

TRAINING MODULE

# Rights of Women Under the Personal Laws in India



TRAINING MODULE  
RIGHTS OF WOMEN UNDER  
THE PERSONAL LAWS IN INDIA

**HRLN**

Human Rights Law Network

New Delhi

October 2011

**TRAINING MODULE: RIGHTS OF WOMEN UNDER THE PERSONAL LAWS IN INDIA**

October 2011

© Socio Legal Information Centre\*

Author

**Varsha C. Sinha**

Co-ordination

**Aparna Dwivedi**

Editor

**Suresh Nautiyal**

Proofs

**Dr. Nand Kishor**

Design

**Mahendra S Bora**

Published by

**Human Rights Law Network**

(A division of Socio Legal Information Centre)

576, Masjid Road, Jangpura

New Delhi – 110014, India

Ph: +91-11-24379855/56

E-mail: [publications@hrln.org](mailto:publications@hrln.org)

Printed at

**Print Graphics**

Ramesh Market, New Delhi-110065, India

Supported by



European Union



Dan Church Aid



**Disclaimer**

The views and opinions expressed in this publication are not necessarily views of the HRLN. Every effort has been made to avoid errors, omissions, and inaccuracies. However, for inadvertent errors or discrepancies that may remain nonetheless, the HRLN takes the sole responsibility.

\*Any section of this volume may be reproduced without prior permission of the Human Rights Law Network/Socio Legal Information Centre for public interest purposes with appropriate acknowledgement.

## **ACKNOWLEDGEMENTS**

---

The *Training Module: Rights of Women Under the Personal Laws in India* is an outcome of the efforts of the WJI team at the Human Rights Law Network.

First of all, sincere thank to Senior Advocate Colin Gonsalves, Founder of the Human Rights Law Network, for providing an opportunity to come out with such a valuable publication.

Thanks to Ms. Varsha C. Sinha, lawyer and women's rights activist, for authoring the Training Module.

Last but not the least, sincere thanks to the Research & Publications Division, HRLN, headed by Mr. Suresh Nautiyal, for creative and intellectual contribution.

—WJI Team, Delhi

# Contents

---

General Introduction	7
Operational Training Module for the Lawyers and Paralegals on Personal Laws Applicable in India	11
Note to the Training on the Module	14
<b>Chapter-I</b>	
Introduction	19
<b>Chapter-II</b>	
Restitution of Conjugal Rights	25
<b>Chapter-III</b>	
Judicial Separation	35
<b>Chapter-IV</b>	
Divorce	47
<b>Chapter-V</b>	
Law on Maintenance	85
<b>Chapter-VI</b>	
Dowry and Dower or Mehr	121

# Contents

---

## **Chapter-VII**

Adoption 139

## **Chapter-VIII**

Women and Succession Rights 151

## **Chapter-IX**

The Protection of Women from Domestic Violence Act, 2005 197

## **Chapter-X**

Domestic Violence: Workshop Methodology 217

## **Chapter-XI**

Uniform Civil Code 231

Conclusion 237

Bare Acts for Reference 239



## GENERAL INTRODUCTION

---

Each legal education handbook should begin with the grounding on the need to understand law from a gender perspective. It should be emphasised that this is not just a working session on what the law says, but also on women's realities, how the formal justice system treats women, the nature of laws, their interpretations by the courts and their impact on women.

Reasons for this *Training Module: Rights of Women Under the Personal Laws in India*, is covering all the Personal Laws applicable in India in legal perspective. The handbook spread over eleven chapters is well articulated with exercises and methodology to conduct the sessions on the above mentioned topic. It has been an earnest endeavour while writing this handbook that it serves as a course for imparting knowledge to the paralegals on the Personal Laws applicable in India and how it affects a woman once she is married. This handbook has been designed to:

- Augment the capabilities of potential trainers/facilitators/resource persons in conducting programmes on Personal Laws in India for paralegals.
- To empower the paralegals with special emphasis on women to realise and understand their position in relation to the law applicable to them
- To empower women to bring about social and economic development, and ensuring gender and social justice within the Personal Laws governing them.
- To acquaint women with knowledge about the Personal Laws applicable in India, in the light of the Constitutional provisions, state government Acts, Rules and Executive orders if any.
- To help them acquire legal knowledge and the necessary skills in having access to court and actively take part for development of gender justice.



- To strengthen delivery of justice system by developing a cadre of barefoot lawyers in rural areas

Training approach & methodology: For the purposes of training and methodology, the approach of trainers will play a crucial role in achieving the objectives of capacity building of paralegals on personal law. The trainer must reflect deep awareness on the subject.

### **Training Methodology**

- Participatory learning/Power Point presentations
- Lectures restricted to a minimum
- Simulation games
- Case studies
- Experience sharing
- Role play/drama
- Film show

This handbook deals with the rights of women in different Personal Law. India is a secular country and there is no Uniform Civil Code even though there is uniformity in criminal and other laws. Thus different religions confer varying rights on the women in respect of personal matters like the marriage, divorce, succession and maintenance, etc. This Module tries to explain the rights of Hindu, Muslim and Christian women and their position with regard to their personal matters.

The first chapter deals with the introduction as to what are Personal Laws and the name of the laws applicable to the Hindus, Muslims, Christians, and Parsis. The second chapter deals with restitution of conjugal rights. The third chapter deals with judicial separation. The fourth chapter deals with divorce. The fifth chapter deals with maintenance. The sixth chapter deals with adoption. The seventh chapter deals with custody of children. The eighth chapter deals with dowry and mehr. The ninth chapter deals with property and inheritance. An inheritance and succession right in co-

parcener property is also discriminative even after making the amendment of 2005 in Hindu Succession Act. There are provisions for succession to women under Indian Succession Act, 1925 which is applicable to Christians and Parsis. The tenth chapter deals with The PWDVA, 2005. This law contains a comprehensive definition of the term “domestic violence,” provisions recognising a women’s right to reside in the shared household and to claim for court orders in the event of domestic violence occurring. Further in recognition of a woman’s inability to approach courts to initiate proceedings, the law puts in place mechanisms that allow her access to court procedure and support services. It identifies specific functionaries such as the protection officers and services providers whose primary duty is to assist women in accessing relief’s provided under the law. The eleventh chapter contains a lucid explanation about the Uniform Civil Code. This chapter highlights what is Uniform Civil Code, the mandate of Article 44 of the constitution and the judicial behaviour with regard to this controversial subject. At the end of the discussion on Personal Laws, there should be a small thought provoking discussion on the necessity of a Uniform Civil Code along the following lines stated in the chapter.



# OPERATIONAL TRAINING MODULE FOR THE LAWYERS AND PARALEGALS ON PERSONAL LAWS APPLICABLE IN INDIA

---

## What is this Training Module about?

This Training Module has been developed to assist the facilitator in the conduct of training programs on Personal Laws by providing the learning material with exercises.

The training guide on Personal Laws seeks to provide useful guidance to the trainers for undertaking training programs for paralegals.

## A. Objective of the proposed training

This module has been designed:

- To augment the capabilities of potential trainers/facilitators/resource persons in conducting programs on Personal Laws in India for paralegals.
- To empower paralegals & lawyers with training emphasizing the issues of women in order for them to realise and understand their position in relation to the law applicable to them.
- To empower women to bring about social and economic development, and gender and social justice within the Personal Laws governing them.
- To familiarise women with knowledge about the Personal Laws applicable in India, in the light of the Constitutional provisions, State Government Acts, Rules and Executive orders if any.
- To help them acquire legal knowledge and the necessary skills to have access to court and actively participate in the development of gender justice.

- To strengthen the delivery of the justice system by developing a cadre of barefoot lawyers in rural areas.

## **B. Training Approach & Methodology**

The approach taken by the trainers will play a crucial role in achieving the objectives of capacity building of para-legals & lawyers on Personal Law . The trainer must have a deep awareness on the subject.

### **Training Methodology**

- Participatory Learning /Power Point Presentation
- Lectures restricted to a minimum
- Simulation Games
- Case Studies
- Experience Sharing
- Role Play/Drama
- Film Show

### **Participants**

- Lawyers, Law Students and Para-Legals

### **Trainer or Facilitators Profile**

- Must be versed with the personal laws governing people
- Must be grounded in the subject areas covered in the Module.

### **Contents or Suggested Agenda for the Training**

**Session I:** General Orientation : Introduction and Icebreakers

**Session II:** General Orientation : Introduction To Personal Laws And Women's Rights Under Personal Law In India

**Session III:** Women's Rights Under Restitution Of Conjugal Rights And Judicial Separation

**Session IV:** Women's Rights Under Divorce

**Session V:** Women's Rights Under Maintenance

**Session VI:** Women's Rights for Dowry And Mehr

**Session VII:** Women's Rights Under Adoption, Custody & Guardianship

**Session VIII:** Women's Rights Under Property And Inheritance

**Session IX:** Women's Rights Under Protection of Women from Domestic Violence Act, 2005

**Number of Sessions :** 9

**Suggested Venue :** Intermix of classroom and residential

**Seating arrangements:** Participants and trainers sit/stand on the ground in a circle for the group work and move around for the games and other activities. If necessary they can also sit on chairs, in circles.

**Number of Trainees:** 30 to 40

**Duration:** Two days

## **NOTE TO THE TRAINERS ON THE MODULES**

---

### **i. How Adults Learn**

A trainer has to know how adults learn. Unlike children, adults do not learn on the basis of a “belief system.” Adult learn:

- If they want and need to learn
- By rechecking their learning with their past or present experiences
- Where the environment for learning is informal and non-threatening

These three characteristics of adult learning make training different from teaching. The trainer should always bear in mind this fundamental difference between training and teaching when planning the delivery of training material to participants.

### **ii. Recall: 5 Main Factors**

Training imparts skills and knowledge to be applied by the participants in their work. The trainers have to be aware that:

- Participants are more likely to remember the beginning of events or the first in a series of events.
- The brain’s recall rapidly decreases after 24 hours without review. Hence recap and review, after regular intervals, of training input is strongly recommended.
- We remember unusual things exceedingly well such as death type experiences, winning a lottery ticket etc. This is the reason why when a person narrates his “life-history” over a period of time, only major events come to her/his mind. This first day in school, last day in the college, date of marriage, birth of the

children, death of a near and dear one, first day in employment and such other events are recalled very easily.

- Recall is high for things which are linked by mnemonics or analogy such as “Sen,” where “S” stands for somebody “e” for everybody and “n” for nobody.
- We are more likely to remember the end of events or the last in a series of events.

### iii. To Activate the Whole Brain

A successful trainer must be able to activate the whole brain of the participants. When the whole brain is activated both absorption of inputs and contribution to the training programme by the participants improve significantly.

### iv. Training Delivery

Training delivery is a critical variable for successful training. Remember the following points:

- (a) **Communication is the first golden rule:** The trainer must be careful in her / his communication. She/he has to communicate well.
- (b) **A Trainer’s demeanor has a great impact on the participants:** The trainer must be enthusiastic about her/his work.
  - If the trainer is not enthusiastic about the training, how can the trainer expect the participants to be enthusiastic.
  - The trainer should consciously use her/his eyes and eyebrows to communicate enthusiasm.
  - The trainer must always maintain a sparkle in her/his voice.
  - The trainer must fight boredom of repetitive sessions by introducing new anecdotes, examples, games, ice-breaking sessions etc, or by changing the lesson structure or methods given in the



previous section.

(c) **Mannerisms of the trainer can make or mar a training session:**

The trainer must, therefore, be careful about her/his mannerisms. There are certain tips that come in handy, as stated below:

- The trainer should not be tempted to play around with what are called ‘manual props’ such as pens, pencils, pointers, spectacles, key chains, etc, during a training session.
- If the trainer is a male he should not keep any loose change in his pocket and fiddle around with it during a training session.
- The trainer should be aware of her/his verbal tics and work on eliminating them (ie OK ! - ‘You know’ – ‘and so forth’ – ‘Now’.....)
- The trainer should avoid ‘closed’ or tense body positions such as clasped hands and crossed arms. She/he should be confident and open. He/she should have open arms.
- The trainer need not worry about pacing, leaning etc during the training sessions.
- The trainer should check her/his hair and dress before entering the class/workshop rooms. A neatly dressed trainer is well received just as neatly organised data is well used.

### **Ten Tips for Trainer**

- The trainer should never be late for her/his session.
- The trainer should never keep her/his eyes on his/her notes.
- She/he must never read out anything except quotations from a text.
- The trainer should exaggerate her/his body movements and verbal emphasis, because paralinguistic and facial expressions convey more than words do.

- The trainer must perform; she/he should not act.
- The trainer should often pause remembering that silence is much longer for the trainers than for the participants.
- The trainer should use humour in the presentation; a laugh is worth a thousand frowns.
- The trainer must be enthusiastic about the training. If the trainer is not enthusiastic about the session why should the participants be enthusiastic at all?
- The trainer should not try for technical accuracy to the last detail.
- The trainer should keep the training sessions simple.



# Chapter

# I

## INTRODUCTION



**Objective:** What are Personal Laws?

**AIM:** Understand the concept of Personal Laws and the areas that they govern.

**Time:** 30 minutes

**Materials needed:** Whiteboard and Markers

### **Method**

- If the facilitator has engaged with the group before and done the session on sources of law, ask the participants to recollect the earlier exercise on 'Sources of Law.'
- If not, then ask the participants about the various sources of law.
- Once the group identifies 'custom/ tradition and religion' as a source of law, ask the participants to define custom and provide examples of customs and customary practices in their community.
- List on a chart paper/ board the customary practices related to marriage.
- Explain to the group the concept of Personal Laws.

### **Discussion points**

- What are Personal Laws?
- What are the different Personal Laws that exist and who do they govern?

Please remember that all Personal Laws, apart from Muslim Law which is based on the interpretation of the Shariat, have been codified. The Muslim Law on maintenance and the right of muslim women to divorce has been codified as well.

### **Women's Rights vis a vis Personal Laws**

India being a secular country entitles each citizen to be governed by her/

his Personal Laws based on the religion that she/he follows inter alia in the matter of marriage and divorce, maintenance, adoption, custody of children and inheritance. These laws are 'Personal Laws.'

### **What is Family Law/Personal Law?**

It is a distinct set of laws that reflect different religious laws, customs and traditions of the community to which the law in question applies. In a larger perspective Personal Law relates to family matters. These laws may be codified or un-codified and govern all family relationships such as marriage, divorce, maintenance, guardianship, adoption, custody of children, inheritance and succession. Till today, marriage is regulated by customs and traditions to a large extent.

### **What are the Personal Laws applicable in our country?**

#### **Laws governing Hindus**

- The Hindu Marriage Act, 1955
- The Hindu Adoptions and Maintenance Act, 1956
- The Hindu Minority and Guardianship Act, 1956
- The Hindu Succession Act, 1956

#### **Laws governing Muslims**

- The Kazis Act, 1880
- The Muslim Personal Law (Shariat) Application Act, 1937
- The Dissolution of Muslim Marriages Act, 1939
- The Muslim Women (Protection of Rights on Divorce) Act, 1986
- The Muslim Women (Protection of Rights on Divorce) Rules, 1986

## **Laws governing Christians**

- The Indian Christian Marriage Act,1872
- The Divorce Act, 1869 ( Prior to the amendment in 2001, this Act was called the Indian Divorce Act,1869)
- The Indian Succession Act, 1939

## **Laws governing Parsis**

- The Parsis Marriage and Divorce Act, 1936
- The Indian Succession Act, 1939

## **Secular/Universal Laws governing all citizens irrespective of the religion they follow**

- Special Marriage Act ,1954
- Guardians and Ward act,1860
- The Protection of Women against Domestic Violence Act,2005
- Section 125, Code of Criminal Procedure, 1973





# **Chapter II**

## **RESTITUTION OF CONJUGAL RIGHTS**



## **What is restitution of conjugal rights?**

Restitution of conjugal rights is a remedy available to both the husband and wife aggrieved by the desertion by the other spouse without any reasonable cause. In other words, if either husband or wife moves out of the company of the other without any reasonable cause, the law makes a provision for the aggrieved to go to court and enforce his or her matrimonial right vis-à-vis the other spouse. This can be done by filing a petition in court seeking for resumption of cohabitation. The clause for the decree of restitution of conjugal rights is also found in the Special Marriage Act of 1954, the Parsi Marriage Act of 1936, and the Indian Divorce Act of 1869.

## **Restitution of conjugal rights under the Hindu Marriage Act,1955**

### **Who can ask?**

Only married Hindus either husband or wife can ask for restitution of conjugal rights under section 9 of the Hindu Marriage Act 1955.

### **When can they ask?**

They can ask whenever either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other.

### **How can they ask?**

The aggrieved party may file a petition to the court for restitution of conjugal rights. On being satisfied with the truth of the statements made in the petition court, and as long as there is no legal ground as to why the application should not be granted, a decree for restitution of conjugal rights may be passed. The fundamental rule of matrimonial law is that one spouse who is at liberty to the society and comfort of the other spouse, forms the foundation of the right to bring a suit for the restitution of conjugal rights. The court has the duty of granting a decree for restitution in those cases where either spouse has abandoned or withdrawn from the company of the other.

## **On whom is the burden of proof?**

The burden of providing reasonable proof depends on the person who has withdrawn from the society.

## **Where do you file a petition for restitution of conjugal rights?**

An application for restitution of conjugal rights has to be made to the family court or else to the district court. If the court is satisfied of the truth of the statements and allegations, a decree for restitution of conjugal rights can be passed.

## **What are the implications on grant of decree?**

- One of the important implications of section 9 is that it provides an opportunity to the aggrieved party to apply for maintenance under section 25.
- Maintenance can also be obtained by the party in case when the action is pending under section 24. Hence, a wife who is not agreed for judicial separation or disruption of marriage, can obtain/seek maintenance from her husband without filing a suit for the same under the Hindu Adoptions and Maintenance Act, 1956.
- Another important implication of the section is that it provides a ground for divorce under section 13(1A) on a condition that there has been no restitution of conjugal rights between them for a period of one year or more after the passing of a decree for the same.

## **How valid is the use of restitution of conjugal rights?**

A petition for restitution of conjugal rights is often filed in case of one spouse who feels that the other has left him or her without any justifiable reason and that the only relief she or he wants is for the spouse to come back into the matrimonial home. This has been questioned by various activist in our country on the ground that this provision has been used to forcefully keep partners together when the couple was unwilling to stay together which may be due to incompatibility or unwillingness. With the

passage of time restitution of conjugal rights is being used as a legal strategy by the Hindu husbands to refuse maintenance to their wives. For example, the husband throws the woman out of the house either for dowry etc. The moment the wife files a suit for maintenance, the husband files a petition for restitution of conjugal rights which works as a hindrance to not provide maintenance to his wife. The argument given in the maintenance court is that he was willing to take his wife but the wife is unwilling to return and therefore, he is not responsible for providing her maintenance. His argument is based on the legal principal 'one cannot take advantage of his or her wrongs.' In this case as argued by the husband, the wife cannot take advantage of her own wrongs.

### **What are the defenses available against a decree for restitution of conjugal rights?**

If there is a reasonable cause for a person to withdraw from her/his spouse, then a decree for restitution of conjugal rights can be denied by the court. What is a reasonable cause is up to the court to decide depending on the fact and allegation made in that specific case. In considering this situation, the court will look into whether there is cruelty or domestic violence in the case.

### **Example**

Naresh filed a suit for restitution of conjugal rights against his wife Savitri after she left him. The court did not entertain his suit as it was proved that Naresh was a drunkard who used to habitually abuse his wife.

### **Case laws**

1. In **Asha Kumari vs Satish Kumar 1990 (1) HLR 7** the court held that as during the life time of the first spouse living the second marriage is void, the man marrying when the first wife is still alive cannot claim restitution as against the second wife.
2. In **Ammimi vs Kuttappan 1990 (1) HLR 454**, where the husband

makes the allegation of unchastity so that she is returned to her matrimonial home, and the allegation is not found to be baseless, it was held that this has to be considered along with the persistent refusal of the wife to stay with the husband. In the instant case, the petition moved by the wife for restitution of conjugal rights was not granted.

3. In **G.Rama Krishna Pillai vs J.Vijayakumari Amma (AIR1990Ker.55)**, the court held that where the husband claims restitution of conjugal rights after a big gap of seven years, there is justification for restitution when the wife does not accompany him.

4. In **Sareetha vs Venkatasubbaiah AIR 1983 AP 356**, the Andhra Pradesh High Court held that the effect of decree of restitution of conjugal rights under Section 9 of the HMA is to coerce the unwilling party to cohabit against that persons consent thus offending article 14 and 21 of the Constitution of India and also held that section 9 was violated of the right to privacy of the individual. This was overruled by the Supreme Court in Saroj Rani vs Sudershan and it was held that in privacy of home and married life, neither Article 21 nor Article 14 has any place.

## **Restitution of conjugal rights under the Dissolution of Muslim Marriage Act, 1939**

### **Who can ask?**

Only married Muslims either husband or wife can ask for restitution of conjugal rights under section 2 of The Dissolution of Muslim Marriage Act, 1939.

### **When can they ask?**

When either husband or wife ceases to cohabit with the spouse without just and reasonable cause then either could seek a right to restitution of conjugal rights. This is a remedy under common law.

If the marriage is void (Batil) or irregular (fasid) under the provisions of the Muslim Law a decree for restitution of conjugal rights will not be

granted. This is provided under The Dissolution of Muslim Marriage Act, 1939.

Some of the grounds on which the wife can resist a suit for restitution of conjugal rights:

- The marriage is irregular
- Legal cruelty by the husband i.e., real violence endangering her health, safety or causing real apprehension of such danger
- False charges of adultery by the husband
- Gross failure in performing matrimonial duties
- Non-discharge of dower's/Mehr's liability

### **Example**

Razak and Arifa got married under the Muslim Customary Law. Razak kept harassing Arifa and assaulted her on many occasions. He used to treat her with cruelty. Arifa finally got fed up and left him and went to stay with her parents. Razak filed a suit in the Court for restitution of conjugal rights but could not succeed because his wife had just and reasonable cause to leave him.

### **How can they ask?**

The aggrieved party may file a petition in the court for restitution of conjugal rights and upon service of notice and hearing the parties, a decree for restitution of conjugal rights may be passed.

## **Restitution of conjugal rights of Christians under the Divorce Act, 1869**

### **Who can ask?**

Only married Christians, either husband or wife, can ask for restitution of conjugal rights under Section 32 of the Act.



### **When can they ask?**

Either husband or wife, has withdrawn without reasonable excuse from the society of the other.

### **How can it be asked?**

The aggrieved party files a petition in the District Court under section 32 for restitution of conjugal rights and the court on being satisfied of the truth of the statements made in the petition, can grant the decree for restitution of conjugal rights.

## **Restitution of conjugal rights under the Parsis Marriage and Divorce Act, 1936**

### **Who can ask?**

Only married Parsis either husband or wife, can ask for restitution of conjugal rights under Section 36 of the act.

### **When can it be asked?**

When a wife or husband has deserted or without lawful cause ceased to cohabit with his each other. The party so deserted or with whom cohabitation has so cease may sue for restitution of her/his conjugal rights in the court.

### **How can it be asked?**

By filing a suit for restitution of conjugal rights in the court and if the court is satisfied of the truth of the allegations contained in the application and where there is no just ground why relief should not be granted the court may grant a decree for restitution of conjugal rights.

According to the Parsi Law the Parsi chief matrimonial court and Parsi district matrimonial courts have to be established to hear suits under this Act.

## **Restitution of conjugal rights under Special Marriage Act, 1954**

### **Who can ask?**

A marriage between two persons; women or men whose religion are different or are from the same religion can ask for restitution of conjugal rights under section 22 of the Special Marriage Act.

### **When can they ask?**

When a husband or a wife has withdrawn from the society of the other without any reasonable excuse.

### **How can they ask?**

The aggrieved party files a petition in the District Court for restitution of conjugal rights. The court on being satisfied of the truth of the statements made in the petition, can grant the decree for restitution of conjugal rights.

### **On whom is the Burden of proof?**

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



# Chapter III

## JUDICIAL SEPARATION



## Session Methodology

### Aims & Objectives

- To sensitise the group on the concept of judicial separation
- To understand clearly the grounds for judicial separation under different Personal Laws and the rights of women in these situations
- To understand the legal processes and the options available to women

Divorce is the dissolution of the legal relationship of marriage where the spouses will cease to be husband and wife. Judicial separation is different from divorce as the marriage remains intact but the couple is allowed to live separate.

