, this right of management passes on to the eldest son as the next Karta. Now, the reason why a guardian cannot be appointed of the undivided interest of a member of a joint Mitakshara family is that the interest of such a member is not separate or undivided property. Such a case would, therefore, be governed by the general principles of Hindu Law relating to joint family property.

Welfare of Minor to be the Paramount Consideration (Section 13): Section 13 of the Act does not lay down any new rule, but merely reiterates the well-established principle that when the Court appoints any person as the guardian of a Hindu minor, the welfare of the minor will be the paramount consideration. This salutary rule forms the key-stone of the whole law on this subject. In this context, the term, "welfare" is to be understood in a very wide sense, and includes, not only the material and physical wellbeing of the minor, but every factor connected with the moral and religious welfare, education and upbringing of the minor.

It is further expressly provided that if the Court is of the opinion that a particular person's guardianship will not be for the benefit of the minor, such a person shall not be entitled to be the minor's guardian, even if he or she is otherwise entitled to do so under the provisions of the Act, or any law relating to guardianship in marriage among Hindus.

It is to be remembered that the present Act is to be read as supplementing the provisions of the Guardians and Wards Act. Section 17 of that Act deals with the matters to be considered by the Court in appointing a guardian. The underlying thread running through both the Act is that the minor's welfare should, in all cases, be the paramount consideration. In determining as to what will be for the welfare of the minor, the Court would have regard to, inter alia, the age, sex and religion of the minor, the character and capacity of the guardian, his nearness of kin to the minor, the wishes (if any) of the minor's deceased parent, and the previous and existing relations of the minor with the proposed guardian. If the minor is old enough to form an intelligent preference, the Court may also consider such a preference.

MUSLIM LAW

Who is a Minor: Law prescribes certain age-limit before which a person is said to be a minor and after which is called a major. Under Muslim Law, the age of majority is prescribed by two ways-

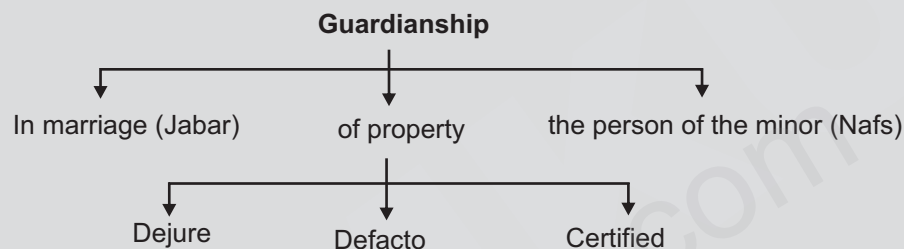
1. The Classical Muslim Law: A minor is one who has not attained the age of puberty. Puberty and majority are same and are presumed to have been attained on the completion of the fifteenth years but only in matters relating to marriage, divorce and dower.

2. Statutory Law:

- 1) A person becomes major on attending the age of eighteen years under the Indian Majority Act, 1875 in respect of all matters except marriage, dower and divorce.
- 2) Where a Muslim body or property is within the supervision of the court of wards, the minority of that child goes upto 21 years.
- 3) Where a Muslim wants to file a suit in court of law in matters of marriage, divorce and dower, the age of majority is eighteen years (not fifteen years). Before the age of eighteen years he cannot file a suit without the next friend.

A minor is supposed to have no capacity to protect his or her own interests. Law therefore, requires some adult person to protect minor and to do everything on his (her) behalf. A person who is authorised by law to protect the minor's body or property is called a guardian.

Kinds of Guardianship: Mohammedan law recognizes three kinds of guardianship in matters relating to-



- 1) **Guardianship in Marriage (Wilayat-e-Jabar/Nikah):** A Muslim child of either sex who has not attained the age of puberty is incompetent to contract a marriage. If such marriage is contracted by a minor, it is a nullity. But a minor can be validly contracted in marriage by his or her guardian. The order of guardianship for the purpose of marriage is as follows-

- a. Father.
- b. The father's father, howhighsoever.
- c. Full brother and other paternal relatives, in the same order as for inheritance.
- d. Mother.
- e. Maternal relations, as maternal uncle (mama) or aunt and other maternal relations within the prohibited degrees.
- f. The Qazi or the court.

Under Shia law, only the father and failing him the father's father howhighsoever is recognised as guardian. A marriage contracted by other person is wholly ineffective, unless it is ratified by the minor on attaining majority.

Effect of Apostasy on Guardianship for Marriage: According to the strict Mohammedan law an apostate (i.e. a person who has renounced the Muslim religion) has no right to contract his infant Muslim child. But the Caste Disabilities Removal Act, 1850, has abrogated this rule of Mohammedan law, according to which no law or usage can inflict on any person who renounces his religion, any forfeiture of rights or property. The power to contract a minor in marriage is a right within

the meaning of the Act, and it is not forfeited by conversion from Islam.

(Gul Muhammad v Mussammat Wagirp)³

- 2) **Guardian of the Person of the Minor (Wilayat-e-nafs):** Guardian of the minor's person means an overall supervision of the minor's personality during its minority, is called Wilayat-enafs. On the other hand custody of the child (Hizanat) simply means a physical possession of the child upto a certain age, because except her, no one else can nurse and handle a child during its infancy. But her custody of the child is subject to the supervision of the father who as a legal guardian, is under an obligation to provide means for upbringing of the child.

Mother's Right of Custody of the Child (Hizanat): This rule is based on the presumption that a mother is obviously the best person in the world to provide natural love and affection to a child which he requires during its infancy including its dependence for feeding. Nature itself has given to the mother the custody of her child's embryo even before it comes in the worldly existence.

Under Sunni law a mother has the custody of her male child until he 'has attained the age of seven years and of her female child until she completes the age of puberty.

Under Shia law she has the custody of her male child upto the age of two years and the custody of female child till the age of seven years. The right continues even after she is divorced. Enamul Haque v Bibi Taimunnisa⁴

A mother is a defacto guardian so she has no right to execute a waqf on behalf of the minor. The mother's right is not lost even if she ceases to be Muslim. Zaynab V Md Ghouse⁵

On being failed the mother, the custody of a boy or a girl goes to the following female relatives in the order given below-

- a. Mother's mother howhighsoever.
- b. Father's mother howhighsoever.
- c. Full sister
- d. Uterine sister
- e. Consanguine sister
- f. Full sister's daughter
- g. Uterine sister's daughter
- h. Consanguine sister's daughter
- i. Maternal Aunt
- ii. Paternal Aunt.

This right of mother or other relatives can be lost if-

- i. She leads an immoral life.
- ii. She neglects to take proper care of the child
- iii. She marries a person not related to the child within prohibited degrees.
- iv. During the subsistence of marriage, she goes and resides at a distance from the father's place.

Father's Right of Custody of a Child: Under Sunni law the custody of a boy over 7 years and of an unmarried girl who has attained puberty while on the other hand under Shia law the custody of a male child over 2 years and an unmarried girl of 7 years or more.

In default of the mother and other female relations the right of custody goes to the father and others as follows-

- (a) Father
- (b) Father's father
- (c) Full brother
- (d) Consanguine brother
- (e) Full brother son
- (f) Consanguine brother's son
- (g) Full brother of the father
- (h) Consanguine brother of the father
- (i) Son of father's full brother
- (j) Son of father's consanguine brother

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited relations to her.

Under Shia law, failing the mother the father or father's father is entitled to the custody of the child. It is doubtful who be the guardian failing the father's father.

The husband is not entitled to the custody of his minor wife unless she attains puberty.

- 3) **Guardianship of Minor's Property:** If a minor possesses any property either movable or immovable, a guardian is required to manage it. Muslim law prescribes certain persons in an order of preference who can be guardian of a minor's property.

(a) **Legal or Natural Guardian (de jure):**

- a. The father
- b. The executor appointed by the father's will
- c. The father's father
- d. The executor appointed by the will of the father's father.

Thus, mother, brother, uncle etc are not entitled as of right to be the legal guardians of the property of the minor. But mother, brother, uncle etc. may be appointed as an executor or executrix by the father or father's father and they will have the same power as possessed by father or father's father himself.

Power of Legal Guardians Regarding Immovable Property: A legal guardians has a very wide power to deal with movable property while regarding immovable property he has a very limited right

of transfer.

A legal guardian may alienate (sell) the immovable property of the minor only in the case of urgent necessity like -

1. When there are debts of the deceased, and no other means of paying them.
2. When he has no other means of livelihood and sale is absolutely necessary for his maintenance.
3. Whereby sale, double price can be obtained.
4. Where the expenses exceed the income of the property.
5. When the property falling into decay.
6. Where the property is in the hands an usurper (who has wrongfully assumed its possession) and the guardian has a reasonable belief that the property cannot be recovered from such person.
7. Where there are legacies to be paid, and no other means of paying them.

(b) Guardian Appointed by the Court (Certified): In the absence of any legal guardian, the court may appoint a guardian for the protection and preservation of the minor's property. A guardian appointed by the court may alienate the movable or immovable property of his ward. However immovable property can be alienated only in the case of necessity, and the guardian must also obtain the previous permission of the court. Without such permission, he cannot either mortgage or charge, or transfer by sale, gift exchange or otherwise, any part of the property. But he can lease any part of such property without the court permission (i) for a term not exceeding five years, or (ii) for more than one year beyond the date on which the minor will cease to be a minor, whichever is shorter.

A legal guardian has much power to sell or pledge regarding movable property for the minor's imperative necessities.

(c) De Facto Guardian: A defacto guardian is a person who is neither a legal guardian, nor a guardian appointed by the court but has assumed the powers and functions of a guardian. Usually defacto guardians are relatives of the minor except father and father's father. A defacto guardian is no guardian in the eyes of law and is simply an unauthorised person who deals with the minor's properties.

An alienation of minor's immovable property without the authority of the court by a defacto guardian is absolutely void. On the other hand, a defacto guardian has the same power to sell and pledge movable property, as a legal guardian possesses himself.

DIVORCE

Divorce was unknown to the laws of the Dharmashastra as marriage was regarded as an indissoluble union of the husband and wife. The provision of divorce in the existing marriage law has brought about a radical change in the legal concept of Hindu Marriage. Divorce puts the marriage to an end, parties revert back to their unmarried status, and are once again free to marry. The Hindu Marriage Act, 1955 originally, based divorced on the fault theory and enshrined nine fault grounds in Section 13(1) on which either the husband or the wife could sue for divorce, and two fault grounds in Section 13(2) on which wife alone could seek divorce. By an amendment Section 13(1), viz, clauses (viii) and (ix), two grounds of breakdown of marriage

were also reorganized.

The Marriage Laws (Amendment) Act, 1976 has inserted two additional fault grounds of divorce for wife and a new section 13-B under which divorce by mutual consent, on the lines of the Special Marriage Act, 1954 is recognized. Thus in the modern Hindu Law the position is that all the three theories of divorce are recognized and divorce can be obtained on the basis of any one of them. Further the customary mode of divorce is also retained.

Grounds of Divorce: The significant situation arising since the Marriage Laws (Amendment) Act, 1976 by the creation of identical grounds of divorce and judicial separation has led to a stage where none of the parties to a marriage now prefers a petition for judicial separation and the aggrieved party straightway, applies for divorce. A petition for divorce can be presented by either party to marriage on any one of the following grounds-

- a) **Adultery [Section 13 (1)(i):** That the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse. Before passing the Hindu Marriage (Amendment) Act 1976, to obtain a divorce on this ground, a continuous series of adultery had to be proved but after amendment, even a single and isolated act of infidelity would be sufficient ground for obtaining divorce.

Adultery is a consensual sexual intercourse between a married person and another of the opposite sex during the subsistence of marriage. An attempt to adultery does not, however amount to adultery, and cannot, therefore be the basis of a petition for judicial separation.

To prove the adultery, direct evidence is not necessary and can be proved by circumstantial evidence (Barker v Barker⁶). The sexual intercourse by either of the spouses other than his or her spouses must be a voluntary act. If one of the spouses is raped it cannot be said that there is a voluntary intercourse. If the husband cohabited with the wife even after knowing that she had been guilty of adultery would be sufficient to constitute condonation (Srivastava v Srivastava⁷). To get the matrimonial relief, the act of cohabitation must be proved beyond doubt. Mere fact that a wife was seen in a semina ked state in a hotel with a stranger or the husband is often seen or found in company with ill-reputed person's or with prostitutes or with ladies of immoral character, are not sufficient enough to prove adultery. Adultery must have taken place after the solemnization of the marriage. Pre-marriage unchastity of the wife or the sexual relation of husband with some other women is not a ground of divorce. The burden of proving adultery is always on the person alleging adultery. The fact that the wife used to be usually absent from the house and was found many times in a company or in strangers room and having no explanation for being there. The court held that the conditions are sufficient for adultery. (Thimmappa Dasappa v Thimmappa⁸)

- b) **Cruelty [Section 13(1)(i-a) :** That the other party has, after the solemnization of the marriage, treated the petitioner with cruelty. The term cruelty was defined first time under English Law in a case of Russel v Russel⁹. The House of Lords observed, cruelty may be brutal or subtle. It may be physical or mental. It may be by words or by gestures or even by mere silence. Cruelty refers to conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The cruelty is not defined in the Act but it should be so serious and weighty that cohabitation becomes impossible.

- a) **Physical Cruelty:** It will necessarily constitute a violence of certain degree and such degree of

violence, sufficient to constitute legal cruelty, will vary with the status of parties in each case. Where bodily injury is inflicted or where there is a reasonable apprehension of danger to life, limb or health, bodily or mental, it is easy to conclude that cruelty has taken place.

- b) Mental Cruelty:** denotes a set of circumstances, which though fall short of actual physical violence, may yet be acts of cruelty, e.g. malicious false accusation, rudeness, forcing wife to prostitution, threatening a pregnant wife, etc.

In *Bhagat v Bhagat*¹⁰, it was observed that mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together.

In *Shanti Devi v Raghav Prakash*¹¹, A wife's allegation that her husband is impotent although only by way of an abuse was considered as mental cruelty.

The question of legal cruelty justifying judicial separation or divorce on that ground may be considered under the following heads-

- i. Actual or threatened physical violence.
- ii. Verbal abuse and insults.
- iii. Excessive sexual intercourse.
- iv. Refusal of intercourse.
- v. Neglect
- vi. Communication of venereal diseases.
- vii. Drunkenness and use of drugs.
- viii. Forcing association with improper persons.
- ix. False charge of immorality against the wife.
- x. Ill treatment of children.
- xi. Wife suffering from deadly disease.

- c) Desertion [Section 13 (1)(i-b)]:** That the other party has deserted the petitioner for a period of not less than two years immediately preceding the presentation of the petition. According to Halsbury's Laws of England, desertion means the intentional forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. There can be desertion even without previous cohabitation by the parties, or without the marriage having been consummated.

- a. Actual Desertion:
 - a. The spouses must have parted or terminated all joint-living.
 - b. The deserting spouse must have the intention to desert the other spouse.
 - c. The deserted spouse must not have agreed to the separation.
 - d. The desertion must have been without reasonable cause; and
 - e. This State of affairs must have continued for the requisite period i.e. two years.
- b. **Constructive Desertion:** Desertion is not only abandoning the company of the other

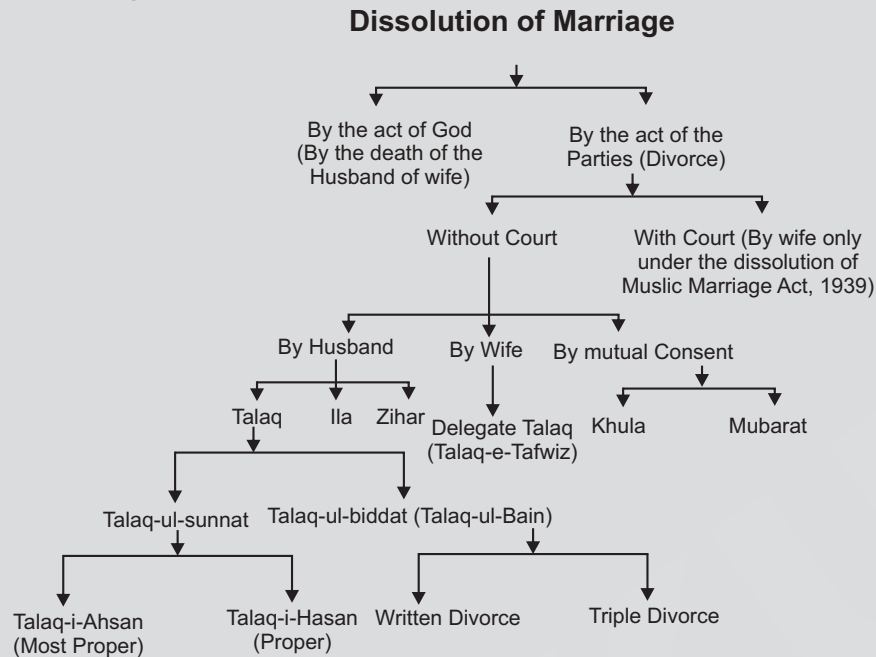
spouse but also abandonment of a state of things, in which one party to marriage has been compelled to leave matrimonial home owing to repulsive behaviour of the other party and the party thus living separately cannot be held to be deserter but the party compelling her/him would be held to be the deserter.

- d) **Conversion [Section 13 (1) (ii)]**: That the other party has ceased to be a Hindu by conversion to another religion. But after passing marriage laws (Amendment) Act. 1976, change of religion does not *isi facto* dissolve the marriage performed under the Hindu Marriage Act between two Hindus.
- e) **Insanity [Section 13 (1)(iii)]** : That the other party 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.
- f) **Leprosy [Section 13(1)(iv)]** : That the other party has been suffering from a virulent and incurable form of leprosy. Before the 1976, Amendment. the minimum requirement of leprosy was of three years.
- g) **Venereal Disease [Section 13(1)(v)]** : That the other party has been suffering from venereal disease in a communicable form. Before the 1976, Amendment. the minimum requirement of venereal disease was of three years.
- h) **Renunciation of World [Section 13(1)(vi)]** : That the other party has renounced the world by entering any religious order. Renunciation of the world and entering into some religious order are the co-exit requirements and the presence of one of them will not suffice.
- i) **Presumed Death [Section 13(1)(vii)]** : That the other party has not being heard of as being alive for a period of at least seven years by persons who would naturally have heard of him, had he been alive.
- j) **Decree of Judicial Separation [Section 13(1-A)(1)]** : That a decree for judicial separation between the parties has been passed, and there has been no resumption of cohabitation for a period of at least one year after the passing of such decree.
- k) **Decree of Restitution of Conjugal Rights [Section 13(1-A)]** : That a decree for restitution of conjugal rights between the parties has been passed, but there has been no restitution of conjugal rights for a period of at least one year after the passing of such a decree.

Muslim Law

Under the Muslim Law a marriage is dissolved either by the death of the husband or wife, or by divorce. After the death of the wife, the husband may remarry immediately while the widow cannot before a certain specified period. Generally, both the parties to the marriage contract have an option for divorce, but the husband has much greater right than the wife. The husband can divorce his wife without any misbehaviour on her part and without assigning any cause. Moreover, even if he makes a promise not to exercise such an absolute power of divorce, he will not be prevented from exercising it and a divorce pronounced by him in violation of such a promise will be effectual. Generally people consider Talaq as divorce while Talaq means not divorce. Talaq is a simple mode of divorce like Ila and Zihar. Thus, there is a much way of dissolution of marriage. They are as follows-

Dissolution of Marriage



Talaq: Talaq is an Arabic word and its original meaning is repudiation or rejection or to release (an animal). Under Muslim Law Talaq means repudiation of marriage by the husband or a release from the marriage tie or to free her from the bondage of marriage immediately or eventually. It is an arbitrary power of a husband to repudiate his marriage at his own pleasure at any time with or without cause and it is not necessary for him to obtain the prior approval of his wife. A revocable pronouncement of talaq does not dissolve the marriage till the period of iddat has expired, but an irrevocable pronouncement dissolves the marriage immediately on its pronouncement.

Note: The basic idea of talaq is that whenever a husband finds that the marriage cannot be continued happily (either because of the misconduct of the wife or because of his own fault) he is entitled to dissolve the marriage.

Capacity for Talaq: Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce Talaq against his wife, whenever he likes. Talaq by minor or insane husband is void and ineffective. However, if Talaq is pronounced by insane husband during his "lucid interval" it is valid. The guardian is not entitled to pronounce Talaq on behalf of a minor.

Free Consent: For a valid Talaq, consent must be free. On the other hand under Sunni Law, a Talaq even pronounced under compulsion, coercion, undue influence, pride or voluntary intoxication etc. is valid and dissolves the marriage. This rule is based on the tradition of the prophet where he is reported to have said thus. 'There are three things which whether done in joke or earnest shall be considered as serious and effectual; one marriage, the second divorce, and the third taking back.'

Involuntary Intoxication: If the husband was forcibly made drunk, and has pronounced Talaq, such a Talaq will not take effect under all the schools of Muslim Law.

Formalities:

a) A Talaq may be oral or in writing, if it is written it is called Talaqnama.

- b) No particular words or specific formula are required to constitute a valid Talaq. Any expression which clearly indicates the husband's desire to break the marriage is sufficient to dissolve the marriage through Talaq.
- c) A Talaq either oral or in writing, needs to be made in the presence of any witnesses. Such Talaq is valid.

Under Shia Law -

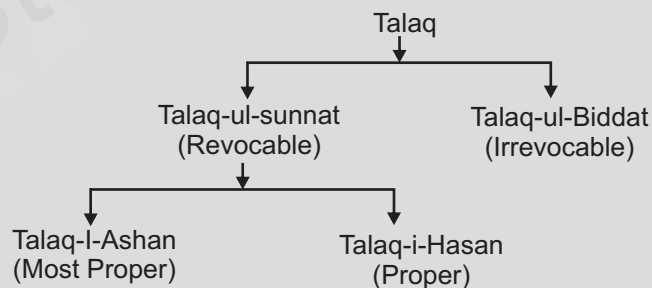
- a) Talaq must be uttered orally, unless the husband is unable to speak. If the husband has capacity to utter the words but gives in writing, the Talaq is void and ineffective.
- b) Some particular Arabic words in the specific formula are required in the pronouncement of Talaq.
- c) Talaq must be pronounced in the presence of either two competent male witnesses or one male and two female witnesses. A Talaq without witnesses or in presence of incompetent witnesses is void.

Note: Every male Muslim who is of sound mind and has attained the age of puberty, is competent witness.

Presence of Wife: For the validity of a Talaq the presence of wife is not necessary and the Talaq pronounced by the husband in the absence of wife is valid and effective. Its notice to wife is not necessary and it becomes effective from the moment of its pronouncement and not from the date on which the wife comes to know about it. However, knowledge of Talaq is required for the claim of dower and for claim of maintenance from former husband.

Conditional and Contingent Talaq: A Talaq may either be absolute (i.e. unconditional) or subject to a condition or contingency. An uncertain future event is called contingency. Under Sunni Law a conditional or contingent Talaq is valid provided that the conditions must not be un-Islamic (against the principle of Islam). If the condition is void, Talaq cannot take place. Under Shia law, conditional or contingent Talaq is void and ineffective, either the condition or contingency is valid and lawful. However Talaq must be unconditional.

Kinds of Talaq: There are two kinds of Talaq



1. **Talaq-ul-Sunnat (Revocable Talaq) (Talaq-ul-Raje):** Talaq-ul-Sunnat is regarded to be the approved form of Talaq, based on the prophet's tradition (Sunna). According to prophet, Talaq was an evil. The prophet recommended only Talaq-ul-Sunnat (revocable Talaq), because in this form the evil consequences of Talaq do not become final at once and there is still a possibility of compromise and reconciliation between husband and wife. Talaq-ul-Sunnat is also known as Talaq-ul-raje and only this kind of Talaq was in practice of the prophet's life time. This mode of Talaq is recognised by Sunnis as well as by the Shias. This Talaq has been further divided into-

- i. **Talaq-i-Ahsan (Most Proper):** The Arabic word 'ahsan' means best or very proper. Thus the talaq uttered in the ahsan form is the best kind of talaq. In talaq-i-ahsan certain conditions must be satisfied.
- a. Talaq is an evil word; the husband must utter the formula of divorce in a single sentence.
 - b. The pronouncement of divorce must be in a state of purity (tuhr); tuhr is a period when a woman is free from her menstrual course.
 - c. He must abstain from intercourse for the period of iddat.

If the marriage has not been consummated, talaq may be pronounced even if the wife is in her menstruation but if any woman is not subjected to menstruation either because of old age or due to pregnancy or the spouses are away from each other for a long period, the condition of tuhr (purity) is not applicable, i.e. a Talaq against her may be pronounced any time. A pronouncement made in the ahsan form is revocable during iddat, either by express words or by implied (cohabitation with the wife). After the expiration of iddat the divorce becomes irrevocable.

- ii. **Talaq-i-Hasan (Good or Proper):** The Arabic word Hasan means 'good or proper'. This form of talaq is lesser worth than that of Ahsan form but there is also a provision for revocation. In this talaq certain conditions are to be followed.
- a) There must be three successive pronouncements of the divorce.
 - b) If the wife is under the menstruation, the first pronouncements should be made during tuhr period, the second during the next tuhr and the third during the third tuhr.
 - c) If there is no menstruation, the pronouncement should be made during the successive intervals of 30 days.
 - d) There must not be any sexual intercourse during these three periods of tuhr.

It is to be noted that the husband may revoke his talaq after the first and second pronouncement either expressly or impliedly. If no revocation is made then lastly the husband is to make the third pronouncement in the third period of purity and after making the third declaration, the talaq becomes irrevocable and the wife has to observe the required iddat.

2. **Talaq-ul-Bidaat (Irrevocable) (Talaq-ul-Bain):** It is a disapproved mode of divorce and becomes effective as soon as the words are pronounced. There is no possibility of reconciliation between the parties. Prophet never approved this talaq, hence it was not in practice during his life time. This talaq is also called Talaq-ul-Bain. Only Sunni Law recognises talaq-ul-biddat, though they think it to be sinful. In this talaq the following requirements are necessary-
- a) Three declaration of talaq are to made during a single tuhr by saying "I divorce thee, I divorce thee, I divorcee thee." He may declare his triple-talaq even in one sentence by saying "I divorce thee thrice." Or I pronounce my first, second and third talaq.