Personal Laws govern divorce, separation and maintenance as well as marriage. Each Personal Law is different and therefore there are many issues to be understood. While doing the session, it is important not only to provide input on the rights of women, but the facilitator should also encourage analysis on challenges faced by a woman when she seeks judicial separation, maintenance and custody of her child.

The facilitator must cover divorce under each Personal Law. It would help the facilitator if the session is structured to address codified laws like Hindu, Christian and Special Marriage Act and then deal with Muslim Law. While doing this session, she/he may seek the inputs of a legal expert so that procedural matters can be properly explained to the group. Since the session will also need to discuss Muslim Laws, it may be useful to seek the assistance of a lawyer or an expert in Muslim Laws to deal with the aspects of the session.

The facilitator should seek to address the following questions:

- What is judicial separation? Misconceptions about it in the community.
- What are the grounds for Judicial separation? Please note that the grounds are the same as divorce in the Personal Laws. The

facilitator must know both.

- Concepts such as cruelty, insanity and all other grounds must be clearly explained.
- What is the procedure for securing judicial Separation?

## Exercise 1

**Title:** Grounds for Judicial separation

**Purpose:** To clarify legal grounds for judicial separation

**Time:** 60 minutes

**Material required:** Chartpapers, pens, whiteboard and markers

### Steps

- Ask the group if they have had to deal with the problem of separation from husband or judicial separation. If the person is comfortable she can be asked to narrate her story.
- Or, the facilitator could begin the session by asking questions to the group divided into two or three:

**Group 1:** What do they understand by the term cruelty? Ask the group to talk about different examples from their experience and what has been heard in their community. Ask the group to list different instances of cruelty.

**Group2:** what does adultery mean? How do you think it can be proved?

**Group3:** What does it mean to be of unsound mind? On what basis can you decide that a person has mental illness?

### What is Judicial Separation?

In a marriage, either party or both parties may discontinue living with each other despite being legally married. This technical situation is called judicial separation. The decree for judicial separation does not sever or dis-

solve the marriage. It only provides time and an opportunity for reconciliation and adjustment. Mutual rights and obligation arising out of marriage are suspended. The parties can live separately keeping their status of wife and husband throughout their life time if they fail to reconcile. If they want to separate they can file a petition for divorce on the ground of Judicial Separation. Thus, the decree of Judicial separation permits the parties to live apart without any obligation for either party to cohabit with the other.

*The clause for the decree of Judicial Separation is also found in the Special Marriage Act of 1954, the Parsi Marriage Act of 1936, and the Indian Divorce Act of 1869.*

## **Judicial separation under the Hindu Marriage Act, 1955**

### **Who can ask?**

Only married Hindus, either husband or the wife, can ask for Judicial separation under section 10 of the Hindu Marriage Act 1955.

### **When can they ask?**

Either husband or wife could ask on the grounds of divorce as given in section 13 (1) and the wife also on any grounds given in section 13(2). The grounds are mentioned below:

What are the grounds when the courts pass a decree for judicial separation?

When section 10 is read along with section 13 of the Hindu Marriage Act the following are the grounds for Judicial Separation:

1. Adultery: If after the marriage either husband or wife has had voluntary sexual intercourse with a person other than her/his spouse.
2. Cruelty: If either husband or wife behaves in a manner which causes physical or mental stress to the other.
3. Desertion: A divorce may be sought on the grounds of desertion if either



husband or wife has abandoned her/his spouse for a period of at least two years or more. There has to be no justification for this abandonment.

4. Conversion: Either spouse has ceased to be a Hindu by conversion to any another religion.

5. Unsound Mind: A divorce may be taken if either spouse is incurably of unsound mind or suffering from any such mental disorder .Unsoundness of mind would mean some form of madness or insanity and where either spouse cannot be expected to continue living with the other.

6. Leprosy: If either spouse is suffering from incurable form of leprosy, it is a ground for divorce.

7. Venereal disease: If either spouse is suffering from communicable venereal disease.

8. Renunciation of the world: A divorce may be sought if either spouse has renounced the world by entering any religious order.

9. Disappearance of spouse: If the party has not been heard of as being alive for a period of seven years or more, by persons who would naturally have heard.

### **Grounds available only to a wife**

10. First wife can file for judicial separation if her husband has married a second wife.

11. Husband has committed rape of someone other than the wife, sodomy or bestiality.

12. Marriage took place before the wife attained 15 years and she repudiated it before attaining 18 years.

13. The husband has not provided the wife maintenance for over two years.

### **Where do you file a petition for judicial separation?**

The aggrieved party may a file a petition to the family court or where there

is no family court in the district court for judicial separation on the grounds mentioned above. The court may pass a decree for judicial separation. It is no longer obligatory for the petitioner to cohabit with the respondent.

Where a decree for judicial separation has been passed and the husband and wife get over their differences and want to live together, the decree will not come in their way and the court has the power under section 10(2), HMA to rescind. This must be exercised with due care.

### **What is the effect of judicial separation?**

Where a decree for judicial separation has been passed and there has been no resumption of cohabitation between the parties to the marriage for a period of one year or more; then it becomes a ground for divorce between the parties.

## **Judicial separation of Christians under the Divorce Act 1869**

### **Who can ask?**

Only married Christians, either husband or wife, can ask for judicial separation under section 22 of the act.

### **When can they ask?**

When either of the husband or the wife married under the Christian Law ask for it on the following grounds given under section 22 of the act.

- Adultery
- Cruelty
- Desertion for 2 years or more

### **Case law**

In *Jorden Diengdoh vs Swaranjeet Singh Chopra*, 1989 RLR 595 the court held the following as cruelty on the husband's part. Husband deceiving his

wife as to antecedents, refusal to cooperate over the family matters, not maintaining personal cleanliness, nagging, moods of sulkiness during which the husband ignore his wife, killing wife's child, brutality to her child, systematic neglect or insult, willful neglect to maintain his wife and children, in certain circumstances, desertion, sexual malpractices on the other spouse such as interrupts, or grossly excessive or revolting sexual demands, refusal to have a child, false accusations of adultery, misconduct in relation to third parties such as husband's indecent assault on the child of the marriage or his step-daughter or his conviction for indecent exposure, writing of threatening letters to wife, making false complaint of theft against her to the police and writing letter(s) to her superior(s) containing false and baseless allegations.

### **Where do you file a petition for judicial separation?**

The aggrieved party can file an application in the District Court under section 23 of the said Act for Judicial separation on the grounds mentioned above. The court on being satisfied of the truth of the statements made in the application and where there is no legal ground why the application should not be granted may pass a decree for judicial separation.

### **Judicial separation under the Parsi law**

#### **Who can ask?**

Only married Parsis either the husband or the wife can ask for judicial separation under Section 34 of the act.

#### **When can they ask?**

A suit for judicial separation may be filed under section 34 of the Parsi Marriage and Divorce Act, 1936. The grounds for which would be the same as in the case of divorce.

#### **What are the grounds for judicial separation?**

The following are the grounds for judicial separation and divorce as given

in section 32 of the Parsis Marriage and Divorce Act, 1936 and as amended in 1988.

- Continuous absence of seven years.
- Non-consummation of marriage within one year owing to wilful refusal.
- Unsound mind provided the other spouse was unaware of the fact at the time of marriage and the divorce must be filed within three years of marriage.
- Pregnant by some other man provided the husband was unaware of the incident during the time of marriage and that he must not have undergone sexual intercourse after he came to know about the situation. The divorce must be filed within two years of marriage.
- Adultery, bigamy, fornication, rape, or any other type of perverse sexual act.
- Act of cruelty.
- Suffering from venereal disease or forcing the wife into prostitution.
- Sentenced to prison for seven years or more.
- Desertion for two or more years.
- Non-resumption of cohabitation after passing an order of maintenance or a decree of judicial separation.

### **Where do you file a petition for judicial separation?**

By filing a suit for restitution of conjugal rights in the court and if the court is satisfied of the truth of the allegations contained in the application and where there is no just ground why relief should not be granted, the court may grant a decree for restitution of conjugal rights.

*According to the Parsis Law the Parsis chief matrimonial court and Parsis district matrimonial courts have to be established to hear suits under this act.*

## **Judicial separation under the Special Marriage Act, 1956**

### **Who can ask?**

A husband and wife married under the provisions of the Special Marriage Act can seek Judicial Separation under section 23 of the Act.

### **When can they ask?**

A suit for judicial separation may be filed under section 23 of the Special Marriage Act 1956. The grounds for which are given below.

### **What are the grounds for judicial separation?**

The following are the grounds for judicial separation and divorce as given in section 27 of the Special Marriage Act, 1956:

- Adultery.
- Desertion without cause for at least three years before filing the petition.
- Imprisonment for seven years or more for an offence under IPC.
- Cruelty.
- Unsoundness of mind for not less than three years.
- Communicable venereal diseases.
- Leprosy.
- Disappearance of spouse. Has not been heard of as being alive for seven years or more by those persons who would naturally have heard of.

### **Where do you file a petition for judicial separation?**

A petition for judicial separation can be moved in the district court under section 31 of the Act by either the husband or the wife on the grounds on which a petition for divorce might be presented and on the ground of

failure to comply with a decree for restitution of conjugal rights.

When the court grants a decree for judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent but if an application is moved by either party and on being satisfied of the truth of the statements made in the application the court could rescind the decree if it consider it just and reasonable.



**Chapter**

**IV**

**DIVORCE**





## Session Methodology

### Aims & Objectives

- To sensitise the group on the concept of divorce.
- To understand clearly the grounds for divorce under different Personal Laws and the rights of women in these situations.
- Discuss and analyse the myths surrounding divorce.
- To understand the legal process and the options available to women.

The facilitator must cover divorce under each Personal Law. It would help the facilitator if the session is structured to address codified laws like Hindu, Christian and Special Marriage Act and then deal with the Muslim Law. While doing this session, she/he may seek the input, of a legal expert so that procedural matters can be properly explained to the group. Since the session will also need to discuss the Muslim Law, it may be useful to seek the assistance of a lawyer or an expert in the Muslim Laws to deal with that aspect of the session.

The facilitator should seek to address the following questions:

- What is divorce? Misconceptions about divorce in the community.
- What are the grounds for divorce? Please note that the grounds are different for men and women. The facilitator must know both.
- Concepts such as cruelty, insanity and all other grounds must be clearly explained.
- What are the different kinds of divorce?
- Procedure for securing a divorce.

### Exercise 1

**Title:** Myths and Facts on Divorce

**Purpose:** To clarify what is understood by the term divorce

**Time:** 45 minutes

**Materials needed:** Whiteboard and markers

**Steps:**

- The facilitator can start the session with a discussion on the meaning of the term divorce. The following questions may be asked:
- What does the group understand by the term divorce?
- Under what circumstances do people consider the option of a divorce?
- Do women look for options other than divorce?
- How do they think their community would react to a separated or divorced woman?
- The purpose of the discussion is to allow the facilitator to assess the level of understanding in the group on what constitutes divorce. This discussion can be used as a starting point to address and clarify misconceptions and myths associated with divorce in the group. The facilitator can use the box on myths and facts given below.

## **Myths and Facts**

**1 Myth:** If there is a dispute between a husband and wife and the husband wants a divorce, the village elders can call a meeting and decide on the divorce.

**Fact:** The panchayat or the village does not have the authority to grant a divorce or force a separation. Divorce is a legal process and cannot be issued at the whims of the panchayat.

**2. Myth:** People are often influenced by the movies and many think that divorce means merely signing on a stamped agreement and then the matter is final.

**Fact:** This is also not true. If a woman signs a paper agreeing to divorce her husband it does not mean that divorce is complete. Proper legal procedure must be followed.

**3. Myth:** Epilepsy, HIV/AIDS, diabetes are ground for seeking divorce.

**Fact:** NO, epilepsy, HIV/AIDS, diabetes are not grounds for seeking divorce.

**4. Myth:** If a woman is unable to produce a child the man can seek a divorce.

**Fact:** This is also false and is not grounds for seeking a divorce.

### **Note to the facilitator**

This discussion should be followed by an exercise on grounds for a divorce and judicial separation. Two exercises are given below. Either one can be used by the facilitator after modifying it to suit the context. These exercises will address the following questions:

- What does the group think are grounds for divorce?
- How can divorce be obtained?
- What is divorce?

### **Exercise 3**

**Title:** Grounds for Divorce

**Purpose:** To clarify legal grounds necessary for divorce

**Time:** 60 minutes

**Materials needed:** Chartpapers and pens

#### **Steps:**

- Divide the participants into small groups.
- Each group will analyse different grounds for divorce and how to prove them.

The following examples can be used:

Group1: What does cruelty mean? Ask the group to talk about different examples from their experiences and what they have heard in the community. Ask the group to list different instances of cruelty.

Group2: What does adultery mean? How can it be proven?

Group 3: What does it mean to be of unsound mind?

On what basis can you decide that a person has mental illness?

#### **Exercise 4**

Title: Grounds for Divorce

**Purpose:** To clarify legal grounds necessary for judicial separation and divorce

**Time:** 60 minutes

**Materials needed:** Case studies given in advance to the group on small slips of paper

#### **Steps:**

The facilitator will have to prepare the cases in advance and write them on small slips of paper. This exercise can be done in two ways:

- First: If the group is small (10-15 people) the facilitator can put all the slips in a bowl and pass it around the group. Play some music, and when the music stops the person who has the bowl has to pick a slip of paper, read the case and state her/his opinion on it. The larger group can then spend a few minutes discussing the view expressed by the person.
- Second: If the group is large (25-30 people), then divide the participants into groups and get them to discuss the cases and come up with their opinions and solutions.

The case studies that could be used are given below:

## Case Study

- Savita has been married to Pramod for three years. Six months ago, Pramod was accused of raping the neighbor's daughter. A case was filed and Pramod was found guilty and sentenced to seven years in prison. Savita is very upset about finding out that her husband is a criminal and comes to you for help. What advice will you give her?

After the cases have been presented the facilitator should lead a discussion on the Law of Divorce. The facilitator must cover all the grounds for divorce available for men and women in this discussion. She should also have elaborated discussion on women's right to stridhan, maintenance and custody.

## Note to the facilitator

The facilitator must prepare for this session by reading up the legal information on Personal Laws. The emphasis should be on analyzing the case from a women's rights perspective. While discussing cruelty, the facilitator should ensure that the group understands the different aspects of cruelty, i.e. mental, physical, verbal, economic deprivation, etc. For example, while adultery is in itself a separate ground for divorce, it is often very difficult to prove. Courts have often held that the husband's adulterous life causes mental cruelty to the wife and this is a ground for divorce. Courts have also held that non-consummation of marriage by the husband or the wife is also cruelty.

In this session, depending on time the facilitator can choose to cover one personal law per session or cover all at the same time. If the facilitator chooses to cover all Personal Laws, it may help her to use the chart given at the end of the chapter.

## What is a Divorce?

Divorce is the dissolution of the legal relationship of marriage where the spouses will cease to be husband and wife. Divorce can be sought only on grounds recognised by the law i.e. under the Hindu Marriage Act.

There are two forms of divorce. One is the contested divorce where one spouse has to prove a matrimonial wrong on the part of other and the second is the mutual consent divorce where both the parties state that it is impossible to continue to live together and mutually opt out of the marriage.

## **Divorce under the Hindu Marriage Act, 1955**

### **Who can ask?**

Only married Hindus either husband or the wife can ask for judicial separation under section 10 of the Hindu Marriage Act 1955.

### **When can they ask?**

Either husband or wife could ask on the grounds of divorce as given in section 13 (1) and the wife also on any grounds given in section 13(2). The grounds are mentioned below:

### **I) Grounds for contested Divorce**

#### **What are the grounds under the Hindu Marriage Act that a person can seek divorce?**

Section 13 of the Hindu Marriage Act spells out the grounds and the procedure for seeking divorce.

#### **a. Adultery : Sec. 13(1) (i)**

The Hindu Marriage Act defines adultery as the act of voluntary sexual intercourse by the respondent with a person other than her/his spouse. Thus, in order to constitute adultery, the applicant has to prove that she/he was married to the respondent and that the respondent has had sexual intercourse with another person other than her/ him. In many causes, the Courts have held that one act of sexual intercourse by the respondent is sufficient to constitute adultery under this section. Proof of adultery entitles a person to seek either judicial separation or divorce.

The burden to prove adultery is on the petitioner. He or she must prove

that an act amounting to adultery was committed. A mere statement is not enough. The statement should be substantiated by concrete evidence.

Example:

Tabesh, was already married to Rani. Quite often, he would go out with another woman and spend nights with her in hotel rooms. Rani can file for a divorce on the grounds of adultery under Section 13(1) (i) of the Hindu Marriage Act, 1955.

### **b. Cruelty: Sec. 13(1) (ia)**

Sec. 13(1) (ia) only states that if after marriage, husband or wife treats the other partner with cruelty, it is a valid ground for divorce. The section has not defined the term cruelty. But over the years the courts have developed an understanding and meaning of cruelty based on the specific circumstances of each case. These are:

- Acts and omissions of such a nature that the couple cannot reasonably be expected to live with each other.
- The behaviour of husband or wife which causes physical or mental trauma and/ or stress to the other.

Cruelty is a form of domestic violence. Thus, cruel behaviour may take any form including mental, physical, emotional, economic and sexual.

**Example:** Smt Asha Handa vs Baldev Raj Handa, AIR 1985 Del 76

Arti and Subhash have been married for two years. Arti complains that for the last one year her husband has done little or nothing to help her run the household. He takes away her entire salary leaving behind only a meagre amount for domestic and her personal use. She says that he is incorrigible and inexcusably comes home late and whenever she raises this issue with him, he reacts sharply. Not only does he snubs her but also abuses and slaps her. It seems like he is too full of himself to think of anyone else. Fed up with this behavior, Arti has filed for divorce on grounds of cruelty. Even though he did not intend to be cruel, acts such as these are considered to amount to cruelty by the courts. If it can be proved that the respondent is



overbearing, harsh and abusive and resorts to violence, then the courts can pass a decree of divorce in the applicant's favour.

### **Types of cruelty recognised in law**

Cruelty can be either physical or mental. Some examples of mental and physical cruelty have been mentioned below:

- Not maintaining the wife and children.
- Domestic violence.
- Sexual abuse.
- Threat of violence.
- Verbal abuse.
- Demands of dowry (see case law Shobha Rani Vs Madhukar Reddi (1988)1SCC105).
- Husband assaulting wife. A single act of violence may be sufficient to be an offence of cruelty(see case law Smt A P Marry Vs K G Raghavan).
- Falsely accusing the spouse of adultery or unchastity repeatedly.
- Persistent refusal to have sexual intercourse.
- Drunkenness.
- False criminal charges.
- Birth of illegitimate child.
- Threat of suicide.

**Example:** Mukesh would quarrel with his wife Radha and abuse her family members. He would put chilli powder in the children's mouths when they fall sick. He would curse the whole family. The court granted a divorce in Radha's favour because on all occasions, even though she continued to reside in the matrimonial home, she did not forgive Mukesh for his acts

of cruelty.

**c. Desertion: Sec. 13(1) (ib)**

A divorce or judicial separation may be sought on the grounds of desertion if either the husband or the wife has abandoned his/ her spouse for a period of at least two years or more without the consent of the other party and without any justifiable reason. Wilfully neglecting a person and not performing marital obligations would also amount to desertion.

In order to constitute desertion under section 13(1) (ib), the petitioner should also be able to prove that the spouse has left her/him for a continuous period of not less than 2 years. The law recognises two kinds of desertion, one which is actual desertion where a person leaves the home and the second kind called constructive desertion which applies in situations where a couple continue to live together yet there is neglect and a failure to perform marital obligations.

**Example:** Mamta went on a trip to Sri Lanka and due to civil strife at that time could not return for two years. This does not amount to actual desertion and sanjeev cannot get a divorce on the grounds of desertion.

**d. Conversion to another religion: Sec. 13(1) (ii).**

Judicial separation or divorce may also be sought on the grounds that either party has converted from Hinduism to any other religion.

**Example:** Mukesh hates everything that is Hindu and, therefore, eats food that is not allowed in his religion and says bad things about all the Hindu gods. He has changed his name to James and goes to the infant Jesus Church every Sunday. He is still a Hindu because he has not converted to Christianity and thus his wife Archana cannot file for a divorce. Also, if he converts to any other religion such as Jainism, Buddhism or Sikhism, she still cannot get a divorce because the Hindu Marriage Act defines a Hindu to include Buddhism, Jainism and Sikhism.

**e. Incurably of unsound mind or suffering from mental disorder: Sec. 13(1) (iii)**

One of the conditions of a valid marriage is that neither party should be

incapable of giving a valid consent due to unsoundness of mind. A contravention of this ground renders the marriage voidable at the instance of the other party under section 12(1) (b). If a person is diagnosed to be mentally ill but is able to take care of his/her daily needs and is able to lead a normal life, this will not be a ground for divorce for the other party.

Sec. 13(1) (iii) affords an option to annul the marriage on grounds of unsoundness of mind after the marriage has taken place. There are two conditions to be fulfilled before a decree for divorce is made on this ground:

- The person's unsoundness of mind or mental disorder must be incurable.
- The mental unsoundness or disorder must be such that the applicant cannot be reasonably expected to live with the respondent.

### **Courts have considered as unsoundness of mind**

It is often difficult to prove mental disorder or unsoundness of mind as not all forms of mental disorder are debilitating. It is thus very important to understand what constitutes mental illness, what the varieties of mental illness are and what treatments they entail.

Mental disorders such as schizophrenia are such that the person may not know of the illness for a long time after it has set in. It is only during the later stages of one's life that schizophrenia becomes debilitating. The court have therefore held that it is not the presence of mental illness but what that illness is actually doing to the applicant that is important to understand before a decree of divorce is granted in favour of the petitioner.

#### **f. Incurable leprosy: Sec. 13(1) (iv).**

If either spouse is suffering from a form of leprosy that is both virulent and incurable, it is a ground for divorce. What is incurable is decided on the facts of the case (the stage of leprosy of the respondent) and the opinion of the medical profession.

### **g. Venereal Disease: Section 13(1) (V)**

If either spouse is suffering from venereal disease in a communicable form, it is a ground for divorce. It is immaterial that the disease is curable or was innocently contracted but it should not have been contracted from the spouse. No specific duration has been mentioned.

### **h. Renunciation of the world by entering a religious order: Sec. 13(1) (vi)**

A spouse is entitled to file for a divorce if the other renounces all worldly affairs by embracing a religious order. A divorce may be sought if either spouse has renounced the world and entered a religious order. Thus, on a petition for divorce on this ground, the petitioner must prove the following:

- The respondent has entered any religious order.
- She/he has performed the necessary ceremonies.

Thus, merely proclaiming that one has become a sanyasi is not sufficient to prove that the person has formally entered a religious order.

### **i. Disappearance for seven years: Sec. 13(1) (vii)**

**Not Heard Alive** – If a person is not seen or heard alive by those who are expected to be ‘naturally heard’ of the person for a continuous period of seven years, the person is presumed to be dead. The other spouse should need to file a divorce if he/she is interested in remarriage.

A person can present a petition to have the marriage dissolved on the grounds that the other party to the marriage has not been heard of as being alive for a period of seven years or more by those persons who would in the normal course have heard from him or her. According to the Indian Evidence Act, a person is presumed dead if he has not been heard of as alive by people who would normally have heard from him in seven years.

**Example:** Birendra is kidnapped and not heard of for seven years. His wife remarries after this period. However, it is around this time that Birendra is released and comes back home. His wife is not guilty of bigamy as the condition under sec. 13(1) (vii) of the Hindu Marriage Act is satisfied.

Since Birendra had been presumed dead for the past seven years, the marriage with him can be dissolved.

#### **j. Non-resumption of co-habitation after judicial separation or restitution.**

It becomes a ground for divorce if the couple fails to resume their co-habitation after the court has passed a decree of separation. When the husband and the wife have not started to live together for a period of one year or more after the decree for judicial separation or restitution order had been passed, this affords grounds to seek a divorce.

Grounds on which a Hindu Wife may apply for divorce: Sec. 13(2) The following are the grounds for divorce in India on which a petition can be filed by the wife only:

#### **I- Bigamy, Sec. 13(2)**

If the husband had another wife living at the time of the marriage. Bigamy is an offence under the Indian Penal Code and a ground for divorce under sec. 13 of the Hindu Marriage Act, 1955.

#### **II- Deviant sexual behaviour, Sec. 13(2)**

If the husband has, after the marriage, been guilty of rape, sodomy or bestiality, this is a valid ground for divorce for a woman.

Deviant sexual behaviour is a criminal act and is punishable under the Indian Penal Code. Sec. 375 of the Indian Penal Code defines rape and provides a minimum punishment of seven years. Rape is forced sexual intercourse by a man with a woman, not being his wife. The Indian Penal Code unfortunately does not recognise marital rape. The wife can plead that she was sodomised although she cannot lead that she was raped. Sec. 377 of the Indian Penal Code deals with sodomy and bestiality under the heading of unnatural offences. The criminal provision has a maximum of ten years punishment.

#### **III- A decree of maintenance has been passed either under sec. 18 HAMA (Hindu Adoptions and Maintenance Act) or under sec. 125**

## **Cr.PC (Criminal Procedure Code) and the parties have not been living together for over a year since the passing of that decree, Sec. 13(2)**

There may be instances where the husband and wife have separated from each other but during such separation the wife may apply under sec. 18 of HAMA (because she continues to be married to her partner) or under sec. 125 Cr.P.C. After applying for maintenance under either of these provisions and getting a favourable order, the wife may continue to live separately for over one year. In this situation, she is entitled to file for a divorce.

### **IV- Repudiation of marriage, Sec. 13(2)**

A woman who was married before she turned 15 years old can repudiate her marriage before she turns 18, by making an application to the court asking for the marriage to be nullified. She will have to prove that she was married before she turned 15 years and that she repudiated the marriage soon after. It is not important to prove that the marriage was not consummated. This factor is immaterial for the purposes of this provision.

### **The Restrictions on Seeking Matrimonial Relief**

#### **a) Taking advantage of one's own wrong**

A person cannot take advantage of one's own wrong at the time of seeking any relief. Taking advantage of one's own wrong means that one who comes to Court must come with clean hands and with sincerity.

#### **Examples:**

A. A husband who had illicit relations with another woman, ignored and ill treated his own wife. When the wife confronted the husband regarding his affair with another woman, he hurled abuses at her and threatened to throw her out of the house. As a result, both quarreled every day. In such a situation if the husband goes to Court seeking divorce on account of mental cruelty by his wife, the Court will state that he cannot come to Court and take advantage of his own wrongs. The court further states that even assuming that the wife was perpetrating mental cruelty upon the husband, it was actually the husband who had enticed her to quarrel with him by having an affair.

B. A husband filed a case of restitution of conjugal rights but actually did not allow the wife to join him. After one year, the husband went to court stating that his wife was refusing to join him and therefore he should be granted a divorce. The court would not entertain his petition for divorce, since he was trying to take advantage of his own wrongs.

### **b) One year bar**

In order to ensure that the parties to a matrimonial proceeding are not taking a hasty decision, a petition for divorce cannot be filed within the first year of marriage. However, there are a few exceptions. If the following circumstances exist the court may allow the petition:

- Exceptional hardship to the person bringing the petition to Court
- The children of the marriage
- No reasonable probability of reconciliation between the parties

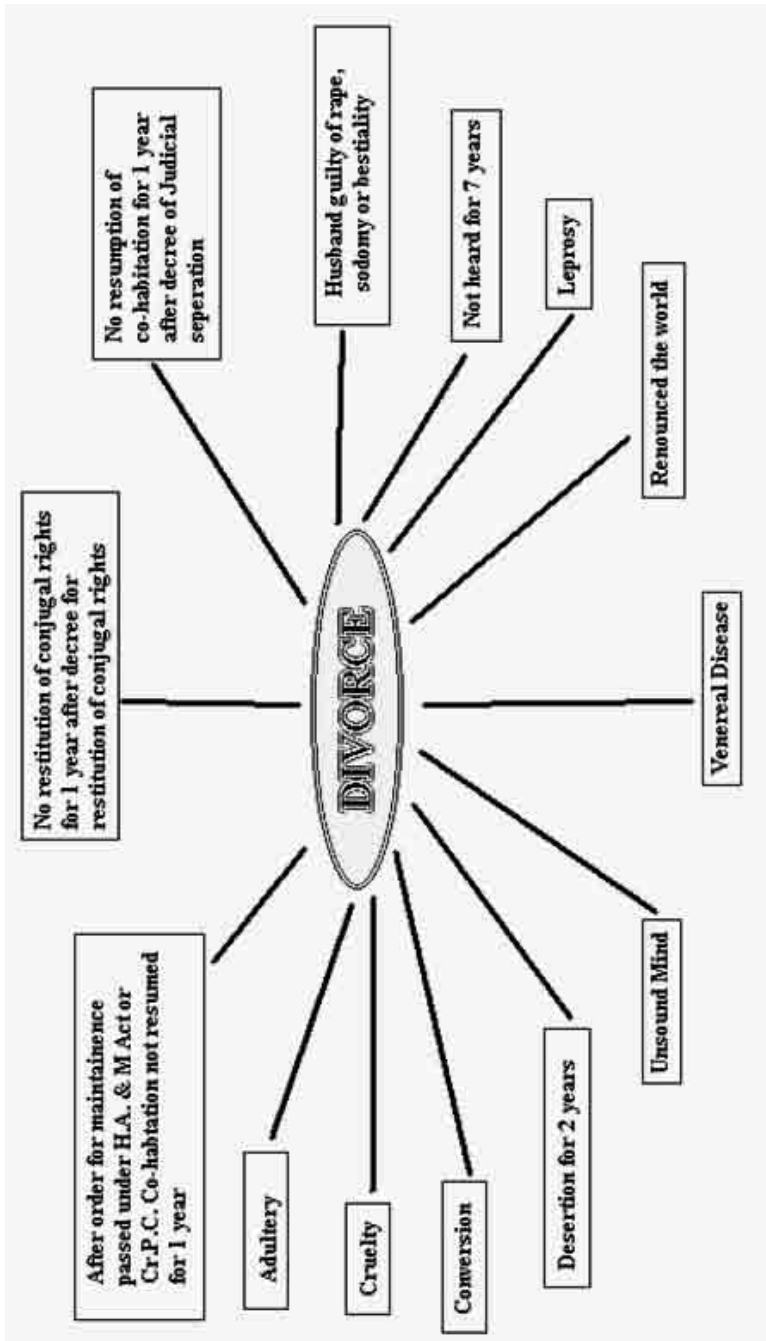
### **Latest Amendment to the Personal Law**

On August 31, 2010, the President of India signed a Bill which was notified in the official gazette on 1st September 2010. The Personal Laws Amendment Act, 2010 which removed the age-old gender discrimination against women and gave Indian women equal rights as men in adopting children and becoming guardians of minors, including their own children.

The Personal Laws (Amendment) Act, 2010 has removed the gender discriminatory provisions from two different laws - the Guardians and Wards Act, 1890 and Hindu Adoptions and Maintenance Act, 1956.

The Guardians and ward Act allowed a court to appoint either the father, or any other person in case the father was not alive, as the guardian of a minor child, thus diluting the mother's claim to be appointed guardian of her child in case of her husband's death. But the latest amendment to the act has removed this anomaly and the courts will no longer be free to appoint any other person as guardian of the child, ignoring the mother's claim.

The Personal Laws (Amendment) Act, 2010 has now amended sections 8





and 9 of the Hindu Adoptions and Maintenance Act, 1956 giving women equal rights as men in matters of adopting children or giving her children in adoption to others.

Following the amendment to the 1956 act, any major Hindu woman of sound mind is also entitled to adopt a son or daughter or give her son or daughter in adoption.

If married and if her husband is alive, who is of sound mind, the woman, then, will have to take the consent of her husband for adopting the children. The law till now entitled only men to adopt children or give them in adoption, albeit in consultation with their living wife, but not vice versa.

The objective of the amendment was to change the law since, as per 2001 census, the female population in India constitutes about 48.26 percent of the total population and the constitution of India guarantees equality of status and equality of opportunity to all citizens, irrespective of the fact whether they are men and women. There is also a growing demand for making laws free from gender bias and to provide legal equality to women in all spheres of life.

## **V- Divorce by mutual consent: Sec. 13B.**

### **What is divorce by mutual consent and what conditions are required?**

Both the husband and the wife may also seek a divorce, jointly by moving an application to the court. This is divorce by mutual consent. The following conditions must be fulfilled before this divorce is granted:

- At the time of filing the application, both the husband and the wife should be living separately for a period of one year or more. This does not mean that they are living in separate houses but that they have not cohabited for more than a year.
- Both should arrive at the decision that they are unable and incapable of living together and have therefore agreed that the marriage must be dissolved.

### **How would a couple apply for a divorce by mutual consent?**

There is a definite procedure for application for a divorce by mutual consent. The procedure is:

1. First, the husband and the wife must make the application voluntarily.
2. The petition for divorce should be filed in the Family Court and if there is no Family Court in the district, in the District Court.
3. The parties have to make a statement that they cannot live together due to differences in their nature and temperament.
4. From the date of filling the application for a period of six months, the Court does not take any action on the application in order to allow the parties to try one more time to rethink on their decision for a divorce.
5. If the parties do not reconsider their decision to divorce in this period, the Court will accept the application for the divorce.

## **Divorce under the Muslim Law**

### **Who can ask for dissolution of Muslim marriage?**

Only married Muslims either husband or wife can ask for dissolution of marriage

### **When can they ask?**

Divorce is the inability of the spouses to live together rather than any specific cause (or guilt of the party) on account of which the parties cannot live together. Muslim Law recognises several modes of divorce

### **How can a Muslim Marriage be dissolved?**

A Muslim marriage can be dissolved by divorce or talaq, either with or without recourse to the Court.

## **I. Dissolution without recourse to Court- Uncodified**

a) By Husband (i) By Talaq (ii) By Ilaa

b) By wife Talaq-i-Tafwiz

c) By mutual consent (i) Khula (ii) Mubaraat

## **II Dissolution with recourse to court – Codified**

d) Under the Dissolution of Muslim Marriage Act, 1939

### **I. Dissolution without recourse to Court**

#### **a) By Husband**

##### **(i) Talaq**

- Talaq means 'taking off of the marriage tie by appropriate means';
- When divorce proceeds from the husband at his own will, it is known as divorce by talaq;
- A Muslim husband who is of sound mind and who has attained the age of puberty can divorce his wife upon his desire without assigning any cause;
- Talaq may be by spoken words or a written document;
- It need not be pronounced in the presence of the wife. If she is not present it is enough that she is informed about it.

#### **What are the kinds of Talaq?**

The kinds of talaq, on the basis of the effect are as follows:

- Revocable (Talaq-i-sunnat)
- Irrevocable( Talaq-i-biddat)

Kinds of Talaq on the basis of approved forms are as follows:

- Talaq Ahusn (means best): This is done by a single pronouncement of divorce (talaq) during a tuhr followed by the observation of iddat. It is the most favoured form of talaq because it is revocable anytime before the expiry of the iddat period.

Note: Tuhr is the period between two successive menstruations.

**Example:**

*Yusuf and Mariana got married. Later Yusuf wanted to divorce Mariana. He pronounced talaq during a tuhr and the iddat period started. During the iddat period, Yusuf changed his mind and wanted to get back with Mariana. So he revoked the talaq.*

- Talaq hasun: This consists of three pronouncements of talaq made during successive tuhrs, with no intercourse taking place during the three tuhrs. The talaq becomes irrevocable on the third pronouncement irrespective of iddat. This form is also approved because there is room for reconciliation before the third pronouncement.

**Example**

*Mohammad and Zia got married. Mohammad wanted to divorce Zia. He pronounced talaq during 3 successive tuhrs. The divorce is complete and irrevocable.*

- Talaq – ul- biddat: This consists of three pronouncements at short intervals or even in immediate succession during a single tuhr or a single pronouncement of talaq during a tuhr showing clearly that the divorce is intended to be effective immediately. This form is considered sinful and is disapproved because it becomes irrevocable as soon as talaq is pronounced irrespective of iddat.

(ii) **By Ilaa:** Ilaa means “oath “. Where a husband who has attained majority and is of sound mind, swears by god that he will not have sexual intercourse with his wife and leaves the wife to observe iddat he is said to make ilaa, the vow not to approach the wife for four months or more It may be cancelled by the husband by resuming sexual intercourse within the period of four months or by verbal interaction .

b) **By Wife:** The wife can exercise her option by Talaq-i-tafwiz.

This is a form of divorce where the power to pronounce talaq is delegated to the wife by an agreement before or after the marriage. Certain condi-

tions may be attached with such agreement. But the mere fact that the husband delegates to the wife the power of pronouncing her own talaq does not deprive the husband himself of his right to pronounce talaq.

### **c) Divorce by Mutual Consent**

#### **What is divorce by mutual consent?**

A divorce by mutual consent takes place any time whenever the husband and wife feel that it is impossible for them to live with mutual love and affection. This is a unique feature of Muslim Law. There are two forms:

#### **Khula and Mubarat**

- **Khula:** A Khula is a divorce by consent at the instances of the wife and if she agrees to give a consideration out of her property to the husband for the divorce. The consideration is mostly waiving the right to receive a part or whole of the Mahr.
- **Mubaraat:** Mubaraat is divorce by mutual consent where both the husband and wife desire dissolution. The offer of divorce may proceed from either party. Their consent must also be free and voluntary. Both Khula and Mubaraat operate as irrevocable divorce. Both require the observance of iddat.

#### **Example 1**

*Salim and Fatima got married two years ago. Fatima was not happy with the marriage and she wanted a divorce. She made an agreement with Salim by which he agreed to release her from the marriage on her returning half of the dower/mehr paid to her on marriage.*

#### **Example 2**

*Tariq and Nazreen got married. Both of them were unhappy with the marriage. So they decided to separate. This is divorce by Mubaraat.*

## II Dissolution with recourse to court – Codified

### Who can ask for dissolution of Muslim marriage under this Act?

Only married Muslims wives can ask for dissolution of marriage under section 2 of The Dissolution of Muslim Marriage Act, 1939. This Act came into force on the March 17, 1939. This Act is applicable to all the wives married under Muslim Law irrespective of their schools and sub-schools.

### When can she ask? / What are the grounds for divorce for a Muslim woman?

A Muslim woman can obtain a divorce on the following grounds:

- The whereabouts of her husband have not been known for a period of four years.
- The husband has not provided for her maintenance and she has been neglected for two years.
- The husband has been sentenced to imprisonment for a period of seven years or upwards.
- Her husband has failed in performing his marital obligations for three years.
- Her husband is impotent.
- If the girl is married before fifteen and decides to end the relationship before she turns eighteen.
- The husband indulges in acts of cruelty.
- Husbands' insanity.
- Husband is suffering from leprosy or venereal disease.

**The husband is missing for four years:** If the husband is missing and his whereabouts are not known for a period of four years or more, the wife may file a petition for divorce under clause (i) of section 2. The husband is deemed to be missing if the wife, or any such person who is expected to have knowledge of the husband, is unable to locate him. The decree thus

passed shall not take effect for a period of six months, and if the husband appears during this period and satisfies the court that he is ready to perform his marital obligation, the court shall set aside the decree.

**Husbands' failure to maintain the wife for two years:** Section 2(ii) provides that if the husband has neglected or failed to provide maintenance to the wife for two or more years, the wife is entitled to obtain a decree for dissolution of her marriage.

**Imprisonment of the husband for seven years:** Section 2 (iii) read with proviso(a), lays down that a wife is entitled to get her marriage dissolved by an order of the court if her husband has been sentenced to imprisonment for a period of seven or more years. The wife's right of judicial divorce begins from the date on which the sentence has become final. Therefore, the decree can be passed in her favour only after the appeal by the husband has been dismissed by the final court.

**Husband's failure to perform marital obligations for three years:** Under section (iv), a wife is entitled to the dissolution of her marriage if her husband fails to perform his marital obligations for a period of three years without any reasonable excuse. This does not define "marital obligations of the husband". There are several into matrimonial obligations of the husband under Muslim Law. But, for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into account which are not included in any of the clauses of section 2 of this Act.

## **Impotency of the husband**

Impotency means incapacity to consummate the marriage, i.e. to have sexual intercourse. Impotency does not signify sterility, but incapacity to have normal sexual intercourse. Therefore, impotency is not the same as infertility.

It can either be physical impotency (deals with a physical dysfunction or abnormality) or psychological impotency (it is mental state where the person is against the act of sexual intercourse).

Impotency is a ground for a divorce to the wife under The Dissolution of Muslim Marriages Act 1939, [Sec. 2 (v) subject to Section 2(ix) proviso (c)].

- The wife must prove that the husband was impotent at the time of marriage and continues to be so.
- On application of the husband, the court may pass an order requiring the husband to satisfy the court within a period of one year of the order that he has ceased to be impotent, and if the husband so satisfied the court, no decree can be passed on the ground of impotency.

The husband's impotency may also amount to cruelty.

### **Case Law**

On a wife's petition for dissolution of marriage on the ground of husband's impotency, the husband sought a year's time to prove that he had ceased to be impotent. On the expiry of one year, the decree was granted on the wife's application. The husband's contention that during the one year period he was denied the company of his wife, was negative. The Act requires an opportunity to satisfy the court about cessation of impotency and that opportunity is available only when husband makes an application for the same. It would not be right to say that subsequent acquisition of virility can be proved only by sexual act with the wife which would mean that she should make herself available to the husband again and again whenever demand during the period of the year. Such interpretation which subjects the wife to this queer predicament cannot be sound, according to the court. (Abdul Azeem Vs Fathimunnisa Begum AIR 1969 Mys 226).

### **Husband's insanity, leprosy or a virulent venereal disease**

Section 2(vi) entitles a wife married under Muslim Law, to obtain a divorce on the ground that her husband is insane or is suffering from leprosy or any virulent venereal disease. In Muslim Law the husband should be insane for a period of two years. The term insanity is used in a very wide sense. It may be continuous or with intervals. Insanity of any kind



can be used as ground for divorce and it has no restricted meaning. The Act is silent about the curability of such unsoundness of mind.

### **Option of puberty by wife**

Under section 2(vii) Dissolution of Muslim Marriages Act, a Muslim woman who has been given in marriage by her father or guardian before she attained 15 and who has repudiated her marriage before she turns 18 (option of puberty) can, if marriage has not been consummated, apply for a decree of dissolution of marriage. This ground for the dissolution of marriage is not based on any fault of the husband. This is also known as "Khyar-ul-Bulugh".

### **Case Law**

Anything done by the minor during the period of minority would not destroy the right which could accrue only after puberty. The cohabitation of a minor girl would not thus put an end to the option to repudiate the marriage after puberty. The assent should come after puberty and not before, for the simple reason that the minor is incompetent to contract, nor should the consummation have taken place without her consent. ( Ghulam LakinaVs Falak Sha Allah Baksh AIR1950 Lah45)

### **Cruelty by husband**

It is when the husband treats his wife with cruelty which may be mental or physical cruelty. Under section 2 (viii) of the Dissolution of Muslim Marriages Act, cruelty is defined as follows:

- Habitual assault in making the wife's life miserable by physical ill-treatment or by a conduct short of that
- Association with women of evil repute or otherwise leading an infamous life
- Attempt to force the wife to lead an immoral life
- Disposing of her property or preventing her from exercising her

rights therein

- Obstructing her in the observance of her religious profession or practice
- Inequitable treatment by a polygamous husband, contrary to what the Quran lays down in this behalf

### **Other grounds**

Section 2(ix) a residuary clause under which a wife may seek dissolution of her marriage on any other valid and reasonable ground recognized by Muslim Law ,which has not been included in this section.

#### **Example 1**

Liaquat and Aqsa got married. When Liaquat had illicit relations with another woman, Aqsa filed a suit seeking divorce and she succeeded.

#### **Example 2**

Nafis and Rukhsana got married. Nafis went on a long journey and did not return for four years. Rukhsana can get divorce on this ground if his whereabouts are not known.

#### **Example 3**

Shamsher neglected his wife Jasmeen and did not provide her with reasonable provisions for maintenance for two years. Jasmeen obtained a divorce on this ground.

#### **Example 4**

Zafar married Shabnam, Shabnam converted to another faith. Her marriage with Zafar does not automatically dissolve on her conversion. Her right to dower or mehr be a part of it will not be affected by a judicial divorce.

### **Apostasy or conversion**

After coming into operation of Dissolution of Muslim Marriage Act, 1939

the law is

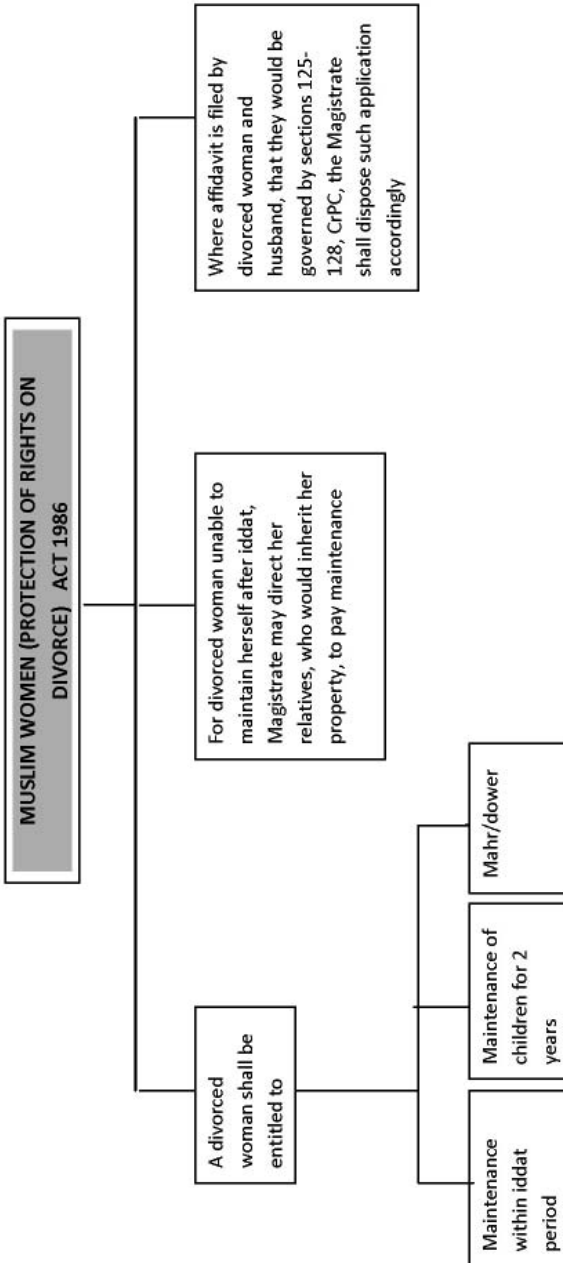
- a) Apostasy (renunciation of Islam) of husband operates as complete and immediate dissolution of marriage.
- b) The renunciation of Islam by a married Muslim woman or her conversion to another faith shall not by itself automatically dissolve her marriage.