- b) A single declaration made during a tuhr with clear irrevocable intention to dissolve the marriage by saying "I divorce thee irrevocably or I divorce thee in Bain."

Ila (Vow of Contenance): Where a husband, who has attained puberty and is of sound mind, swears by God that he will not have sexual intercourse with his wife for a period of four months or more or for an unspecified period, he is said to make ila. Thus, if any husband says to his wife, "I swear by God that I shall not approach thee," it is a valid ila. After the expiration of these four months, the marriage dissolves irrevocably. But, if the husband resumes cohabitation within the prescribed period of four months, ila is cancelled and the marriage does not dissolve. The custom of ila is however, more less absolute now Ila is not a practice in India.

Under Shia law, Ila cannot take place without the order of the court of law. After the expiration of the prescribed period the wife may file suit either for the restitution of conjugal rights or for the dissolution of marriage. If she does not obtain the decree of court, the marriage does not dissolve.

Note: In ila husband is called Mula and the wife is called Muli.

Zihar (Injurious Assimilation) (Unlawful Comparison): When a husband (sane and adult) compares his wife with a woman with whom he cannot cohabit e.g. mother or sister etc. The husband would say that from today the wife is like his mother or sister and does not make a relation upto four months. The wife has a right to refuse herself to him until he has performed penance by (i) freeing a slave (ii) fasting, for two months (iii) feeding, sixty poor persons.

After the expiry of four months, the Zihar is complete but marriage does not dissolve. She may go to the court either for the restitution of conjugal rights or for a judicial divorce.

Delegated Divorce (Talaq-e-Tafweez): A Muslim husband has unlimited power to divorce his wife at any time on any ground. This power or right is so absolute that he may exercise it either himself or may delegate to other person, including his own wife. When the right of talaq is exercised by any person other than the husband himself it is called Talaq-e- Tafweez or delegated divorce and that talaq is as effective as made by husband himself. The delegated power of divorce to the wife may either be permanent or temporary i.e. only for a specified period. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband.

The delegation may be conditional or subject to certain condition or contingency. If the delegation is conditional, the talaq cannot take place until that condition is fulfilled. It is to be noted that the mere fact, where husband delegates to his wife the right of pronouncing talaq, does not deprive the husband himself of his right to pronounce talaq.

Divorce by Mutual Consent; Under Muslim Law whenever the husband and wife feel that it is now impossible for them to live with mutual love and affection as is desired by God, they may get separated from each other either by Khula or Mubarat.

Khula (Divorce at the Request of Wife): The literal meaning of the word Khula is, to lay down or to take off the clothes. In law, it means a wife obtains the divorce from her husband with his consent, on payment of something to him. There was no khula in pre-islamic legislation.

Essentials:

- i. There must be an offer from the wife (only wife's desire)

- ii. The offer must be accepted with the consideration (evaz) for the release.
- iii. (Hi) The offer must be accepted by the husband.
- iv. The husband and wife must be competent (sound mind, sane and have attained the age of puberty.
- v. The offer and acceptance must be made with free consent.

Mubarat (Divorce by Mutual Consent): In Mubarat both the parties want separation from each other. Therefore, in this form of divorce, the offer may be either from the side of wife or from the side of husband, to be accepted by the other. In mubarat, no party is legally required to compensate the other by giving some consideration. When an offer is accepted, it becomes an irrevocable divorce (talaq-ulbain) and iddat is necessary.

Judicial Divorce (Faskh): By judicial divorce we mean a divorce by the order of a court of law. Islam provides for the dissolution of a marriage by a Kazy or Judge. On the application of a wife if the marriage was found to be harmful or undesirable for her, the Kazi could dissolve the marriage. A Muslim wife has no absolute right to obtain a divorce, her rights extend only under certain specific contingencies and conditions before the passing of dissolution of Muslim Marriage Act, 1939-

(a) Before the Shariat Act of 1937-

- a. Impotency of the husband.
- b. Lian (false charge of adultery) i.e. when the husband charged his wife with adultery, and the charge was proved to be false.
- c. Option of puberty (Khar-ul-Bulugh).

(b) After the Shariat Act of 1937-

- (i) Ila (ii) Zihar

But now the dissolution of Muslim Marriage Act 1939, has introduced a revolutionary change in this respect and has restored to her, right of divorce granted to her under Shariat. This Act came into force on 17th March, 1939. It extends to the whole of India.

Under Section 2 of the Act a woman married under Muslim Law is entitled to obtain a decree for the dissolution of her marriage on anyone or more of the following nine grounds -

1. **The Husband is Missing for Four Years:** Section (2)(i), if the husband is missing and his whereabouts are not known for a period of four or more years. The decree passed by the court on this ground becomes effective only after the expiry of six months, from the date of such decree. If before the expiry of six months, the husband reappears in person or communicates to the court through his agent and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree and the marriage is not dissolved.
2. **Husband's Failure to Maintain the Wife for Two Years:** Section 2(ii), if the husband has neglected or failed to provide maintenance to the wife for two (or more) years. Failure to maintain the wife need not be wilful. It may be due to poverty, weak health, loss of work, imprisonment or any other cause. Even if the wife is rich, she is entitled to maintenance.

It is to be noted that husband's obligation to maintain his wife is subject to wife's own performance of

matrimonial obligations. Therefore, if the wife lives separately without any reasonable cause, she is not entitled to get judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her for maintenance.

3. **Imprisonment of the Husband for Seven Years:** Section 2 (iii), if the husband has been sentenced to imprisonment for a period of seven years or more, no decree can be passed on this ground unless the sentence has become final.
4. **Failure to Perform Marital Obligations:** Section 2(iv), if any husband fails to perform his marital obligations for a period of three years without any reasonable excuse. The Act does not define marital obligations but for the purpose of this clause only conjugal obligation may be taken into account.
5. **Husband's Impotency:** Section 2(v), a wife has to prove (i) that the husband was impotent at the time of the marriage and (ii) that he continues to be impotent till the filing of the suit. But before passing a decree of divorce, the court is bound to give to the husband one year's time to prove his potency provided he makes an application for it if he is successful in proving, divorce cannot be passed but if he fails, marriage will be dissolved.
6. **Insanity, Leprosy or Venereal Disease:** Section 2(iv), if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease. It is to be noted that leprosy and virulent venereal diseases need not be two years old, it may be even recent.
7. **Option of Puberty by Wife:** Section 2(vii), any wife whose marriage was contracted by her father or any other guardian before the age of 15 years can repudiate her marriage before attaining the age of 18 years, provided the marriage has not been consummated.
8. **Cruelty by the Husband:** Section (viii) if the husband treats his wife with cruelty, that is to say-
 - a. Habitually assaults her or makes her life miserable by cruelty or bad conduct even if
 - b. such conduct does not amount to physical ill-treatment.
 - c. Association of the husband with women of evil repute or that he leads an infamous life.
 - d. The husband attempts to force his wife to lead an immoral life.
 - e. The husband disposes off her property or prevents her from exercising her legal right over it.
 - f. The husband obstructs her in the observance to her religious profession or practice.
9. Any other ground which is recognised as valid for the dissolution of marriage under Muslim Law - Section 2(ix).

This clause covers the divorces by Ila, Zihar, Khula, Mubarat and Tafweez. Imputation of unchastity or a false charge of adultery against the wife (Ien) is also a good ground for the dissolution of her marriage.

CRIMINAL LAW AND SOCIAL LEGISLATION

Sections 125 to 128 (Chapter-IX) provide for speedy, effective and inexpensive remedy against persons who neglect or refuse to maintain their 'dependent' wives, children and parents.

"Section 125 of the Code of Criminal Procedure, 1973 makes provision for maintenance of wives, children

and parents. The mandates of this section shows that it is natural and fundamental duty of every person to maintain his wife and children so long as they are not able to maintain themselves. It is considered to be holy duty of a person to maintain his parents too.

In case of Mohd. Ahmad Khan v. Shah Bano Begum (1985 Cr. L.Y. 875 (SC) the court has held that Section 125 is applicable to all irrespective of their religion. According to the Supreme Court Section 125 of the Code of Criminal Procedure 1973 is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) of reinforced by Article 39. There is no doubt that Sections 125 to 128 of the code calling for interpretation by the courts are not specified but vibrant words with social functions to fulfil. (Ramesh Chandra Kaushik v. Mrs. Veena Kaushik 1979 Cr.L.J. 3 SC.

Purpose of Section 125 of the Code: The purpose of enacting Section 125 of the code is not to recognise or create a right as such in favour of a wife. It is intended to ameliorate social problem which concerns destitution or vagrancy. The primary object of the Section is to prevent starvation and vagrancy of persons and enable a discarded wife and a helpless child to get the much needed and urgent relief in one or the other of the forms convenient to them. It is a public policy and it is the basic principle of law that an agreement apposed to public policy can not be enforced in a court of law. Section 23 of the contract Act renders such an agreement void if its consideration or object is unlawful. And if the object and consideration of an agreement is opposed to public policy, the agreement will be treated as unlawful, and consequently void.

According to Section 125(1) of the code of criminal procedure, 1973 the following persons are entitled to claim maintenance:

1. Wife
2. Minor child, illegitimate/legitimate, married/unmarried (excepted a married daughter whose husband is capable to maintain her section-125(B)
3. Major child, legitimate or illegitimate (not a married daughter) who by reason of any physical/mental abnormality or injury unable to maintain himself section-125(C).
4. Father/Mother unable to maintain himself/herself section-125(D).

Wife [Section-125(1)(a)]: The wife (minor/major), unable to maintain herself. is entitled to maintenance. Wife includes a woman who has been divorced by, or has obtained divorce from her husband and has not remarried. So, a woman divorced by her husband under Hindu Law continues to enjoy the status of wife for maintenance only.

Wire means only a legitimate/legally wedded wife and therefore any marriage proved illegal cannot give a wife any right to get maintenance. The second wife cannot be entitled to be maintained. The legality of marriage is proved by the personal law of the parties and a woman living as wife is not the wife.

A strict proof of marriage is not sine qua non in considering relief under section-125 but this does not mean that if parties were living together as husband and wife that she has a right to claim of maintenance.

Husband's remarriage gives a right of maintenance to the first wife - The Supreme Court held that the first

wife could claim maintenance while living separately even though the second marriage was valid if their personal laws permit them. The court further held that either he had remarried or had kept a mistress, the first wife was entitled to maintenance and offer by husband to take her back could not be considered bonafide. The first wife is entitled even if she consented to the remarriage of his husband.

Child [Section-125(1)(b)(c): A minor child whether legitimate/illegitimate, married/unmarried, if unable to maintain itself. is entitled to claim maintenance.

Minor means - a person who has not completed the age of 18 years according to the Indian Majority Act, 1875. According to proviso of section-125(1) if the husband of minor female child is not possessed of sufficient means, the father of such child is required to maintain her until her majority.

It is immaterial in which custody the child is, either in mother's custody under Muslim Law or in a guardian's appointed by the court, the father still has the obligation to maintain.

The basis of an application for the maintenances of a child is paternity of the child either legitimate/illegitimate. It is also immaterial whether the child is natural born or adopted.

Even after attaining majority, a legitimate/illegitimate child (except a married daughter) is entitled to claim maintenance if he is unable to maintain himself because of any physical or mental abnormality or injury. Under Section-125(1 Hc) a minor child could claim maintenance from father living abroad (Priyal v. Dr. Pradeep K. Kamboj 2000).

Father or Mother [Section-125(1)(d)] : A father or mother, unable to maintain himself or herself. is entitled to claim maintenance from his or her son. The Supreme Court held that apart from any law, the Indian society casts a duty on the children to maintain the parents and this social obligation equally applies to a daughter (VOaya Manohar Arbat v. Kashirao 1989 SC). Mother includes adoptive mother but not step mother. The Supreme Court had that a childless stepmother may claim maintenance from her step son provided she IS widow or her husband, if living, is unable to support and maintain her (Kirtikant v. State of Gujrat 1996 SC). A claim may be asked with a legitimate child only.

BASIS OF THE CLAIM OF MAINTENANCE:

- 1) Sufficient Means to Maintain:** Means the capability of earning and maintaining the health rather than visible means such as real property or definite employment. So the unemployment in debt insolvent. professional beggar or monk are not considerable ground. The burden of proof is on him that by reason of some ailment/infirmity or accident he is unable to maintain.
- 2) Neglect or Refusal to Maintain:** The term neglected is used in a wider sense so as to include disregard to duty whether willful or intentional. Similarly, refusal to maintain need not to be express and it may be implied from the conduct. Burden of proving neglect is on the claimant. Change of religion does not relieved a person of his obligation to maintain (M.A. Rahman v. Venkata Ramamma, 1980 A.P.).

Maintenance means appropriate food, clothing and lodging and it must include the minimum amount of a child's education.

When wife's claim of maintenance may be defeated section-125(4)-

- i. If she is living in adultery and it must be a continuous course and not an isolated act.
- ii. If she refused to live with her husband without any sufficient reason. However if a husband contracted other marriage or keeps a mistress, is considered a good ground for refusal to live with him.
- iii. If the parties are living separately by mutual consent. While living separately she can not be characterized as wife but children living with her can claim.

3) Claimant must be unable to Maintain himself/herself: Inability of wife to maintain herself is a condition precedent to granting maintenance to her under section-125 and need not to specifically plead that she is unable to maintain herself. If the wife is able to earn but refused, this does not affect her right to claim but she would be disentitled to get full amount of maintenance.

The phrase 'unable to maintain itself' in the context of a child means unable to earn a livelihood for itself.

A father is also entitled if unable to maintain himself. This is a statutory obligation and the claim cannot be defeated that the father had failed to fulfill his parental obligation towards the children during their minority.

Quantum of Maintenance: No maximum limit is fixed and the Magistrate may order such monthly rate as he thinks fit according to the merits of each case (e.g. status of the family) and the separate income and means of the person claiming maintenance are to be taken into account. The monthly rate which is fixed, if necessary can be altered from time to time under section-127.

Each claimant should be awarded separately, a joint award of maintenance to wife and child is not within the contemplation of section-125(1).

Interim Maintenance [Section-125(2)]: The Magistrate can order the payment of maintenance allowance (or interim maintenance and expenses of the proceedings) from the date of the order or from the date of the application.

To grant interim maintenance is the courts inherent power (Savitri v. Govind 1986).

Now interim maintenance has been incorporated (II proviso section 125 (1)). The Magistrate may during the pendency of proceeding, order to make a monthly allowance for the interim maintenance of his wife or such child, father or mother and the expense of such proceeding.

An application of the interim maintenance, as far as possible, be disposed of within 60 days of the service of notice of the application to such person.

Remedies for the Enforcement of Order of Maintenance [Section-125 (3)]: Two modes of execution of maintenance order-

- a) Issue a warrant for levying fines.
- b) Sentence such person to imprisonment for a term which may extend to one month or united

payment if sooner made, if after the execution of warrant the whole/any part of the amount of maintenance remains unpaid.

A warrant shall be issued after the application is made within one year from the date on which such amount became due [I proviso section-125 (3)].

The court is bound to enquire into the reasons for non-payment of maintenance amount. Sending to jail does not absolve a person of liability to pay maintenance and it could be satisfied only by making actual payment.

Alteration and Cancellation of Maintenance Order (Section-127): The Magistrate has the power to alter or cancel the maintenance order according to the change in circumstances of the party paying or receiving the allowance. The amount may be increase or decrease, if the person paying the amount has retired or ailing in a hospital or the claimant got the job.

The Magistrate should vary his order according to the decision of a competent civil court [section127(2)].

The Magistrate shall cancel the order made in the favour of a wife if she is living in adultery or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent [section-125 (4)].

The order made in the favour of a divorced wife may be cancelled [section-127 (3)]-

- a. When she remarries (from the date of marriage).
- b. When she has received whether before/after the date of maintenance order, the whole of the sum which under any customary or personal law applicable to the parties, may be payable on such divorce.
- c. When she has voluntarily surrendered her right to maintenance after her divorce.

An order once passed remains in force until it is either cancelled or modified by the court.

Jurisdiction (Section 126): A wife can sue her husband for maintenance-

- a. Where the person works for gain, or
- b. Where he resides, or
- c. Where his wife resides, or
- d. Where he last resides with-
 - i) his wife; or
 - ii) the mother of the illegitimate child.

Parents can petition for maintenance at place where their children reside. (N.B. Bhkshu v. State, 1993 A.P.) or where they reside themselves.

WOMEN PARTICIPATION IN DOMESTIC GOVERNMENT

Government

Introduction: The Indian democracy, inaugurated in 1950 with a written constitution, guaranteed to all women the fundamental right to equality and political participation. It recognised the political rights of women, without any discrimination, distinction or qualification to participate in the decision making for the nation at all the levels. After four decades and tremendous strides in democracy and development women's participation and role in public life has not made much headway. Their participation in setting the agenda for their own and other's development and not merely to get on to such agenda, requires immediate attention. This would require women's empowerment. At the same time, such an empowerment can come to women only with their socio-political advancement and an increase in their number and participation in decision making positions and political roles.

In the post-independence period such participation of women has been at various levels and forums. The first and foremost occasion in which women of all ages and developmental levels can participate equally, without any pre-conditioning, is the elections.

But many studies have pointed out to the low participation -of wome-rimeTecti6nsas voters as well as candidates. There studies have pointed out that –

- a. women are not independent voters
- b. that a majority of them are illiterate
- c. that a majority of them make their choice on the basis of suggestions from male members of the family-husband and sons,
- d. that women lack information and political awareness and, that
- e. women are not politically conscious.

Participation in Panchayati Raj: Another level of understanding women's participation both as voters and candidates (wherever elections have been held) for the Panchayati Raj institution is at grass root level. The participation at this level has different meaning and is based on factors different from those at the state and central legislatures.

The village Panchayat was a unit of local administration since the early British days, but they had to work under Government control.

The demand for reservations for women in adequate proportion in the various representative bodies at different political level-local, state and central as a way of ensuring women to enter those bodies, has thus been persistent. This is particularly put forward by women who have 'made' it to politics and even the central legislature, it thereby shows the various odds against which they had to struggle, before reaching where they are. But it has also been felt that mere representation of women in the committees at the lower level is not enough. If the representation has to be meaningful enough to bring about the development of women and children, a more effective way would be to guarantee women's emergence as the sarpanch head of the villages and women have to be represented at the higher level bodies like zilla parishad.

Thus the running theme in the debates on Panchayat Raj concerning women, from 1957 to 1989, was one of how to make more women participate in the Panchayat Raj, at its various levels. The Panchayati Raj was born in 1959 with the submission of the Balwant Rai Mehta Committee Report (1957).

The passing of the Panchayat Raj and Nagarpalika Constitution which enjoins the state to take steps to organise village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government. This mandate of the constitution has now been implemented though belatedly by passing the two constitutional amendments in 1992. This would help to realise the objectives of Gram Swaraj, the idea cherished by Mahatma Gandhi, it will go a long way in ensuring democratic functioning of the grass root democratic institutions.

It is however. to be noted that the constitution, elections, devolution of powers and authority relating to these institutions have been completely left within the purview of the States. On 24th March 1993, the Panchayat Raj Act came into force with the enactment of new legislation and ratification of the Act by more than 50 per cent of the states and union territories.

The 73rd and 74th Constitution Amendment Acts: The idea so evolved culminated in the passing of Constitution 73rd and 74th Amendment Acts 1992 which inserted parts IX and IX A in the Constitution. While Part IX relates to the Panchayats containing Articles 243 to 243-0, Part IXA relates to the Municipalities, Containing Articles 243 P to 243 ZG.

It is to be recalled that 'local Government' including self-government institution in both urban and rural areas is an exclusive state subject under Entry 5 of list II of the 7th Schedule, so that the Union can not enact any law to create rights and liabilities relating to these subjects.

After implementing legislation was enacted by the States, elections have taken place in most of the states and the Panchayats and Municipalities have started functioning under the new law. These amendments do not apply to Jammu and Kashmir, Meghalaya, Mizoram, Nagaland and National Capital Territory of Delhi.

Panchayat: Part IX of the Constitution envisages a three-tier system of Panchayats namely [243 (3)]

- a. The village level
- b. The District Panchayat at the district level
- c. The Intermediate Panchayat which stands between the village and district panchayat in states where the population is above 20 lac.

Composition of Panchayat: Article 243-A provides that the Gram Sabha may exercise such powers and perform such functions at the Village level as the legislature of a state may by law provide. Gram Sabha means a body consisting of persons registered in the electoral rolls relating to a Village comprised within the area of Panchayat at the village level.

Chairperson of each Panchayat shall be elected according to the law passed by a State and such State Law shall also provide for the representation of chairpersons of village and Intermediate Panchayat in the District Panchayat as well as members of the Union and State Legislative in the Panchayats above the village level.

The legislature of a State may by law provide for representation of following persons in panchayats-

- a. the Chairpersons (Chairmen) of the Panchayats at the village level, in the Panchayats at the intermediate level or in the case of a State not having Panchayats at the intermediate level, in the case of a State not having Panchayats at the intermediate level, in the Panchayats in the district level;

- b. the Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level;
- c. the members of the Lok Sabha and the Legislative Assembly of the State representing constituencies which comprise wholly or partly a Panchayat area at the level other than the village level, in such Panchayats;
- d. the members of the Rajya Sabha and Legislative Council of the State where they are registered as electors;
 - a. a Panchayat area at the intermediate level. in Panchayat at the intermediate level;
 - b. a Panchayat area at the district level, in Panchayat at the district level.

Reservation of seats for SC and ST: Article 243-0 provides that seats are to be reserved for Scheduled castes and scheduled tribes. The reservation shall be in proportion to their population.

Reservation for Women: Out of the seats so reserved not less than 1/3rd of the seats shall be reserved for women belonging to Scheduled Castes and Scheduled Tribes, respectively. Not less 1/3rd of the total number of seats to be filled by direct elections in every Panchayat shall be reserved for women.

A State may by law make provision for similar reservation of the offices of Chairpersons in the Panchayats at the village and other levels.

Duration of Panchayat: Every Panchayat shall continue for 5 years from the date of its first meeting. But it can be dissolved earlier in accordance with the procedure prescribed by State law.

Dis-Qualification of Membership: A person shall be disqualified for being chosen as, and for being a member of Panchayats-

- a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the legislature of the State concerned;
- b) if he is so disqualified by or under any law made by the legislature of the State.

But no person shall be qualified on the ground that he is less than 25 years of age, under clause (a), if he has attained the age of 21 years.

If any question arises as to whether a member of a Panchayat has become subject to any of the qualifications mentioned in clause (1) the question shall be referred for the decision of such authority and in such manner as the legislature of a State may, by law, provide Cl. (2).

Powers, authority and responsibility of Panchayat: Article 243G, provides that subject to the provisions of this Constitution the legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as an institution of self government. Such law may contain provisions for the devolution of powers and responsibilities upon Panchayats subject to such conditions as may be specified therein, with respect to-

- a. the preparation of plans for economic development and social justice;

- b. the implementation of schemes for social development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

Powers to impose taxes and funds of Panchayats : Article 243(H) empowers a State Legislature to make by law provision for imposing taxes etc. by the Panchayats. Such a law-

- a) authorize a Panchayat to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;
- b) assign to a Panchayat such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits;
- c) provide for making such grants-in-aid to the Panchayats from the Consolidated Fund for the State; and
- d) provide for constitution of such funds for crediting all moneys received, by or on behalf of the Panchayats and also for the withdrawal of such money therefrom.

Municipalities: Part IX-A which has come into force on 1-6-1993 gives a constitutional foundation to the local self-government units in urban areas. In fact such institutions are in existence all over the country.

Some of the provisions are similar to those contained in Part IX.

This part gives birth to two types of bodies-

- a) Institutions of self-government [Article 243 (Q)]
- b) Institutions for planning [Articles 243 (ZX) and 243 (ZE)].

Institutions of self-government, called by a general name 'municipalities' are of three types-

- a) Nagar Panchayat, for a transitional area, i.e. an area which is being transformed from a rural area to an urban area.
- b) Municipal council for a smaller urban area.
- c) Municipal Corporation for a larger urban area.

Article 243 Q makes it Obligatory for every state to constitute such units.

Composition of Municipalities: Article 243(R) provides that save as provided in clause (2), all the seats in a municipality shall be filled by persons chosen by direct elections from territorial constituencies in the Municipal area. For this purpose each Municipal area shall be divided into territorial constituencies to be known as Wards.

The legislature of a State may by law, provide for the representation in a Municipality of the following-

- a) persons having special knowledge or experience in Municipal administration;
- b) the members of the Lok Sabha and the Legislature Assembly of the State representing

- constituencies which comprise wholly or partly the Municipal area;
- c) the members of the Rajya Sabha and the Legislative Council of the State registered as electors within the Municipal area;
 - d) the Chairpersons of the committees constituted under clause (5) of Article 243S.

However, the persons referred to in paragraph (i) shall not have the right to vote in the meeting of the Municipality.

The legislature will also by law provide the manner of election of the chairpersons of a Municipality.

A "Municipal area" under Article 243R means the territorial area of a Municipality as is notified by the Governor.

Reservation of Seats: As in part IX reservations of seats are to be made in favour of the Scheduled Caste and Scheduled Tribes in every municipality.

Reservation for Women: Out of the total number of seats to be filled by direct elections at least 1/3rd would be reserved for women. This includes the quota for women belonging to Scheduled Caste and Tribes.

It has been left to the State legislature to prescribe by law the manner of reservation of the offices of the Chairpersons of Municipalities.

All reservations in favour of scheduled Castes and Tribes shall come to an end with the expiry of the period specified in Article 334 (i.e. upto 2000 A.D.)

It is permissible for a State Legislature to make provisions for reservation of seats or offices of chairpersons in favour of backward classes.

Duration of Municipalities : Every municipality shall continue for 5 years from the date of its first meeting. But it may be dissolved earlier according to law.