### **Effects Of Apostasy Or Conversion**

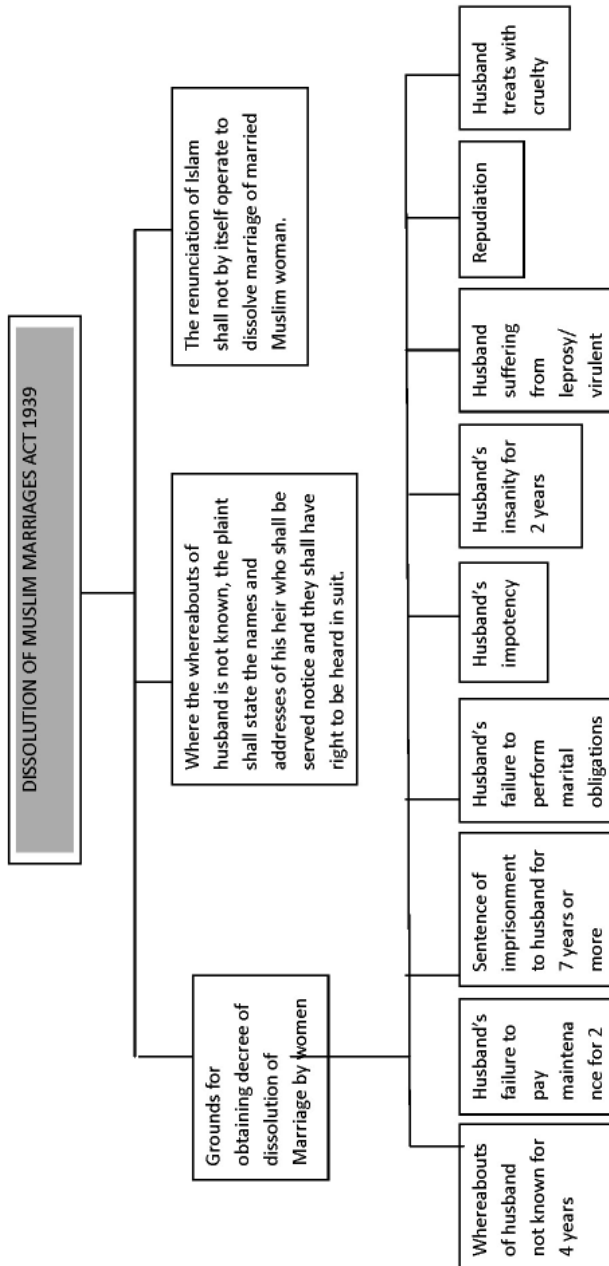
As per the Koran, a Muslim can renounce Islam just by saying “I renounce Islam” or “I do not believe in the God and the prophet Mohammed.” Also when a person says something very disrespectful to Allah it is assumed that they are apostate. So renunciation or conversion is grounds for a divorce. In ancient times apostasy was an offence that led to the death sentence for a man and life imprisonment for a woman. Thus it meant a marriage was automatically dissolved but now there has been a change and apostasy of the husband results in the instant dissolution of the marriage. Subsequently, if the wife remarries before iddat it is not bigamy.

If the wife is apostate it does not lead to automatic dissolution. The husband must divorce her or she has to file for divorce under sec. 2 of the Dissolution of Muslim Marriages Act. (If she was a convert to Islam then it dissolves her marriage immediately).

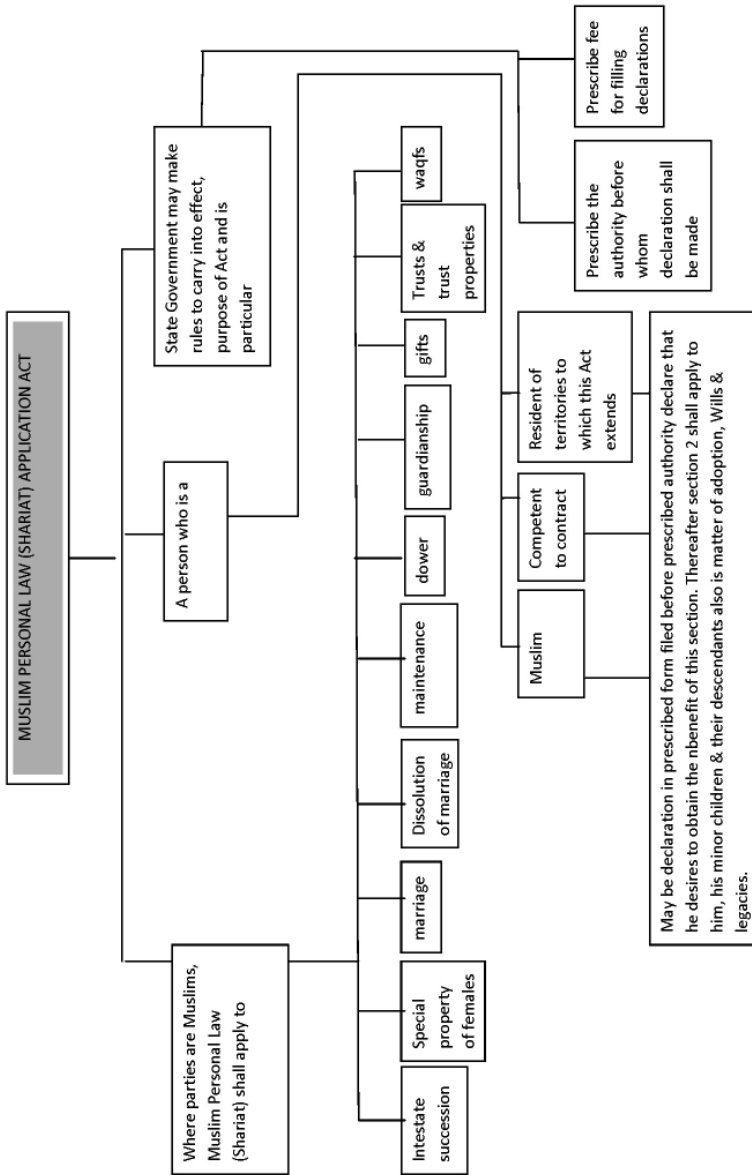
# Muslim Women (Protection of Rights on Divorce) Act, 1986



## Dissolution of Muslim Marriages Act, 1939



# Muslim Personal Law (Shariat) Application Act



## **Divorce under Christian Law**

### **Who can ask?**

Only married Christians, either the husband or the wife, can ask for divorce under Section 10 of The Divorce Act, 1869.

### **When can they ask?**

When either of the husband or the wife married under the Christian law ask for it on the following grounds given under Section 10 of the act enumerated herein below:

### **I) Contested Divorce**

#### **What are the grounds for Divorce ?**

The following are the grounds for divorce as given in section 10(1)&(2) of the Divorce Act ,1869 and as amended in 2001.

- a. Adultery.
- b. Conversion to another religion.
- c. Incurable of unsound mind continuously for a period of two years or more.
- d. Suffering from incurable form of leprosy.
- e. Suffering from venereal disease in communicable form.
- f. Not heard of for a period of seven years.
- g. Refusal to consummate the marriage.
- h. Has failed to comply with a decree for restitution of conjugal rights for a period of two years.
- i. Desertion.
- j. Cruelty.

**Grounds available only to the wife:** (Section 10(2) of the divorce Act

1869) Husband guilty of:

- Rape
- Sodomy or
- Bestiality

## **II) Mutual Consent Divorce**

### **When can they ask?**

Under section 10A, a petition for dissolution of marriage is filed before the district court by both the parties together on the ground

- that they have been living separately for more than a period of two years;
- that they have not been able to live together; and
- they have mutually agreed to dissolve the marriage

Under normal circumstances, it may just take six months from the date of filing the petition to get the divorce. The maximum time limit for granting a divorce by mutual consent is 18 months.

### **Where do you file a petition for divorce?**

The aggrieved party files an application to the Family Court or in the District Court for divorce in the grounds mentioned above.

### **What are the documents required for this application?**

To get divorced by mutual consent, you need to submit proof of marriage such as the marriage certificate or the invitation card, two passport size photographs.

## **Divorce under Parsi Law**

### **Who can ask?**

Only married Parsis either husband or wife can ask for divorce under Sec-



tion 32 of The Divorce Act, 1869.

### **When can they ask?**

When either of the husband or the wife married under the Parsi Law ask for it on the following grounds given under Section 32 of the act enumerated herein below

### **What are the grounds for Divorce ?**

The following are the grounds for divorce in India included in the Parsis Marriage and Divorce Act, 1936 and the amendment of the same in 1988.

- Continuous absence of seven years.
- Non-consummation of marriage within one year.
- Unsound mind provided the other spouse was unaware of the fact at the time of marriage and the divorce must be filed within three years of marriage.
- Pregnancy by some other man provided the husband was unaware of the incident during the time of marriage and that he must not have undergone sexual intercourse after he came to know about the situation. The divorce must be filed within two years of marriage.
- Adultery, bigamy, fornication, rape, or any other type of perverse sexual act.
- Act of cruelty.
- Suffering from venereal disease or forcing the wife into prostitution.
- Sentenced to prison for seven years or more.
- Desertion for two or more years.
- Non-resumption of cohabitation after passing an order of maintenance or a decree of judicial separation.

## Position in India: Consequences of Divorce

**Economic:** There is great disparity between the economic ramifications of divorce between men and women. Men remain relatively unaffected while women, especially those with children, have difficulty “providing food, clothing and shelter for themselves and their children.” The government in urban areas usually provides some form of public assistance to single mothers, but this service is not fully taken advantage of because most of the single mothers do not know of its existence.

**Social:** While India feels that one should have the right to divorce, it is still a highly stigmatising action. Women are looked down upon more harshly than men in this regard. There continue to be segments of Indian society that feel divorce is never an option, regardless of how abusive or adulterous the husband may be which adds to the greater disapproval for women. A divorced woman often will return to her family, but may not be wholeheartedly welcomed. She puts, especially if she has children, an economic burden on her family and is often given lowly household tasks.

### Comparative Chart on grounds of divorce

Grounds for divorce	Hindu Law		Christian Law		Special Marriage Act	
	Husband	Wife	Husband	Wife	Husband	Wife
Adultery	Yes	Yes	Yes	Yes	Yes	Yes
Desertion for a period of 2 years	Yes	Yes	Yes	Yes	Yes	Yes
Imprisonment for 7 years or more					Yes	Yes
Cruelty	Yes	Yes	Yes	Yes	Yes	Yes
Incurably of unsound mind or has been suffering continuously or intermittently from mental disorder	Yes	Yes	Yes- for a continuous period of two years before presentation of petition	Yes- for a continuous period of two years before presentation of petition	Yes	Yes

Suffering from venereal disease in communicable form	Yes	Yes	Yes- for 2 years	Yes- for 2 years	Yes	Yes
Suffering from virulent and incurable form of Leprosy	Yes	Yes	Yes- should have been suffering for 2 years	Yes- should have been suffering for 2 years	Yes	Yes
Person not been heard of as being alive for 7 years or more	Yes	Yes	Yes	Yes	Yes	Yes
Wilfully refuses to consummate marriage and marriage has not been consummated			Yes	Yes		
Husband guilty of rape		Yes		Yes		Yes
Order of maintenance has been passed against husband and there has been no cohabitation between husband and wife after the order was passed		Yes-if no cohabitation after 1 year of order being passed				Yes-if no cohabitation after 1 year of order being passed
No cohabitation even after an order of judicial separation has been passed	Yes-if no cohabitation even after 1 year of order being passed	Yes-if no cohabitation even after 1 year of order being passed			Yes-if no cohabitation even after 1 year of order being passed	Yes-if no cohabitation even after 1 year of order being passed
No restitution of conjugal rights even after an order being passed	Yes-if no restitution even after 1 year of order being passed	Yes-if no restitution even after 1 year of order being passed	Yes-if no restitution even after 2 years of order being passed	Yes-if no restitution even after 2 years of order being passed	Yes-if no cohabitation even after 1 year of order being passed	Yes-if no cohabitation even after 1 year of order being passed
Conversion to another religion	Yes	Yes	Yes (If Christian converts to another religion)	Yes (If Christian converts to another religion)		

Has renounced the world	Yes	Yes				
Divorce by mutual consent	Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court. No petition for divorce can be filed within 1 year of marriage	Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court on the grounds that they have been living separately for 2 years and they have mutually agreed that the marriage should be dissolved	Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court. No petition for divorce can be filed within 1 year of marriage			



# Chapter

# V

## **LAW ON MAINTENANCE**



## Session Methodology

### Objectives

To understand what maintenance is, who is entitled to it, and how to secure it.

### Introduction

Under Indian law, it is not only the wife but mothers, sisters and daughters who have the right to claim maintenance under different circumstances. The session on maintenance can be done as a stand-alone session or along with other Personal Laws.

Topics to be covered in this session:

- What is maintenance?
- Who is entitled to maintenance?
- How can a woman secure maintenance?
- How is maintenance calculated?
- What happens when maintenance is not paid?
- Rights of maintenance under different Personal Laws with the help of the comparative chart
- Where can a petition for maintenance be filed?

### Note to the facilitator

The facilitator must remember to deal with all these aspects as well while discussing maintenance.

### EXERCISE 1

**Title:** Discussion on Women's Right to Maintenance under the various Personal Laws



**Purpose:** To understand what rights women have to claim maintenance

**Time:** 60 minutes

**Materials needed:** Chart paper and pens/ Whiteboard and markers

**Steps:**

Ask the group the following questions and list all the responses:

- What does the group understand by the term maintenance?
- Who is entitled to claim maintenance?
- Who is entitled to pay maintenance?
- How can a woman secure maintenance? Does she always have to go to Court?
- Under what circumstances can a woman claim maintenance?
- What are the difficulties and pressures that are faced by a woman claiming maintenance from family, from community, legal system, husband?

Respond to each of the responses that have been given.

**Additional discussion points**

- Court procedure takes a very long time. How can a woman seek maintenance? Can she seek the help of village elders, NGOs, social workers, women's collectives, etc?
- On what basis can a woman decide how much maintenance she is going to claim?
- If a woman is not aware of her husband's wealth and sources of income, what should she do?
- What can she do if the man refuses to pay or he does not pay regularly?
- How can women's groups support and help in these cases?

- If the man does not have a regular source of income or he decides to quit his job, how can the woman ensure that he pays?
- If he has some property- can some settlement be worked out?

## **What is Maintenance?**

Maintenance is financial support that one spouse provides to the other in the event of divorce or legal separation. Obligation of a husband to maintain his wife arises out of the status of marriage. The responsibility of a family to take care and provide for each other is the basis of the Law on Maintenance under Personal Laws. Maintenance under Hindu Personal Law is governed by four legislations and includes providing for food, clothing, residence, medical assistance, education and care for one's spouse, child or parents as the case maybe. The courts have further developed the meaning of maintenance:

- Maintenance should include a provision for residence, which may be made either by giving a lump sum in money, or property in lieu thereof. Maintenance may also be made by providing, for the course of the person's life, a residence and money for other necessary expenditure.( Mangat Mal (dead)&another Vs Smt Punni Devi (dead)& others 1995 (6)SCC 88.
- It should also include provision for food and clothing.
- Reasonable expenses for marriage in case of an unmarried daughter.

## **Law of Maintenance under Hindu Law**

### **Who can ask for maintenance?**

Only married Hindus, either husband or wife, can ask for maintenance under the legislations given below. In a marriage, the fact of marriage between two people is grounds in itself for the wife or the husband (under Hindu law only) to claim that she or he be maintained.

## **What is the law on maintenance under the Hindu Personal Law?**

There are four important legislations enumerating the rights of parties and the procedure on maintenance. They are as follows:

- Hindu Marriage Act, 1955.
- Hindu Adoption and Maintenance Act, 1956.
- Criminal Procedure Code – Sec. 125 (available only for women, children and old parents).
- The Protection of Women against Domestic Violence Act, 2005.

## **Who can claim maintenance under Hindu Law?**

- Under the Hindu Marriage Act, 1955 only a Hindu wife and husband have a right to claim maintenance from each other.
- Under the Hindu Adoptions, and Maintenance Act (HAMA), 1956 the wife (from her husband), widowed daughter-in-law (from her father-in-law), children (both legitimate and illegitimate from either parent), aged parents (from both son and daughter) and dependants are entitled to maintenance.

## **What are the types of maintenance under Hindu Law?**

The Hindu Personal Law talks about two kinds of maintenance depending on the stage of proceedings at which it is asked. They are:

- Interim maintenance or maintenance pendent elite; It is granted to the spouse during on-going matrimonial proceedings in court such as divorce, judicial separation and restitution of conjugal rights. For claiming this a separate application has to be made along with the main petition. When a person files for judicial separation, divorce, annulment of marriage or any other matrimonial relief, the person can ask for interim maintenance in order to take care of the person's needs and expenses until the case is finally decided. (Sec. 24 of the Hindu Marriage Act).
- Permanent alimony – In a proceeding for divorce, judicial separation

ration, annulment of marriage or restitution of conjugal rights, the Court can, on an application, make an order of permanent maintenance either to the wife or the husband towards her/ his maintenance and support after the couple is divorced (or separated). This order of maintenance will hold good only during the lifetime of the applicant. It will cease to be in operation upon her/ his death. Permanent alimony will be granted only if an order for divorce, judicial separation or annulment of marriage is passed. Permanent alimony can be granted either in the form of one time lump sum amount or periodical payments.

### **While granting interim maintenance what are the points that the applicant has to prove?**

- There is no independent income sufficient for her/ his support.
- Necessary expenses of the legal proceedings cannot be met.

### **Example:**

*Savita filed for divorce under sec. 13 of Hindu Marriage Act and moved an application for interim maintenance under Sec. 24, HMA. Savita's husband Suresh alleged that Savita was having an affair with another man and therefore should not be granted interim maintenance. Courts have held in numerous decisions that as a general rule, the wife will be considered innocent, until proven guilty of any charge or counter-charge made against her, for the purposes of allowing pendent elite. She will thus be entitled to interim maintenance in this case.*

- The wife could be entitled to claim interim maintenance even though it was found that she was the second wife of her husband and therefore the marriage itself was void. (Laxmi Bai Vs Ayodhya Prasad, 1990 2DMC594).
- The wife is entitled to alimony pendent elite whether or not the husband is entitled to decree for restitution of conjugal right. (Malkait Kaur Vs Darshan Singh 1990 2 DMC 81).
- In Smt Gurmeet Kaur Vs Gur Raj Singh AIR Punjab & Haryana 223, the

court held, to refuse interim maintenance and expenses of litigation to the wife and her minor child, merely to pressurize the wife to reconcile her differences with her husband is a misuse of the provision of Sec. 24 of the Hindu Marriage Act, 1955.

### **What are the factors based on which the Court will decide the amount of maintenance (interim or permanent)?**

The Court has to take into consideration the following factors before it decides on the quantum of maintenance:

- Income and property of both the parties.
- The need of the person asking for maintenance (applicant).
- Paying capacity of the person from whom maintenance is being asked (respondent).
- Conduct of the parties.
- Courts have laid down that the amount of maintenance fixed for the wife should be such that she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case.

### **IMPORTANT**

The order of maintenance has to be executed or enforced. It has to be noted that maintenance should be awarded with effect from the date of filing the petition and not from the date of passing the decree. It is important for the lawyer/ petitioner to ask for maintenance from the date of filing of the petition.

### **Who can claim maintenance under the provisions of the Hindu Adoptions and Maintenance Act (HAMA)**

Wife can claim maintenance from her husband (Sec. 18, HAMA)

Sec. 18 applied only to the wife's application for maintenance from her husband. An application under this section will be entertained only if the

marriage between the parties subsists at the time of making the application. The rationale behind this provision is that the wife should be maintained by her husband during her lifetime due to the very fact of marriage.

In case the wife decides to live separately and not with her husband, she can still make an application under this section if she can prove that he is guilty of the following act:

- He has abandoned her without good cause
- He has treated her cruelly
- He is suffering from a virulent form of leprosy
- He is living with a second wife or has kept a concubine along with his wife in the same house or has been living with another woman in a different place
- He has converted to another religion

If the wife decides to allege any of the above mentioned acts against her husband, she would have to prove the allegations to the Court before maintenance is granted under this Section. If on the other hand, she is unable to prove any of these allegations, maintenance under this section will not be possible. She would then have to make an application under Sections 24 and 25 of the Hindu Marriage Act, 1955 along with an application for divorce, or nullity of marriage or judicial separation.

On the other hand, the wife will be unable to claim maintenance under Section 18 under the following circumstances:

- Their marriage does not subsist at the time of application under HAMA
- She has converted to another religion
- She is unchaste

While there are not rigid factors, the quantum of maintenance is determined by:

- Facts and circumstances of each case
- The status of the parties, income and property of the husband or wife
- Respective needs of both the husband and wife
- Conduct of the parties both before and after the marriage
- Husband's capacity to pay
- Involuntary payments and deduction
- Reasonable comforts needed by wife considering her status and mode of life while living with her husband

After making an order for maintenance, the Court can vary, modify or rescind any order if circumstances change such as a hike in prices of essential commodities, the increase or decrease of income of the parties etc. On the other hand, the Court may refuse to grant maintenance if the person seeking it can support himself or herself without any financial help from anyone.

### **Maintenance for widowed daughter-in-law from her father-in-law: Sec. 19**

This provision enables a woman to claim maintenance from her father-in-law after her husband's death. She will be able to make an application under section 19 only if she is able to prove to the Court that:

- She is not able to provide for herself out of the property of her husband, father or mother
- Her son or daughter is not able to maintain her out of their property
- Her own earnings or property is not sufficient to provide for her

The right will however not be available to her under the following circumstances:

- She has remarried
- Her father-in-law does not have the means to take care of her from his share of the coparcenary property

### **Maintenance of children and aged parents by either parent/child: Sec. 20**

The rationale behind this provision is the moral responsibility of every individual to take care of her/his legitimate or illegitimate children and aged parents. The obligation to maintain one's children and elderly parents extends so far as they are unable to maintain themselves out of their own earnings or property.

### **Maintenance of dependants: Sec. 22**

Sec 22 envisages a situation where a person has died leaving behind her/his descendants and her/his property has devolved on her/his heirs. In order to obviate the possibility of the descendants left behind without anyone being able to maintain them, this provision casts a duty on those heirs to maintain the descendants out of the property of the deceased. The descendants include the following category of people related to the deceased:

- Father
- Mother
- Widow so long as she does not marry
- Son, grandson, great – grandson as long as he is minor and unable to maintain himself
- Unmarried daughter until her marriage
- Illegitimate minor children

### **What are the important points that one should remember in relation to maintenance?**



Along with the substantive Law of Maintenance, it is essential to know the actual Court procedure and the measures one should take while making an application in the Family Court:

- Highlight the details of the income and property of both the parties in the application
- The other party is given an opportunity to put forth his or her defence
- The Court may order either the payment of a gross sum or monthly/ periodical sum either until the woman has remarried or until her death
- None of the three legislations- the Hindu Marriage Act, the Hindu Adoption and Maintenance Act and Sec. 125 of the Criminal Procedure Code- impose a limit on the amount of maintenance. This amount is for the Court to decide on the basis of the law

**What is the difference between section 18 of HAMA and section 24 of HMA, the provisions for maintenance?**

<b>Section 18 HAMA,1956</b>	<b>Section 24 HMA,1955</b>
<ol style="list-style-type: none"> <li>1. Only wife can claim maintenance.</li> <li>2. Object of the section is to preserve &amp; protect the right of the wife to maintenance as also the right of separate living if conditions as given in section18( 2) are fulfilled.</li> </ol>	<ol style="list-style-type: none"> <li>1. Maintenance can be claimed by either spouse from the other.</li> <li>2. Objective of this section is to ensure that the party to the proceedings does not suffer in prosecuting or defending due to lack of funds &amp; also provide maintenance during the pending of proceedings.</li> </ol>

<p>3. Here there are regular trial &amp; can be decided after providing full opportunity to both the parties to lead the evidence in support of their respective version.</p> <p>4. Here the order shall be final unless set aside, modified or altered in legal proceedings.</p> <p>5. Here the suit would be original &amp; independent proceedings.</p> <p>6. Here court shall have regard if the wife is living separately; whether she is justified in doing so.</p> <p>7. The section does not give such a right to claim proceeding expenses in the suit.</p> <p>8. Here the decree passed is appealable.</p> <p>9. Here there is no such mandate for quick disposal.</p> <p>10. The right of the wife comes to end on the death of the husband. However, as a widow she can claim maintenance under section 22 of the said act if the other conditions are satisfied.</p>	<p>3. Here proceedings are summary in nature &amp; can be disposed of on the basis of affidavit alone.</p> <p>4. Here the order would be interim in nature &amp; would remain only for the period for which the main proceeding remain pending.</p> <p>5. Here the application would be filed pending of main proceedings for divorce. It is not an independent proceeding.</p> <p>6. Here the wife has to prove that she has no independent income sufficient for her support &amp; the necessary expenses of the proceedings. But before order of monthly expenses the court will have regard to wife's income and to the income of the husband.</p> <p>7. Here even expenses of the proceedings can be claimed.</p> <p>8. Here, the order is not appealable. Only revision application will lie.</p> <p>9. Here, proceeding require quick &amp; early disposal.</p> <p>10. The right of the wife comes to end on death of the husband</p>
---	--

## **Maintenance under the Muslim Law**

Maintenance under Muslim Law is also known as NAFQA.

### **Who can ask for maintenance under Muslim Law?**

The following persons are entitled to get maintenance under Muslim Law:

- 1) Wife
- 2) Children and grandchildren
- 3) Aged parents

### **What is the Law on Maintenance under the Muslim Law?**

There are three important legislations enumerating the rights of parties and the procedure on maintenance. They are as follows:

- The Muslim Women (Protection of Rights on Divorce Act, 1986 ) along with the Muslim Women (Protection of Rights on Divorce) Rules, 1986.
- Criminal Procedure Code – Sec. 125 (available only for women, children and old parents) The provision under Sec. 125 of the Criminal Procedure Code, which is a secular law and is partially applicable to the Personal Laws of Muslims in terms of the principles of maintenance and the quantum of maintenance.
- The Protection Of Women against Domestic Violence Act, 2005

### **Maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986.**

#### **What is the history for passing this act ?**

The Muslim Women (Protection of Rights on Divorce) Act, 1986 was the culmination of the controversy created by Shah Bano judgment. This act was enacted to negate the law laid down in the case, in so far as divorced Muslim women' claim of maintenance beyond Iddat period is concerned.

Shah Bano Case – Shah Bano was married to Mohd. Ahmed Khan, an

advocate, in 1932. Two sons and three daughters were born to them from the marriage. In 1975 Mohd. Ahmed Khan drove Shah Bano out of the matrimonial home. In April 1978, Shah Bano filed a petition under sec. 125 Cr.PC against her husband asking for maintenance at the rate of Rs. 500 per month. Pending this petition, he divorced her.

Mohd Ahmed Khan defended himself saying that he had paid her maintenance before he divorced her and he does not have any obligation to provided maintenance to her upon their divorce.

In 1979, the Magistrate ordered Mohd. Ahmed Khan to pay a sum of Rs. 25 per month which on revision application filed by Shah Bano was increased to Rs. 179.20 per month.

Mohd Ahmed Khan appealed against this decision.

The Supreme Court held that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Sec. 125 of the Code of Criminal Procedure.

This decision of the Supreme Court led to controversy as to the obligation of Muslim husband to pay maintenance to the divorced wife. Through sec. 125 of the Criminal Procedure Code, the Supreme Court tried to extend the rights of divorced Muslim women since the Muslim Personal Law limited the husband's liability to provide for maintenance of the divorced wife to the period of iddat.

This led to the Parliament enacting the Muslim Women (Protection of Rights on Divorce) Act, 1986 which ousted the jurisdiction Under Sec. 125 Criminal Procedure Code unless both the husband and wife decided to approach the Court under it.

### **Who can ask for maintenance under this Act?**

The Muslim Women (Protection of Rights on Divorce) Act, 1986, is applicable to every divorced woman who has married according to Muslim Law. Only married divorced women can claim maintenance from her husband under this Act. This legislation does not apply to Muslim women

divorced before the Act came into force, that is, before 1986.

### **When can they ask?**

Only married women who have been divorced by or obtained divorce from her husband under the provisions of Muslim Law can ask for it. The dissolution of marriage may take place in any form given in the divorce chapter.

### **What are the rights of divorced Muslim Women under the Act?**

Under the Muslim Women (Protection of Rights on Divorce) Act, 1986 section 3(1), a Muslim wife has the following rights:

- **A reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her divorcing husband.**

The Supreme Court has explained the meaning of the terms ‘provision’ and ‘maintenance’ in a landmark case of *Danial Latifi vs Union of India* in 2001. The Supreme Court explained that under section 3(1) (a) the Muslim husband has two separate and distinct obligations:

- To make a reasonable and fair provision for his divorced wife; and
- To provide maintenance to her

The words ‘within iddat period’ mean that the arrangement for payment of provision and maintenance should be concluded within the iddat period. They do not refer to the duration of such provision and maintenance.

If a man has already discharged his obligations of both ‘reasonable and fair provision’ and ‘maintenance’ by paying those amounts in a lump sum to his divorced wife, in addition to having paid his wife’s Mehr and restored her dowry, this legislation excludes him from liability for the post – iddat period.

Thus, the husband is required to make ‘fair and reasonable provision’ within the iddat period, not only for the iddat period but also the period till her remarriage or future sustenance.

- **If she maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance is to be made and paid by her former husband for a period of two years from the respective dates of birth of the children under sec. 3(1) (b).**

After the completion of two years the children can then claim maintenance under section 125 of the criminal Procedure Code and not any more under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Under this provision, the divorced wife can claim maintenance for her children from her former husband even if the children were not born through him, as long as he is deemed in law to be the father.

- **A right to get an amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time later according to Muslim Law under section 3(1)(c).**

Under the Muslim Law, dower/mehr is paid by the husband to the wife at the time of marriage as a mark of respect towards her. This is separate from and independent of her right to maintenance under this legislation and she is entitled to it.

- **A right to get all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends under Sec. 3(1) (d).**

In a more recent development, the Supreme Court of India passed a Judgment on June 5, 2007 stating the deserted Muslim women are entitled to maintenance under section 125 Cr.P.C. The details of the case and significant aspects of the Judgment are given below:

### **Iqbal Bano's Case**

Iqbal Bano of Aligarh was deserted by her husband. She claimed maintenance under sec. 125 Cr.P.C. In 1994, the Trial Court directed her husband to pay her maintenance of Rs. 450 per month. On revision petition in

2001, the Allahabad High Court accepted the husband's contention that as he had divorced his wife by pronouncing triple talaq, the claim for maintenance should be made under the 1986 Act and not under section 125 Cr.P.C. Iqbal Bano appealed against this in the Supreme Court of India and contended that there was no bar on a Muslim woman filing a petition under section 125 Cr.P.C. The 1986 Act could apply only to divorced Muslim women and since her husband had not divorced her in a proper manner and had deserted her, she could claim maintenance under Sec. 125 Cr.P.C.

The Supreme Court of India, in a judgment dated June 5, 2007, agreed with Iqbal Bano's contention and set aside the High Court judgment. It also directed the Allahabad High Court to have a fresh look at the claim for maintenance and stated that the High Court should dispose of the judgment within six months as it has been pending for the last two decades.

The Supreme Court stated "under the 1986 Act, the husband has two separate and distinct obligations, viz. to make a reasonable and fair provision for his divorced wife (for her residence, food, clothes and other articles), and to provide maintenance for her. Though it may look ironical that the enactment intended to reverse the decision in the Shah Bano case it actually codified the very rationale contained therein." It also said that deserted Muslim woman could still avail herself of the provisions of Sec. 125 Cr.P.C to claim maintenance from her husband and the 1986 law should not be a bar.

### **What happens if maintenance is not provided to the divorced wife?**

If the husband does not give to the divorced wife the maintenance amount, Mehr or dower on her divorce, the wife can make an application to the Magistrate for an order for payment of such provisions and maintenance of mehr or dower or the properties.

In respect of the application under the Muslim Women (Protection of Rights on Divorce) Act, the following points have to be kept in mind:

- The Family Court does not have the jurisdiction in respect of matters under the Muslim Women (Protection of Rights on Di-

orce) Act.

- There is no period of limitation prescribed for filing an application under section 3(2) of the Act.

The Magistrate will take the following points into consideration while making an order under sec. 3(3)

While making an order for maintenance against the husband, the Magistrate has to satisfy himself that:

- The husband has sufficient means. The Magistrate does not have to assess the means of the husband in case of payment of her Mehr and others properties. The question of sufficient means arises only when the issue of provisions and maintenance of wife and children is involved.
- Either he has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and her children, or
- The wife has not been paid the amount equal to the sum of Mehr or dower, or
- That she has not been delivered all the properties given to her before at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.
- The remarriage of the divorced Muslim woman during the pendency of the proceedings will also be a relevant factor while deciding the case.

The amount of provision and maintenance determined by the Magistrate will be based on the following:

- The needs of the divorced woman, which include, for example, the needs of the children who are maintained by her
- The standard of life enjoyed by her during her marriage



- The means of her former husband

### **Maintenance from the relatives of the divorced woman and Wakf Board.**

Under sec. 4 of the act, the Magistrate can ask the relatives of the divorced Muslim woman (who would inherit property from her if she were to die) to pay reasonable and fair amount of maintenance to her depending on the needs of the woman and the standard of life enjoyed by her during her marriage and the means of the relatives.

Under sec. 4(2) where the divorced woman does not have relatives who can provide maintenance or if none of them have sufficient means to maintain such a divorced woman, the Magistrate can order the State Wakf Board Established under the Wakf Act, 1956 to pay the amount determined by the Court.

The Magistrate will make such an order if:

- Since her divorce from her previous husband, she has not re-married
- She is not able to maintain herself after the iddat period

It is optional to refer the matter of maintenance under section 125 Cr.PC and not under the Muslim Woman (Protection of Rights on Divorce) Act.

The parties to the dispute can decide to settle the matter under section 125 Cr.PC and not under section 5 of the Muslim Woman (Protection of Rights on Divorce) Act.

In order to be able to do this, the following conditions need to be fulfilled:

- The application must have been filed under Section 3(2), which seeks to claim maintenance against the husband. An application filed under Section 4 (claim of maintenance from relatives or the Wakf Board) will disentitle the parties to opt out of this legislation.
- The divorced woman and her husband must declare either by an

affidavit or by any other declaration in writing that they prefer to be governed by Sec. 125 Cr.P.C to Sec. 128 Cr.P.C.

- The declaration must be filed in the Court hearing the case on the date of the first hearing of the application under section 3(2).

What are the remedies for maintenance for a Muslim Woman beyond the period of iddat?

- The Magistrate can order any of her relatives who will receive a share in her property on death to pay for her maintenance;
- If she has children, they alone shall be liable to provide for her;
- If the children are unable to maintain her, her parents will be liable to maintain her;
- If the parents are also not able to provide for her, the Magistrate may order any other relative to maintain her.

### **Wakf Board's obligations**

The Wakf Board's obligations arise only when a Muslim woman is unable to maintain herself after the iddat period and her relatives also do not have the means to provide for her.

The law relating to divorced Muslim women is governed by the Muslim Women (Protection of Rights on Divorce) Act, 1986. This legislation was enacted into law by the Parliament following the decision by the Supreme Court in the case of Mohammed Ahmed Khan V Shah Bano Begum.

This legislation does not apply to Muslim women divorced before the Act came into force, that is, before 1986. There is no limit to the amount of maintenance and provision the Magistrate can make under this legislation. Also there is no period of limitation for application for maintenance.

## **Maintenance under Christian Law**

### **Which law deals with the maintenance of Christian wives?**

There are two legislations enumerating the rights and procedure for maintenance of Christian's wives.

- The Divorce Act, 1869, under part IX -s.36-s.38
- Section 125, CrPC 1973. This is a secular law

A Christian woman can claim maintenance from her spouse through criminal proceeding or/and civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In criminal proceedings, the religion of the parties does not matter at all, unlike in civil proceedings.

### **Who can ask?**

The Indian Divorce Act, 1869 is only applicable to those persons who practice the Christianity religion and governs maintenance rights of Christian wives under Section 36. Only wives have a right to maintenance.

### **When can they ask?**

Under section 36, when either husband or wife, married under the Christian Marriage Act, has filed a suit of divorce under section 10 of the Divorce Act or where the wife has obtained /not obtained an order for protection.

If a divorced Christian wife cannot support her in the post divorce period she need not worry as a remedy is in store for her in law. Under section 37 of the Indian Divorce Act, 1869, she can apply for alimony/ maintenance in a Civil Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime.

### **How can it be asked?**

The wife files a petition in the District Court for expenses of the proceedings and alimony during the pendency of the suit. The suit would be served on the husband, and the court, after being satisfied of the truth of the statements made in the petition, may make an order to the husband for

payment to the wife of expenses of the proceedings and alimony pending the suit as it thinks fit.

### **What is the time frame to decide alimony petitions?**

The petition for expenses of the proceedings and alimony pending the suit as far as possible are to be disposed of within 60 days of the service of the petition on the husband.

### **What is the quantum of permanent alimony?**

Under section 37, Where a wife has obtained a decree of dissolution of the marriage or a judicial separation from the husband this shall secure to the wife such gross sum of money or annual sum of money for her life time having regard to her fortune if any and ability of the husband.

The court may order the husband to pay his wife a monthly sum or weekly sum as maintenance when it thinks reasonable. But if the husband is unable to pay the maintenance amount, the husband could get the order to discharge or modify or temporarily suspend the whole or part of the payment which could be revived wholly later by moving an application.

Under section 38 the Court may direct payment of alimony to wife or to her trustee. -In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf with approve by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient to do so.

Under the Code of Criminal Procedure,1973 right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claim of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs 500 per month but now it has been increased and the magistrate can exercise his discretion in adjudging a reasonable amount. Inclusion of the right of maintenance under the Code of Criminal Procedure has the great advantage of making the remedy both speedy and

cheap cost effective.

## **Maintenance under the Parsi Law**

Which law deals with the maintenance of Parsis wives?

There are two legislations may be secured procedure for maintenance of Parsi wives .

- The Parsi Marriage and Divorce Act, 1936
- Section 125, Cr P C 1973. This is a secular law

A Parsi woman can claim maintenance from her spouse through criminal proceeding and/or civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In the criminal proceedings, the religion of the parties does not matter at all, unlike in the civil proceedings.

### **Who can ask?**

The Parsi Marriage and Divorce Act, 1936 is only applicable to those persons who practice the Parsi religion and governs maintenance rights of a Parsi wives under section 37. Both the husband and the wife have a right to maintenance.

### **When can they ask?**

Under section 39, when either of the husband or the wife married under the law has filed a suit of divorce under act ,can ask for maintenance.

### **How can it be asked?**

The wife or the husband can file a petition in the Court for expenses of the proceedings and for alimony during the pendency of the divorce case and, if it appears to the court that either the wife or husband, as the case may be, has no independent income sufficient for her or his support and necessary expenses for the suit. In other words, after the Court order, the defendant to pay to the plaintiff the expenses of the suit and other weekly or monthly sum having regard to the plaintiff's own income and

the income of the defendant. If the husband refuses to pay maintenance, wife can inform the court that the Husband is refusing to pay maintenance even after the order of the court. The court can then sentence the husband to imprisonment unless he agrees to pay. The husband can be detained in jail as long as he does not pay.

The Parsi Marriage and Divorce Act, 1936 recognises the right of wife to maintenance—both alimony pendent elite and permanent alimony.

### **What is the time frame to decide alimony petitions?**

The petition for expenses of the proceedings and alimony pending the suit as far as possible are to be disposed of within 60 days of the service of the petition on the husband or the wife.

### **What is the quantum of permanent alimony?**

(1) On an application for permanent alimony under section 40 moved by either the wife or the husband, the court can order the defendant to pay to the plaintiff for her or his maintenance and support. such gross sum or monthly or periodical sum must be for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property. If any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment, if necessary, by a charge on the movable or immovable property of the defendant.

2) If the court is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1). It may, at the instance of either party; vary, modify or rescind any such order in such manner as it may deem just.

(3) If the court is satisfied that the party in whose favor, an order has been made, under this section, has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just. When a wife has obtained a decree

of dissolution of the marriage or a judicial separation from the husband, the court shall secure to the wife such gross sum of money or annual sum of money for her life time having regard to her fortune, if any, and ability of the husband .

## **Maintenance Under the Code of Criminal Procedure: Sec. 125 Secular law**

The provision under section 125 of the Criminal Procedure Code, is a secular law and is partially applicable to the Personal Laws of Muslims in terms of the principles of maintenance and the quantum of maintenance.

### **1. Who all can claim maintenance under section 125 Criminal Procedure Code (Cr.PC)?**

- Wife who can't maintain herself.
- Legitimate, illegitimate minor child, whether married or not, who can't maintain herself/himself.
- Legitimate, illegitimate major child, except a married daughter who because of any mental or physical infirmity, is unable to maintain herself/himself.
- Parents unable to maintain themselves.

Sec. 125 Cr.PC, is applicable to all neglected or divorced wives, abandoned children and hapless parents belonging to any religion, community or nationality or having any domicile. The right to claim maintenance under section 125 is available only against the husband, father or son. No other relation can claim maintenance under this provision.

#### **a. Wife**

The wife, who is unable to maintain herself, is entitled to claim maintenance. She may be of any age-minor or major. The term 'wife' includes:

- A woman who has been divorced by or has divorced her husband;

- A woman who after divorce, has not married again.

The inclusion of 'divorced wife' in the definition of 'wife' is intended to prevent the unscrupulous husbands frustrating the legitimate maintenance claims of their wives by just divorcing them under Personal Laws. The provisions does not apply to Muslim women who have been divorced. A divorced Muslim woman cannot apply for maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

## **b. Child**

A minor child: A minor child, whether male or female, unable to maintain himself/ herself, can claim maintenance under sec. 125. It is immaterial whether such a child is legitimate or illegitimate, or whether married or unmarried. A minor girl, who is married, may be entitled to claim maintenance from her husband or father provided the other conditions under this provision are fulfilled. If the husband of a minor married girl is not capable of sufficient means, the responsibility to maintain the child falls on her father until she becomes a major.

**On having attained majority:** Even after attaining majority, a legitimate or illegitimate individual is entitled to claim maintenance if by reason of any physical or mental illness or injury, she/he is unable to maintain himself/herself. However, a married daughter is not entitled to maintenance under sec. 125 if she has attained majority. In such cases the responsibility of maintaining her falls on her husband and not her father.

## **c. Father or Mother**

A father or mother, unable to maintain himself or herself, is entitled to claim maintenance from their son or daughter who is a major (18 years old and above) as per the Indian Majority Act.

- If the husband, father or the son has neglected or refused to maintain his wife, children or parents respectively; the term 'neglect' is used here to signify a mere failure on the part of a person bound to maintain his wife etc, even when no demand is



made on him by the latter. Neglect or refusal to maintain may be by words or by conduct.

**Example:**

Ravi and Radha were married for four years. After some time, Ravi left Radha and married Surya. When Radha asked Ravi to make provision for her maintenance, he said that he was ready to do so provided she lived in his new house with the second wife. This amounts to neglect or refusal to look after and maintain the first wife under section 125 Cr.P.C.

- Such a person possesses sufficient 'means' to maintain them: The expressions 'means' is not restricted to tangible means such as existence of movable or immovable property but includes earning potential, or capacity to earn. It is open to a person to show that on account of some ailment, physical infirmity, accident or prevailing unemployment, he is in fact not capable of earning anything. However, prevailing unemployment is also a guise often used by men to escape their responsibility to maintain.
- Person claiming maintenance must be unable to maintain himself or herself: Under section 125 (1) (a), maintenance allowance cannot be granted to every wife who is neglected by her husband or whose husband refuses to maintain her, but can be granted only if the wife is unable to maintain herself.

**2. Whom should they apply to?**

They should apply to a Magistrate of the first class.

**3. When will a magistrate grant maintenance?**

When he is satisfied upon the proof given by the affected party regarding the neglect or the refusal towards the affected party. (child/parents/wife).

**4. How much claim of maintenance under section 125 Cr.PC can be asked?**

Earlier it was not supposed to increase Rs. 500 but now according to the

2002 amendment it depends on the magistrate to grant any amount which he thinks fit and reasonable depending on the facts of the case.

While deciding an application of maintenance under this provision, the Magistrate will consider the following points:

**a. When does the order of maintenance granted by the magistrate become effective?**

The order of maintenance becomes effective from the date of the order or from the date of application filed by the affected party.

**b. What happens if the person so ordered to pay the amount of maintenance fails to comply with the order?**

- If the person fails to pay the amount of maintenance without any sufficient means, he may be issued a warrant imposing fines for the breach of the order and he may even be imprisoned which may extend to a period of one month, but if the person makes the required payment before the expiry of period of one month he would be subsequently released.
- No warrant can be issued for recovery of any amount due under this section if the application is not made within a period of one yr from the date when it became due.

**c. What will happen if the husband imposes a condition that he will pay maintenance if his wife agrees to reside with him?**

- If the husband agrees to pay maintenance to his wife on the condition that she will have to reside with him but the wife does not want to and states her reasons for her decision, the magistrate can pass any order if he considers those grounds fit. For example if the husband enter a contract for a second marriage or keeps a mistress, it will be a just ground for the wife to refuse to live with him.

**d. What are the instances where the wife will not be given maintenance?**

- If the wife commits adultery

- If the reasons given by the wife for her refusal to stay with the husband are not sufficient
- If the husband and the wife are living separately by mutual consent

**e. When can the magistrate cancel the order of maintenance?**

He may cancel the order of maintenance on receiving the proof that the effected party in whose favor the order was passed, is living in adultery, or refuses to live with her husband without any sufficient reasons or if they are living separately by mutual consent.

**f. Where can the proceedings take place?**

The proceedings can take place at either of the following places:

- Where the man resides, or
- Where the women resides, or
- Where the man last resided with his wife or the mother of his illegitimate child
- The evidence shall be taken in the presence of the person (husband) or his pleader, who has to comply with the order of the maintenance so that he knows what all evidence has been given against him in the prescribed format

**g. What will happen if the husband is willfully avoiding the service of summons and is avoiding from attending the court?**

If the magistrate is satisfied that the man is willfully avoiding the service of summons or is willfully not attending the court, he/she can proceed with the hearing of the case and decide the case ex-party.

**h. What will happen if the husband comes to the court after the order for maintenance has been passed?**

- If within three months of the order was passed, if the man comes up with a good cause or a sustainable reason, the magistrate may put aside the previous order by asking the husband to pay the costs to

the other party.

- While dealing with an application under s.125 the Magistrate has the power to make the order for payment of costs to other party in this case.

#### **i. When can there be alteration in allowance?**

Under section 127, alterations in allowance can be made:

- Where there is a proof in the change of the circumstances of any person either the husband or the wife, the magistrate may pass an order making such alterations in the order of the maintenance.

#### **j. What are the instances where the magistrate may cancel the order of maintenance?**

- In cases where the magistrate thinks that any order passed by a competent Civil Court needs the order of maintenance to be cancelled he may cancel the order of maintenance.
- In cases where a women had obtained divorce from her husband or was divorced by her husband and subsequently after that she remarries, (order will be cancelled from the date of second marriage).
- In cases where the women was divorced and on such divorce she was paid a lump sum amount under any Personal or Customary Law. She is not entitled to claim maintenance again under section 125,even if the payment has been made before the order of maintenance was passed or after the expiry of such period.
- If the women had obtained divorce from her husband and has voluntarily surrendered her rights to maintenance.
- When there is any decree to be made regarding recovery of the amount of maintenance or dowry from the person against whom the order of maintenance has been passed, the court shall consider the amount which has already been recovered.

### **k. How is the order of maintenance being enforced?**

- A copy of the order of maintenance has to be given to the person in whose favor the order has been passed or to her/his guardian or to the person by whom maintenance has to be paid.
- It can be enforced by any magistrate at the place where the magistrate is satisfied about the identity of the person in whose favor the order has been passed.

### **Important Procedural Points to Remember**

Only a first class Judicial Magistrate can decide applications in respect of maintenance under sections 125-128 of Cr.PC (Sec. 125-128 deal with applications for maintenance, enhancement and enforcement of the order of maintenance).

Proceedings for maintenance under section 125 may be taken against a person in any district where he is, or where he or his wife reside, or where he last resided with his wife, or with the mother of the illegitimate child. (Sec. 126(1) deals with the procedure for the application for maintenance).

### **Comparative Chart On Maintenance**

#### **Section 125 of Cr.PC**

- Application to be made to a Criminal Court – Magistrate of First Class.
- May be filed by any woman unable to support herself.
- She can claim maintenance from her father, husband or son.
- Maintenance is decided by the Court according to her needs.
- Within 60 days of the notice issued, maintenance is to be given to her.

#### **Section 18 of HAMA**

- Hindu Wife has a right to get expenses for her living from her husband

if she is unable to support herself.

- A good reason is required to stay away from the husband.
- Such as – desertion by husband, fear due to cruelty of husband, husband commits adultery or bigamy, husband changes religion
- She will not be entitled if she lives in adultery, and/or changes her religion.