Disqualification of Membership: Article 243(V) lays down that all persons who are qualified to be chosen to the State legislature shall be qualified for being members of a Municipality. There is an important difference. Persons who have attained the age of 21 years will be eligible to be members. While the constitutional requirement is that for election to the State legislature of a State a person must have attained the age of 25 years [Article 173].

Powers, authority and responsibilities of Municipalities: Legislatures of States have been conferred the power [Article 243W] to confer on the Municipalities all such powers and authority as may be necessary to enable them to function as institutions of self government. It has specifically been mentioned that they may be given the responsibility of (a) preparation of plans for economic development and social justice, (b) implementation of schemes as may be entrusted to them, and (c) in regard to matters listed in the 12th schedule. This schedule contains 18 items, e.g. Urban Planning, Regulation of Land Use, Roads and Bridges, Water Supply, Public Health, Fire Services, Urban Forestry, Slums, etc.

A State legislature may by law authorise a Municipality to levy, collect and appropriate taxes, duties, tolls etc.

The Finance Commission appointed under Article 243-1 (see Chapter 18 under Panchayat Finance Commission) shall also review the financial position of the Municipalities and make recommendations.

Apart from giving constitutional recognition to Municipalities the 74th Amendment lays down that in every State two committees shall be constituted.

- a. At the district level a District Planning Committee [Article 243(ZD)].
- b. In every metropolitan area a Metropolitan Planning Committee Article 243(ZB)].

It is quite well recognised among the women's studies/development activists that the one third representation of women as members or the chairpersonship of a Panchayat will have little or no relevance, if the Panchayat themselves are crippled and powerless. Both for women and men of the villages to effectively participate in self government. the first requisite would be the endowment of the Panchayats with sufficient political and administrative power, authority and scope.

However, it is on the last count. viz. the drawing of more women into politics and the panchayats, that many women are opposed to political parties in the fray. Party platforms rather than gender issues and activism in the field will dominate. Women also will be discouraged to be rechristened on party labels and will be hesitant to enter the rough and tumble of party politics.

IMPORTANT QUESTIONS

- Q.1. What are the general rules of succession to the property of a Hindu female under the Hindu Succession Act, 1956?
- Q.2. Discuss maintenance under Cr.P.C. 2(a) State the grounds on which a Hindu wife can claim maintenance. When is this right lost?
- Q.3. Explain the concept of 'cruelty' as ground of judicial separation under the Hindu Law.
- Q.4. Distinguish between judicial separation and divorce.
- Q.5. What is Iddat?
- Q.6. What are the grounds of divorce available only to the wife under the Hindu Marriage Act, 1955? Discuss.
- Q.7. What do you mean by minor? Who are natural guardians of minor children and what are their powers?
- Q.8. Explain the nature and extent of the rights of a Muslim widow to retain possession of her husband's estate in lieu of her dower.

References :

1. 6 M.I.A. 393
2. A.I.R. 1963 Pat. 146

3. (1901) 3 Punj. Rec. 191.
4. AIR (1967) A.P. 344.
5. AIR (1952) Mad. 284.
6. A.I.R. 1955, Mad 103
7. AIR 1967 SC 581
8. AIR 1972 Mys 1
9. 1897 A.C. 395
10. AIR 1994 SC 710
11. AIR 1986 Raj 13

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UNIT - III

Today's girl is tomorrow's woman. Ladies first, this necessity has more or less a matter of social courtesy, limited perhaps to the higher strata of society. Despite their contributions in various fields, very little has been done or given to encourage women to emerge from the society. It is extraordinarily difficult to sum up succinctly the situation of women in India, since there is probably no nation in the world with greater internal diversity and plurality. India's Constitution is in some ways very attuned to issues of sex equality. The text of the constitution is in many ways exemplary in its treatment of issues of gender and sex, particularly in the section dealing with Fundamental Rights.

Right to serve in Government or Private Service or Self-Employment: Article 16 of the Constitution of India guarantees equality of opportunity in matters of employment that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and 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. However nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or employment to an office under the Government of 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. The State is empowered under this Article to make 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. Besides, 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.

In a case of *Air India v. Nargesh Meerza* (AIR 1981 SC 1829) the court has been held that the provisions on pregnancy bar and the retirement and the option of the Managing Director were unconstitutional as being unreasonable and arbitrary and violative of Article 14, if upheld the validity of the provision prohibiting the Air Hostesses to marry within four years of their service as there was no unreasonableness and arbitrariness in that provision. It is by all standards a "very sound and salutary provision". Apart from improving the health of the Air Hostess, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal.

Equal pay for Equal Work: (Section 39(d)) : The Apex Court in *Randhir Singh v. Union of India*¹, has expressed the opinion that the principle of "equal work" is not declared in the Constitution to be a fundamental right but it is certainly a constitutional goal. Article 39 (d) of the Constitution declares that, State shall direct its policy towards securing that there is equal pay for equal work for both men and women. The Court further said that continuing Articles 14 and 16 in the light of preamble and Article 39 (d), the principle of equal pay for equal work is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though, those drawing the different scales of pay do identical work under the same employer. In the present case the Supreme Court has held that the principle of 'equal pay and equal work', though not a fundamental right, is certainly a constitutional

goal and therefore, capable of enforcement through constitutional remedies under Article 32 of the Constitution.

The doctrine of 'equal pay for equal work' is equally applicable to both men and women, even the daily wagers are also entitled to the same wages as other permanent employees in the department employed to do the identical work². Similarly, in *State of Haryana v. Rajpal Sharma*,³ the Supreme Court has held that the teachers employed in privately managed aided schools in the state of Harayana are entitled to the same salary and dearness allowance as is paid to teachers employed in Government schools.

If the kind of work is not identical then it does not matter if men are paid more. But, in case work is of the same type both men and women should be paid equally without any discrimination.

Section 19 (g) guarantees protection of right regarding to practise any profession or to carry on any occupation or trade subject to certain reasonable restrictions given in this Article.

WOMEN EMPLOYMENT

You can tell the condition of a nation by looking at the status of its women. - Jawaharlal Nehru

It is the whole process of socialisation that decides the economic status of women. Women in India generally dominate the informal sector of the economy. Economic statistics and analysis of labour and capital grossly neglect women's work as producers. Although women form a major part of the wage labour force, much of their work however is unpaid. The visible and genuine decline in work participation rates, too, are related to a number of trends which adversely affect women decline in the female proportion of the population, declining representation in decision-making bodies, and increasing gap in male and female literacy rates, and unequal access to health and medical services.

Labour workforce participation for women is nevertheless, not a simple linear downward curve. The effects of the increase in rural and industrial unemployment for women in urban white collar jobs, professions and administration. But the contrast between the working conditions of the great majority in unorganized sector and those working in the small visible organized sector is striking. Moreover, women, especially the disadvantaged, have been denied access to business capital. Even where they have access, there is a lack of confidence, training and tools.

In addition to their wage-earning activities, women are responsible for a range of household responsibilities that are critical to family survival. The use of part-time and temporary workers is becoming increasingly common and majority of these workers are women. This has had short-term benefits by increasing the availability of jobs that can be handled along with household responsibilities. While there are long-term disadvantages to this type of employment including diminished job security, retraining opportunities, and fringe benefits. The risk of facing sexual harassment and rape in the workplace becomes higher in the informal sector and such part-time jobs.

Apart from particular gender disadvantages, women are disproportionately affected by a range of other occupational hazards. They are more likely than men to be employed in unsafe, unregulated industries and are less able to afford protective clothing and equipment. They may also be disproportionately affected by exposure to toxic chemicals.

Women workforce constitutes an integral part of total workforce in India. On 31st March 2004, women

constituted 19 per cent of the total workforce. The participation of women in the labor force has always been lower than that of men, in the rural as well as urban areas. The work participation rate for women has increased significantly. In 1981, work participation rate for women was only 19.67 per cent which increased up to 22.73 per cent in 1991 and 26.68 per cent in 2001. In the women workforce, women from rural areas are greater in number as compared to the urban women. Amongst rural women workers, a majority is employed in agriculture and some are employed in cottage industries. In the urban areas, women workers are primarily employed in the unorganized sectors. As on the 31st March, 2005 a total number of 50.16 Lacs women employees were engaged in the organized sector, out of which 29.21 lacs (58 per cent) in the public sector and 20.95 lacs (42 per cent) in the Private Sector. Employment of women in public sector increased by 1.1 per cent and by 2.5 per cent in the private sector during 2004-2005. The zone wise analysis showed an increase of 8 per cent in North-Eastern Zone, followed by Western Zone (5.3 per cent), Eastern Zone (3 per cent) and Central Zone (1.3 per cent) and Northern Zone (1.2 per cent). Only Southern Zone registered a marginal dip of 0.8 per cent.

Some Vital Statistics

- a. The number of women job seekers has increased from 99.3 lacs in 1999 to 106.1 lacs in 2004. Thus the percentage of women job seekers to the total job-seekers has also increased from 24.6 per cent in 1999 to 26.2 per cent in 2004.

1999	99.3	24.6
2000	104.5	25.3
2001	108.8	25.9
2002	106.0	25.9
2003	107.5	26.0
2004	106.1	26.0

- b. Number of Educated Women Job Seekers as on December 2004 was 7537.7 thousand. Educated Women at the end of 2004 accounted for 25.8 per cent of the total educated job-seekers.

2000	7911.7	27.1
2001	8525.6	28.1
2002	7921.4	26.8
2003	8032.4	26.6
2004	7537.7	25.8

- c. The State wise analysis reflects that Kerala has the maximum (21.1 lacs) women job-seekers followed by West Bengal (19.3 lacs) and Tamil Nadu (15.3 lacs) while minimum number of women job-seekers are in Rajasthan (1.0 lacs).
- d. The percentage of educated women job seekers among the total women job seekers has gone down from 73.3 per cent to 70.4 per cent in 2004.
- e. The work participation rate for women was 25.68 per cent in 2001. This shows an improvement over 22.73 per cent in 1991 and 19.67 per cent in 1981.
- f. Women workers constituted 19 per cent of the total organized sector employment in the country, as

compared to 18.4 per cent in the previous year. As on 31st March, 2004, there were about 49.34 lacs women workers employed in the organized sector (Public and Private Sector).

- g. As far as industries are concerned, in 2005, the manufacturing industry faced a dip of 1.1 per cent in women employment. On the other hand, other industries reflected an increase in women employment. An increase of 7.8 per cent was registered in Wholesale and Retail Trade followed by 5.6 per cent in Mining and Quarrying, 5.5 per cent in Agriculture, Hunting, Forestry & Fishing, 5.2 per cent in Financing, Insurance Real Estate & Business Services, 1.7 per cent in Community, Social and Personal Services and 1.2 per cent in Transport, Storage & Communications.

Thus is obvious that a woman being or having quite equal status with man, has an unrestricted right to serve on any Government or private post or to engage herself in any profession, trade or business. Her husband or any relation among her in-laws or even her parents have no right to check or restrain her from enjoying herself in the service, profession, trade or business of her choice. And on this ground no matrimonial relief like divorce or judicial separation is available, except to get his maintenance in the case of husband or a parent in the state of their helplessness.

However, with the birth of non-market economies and with current global effort to give content to gender equality, economists have paid increasing attention to gender, family and sex.

PROTECTION AND ENFORCEMENT AGENCIES

Indian women to whatever caste, cre-ed or religion they may belong have been afforded certain rights and protections under the Major Criminal Act, i.e., the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

a) **Protectional Rights and Remedies under Criminal Laws**

- 1) Protection of women in search by a Police Officer: Where a woman is confined in such circumstances as appear to amount to an offence, any District Magistrate, SubDivisional Magistrate or a Magistrate of the First Class may issue a search warrant and the person to whom such search warrant is directed may search for the person so confined and the person, if found, shall be immediately taken before a Magistrate who shall make such order as in circumstances of the case seems proper⁴.
- 2) **Restoration of abducted females**⁵: Upon complaint made on oath of the abducted or unlawful detention of a woman, or a female child under the age of eighteen years for any unlawful purpose, a District Magistrate, Sub-Divisional Magistrate of the First Class may make an order for the immediate restoration of such woman to her liberty or of such female child to her husband, parent, or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.
- 3) **Precautions for taking search of a woman**⁶: Where any person in or about such place which is being searched, is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.
- 4) **Requiring attendance of a woman as witness by a police officer**⁷: Any police officer making an investigation may by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise appears to be

acquainted with the facts and circumstances of the case, and such person shall attend as so required. But no male person under the age of fifteen years or woman (or any age) shall be required to attend at any place other than the place in which such male person or woman resides.

A woman may report and prosecute an offender for the following offences-

- 1) **Cohabitation caused by a man deceitfully inducing a belief of lawful marriage⁸**: Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment for either description for a term which may extend to ten years, and shall also be liable to fine.
- 2) **Marrying again during life-time of husband or wife⁹**: Whoever being a husband of wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. But such person will not be liable for this offence, whose marriage with such husband or wife has been declared void by a court of competent jurisdiction. Nor any such person will be liable who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.
- 3) **Same offence with concealment of former marriage from person with whom Subsequent marriage is contracted¹⁰**: Whoever commits the offence defined above (in S. 494) having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
- 4) **Marriage ceremony fraudulently gone through without lawful marriage¹¹**: Whoever dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.
- 5) **Adultery¹²**: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be 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 of either description for a term which may extend to five years, or with fine or with both. In such case, the wife shall not be punishable as an abettor.
- 6) **Enticing or taking away or detaining with criminal intent a married woman¹³**: Whoever takes or entices away any 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 the intent any such woman, shall be punished with imprisonment of either description which may extend to two years, or with fine or with both.

Women's Protectional Rights under the Indian Penal Code, 1860

Dowry Death: Unnatural death of a married woman where motive for want of dowry is existing and such death is taking place within 7 years from the date of marriage is called dowry death.

Dowry Death under Section 304-8 I.P.C.: Section 304-B of the Indian Penal Code deals with the dowry death, which reads as follows-

"Section 304-8 Dowry Death: (1) Where the death of a women is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 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 purpose of this sub-section 'dowry', shall have the same meaning as in Section 2 of the Dowry Prohibition Act 1961 (28 of 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."

Purpose of Section 304-8: Section 304-B of the Indian Penal Code, 1860 and the cognate provisions are meant for eradication of the social evil of dowry which has been the bane of Indian Society and continues unabated inspite of emancipation of women and the women's liberation movement.

Dowry: The explanation of this section says that 'dowry' shall have the same-111Baning as in Section 2 of the Dowry Prohibition Act.

Section 304-B was inserted into the Indian Penal Code by Act No. 43 of 1986 to save bribes from being burnt for non-payment of dowry, and to curb any social evil which was gaining momentum. (Amarnat Gupta v. State of M.P. [(1991) Cr. L.J. 2163] where there was proper evidence of harassment for the non-payment of dowry and unnatural death which has occurred within seven years after the marriage, under these circumstances, the presumption of dowry death was right.

Essentials for establishing the offence punishable under Section 304-8 I.P.C.: There are three ingredients that are essentials for establishing the offence punishable under Section 304-B I.P.C. are-

- 1) that there is a demand of dowry and harassment by the accused,
- 2) that the deceased died,
- 3) that the death is under unnatural circumstances.

In Vemuni Venkataswara Rao and another v. State of Andhra Pradesh (1992) (1) crimes 287 (AP). the Andhra Pradesh High Court has held that since there is a demand for dowry and harassment against the deceased, and death occurs within seven years of the marriage, the things automatically follow due to the statutory presumption contemplated under Section 113-B of the Evidence Act, 1872.

In Shanti v. State of Haryana (1991) it was held that this section has the following essentials

"The death of the woman should be caused by burns or bodily injury or otherwise than under normal

circumstances. Such death should have occurred within seven years of her marriage. She must have been subjected to cruelty or harassment which should be in connection with demand of dowry".

The offence under Section 304-B is cognizable, not-bailable and non compoundable and triable by the court of session.

What are the ingredients required to be proved: The Rajasthan High Court in Lila Ram v. State of Rajasthan (1993) 1 BMC 62 (Raj), laid down the ingredients which are required to be proved by the prosecution while dealing with the offence as to dowry death cases. The burden on the prosecution is to prove the following ingredients-

- a. that it is a death of a woman,
- b. that death is caused by burns or burns of bodily injury or occurs otherwise than under normal circumstances,
- c. that it is within seven years of her marriage,
- d. that it is shown that soon before her death she was subjected to cruelty or harassment.
- e. that it was by her husband or any relatives of husband or
- f. that it was in connection with any demand of dowry.

The prosecution side is required to prove all the above ingredients for an offences committed under Section 304-B of the Indian Penal Code. The burden of proof in absence of presumption of law never goes to the accused because the burden of proof continues to lie on the prosecution all the time like any other criminal case.

Where in suicide is committed by burning but there is no evidence of demand for dowry. However, there is material contradiction and serious omission in the statements of even created witnesses. Mere bringing girls of bad character to house may be the cause of misery to the deceased, but that does not attract the ingredients of Section 304-B, that deceased was being subjected to cruelty or harassment soon before her death in connection with demand for dowry.

1) Abetment of Suicide (Section 306): If any person commits suicide, whoever abates the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

2) Intention to outrage the Modesty of women (Section 354) : An assault short of rape is punished under under Section 354 of the Indian Penal Code which reads as under-

"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 t\NO years or with fine or with both."

3) Kidnapping, Abducting or inducing woman to compel her Marriage (Section 366) : Under the Indian Penal Code, 1860 kidnapping, abducting or inducing woman with the intent to compel her for marriage is an offence. Section 366, of the Code deals with such offence. It reads as under-

"Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be

likely that she will be compelled, to marry someone against her will, or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or reduced to illicit intercourse with another person shall also be punishable as aforesaid."

Comments: Above reading of Section 366 of the Code shows that to constitute the offence under this Section, there must be kidnapping or abducting or woman with intent that-

- a. woman in question may be compelled to marry any person against her will, or
- b. she may be compelled or seduced to illicit sexual intercourse, or
- c. she may be forced or induced to illicit sexual relationship by means of criminal intimidation.

However, it is immaterial whether the woman in question is married or not.

- 4) **Procuration of Minor Girl (Section 366-A)** : For the purpose of prostitution procurement of minor girl from one part of India to another part is an offence under Section 366-A of the Indian Penal Code, 1860. It reads as under-

"Whoever, by any means whatsoever, induces any minor girls under the age of 18 years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

- 5) **Importation of Girl from Foreign Country (Section 366-8)** : Importing the girl below 21 years of age from Outside India for the purpose of prostitution is an offence under Section 366-8 of the Indian Penal Code, 1860. This section reads as under-

"Whoever imports into India from any country outside India or from the State of Jammu and Kashmir, any girl under the age of 21 years with the intent that she may be, or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to 10 years, and shall also be liable to fine."

- 6) **Sexual Offences (Section 375)**: A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 there is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent when at 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 16 years of age.

Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception- Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape.

Punishment for rape (Section 376) : (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both-

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 seven years.

(2) Whoever-

- a. being a police officer commits rape-
 - a. within the limits of the police station to which he is appointed; or
 - b. in the premises of any station house whether or not situated in the police station to which he is appointed; or
 - c. on a woman in his custody or in the custody of a police officer subordinate to him; or
- b. being a public servant takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
- c. 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
- d. women's or children's institution takes advantage of his official position and 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, takes advantage of his official position and commits rape on a woman in that hospital; or
- f. commits rape on a woman knowing her to be pregnant; or
- g. commits rape on a woman when she is under twelve years of age; or

h. commits gang rape-

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine-

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation-1: Where 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 within the meaning of this sub-section.

Explanation 2 : "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3 : "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.

Intercourse by any member of the management or staff of a hospital with any woman in that hospital (Section 376-0) : Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation- The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of Section 376.

7) **Commission of Offences Relating to Marriage:** A woman may report and prosecute an offender for the following offences-

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

b) **Marrying again during life-time of husband or wife:** Whoever being a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. But such person will not be liable for this offence, whose marriage with such husband or wife has been declared void by a court of competent jurisdiction. Nor any such person will be liable who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for seven years, and shall not have been heard of by such

person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

- c) **Same offence with concealment of former marriage from person with whom subsequent marriage is contracted:** Whoever commits the offence defined above (in Section 494) having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
- d) **Marriage ceremony fraudulently gone through without lawful marriage:** Whoever dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.
- e) **Adultery:** Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be 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 and adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both. In such case, the wife shall not be punishable as an abettor.
- f) **Enticing or taking away or detaining with criminal intent a married woman:** Whoever takes or entices away any 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 the intent any such woman, shall be punished with imprisonment of either description which may extend to two years, or with fine or with both.

8) **Cruelty:** Cruelty against a woman by her husband or relatives of husband is punishable offence under Section 498-A of Indian Penal Code.

Husband or relatives of husband of a woman subjecting her to cruelty: Whoever being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which they extend to three years shall also be liable to fine.

Explanation- For the purposes of this section 'cruelty' means-

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

This section says that the offender must be-

1. husband of a woman, or
2. a relative of husband.

Explanation of this section defines cruelty by saying that for the purpose of this section cruelty means (a) any wilful conduct which was of such a nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life limb or mental or physical health of the woman. (b) harassment of the woman where such harassment was caused with a view to forcing 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.

Unlawful demand of dowry is punishable offence under this section because it amounts to mental cruelty against woman¹⁴.

Section-498-A of Indian Penal Code is applied only when, the harassment and cruelty are established with a view to forcing wife to commit suicide or to fulfil.

Illegal demands of husband and his relatives¹⁵.

Wilful Conduct of Husband: The term 'wilful conduct' is not defined in the Indian Penal Code.

Webster's Dictionary defines the 'wilful' as governed by one's own will. Generally wilful means-

- a) Obstinate
- b) Refractory.
- c) Wayward
- d) Intentional and
- e) Self willed.

Taking away of the child without the consent of mother: Where petitioner has taken away the son of complainant (mother of child) without obtaining her consent. It has been held that the said conduct of the petitioner is amounted to cruelty because the intention to take away the child was to harass the mother of child on account of her failure to meet the demand of dowry¹⁶.

Denial of Conjugal life : Where the fact says that the couple did not have any issue in spite of a marriage life for four years, it is not sufficient to indicate denial of conjugal life therefore it is not amounted to cruelty¹⁷.

Coming late home and assaulting the wife: Where the husband used to come late in the nights, it does not amount to cruelty within the meaning of Section 498-A of the Indian Penal Code but wife's questioning about his being late and being beaten by the husband it has to be treated as cruelty within the meaning of Section 498-A¹⁸.

If the husband taking drink and coming late home it is against the will of woman but not amounts to cruelty but the acts of beating, harassing and demanding the dowry is certainly cruelty defined in Section 498-A of the Indian Penal Code¹⁹.

Presence of mother-in-law in the family and cruelty: Where the domestic quarrels occur on account of the presence of the mother-in-law in the family it does not amount to mental cruelty.²⁰

It is true that cruelty has not been defined but it has been used in relation to human conduct or human behaviour, it is course of conduct.

Cruelty may be-

Mental

Physical

Intentional or

Unintentional.

Refraining from conjugal relationship - Cruelty: Refraining from conjugal relationship and not touching the meals prepared by the wife are the ill treatments against the wife.

- 9) **To insult the modesty of a woman (Section 509):** Section 509 of the Indian Penal Code, 1860 deals with the offence regarding word, gesture or act intended to insult the modesty of a woman. This section reads as under-

"Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending, that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both."

Women's Protectional Rights under Evidence Act: Section 113-A and 113-B of the Evidence Act as amended deal with the presumption as to abetment of suicide by a married woman. The legislature with the view to deal with the evil of dowry death incorporated section 304-B and 498A in the Indian Penal Code and these provisions relate to dowry death and cruelty by husband or relatives of husband. In order to tackle this evil legal presumptions relating to abetment of suicide and dowry death were provided in the Present Evidence Act so that the perpetrator can not take advantage of legislative incompetency for want of proof because the offence as to dowry death has certain peculiarity as it is usually committed inside the matrimonial home.

This section reads as under -

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

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

"Presumption as to dowry death (Section 113-8): When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

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

The provisions contained in Section 113-A show that to attract the applicability of Section-113-A it must be shown that-

1. the women has committed suicide;
2. such suicide has been committed within a period of 7 years from the date of her marriage;
3. the husband or his relatives, who are changed had subjected her to cruelty.

A bare reading of Section 113-A of the Evidence Act shows that presumption under this Section is not mandatory and it is only permissive. The Supreme Court in Ramesh Kumar v. State of Chhattisgarh (2001 (7) SLT 356) observed that provision was introduced by Criminal Law (Second) Amendment Act 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the house. However, still it can not be lost sight of that the presumption is intended to operate against the accused in the field of criminal law.

The Indecent Representation of Woman (Prohibition) Act, 1986

Introduction: This Act was published in the Gazette of India on 23rd December, 1986. It was enforced with effect from 2nd October, 1987 by publishing in the Gazette of India Extraordinary dated 25th September, 1987. Under Section 1, this Act was titled as the Indecent Representation of Women (Prohibition) Act 1986.

This Act was brought to check the increasing immoral reproduction of women as a means of advertisement film productions, publications and other means of spreading business or trade by unfair allurements.

The main features of the Act are to check indecent representation of women in any way tending to derogate or to degrade women by their business propaganda as a means of advertisement creating attraction to the public at large to the obscene display of the body of a female.

Such acts are not only checked or restrained but are also made offences duly punishable by imprisonment upto two years and fine upto two thousand rupees.

Objects and Reasons of the Act: The law relating to obscenity in this country is codified in Sections 292, 293 and 294 of the Indian Penal Code in spite of these provisions. It is, therefore, felt necessary to have a separate legislation to effectively prohibit the indecent representation of women through advertisements, books, pamphlets, etc.

The salient features of the Bill were-

- a) Indecent representation of women has been defined to mean the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect to being indecent or derogatory to or denigrating women or is likely to deprave, corrupt or injure the public morality or morals.
- b) It was proposed to prohibit all advertisements, publications, etc. which contain indecent representation of woman in any form.

- c) It was also proposed to prohibit selling, distribution, circulation of any books, pamphlets, etc. containing indecent representation of women.
- d) Offences under the proposed Act were made punishable with imprisonment of either description for a term extending to two years and fine extending to two thousand rupees on first conviction and second and subsequent convictions would attract a higher punishment.