### **Section 19**

- If she is unable to support herself from her own income or property, she is entitled to maintenance from her husband's property or parents or her sons or daughters of their property.
- If the above people don't maintain her, she can claim from Father-in-Law.
- Upon remarriage she will not be entitled to maintenance.

### **Section 20**

- Legitimate and illegitimate children are entitled to maintenance from their parents.
- Old or infirm parents can get maintenance from their sons or daughters.
- Only such persons are entitled to claim who cannot maintain themselves from their own income or out of their property's income.

### **Section 20 of DV Act**

- Magistrate can direct the respondent to pay monetary relief to meet expenses and losses of the aggrieved person and children of the aggrieved person of domestic violence.
- Relief may include, without being limited to – loss of earnings, medical expenses, loss caused due to damage of property.
- Such relief must be fair, reasonable and consistent to the standard of

living of the aggrieved person.

- An appropriate lump sum or periodical payments can also be awarded.
- Upon failure to pay, the Magistrate may direct the employer or debtor of the respondent to pay directly to the aggrieved person or deposit such amount in Court, as relief to the respondent.

### **Section 24 of Hindu Marriage Act**

- If the wife or husband during proceeding under the act doesn't have income for expenses or proceedings, an application may be filed by such person to be maintained by the other, for an amount reasonable as per the Court.

### **Section 25**

- The court may order on application of the wife or husband, either of them to pay to the other such amount for maintenance and support. Such gross sum or periodical support, at a rate viewed as just to the Court.
- On change in circumstances, the court can modify its order.
- If party receiving maintenance remarries or is chaste, the court may modify or rescind the order as it may feel just.

### **Section 36 of Special Marriage Act**

- If it appears to the court that the wife has no income to support herself and expenses of the proceeding, on application of the wife the court can order the husband to maintain her.

### **Section 37**

- The court may on application to it, order the husband to secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property a gross sum or a periodical payment.
- District Court can modify the order if the wife doesn't lead a chaste

life or remarries.

### **Muslim Law**

- A divorced woman can claim maintenance from her husband.
- A sum equal to Mehr settled at marriage.
- Maintenance for children till they are two years old.
- All gifts given to her at her marriage.
- Maintenance during the period of Iddat.
- If all the above are not given to her she can file a petition in the court of a Magistrate.
- Amount ordered by the Magistrate is to be paid by her husband.
- Durring Iddat she is entitled to as much maintenance as necessary.

### **Maintenance after Iddat to divorced woman**

- Husband is liable for reasonable and fair provisions of maintenance for after the Iddat, which are to be made during the period of Iddat.
- Liability of husband is not confined to the Iddat period.
- Divorced woman if not remarried, can claim or can proceed against relatives liable to maintain her, after her Iddat period.
- Magistrate may direct State Wakf Board to pay maintenance to her.





# **Chapter**

# **VI**

## **DOWRY AND DOWER OR MEHR**



## **Dowry Prohibition Law**

The dowry evil is essentially a social one having relation with property rights of a woman. It has been a matter of serious concern to everyone in view of its ever increasing and disturbing proportion. Demand for dowry has its origin in customary practice such as stridhan wherein its given to daughters at the time of marriage. This concept was evolved just to assist the daughter in setting up her house over the years, but the demand increased and spread to a large proportion. Over a period of time, this concept has been corrupted to its current and volatile form, which, in many cases has led to the murder of wives by their husbands and his relatives.

In order to put an end to this tradition, the Government of India passed a central legislation in 1961 by making the giving and taking of dowry in relation to marriage a criminal offence. This was called the Dowry Prohibition Act, 1961.

### **What is dowry?**

Section 2 of the Dowry Prohibition Act, 1961 defines 'dowry' as any property or valuable security given or agreed that it will be given by one party to another party either directly or indirectly:

- Before the marriage
- At the time of the marriage
- After the marriage

In principle, if any dowry was given to the wife either before, at the time of or after the marriage, such property is to be returned to her within three months of the date of marriage or receipt of dowry or the woman attaining the age of 18. Failing to return the dowry can attract a punishment of imprisonment for six months to two years and a fine of Rs. 5,000 and Rs. 10,000. If the woman dies before receiving the dowry, then the dowry will be transferred to her heirs.

### **What constitutes an offence under the Act?**

Under section 4 of the Act, demanding, giving or taking dowry in relation

to marriage is a criminal offence.

- **Before the marriage:** If dowry is demanded even before the woman and the man become the 'bride' and the 'bridegroom', it would constitute an offence under Section 4 of the Dowry Prohibition Act, 1961. (LV Jadhav vs Shankarrao Abasaheb Pawar and Ors, (1983) 4SCC 231)

### Example

Kalpana and Ram, who are in their mid-20s, are to be married soon. Soon after the marriage was fixed by the parents of Ram and Kalpana, the two families met again to discuss the other issues regarding the marriage. Ram's uncle, in the course of talking about the expenses, suggested that Kalpana's father give them at least a car and some money since they were spending so much money on the wedding. Kalpana's father complained about this because when both the families met the first few times, Ram's family had said that they will not ask for any money or property from Kalpana's parents. Ram's father denied that he was party to the discussion between Kalpana's father and Ram's uncle.

In this situation, Ram's family is guilty of asking for dowry even though Ram's parents did not give their consent to the demands made by Ram's uncle.

- **At the time of marriage:** If the bride is handed a list of ornaments and household articles such as a refrigerator etc. at the time of settlement of marriage between the two families that can also be considered as a dowry demand. (Madhu Sudan Malhotra v. Kishore Chand Bhandari and ors, 1988 (SUPP) SCC 424)
- **After marriage:** If the demand for dowry is made after the marriage, this would also be an offence under Section 4 of the Dowry Prohibition Act, 1961. The dowry need not only be money; it can be any valuable security or property.

Dowry related offences are non-bailable and non-compoundable. Any agreement to give or take dowry is void.

### **What is not dowry under the Act?**

- Presents given at the time of marriage to the bride without any demand being made.
- Presents given to the bridegroom without any demand made in that regard.
- In both these cases, the legislation asks that a list of such presents be made and signed by both parties to the marriage.

### **For whose benefit is dowry given?**

Under section 6 of the Dowry Prohibition Act, dowry is given for the benefit of the wife and her heirs. If dowry is received by anyone other than the bride it should be held in trust by this person until it is transferred to the bride within the following time period:

- If the dowry was received before marriage, within three months after the date of marriage; or
- If the dowry was received at the time of or after the marriage, within three months after the date of its receipt; or
- If the dowry was received when the woman was a minor, within three months after she has attained the age of eighteen years.

### **What happens if dowry is not transferred to the woman?**

If a person does not transfer the dowry received on behalf of the woman within the time period mentioned in section 6, he shall be punishable with imprisonment for less than 6 months, but which may extend to two years or a fine which shall not be less than Rs. 5,000, but which may extend to Rs. 10,000, or with both.

### **What happens to the dowry if the woman dies before the dowry is transferred to her?**

If a woman dies before the dowry is transferred to her, the heirs of the woman shall be entitled to claim it from the person holding it. But if a

woman dies within seven years of her marriage under unnatural circumstances, the property will:

- If she has no children, be transferred to her parents; or
- If she has children, be transferred to such children and pending such transfer, be held in trust for such children.

### **What is the difference between dowry and stridhan?**

The difference between dowry and stridhan is:

- Property given to the daughter voluntarily at the time of marriage would be stridhan
- Any property which the wife owns prior to her marriage and is brought into the matrimonial house would also be stridhan
- Property given on demand in connection with marriage is dowry

It is important to remember that both dowry and stridhan belong to the woman.

### **What is the punishment for the offence of demanding, giving or taking dowry?**

Punishment for giving, taking or abetting the giving or taking of dowry:

If any person gives, takes or abets the exchanging of dowry, he/she shall be punished with imprisonment for a term which shall not be less than five years and with a fine which shall not be less than Rs. 15,000 or the amount of the value of such dowry, whichever is more.

Penalty for demanding dowry: If any person demands, directly or indirectly, from the parents, other relative or guardian of a bride or bridegroom, any dowry, he/she shall be punishable with imprisonment for a term between six months to two years and a fine which may extend to Rs. 10,000.

### **Who can be held responsible?**

Any person who gives or takes or abets the giving or taking of dowry can be punished under this legislation. This means that the parents of the girl

as well as the boy and any one related to them who demands or gives dowry can be held responsible.

### **How is the law relating to prohibition of dowry implemented?**

The government of each state also appoints Dowry Prohibition Officers in each district in order to prevent the demanding, giving and taking of dowry.

Their duties are:

- to see that the provisions of this Act are complied with
- to prevent, as far as possible, the taking or abetting the taking of, or the demanding of, dowry
- to collect any evidence that may be necessary for the prosecution of persons committing offences under the Act

In order to assist the Dowry Prohibition Officers the State government is supposed to appoint an advisory board consisting of not more than five social welfare workers (out of whom ,at least two shall be women) from the area.

### **It is essential to ake a list of all the gifts received at the time of the wedding:**

- There should be two lists of the gifts given to the bride by her parents, in-laws, friends or relatives, etc.
- The list of gifts given to the groom should be kept by him.
- The list of gifts given to the bride should be kept with her.
- This list should be made at the time of the wedding or immediately after the wedding.
- The list should be in writing.
- There should be a brief description of each gift in the list.
- The approximate value of the gift should also be written.



- The name of the person giving the gift should also be written.
- If the giver is a relative then the relationship to the bride or groom should be mentioned.
- The list should be signed by the bride and the groom.
- If the boy and girl are illiterate then after the list is read to them, their thumb impressions should be put on the list.
- If the bride and groom wish, the list can also be signed by any relative or person who has attended the wedding.

### **Loopholes in the Dowry Prohibition Act, 1961**

- The term 'in connection with marriage' in the definition of dowry is usually difficult to define and prove. The parties often tend to hide the problem by saying that what was given to the girl was gifted to her and was not dowry.
- Imposing liability on the bride's family could result in less reporting of dowry harassment by the woman and her family.
- The Act prohibits demanding dowry 'directly or indirectly'. It is difficult to prove indirect demand for dowry.
- In many instances, it is difficult to prove the connection between the death of the woman and the cruelty that was its cause.
- Since the offence is usually caused within the confines of the family and family members do not reveal the atrocities committed by their own family, it becomes difficult to prove offences.

### **Things to remember: as a paralegal, what can you do to prevent dowry?**

- Educate women and young girls on the evil of dowry and the law.
- In meetings, speak about the courage of other women who have refused to get married on the day of the marriage, because of a dowry demand by the groom.

- Inform women that dowry is their property and if they are leaving their matrimonial home they should take the property that belongs to them.
- When cases of dowry harassment come to you, complain to the Dowry Prohibition Officer in your district.
- Find out the address and contact details of the Dowry Prohibition Officer.
- Keep in touch with the officer and regularly follow up on reported cases.
- Find out who are the members on the advisory board at the district level and find out what work they are doing to stop dowry harassment in your district.

### **Cruelty in Criminal and Civil Law**

In the 1980s, it was noticed that a large number of young married women were committing suicide. Investigations showed that this was happening because of dowry related harassment. Two things were happening—women were either being killed by their husbands or the husband’s family, or the women were killing themselves because they were unable to cope with the dowry harassment by their husbands and their families. In order to deal with this issue and to increase conviction in such cases, there were several changes made to the Indian Penal Code and the Indian Evidence Act and the following sections were introduced:

- Section 498A IPC
- Section 113A Indian Evidence Act
- Section 304B IPC
- Section 113B Indian Evidence Act

### **What is Section 498-A of the IPC?**

This section deals with the problem of cruelty faced by a woman from her husband and or his relatives. This section was introduced into the IPC in

1983. It stated that if found guilty a person will be punished with imprisonment for three years, and be liable to pay a fine.

With the passage of time it became very difficult to get conviction under section 498A since women were often reluctant to go and file a complaint in the police station. Usually the trend of the police has been to discourage a woman from filing an FIR for any case of domestic violence on the contrary the police has advised to force the woman to adjust with the husband and his family.

The police on the other hand often do not take the cases of domestic violence seriously and thus women were left at the mercy of compromises despite the law being very strict. A complaint must be made within 3 years of the act of cruelty. A woman cannot file an FIR against her husband because he beat her 5 years ago. It must be remembered that cruelty happens over a period time and is always continued. A complaint must be based on the most recent act of cruelty. The offence is non-bailable and non compoundable (compromise is not allowed). If a case is filed and went to the Court but in the mean time the husband is willing for a compromise. Such compromise cannot happen without any direction by the Court. Courts have often allowed compromise and dismissed case.

### **What is Section 113A of IEA?**

If a case comes before the Court where a woman has committed suicide within seven years of marriage, the Court has to decide if the husband or any relative of the husband has abetted this crime. If there is evidence to show that the woman was treated with cruelty, the Court will presume that the husband or relative has abetted the suicide. This means that now the burden of proving that they did not treat the woman in a cruel manner and that they did not abet the suicide falls on the husband or relative.

### **What is Section 304B IPC?**

This section deals with dowry death and says that if a woman dies in unnatural circumstances within seven years of her marriage and there is evidence that she was subject to dowry harassment before her death, it will be considered a dowry death. The punishment for dowry death is

imprisonment for a minimum of seven years and in some cases up to life imprisonment.

### **What is Section 113B of the Indian Evidence Act?**

When there is a case before the Court where it has to decide if a person has committed the dowry death of a woman, it can be shown that the person was harassing the woman or treating her with cruelty and demanding dowry, the court will presume that this person caused the dowry death. This means that now the accused has to prove that he or she did not cause the dowry death.

### **What is the definition of cruelty under Section 498A?**

The term cruelty has been defined widely to include mental and physical cruelty. It also includes:

- Any willful conduct on part of the husband or his relatives that is likely to drive the woman to commit suicide or cause grave injury or physical or mental danger to life, limb or health of the woman.
- Harassing a woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security.

### **Examples of cases of cruelty where Courts have convicted under Section 498A**

- Drinking and coming home late at night coupled with beating and demanding dowry has been taken to amount to cruelty.
- A married woman committed suicide by pouring kerosene and burning herself. In her dying declaration she said that her husband used to beat her after drinking liquor, for which he used to borrow money from the villagers. The Court said that this amounted to cruelty within the meaning of this section.
- In a case of suicide by a girl within a year of her marriage, the victim was subjected to abuse, humiliation and mental torture. She was

branded a woman who brought ill luck from the very beginning of her married life because an elderly member in the in-laws' family died soon after her marriage. Her mother-in-law suggested that she end her life. To add to her misfortune her first conception aborted and her mother-in-law told her that she had swallowed her own baby and that she should commit suicide. Her husband used to come home drunk and abused and assaulted her on several occasions. The bridal presents brought by her were branded as goods of inferior quality. Both her husband and her mother-in-law were convicted under section 498A.

- The husband accompanied his deceased wife to his in-laws to ask not only the unpaid balance of the agreed dowry but also for additional dowry. This was held to be sufficient to constitute an offence under section 498A as also under the Dowry Prohibition Act, 1961.
- The conduct of a husband and his father in not accepting the birth of a baby girl was held as amounting to cruelty.
- The husband told the Court that the intruders killed her. He did not immediately make a complaint to the Police, nor did he seek medical help for her. Though the Court did not consider this enough evidence to convict him of murder, the witnesses' evidence was held sufficient to convict him under section 498A IPC.

## **Dower or Mehr**

### **What is Dower or Mehr?**

Dower is the sum of money or property, which a Muslim wife is entitled to get as a token of respect towards her Muslim marriage, is like a contract of sale in which wife is the property and dower is the price.

What is the Object of Dower- The object of Dower is as under-

- To impose an obligation on the husband as a mark of respect to the wife
- To play such check on the careless use of divorce by the husband

- To provide subsistence after the dissolution of her marriage either by the death of the husband or by divorce

### **What is the importance of Dower to a marriage?**

Dower/Mahr in Islam is necessary for a lawful marriage that if it were not mentioned at the time of the marriage the law will presume that the marriage did not take place. It is an essential ingredient under Muslim Law to such an extent that even when it is unspecified at the time the marriage is contracted it must be adjudged on definite principles. If there is an agreement between husband and wife that the wife will not claim dower/mehr such an agreement is void and the right to dower remains in spite of such an agreement. If the wife dies before the payment of the dower, her legal representatives are entitled to the dower amount.

There are different types of dower under Muslim Law- Dower may be classified into two specified or fixed dower and the other is unspecified or proper dower.

#### **(1) Specified dower**

When the Mehr is fixed in the marriage contract it is called a specified dower. It may be fixed either before or at the time of marriage or after marriage, where the husband has not attained the age of liberty the dower may be fixed by his father on his behalf

(a) **Prompt Dower-** prompt dower is payable on demand. It may be demanded by the wife even before the consummation of marriage takes place.

\*If the husband sues the wife for restitution of conjugal rights before the consummation of marriage the non-payment of prompt dower is a complete defense to the suit.

(b) **Deferred Dower-** this is payable on dissolution of marriage either by death or divorce. If there is no specification at the time of marriage as to what part of dower is to be prompt or deferred, the presumption in Shia Law is that the whole of the dower is prompt and Sunni Law

half dower is prompt and half is deferred.

(2) **Unspecified Dower-** It is also called customary Mehrs. When the amount of dower is not fixed in the marriage contract or even if the marriage has been contracted on the condition that she should not claim any dower the wife is entitled to proper dower. Proper dower is to be determined by taking into consideration the amount of dower settled upon other female members of the father's family

Dower is usually settled and written in the Nikaha-nama.

### **How much amount of Dower may be settled or fixed?**

Any amount or value may be settled as dower. It could be in terms of money or a specific property. Any sum of money or property or of any valuation may be settled and there is no maximum limit to the amount. This act indirectly controls and restricts the husband's right to pronounce talaq.

### **Can the Dower amount be changed subsequent to the marriage?**

At any time after the marriage, husband and wife may lawfully enter into a contract for increasing the amount of dower payable by the husband which means the dower amount fixed at the time marriage may be increased and subsequently the wife is entitled to claim this additional or enhanced amount from the husband. However, the amount of specified dower can never be reduced by the husband after the marriage but the wife herself may voluntarily agree to reduce the amount payable to her as dower from the husband. This is known as voluntary remission of dower and is completely at the option of the wife.

### **When does dower become payable?**

In the case of prompt dower, the husband has to pay the dower amount as the wife makes a demand for it whether the marriage has consummated or not. If any delay is caused in the payment of the dower, the wife is entitled to get interest for the period during which the dower has been unpaid. The wife may also refuse consummation till the husband pays the prompt dower. In deferred dower, the husband pays the dower after the occurrence of a particular event i.e. either on dissolution of marriage

or upon the death of husband. The husband in either case has to pay the amount soon.

### **Can the Dower amount payable be forfeited by the wife?**

The dower amount may or may not be forfeited by the wife against her husband.

### **What are the rights of a woman when her Dower is not paid by the husband?**

The Muslim Law confers upon a wife or a widow the following rights to compel the her husband for payment of her dower:

- Right to dower as debt: Unpaid dower is like an unpaid debt. It is enforceable by the wife by filing a suit in the Court of Law. If the husband is not alive, the wife is allowed to recover this amount from the legal heirs of the husband.
- Refusal to co-habit: If the marriage has not been consummated and the dower is prompt, the wife may refuse conjugal rights to her husband till he pays her prompt dower. Non-payment of prompt dower is lawful justification for the wife to refuse cohabitation with the husband.
- But where the consummation has already taken place even once, the wife's right to refuse consummation is lost. Then if the husband files a suit for restitution of conjugal rights, it will succeed despite non-payment of prompt dower.
- Right to retain: After the death of the husband, the most effective method for enforcement of dower is through the exercise of the "right of retention." Here a widow, whose dower is unpaid, has a right to retain a property of her husband till her dower debt has been satisfied.

### **Hiba or gift – What is Hiba under Muslim Law**

Gift in law means a transfer of property made immediately and without



any exchange. Under Muslim Law, a person is allowed lawfully to make a gift of his property to another during his life time. The person making the transfer is termed *wahib* or donor the person to whom it is made is termed *Mouhubla-hu* or donee and the gift given is called *mouhub*. Gift or *hiba* has been included in the shariat act, 1937 it is regulated only by provisions of Muslim personal law when the gift is made by Muslims. *Hiba* is an unconditional transfer of ownership in an existing property made immediately and without consideration.

### **Who are the persons involved in making a gift?**

The parties to the gift are the donor and the donee. Donor is a person giving the gift and the donee is the person receiving the gift. A *hiba* may be made orally or in writing. In *Mohamad Hisabuddin Vs. Mohamad Hesanuddin AIR, 1984 Guwahati 41*, a Muslim woman made a gift of her immovable property to her son. The gift was written on ordinary paper and not registered in the court. The High Court held that the gift was valid because under Muslim Law, writing and registration are not essential conditions for the validity of the gift.

### **What are essentials for making a valid gift under Muslim Law?**

The following are basic ingredients of a valid *hiba*-

- Competency of a donor. He or she must be an adult above 18 years of age, of sound mind, must be a Muslim and be governed by Muslim Law.
- Where a Muslim signifies his willingness to make to another an immediate transfer without consideration of the ownership of any property with a view to obtain the assent of the other to such transfer, he is said to make a declaration (*IJAD* of gift).
- The acceptance must be an acceptance of the gift by the donee. The donee may be minor or major, natural person or an artificial one. The age, sex, race or religion is no bar to be a donee but the donee must be in existence at the time of making the gift. A child who is in the womb or is to be born within six months from the

date of the declaration of the gift is a competent donee.

In case of a minor donee the acceptance may be by the guardian. If it is a mosque the acceptance may be by the Mutawalli or trustee.

Delivery of possession is essential to the validity of a gift under Muslim Law. There should be a delivery of the gifted property. The necessity of delivery exists even in a gift through a registered deed. In *Saira Bai Vs. SS Joshi* AIR, 1960 MP 260 a gift of a house was executed by a registered document but it was held that the gift was incomplete and void because the possession was not delivered.

### **What can be subject matter of a valid gift?**

Any kind of property which is owned by the donor at the time of making the gift can be the subject matter of the gift; it may be movable or immovable property. There are certain things which must be recognized and specified.

- Gift of a future property- a property which is not yet in existence is not valid.
- A Muslim cannot make a valid hiba of a property that he or she is going to inherit in the future.
- Gifts or debts due tenancy rights, right to collect rent and other actionable claim are allowed and valid under the Muslim Law.
- Gift of insurance policy is not valid under Muslim Law because this would be a conditional gift.
- Gift of Mahr or Dower by the wife is allowed. However the gift of dower can be made only by the wife to the husband and to no other person. The gift of a dower to a dead husband is also valid and it serves to remove the right of the widow to claim dower.

### **What is revocation of a Hiba or Gift?**

Revocation means the gift is withdrawn and the donor does not want to make the gift any more. A donor is competent to withdraw his offer of the gift if delivery of possession was not made. No order of the Court in such

case is necessary. After delivery of position the gift cannot ordinarily be withdrawn. A suit for the purpose has to be filed in the Court of Law. The revocation can also be made with the consent of the donee in *Mehboob Vs. Abdul AIR 1964, Rajasthan 250* after the delivery the donor has a right to revoke the gift either with the consent of the donee or by formal decree of the Court. The following gifts are irrevocable

1. When the donor is dead.
2. When the donee is dead.
3. When the donee is related to donor in prohibited degrees of consanguinity, example: brother and sister.
4. When the donor and donee stand in marital relationship e.g. as husband and wife.
5. When the subject of the gift has been transferred by the donee by sale gift or otherwise.
6. When the subject of the gift has been lost, destroyed or so changed as to lose its identity.
7. When the subject of the gift has increased in value and the increment is inseparable when anything has been accepted in return.

Under Shia Law a gift may be revoked by mere declaration of withdrawal even after delivery of position of the gift. There are, however, certain gifts that are irrevocable and cannot be invalidated by the donor once made. A gift by husband to a wife or by a wife to a husband cannot be revoked. However, in Shia Law such gifts can be revoked by mere declaration.

**Chapter**

**VII**

**ADOPTION**



## **What is adoption?**

Adoption is a process whereby a person assumes the parenting for another who is not kin and, in so doing, permanently transfers all rights and responsibilities from the original parent or parents. Adoption can be a beautiful solution not only for the childless couples and single people but also for homeless children. It enables a parent-child relationship to be established between persons not biologically related. It is defined as a process by which people take a child not born to them and raise it as a member of their family.

## **What is the history of adoption under the Personal Law in India?**

Adoption as a legal concept was available only among the Hindus. It allowed to legally adopt a child and the other communities could only act as a legal guardians of the child.

The religion-specific nature of adoption law was a very retrograde step. It reinforced practices that were unjust to children and hindered the formation of a Uniform Civil Code.

Article 44 of the Constitution declares: The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.

Over the years, several attempts were made to formulate a general secular law on adoption. The attempts of Parliament in this direction did not bear fruit, all these went in vain on account of a number of reasons. The history of all such efforts does not bring credit to the secular credentials of the Indian polity.

The Adoption of Children Bill, 1972 was not approved as the Muslims opposed it. The Adoption of Children Bill, 1980, aiming to provide for an enabling law of adoption applicable to all communities other than the Muslim community, was opposed by the Bombay Zoroastrian Jashan Committee, which formed a special committee to exempt Parsis from the Bill. The National Adoption Bill, tabled twice in Parliament in the Seventies, has yet to enter the statute books. The history of attempt to bring in the concept of secular adoption into our system of laws narrates a sad tale of inaction

and action without conviction on the part of the legislature.

## **ADOPTION UNDER THE HINDU LAW**

Adoption in the Hindus is covered by the Hindu Adoptions and Maintenance Act (HAMA), 1956 and after the enforcement of this Act all adoptions can be made in accordance with this Act. It came into effect from December 21, 1956.

Before enactment of this Act, only a male could be adopted, but with the passing of the Act it makes a provision that a female may also be adopted. One of the features of this Act is that no Hindu person can adopt a son or daughter, if they already have a child of that sex. Often the intentions behind the law are good, but the methods adopted fall short. The HAMA provides that there should be an age difference of 21 years between the adoptive parent(s) and the adopted child whenever they are of opposite sex. This is intended to prevent sexual abuse.

### **What are the laws under which adoption can be made?**

There are three legislations under which adoption can be made. They are:

- The Hindu Adoptions and Maintenance Act (HAMA), 1956
- Guardians and Ward Act, 1890
- The Juvenile Justice (Care and Protection of Children) Act, 2000.

### **Who has a right for adoption under the HAMA ?**

Only Hindus, Buddhists, Jains and Sikhs and to any other person who is not a Muslim, Christian, Parsi by religion. (section 2(1)(a)(b)(c))

### **What are the requirements for a valid adoption?**

As given in section 6, no adoption can take place unless:

i) The person adopting has the capacity and the right, to take in adoption

## Who may adopt?

### **CAPACITY OF MALE (Section 7)**

Any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or daughter in adoption. Provided that if he has a wife living, he shall not adopt except with the consent of his wife, unless his wife has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind. If a person has more than one wife living at the time of adoption the consent of all the wives is necessary unless the consent of one of them is unnecessary for any of the reasons specified in the preceding provision.

### **CAPACITY OF FEMALE (section 8)**

- Any female Hindu
- who is of sound mind
- who is not a minor, and
- who is not married, or if married, whose marriage has been dissolved or whose husband is
- dead or has completely and finally renounced the world or has ceased to be a Hindu, or has
- been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to
- take a son or daughter in adoption. Where the woman is married it is the husband who has
- the right to take in adoption with the consent of the wife.

ii) The person giving a child in adoption has the capacity /right to do so: section 9

- No person except the father or mother or guardian of the child shall have the capacity to give the child in adoption.
- The father alone, if he is alive, shall have the right to give in adoption,



but such right shall not be exercised except with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind.

- The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind.
- Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is unknown - the guardian of the child.
- may give the child in adoption with the previous permission of the court. The court while granting permission shall be satisfied that the adoption is for the welfare of the child and due consideration.
- will be given to the wishes of the child having regard for the age and understanding of the child.
- The court shall be satisfied that no payment or reward in consideration of the adoption except as the court may sanction has been given or taken.

iii) the person adopted is capable of being taken in adoption (section 10)

no person can be adopted unless

- He or she is a Hindu;
- He or she has not already been adopted;
- He or she has not been married, unless there is a custom or usage applicable to the parties;
- Which permits persons who are married being taken in adoption;
- He or she has not completed the age of fifteen years unless there is a

custom or usage applicable to the parties which

- Permits persons who have completed the age of fifteen years being taken in adoption.

### **What are the other conditions for a valid adoption?**

Section 11 provides for the conditions to be complied with. They are as follows:

i) If the adoption is of a son, the adoptive father or mother by whom the adoption is made

- must not have a Hindu son. The son's son or son's son's son living at the time of adoption

ii) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made

- must not have a Hindu daughter or son's daughter living at the time of adoption;

iii) If the adoption is by a male and the person to be adopted is a male, the adoptive father is at

- least twenty one years older than the person to be adopted;

iv) If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted;

v) The same child may not be adopted simultaneously by two or more parents;

- The child to be adopted must be actually given and taken in adoption with an intent to transfer the child from the family of birth.

### **What are the effects of adoption?**

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 adoption.

However, any property which vested in the adopted child shall continue to vest in such person subject to the obligations if any attached to the ownership of such property including the obligation to maintain relatives in the family of his or her birth.

Similarly the adopted child shall not divest a person of any estate which vested in him or her before adoption.

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or will.

## **REGISTRATION**

The adoption deed is not required to be registered (except in Uttar Pradesh).

Except where it declares or reserves an interest worth Rs. 100 or more for a third person in an immovable property.

However, authority to adopt is required to be registered under section 17(3), Indian Registration Act. The Hindu Minority and Guardianship Act, 1956 (32 of 1956) has codified laws of Hindus relating to minority and guardianship. As in the case of uncodified law, it has upheld the superior right of father. It lays down that a child is a minor till the age of 18 years. Natural guardian for both boys and unmarried girls is first the father and then the mother. Prior right of mother is recognised only for the custody of children below five. In case of illegitimate children, the mother has a better claim than the putative father. The act makes no distinction between the person of the minor and his property and, therefore guardianship implies control over both. The Act directs that in deciding the question of guardianship, courts must take the welfare of child as the paramount consideration. A guardian may be a natural guardian, testamentary guardian or a guardian appointed by the court. In deciding the question of guardianship, two distinct things have to be taken into account – person of the minor and his property. Often the same person is not entrusted with both.

## **ADOPTION UNDER MUSLIM, CHRISTIAN AND PARSI LAW**

### **The Guardians and Wards Act, 1890:**

Personal laws of Muslims, Christians, Parsis do not recognise complete adoption. Muslims, Christians and Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance.

Foreigners, who want to adopt Indian children have to approach the court under the aforesaid Act. In case the court has given permission for the child to be taken out of the country, adoption according to a foreign law, i.e., law applicable to guardian takes place outside the country.

As non-Hindus do not have an enabling law to adopt a child legally, the people belonging to these religions who are desirous of adopting a child can only take the child in 'guardianship' under the provisions of the Guardians and Wards Act, 1890. The statute does not deal with adoption as such but mainly with guardianship. However, these persons can adopt the children from orphanage by obtaining permission from the court under the Guardians and Wards Act. The process makes the child a ward, not an adopted child. Under this law, when children turn 21 years of age, they no longer remain wards and assume individual identities. They do not have an automatic right of inheritance. Adoptive parents have to leave whatever they wish to bequeath to their children through a will, which can be contested by any 'blood' relative.

The aforesaid enactments remain silent about the orphan, abandoned and surrendered children.

There was no codified legislation dealing with the adoption of the children of these categories.

As a result, several misconceptions or irregularities appeared in respect of the custody, guardianship or adoption of these types of children, which were prejudicial to the interest of the children.

Considering all the aspects mentioned above laudable attempt were un-

undertaken by the legislature by the stipulations, which have been made in Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000. This enactment shows that the legislature may be found to have accepted the concept of secular adoption whereby without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt and all children to be adopted.

It is pertinent to mention here that there arises confusion as to the interpretation as well as concept of adoption as because the expression “Adoption” has not been defined at all in the enactments like HAMA or GAWA. Moreover, the legal status of the adopted child has not declared to be equal to that of a biological legitimate child. Though at the initial stage the Juvenile Justice (Care and Protection of Children) Act, 2000 did not contain these factors, these are introduced in Juvenile Justice (Care and Protection of Children) Amendment Act, 2006.

The concept of adoption has been well defined in Sec.2 (aa) of the said Act, which is as follows:

Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.

Adoption is the transplantation of a son from the family in which he is born, into another family by gift made by his natural parents to his adopting parents. Islam does not recognise adoption. In *Mohammed Allahabad Khan v. Mohammad Ismail*, it was held that there is nothing in the Muslim Law similar to adoption as recognised in the Hindu System. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption. The material difference between the two can be stated that in adoption, the adoptee is the known son of another person, while one of the essentials of acknowledgement is that the acknowledgee must not be known son of another. However, an adoption can take place from an orphanage by obtaining permission from the court under Guardians and wards Act.

The Personal Laws of Christians and Parsis communities also do not recognise adoption and here too an adoption can take place from an orphanage by obtaining permission from the court under Guardians and Wards Act. A Christian has no adoption law.

Since adoption is legal affiliation of a child, it forms the subject matter of personal law. Christians have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. National Commission on Women has stressed on the need for a uniform adoption law. Christians can take a child under the said Act only under foster care. Once a child under foster care becomes major, he is free to break away all his connections. Besides, such a child does not have legal right of inheritance.

The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. This Act also provides that the court must take into consideration the welfare of the child while appointing a guardian under the Act.



# **Chapter**

# **VIII**

## **WOMEN AND SUCCESSION RIGHTS**





## Session Methodology

### Property Laws In India

- A. The Hindu Succession Act, 1956- applicable to Hindus, Jains, Buddhist, Sikhs.
- B. The Indian Succession Act, 1925- applicable to Christians and people married under the Special Marriage Act.
- C. Muslim Law of Inheritance – applicable to Muslims.

### EXERCISE 1

**Title:** Property Laws in India

**Purpose:** To understand the various property laws in India

**Time:** 60 minutes

**Materials needed:** Legal information on property laws, case studies, whiteboard and markers

#### Steps:

- The steps followed here can be repeated for the Hindu Succession Act 1956, Indian Succession Act, 1925 and Muslim Laws of Inheritance.
- The facilitator should use case studies to explain the laws. Examples of cases studies are given below.
- Use the legal information section to address the questions in the case studies.
- This can be done in the form of group work, by giving cases to the participants and a copy of the law.
- Presentations will be made to the large group and the facilitator will clarify the law. It is important that the facilitator have a property lawyer who is aware of these laws, present to assist her.

Case Studies for the Hindu Succession Act, 1956

### **Case Study 1:**

Geeta is an unmarried woman and lives with her mother, her brother Suresh and his wife, Rani. Her father used to work in a government office and died of a heart attack suddenly six months ago. The family owns the house in which they live and also have ancestral property in the village. Geeta's father died without making a will.

- Do Geeta and her mother have a right to property?
- What is their right? What is their share in the property?
- If Geeta were married, would the situation have been different?
- Assume Geeta is married and has been abused by her husband. She leaves her husband's home and comes to live with her family. As long as her father was alive, things were fine in the family. But now, Suresh and Rani want to live independently and want Geeta and her mother to move out of the house. What Geeta can do in this situation?
- If Geeta has a right in the property, what are the challenges Geeta will face in securing the property?

### **Case Study 2:**

Reena was married to Ramesh and they lived in a joint family with Ramesh's parents and brothers. Ramesh used to work as a driver in a factory. Ramesh died in a car accident a year ago when their son was 10 and daughter was 12 years old. Reena has been hearing conversations in the house about selling the family property. She is worried about her future since she does not know if her in-laws will give her or her children any share in the property.

- What are Reena's and her children's rights to the family property?
- What can Reena do to secure these rights?
- What can Reena do if her in-laws refuse to provide for her and her children?

- In addition to the family property, do Reena and her children have the right to any other property?

## **Case Study for Indian Succession Act, 1925**

### **Case Study 3:**

Lisa's husband Daniel, passed away without writing a will. Daniel had a lot of rubber plantations. He has two brothers who have been vying for his property. Lisa is worried that they will take away the property from her. She has a three year old daughter, Rachel.

- What share of property is Lisa entitled to under the Indian Succession Act, 1925?

## **Case Study for devolution of property under Muslims Laws on Property**

### **Case Study 4:**

Mumtaz and Mehtab are brother and sister. Their parents Rafiq and Tabassum, recently passed away in an accident. There was no will left behind. Mumtaz is 30 and Rafiq is 29, Rafiq is married with one daughter. Mumtaz is also married with one son.

- How will the property be divided between Rafiq and Mumtaz?
- Are Mumtaz's and Rafiq's children entitled to any share in property? When will they be able to claim it?

## **EXERCISE 2**

**Title:** How to write a will

**Purpose:** To understand the main components of a valid will or testament

**Time:** 45 minutes

**Materials needed:** Whiteboard and markers, chart paper and pens

**Steps:**

- Ask participants what they understand by a will.
- Divide them into 2-3 groups, depending on the numbers, and ask them to draft a will.
- Once the groups are ready, ask them to present the will to the larger group.
- Compare the will drafted by the group to a legally valid will and point out the common mistakes people make when they draft wills.

Lead a discussion on the Law of Wills which answers the following questions:

- What is a valid will?
- Does a will necessarily have to be written on a stamp paper?
- What precautions should a person take while making a will?
- Should a will be registered? What are the benefits of registration?
- Can a will be changed?
- How can a will be enforced? What must a person do to give effect to a will?
- Can a will be challenged?

**Note to the facilitator**

The facilitator should have a discussion on enforcement of property rights. This discussion should be linked to the first step where the participants identified the challenges that women face in securing their right to property. In leading the discussion, the facilitator must encourage the group to analyse the specific problems and try and find solutions for them.

Question: It is not possible for a woman to file a case in the court because she has no money and the cases take very long to be resolved.

The facilitator's response could be, "It is true that the court process in civil cases takes a very long time, so is there any other way? Can the woman try to negotiate a family settlement that will secure her rights? Family arrangements are valid in law. An agreement can be signed based on the rights of each of the parties and the woman can be given her due share and the property can be registered as per the arrangement."

Question: If the family cannot come to any settlement and the woman is not able to negotiate herself, what can she do?

Get the group to talk about collective action. Can a women's collective or a local NGO or a mediator with who the woman is comfortable with help her secure her rightful share? If nothing works, the ultimate way is to go to the court.

### **Note to the facilitator**

This is a session that will raise many questions from the participants like those listed below. It may be useful to identify a good lawyer to participate at the end of the session to answer these specific questions:

- When can a person ask for partition of property?
- What documents are important in order to prove title to the property?
- Is registration of property after partition important?
- Is it difficult for women to control property that legally belongs to them? What are ways in which this can be avoided? What precautionary measures can one take?
- Who is a nominee? What rights to property does the nominee have?
- Are illegitimate children allowed a share in parents' property?

### **Action Points**

Ask the group to look at the list of reasons they put down as a bar on

accessing the right to property and get them to come up with practical solutions that they can implement in their own lives in order to overcome these.

### **What is succession of property?**

Succession means where one person inherits an estate or title from a deceased person. Succession of property of a deceased person can be either testamentary or intestate.

- Testamentary succession this means that the deceased has made a will during his life time and legacy is decided on the basis of what has been written in the will.
- Intestate succession is called inheritance where property is divided equally between the legal heirs of the deceased upon the death of the deceased person.

### **What does an heir mean?**

- “Heir” means a person, male or female, who is entitled to succession to the property of an intestate.

### **What are the laws governing succession in India?**

The law of inheritance in India is governed on the basis of religion that a person follows-

- a) Hindus are governed by the Hindu Succession Act, 1956
- b) Muslims follow the Muslim Law, and
- c) Christians, Parsis follow the secular law called the Indian Succession Act, 1925
- d) People of all religions who are married under the secular Special Marriage Act follow the Indian Succession Act, 1925.

The law relating to testamentary succession among the Hindu, Christians, and Parsis, etc., is contained in the Indian Succession Act, 1925. This law does not make any distinction between the rights of women and men under a will.

Initially, the entire law of succession was un-codified but with the advent of modern government and legislature, most of the succession laws have been codified and consolidated. There is no uniformity in the succession law relating to women following different religions.

## **Women's Right to Succession under the Hindu Law**

- Women's right to property in the Hindu Law has been a very contentious issue which has changed slowly and with the codification of the law in 1955, a pragmatic change took place in the Hindu Law.
- Prior to 1937, a woman did not have a right to own property except for her stridhan.
- In 1937 a law called the Hindu Women Right to Property Act was passed which made it possible for a woman to have limited interest in property apart from a stridhan. This meant that when a man died, his property would go to his widow so that she could maintain herself from her husband's property. She had limited right of ownership in property which meant that she could not own it completely but she could use the property to take care of herself until she died or until she remarried.
- In 1956 the Hindu Succession Act was passed. This law improved the position of women to great extent. Henceforth, a woman has the right to own the property completely. She was the absolute and full owner and the law also gave a woman an equal share in the property of her husband. She could get the same share in the property as her children would get.
- But even these developments were not sufficient for women because in the fundamental principle of the Hindu Law, men got a share in their ancestral property by birth but women only got a share in their father's self acquired property or husband's property. So, men not only had a share in the ancestral property but they also got a share in the father's property. Woman on the other hand did not get a share in the ancestral property by birth; they only got a share in the property of



the dead father or husband. This position is unequal till amendment.

- While a woman does not have a right to ask for partition of the joint family property, she does enjoy certain rights on the joint family property such as right to residence. Till the property was divided, the woman enjoy the rights to use the joint family property, but upon partition the woman does not get a share in the property only the co-parceners did. This concept violated the fundamental right to equality as envisaged in the Constitution of India.
- In order to correct this inequality, several states amended the Hindu Succession Act so that women in their state attain the same and equal rights to property as men. Andhra Pradesh made an amendment in 1985, Tamil Nadu in 1989, Maharashtra and Karnataka in 1994, so in these states, a woman had a right in ancestral property from birth and she could ask for partition of ancestral property.

In September, 2005 Government of India introduced an amendment Bill of the Hindu Succession Act to give equal property rights to women by birth. The Hindu Succession (Amendment Act 2005) came into force from September 9, 2005.

### **What is the law relating to Hindu Women's right to succession?**

The law that governs Hindu women's right to succession is the Hindu Succession Act, 1956.

### **What is Hindu Succession Act?**

The Hindu Succession Act 1956 is a law that governs intestate succession, which means that if a person dies without writing a will and that person is a Hindu, the property of the person will be distributed according to the law laid down in the Hindu Succession Act.

### **To whom does this law apply?**

The Hindu Succession Act applies only to Hindus, Buddhist, Jains and Sikhs.

If a Hindu marries a Non-Hindu, the property law applicable to them is the

Indian Succession Act.

If two Hindus get married under the Special Marriage Act without undergoing any ceremony under the Hindu law or custom, the property law applicable to them is the Indian Succession Act.

### **What are the types of property under the Hindu law?**

There are two kinds of property under Hindu Law

- (a) Coparcenary Property or Joint family property
- (b) Self acquired property

Property can be immovable like land and houses and movable like cash, furniture, jewellery and other things that can be moved from place to place.

### **What is Coparcenary/joint/ancestral Property?**

Under Hindu family the head of the family is known as the karta. This concept of joint family and karta developed in order to ensure that the property remained within one family and people who had the same blood. The word ancestral property, joint family property or coparcenary property means the same. A joint family essentially means a man, his wife, his unmarried daughters, his male descendants, their wives and unmarried daughters. Coparcenary or joint property or ancestral property belongs to a group of people known as coparceners.

### **Who are the Coparceners? Can women be coparceners after the amendment?**

In Hindu Law, a male child in the family is considered to be coparcener and thus has a share in the property. The right of coparceners in a joint family property cannot be taken away by the father or even the other coparceners. It is the right by birth. Since September 2005 all women in India have a right to become coparceners in the Joint family property. Historically, in the Hindu Law women were not allowed to be coparceners. Since the constitution of India guarantees equality to men and women and therefore, this law also needed to be amended. The right of woman to be coparcener will start from the date the law was changed. for example; the

change in Karnataka came into effect on July 30, 1994 thus, a woman in Karnataka who was unmarried as of July 30, 1994 will be considered as a coparcener. A woman who was married before July 30 1994 will not have the coparcenary right in ancestral property,. She will only get a share from her father's property. If ancestral property has been partitioned before July 30 1994, a woman cannot claim right as a coparcener in the ancestral property, she will only be entitled to her share from the father's property.

### **What are the features of a Coparcener?**

Under the Hindu Law, a coparcener could only be a male but now with the amendment to the Hindu Succession Act, woman have also been given the right to be coparceners.

A person cannot be a coparcener by be an agreement or arrangement.

All coparceners jointly own and enjoy the property. No person can claim that a specific item or thing belongs to them until partition has taken place.

A coparcener gets a share in the joint family property on his or her birth, but this share keeps changing based on the birth/ death of other coparceners. The rights of a coparcener are clearly defined only when there is a partition.

While the coparcener has the right to share in the joint family property by birth, the other members of the joint family also have such rights, such as right to residence of a female member such as mother, daughter and wife. The joint family property is available for all until partition takes place.

A coparcener (once he or she has attained the age of 18 years) has the right to ask the karta of the family for a partition of the property at any time in case the family does not agree, the partition suit can be filed in a court of law.

A coparcener on himself/herself cannot sale or mortgage the property. This can only be done by the karta of the family, under some circumstances.

Self acquired property is the property which an individual has created or

which has been inherited from someone other than his or her father or a gift received from someone.

Examples:

- Salary earned by a person from a job.
- Property received by way of price or scholarship.
- For example, If Ramana received property from his mother's father this would be treated as self acquired property.
- When Sharad's father died, he gave Sharad a house which was part of his self acquired property. This house will be Sharad's self acquired property and will not form part of the joint family property.

### **What is the difference between Joint family property and self acquired property?**

Joint family property cannot be bequeathed through a will; only self-acquired property can be bequeathed through a will.

Joint family property cannot be given away by any of the coparceners. For example, a gift would not be valid.

### **What are the rights of the coparcener in a joint family property?**

- Right by birth.
- Ownership of the property is joint. Thus the property is to be enjoyed jointly and the liabilities such as debts have to be borne jointly. The property cannot be generally given away without consent of all coparceners.
- Right of Survivorship: This means that the share of the coparcener in a joint family property keeps changing, based on births and deaths in a family.

Example:

- Naresh has five children, Durgesh, Ravi, Suresh, Anil and Sub-

hadra. None of them are married. So in a joint family property, each had one-sixth share but if Naresh dies the share of the others become one-fifth each in the property. This right of surviving coparceners to increase their share is called the right of survivorship.

- Right to ask for accounts
- Right to ask for partition
- Right to stop improper action by other coparceners which is against the interest of the joint family property, and
- Right to have other self acquired property

### **What are the property rights of a woman under the law in India?**

A woman has several rights depending on who she is – as a married daughter, as an unmarried daughter, as a widowed daughter in law, as a sister and as a mother.

A Hindu daughter, after 2005, is considered a coparcener and thus enjoys the right to ancestral property by birth. She enjoys the following rights:

- Right to Maintenance under section 125 CrPC
- Right to Maintenance under section 18 of the Hindu Adoption and Maintenance Act
- Right to Maintenance under section 25 of the Hindu Marriage Act
- Right to Maintenance can be claimed by widowed daughter in law under section 19 of the Hindu Adoption and Maintenance Act
- Right to residence (a daughter has a right to reside in her father's house if she is unmarried, deserted or separated from her husband or is a widow)
- Right to stridhan, and
- Right to a share in husband's property and father's property

## What is the method of distribution under the Hindu Succession Act?

### I) Distribution of property of a Hindu male

**Self acquired property:** If a Hindu male has written a will then his self acquired property will be divided as per his will. If there is no will, the property will be distributed in the following way:

–Firstly among his class-I heirs.

–Secondly if there are no class-I heirs, the property will be distributed to class-II heirs.

–Thirdly if there are no class-II heirs, the property will be distributed among the agnates of the deceased person. Agnate refer to two people who are related by blood or adoption wholly by man.