Prohibitions made in the Act: Sections 3 and 4 of the Act mandate certain prohibitions which are as follows-

- a) **Prohibition of advertisements containing indecent representation of women:** No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition or, any advertisement which contains indecent representation of women in any form (Section 3).
- b) **Prohibition of publication or sending by post of books, pamphlets, etc. containing indecent representation of women:** No person shall produce or cause to be produced, shall, let to hire, distribute, circulate or send by post any book, pamphlet paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form (Section 4).

Provided that-nothing in this Section shall apply to-

- a) any book, pamphlet paper, slide, film, writing, drawing, painting, photograph, representation or figure-
 - i. the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art, or learning or other object of general concern; or
 - ii. which is kept or used bona fide 'for religious purposes;
- b) any representation sculptured, engraved, painted or otherwise represented on or in-
 - i. any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958), or
 - ii. any temple, or on any car used for conveyance of idols, or kept or used for any religious purposes;
- c) any firm in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable.

Powers of authorised Gazetted Officers to enter and search (Section 5): .Section 5 lays down that-

- 1) Subject to such rules as may be presented, any Gazetted Officer authorised by the State Government may within the local limits of the area for which he is so authorised,-

- a. enter and search at all reasonable time, with such assistance, if any, as he considers necessary, any place in which he has reason to believe that an offence under this Act has been or is being committed;
- b. seize any advertisement of any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which he has reason to believe contravenes any of the provisions of this Act;
- c. examine any record, register, document or any other material object found in any place mentioned in Clause (a) and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

Exceptions to the use of such power:

- i. No entry under this sub-section shall be made into a private dwelling house without a warrant (Proviso-1).
 - ii. The power of seizure under this sub-section may be exercised in respect of any document, article or thing which contains any such advertisement, including the contents if any of such document, article or thing if the advertisement cannot be separated by reason of its being embossed or otherwise from such document, article or thing without affecting the integrity, utility or saleable value thereof.
- 2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply to any search or seizure under this Act as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of the said code.
 - 3) Where any person seizes anything under Clause (b) or (c) of sub-section (1), he shall, as soon as may be, inform the nearest Magistrate and take his orders as to the custody thereof.

Penalty for contravention of the prohibitions under this Act (Section 6): Section provides that any person who contravenes the provisions of Section 3 or Section 4 shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lac rupees.

Section 7 lays down as to offences committed by companies. It mandates that-

- 1) Where an offence under this Act has been committed by a company, every person, who, at the time the offence was committed, was incharge of, and was responsible to, the company for the conduct of the business of, the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Exception: This provision shall not render any such person liable to any punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. (Proviso)

- 2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or, is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be proceeded against and punished accordingly.

In this connection, it may be noted that-

- a. 'Company' means any body corporate and includes a firm or other association of individuals, and
- b. Director', in relation to a firm, means a partner in the firm.

Under Section 8 the offences under this Act are cognizable and bailable. It states that-

- a. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be bailable.
- and
- b. Such an offence shall be cognizable.

Immunity of the Central Government and the State Governments and their officers: Section 9 provides protection of action taken in good faith that no suit prosecution or other legal proceeding shall lie against the Central Government or any State Government or any other officer of the Central Government or any State Government for anything which is in good faith done or intended to be done under this Act.

Power of the Central Government to make rules: Section 10 lays down that-

- i. the Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act;
- ii. in particular and without prejudice to the generality of this power, such rules may provide for all or any of the following matters, namely-
 - a. the manner in which the seizure of advertisements or other articles shall be made, and the manner in which the seizure list shall be prepared and delivered to the person from whose custody any advertisement or other article has been seized.
 - b. any other matter which is required to be, or may be, prescribed.
- iii. Every rule made under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under

that rule.

- iv. The authorised Officer shall pack and seal such advertisements or articles in the manner provided in Rule 4 and shall deliver a copy of the list so prepared to the person from whom such advertisements or articles are seized.
- v. The advertisements or articles so seized shall be marked with a distinguishing number and shall also be signed by the authorised officer; the person from whom such advertisements or articles have been seized and two respectable habitants of the locality. If it is not possible to mark any such advertisement or article, the marking may be done on the packaging or in any other manner which the authorised Officer thinks proper.

Manner of packing and dealing with the advertisements or articles seized is laid down in rule 4 as follows-

- a. The advertisements or articles seized shall be packed in adequately strong paper, cloth or any other packing material in such a way that the advertisements or articles may not be tampered with and the ends of paper, cloth or other packing material shall be neatly folded and affixed by means of gum or other adhesive or stitched or tied.
- b. The package shall be further secured by means of strong twine or thread and the twine or thread shall be fastened on the package by means of wax on which there shall be at least four distinct and clear impressions of the seal of the authorised officer of which one shall be on the top of the package, one at the bottom and the other two at the body of the package and knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the authorised officer.
- c. Where necessary, the authorised officer shall put the advertisements or articles in a box or a container of a suitable material and seize and seal it in the manner provided in sub-rule (2).

Manner of seizing and sealing the advertisements or articles in certain cases is given in Rule 5 of the Rules. This rule says that notwithstanding any thing contained in Rules 3 and 4, where the authorised officer is of the opinion that it is not possible to seize and seal an advertisement or article in the manner prescribed in Rules 3 and 4 due to the size or the nature of such advertisement or article, he may take such steps as he thinks fit for the seizure and sealing of such advertisement or article without affecting the integrity, utility or saleable value thereof.

The Commission of Sati (Prevention) Act, 1987

Today, the status of women in India can be gauged quite closely from the fact that a practice such as Sati is possible, and publicly supported and glorified. The 10th anniversary of Roop Kanwar's sati has come and gone, but it appears that nobody is keen to eradicate or remove this social evil prevalent in our country, because more and more cases are being reported in daily newspapers.

The new Anti Sati Act. substitutes the various legislations that have been operative in different parts of the country with a Central Law that seeks not only to prevent and punish the commission of the act itself. but also makes any glorification of the act of Sati an offence.

Specifically, the Act makes a criminal offence, equivalent to murder, the abetment or encouragement of a Sati or an attempted Sati. Such action is liable to sentence of death or life imprisonment, with an appropriate fine. Section 4]

Sati means the burning or burying alive of-

- i. any widow alongwith the body of her deceased husband or any other relative or with anything or article associated with husband or such relative, or
- ii. any woman alongwith the body of any of her relatives-

Such burning or burying may either be voluntary or otherwise. [Section 2 (1)(c)]

The Sati herself is liable to prosecution as suicide, the penalty being a year's imprisonment with fine. (Section 3).

The glorification of Sati is defined as the observation of any ceremonies or the taking out of processions in connection with the incidence or practice of Sati; the support, justification or propagation of the practice; or the arrangement of or participation of any function to eulogise a person committing Sati; the creation of a trust or fund or collection of donations for the purpose of a temple or any other structure with a view to perpetuate or honour the memory of a person committing Sati; or the performance of any ceremony for the same purpose. [Section 2(1)(b)].

Under the Act, all temples dedicated to such practice or persons are to be removed. (Section 7).

The penalty for glorification of Sati is imprisonment from 1 to 7 years, a fine of Rs. 5,000 to Rs. 30,000 and the confiscation of all assets collected in the name of Sati. (Section 5).

Special Courts are to be convened for the trial of offences under this Act. equivalent to sessions courts, with Judges of equivalent powers. (Section 9).

All such cases are to be tried without delay, there being required reasons to be furnished if trials are adjourned beyond the next day. [Section 12(3)].

The onus of proof of innocence rests with the accused (Section 16). No person who had abetted the commission of Sati may inherit the estate, either whole or even in part, of the deceased woman (Section 18).

The Act unfortunately does not take into consideration two important facts-

The first is that the widow is a victim of her social environment and pressures, treating her instead as a criminal.

The second is that funds for the glorification of Sati are often donated not by individuals but by corporate entities for publicity purposes or tax evasions.

However, prior to the enactment of this Act in similar cases of Sati, the accused were held liable for the offence of abetment of suicide under Section 306 of the Indian Penal Code.

Recently, in *Gaurav Jain v. Union of India*,²¹ the Supreme Court has given comprehensive instruction to the government for rescue and rehabilitation of the fallen women and their children. For better rehabilitation, it is necessary to provide them with dignity of person, means of livelihood and socio-economic

empowerment. Economic rehabilitation is one of the most important factors that can prevent such practice. It is also necessary to enroll all these persons in resocialization programmes that provide vocational training and psychotherapy.

Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

Female foeticide has become rampant in the country. Despite the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, State Governments are yet to take the law seriously.

In a case, the Supreme Court strongly reprimanded State Governments for not doing enough to prevent the scourge of female foeticide. Even simple measures like registration of ultrasound machines in the State have not been fully implemented.

The Act prohibits pre-natal sex determination in any form and use of ultrasonography for the purpose of sex determination of foetus. The person who contravenes the provisions of the Act is punishable with imprisonment of a term and fine prescribed under the Act.

Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 came into existence w.e.f. 1-1-1996 which was amended in the year 2002 due to several drawbacks. The Act has been renamed as 'Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act'. The amended Act has been made effective w.e.f. 14-2-2004. The new Act will tighten the noose around misuse of ultrasound machines for illegal detection of sex of the foetus.

The former Act was ill-equipped to deal with new ways to discriminate against the girl child. Now, under the provisions of Section 23(3) of the amended Act the amount of penalty is Rs. one lac and the registration of violators of the Act can be suspended under the provisions of Section 23(2) of the Act. The proviso of Section 4(3) of the new Act mandates maintenance of records for case-by-case use of ultrasound machines. The sale of ultrasound machines will also be regulated under Section 3-8. Under Section 16 of the amended Act the Central Supervisory Board has been further empowered to advise the Government on policy matters relating to sex selection techniques and their misuse, monitoring the implementation of the Act and creating public awareness against the practice of sex selection before conception.

The Medical Termination of Pregnancy Act, 1971: The Medical Termination of Pregnancy Act 1971 is an Act which provides for the termination of certain pregnancies by registered medical practitioners and matters connected there with or incidental thereto. It extends to the whole of India except the State of Jammu and Kashmir. It was assented to by the President of India on 10th August 1971.

B) Women's Protectional Rights Under Industrial Law

The Equal Remuneration Act, 1976

Introduction: The principle of equal pay for equal work is contained in Clause (d) of Article 39 of the Indian Constitution which envisages that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. This principle implies that where all things are equal, that is, where all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the

posts are of the same rank and the nomenclature is the same. In *Randhir Singh v. Union of India* the Supreme Court held that the principle of equal pay for equal work though not a fundamental right is certainly a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32 of the Constitution. The wagers are entitled to the same wages as other permanent employees in the department employed to do the identical work.

Equal pay for equal work finds its place in the Directive Principles of State Policy and it is an accompaniment of equality clause enshrined in Articles 14 and 16 of the cannot be read in Article 14. Reasonable classification based on intelligible criteria, having nexus to the object sought to be achieved, is permissible.

Section 5. No discrimination to be made while recruiting men and women workers: On and from the commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, or in any condition of service subsequent to recruitment such as promotions, training or transfer, make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force:

Provided that the provisions of this section shall not effect any priority or reservation for Scheduled Castes or Scheduled Tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment.

Section 6. Advisory Committee

1. For the purpose of providing increasing employment opportunities for women the appropriate Government shall constitute one or more Advisory Committees to advise it with regard to the extent to which women may be employed in such establishments or employments as the Central Government may, by notifications, specify in this behalf.
2. Every Advisory Committee shall consists of not less than ten persons to be nominated by the appropriate Government, of which one-half shall be women.
3. In tendering its advice, the Advisory Committee shall have regard to the number, of women employed in the concerned establishment or employment, the nature of work, hours of work, suitability of women for employment, as the case may be, the need for providing increasing employment opportunities for women, including part-time employment, and such relevant factors as the Committee may think fit.
4. The Advisory Committee shall regulate its own procedure.
5. The appropriate Government may, after considering the advice tendered to it by the Advisory Committee and after giving to the persons concerned in the establishment or employment an opportunity to make representations, issue such directions in respect of employment of women workers, as the appropriate Government may think fit.

Section 7. Power of appropriate Government to appoint authorities for hearing and deciding claims and complaints:

1. The appropriate Government may, by notification, appoint such officers, not below the rank of a

Labour Officer, as it thinks fit to be the authorities for the purpose of hearing and deciding-

- a. Complaints with regard to the contravention of any provision of this Act;
- b. Claims arising out of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature.

and may, by the same or subsequent notification, define the local limits within which each such authority shall exercise its jurisdiction.

2. Every complaint or claim referred to in sub-section (1) shall be made in such manner as may be prescribed.
3. If any question arises as to whether two or more works are of the same nature or of a similar nature, it shall be decided by the authority appointed under sub-section (1).
4. Where a complaint or claim is made to the authority appointed under sub-section (1), it may, after giving the applicant and the employer an opportunity of being heard and after such inquiry as it may consider necessary, direct-
 - a. In the case of a claim arising out of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature, that payment be made to the worker of the amount by which the wages payable to him exceed the amount actually paid:
 - b. In the case of complaint, that adequate steps be taken by the employer so as to ensure that there is not contravention of any provision of this Act.
5. Every authority appointed under sub-section (1) shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).
6. Any employer or worker aggrieved by any order made by an authority appointed under subsection (1), on a complaint or claim may, within thirty days, from the date of the order, prefer an appeal to such authority as the appropriate Government may, by notification, specify in this behalf, and that authority may, after hearing the appeal, confirm, modify or reverse the order appealed against and no further appeal shall lie against the order made by such authority.
7. The authority referred to in sub-section (6) may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the period specified in sub-section (6), allow the appeal to be preferred within a further period of thirty days but not thereafter.
8. The provisions of sub-section (1) of section 33-C of the Industrial Disputes Act. 1947 (14 of 1947), shall apply for the recovery of monies due from an employer arising out of the decision of an authority appointed under this section.

Penalties (Section 10)

(1) If after the commencement of this Act, any employer, being required by or under the Act, so to do:

- a. Omits or fails to maintain any register or other document in relation to workers employed by him, or
- b. Omits or fails to produce any register, muster-roll or other document relating to the employment of workers employed by him, or
- c. Omits or refuses to give any evidence or prevents his agent, servant, or any other person in charge of the establishment, or any worker from giving evidence. or
- d. Omits or refuses to give any information,

he shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both.

(2) If, after the commencement of this Act, any employer:

- a. Makes any recruitment in contravention of the provisions of this Act, or
- b. Makes any payment of remuneration at unequal rates to men and women workers, for the same work or work of a similar nature, or
- c. Makes any discrimination between men and women workers in contravention of the provisions of this Act, or
- d. Omits or fails to carry out any direction made by the appropriate Government under sub-
- e. section (5) of section 6,

he shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall not be less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.

(3) If any person being required so to do, omits or refuses to produce to an Inspector any register or other document or to give any information, he shall be punishable with fine which may extend to five hundred rupees.

The Maternity Benefit Act, 1961

Section-I Extent and Commencement: The Maternity Benefit Act, 1961 was enacted 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. This Act extends to the whole of India except the State of Jammu and Kashmir. It shall come into force on such date as may be notified in this behalf in the Official Gazette, (a) in relation to mines and to any other establishment wherein persons are employed for the exhibition of, equestrian, acrobatic and other performance, by the Central Government and (b) in

relation to other establishments in a state by the State Government.

The Maternity Benefit Act is intended to achieve the object of doing social justice to women workers. Therefore in interpreting the provisions of this Act beneficent rule of construction, which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court.

Application (Section 2)

It applies in the first instance-

- a. To every establishment which is a factory, mine or plantation, including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances,
- b. to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a state, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

Definitions (Section-3)

In this Act, unless the context otherwise requires-

- a. **Appropriate Government:** In relation to an employment being a mine, or an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances the appropriate Government means Central Government and in relation to any other establishment, the State Government.
- b. **Woman:** 'Woman' means a woman employed, whether directly or through any agency, for wages in any establishment.

Employment of, or work by woman prohibited during certain period (Section-4): Under Section 4 of the Act, the employer is prohibited from knowingly employing any woman in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy. No woman shall work in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

Without prejudice to the provisions of Section 6 no pregnant woman shall, on a request being made by her, be required by her employer to do any work of the following nature during the period of one month immediately preceding the period of six weeks before the date of her expected delivery and during the said period of six weeks for which the pregnant woman does not avail of the leave of absence under Section 6-

- a. any work which is of arduous nature;
- b. any work which involves long hours of standing;
- c. any work which in any way is likely to interfere with her pregnancy or the normal development of foetus or likely to cause her miscarriage or otherwise adversely affect her health.

Right to Payment of Maternity Benefit (Section-S)

Provides that the maternity benefit to which every woman shall be entitled and her employer shall be liable for is a payment to a worker at the rate of average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for six weeks immediately following that day.

Payment of maternity benefit in certain cases (Section-58): Every woman-

- 1) who is employed in a factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948, apply;
- 2) (b) whose wages (including remuneration for over-time work) for a month exceed the amount specified in sub-clause (b) of clause (9) of Section 2 of that Act; and
- 3) who fulfills the conditions specified in sub-section (2) of Section 5, shall be entitled to the payment of maternity benefit under this Act.

Notice of claim for maternity benefit and payment there of (Section 6): Section 6 provides that any woman employed in an establishment and entitled to maternity benefit under the provisions of the 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 be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

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. Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after delivery. On receipt of the notice, the employer shall permit such woman to absent herself from the establishment until the expiry of six weeks after the day of her delivery.

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 to woman is pregnant and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of such proof as may be prescribed that the woman has been delivered of a child.

Payment of maternity benefit in case of death of a woman (Section 7): If a woman entitled to maternity benefit or any other amount, under this Act, dies before receiving such maternity benefit or amount, or where the employer is liable for maternity benefit under the, second proviso to Section 5(3), the employer shall pay such benefit or amount to the person nominated by the woman in the notice given under Section 6 and in case there is no such nominee to her legal representative.

Payment of medical-bonus (Section 8): Every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of twenty-five rupees if no pre-natal confinement and post-natal care is provided for by the employer free of charge.

Leave for miscarriage (Section 9): In case of miscarriage or medical termination of pregnancy, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage or, as the case may be, her medical termination of pregnancy.

Leave with wages for tubectomy operation (Section 9-A): In case of tubectomy operation, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of her tubectomy operation.

Other leaves (Section 10): A woman suffering from illness arising out of pregnancy, delivery, premature birth of a child, miscarriage, medical termination of pregnancy or tubectomy operation shall, on production of such' proof as may be prescribed, be entitled in addition to the period of absence allowed to her under Section 6, or as the case may be, under Section 9 to leave with wages at the rate of maternity benefit for a maximum period of one month.

Nursing breaks (Section 11): Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for the rest allowed to her, be allowed in the course of the daily work, two breaks of the prescribed duration for nursing until the child attains the age of fifteen months-

- a. Discuss the features of Indian Maternity Benefit Act, 1961.
- b. State the circumstances under which a workman is eligible for 'bonus' under the Payment of Bonus Act, 1965. What is minimum and maximum limit of bonus as permissible under the Act?

Women's Protectional Right and Remedies under the Factories Act, 1948

Prohibition of employment of women and children near cotton-openers: Section 27 of the Factories Act, 1948 mandates that no woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-spinner is at work: But 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.

Facilities to be provided in a factory: Under Section 19(1), in every factory-

- a. sufficient latrine and urinal accommodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at the factory;
- b. separate enclosed accommodation shall be provided for male and female workers;
- c. such accommodation shall be adequately lighted and ventilated, and no latrine or urinal shall, unless specially exempted in writing by the Chief Inspector, communicate with any work room except through an intervening open space or ventilated passage;
- d. all such accommodation shall be maintained in a clean and sanitary condition at all times;
- e. sweepers shall be employed whose primary duty it would be to keep clean latrines, urinals and washing places.

Creches: Under Section 48 it is directed that,-

- 1) In every factory wherein more than thirty 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 six years, of such women.
- 2) Such rooms shall provide adequate accommodation which 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 the 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.

Work on or near machinery in motion not allowed to women and young persons: Section 22(2) provides that no woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.

Further restrictions on employment of women: Under Section 66 it is provided that –

- 1)
 - a) no exemption from provisions of Section 54 (daily hours) 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.

But 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 such variation shall authorise the employment of any factory group or class or description of factories, vary the limits laid down in clause (b), but so such variation shall authorise the employment of any woman between the hours of 10 p.m. and 5 a.m.

- c) there shall be no change of shifts except after a weekly holiday or any other holiday.
- 2) The State Government may make rules providing for the exemption from the restrictions set out in sub-section (1), to such extent and subject to such conditions as it may prescribe, of women

working in fish-curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material.

- 3) The rules made under sub-section (2) shall remain in force not more than three years at a time.

Restriction on employment of women, adolescents or children in dangerous operations: may be prescribed by some rules made by a State Government under Section 67, prohibiting or restricting their employment in factory wherein manufacturing process or operation carried on exposes any persons employed in it to a serious risk of bodily injury, poisoning or disease.

Welfare facilities: Under Sections 42 to 50, certain measures for welfare of the workers are to be kept and mentioned. These are washing facilities under Section 42, facilities for storing and drying clothes under Section 43, facilities for sitting under Section 44, first aid appliances under Section 45, canteens under Section 46, shelters, rest rooms and lunch rooms under Section 47 and creches under Section 48.

Women's Protectional Rights under Mines Act 1952: In Section 46 of this Act it has been provided that-

- 1) No woman shall, notwithstanding anything contained in any other law, be employed-
in any part of a mine which is below ground;
in any mine above ground except between the hours of 6 a.m. and 7 p.m.
- 2) Every woman employed in a mine above ground shall be allowed an interval of not less than eleven hours between the termination of employment on anyone day and the commencement of the next period of employment.
- 3) Notwithstanding anything contained herein above, the Central Government may, by notification in the Official Gazette, vary the hours of employment above ground of women in respect of any mine or class or description of mine, so however that no employment of any woman between the hours of 10 p.m. and 5 a.m. is permitted thereby .

Women's Rights under the Employees' State Insurance Act, 1948

Maternity benefit under the Act: Section 50 lays down that the qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government.

Under the Employees State Insurance (General) Regulations, 1950: Under Regulations 87 to 95 the following obligations and benefits are provided to an insured woman-

- 1) **Notice of pregnancy:** Under Regulation 87 - an insured woman, who decides to give notice of pregnancy before confinement, shall give such notice in Form 19 to the appropriate local office by post or otherwise and shall submit, together with such notice, a certificate of pregnancy in Form 20 given in accordance with these Regulations on a date not earlier than seven days before the date on which such notice is given.
- 2) **Claim for maternity benefit commencing before confinement:** Under Regulation 88, every

insured woman claiming maternity benefit before confinement shall submit to the appropriate local office by post or otherwise-

- i. a certificate of expected confinement in Form 21 given in accordance with these Regulations, not earlier than fifteen days before the expected date of confinement;
- ii. a claim for maternity benefit in Form 22 stating therein the date on which she ceased or will cease to work for remuneration; and
- iii. within thirty days of the date on which her confinement takes place, a certificate of confinement in Form 23 given in accordance with these Regulations.

3) Claim for maternity benefit only after confinement or for miscarriage: Under Regulation 89, every insured woman claiming maternity benefit for miscarriage shall within 30 days of the date of the miscarriage, and every insured woman claiming maternity benefit after confinement, shall submit to the appropriate office by post or otherwise a claim for maternity benefit in Form 22 together with a certificate of confinement or miscarriage in Form 23 given accordance with these Regulations.

4) Claim for maternity benefit after the death of an insured woman leaving behind the child: Under Regulation 89-A, the person nominated by the deceased insured woman on Form 1 or on such other form as may be specified by the Director General in this behalf and if there is no such nominee, the legal representative, shall submit to the appropriate office by post or otherwise a claim for maternity benefit, as may be due, in Form 24-A within 30 days of the death of the insured woman together with a death certificate in Form 24-B given in accordance with these Regulations.

5) Claim for maternity benefit in case of Sickness arising out of pregnancy, confinement, premature birth of child or miscarriage: Under Regulation 89-B-

- a) Every insured woman claiming maternity benefit in case of sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, shall submit to the appropriate office by post or otherwise claim for benefit in one of the Forms (12-A, 13 and 13-A) appropriate to the Forms (12-A, 13 and 13-A) appropriate to the circumstances of the case together with the appropriate medical certificate in Form 8, 9, 10 or 11, as the case may be, given in accordance with these Regulations.
- b) The provisions of Regulations 55 to 61 and 64 shall, so far as may be, apply in relation to a claim submitted and a certificate given in accordance with this Regulation as they apply to certification and claims under these Regulations.

6) Other evidence in lieu of a certificate: Under Regulation 90, the Corporation may accept any other evidence in lieu of a certificate of pregnancy, expected confinement, confinement death during maternity, miscarriage or sickness arising out of pregnancy, if in its opinion, the circumstances of any particular case so justify.

7) Notice of work for remuneration: is provided in Regulation 91 that except as provided in Regulation 89-B every insured woman who has claimed maternity benefit shall give notice in Form 24 if she does work for remuneration on any day during the period for which maternity benefit would be payable to her for her working for remuneration.

8) Date of payment of maternity benefit: is provided in Regulation 92 that maternity benefit shall be

payable from the date it is claimed provided that such date does not precede the expected date of confinement for more than forty two days and that no work is undertaken by the insured woman for remuneration.

- 9) **Disqualifications for maternity benefit:** also are provided in Regulation 93 that an insured woman may be disqualified from receiving maternity benefit if she fails without good cause to attend for or to submit herself to medical examination when so required, and such disqualification shall be for such number of days as may be decided by the authority authorised by the Corporation in this behalf: But a woman may refuse to be examined by other than female doctor or midwife.
- 10) **Authority which may issue certificate:** Regulation 94 lays down that no certificate required under any of the Regulations 87 to 89-B shall be issued except by the Insurance Medical Officer to whom the insured woman has or had been allotted or by an Insurance Medical Officer attached to a dispensary, hospital clinic or other institution to which the insured woman is or was allotted and such Insurance Medical Officer shall examine and in his opinion the condition of the woman so justifies or in case of death of the insured woman or the death of the child, if satisfied about such death issued to such insured woman or in case of her death to her nominee or legal representative, as the case may be, free of charge any such certificate when reasonably required by such insured woman or her nominee or legal representative, as the case may be, under or for the purposes of the Act or any other enactment or these regulations.

Exceptions-

- i. A midwife also may issue such certificate counter-signed by the Insurance Medical Officer.
- ii. An officer who is not allotted as afore required, also may issue such a certificate, if such officer is attending the woman for pre-natal care or for confinement.
- iii. A certificate of pregnancy etc., as required under these Regulations may be issued by a registered midwife also on counter signature by the Insurance Medical Officer.

Dowry Prohibition Act, 1961

Under this Act. both the giving and receiving of dowry are prohibited. Under Section 2, Dowry has been defined as any valuable asset. property or gift that is given or received by either party of the marriage, or the parents of either party of the marriage, to either each other or to any other person, in connection with or consideration of the marriage.

The legitimate owner of any assets of property given to bride as dowry or given in connection with her marriage is the bride. In the event that such assets have been received by any other person, they are to be handed over to the woman within three months of receipt or of the marriage or of the attainment of majority of the woman, in case she received to dowry as a minor. In case this is not done, a complaint must be made within one year from the date of expiry of the three months. The penalty for contravening this law is a minimum term of six months imprisonment which can be extended upto two years, or a fine upto ten thousand rupees or both. The court has no discretion to award a prison term of less than six months. [Section 6 (1) and (2)].

Even though dowry received or given before this Act is not covered by the Act. complaints in respect of retrieving such dowry are covered by the legislation.

The dowry Prohibition Amendment Act, 1986 has placed a ban on advertisement by any person, of any share in his property or of any money as consideration for the marriage of his son or daughter or any other relative. Such offence is punishable with imprisonment for a term of minimum 6 months which can be extended to 5 years or with fine which may extend to Rs. 15,000 (Section 4A).

It is also to be noted that the anticipatory bail should not be granted in such case.

Offences under this Act are non-cognizable and non-bailable (Section 8).

The Hon'ble Supreme Court defined 'dowry' as following-

"In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly-

- a. by one party to a marriage to the other party to the marriage; or
- b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, to either party to the marriage or to any other person, at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or maher in the case of persons to whom the Muslim Personal Law (Shariat) applies.

The above definition of 'dowry', quoted by Hon'ble Supreme Court is obsolete, which has been amended by the Dowry Prohibition (Amendment) Acts, 1984 and 1986. The present definition of 'dowry' under Section 2 of the Dowry Prohibition Act, is as following-

"In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly-

- a. by one party to a marriage to the other party to the marriage; or
- b. by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before (or any time after the marriage) (in connection with the marriage of the said parties but does not include) dower or maher in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Convention on the Elimination of all forms of Discrimination against Women

The General Assembly on November 7, 1967 adopted a declaration on the Elimination of Discrimination Against Women and in order to implement the principle set forth in the Declaration, a convention on the Elimination of All Forms of Discrimination Against Women was adopted by the General Assembly on December 18, 1979. The Convention came into force in 1981. It was ratified by India in the year 1993.

Definition of 'Discrimination Against Women': Although the International Bill of Human Rights laid down a comprehensive set of rights to which all persons, including women are entitled, additional means for protecting the human rights of women were considered as necessary because the mere fact of their 'humanity' has not been sufficient to guarantee women the protection of their rights. The Preamble to the

Convention on the Elimination of All Forms of Discrimination Against Women explains that, despite the existence of other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society. The Convention under Article 1 defines the term "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.

State parties to the Convention condemned discrimination against women in all its forms and agreed to pursue by all appropriate means to eliminate discrimination against women and, to this end they undertook-

- 1) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein;
- 2) To adopt appropriate legislative and other measures prohibiting all discrimination against women;
- 3) To establish legal protection of the rights of women on an equal basis with men.
- 4) To refrain from engaging in any act or practice of discrimination against women;
- 5) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- 6) To repeal all national penal provisions which contribute discrimination against women.

Implementation Procedure: Article 17 of the Convention made a provision for the Establishment of a Committee on the Elimination of Discrimination Against Women for the purpose of considering the progress made in the implementation of the provisions of the Convention. The Committee shall consist of eighteen members (at the time of entry into force of the Convention) and twenty three members (after ratification or accession to the Convention by thirtyfive States). The members shall be experts of high moral standing and shall possess competence in the field covered by the Convention.

The State Parties shall submit periodically to the Committee a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention. The Committee examines reports submitted by the State Parties and makes it suggestions and recommendations based on their considerations, it may also invite United Nations specialized agencies to submit reports for consideration and may receive information from non-governmental organizations.

A Committee on the Elimination of Discrimination Against Women was established in the year 1981 when the Convention entered into force. It is composed of 23 independent experts. The Committee meets only for two weeks a year, which is clearly inadequate. The State Parties are required to report periodically to the Committee on the legislative, judicial. administrative or other measures which they have adopted to give effect to the provision of the Convention.

Optional Protocol to the Convention on Women: The Convention did not provide for individual complaint system. In order to fulfill this deficiency the General Assembly on October 7, 1999 adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women

[CEDAW] which would enable victims of sex discrimination, sexual exploitation and other abuses to communicate the grievances against State Parties to the protocol, to the Committee on the Elimination of Discrimination Against Women.

In addition to the above Convention three Conferences held during the U.N. sponsored International Women's Decade (1976-1985) Mexico City, 1975; Copenhagen, 1980, and Nairobi, 1985 and the Beijing Conference, 1995.

The Commission on the Status of Women, a functional Commission of the Economic and Social Council, was established in the year 1946. Originally, the membership of the Commission was fifteen and expanded to 21 in the year 1961. Since the year 1991, the Commission has 45 members. The Commission meets once in two years in Vienna to examine women's progress towards equality throughout the world. Its function is primarily to prepare recommendation and to make reports to the Economic and Social Council on the promotion of women's rights. It also prepares drafts and develops proposals to give effect to these recommendations aimed at improving the status of women in law and practice.

The Commission recognised that women would not make progress in any field unless they shared decision making power with men. In year 1949, the Commission initiated work on the convention on the political rights of women. The Convention, the first legal instrument dealing exclusively with women's rights was adopted by the General Assembly in the year 1952 .

The National Commission for Women Act, 1990

1) Short title, extent and commencement:

- i. This Act may be called the National Commission for Women Act 1990.
- ii. It extends to the whole of India except the State of Jammu and Kashmir.
- iii. 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.

4) Constitution of the National Commission for Women:

- i. The Central Government shall constitute a body to be known as the National Commission for Women to exercise the powers conferred on, and to perform the functions assigned to it under this Act.
- ii. 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 increase 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:

- i. The Chairperson and every Member shall hold office for such period, not exceeding three years, as may be specified by the Central Government in this behalf.
- ii. The Chairperson or a Member (other than the Member-Secretary 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) 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.
- iii. The Central Government shall remove a person from the office of Chairperson or a Member referred to 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.

- iv. A vacancy caused under sub-section (2) or otherwise shall be filled by fresh nomination.
- v. 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:

- i. The Central Government shall provide the Commission with such officers and employees as may be necessary for the efficient performance of the functions of the Commission under this Act.
- ii. The salaries and allowances payable to and the other terms and conditions of service of, the officers, 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 and Members and the administrative expenses, including salaries, allowances and pensions payable to the officers and other employees referred to in Section 5, shall be paid out of the grants referred to in sub-section (1) of Section 11.

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:

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

9) Procedure to be regulated by the Commission:

- i. 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.
- ii. The Commission shall regulate its own procedure and the procedure of the committees thereof.
- iii. All orders and decisions of the Commission shall be authenticated by the MemberSecretary or any other officer of the Commission duly authorised by the Member-Secretary in this behalf.

10) Functions of the Commission:

- i. 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 States;
- 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 legislation;
- 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 motu 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.
- 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 impeding 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 socio-economic development of women;
- j. evaluate the progress of the development of women under the Union and any State;
- 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 the Central Government.

- ii. The Central Government shall cause all the reports referred to in clause (b) of subsection (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.
- iii. 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 on the recommendations relating to the State and the reason for the non-acceptance, if any, of any of such recommendations.
- iv. The Commission shall, while investigating any matter referred to in clause (a) or subclause (i) of clause (f) or sub-section (1), have all the powers of a civil court trying a suit and, in particular, in respect of the following matters, 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.

11) Grants by the Central Government:

- i. The Central Government shall, after the appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.
- ii. The Commission may spend such sums as it thinks fit for performing the functions under this Act and such shall be treated as expenditure payable out of the grants referred to in sub-section (1).

12) Accounts and Audit:

- a. The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.
- b. The accounts of the Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General.
- c. The Comptroller and Auditor-General and any person appointed by him in connection with the audit

of the accounts of the Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

d. The accounts of the Commission, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the Central Government by the Commission.'

13) **Annual Report:** The Commission shall prepare, in such form and at such time, for each financial year, as may be prescribed, its annual report giving a full account of its activities during the previous financial year and forward a copy thereof to the Central Government.

14) **Annual report and audit report to be laid before Parliament:** The Central Government shall cause the annual report together with a memorandum of action taken on the recommendations contained therein, in so far as they relate to the Central Government and the reasons for the non-acceptance, if any, of any of such recommendations and the audit report to be laid as soon as may be after the reports are received, before each House of Parliament.

15) **Chairperson, Members and staff of the Commission to be public servants:** The Chairperson, the Members, officers and other employees of the Commission shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

16) **Central Government to consult Commission:** The Central Government shall consult the Commission on all major policy matters affecting women.

17) **Power to make rules:**

i. The Central Government may, by notification in the Official Gazettee, make rules for carrying out the provisions of this Act.

ii. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

a. salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and Members under sub-section (2) of Section (5) of Section 4 and of officers and other employees under Sub-section (2) of Section 5;

b. allowances for attending the meetings of the committee by the coopted persons under sub-section (3) of Section 8;

c. other matters under clause (f) of sub-section (4) of Section 10;

d. the form in which the annual statement of accounts shall be maintained under sub-section (1) of Section 12;

e. the form in, and the time, at. which the annual report shall be prepared under Section 13;

- f. any other matter which is required to be, or may be, prescribed.
- iii. Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament. while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect. as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the rule .

Domestic Violence Act, 2005

In the year 2005 Protection of Women from Domestic Violence Act. 2005 has been enacted by the Parliament. Domestic violence results in one of the worst denials of human rights to women. The Beijing Declaration and Platform of Action (1995) had regarded domestic violence as a human rights issues and a serious deterrent to development.

IMPORTANT QUESTIONS

- Q.1. What are the provisions regarding benefits available to a woman worker for miscarriage and pregnancy under the Maternity Benefit Act, 1961?
- Q.2. Discuss the main features of the Equal Remuneration Act, 1976. a.3. Explain "Equal pay for Equal work".
- Q.3. Is prostitution justifiable? Why?
- Q.4. Discuss the legal protection available to women against sexual harassment at work places.
- Q.6. Is Section 354 of the Indian Penal Code valid? Why?
- Q.7. Define 'Indecent Representation'.

References:

1. AIR 1982 SC 879.
2. Daily Rated Casual Labour v. Union of India (1988) 1 SCC 122.
3. AIR 1997 SC 449.
4. Vide S. 97, Code of Criminal Procedure, 1973.
5. Vide S. 98, Ibid.
6. Vide S. 100(3), Ibid.
7. Vide S. 160, Ibid.
8. S. 493, Indian Penal Code, 1860.
9. Vide S. 494, Ibid.

10. Vide S, 495, Ibid.
11. Vide S. 496, Ibid.
12. S. 497, Ibid.
13. S. 498, Ibid.
14. Wazir Chand v. State of Haryana AIR 1989 SC 378.
15. Sarla Prabhakar Baghmare v. State of Maharashtra, (1991) 1 D.M.C. 310.
16. VUaya Kumar Sharma v. State of U.P. (1991) D.M.C. 244.
17. Samir Samanta v. State, 1992 (1) Crimes 850.
18. Public Prosecutor v. Dasari Mohan. 1993 (2) Crimes 139.
19. P. Bikashapati v. State of A.P., 1989 Cri. L.J. 1186.
20. Yashoda Bai v. Krishnamurthy Bhimappa Kalashar, AIR 1992 Kant 368.
21. AIR 1997 SC 3021.

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UNIT - IV

Introduction: The word 'child' has not been defined either in the constitution or in the General Clauses Act. This word cannot be said to be identical with the word "minor". As a general rule, the age of majority in India as fixed under the Indian Majority Act 1875 is 18 years unless it falls in the category of specified exceptional cases, in which case it is 21 years. There may be provisions in some statutes themselves to hold a person to be a child. Section 2(2) of the Factories Act 1948 defines child as a person who has not completed the age of 15 years.

- i. Children as 'nasty, dwarf and brutish' versus children as 'angelic, divine and godly.
- ii. 'Childhood' a social construct - According to Philippe Aries (Centuries of Childhood, Knopf, N.Y. 1962) in Europe the first idea of childhood was in the 15th century and the second idea emerged in the 17th century, when children were perceived as miniature adults that needed to be disciplined and trained to industrious and cultured ways of life. In the contemporary society context the thinkers like Neil Postman (The Disappearance of Childhood, 1994) have expressed anxiety about the phenomenon of disappearance of childhood'. Professor M.D.A. Freeman opines that such anxieties are baseless and assures that childhood has neither disappeared nor would it ever happen. But Freeman draws our attention to the fact that childhood is not a single, universal, cross cultural phenomenon and holds that there are 'childhoods' rather than a single childhood.
- iii. Children as deficient incapable and dependent entities - till a late stage children were treated more or less as a property of the family that enjoyed patria potestas power over life and death of children. The rampant abuse of patria potestas power in feudal and later the industrial stages of development led to invoking parens patria jurisdiction by the King, the state over all the children within the kingdom.

Like women, children also are very cruelly treated in the society like young fawns of animal. To prevent this various laws have been brought from time to time; such as the Employment of Children Act 1938, Child Labour Act 1988, Children Act 1960, Children (Pledging of Labour) Act 1953, Child Marriage Restraint Act 1929.

The pathetic condition of the infant babies and increase in their death rates are due to lack of education and medical awareness especially in slums area. Another factor is lack of implementation of various central Government sponsored schemes pertaining to the child's protection and upliftment of medical standard among bodies.

As far as India is concerned the India report submitted in the special U.N. Session on Children in New York in the year 2002 presented a fairly positive picture of the conditions in India, as the report submitted by our country shows overall development of 380 million children. In fact India's presentation is in sharp contrast to the latest annual report of HRD Ministry, Government of India which has confessed that progress on these points has been slow. Profiling the "Status of Indian Children" the report gives a graphic account of the areas where the country is lagging. The annual report commits that progress on lowering infant mortality rates (IMR) has slowed down in recent years and has in fact, been stagnating between 70-74 since 1993.

The Government attributes the cause of child deaths to pneumonia, diarrhea and neonatal sepsis, mainly because of a lack of timely attention and treatment of children and low rates of routine immunisation.

Legal Status of children - From Legally Incapable to right bearing entities: widely shared belief in diminished legal capacities of children. Thinkers like Locke wrote in support of special rules of liability and accountability for children as well as limited range of freedoms and liberties for them. John Stuart Mill in his 19th century essays: On Liberty advocated protection for children against their own actions as well as against external injuries. John Rawls in his treatise on Justice (1971) gives even better elaboration of the physical and psychological incapacities of children and their implications for the legal system. He relates children's diminished capabilities with the degrees of autonomy that a child ought to enjoy and the demand such autonomy raises on the parents and the state. According to Rawls, parental intervention in the lives of children cannot be ruled out but only till their autonomous capacities remain impaired. Thus, as children become more capable the parental interference ought to diminish. Rawls argues that since the child is not in a position to make an autonomous decision "we try to get for him the things he (the child) presumably wants; whatever he wants, one helps children to obtain primary goods such as wealth, opportunity, self respect and other things that would make them capable of exercising autonomous choice. Children, therefore, have not the same liberty rights as adults, but have higher protection rights based on needs."

Undoubtedly, children are future of the country and need special protection. In Article 45 of the Indian Constitution, the State was directed to endeavour to provide within a period of ten years from the commencement of this constitution for free and compulsory education for all children until they complete the age of fourteen years. Children are the assets of a nation. It is the most important obligation of the State to nourish them since their conception and birth in nurseries of the State equally, to whatever families high or low they belong. The feeling of high and low must be buried from the very birth of theirs. They must be nourished at the State expenses and be also given education free of all costs by the State.

The bed bugs of the society must be finished and may not be allowed to exploit the childhood of the nation at any rate. Primary education has been provided by the Constitution to be given to every child upto 14 years, but is still not implemented and schooling has been privatised, throwing off the burden and obligation of the State.

Children have been given various protective rights in criminal and labour laws, which must be strictly implemented.

Flow of population also has become a hindrance in the well-being and welfare of children. Family planning, not being made compulsory, the minorities and backward classes are increasing their population not on the theory of Malthus but with the aim to increase their votes and capture the administration of the State, befooling those who are trying to decrease the population by voluntarily adopting the family planning.

This can be done only when the State is represented by common men pro rata of their population and not by the rich playing a farce of democracy. That is very essential for the due development of children of common folk, who beseech for their bare bread and education is nowadays dream for them in the self-centred leadership of the State. Milk of human kindness has been dried in them with the advent of independence, the fruits of which they deem to be for them only and their families to come.

Normative framework of the Rights of the Children at the International Level: Earlier the League of Nations (1924) and the United Nations (1959) had adopted Declarations about the rights of the children.

However, though these documents constituted significant statements of principle, neither of them had any binding authority on the member states. The momentum created by these declarations created a thinking amongst the nation states about the physical and psychological conditions even within their families. Within the U.N. Commission of Human Rights a special working group was set up in the 70's for the purpose of drafting a convention. Finally in 1989 the convention on the Rights of the child came into force, and by now over 190 nation states have either become a Signatory to it or ratified it (India ratified it in November, 1992). The Convention provides an elaborates catalogue of children's rights that can be grouped into four main categories namely-

- a. Right to survival
- b. Right to Protection
- c. Right to Participation
- d. Right to Development

The rights expounded in the convention were so much beyond the need based and protection rights recognized by the 1959 Declaration. The rights created obligations not only on the State, but also for the parents and the community, which means a change in approach from kindness and charity to children to a moral and legal obligation to children.

The second debate has great relevance to countries that are busy with democratic reconstruction of the society and where there are substantial percentage of child population with different social needs. Taking into account the view point of children may not only enhance democratic participation of fairly large population group, but will also lead to thrashing out a more socially relevant catalogue of children's Rights.

NATIONAL POLICY FOR CHILD, 1987

The National Policy on Child Labour, August 1987 contains the action plan fortackling the problem of child labour. It envisages-

- a. A legislative action plan
- b. Focussing and convergence of general development programmes for benefiting children wherever possible, and
- c. Project-based action plan of action for launching of projects for the welfare of working children in areas of high concentration of child labour.

In pursuance of National Child Labour Policy, the NCLP Scheme was started in 1988 to rehabilitate child labour. The Scheme seeks to adopt a sequential approach with focus on rehabilitation of children working in hazardous occupations and processes in the first instance. Under the Scheme, after a survey of child labour engaged in hazardous occupations and processes has been conducted, children are to be withdrawn from these occupations and processes and then put into special schools in order to enable them to be mainstreamed into formal schooling system.

Strategy for elimination of child labour in Xth Plan: Keeping in view the policy of the Government as laid down in the National Agenda and Prime Minister's directions in the National Conference on Child Labour, the evaluation studies carried out by the VVGNI and the approach defined in the working paper for the

Tenth Plan, the strategy adopted during this Plan period aims at bringing qualitative changes in the scheme for elimination of child labour. The details are as follows-

- a. Policy and programmes for elimination of child labour would be continued in a more focused, integrated and convergent manner.
- b. Focused and reinforced action to eliminate child labour in the hazardous occupations by the end of the Plan period.
- c. Expansion of the NCLPs to additional 150 districts during the Plan.
- d. Ensuring that the NCLPs have a focused time frame of 5 years with clearly defined targets.
- e. Linking the child labour elimination efforts with the scheme of Sarva Shiksha Abhiyan of the MHRD an attempt to ensure that small children in the age group of 5-8 years get directly linked to school and the older children are mainstreamed to the formal education system through the rehabilitation centres; increased efforts to provide vocational training to the older children.
- f. Strengthening of the formal school mechanism in the endemic child labour areas in the country both in terms of quality and numbers in such a manner as to provide an attractive schooling system to the child labour force and its parents so that motivational levels of both the parents and such children are high and sending these children to school becomes an attractive proposition.
- g. Convergence with the ongoing schemes of the Dept. of Education, Rural Development, Health and Women & Child Development would be critical for the ultimate attainment of the objective of elimination of child labour in a time bound manner.
- h. Large-scale involvement of the voluntary organizations at the district level to assist in the running of the NCLP schools. The attempt during this Plan would be to encourage the running of the rehabilitation schools only through accepted and committed NGOs so that the Government machinery is not burdened with running of such schools.

Certain important and enhanced parameters that have been introduced in the scheme now are as under

Stipend: In the existing arrangement, the stipend of Rs. 100/- per child per month was being disbursed every month. As per the revised scheme, the monthly stipend of Rs. 100/- month per child will be disbursed only after the child is successfully mainstreamed into formal system of schooling. Till that period, the amount of stipend will be regularly deposited in the Bank Account of the child. The accumulated stipend amount could be handed over to the child at the time of her/his getting mainstreamed.

Nutrition: The amount for provision of nutrition to the children in the special schools has been doubled from Rs. 2.50/- per child per day to Rs. 5/- per child per day.

Health Component: In the existing scheme, there was no separate budgetary provision for any health component to take care of the health-related aspects of the children. In the revised scheme an amount of honorarium (Rs. 5,000/-per month for one doctor for every 20 schools) has been provided to put in place an institutionalised mechanism for regular and periodical effective health care of the children by a doctor. A

health card in respect of every child also needs to be maintained with all the necessary entries.

Vocational Training: In the existing scheme, there was no separate budgetary provision for the services of any Master Trainer for imparting training to the children/teachers. In the revised scheme, budgetary provision (Rs. 5,000/- for one Master Trainer for each NCLP) has been provided to hire the services of a Master for each NCLP.

Training for Educational Teachers: In the existing scheme, there was no separate budgetary provision for providing training to the educational teachers. In the revised scheme, budgetary provision has been provided to impart training to the teachers twice during the 10th Plan period.

Survey: In the revised Scheme, provision (Rs. 2.75 lakh per survey) has been made to conduct surveys of working children two times during the 10th Plan period.

By following the strategy enunciated above and combining this with the existing established mechanisms of enforcement it is expected that a drastic reduction in child labour would result by the end of Plan period.

The problem of child labour requires to be dealt through sustained efforts over a period of time. Government is committed to the goal of eradication of child labour in all its forms. Considering the nature and magnitude of the problem a gradual and sequential approach has been adopted to withdraw and rehabilitate child labour beginning with the children working in hazardous occupations.

One of the objectives of the Ministry of Human Resource Development is to bring about coordinated and integrated approach in regard to programmes affecting human resource development namely, programmes of Education, Health, Nutrition, Employment etc. The National Policy on Education 1986 emphasises the need to further intensify the nation-wide efforts in human resource development with education playing its multi-faceted role. In the implementation of National Policy on Education, the linkages with several related sectors, such as, Health, Nutrition, Employment, etc. have been kept in view. Besides, the Ministry of Human Resource Development has also requested the State Governments to initiate pilot/experimental projects for working out better coordination and integration of programmes in several areas concerning human resource development so that the experience gained and the conclusions arrived at as a result of these experimental projects could form the basis for the development of a coordinated and integrated strategy for human resource development in the 8th Five Year Plan.

In the following five parts of the report, the Ministry presents a comprehensive picture of the activities and achievements of the different Departments-

Part I Department of Education

Part II Department of Culture

Part III Department of Arts

Part IV Department of Women and Child Development

Part V Department of Youth Affairs and Sports.

The year 1987 witnessed the commencement of implementation of the National Policy on Education 1986. Activities envisaged under the Programme of Action were taken up. Major steps to achieve the objective of universalisation of elementary education were put in full steam.

In order that the talented children of the rural masses are given equitable opportunities, decisions involving major investments on residential schools (Navodaya Vidyalayas) were taken. A network of these schools is

coming up all over the country.

Science education, on environment. and education technology and vocationalisation have been brought under special focus.

The quality of the teachers in general has been sought to be improved by systematic training programmes. The scales of pay of the University and college teachers have been revised significantly with massive assistance for States.

The All India Council for Technical Education has come to be given a statutory base to facilitate orderly growth of technical education.

The preservation, promotion and enrichment of the cultural traditions of the country have continued to be the vital concern of the Department of Culture. The Department has sought to maintain the vibrancy of these traditions through a network of institutions and supportive schemes. Seven Zonal Cultural Centres undertook activities focussing attention on cultural kinship and dissemination of culture through popular expositions. Conduct of festivals of India abroad and cultural festivals concerning other countries in India as well as cultural exchange programmes with over 70 countries brought the peoples of various countries closer to the people of India.

In the Department of Arts, action was initiated for nucleating the programmes of the Indira Gandhi National Centre for arts (IGNCA) as per the conceptual plan of the Centre. Important initiatives included enlargement of the Cultural Reference Library and streamlining of the computerised national information system and data bank on arts, humanities and cultural heritage. Another highlight has been drawing up of a plan for compiling Tribal Art. Atlas. The IGNCA itself was registered as an autonomous trust with Shri Rajiv Gandhi as the President of the trust and Shri P.V. Narasimha Rao as Chairman of its Executive Committee.

The Department of Women and Child Development undertook coordinated efforts at the development of pre-school children and women, enlisting the support and cooperation of several Departments and also the States and Union Territories. Under the Integrated Child Development Services (ICDS), a package of early childhood services was rendered in terms of supplementary nutrition, immunization, health checkup etc. to children below six years of age and expectant nursing mothers.

The Festival of India in USSR and of USSR in India facilitated reciprocal visits of the youth to the two countries. The National Service Scheme volunteers and Nehru Yuvak Kendras made significant contributions in the area of natural calamities relief. The Society for National Institutes of Physical Education and Sports (SNIPES) was amalgamated with the Sports Authority of India effective from 1st May, 1987. The sports infrastructure in the country has been strengthened by the Third South Asian Federation Games and Second National Games. "Reliance Cup- 1987" was the fourth in the series of World Cup in Cricket. This was jointly hosted by India and Pakistan. Signing of Sports Protocols with USSR GDR Cuba and Mauritius and unanimous adoption of the revised draft National Policy of Youth in a conference, of Ministers of States and Union Territories incharge of Youth in a conference of Ministers of the other highlights of the activities of the Department of Youth Affairs and Sports.

INDIAN CONSTITUTIONAL PROVISIONS REGARDING WELFARE OF CHILD

Undoubtedly, children are future of the country and need special protection because of the physical and mental faculties they possess. There are constitutional provisions relating to the child. State Government under Article 15 (3) of the Constitution is empowered to make special provisions for the children. Article 15 (3) is one of the exceptions to the general rule provided in clauses (1) and (2) of Article 15. Article 15

confirms powers on the State to make special provision for the women and child. Women and Children both are required special treatment on account of their very nature. Therefore, Article 15 (3) empowers the State to make Special Provision for them. The physical structure of women and children is the basic reason in this regard. (State of Rajasthan v. Omprakash, 2002 Cr. L.J. 2951)

Article 24 of the Constitution prohibits employment of children in factories etc. This Article states that "No child below the age of 14 years shall be employed to work in any factory or mine or engaged in other hazardous employment."

As provided under Article 39 (c) of the Constitution the children of tender age should not be subjected to abuse and they should be given opportunities and facilities to develop in a healthy manner. Freedom and dignity of children should be protected.

Article 39 (e) provides that the health and strength of workers, men and women and the tender age of the children are not abused and the citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.

Article 39 (f) - that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 42 - the State shall make provision for securing just and human conditions of work and for maternity relief.

Article 45 of the Constitution makes provision for free and compulsory education for children. It states that "the state shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children unless they complete the age of 14 years.

In P. Cheryakya v. Union of India, (AIR 1994 Ker. 27), the Kerala High Court held that protection of life and personal liberty includes right to education.

Further Article 47 states that it is the duty of the State to raise the level of nutrition and standard of living and to improve public health.

U.N. DECLARATION OF THE RIGHTS OF THE CHILD

The Universal Declaration of Human Rights had stipulated under Para 2 of Article 25 that childhood is entitled to special care and assistance. The above principle alongwith other principles of the Universal Declaration concerning the child were incorporated in the Declaration of the Rights of the child adopted by the General Assembly on November 20, 1959. The International Covenant on civil and Political Rights under Article 23 and 24 and the International Covenant on Economic, Social and Cultural Rights under Article 10 made provisions for the care of the child. In a number of other International documents it was stated that the child should grow up in a family environment, in an atmosphere of happiness, love and understanding. Although principles were proclaimed for the care and development of the child, these principles were not binding on the states. It was therefore realized that a convention is prepared which should be legally binding on states.

1924 OF 1959 AND THE 1986 CONVENTION OF CHILDREN

The process was started by the League of Nations in the year 1924 when the Geneva Declaration on the Rights of the Child was adopted. The United Nations restarted the process in 1959 by adopting another Declaration on the Rights of the Child. Thereafter, the year 1979 was celebrated as the International Year of the Child. The culmination of that process reached when the General Assembly adopted on 20th November, 1989 the United Nations Convention on the Rights of the Child. It came in force on 2nd September, 1990 after receiving the necessary ratification. India acceded to it in the year 1992.

Who is a Child under the Convention?

Article 1 of the Convention provides that all persons below the age of 18 years are to be treated as children, unless under specific laws of member countries applicable to the child, majority is attained earlier. The definition of 'Child' might also vary under various Labour Laws, the Juvenile Justice [Care and Protection of Children] Act, and the Child education laws.

The convention recognizes following important rights of the child:

- 1) **Right to Life:** According to Article 6(1) of the Convention, a child has the inherent right to life. Thus, capital punishment cannot be inflicted for any crime committed by a person who is below eighteen years of age. Here, it is worth mentioning that according to Article 6(5) of the International Covenant on the Civil and Political Rights, "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on a pregnant woman."

This right is absolute. Under no conditions, there should be an exception to it. The right to life implies that sentence of imprisonment for the whole length of life cannot be given because a life spent fully in jail has no meaning.

- 2) **Right to Name:** Article 7(1) of the Convention gives the child a right to name. He has a right to an honourable name.
- 3) **Right to Parental Care:** Under Article 9(1) of the Convention, a child has the right to be cared by his parents. Thus, the parents either both or one of them must give company to him for sufficient time everyday. Children are being deprived of this right in the societies where both the spouses are employed.

In India also, because of the economic constraints both husband and wife are preferring job, and thus have to remain outdoors in the day, and due to breaking up of the joint family system, there is no member of the family to look after the children.

- 4) **Health of Child:** Under Article 24(1) of the Convention, the child has the right to the highest attainable standard of health. Thus, special attention must be given to the health of children.
- 5) **Child Labour:** Under Article 32(1) of the Convention, the child has the right to be protected from economic exploitation. The child has the right to be protected from work which is hazardous or which interferes with the education or which is harmful for his health, physical, mental, spiritual, moral or social development.

It may be argued that if the parents can afford, they will certainly send their children to schools and not to

any kind of work. Child Labour cannot be avoided in case of poverty. The children go to work to earn for themselves and sometimes for the family also. If they will not work, they will have to face starvation.

- 6) **Right to Education:** Under Article 28, the Convention recognizes universal, compulsory and free primary education as a matter of right for children. In *Unni Krishnan v. State of Andhra Pradesh*¹, the Hon'ble Supreme Court has held that primary education is a Fundamental Right of the children as an aspect of their personal liberty guaranteed by Article 21 of the Constitution of India.

In spite of the positive policy initiatives, India may not achieve gender parity either in primary or secondary levels of education by year 2015. So says UNESCO'S Education for All-Global Monitoring Report, 200304. The Report says its forecasts are based on past trends. In enrollment of girls, India is slightly ahead of Pakistan.

Some other rights have also been stipulated in the Convention, viz.

- a. Right to acquire nationality (Article 7);
- b. Right to freedom of expression (Article 13, para 1)
- c. Right to freedom of thought conscience and religion (Article 14, para 1)
- d. Right to freedom of association and to freedom of peaceful assembly (Article 15, para 1)
- e. Right to benefit from social security (Article 26, para 1)
- f. Right to a standard of living adequate for the child's physical, mental, spiritual and social development (Article 27, para 1)
- g. Right to the protection of the law against arbitrary or unlawful interference with his or her privacy, family, home or correspondence. (Article 16, para 1)

Implementation Procedure: A Committee on the rights of child (C.R.C.) has been monitoring the Convention since 1991. The Committee in accordance with Article 43 of the Convention, is composed of ten experts of high moral standing and recognized competence. The members of the Committee are elected for a term of four years and are eligible for re-election. The Conference of State Parties to the Convention on December 12, 1995 adopted an amendment to Article 43 increasing the membership of the Committee to 18 experts. The amendment was approved by the General Assembly on December 21, 1995. The members of the Committee shall be elected by secret ballot from a list of persons nominated by State Parties. Each State Party may nominate one person from among its own nationals.

State Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized therein and on the progress made on the enjoyment of those rights. The Committee is required to submit reports on its activities every two years to the General Assembly through the Economic and Social Council. The Committee may recommend to the General Assembly that the Secretary-General be requested to undertake on its behalf studies on specific issues relating to the rights of the child and may make suggestions and general recommendations.

The Convention on the Rights of the Child does not lay down any procedure for individual complaints from children or their representatives. However, it has merely achieved the universal ratification.

Optional protocols to the Convention on the Rights of the Child: Two Optional Protocols to the Convention on the Rights of the Child were adopted on May 25, 2000 in New York, which are as follows –

- a. **Optional Protocol on the Involvement of Children in Armed Conflict:** The objective of the Protocol was to seek limits on the issue of children in armed conflict and particularly to raise the minimum age limit for recruitment and to limit the actual participation of persons under 18 years in hostilities. The Protocol prohibits the recruitment of individuals under eighteen years of age by non-State actors. It imposes an obligation upon States to raise the minimum age of recruitment above the age set by the Convention on the Rights of the Child.

The Optional Protocol also establishes an obligation upon States to take all feasible measures to prevent the direct participation in hostilities by individuals under the age of eighteen. It further requires States to establish safeguards relative to the voluntary recruitment of individuals under the age of eighteen. Finally, the Protocol sets forth an obligation upon States to report to the Committee on the Rights of Child on its implementation.

- b. **Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography:** The Optional Protocol supplements the provisions of the Convention on the Rights of Child by providing detailed requirements for the criminalization of violations of the rights of children in the context of the sale of children, child prostitution and child pornography.

The Protocol provides definition for the offences of sale of children, child prostitution and child pornography. It sets standards for the treatment of violations under domestic law, including with regard to offenders, protection of victims and preventive efforts. It also provides a framework for the increased international cooperation in these areas, in particular for the prosecution of offenders.

IMPORTANT QUESTIONS

- Q.1. What are the human rights of a child on the international level?
- Q.2. Discuss the human rights of child under the constitution of India.

References:

1. AIR 1993 SC 2178

employments.

C) The Child Labour (Prohibition and Regulation) Act, 1986

Refer to chapter Legal Control of Child Labour.

D) The Child Labour (Prohibition and Regulation) Rules, 1988

The Child Labour (Prohibition and Regulation) Rules, 1988 have been framed by the Central Government in exercise of the powers conferred on it by Section 18(1) of the Child Labour (Prohibition and Regulation) Act 1986. These Rules were enforced with effect from 10th August 1988, by publication in the Official Gazette.

E) Juvenile Justice (Care and Protection of Child) Act, 2000

Under Section 69 of the Juvenile Justice (care and protection of child) Act 2000, the Juvenile Justice Act 1986 has been repealed. Present Juvenile Justice Act 2000 has been enacted to provide for-

- a. Care
- b. Protection
- c. Treatment
- d. Development
- e. Rehabilitation of neglected -
- f. Juveniles or delinquent juvenile. It also considers certain matters relating to juvenile offenders.

The Act contains five chapters consisting of seventy sections. Chapter I is a preliminary. Section 1 (2) of the Act provides that it extends to the whole of India except the State of Jammu and Kashmir. Subsection (3) of Section 1 provides that the Act shall come into force with effect from the date prescribed by notification of the Central Government.

According to Section 20 of the new Act all proceedings in respect of juvenile pending in any court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of juvenile, forward the juvenile to the board which shall pass orders in respect of that juvenile in accordance with the provision of this Act.

The Act has been enacted keeping in view the provisions of United Nations Convention on the Rights of Child, 1989 and the Constitution of India.

Definition (Section 2): In this Act unless the context otherwise requires-

- a. "advisory board" means a Central or a State advisory board or a district and city level advisory board, as the case may be, constituted under Section 62;
- b. "begging" means-

- i. soliciting or receiving alms in a public place or entering into any private premises for the purposes 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;
- 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 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,
 - iii. who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
 - iv. who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
 - v. who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run-away child and whose parents cannot be found after reasonable inquiry,
 - vi. who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
 - vii. who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
 - viii. who is being or is likely to be abused for unconscionable gains,
 - ix. who is victim of any armed conflict, civil commotion or natural calamity;
- e. "children's home" means an institution established by a State Government or by voluntary organisation 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 child in need of care and protection a Committee and in relation to juveniles in conflict with a law Board;
- h. "fit institution" means a governmental or a registered non-governmental organisation or a voluntary

organisation is found fit by 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 recognised 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.

Continuation of inquiry in respect of juvenile who has ceased to be a juvenile (Section 3):

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 the 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 a juvenile or a child.

Juvenile in conflict with law:

- a) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) the State Government may, by notification in the Official Gazette, constitute for a district or a group of districts specified in the notification, 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.
- b) 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 (2 of 1974), 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.
- c) 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.
- d) 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.
- e) The appointment of any member of the Board may be terminated after holding inquiry, by the State Government, if-
 - a. he has been found guilty of misuse of power vested under this Act,
 - b. 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,

- c. 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.

Procedure, etc. in relation to Board:

- a) 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.
- b) A child in conflict with law may be produced before an individual member of the Board, when the Board is not sitting.
- c) 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.

- d) 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.

Powers of juvenile Justice Board:

- a. Where a Board has been constituted for any district or a group of districts, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.
- b. 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.

Observation Homes: Section 8(1) provides that the State Government may establish and maintain either by itself or under an agreement with voluntary organisations, observation homes in every district or a group of districts, for the temporary reception of juvenile in conflict with law during the pendency of any enquiry.

Special Homes: Under Section 9 (1) of the Act the State Government may establish and maintain either by itself or under an agreement with voluntary organizations, special homes in every district or-3 group of districts, for reception and rehabilitation of juvenile in conflict with law. In fact, remand homes are still remand homes in Bihar whereas the new Act calls them as Special Homes.

According to Section 11 of the Act, any person in whose charge a juvenile is placed in pursuance of this Act, shall be responsible for his maintenance and the juvenile shall continue in his charge for the period stated by competent authority, notwithstanding that he is claimed by his parents or any other person.

According to Section 12 of the Act, when any juvenile accused of a bailable or non-bailable offence is arrested, he shall be released on bail with or without surety but he shall not be so released if there are reasonable grounds for believing that the release is likely to bring him into association with any known

criminal or that his release would defeat the ends of justice.

According to Section 14 of the Act, where a juvenile in conflict with law, is produced before a Board, the Board shall complete the enquiry 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.

According to Section 15 of the Act, where a Board is satisfied on enquiry that juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law, the Board may, if it thinks so fit-

- a. allow the juvenile to go home;
- b. direct the juvenile to participate in group counselling 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 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, on executing a bond, with or without surety, 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 special home-
 - i. in the case of juvenile, over seventeen years but less than eighteen years of age for a period of not less than two years;
 - ii. in case of any other juvenile for the period until he ceases to be juvenile.

According to section 16 of the Act, notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or life imprisonment or committed to prison in default of payment of fine or in default of furnishing security.

According to the provision of the Section where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juveniles in a special home to send him to such special home, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such a manner as it thinks fit and shall report the case for the order of the State Government.

On receipt of such report from a Board, 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 provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the juvenile could have been sentenced for the offence

committed.

The provisions of Chapter VIII of the Code of Criminal Procedure shall not be applicable on juvenile. (Section 17).

According to Section 18 (1) of the Act, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile. If a juvenile is accused of an offence for which under Section 223 of the Cr.P.C. or any other law for the time being in force, such juvenile and the other person who is not a juvenile would, but for the probation contained in sub-section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person.

According to Section 19, a juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under any other law.

The Board shall make an order directing that the relevant records of such conviction shall be removed after expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be.

According to Section 20 of the Act, all proceedings pending in any court at the time of enforcement of this Act, shall be continued in that court, and if that court finds that the juvenile has committed an offence, it shall record such findings and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board for passing appropriate orders in respect of that juvenile in accordance with the provisions of this Act.

According to Section 21 (1) of the Act, the report in any newspaper, magazine or visual media etc. of any enquiry regarding a juvenile in conflict with law under this Act shall not disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile. The picture of the juvenile in conflict with law shall not be published. But, the authority holding such enquiry may permit such disclosure after recording the reasons thereof in writing, if in its opinion such disclosure is in the interest of the juvenile.

Under sub-section (2) of Section 21 of the Act, any person contravening the provisions of sub-section (1) shall be punishable with fine, which may extend to one thousand rupees.

According to Section 22 of the Act, notwithstanding anything to the contrary contained in any other law for the time being in force, any police officer may take charge without warrant of a juvenile in conflict with law who has escaped from a special home or an observation home or from the care of a person under whom he was placed, and shall be sent back to the special home or the observation home or that person, as the case may be; and no proceeding shall be instituted in respect of the juvenile for such escape, but the special home, or the observation home or the person may, after giving the information to the Board which passed the order in respect of the juvenile, take such steps in respect of the juvenile as may be deemed necessary.

According to Section 23, whoever 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.

Section 24(1) provides that whoever, employs or uses any juvenile or the child for the purpose of begging, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to

fine. Not only this its abetment is also punishable under Sub-section (2) of Section 24. 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 one year and shall also be liable to fine.

Whoever, gives, or causes to be given, to any juvenile or the child any intoxicating liquor in a public place or any narcotic drug etc. except upon the order of the duly qualified medical practitioner or in case of sickness shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine under Section 25 of the Act.

Section 26 provides that whoever ostensibly procures a juvenile or the child for the purpose of any hazardous employment, keeps him in bondage and withholds his earnings or uses such earning for his own purposes shall be punishable with imprisonment for a term upto three years and a fine.

The offences punishable under Sections 23 to 26 are cognizable under Section 27 of the Act. According to Section 28 of the Act, where a person is found guilty under this Act and also under any other Central or State Act then the offender shall be liable to such punishment which is greater in degree.

Juvenile and bail application (Section 12): Bail application cannot be considered without enquiry and therefore it could be in the interest of justice that enquiry be made first.¹

Bail application of a juvenile should be considered only in accordance with proper provisions of law under the Act. It should not be considered under Section 439 of Cr.P.C.²

Bail application of juvenile offender should not be rejected on the ground that the juvenile is likely to come in the company of criminals, if enlarged on bail.³

Where bail application produced by the petitioner aged 17 yrs the Sessions Court is empowered to grant bail.⁴

Child In Need of Care and Protection (Section 29)

Child Welfare Committee (Section 29):

- a. The State Government may, by notification in Official Gazette, constitute for every district or group of districts, specified in the notification, 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 and this Act.
- b. 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.
- c. The qualifications of the Chairperson and the members, and the tenure for which they may be appointed shall be such as may be prescribed.
- d. 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
 - iii. he fails to attend the 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.
- e. The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

Procedure, etc., in relation to Committee (Section 30):

- 1) The Committee 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 need of care and protection may be produced before an individual member for being placed in safe custody or otherwise 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 notwithstanding the absence of any member of the Committee, and no order made by the Committee shall be invalid by reason only of the absence of any member during any stage of the proceeding.

Powers of Committee (Section 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, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need for care and protection.

Production before Committee (Section 32):

- i. Any child in need for care and protection may be produced may be produced before the Committee by one of the following persons-
 - a. any police officer or special juvenile police unit or a designated police officer;
 - b. any public servant;
 - c. childline, a registered voluntary organisation or by such other voluntary organisation or an agency as may be recognised by the State Government;
 - d. any social worker or a public spirited citizen authorised by the State Government; or

- e. by the child himself.
- ii. The State Government may make rules consistent with this Act to provide for the manner of making the report to the police and to the Committee and the manner of sending and entrusting the child to children's home pending the inquiry.

Inquiry (Section 33):

- 1) On receipt of a report under Section 32, the Committee or any police officer or special juvenile police unit or the designated police officer shall hold an inquiry in the prescribed manner and the Committee, on its own or on the report from any person or agency as mentioned in sub-section (1) of Section 32, may pass an order to send the child to the children's home for speedy inquiry by a social worker or child welfare officer.
- 2) The inquiry under this section shall be completed within four months of the receipt of the order or within such shorter period as may be fixed by the Committee:

Provided that the time for the submission of the inquiry report may be extended by such period as the Committee may, having regard to the circumstances and for the reasons recorded in writing, determine.

- 3) After the completion of the inquiry if the Committee is of the opinion that the said child has no family or ostensible support, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.

Children's Homes (Sections 34):

- 1) The State Government may establish and maintain either by itself or in association with the voluntary organisations, 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 the 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 organisation may be granted or withdrawn.

Inspection (Section 35):

- 1) The State Government may appoint inspection committees for the children's homes (hereinafter referred to as the inspection committees) for the State, a district and city, as the case may be, for such period and for such purposes as may be prescribed.
- 2) The inspection committee of a State, district or of a city shall consist of such number of representatives from the State Government, local authority, Committee, voluntary organisations and such other medical experts and social workers as may be prescribed.

Social auditing (Section 36): The Central Government or State Government may monitor and evaluate

the functioning of the Children's homes at such period and through such persons and institutions as may be 'specified by that Government.

Shelter homes (Section 37):

- 1) The State Government may recognise, reputed and capable voluntary organisations 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 the 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.

Transfer (Section 38)

- 1) If during the inquiry it is found that the child hails from the place outside the jurisdiction of the Committee, the 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 home in which he is lodged originally.
- 3) The State Government may make rules to provide for the travelling allowance to be paid to the child.

Restoration (Section 39):

- 1) Restoration of and protection to a child shall be the prime objective of any children's home or the shelter home.
- 2) The children's home or a shelter home, as the case may be, shall take such steps as are considered necessary for the restoration of and protection to a child deprived of his family environment temporarily or permanently whether such child is under the care and protection of a children's home or a shelter home, as the case may be.
- 3) The Committee shall have the power to restore any child in need of care and protection to his parent guardian, fit person of fit institution, as the case may be, and give them suitable directions.

Explanation: For the purposes of this section "restoration of child" means restoration to-

- a. Parents;
- b. adopted parents;
- c. foster parents.

Rehabilitation and Social Reintegration

Process of rehabilitation and social reintegration: The rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship,

and (iv) sending the child to an after-care organisation.

Juveniles and Proper Care: The authorities concerned should provide proper facilities regarding food, clothing, medical treatment, health and education.⁵

Adoption (Section 41):

- 1) The primary responsibility for providing care and protection to children shall be that of his family.
- 2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.
- 3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard.
- 4) The children's homes or the State Government run institutions for orphans shall be recognised as adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued under sub-section (3).
- 5) No child shall be offered for adoption-
 - a. until two members of the Committee declare the child legally free for placement in the case of abandoned children,
 - b. till the two months period for reconsideration by the parent is over in the case of surrendered children, and
 - c. without his consent in the case of a child who can understand and express his consent
- 6) The Board may allow a child to be given in adoption-
 - a. to a single parent and
 - b. to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters.

Foster care (Section 42):

- a. The foster care may be used for temporary placement of those infants who are ultimately to be given for adoption.
- b. In foster care, the child may be placed in another family for a short or extended period of time, depending upon the circumstances where the child's own parents usually visit regularly and eventually after the rehabilitation, where the children may return to their own homes.
- c. The State Government may make rules for the purposes of carrying out the scheme of foster care programme of children.

Sponsorship (Section 43):

- a. The sponsorship programme may provide supplementary support to families, to children's homes and to special homes to meet medical, nutritional educational and other needs of the children with a view to improving their quality of life .
- b. The State Government may make rules for the purposes of carrying out various schemes of sponsorship of children, such as individual to individual sponsorship, group sponsorship or community sponsorship.

After-care organisation (Section 44): The State Government may, by rules made under this Act provide-

- a. for the establishment or recognition of after-care organisations and the functions that may be performed by them under this Act;
- b. for a scheme of after-care programme to be followed by such after-care organisations for the purpose of taking care of juveniles or the children after they leave special homes, children homes and for the purpose of enabling them to lead an honest industrious and useful life.
- c. for the preparation or submission of a report by the probation officer or any other officer appointed by that Government in respect of each juvenile or the child prior to his discharge from a special home, children's home, regarding the necessity and nature of after-care of such juvenile or of a child, the period of such after-care, supervision thereof and for the submission of report by the probation officer or any other officer appointed for the purpose, on the progress of each juvenile or the child;
- d. for the standards and the nature of services to be maintained by such after-care organisations;
- e. for such other matters as may be necessary for the purpose of carrying out the scheme of aftercare programme for the juvenile or the child.

Provided that any rule made under his section shall not provide for such juvenile or child to stay in the after-care organisation for more than three years:

Provided further that juvenile or child over seventeen years of age but less than eighteen years of age would stay in the after-care organisation till he attains the age of twenty years.

Linkages and co-ordination (Section 45): The State Government may make rules to ensure effective linkages between various governmental, non-governmental, corporate and other community agencies for facilitating the rehabilitation and social reintegration of the child.

Miscellaneous

Attendance of parent or guardian of juvenile or child (Section 46): Any competent authority before which a juvenile or the child is brought under any of the provisions of this Act, may, whenever it so thinks fit, require any parent or guardian having the actual charge of or control over the juvenile or the child to be present at any proceeding in respect of the juvenile or the child.

Dispensing with attendance of Juvenile or child (Section 47): If, at any stage during the course of an

inquiry, a competent authority is satisfied that the attendance of the juvenile or the child is not essential for the purpose of inquiry, the competent authority may dispense with his attendance and proceed with the inquiry in the absence of the juvenile or the child.

Committal to approved place of juvenile or child Suffering from dangerous diseases and his future disposal (Section 48):

- a. When a juvenile or the child who has been brought before a competent authority under this Act, is found to be suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the competent authority may send the juvenile or the child to any place recognised to be an approved place in accordance with the rules made under this Act for such period as it may think necessary for the required treatment.
- b. Where a juvenile or the child is found to be suffering from leprosy, sexually transmitted disease, Hepatitis B, open cases of Tuberculosis and such other diseases or is of unsound mind, he shall be dealt with separately through various specialised referral services or under the relevant laws as such.

Presumption and determination of age (Section 49):

- 1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.
- 2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person.

Sending a juvenile or child outside jurisdiction (Section 50): In the case of a juvenile or the child, whose ordinary place of residence lies outside the jurisdiction of the competent authority before which he is brought, the competent authority may, if satisfied after due inquiry that it is expedient so to do, send the juvenile or the child back to a relative or other person who is fit and willing to receive him at his ordinary place of residence and exercise proper care and control over him, notwithstanding that such place of residence is outside the jurisdiction of the competent authority; and the competent authority exercising jurisdiction over the place to which the juvenile or the child is sent shall in respect of any matter arising subsequently have the same powers in relation to the juvenile or the child as if the original order had been passed by itself.

Reports to be treated as confidential (Section 51): The report of the probation officer or social worker considered by the competent authority shall be treated as confidential-

Provided that the competent authority may, if it so thinks fit, communicate the substance thereof to the juvenile or the child or his parent or guardian and may give such juvenile or the child, parent or guardian an opportunity of producing such evidence as may be relevant to the matter stated in the report.

Appeals (Section 52):

- a. Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session-

Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

- b. No appeal shall lie from-
- 1) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or
 - 2) any order made by a Committee in respect of a finding that a person is not a neglected juvenile.
- c. No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

Revision (Section 53): The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit-

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

Procedure in inquiries, appeals and revision proceedings (Section 54):

- 1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.
- 2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

Power to amend orders (Section 55):

- a. Without prejudice to the provisions for appeal and revision under this Act. any competent authority may, on an application received in this behalf, amend any order as to the institution to which a juvenile or the child is to be sent or as to the person under whose care or supervision a juvenile or the child is to be placed under this Act-

Provided that there shall be at least two members and the parties or its defence present during the course of hearing for passing an amendment in relation to any of its order.

- b. Clerical mistakes orders passed by a competent authority or errors arising therein from any accidental slip or omission may, at any time, be corrected by the competent authority either on its own motion or on an application received in this behalf.

Power of competent authority to discharge and transfer juvenile or child (Section 56): The competent authority or the local authority may, notwithstanding anything contained in this Act. at any time, order a child in need of care and protection or a juvenile in conflict with law to be discharged or transferred from one children's home or special home to another, as the case may be, keeping in view the best interest of the child or the juvenile, and his natural place of stay, either absolutely or on such conditions as it may think fit to impose-

Provided that the total period of stay of the juvenile or the child in a children's home or a special home or a fit institution or under a fit person shall not be increased by such transfer.

Transfer between children's homes, under the Act, and juvenile homes, of like nature in different parts of India (Section 57): The State Government or the local authority may direct any child or the juvenile to be transferred from any children's home or special home outside the State to any other children's home, special home or institution of a like nature with the prior intimation to the local Committee or the Board, as the case may be, and such order shall be deemed to be operative for the competent authority of the area to which the child or the juvenile is sent.

Transfer of juvenile or child of unsound mind or suffering from leprosy or addicted to drugs (Section 58) : Where it appears to the competent authority that any juvenile or the child kept in a special home or a children's home or shelter home or in an institution in pursuance of this Act, is suffering from leprosy or is of unsound mind or is addicted to any narcotic drug or psychotropic substance, the competent authority may order his removal to a leper asylum or mental hospital or treatment centre for drug addicts or to a place of safety for being kept there for such period not exceeding the period for which he is required to be kept under the order of the competent authority or for such further period as may be certified by the medical officer necessary for the proper treatment of the juvenile or the child.

Release and absence of juvenile or child on placement (Section 59):

- 1) When a juvenile or the child is kept in a children's home or special home and on a report of a probation officer or social worker or of Government or a voluntary organisation, as the case may be, the competent authority may consider, the release of such juvenile or the child permitting him to live with his parent or guardian or under the supervision of any authorised person named in the order, willing to receive and take charge of the juvenile or the child to educate and train him for some useful trade or calling or to look after him for rehabilitation.
- 2) The competent authority may also permit leave of absence to any juvenile or the child, to allow him, on special occasions like examination, marriage of relatives, death of kith and kin or the accident or serious illness of parent or any emergency of like nature, to go on leave under supervision, for maximum seven days, excluding the time taken in journey.
- 3) Where a permission has been revoked or forfeited and the juvenile or the child refuses or fails to return to the home concerned or juvenile to which he was directed so to return, the Board may, if necessary, cause him to be taken charge of and to be taken back to the concerned home.
- 4) The time during which a juvenile or the child is absent from a concerned home in pursuance of such permission granted under this section shall be deemed to be part of the time for which he is liable to be kept in the special home-

Provided that when a juvenile has failed to return to the special home on the permission being revoked or forfeited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is liable to be kept in the institution.

Contribution by parents (Section 60):

- 1) The competent authority which makes an order for sending juvenile or the child to a children's home or to a special home or placing the juvenile under the care of a fit person or fit institution may make an order requiring the parent or other liable to maintain the juvenile or the child to contribute to his maintenance, if able to do so, in the prescribed manner according to income.
- 2) The competent authority may direct, if necessary, the payment to be made to poor parent or guardian by the Superintendent or the Project Manager of the home to pay such expenses for the journey of the inmate or parent or guardian or both, from the home to his ordinary place of residence at the time of sending the juvenile as may be prescribed.

Fund (Section 61):

- 1) The State Government or local authority may create a Fund under such name as it thinks fit for the welfare and rehabilitation of the juvenile or the child dealt with under this Act.
- 2) There shall be credited to the Fund such voluntary donations, contributions or subscriptions as may be made by any individual or organisation.
- 3) The Fund created under sub-section (1) shall be administered by the State advisory board in such manner and for such purposes as may be prescribed.

Central, State, district and city advisory boards (Section 62):

- 1) The Central Government or a State Government may constitute a Central or a State advisory board, as the case may be, to advise that Government on matter relating to the establishment and maintenance of the homes, mobilisation of resources, provision of facilities for education, training and rehabilitation of child in need of care and protection and juvenile in conflict with law and co-ordination among the various official and non-official agencies concerned.
- 2) The Central or State advisory board shall consist of such persons as the Central Government or the State Government, as the case may be, may think fit and shall include eminent social workers, representatives of voluntary organisation in the field of child welfare corporate sector, academicians, medical professionals and the concerned Department of the State Government.
- 3) The district or city level inspection committee constituted under Section 35 of this Act shall also function as the district or city advisory boards.

Special Juvenile police unit (Section 63):

- 1) In order to enable the police officers who frequently or exclusively deal with juveniles or are primarily engaged in the prevention of juvenile crime or handling of the juveniles or children under this Act to perform their functions more effectively, they shall be specially instructed and trained.

- 2) In every police station at least one officer with aptitude and appropriate training and orientation may be designated as the juvenile or the child welfare officer' who will handle the juvenile or the child in co-ordination with the police.
- 3) Special juvenile police unit of which all police officers designated as above, to handle juveniles or children will be members, may be created in every district and city to co-ordinate and to upgrade the police treatment of the juveniles and the children.

Juvenile in conflict with law undergoing sentence at commencement of this Act (Section 64): In any area in which this Act is brought into force, the State Government or the local authority may direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government or the local authority thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of Section 16 of this Act.

Procedure in respect of bonds (Section 65): Provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973 (2 of 1974) shall, as far as may be, apply to bonds taken under this Act.

Delegation of powers (Section 66): The State Government may, by the general order, direct that any power exercisable by it under this Act shall, in such circumstances and under such conditions, if any, as may be prescribed in the order, be exercisable also by an officer subordinate to that Government or the local authority.

Protection of action taken in good faith (Section 67): No suit or legal proceedings shall lie against the State Government or voluntary organisation running the home or any officer and the staff appointed in pursuance of this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or order made thereunder.

Power to make rules (Section 68):

- 1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.
- 2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely-
 - i. the term of office of the members of the Board and the manner in which such member may resign under sub-section (4) of Section 4;
 - ii. the time of the meetings of the Board and the rules of procedure in regard to the transaction of business at its meeting under sub-section (1) of Section 5;
 - iii. the management of observation homes including the standards and various types of services to be provided by them and the circumstances in which and the manner in which, the certification of the observation home may be granted or withdrawn and such other matters as are referred to in Section

8;

- iv. the management of special homes including the standards and various types of services to be provided by them and the circumstances in which and the manner in which, the certification of the special home may be granted or withdrawn and such other matters as are referred to in Section 9;
 - v. persons to whom any juvenile in conflict with law may be produced before the Board and the manner of sending such juvenile, to an observation home under sub-section (2) of Section 10;
 - vi. matters relating to removal of disqualification attaching to conviction of a juvenile under Section 19;
 - vii. the qualifications of the Chairperson and members, and the tenure for which they may be appointed under sub-section (3) of Section 29;
 - viii. the time of the meetings of the Committee and the rules of procedure in regard to the transaction of business at its meeting under sub-section (1) of Section 30;
 - ix. the manner of making the report to the police and to the Committee and the manner of sending and entrusting the child to children's home pending the inquiry under sub-section (2) of Section 32;
 - x. the management of children's homes including the standards and nature of services to be provided by them, and the manner in which certification of a children's home or recognition to a voluntary organisation may be granted or withdrawn under sub-section (2) of Section 34;
 - xi. appointment of inspection committees for children's homes, their tenure and purposes for which inspection committees may be appointed and such other matters as are referred to in Section 35;
 - xii. facilities to be provided by the shelter homes under sub-section (3) of Section 37;
 - xiii. for carrying out the scheme of foster care programme of children under sub-section (3) of Section 42;
 - xiv. for carrying out various schemes of sponsorship of children under sub-section (2) of Section 43;
 - xv. matters relating to after-care organisation under Section 44;
 - xvi. for ensuring effective linkages between various agencies for facilitating rehabilitation and social integration of the child under Section 45;
 - xvii. the purposes and the manner in which the Fund shall be administered under sub-section (3) of Section 61;
 - xviii. any other matter which is required to be, or may be, prescribed.
- 3) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the Legislature of that State.

Repeal and savings (Section 69) :

- a. The Juvenile Justice Act, 1986 (1986) is hereby repealed.
- b. Notwithstanding such repeal, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act.

Power to remove difficulties (Section 70):

- a. If any difficulty arises in giving effect to the provisions of this Act. the Central Government may, by order, not inconsistent with the provisions of this Act. remove the difficulty-
- b. Provided that no such order shall be made after the expiry of the period of two years from the commencement of this Act.
- c. However, order made under the section shall be laid, as soon as may be after it is made, before each House of parliament.

**F) Legal Protection of Child under Under I.P.C.
Kidnapping and Abduction (Sec. 359) :**

1. provides for two kinds of kidnapping:
 - (a) Kidnapping from India (Sec. 360)
 - (b) Kidnapping from lawful guardianship. (Sec. 361)
2. Both the offences are punishable U/s 363.
3. Sec. 362 defines Abduction.
Abduction by itself is no offence.

Kidnapping from India (Section- 360)

1. Kidnapping has following two kinds:
 - (a) Kidnapping from India.
 - (b) Kidnapping from lawful guardianship.
2. Sub. 360 defines kidnapping from India. It provides:

"Whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from India."

From the analysis of Sec. 360 following essentials are made out:

- a. The accused must have conveyed the victim.
- b. The conveying must have been beyond the limits of India.
- c. Such conveying must have been without the legally authorized on his behalf to consent.
- d. Kidnapping from India may be committed against a person of any age. The conveying must have been of a natural person.
- e. The word 'person' has been used in narrower sense in Sec. 360. Here the word 'person' is restricted

to natural persons. Any company or body of persons or association are not persons for the purposes of Sec. 360.

- f. The word conveying has not been defined in the code. Ordinarily it suggests carrying away or getting carried away.

The offence u/s 360 is punishable u/s 363. Punishment of either description which may extend up to 7 yrs and also fine.

Kidnapping from lawful guardianship (Section 361) :

1. Sec. 361 provides:

"Whoever takes or entices any minor under 16 yrs of age if is a male of under 18 yrs of age if is a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship."

2. From the analysis of Sec. 361 following essentials are made out:

- a. The accused must have taken or enticed a minor. (under 16 yrs in case of a male or under 18 yrs of age in case of a female) or a person of unsound mind.
- b. Such taking or enticing must have been out of the keeping of the lawful guardian.
- c. Such taking or enticing must have been without the consent of lawful guardian.

3. The term lawful guardian has been used in wider sense in Sec. 361. The explanation to Sec. 361 provides:

"Lawful guardian includes any person lawfully entrusted with the care or custody of the minor or other person."

4. Exception: Sec. 361 does not extend to the acts of following persons:

- a. A person who in good faith believes himself to be the father of the illegitimate child.
- b. A person who in good faith believes himself to be entitled to the lawful custody of such child.

The above persons may also be held liable for offence defined u/s 361 if their act is unlawful and for an immoral purpose.

5. There is difference in ages of minors on the basis of their sexes. In case of male minor the age is under 16yrs. In case of female minor the age is under 18 yrs. of age.

Taking or Enticing

1. Taking or enticing suggests inducement or external influence. It has its basis in temptation or creation of a false expectation. In it the act of the victim is not voluntary.

2. Taking or enticing suggests an active role of the accused persons.
3. Varadrajan vis State of Madras⁶

Held: Taking or enticing a minor is entirely different from permitting a minor to accompany a person. The two expressions are not synonymous. In taking or enticing external influence or inducement is necessary.

Abduction (Section- 362):

1. Sec. 362 provides: "Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."
2. One who commits abduction is not a criminal. Abduction by itself is no offence, it is only a helping or accessory act.
3. Abduction is punishable only if it is committed by some criminal intention. Abduction in the circumstances as contemplated by Sec. 364 to 368 may be punishable.
4. Allah Rakhyo, 1934, Sindh

Held: To constitute abduction compelling by force or inducement by necessary means is necessary. For abduction it must be proved that the change of the mind of the victim was by external influence.

Punishable Abductions:

1. Abduction in order to murder (Sec. 364)
2. Abduction with intent secretly and wrongfully to confine a person (sec. 365)
3. Abduction of a woman to compel her marriage etc. (Sec. 366)
4. Abduction in order to subject a person to grievous hurt or slavery etc. (Sec. 367)
5. Wrongfully concealing or keeping in confinement abducted person (Sec. 368)
6. Abducting a child under 10 yrs of age with intent to steal from its person (Sec. 369)

Kidnapping too shall be punishable under the same sections under the similar circumstances.

Kidnapping Abduction

1. Minor - 16 - male
 - 18 - female
 unsound mind
- 1) Any age
2. Removed out of lawful custody, no kidnapping or an orphan
2. Refers to the person kidnapped/abducted need not be in the keeping of any body.
3. Simple taking or enticing away of a minor or unsound mind

3. Force, compulsion or deceitful means used.
4. Consent of person taken immaterial.
4. Consent, if free and given voluntarily, condones the offence.
5. Intention of kidnapper is irrelevant.
5. Intention is important because abduction is not an offence unless committed with certain intent.
6. Not a continuing offence; complete the moment a person is deprived of lawful guardianship.
6. Continuing offence so long as person is moved from one place to other
7. Substantive offence
7. Auxiliary offence, not punishable by itself till intention specified.

G) Legal Protection to the Child Under Evidence Act (Section 112)

According to Section 112 of Evidence Act "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Presumption of legitimacy: An illustration of a conclusive presumption of law is to be found in the provisions of Section 112. It deals with the presumption of the legitimacy of a child. The effect of the provision is that a child born to married parents is conclusively presumed to be their child. The same presumption arises where the marriage was dissolved and the child was born within 280 days after dissolution, the mother remaining unmarried in the meantime.

The essential conditions for the presumption to arise are:

- 1) The child should have been born during the continuance of a valid marriage, or if the marriage was dissolved, within 280 days after its dissolution, the mother remaining unmarried.
- 2) The parties to the marriage should have had access to each other at any time when the child could have been begotten.

Both these requirements are fully satisfied by the very fact of marriage and of living together. It is a presumption founded upon public policy which requires that every child born during wedlock shall be deemed to be legitimate unless the contrary is proved. The presumption will apply to children conceived before marriage as also to those born after the dissolution of marriage, provided the other prerequisites are present.

Access to each other: The presumption of legitimacy largely depends upon the presumed fact that the parties to a marriage have necessary access to each other. It has been pointed out by the Supreme Court in *Chilkuri Venkateswarlu v. Venkatanarayana*,⁷ that as the presumption of legitimacy is highly favoured by

law it is necessary that proof of non-access must be clear and satisfactory.

The presumption of legitimacy is a presumption of law, not a mere inference to be drawn by a process of logical reasoning from the fact of marriage and birth or conception during wedlock. It is a presumption founded upon public policy which requires that every child born during wedlock shall be deemed to be legitimate unless the contrary is proved and, in my view the contrary cannot be said to have been proved unless it is shown that during the whole period when conception might have occurred the husband, whether because of absence or for some other reason, could not have been the child's father.

Even the illness of the husband may not be sufficient to displace the presumption of access, unless the illness is totally disabling. In a case before the Privy Council *Narendra Nath Pahari v. Ram Govind Pahari*⁸ a child was born within 280 days of the husband's death. The evidence was offered of the fact that about the time while the child was conceived the husband was suffering from carbuncle and died of the illness within fourteen days. Their Lordships held the child to be legitimate.

The presumption applies with equal force even where the child is born within a few days or even hours after the marriage.

Vasectomy operation and presumption of legitimacy: In a case before the Kerala High Court⁹ a married woman became pregnant even after her husband had undergone vasectomy operation. The court held that vasectomy was not sufficient by itself to overthrow the presumption of legitimacy. No proof was offered to show whether the operation was successful. Nor there was any evidence showing that the parties had no access before the conception. The allegation that the pregnancy must have been the result of some illegal relation was not repeated by the husband in the witness-box on oath.

Blood group test: The courts do not normally order any body to submit himself for blood test.

CHILD AND CRIMINAL LIABILITY

Chapter IV of the Indian Penal Code deals with the various defences which a person, accused of an offence under the Code or any special or local law can plead. This chapter deals with broad classes of exceptions, namely-

- i. Excusable - Section 76 & 95 of I.P.C.
- ii. Justifiable - Section 96 - 106 of I.P.C.

Excusable defences are those where that act committed is excused for want of necessary requirement of mens rea. In such cases the act is not criminal because the intention was not criminal. But in justifiable defences the act committed is not excused but is justified on account of some considerations neutralising the liability otherwise incurred.

Act of a Child under Seven years of age (Section 82 of I.P.C.): Nothing is an offence which is done by a child under seven years of age.

Infancy is a defect of the understanding and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever. In legal sense both boys and girls were held to be infants under the age of 7 years and were immune from punishment under English and Roman Law.

Both under English and Roman Law when the boy became of 14 and the girl of 12 they were said to have attained the age of discretion, and, therefore, children above this age were held liable for offences committed by them. So the children before they attained this age were said to be doli incapax.

In India a child below 7 years of age is considered to be doli incapax and therefore cannot be held guilty of any offence. Merely the evidence of that age would be a conclusive proof of the innocence of a child and would ipso facto be an answer to any charge against him. In *Marsh v. Loader*,¹⁰ defendant caught a child while stealing a piece of wood from his premises, and gave into custody. Since the child was under the age of responsibility (i.e. 7 years) he was discharged. Where the members of a partnership or coparceners of a joint family are made liable, under certain law, for the criminal act of their servant. the case of minor coparceners will be governed by sections 82 and 83 of the Code. A child below 7 years of age is absolutely immune from criminal liability.

Act of a Child above seven and under twelve of immature understanding (Section 83): 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.

The age at which a person may be said to have acquired sufficient intelligence to judge of the nature and consequence of his acts varies with and depends upon the climatic condition, education, precocity etc. Upon a certain age, the presumption of innocence is conclusive. In our country this age of conclusive presumption is fixed by section 82 of the Code at 7 years. In England this age, is fixed at below 10 years.

Ingredients: The following are ingredients of section 83-

- a. An act done by a child above 7 years but under 12 years of age.
- b. The child must not have attained sufficient maturity of understanding to judge of the nature and consequence of his conduct.
- c. Incapacity must exist at the time of commission of the act.

Section 83 deals with the cases of qualified immunity because a child above 7 but below 12 years of age is presumed to be possessed with maturity of understanding and capacity to commit a crime. However, the presumption is rebuttable and the burden to rebut this presumption lies upon the defendant. A child between 7 to 12 years of age is qualified to avail the defence of doli incapax if it is proved that he has not attained sufficient maturity of understanding to understand the nature and consequences of his conduct on that occasion. In *Hiralal v. State of Bihar*,¹¹ the boy participated in a concerted action and used a sharp weapon for a murderous attack on the accused. In the absence of evidence leading about the boy's feeble understanding of his actions the defence under section 83 was not allowed.

In India a child below 7 years of age is absolutely immune from criminal liability; in England this age is fixed at 10 years.

It may be pointed out that the Indian law relating to infancy suffers from one lacuna. Section 82 deals with an act done by a child below 7 years of age. Section 83 deals with acts of children who are above seven but below 12 years of age. The two sections make no provision for an infant who is of exact 7 years. It is submitted that such an infant should be dealt with under section 82 of the Code because penal statutes are to be interpreted strictly.

It may also be argued that the presumption of capacity and responsibility against the child of above 7 years under the Indian Law seems to be unreasonable and no judge is likely to hold a child of that age group

criminally responsible without satisfying himself that the child has sufficient maturity of understanding to judge the nature and consequence of the act. This principle is based on the principle that quia malitia supplet actatam which means 'malice makes up for age'.

Ulla Mahapatra v/s State¹²-Where the accused, a boy over eleven years but below twelve years of age, picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a kathi (knife) would effectuate his intention.

Krishna v/s State¹³-Where a child of nine years of age stole a necklace, worth Rs. 2-8-0, and immediately afterwards sold it to the accused for five annas, the accused could be convicted of receiving stolen property, because the act of the child in selling the necklace showed that he had attained a sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion within the meaning of this section.

STATE RESPONSIBILITY FOR THE EDUCATION OF CHILD

According to Section 21-A of the Indian Constitution [Inserted by the Constitution (Eighty-Sixth Amendment) Act. 2002]. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Even before insertion of the Article 21-A, new dimensions were given to the fundamental right to life and personal liberty and child's right to education was one of the expanded meanings given by the courts to enable the citizens to enforce this right as fundamental right.

Under Article 41 the State is empowered to make effective provisions for right to education. Article 45 mandated the State to make provision for free and compulsory education for children below the age of 14 years within the time limit of 10 years from the date of the commencement of the Constitution of India. Article 46 mandates the State to promote with special care the educational interest of the weaker sections of the society. The right to education, as understood in the context of Articles 45 and 46, means- every child-citizen of this country has a right to free education upto the age of 14 years, after the age of 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development; and special care of the rural sections and weaker sections of the society shall be taken.

In Unni Krishnan v. State of A.P. (1993) case the directive principles contained in Article 45 have been raised to the status of a fundamental right. In this case it has been held that the children below the age of 14 years have fundamental right to free and compulsory education.

In this case the Supreme Court was approached by the petitioners to re-examine the correctness of the decision delivered by the Hon'ble Supreme Court in Mohini Jain v. State of Karnataka (AIR 1992 SC 1858).

In this case Supreme Court held that every citizen has a right to education under the constitution. The State is under the constitutional obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligations through State owned or State recognized educational institutions. When the State Government grants recognition to the private educational institution it creates an agency to fulfil its obligation under the Indian Constitution. The students are given admission in recognition to their right to education under the constitution. Charging capitation fee in consideration of admission to educational institutions was thus held to be patent denial of a citizen's right to education under

the Constitution of India.

The Court further elaborated that Indian civilization recognises education as one of the pious obligation of human society. To establish and administer educational institution is considered a religious and charitable object. Education in India has never been a commodity for sale. Capitation fee can't be sustained in the eye of law.

In Unni Krishnan's case the right to education came to be more elaborately explained and engrafted to Article 21 of the Indian Constitution.

While declaring the children's right to education as fundamental right under Article 21 of the Indian Constitution the Court clarified that the fundamental rights and directive principles are supplementary to each other. The Supreme Court reiterated its previous views that fundamental rights are empty vessels into which each generation must pour its contents in the light of experience.¹⁴ Directive principles supply life and blood to fundamental rights¹⁵.

Part III and Part IV of the Indian Constitution are like two wheels of a chariot and to give absolute primacy to one over the other is to disturb the harmony of the Constitution.¹⁶

Articles 41, 45, and 46 of the Indian Constitution constitute a simple directive that for the advancement of the nation, the State is obliged to ensure that child is imparted good education. Education develops the understanding and knowledge and it makes the human being powerful. The child's right to education should be determined in the light of Articles 41, 45 and 46 of the Constitution. Now, Article 21-A has been added in the Indian Constitution vide the Constitution (Eighty-sixth Amendment) Act, 2002 according to which the State shall provide free and compulsory education to all children of the age of six to fourteen years.

Another question to be determined by the court was whether a citizen has a right to establish educational institution as a part of his right guaranteed to him by Article 19(1) (g) of the Indian Constitution. The Supreme Court held that a citizen of this country may have a right to establish an educational institution but no citizen, person or institution has a right much less a fundamental right, to affiliation or recognition, or to grant-in-aid from the State.

The Supreme Court, however, categorically held that education is the second highest sector of budgeted expenditure after the defence. Overruling the Mohini Jain's verdict the Supreme Court held that in comparison to other countries, we spent only 3 per cent (it is likely to be raised to 6 per cent) of our gross national product on education.

The implications of Unnikrishnan's verdict were that right to education is available to children who are citizens of India and are below the age of fourteen years. The capitation fee had been retained with reasonable restrictions which, however, cannot be charged arbitrarily. The apex Court has not touched the main problem that is the problem of child's education.

Conclusion and Suggestions: The fundamental rights impose a duty on State to enforce them. In a welfare State the State has to give them positive contents. They are made enforceable. However the Directive principles of State Policy contained in Part IV of the Constitution are fundamental in the governance of the country. While implementing the fundamental rights the State has to keep in view the directives contained in Part IV of the Indian Constitution. The State was mandated to make provisions for

free and compulsory education to the children below the age of fourteen years.

The subject is of vital importance but so far it is most neglected. Bharat lives in villages and the condition of primary education in villages is appalling. In our country schools are opened on papers and it is not ensured whether (i) the teachers are there (ii) the building is there (iii) playgrounds are there or whether there is facility where a child should get education. Apart from this due to scientific developments and industrialization people prefer to migrate to the cities and in cities government does not bother for primary schools because the public schools run by the private managements are equally unmanageable, for they charge the fee which is beyond the reach of common man. In India, poverty due to uncontrolled population is the main cause for deprivation of a child of his primary education. Instead of going to schools he has to go in search of bread and butter. Child labour is rampant in India. It needs long term planning. We will have to eradicate poverty. We will have to control population growth. In villages girls' education is neglected more than that of boys. The female children are kept busy in their households affairs and even parents take work from them which is supposed to be done by a home servant. Generally, they are not allowed to go to schools.

Gandh Ji used to say that if you send your son to the school, only one individual is educated, but when you send your daughter to the school, the whole family, the society, in fact the nation is educated, because no literate mother will tolerate illiteracy in the house.

Their right to education cannot be realised unless those who teach accept that they have a responsibility towards children. Teacher's responsibilities include creating appropriate learning climate for the children in the physical surroundings and emotional climate in which children are disposed to learn.

If the childhood is lost and primary or basic education is not imparted the foundation of good citizenship is weakened. The anarchy or lawlessness in the present political system is due to lack of basic and value based education. The human rights enforcement mechanism must be geared up to ensure that the children below the age of fourteen years are not deprived of their fundamental right to education.

Recently, a fundamental right to education has been incorporated under Article 21-A of the Constitution of India vide the Constitution (86th Amendment) Act 2002. It makes education for 6 to 14 years old children a Fundamental Right within the meaning of Part III of the Constitution.

Now, the country is realising that the wealth of the nation does not lie in the banks but in its primary schools. Send the children, particularly the girl child to the school and build the nation for she is the future of India.

A family in any society consists of an inherited group of people who are related with by birth or marriage. It is a relation between parents and children, relations between spouses or between grand parents and grandson. Good family relationships are vital for the development of child's personality. Developing healthy relation is in the hand of family members. Their habits, way of working, problem solving approach all together make a home heaven or hell. All of us want home to be a place where we can relax and be ourselves, and recover from the conflicts of the external world.

There are different types of family structure in Indian culture. In past there were joint families because members were involved in home business or farming. They lived together and jointly worked in specialized area to generate income for family. There are many benefits of joint family. Children can get better environment. Many members are there to take care in case of any problem. There were less security problems. Members enjoy their festival with full enthusiasm. Still there are happy joint families. But in

modern times, nuclear families are developing. Sons or daughters have to leave parents' house for job and they have separate unit. They have to face many problems but somehow they manage because it is necessary for earning money. There is some freedom in nuclear family. Individuals can take their own decisions to make their future bright. They can ignore some orthodox belief.

Family relationships never lose colors. Though there may be some disagreement between family members, it is very imperative that everyone must remain trustworthy to all relatives and spend lots of time with them. It will augment relationship and can avoid major family conflicts. In order to solve family relationship problems, everyone needs to go off his consciousness up a level and take a deeper look at his values, beliefs, and his characterization of terms like loyalty and family. Family members must share their problems and take major decision in discussion with each member of the family.

Families who have high moral values have prestigious status in society and they are the ideal for those people in society who are confused or did not learn good ethics in teenage living with unity and following ethics, families can contribute to eradicate societal problems. It is observed that in hi tech world, people do not have any relation with neighbour. All are too busy in their work. They donot have time to expand social relationship. So, there is a need to develop strong relationship by following family traditions which provides a good base for bringing the family closer together. We all must step forward to unite family members, respect elders to create an atmosphere of affection.

Objective of this study, to expand the current knowledge base of family characteristics of intrafamilial and extrafamilial child sexual abuse victims and their families is two fold.

- a. To identify the relationship between family interactions and abuse characteristics and examine which family variables, mediate potentially detrimental consequences of child sexual abuse. Family variables include parental support. family communication and perceptions and expectations of behaviour.
- b. To identify differences in perceptions and expectations of sexually abused children and their parents. The multiple perspectives will be attained from sexually abused children, their parents, their clinicians, and lay persons. The child sexual abuse affects the victim's functioning and ability to adjust. Although evidence suggests that the parental support factor plays a key role in the sexually abused child's ability to adjust.

Importance of the grandparents-grandchild relationship: Grand parenting roles are continually evolving and changing as life expectancy increases and family relationship patterns become extremely diverse and complex. Grand fathers will investigate the changing roles of grandfather and intergenerational family relationship patterns.

How children and parents adjust to preschool: Mothers completed questionnaires about parenting attitudes. In the Spring, they completed the Computer-Presented Parenting Dilemmas and participated with their children in a Videotaped boat-building task. Preliminary examination of the videotape task underscores the importance of mothers' sensitivity to their children's need for assistance versus mothers' over or under-involvement in their children's efforts. The videotape coding also suggests the importance of the level of cognitive representation in mothers' speech to their children. Examples of high levels of cognitive representation include mothers' questions that encourage the child to infer cause and effect relationships. Examples of low levels of representation include mothers' requests for the child to name or label an object. The relationship of maternal sensitivity and level of representation to children's cognitive skills in preschool will be examined.

How Schools and Families Promote the Successful Transition of Child to Public School: Sixtyone mothers of kindergarten children completed questionnaires in the Fall and granted permission for the research staff to work with and interview their child's teacher. Parents, teachers and children continued to participate in the Spring. Teachers of 56 of these children provided information about the children's friendships and adjustment during the year; these same children also completed the MCCarthy Scales of Children's Abilities and the Peabody Picture Vocabulary Test.

Relationship of Social, Emotional, and Family Variables to "Risk Status": This study project includes a series of studies of variables that place children at higher risk for deleterious outcomes. One component of this project has been the development of a measure of parenting and family climate, the Computer-Presented Parenting Dilemmas. Three dilemmas assess parental reactions to child misbehaviour and three assess reactions to child distress. Two factor analyses, one for misbehaviour and one for distress, revealed 8-factor solutions. Factors summarizing maternal responses to child misbehaviour include power assertion (spank, yell, "do it because I said so"), offering the child a bribe to stop misbehaving, and time out. Factors summarizing maternal responses to child distress include warmth (hug, helping child figure out what went wrong), and offering the child a bribe to stop crying. Preliminary results underscore the importance of these factors in predicting children's behaviour problems in preschool.

The long range goal for the current study is to examine the efficacy and outcomes of systemic family therapy and training. This project is designed to identify whether or not marriage and family therapy and training is effective. Specifically, the aims of this project will identify and examine the following-

- 1) the components and factors which account for the effectiveness and outcomes of family therapy;
- 2) the relationship between various co-therapy teams (pairs of beginners, pairs of advanced, faculty, or mixed pairs,) and client perceptions of behavioural outcomes in therapy, and
- 3) the differences between therapist characteristics at various developmental levels in their training and how these differences impact therapy outcomes.

LEGAL CONTROL OF CHILD LABOUR

The Child Labour (Prohibition and Regulation) Act, 1986

Introduction: The need for providing protection and safeguards to children have first been stated in the Geneva Declaration of the Rights of the Child. 1924 and was recognised in the Universal Declaration of Human Rights, 1948 and in the Statutes of specialised agencies of U.N.O. Art, 25 of the Universal Declaration of Human Rights, 1948 provides that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection". Rights to free and compulsory elementary education to children is assured by Article 26.

The Declaration of the Rights of Child, 1959: A concrete step has been taken through the Declaration of the Rights of the child in 1959 which aims that the child may have a happy childhood and enjoy for his own good and for the good of the society, the rights set forth in the Declaration. The Preamble of the Declaration expresses concern of the International Community for child welfare. The child by reason of his physical and mental immaturity, needs special welfare. The child by reason of his physical and mental immaturity, needs special safeguards and care. It also calls upon parents, upon men and women as individuals, and upon

voluntary organisations, local authorities and national Governments to recognise children rights and strive for their observance by legislative and other measures. These rights which the General Assembly of the United Nations calls upon to be recognised and implemented by the National Governments are contained in the following Ten Principles of the Declaration.

International Convention on the Rights of Child, 1989 : A great headway had been made in the year 1989, which marked the 30th Anniversary of the 1959 Declaration of the Rights of the Child and the 10th Anniversary of the international year of the child, when on 20th November the General Assembly adopted an international convention on the rights of child, which was termed by the adopted an international convention on the rights of child, which was termed by the General Assembly President Joseph N. Garba as a binding piece of international legislation. The convention needs to be ratified by 20 countries before it comes into force. Prior to being placed before the assembly the draft of the Convention was approved by the Economic and Social Council and the commission on Human Rights during their sessions in 1989.

Section 1.

Object and Scope: There are a number of enactments which prohibit, the employment of children below 14 years and 15 years of age in certain specified employments. However, there is no procedure laid down in any law for deciding in which employments, occupations or processes the employment of children should be banned. There is also no law to regulate the working conditions of children in most of the employments where they are not prohibited from working and are working under exploitative conditions.

Therefore the Child Labour (Prohibitions and Regulation) Act 1986 has been enacted to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments. The Act seeks to achieve the following objects-

- 1) To ban the employment of children, i.e., those who have not completed their fourteenth year, in specified occupations and processes;
- 2) To lay down a procedure to decide modifications to the Schedule of banned occupations or processes;
- 3) To regulate the conditions of work of children in employments where they are not prohibited from working;
- 4) To lay down enhanced penalties for employment of children in violation of provisions of this Act and other Acts which forbid the employment of children;
- 5) To obtain uniformity in the definition of "child" in the related laws.

In view of sub-section (2) of Section 1 this Act extends to the whole of India. Section 1 (3) provides that the provisions of this Act other than Part III, shall come into force at once, and Part III shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States and for different classes of establishments.

Section 2.

Definition: In this Act unless the context otherwise requires-

- 1) "child" means a person who has not completed his fourteenth year of age;

- 2) "day" means a period of twenty-four hours beginning at midnight;
- 3) "establishment" includes a shop, commercial establishment workshop, farm, residential hotel, restaurant eating house, theatre or other place of public amusement or entertainment;
- 4) "family", in relation to an occupier, means the individual, the wife or husband, as the case may be, of such individual, and their children, brother or sister of such individual;
- 5) "occupier", in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop;
- 6) "port authority" means any authority administering a port;
- 7) "workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of Section 67 of the Factories Act 1948 (63 of 1948), for the time being, apply.

Section 3.

Prohibition of employment of children in certain occupations and processes: No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on:

Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

Section 5.

Child Labour Technical Advisory Committee:

1. The Central Government may, by notification in the Official Gazette, constitute an advisory committee to be called the Child Labour Technical Advisory Committee (hereafter in this section referred to as the Committee) to advise the Central Government for the purpose of addition of occupations and processes to the Schedule.
2. The Committee shall consist of a Chairman and such other members not exceeding ten, as may be appointed by the Central Government.
3. The Committee shall meet as often as it may consider necessary and shall have power to regulate its own procedure.
4. The Committee may, if it deems it necessary so to do, constitute one or more sub-committees and may appoint to any such sub-committee, whether generally or for the consideration of any particular matter, any person who is not a member of the Committee.
5. The term of office of the manner of filling casual vacancies in the office of and the allowances if any payable to the Chairman and other members of committee and the conditions and restrictions subject

to which the committee may appoint any person who is not a member of the committee as a member of the Committee or a member of any of its sub committees.

Section 6.

Application of Part: The provisions of this Part shall apply to an establishment or a class of establishments in which none of the occupations or processes referred to in Section 3 is carried on.

Section 7.

- a. No child shall be required or permitted to work in any establishment or a class of establishments.
- b. The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.
- c. The period of work of a child shall be so arranged that inclusive of his interval for rest, under subsection (2), it shall not be spread over more than six hours, including the time spent in waiting for work on any day.
- d. No child shall be permitted or required to work between 7 p.m. and 8 a.m.
- e. No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.
- f. No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Section 8.

Weekly holidays: Every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Section 9.

Notice to Inspector:

- 1) Every occupier in relation to an establishment in which a child was employed or permitted to work immediately before the date of commencement of this Act in relation to such establishment shall, within a period of thirty days from such commencement, send to the Inspector within whose local limits the establishment is situated, a written notice containing the following particulars, namely:
 - a. The name and situation of the establishment;
 - b. The name of the person in actual management of the establishment;
 - c. The address to which communications relating to the establishment are sent;
 - d. The nature of the occupation or process carried on in the establishment.

- 2) Every occupier, in relation to an establishment who employs, or permits to work, any child after the date of commencement of this Act in relation to such establishment. shall. within a period of thirty days from the date of such employment. send to the Inspector within whose local limits the establishment is sit~3ted, a written notice containing the particulars as are mentioned in subsection (1).

Section 11.

Maintenance of register: There shall be maintained by every occupier in respect of children employed or permitted to work in any establishment. a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment. showing:

- a. the name and the date of birth of every child so employed or permitted to work;
- b. hours and periods of work of any such child so employed or permitted to which he is entitled;
- c. the nature of work of any such child; and
- d. such other particulars as may be prescribed.

Section 13.

Health and Safety

1. The appropriate Government may, by notification in the Official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.
2. Without prejudice to the generality of the foregoing provision, the said rules may provide for all or any of the following matters, namely-
 - a. Cleanliness in the place of work and its freedom from nuisance;
 - b. Disposal of wastes and effluents.;
 - c. Ventilation and temperature;
 - d. Dust and fume;
 - e. Artificial humidification;
 - f. Lighting;
 - g. Drinking water;
 - h. Latrine and urinals;
 - i. Spittoons;
 - j. Fencing of machinery;
 - k. Work at or near machinery in motion;
 - l. Employment of children on dangerous machines;
 - m. Instructions, training and supervision in relation to employment of children on dangerous machines;
 - n. Device for cutting of powers;
 - o. Self-acting machines;
 - p. Device for cutting of powers;
 - q. Self-acting machines;

- r. Pits, sumps, openings in floors, etc.; t. Excessive weights;
- s. Protection of eyes;
- t. Explosive or inflammable dust gas, etc.;
- u. Safety of buildings and machinery.

Section 14.

Penalties:

1. Whoever employs any child or permits any child to work in contravention of the provisions of Section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.
2. Whoever, having been convicted of an offence under Section 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.
3. Whoever-
 - a. Fails to give notice as required by Section 9, or
 - b. Fails to maintain a register as required by Section 11 or makes any false entry in any such register; or
 - c. Fails to display a notice containing an abstract of Section 3 and this section as required by Section 12; or
 - d. Fails to comply with or contravenes any other provisions of this Act or the rules made thereunder;

shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both.

Procedure relating to offences (Section 16):

1. Any person, police officer or Inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.
2. Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.
3. No court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act.

Meaning of Complaint: The word 'complaint' as used in this section has a wide meaning since it includes even an oral allegation. No particular form of complaint is prescribed. But a complaint must be an allegation prima facie disclosing the necessary facts that are necessary to constitute the offence alleged. It is on the

basis of these facts that the Magistrate takes action.

While children around the world continue to face various forms of adversity in the 21st century, girl children in particular are subjected to multiple forms of oppression, exploitation, and discrimination due to their gender. United Nations statistics, national reports and studies initiated by non-governmental organizations repeatedly show that girls, as a group, have lower literacy rates, receive less health care, and are more often impoverished than boys. It is also important to note these conditions, more often than not, do not improve as girls grow to become women.

Forms of discrimination against girl children are numerous and vary depending on the traditions, history, and culture of a particular society. In our work to improve the condition of girls, Youth Advocate Program International focuses on three life-threatening practices that impact the lives of millions of girl child: female infanticide, female genital cutting, and honour killing.

Age of Majority: The Convention on the Right of the Child (CRC) defines a child as a person under the age of 18 unless national laws recognize the age of majority earlier. The age of 18 is now accepted as the world standard, since every country has ratified the CRC except Somalia and the United States.

Infanticide: Female infanticide is the murder of a young girl child, often occurring as a deliberate murder of a girl infant or young girl child or as the result of neglect. Selective abortion—also called gender-selective abortion, sex-selective abortion, or female foeticide—is the abortion of a foetus because it is female. Medical technology has made it possible for parents to discover the sex of a foetus at earlier stages of pregnancy, so many women from communities with a preference for boys practice selective abortion.

These practices occur most frequently in societies where a girl child is viewed as culturally and economically less advantageous than a boy child.

Female infanticide and foeticide are predominantly practiced in regions of significant poverty and overpopulation. One reason boys are more valued than girls is preserving lineage, as family lineage and family name are carried only by males in most societies. Also, children are expected to care for parents in their old age in many countries, so raising a son becomes a better investment because once a girl married, she becomes the property of her husband and of virtually no value to her parents.

Economically: Girls often have a lower earning potential than boys, as boys are more likely to find work and receive higher pay. This is significant in poor communities where each family member is expected to add to the household income. A girl can no longer contribute to her family's income after marriage when she must turn all of her wages over to her husband. In many situations, it is much more of an economic burden to raise a girl, as many cultures require religious and social ceremonies for girls but not boys.

Sex-selective abortion: Female infanticide has had consequences beyond the loss of many females' lives. They have contributed to the dramatic change in the ratio of men to women in some countries. As fewer men can find women to marry in societies where these practices are widespread, the trafficking of women from foreign countries to sell as wives has become a profitable business.

Female Genital Cutting (FGC) : Refers to any practice that involves the removal or the alteration of the female genitalia. It is a centuries-old cultural practice found in many countries among people following various religions and beliefs, but is most prevalent in Africa.

Honour killing is the practice of killing girls and women who are perceived to have defiled a family's honour by allegedly engaging in sexual activity or other improprieties before marriage or outside of marriage.

"Improper" behaviour justifies grounds for killing, however. has expanded to include transgressions that are not initiated by the girl, including rape, incest, sexual abuse, or sexual rumor. A girl is killed most often by male kin-father, husband, brother, uncle, or cousin-to restore honour to her family. Criminal penalties for honour killing are lenient in countries where this practice is most prevalent.

Because many cases go unreported, it is difficult to determine the number of women who are the victims of honour killing. The United Nations Population Fund (UNPF) estimates as many as 5,000 females are being killed each year as a result of honour killings. Honour killing occurs most frequently in Muslim countries.

Violations of honour include engaging in an illicit sexual relationship, eloping, being raped, being sexually abused by a family member and then running away, seeking divorce, and being seen alone with a man or boy even if the interaction is innocent. Some children are killed for being born to a mother who is accused of violating a family's honour. Allegations of these activities or other improprieties are enough to instigate honour killings, often little or no proof is necessary.

Depending on the country, community, and specific situation, girls can be strangled, shot, beaten to death, stabbed, hacked to death, or in some cases, burned.

In communalistic societies, actions committed by any family member affect the social stature of the entire family. The family's reputation comes before an individual's interests or safety. Men in many societies consider their family's honour to be inextricably tied to their own honour, and thus perform honour killings to cleanse the family's name from the improper deeds of girls or women.

The punishment for men who commit honour killings is often non-existent or extremely lenient. In some cases, judges extend light sentences because they often empathize with men who claim to have killed in defense of their honour.

Significant steps have been taken in the last decade to stop the practice of honour killing and to hold men who murder female family members more accountable for their actions.

Offence Relating to Minor Girls: Section 366-A and 373 of the Indian Penal Code are significant on this point according to which procurement of minor girl for purposes of prostitution selling or letting, to hire a minor girl and buying or obtaining possession of a minor girl for the same purpose are criminal actions conveying a penalty of upto ten year and fine.

There are many situations of violence against women. Apart from violence that is not gender specific such as murder, there are laws that relate to sexual violence inflicted upon women. Especially sexual crimes against children in the country during last five years have gone up.

Child Sexual Abuse: Child sexual abuse exists in India on a comparable scale to the rest of the world. A study presented at a meeting of psychiatrists and psychologists in Chennai, about 74 percent college going girls have suffered some form of sexual abuse from the age of 10 or even earlier.

In *Satish Mehra v. Delhi Administration* (1996) 9 SCC 760 the court found the accusations of child abuse against the father 'eerie' and 'incredible', in spite of the medical examination called out on the eight-year-old girl which revealed a wide vaginal opening-wider than expected of their age group.

The mother submitted that the father had been sexually abusing their daughter from the age of three while they were in the United States, backing this up with reports from child psychotherapists, doctors and the

police in India and the United States.

Lapses in Child Abuse Law: Indian laws dealing with sexual offences do not specifically address child sexual abuse. Section 376 of the Indian Penal Code-the Rape Law, as it is otherwise known-is rarely interpreted to cover the entire range of sexual abuse like oral abuse, finger abuse and others. Such forms of abuse tend to get covered under Section 354 of the Indian Penal Code as violation of a woman's modesty.

Just as the law makes a distinction among rape, gang rape and custodial rape, it needs to differentiate between sexual abuse by parents or relatives of a child.

Child abuse is often not a one-time event; sexual child abuse is equivalent to being raped over and over again, mostly by a person who has a position of power or authority over the child. The law does not take note of it.

Recording the child's evidence is a severe problem area. A little child has to relate the horror in front of as many officials by recounting the tale again and again. Girls go into distress when this happens in front of mostly male officials. Audio or video recording of the child's evidence once is an important provision which needs to be introduced.

In Sakshi v. Union of India,¹⁷ it was observed that in a case of Child Sexual Abuse the provisions of Section 327(2) of Cr.P.C. which contemplate trial in camera shall apply. Video conferencing is permissible. Screen or some such arrangements may be made where victim or witnesses do not see body or face of accused.

CHILD AND CONTRACTUAL LIABILITY

According to Section 10 of I.C. Act, 1872, one of the essential requirements of a valid contract is that the parties must be competent to contract.

Section 11 of I.C. Act, 1872, contains the provision regarding competency to contract. It states that "Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Hence, the following persons can not enter into a valid contract-

- a. Persons of unsound mind
- b. Persons disqualified from contracting by any law to which they are subject.
- c. Minors i.e. a person under the age of 18 years or if a guardian of a minor's person or property is appointed by the court, then under the age of 21 years (according to Section 3 of Indian Majority Act, 1875).

Now the question arise- What will be the nature of contract if it is entered by a incompetent person. The Indian contract Act 1872 is fully silent about the nature of contract entered by incompetent person.

Legal position (nature) of minor's contract: Before the year of 1903, there was a great controversy in India whether a minor's contract is void or voidable but in the year of 1903 -

In the case of Mohri Bibi Vs Dharmodas Ghose ILR (1903) 30 Cal. 539 PC. The Privy Council finally settled the issue and held that a minor's contract is wholly void i.e. void-ab-initio.

But if the contract is in the intent of the minor, court may declare such a contract as valid.

In the case of Srikakulam Subramanyam Vs Kurra Sabha Rao (1949) 75 IA 115, the Privy Council held that if the guardian transfers property inherited by minor in lieu of the payment of debt, the transfer shall be binding.

This means that a guardian can enter into a contract on behalf of the minor and if it is in the interest of minor, the contract is valid in the eyes of law.

Effect of Minor's Contract: It is clear from the above discussion that a minor's contract is void-abinitio and has no existence in law. But a pertinent question arises-what will happen of the benefits which have been derived by a minor under a void contract?

In Mohri Bibi's case, Section 64 and 65 of Indian Contract Act, 1872 and Section 41 of specific Relief Act, 1877 was argued against minor.

The Privy Council did not apply Section 64 of I.C. Act, 1872, as it deals with the consequences of rescission of voidable contracts. Hence P.C. held that Section 64 and Section 65 refers to contracts made by persons competent to contract and therefore it did not apply to minor's contract.

As regards Section 41 of Specific Relief Act, 1877 the Privy Council held that this section gives discretion to the court to make any compensation to the other which justice may require but the court did not order restitution in this case because the appellant had advanced the loan to Dharmodas Ghose while knowing that he was a minor.

But generally, if a minor obtains some property by misrepresenting his age, he can be ordered to restore the property or goods thus obtained, but the minor may be compelled to restore the goods or property so long as they are traceable.

In the case of Leslie Vs Shell (1914) 3 KB 607.

The defendant minor induced the plaintiff to lend him two sums of £ 200 each by fraudulently misrepresenting himself as major. The plaintiff filed the suit to recover the amount with interest. The court dismissed the suit because the minor had spent the money received. Since money was not traceable, the minor could not be asked to restore it.

But in the case of Khan Gul Vs. Lakha Singh (1928) 9 Lah. 701. A Lahore full Bench did not follow the rule laid down in Leslie Vs Sheill .

But Later on in the case of Ajudhia Pras'ad Vs. Chandan Lal AIR 1937 All. 610 (FB). The Allahabad High Court followed the rule laid down in Leslie Vs. Shell. Then the controversy was finally resolved in 1963 by the inclusion of Section 33(2)(b) in the specific Relief Act, 1963.

According to Sec. 33(2) (b) of specific Relief Act, 1963 - "the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian

Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has been benefited thereby."

Hence it is clear from the provision that the decision of Khan Gul Vs. Lakha Singh has been finally adopted.

Application of Principle of Estoppel, in case of a minor's contract

Now the question is whether the principle of estoppel applies if a minor fraudulently misrepresents himself to be major and later on asserts that contract is void because he was a minor when he contracted.

In the case of Mohri Bibi Vs. Dharmodas Ghosh ILR (1903) 30 Cal. 539(PC), The PC held that there can be no estoppel where the truth of the matter is known to both the parties. In this case the moneylender had received the information through his agent Kedarnath about the defendants minority.

In the case of Khan Gul Vs. Lakha Singh ILR (1928) 9 Lah. 701 and in case of Ajudhia Prasad Vs Chandan Lal AI R 1937 All. 610 (FB) it was held that no estoppel can be pleaded against the statute and rule of estoppel is not applied because a minor's contract is void-ab-initio.

Rule of Ratification whether applicable to minor's contract?

A minor's contract can not be validated by ratification after attaining majority because it is void-ab-initio as held in Mohri Bibi Vs. Dharmodas Ghosh ILR (1903) 30 Cal. 539(PC).

- Q.1. Discuss law relating to minor's contract with the help of decided cases and relevant provisions under the Indian Contract Act, 1872.
- Q.2. State the law relating to testimony of children under the Indian Evidence Act, 1872. Discuss fully.
- Q.3. Explain with illustrations the criminal liability of children below 12 years.
- Q.4. Discuss the main features of the Child Labour (Prohibition and Regulation) Act, 1986.
- Q.5. Why was Juvenile Justice Act passed?
- Q.6. What is child marriage?
- Q.7. What does Article 45 of the Constitution say?
- Q.8. Distinguish between kidnapping and abduction.
- Q.9. Buying minor for the purposes of prostitutions is punishable under Section 373 of I.P.C. Discuss.

SUGGESTED READINGS

Falvia Agnes	:	Law and Gender Inequality
Shobha Saxena	:	Crime Against Women and Protective Laws
Dr. S.C. Tripathi and Vibha Arora	:	Law Relating to Women and Children
Manjula Batra	:	Woman Law Relating to Children in India