–Lastly, if there are no agnates, the property will be distributed among the cognates of the deceased. Cognate is the relation between two people either by blood or adoption but not by man.

(Section 8, The Hindu Succession Act, 1956)

**Ancestral property:** When a male dies leaving behind an interest in his ancestral property, his interest in the property will be distributed among surviving coparceners by the rule of survivorship.

But, if the male dies leaving behind any female or any male relative mentioned in the list of class I heirs, who can claim through a female relative, in this case, the property will devolve either through testamentary/ intestate succession as per the Hindu Succession Act.

The share of the Hindu male in the property would be the share that would have been allotted to him had there been a partition at the time of his death.

The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving children of such pre-deceased son or of pre-deceased daughter.

The share of a pre-deceased child of a pre-deceased son or of a pre-deceased daughter shall be allotted to a child of the predeceased son or a predeceased daughter.

### **General rules of succession among class-I heirs**

- Widow gets one share
- The sons, daughters and mother get one share each
- Heirs of each branch of the predeceased son or daughter get one share each
- The property is distributed in such a way that the widow of pre-deceased son and the children all get one share each
- The children of a predeceased daughter get equal portions

#### **Class-I heirs**

1. Son
2. Daughter
3. Widow
4. Mother
5. Children of predeceased son
6. Children of predeceased daughter
7. Widow daughter-in-law
8. Children of a predeceased grandson
9. Widowed grand daughter-in-law

Example:

Ramesh was a government servant and when he died in 2000 and left behind his mother Leela, his widow Kamini and his two sons Suhas, Paras and two daughters Manisha and Asha. Suhas had died but Suhas's wife and three children were alive. Ramesh had one bungalow which he had

inherited from his father and a plot of land which he had purchased from his own money. Since Ramesh died without a will, his property would be divided as follows:

Leela (mother)  $1/6^{\text{th}}$

Kamini (Widow) –  $1/6^{\text{th}}$

Suhas (dead son's share) –  $1/6^{\text{th}}$

Paras (son) –  $1/6^{\text{th}}$

Manisha (daughter) –  $1/6^{\text{th}}$

Asha (daughter) –  $1/6^{\text{th}}$

### **Principles for distributing property among class-II heirs**

There are nine entries under class-II heirs Property must be shared equally among people mentioned in each entry. It will only be possible to move from one entry to the next, if there are no heirs alive mentioned in that entry.

#### **Class-II heirs**

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



(Section 11 of the Hindu Succession Act, 1956)

## **II) Property of Hindu female (Section 14 of the Hindu Succession Act, 1956)**

Any property of a Hindu female is considered of her own and absolute property. This includes all types of movable and immovable property like-

- Salary earned or anything purchased by woman
- Property received as inheritance or by way of partition
- Property received in lieu of maintenance
- Arrears of maintenance
- Gift from any person before marriage, at marriage and after marriage.
- Stridhan

### **Distribution of property of a Hindu female (section 15)**

Self acquired property: If there is a will, the property will be distributed as written in the will and if there is no will, the property of the women will devolve in the following manner:

- Firstly, to the sons and daughter including children of a pre-deceased son and daughter and the husband;
- Secondly, If there is no one from the above category, then to the heirs of the husband;
- Thirdly, if there is no one from the second category, to the mother and father;
- Fourthly, if there is no one from the third category, then to the heirs of the father;
- And lastly, if there is no one from the fourth category to the heirs of the mother.

(Section 15(1) of HSA, 1956)

But if the Hindu female inherited property from her mother or father and she has no sons or daughter or any grand children then this property will go to the heirs of a father. (Section 15(2)(a) of the HSA,1956)

If the female inherited property from her husband or her father- in- law and if she dies without living behind the son daughter or any grand children then the property will go to the heirs of the husband. (Section 15(2) (b) of the HSA, 1956)

The reason behind this rule is to ensure that the property goes back to the source from where it came in case of women who does not live behind any children or grand children.

### **Ancestral Property**

After the amendment of the Hindu Succession Act, 1956 in 2005, women have equal share in ancestral property on birth in the same manner as men. The general rule of inheritance of ancestral property is the rule of survivorship. This means that if a woman coparcener dies her interest in the property will go to the surviving member of the coparcenary.

But if the woman leaves behind a child or a child of a predeceased child then her interest in the coparcenary property will devolve by testamentary succession (through a will) or intestate succession under the Hindu Succession Act and the rule of survivorship will not be followed. The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter.

### **How can a woman get her property rights enforced?**

Under the Hindu law ancestral property is jointly held by all the coparcener. Even if the property is in the name of the Karta, the other coparceners have a share as per the law, but this share is a notional share when a person cannot claim that one share of the property belongs to him. This can only be enforced once a partition is asked for by the coparceners or anyone of the coparcener.

If they agree to a partition the property will be divided and distributed later. Division takes place on the basis of principle as discussed earlier. There is no need to go to the Court if everyone agrees. But if there is disagreement a case could be filed in the Court. If one person wants partition of the property and the others would like to continue as joint family, in that case, if the family agrees they can give the person his or her share of the property and the rest of them can continue as a joint family property.

### **What are the rights of children born from a void or voidable marriage and of illegitimate children?**

#### **Rights of children born from a void or voidable marriage:**

The Hindu Marriage Act Section 16, Special marriage act Section 26 were amended in 1976 to make a very important change. The law today recognizes children born of a void marriage (for example second marriage) and children born of voidable marriage, where the parties to marriage have gone to the Court and had the marriage nullified, as legitimate children. The reason for this is that, if the marriage had been a legal marriage the children would have all the rights of legitimate marriage. Just because the marriage is void/ voidable the children should not suffer.

The children born out of such backlog at the following rights-

- Right to maintenance until the age majority
- Right to the property of their mother and father only
- Rights of illegitimate children

Under the Hindu Law, prior to its codification, illegitimate children had several rights. Since the codification and enactment of the Hindu Succession Act and Hindu Adoption and Maintenance Act, 1956, the rights of illegitimate children have been curtailed and they are limited.

- An illegitimate Hindu child has the right to claim of maintenance from his father and mother until he or she is 18 years of age. This right is available under the Hindu Adoption and Maintenance Act, 1956. ( Section 20)

- If the father and mother are dead and the illegitimate child is below 18 years of age, the child has right to maintenance from the property of the deceased person. Therefore the heirs of the deceased person should maintain the illegitimate child.
- No right to inherit from father but has the right to inherit property from the mother's side such as:
  - Property of mother, self acquired and ancestral property
  - Property of brother and sisters (born to the same mother)
  - The mother can inherit from an illegitimate child but the father cannot inherit from an illegitimate child

### **What are the basic problems or impediments to woman accessing their property rights?**

The law recognises equal rights of women to property but the problem occurs the way the society looks at their right to property of a women:

- (a) Women themselves are very reluctant to ask their fathers and brothers for property because they feel it will disturb the harmony in the family. After the property is asked for, the daughter is likely to stop her visits to her parents home.
- (b) The members of the parents home feel that when a woman gets married and dowry is given which was equivalent to the amount that the brother would inherit it is not considered necessary to give the sister any share.
- (c) In most of the cases, she is often abused and upon the death of the husband, no property is given because she is seen as an outsider.

### **What can a woman do if her brother or her in-laws threaten to throw her out of the house?**

The woman can approach the Court and ask for an order of protection under the PWDVA Act and can also obtain an injunction order. In many cases

in laws take away jewellery of the woman saying it belongs to the family and often throw the woman out of the house. Jewellery given to a woman is considered to be her stridhan, therefore, it is her personal property and no one else has any claim over it. All gifts and property given to a woman before, during and after her marriage are her stridhan, dowry given to her marriage is also her stridhan, and these are her personal property.

Mother, Grandmother, married/separated/divorcee daughter, widow daughter-in-law all have right to live in the family home and they cannot be thrown out of the family. A woman has a right to live in her in-laws as well as at her parent's home.

### **Can a woman ask a partition of property?**

A woman is considered as coparcener in the ancestral property and thus has a right to ask for partition in the ancestral property.

## **WOMEN RIGHTS TO SUCCESSION UNDER THE MUSLIM LAW**

### **What are the laws relating to Muslims Women's right to Inheritance /Succession?**

Muslim Law in India is governed by mainly two schools of law. These are the Hanafi and Shia School of Law. Muslim property rights are derived from the school of law, they are governed by relation to a male or a female. Under the Hanafi Law, only those will be considered heirs, who are related to a deceased person through a male. Under the Shia law, even those will be considered heirs who are related to the deceased person through a female. In India majority of the Muslims are Sunni and, therefore, governed by the Hanafi school of law, while a small number are shia govern which is also known as Ithna Ashari Shiite School.

### **Have customs changed Islamic law relating to inheritance?**

(a) Principles of Pre-Islamic Law: Before reforms:

- Females could not inherit
- Nearest male agnates used to inherit property

- Descendants were preferred over parents and other ascendants

(b) After reforms:

- Females are allowed to inherit land as the Quran introduced a new class of legal heirs constituting female and aged parents,
- Husbands and wives have been made legal heirs of each other ,
- Parents and ascendants are entitled to inherit even in the presence of descendants.
- Normally the share of a female is half of that of a male

Upon the death of a Muslim person, there are three ways in which the property is divided. Firstly, the property is used to pay off debts or government dues that the person may have had as well as the funeral expenses. Secondly, it is divided as per the will left behind by the deceased and thirdly, the remaining property is heritable property. This is inheritance.

### **What is heritable property?**

Heritable property is property which is available to legal heirs for inheritance. The legality of the heirs is pre decided by the Hanafi or the Shia law depending upon their relationship to the deceased.

### **Is there a birth right that Muslims enjoy to inheritance?**

Muslim Law does not recognize right by birth. There are various rules that need to be followed. Inheritance depends upon various situations. Different persons inherit different share of property on pre- decided rules which focus on the degree of relation with the deceased person. There are also different category of persons who will stand to inherit, such as “residuary” and “distant kindred”. Inheritance opens only after death and no Muslim may be an heir while the person is still living.

### **How does succession of property happen?**

Succession of property takes place through two means; one is per capita and the other is per strike succession. Per capita means per head, that is the property is divided equally amongst the number of heirs. Per strike

succession means that several heirs belonging to different branches of the family will derive a share only from the amount of property that has been allotted to their branch of family and not from the total amount of property left behind by the deceased.

### **Do unborn and step children have a right to inheritance?**

Step children cannot inherit property of their step parents, Step parents can also not inherit property from their step children.

### **Can a missing person's property be inherited?**

As per the Hanafi Law, a missing person would be considered dead only after he would have reached the age of 90 upon which the property would be open for inheritance. However, under section 108 of the Indian Evidence Act, it was changed to presume that if a Muslim has been missing for the last seven years and if it could not be proven that he was alive, the person would be legally presumed to be dead and his property would be opened for inheritance.

### **Do Muslim women in India have right to property?**

Under the Muslim Law in India, women are entitled to property. All schools of Islamic Law recognize that women have a right to inheritance in immovable property even though, this is unequal to the rights that Muslim men have. The share of a male is usually double than that of a female. The justification has been made on the basis that the female heir is entitled to maintenance and mehr from her husband. Muslim women can inherit property through mainly three ways

- (a) Succession
- (b) Mehr or dower
- (c) Hiba or gift

### **What are the main principles in the Hanafi or Suni Law of inheritance?**

Under the Hanafi Law of Inheritance there are three classes of heirs.

These are:

(a) **Sharers:** those who are entitled to a prescribed share of inheritance that is property would be given after the funeral expenses, debts and legacies have been paid off. The share that each person gets depends on the context of the situation and the relation of each sharer to the deceased. Under the Hanafi Law, the sharer has been traditionally male. However, after the Islamic reforms, women too have been included as Quranic heirs though their share is usually half of that of the male.

(b) **Residuaries:** If there are no sharers or there has been a residue of property left after filling the share that the sharers are entitled to, then the remaining property or the whole will be given to the residuaries. If there residue is left and there is no residuary then the residue is written to the sharer, this is called written or radd. Neither the husband nor the wife is entitled to radd, if there are any other heirs.

(c) **Distant kindred:** if there are no sharers or residuaries, the property would be divided amongst distant kin. These are again classified into the categories of people who are related to the deceased by blood

(d) There are also successors who are unrelated by blood. These are –

- **Successors by contract:** if there is a default in a sharer, residuaries and distant kin then the inheritance is devolved upon the successor by contract. This is a person who gains the right to inherit property of the deceased on the consideration of an undertaking given by him to pay any fine or ransom to which the deceased may have become liable.
- **Universal legatee:** this is a person to whom the deceased has left his property through a will.

(e) Escheat on the failure of all heirs and successors that have been specified, the property of the deceased Sunni Muslim goes to the Government.

### **Right of Muslim women under the Hanafi School of Law**

- A daughter only will receive half of the deceased parents estate when



there is no son and can be excluded by no other heir because she is a 'Quranic' heir.

- If there are two or more daughters and no sons, they jointly get a two third share each which is divided equally between them.
- If there is a son then the daughter, ceases to be considered as a quranic heir and will be considered an agnatic co sharer which means she will get only half of what the son gets.
- Sons and daughters can be excluded by no other heirs.
- Husband and wives are also considered Quranic heirs and they too can not be excluded by any other heir.
- A widow will receive one fourth or one eighth of the share depending upon whether there is a child or a son's descendants. A widower will receive half or one fourth.
- If there is more than one widow, there collective share will be one eighth of the total inheritance. This will have to be shared equally between all the widows.
- Consanguine and uterine sisters are considered as Quranic heirs but can be excluded by male agnatic descendants and ascendants depending on the circumstances.

### **What are the main principles in the Shia Law of Inheritance?**

Under the Shia Law of Inheritance, heirs are divided into two groups. These are:

(A) heirs by consanguinity or nasab i.e. by blood relations they consist of

(I) (i) Parents

(ii) Children and other lineal descendants

(II) (i) Grandparents however high soever (true and false)

(ii) Brothers and sisters and their descendants

- (III) (i) Paternal uncle and aunts of the deceased, and of his parents and grandparents -how high so ever and their descendants how low so ever
- (ii) Maternal Uncle and aunts of the deceased, and of his parents and grandparents -how high so ever and their descendants how low so ever
- (B) Heirs by marriage, The husband or wife is never excluded from succession. The husband or the wife inherits property along with the nearest heirs who are related by blood. The wife usually gets half of what is entitled to the husband.
- (C) Categories of inherit us unlike hanafi, the heirs under Shia law of inheritance are divided under sharers and residuaries. There are no classification for distant kindred. There are nine sharers; husband, wife, father, mother, daughter, uterine brother, uterine sister, full sister and consanguine sister. The remaining are residuaries.
- (D) Distribution of property. If the deceased lives only one heir, the heir gets all the succession. In case the heir is a wife, she is entitled only to one fourth of inheritance and the remaining will go to the government. In case the deceased leaves two or more heirs, the first step would be to give a shae to the husband or the wife and the remaining state will be given to the successor as per rules that have been laid down in doctrine of return (radd). If there is residue left and there are no residuaries, the remaining inheritance is given to the sharers as per each one share. In the succession, husband and wife are not entitled to a return or radd.
- (E) Escheat. If there are no natural heirs then the estate of the deceased escheats to the government.
- (F) Eldest son. The eldest son if of sound mind is exclusively entitled to the father's apparel; for example, his Quran, sword and ring.
- (G) Illegitimate child does not inherit at all, even from his mother or her relation nor does she/he inherit from him.

## **WOMEN'S RIGHTS TO SUCCESSION UNDER THE CHRISTIAN LAW**

### **What are the laws relating to Christian Women's right to succession?**

The Indian Succession Act, 1925 provides that succession to immovable property in India of a deceased person who is not a Hindu, Muslim, Buddhist, Sikh or Jain shall be regulated by the said law. The provisions of the Indian Succession Act, 1925 are not applicable to Muslims. However, a Muslim cannot claim immunity if his marriage was held under the Special Marriage Act, 1954. In such cases, the provisions of the Indian Succession Act 1925, shall be applicable even though the will was made before or after the marriage. Where a will is governed by the Muslim Law, it will be subject to the provisions of the Shariat Act 1937.

### **Applicability of the Indian Succession Act, 1925**

The Indian Succession Act came into operation on 30th September 1925 and it seeks to consolidate all the Indian Laws relating to succession. It has no retrospective operation and is applicable to intestate and testamentary succession.

### **Inheritance in absence of a Will Under the Indian Succession Act**

Section 27 of the Indian Succession Act, 1925 states that there is no distinction for the purposes of succession

- (a) Between those who are related to a person deceased to his father and those who are related to him through his mother
- (b) Between those who are related to a deceased person by full blood and those who are related to him by half blood
- (c) Between those who are actually born and those who were only conceived in womb, but who have been subsequently born alive.

Intestate succession to Christians: According to section 32 of the Indian Succession Act, 1925 the property of an intestate devolves upon the wife, husband or upon those who are kindred of the deceased. A widow will not be entitled to provisions, if by a valid contract, she has been excluded from her share of her husband's estate.

Section 33 of the Indian Succession Act 1925 where the intestate has left a widow:

- (a) If he has also left any lineal descendant, one third of his property shall belong to the widow and the remaining two third shall go to the lineal descendants according to the rules herein after being contained.
- (b) If no lineal descendant is left but persons who are kindred to him have been left, one or half of his property shall belong to the widow and the other half shall go to those who are kindred to him.
- (c) If none of the kindred relative are alive his entire property shall belong to his widow. As per Section 33-A ,intestate has left widow and no lineal descendant a net value of the property that does not exceed Rs.5,000 and the whole of his property shall belong to the widow.
- (d) When the net value of the property exceeds Rs. 5,000, the widow shall be entitled to Rs. 5,000 there of and for the remaining charge, with interest there on from the death of the intestate four person per annum until payment
- (e) The net value of the property shall be ascertained by deducting from the gross value all the debts, funeral expenses, administration expenses of the state and any other lawful liabilities and charges to which the property shall be subject.

According to section 34 of the Indian Succession Act, 1935 where the intestate has left no widow, and where he has left no kindred his property shall go to lineal descendant and if none are there, it shall go to the government.

According to section 35 of the Act the right of a widower has the same in respect of her property. Section 36 of the Indian Succession Act, 1925 lays down of the rule of the intestate property after deducting the widow's share if he had left a widow and amongst his lineal descendant in the

following manner-

- (i) Where intestate has left a child or children, only the property shall belong to the surviving child or shall be equally divided among all his surviving children;
- (ii) Where intestate has left no child and also has no grand child or no grand children, the property shall belong to the mother;
- (iii) Where the intestate has left no lineal descendant, no father, no mother, the property shall be divided equally between his brothers, sisters and children in equal shares;
- (iv) Where the intestate has neither left lineal descendant nor parents, no brother, no sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him;
- (v) Children's advancement, not brought into hotch potch were distributive share in the property of the person who have died intestate, is claimed by a child or any descendant of a child or such person. No money or other property which the intestate may during his life have paid, given or settled to, or of the advancement of the child by whom or by whose descendant the claim is made, shall be taken into account in estimating such distributive share.

## **WOMEN'S RIGHTS TO SUCCESSION UNDER THE PARSI LAW**

What are the laws relating to Parsi's Women's right to succession

The Indian succession act 1925 governs the Parsi's intestate succession according to Section 50 of the act. Intestate succession among Parsi's –

- (a) There is no distinction between those who were born and those who were conceived in the womb.
- (b) If an intestate dies without leaving a widow or widower or any lineal descendant the property shall be divided.
- (c) Where a widow of an intestate has been married, she shall not

be entitled to receive any share of the property.

Division of the male property among widow, children and parents- Section 51 of the Indian Succession Act, 1925 provides property of a male parsi who dies intestate, shall be divided between a widow and children so that the share of each son and of the widow shall be double than the share of each daughter:

(a) Where the children are there and wife is no more, the property is divided among children so that the share of each son shall be double the share of each daughter.

(b) Where the male Parsi dies leaving one or both parents in addition to children or a widow, the property shall be divided so that father receive the equal share to the half share of the son and the mother shall receive a equal share to half the share of a daughter.

(c) In the division of female intestate property among a husband and children, section 52 of the Indian succession act the property of which a female Parsi dies intestate, shall be divided:

(i) When she dies, and there remains only a husband and children. Husband and each child shall receive equal shares.

(ii) Where she dies and there remain only children the property would be divided among the children in equal shares

Division of share of pre deceased child of intestate living lineal descendant according to section 53 of the Indian Succession Act 1925 in all cases, were a parsi dies living any lineal descendant, if any child of such intestate has died in the lifetime of the intestate, the division of the share of the property of which the intestate has died, which such child would have taken if living at the intestate dead shall be in the following manner-

(a) If such deceased child was a son, his widow and children shall take shares as if he had died immediately after the intestate's death. But if such deceased son has left a widow or widow of a son, but no children, the residue of his share after such distribution shall be divided taking into account as though he were alive.

- (b) If such deceased child was a daughter, her share shall be divided equally among her children.
- (c) If any child of such deceased child has also died during the life time of the intestate, which he or she would have taken if living at the intestate death, shall be divided as stated in clause a & b

Distribution of property where the intestate leaves no children but leaves a widow or a widower or a widow of the lineal descendant section 54 of the Indian Succession Act, 1925, when a Parsi dies without living any lineal descendant but leaves a widow or a widower or a widow of a lineal descendant, the property shall be divided in the following manner:

- (a) If the intestate leaves the widow or a widower, both shall take half of the same property.
- (b) But if the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one third of the said property and the widow of any lineal descendant shall receive another one third.
- (c) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one third of the said property. If there is more than one widow of a lineal descendant, two third of the said property shall be divided among such widows in equal shares.
- (d) Distribution among relatives shall be made in the following manner:
  - (i) Father and mother
  - (ii) Brother and sister (other than uterine brother and sister)
  - (iii) Paternal grandfather and paternal grandmother
  - (iv) Children of paternal grandfather and lineal descendants of such of them as have pre-deceased the intestate.
  - (v) Paternal grand-father's father and mother.

(vi) Paternal grandfather, father's children and lineal descendant of such of them as have pre-deceased the intestate.

(e) There are no relatives entitled to residue share

Distribution of property may intestate may leave neither lineal descendants nor a widow or a widower nor a widow of lineal descendant. Section 55 of the Indian Succession Act states that "the whole of the property shall be divided in the following manner:

- (i) Father and mother
- (ii) Brother and sister
- (iii) Paternal grandfather and paternal grandmother
- (iv) Children of paternal grandfather
- (v) Paternal grand father's father and mother
- (vi) Paternal grandfather, father's children
- (vii) Uterine brothers and sisters
- (viii) Maternal grandfather and maternal grandmother
- (ix) Children of maternal grandfather
- (x) Widows of brothers or half brothers
- (xi) Paternal grandfather's son's widow
- (xii) Maternal grandfather's son's widow
- (xiii) Widowers of deceased lineal descendant of the intestate who have not married again before the death of the intestate
- (xiv) Maternal grandfather's father and mother
- (xv) Children of maternal grand father's father
- (xvi) Children of paternal grand mother
- (xvii) Paternal grandmothers father and mother



(xviii) Children of paternal grand father's father and the lineal descendant of such of them as pre-deceased the intestate

Division of property where there is no relative entitled to succeed under the provisions of the chapter as per section 56 of the Indian Succession Act, 1955, the estate of a parsi and the property shall be divided equally among those of the intestate relative who are in the nearest degree of kindred to him.

Section 42 of the Parsi Marriage and Divorce Act 1936 discusses about any suit of divorce under this act, the court may make such provisions, in the final decree, as it may deem just and proper with respect to the property presented to all about the time of marriage, which may belong jointly to both the husband and wife. According to section 50 of the same Parsi Marriage Divorce Act, 1936, in any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife, it shall be made to appear to the Court that the wife is entitled to any property. Either in imposition or reversion, the Court may order such settlement as it shall think reasonable to be made of any part of such property, not exceeding one half thereof, for the benefit of the marriage of the children or any of them.

## **General Awareness Points**

### **Special Marriage Act**

- If a Hindu marries a non-Hindu under the Special Marriage Act, he shall be severed from the undivided family. However, if two persons who are Hindus get married under the Special Marriage Act, no such severance takes place.
- If a Hindu marries a non-Hindu under the Special Marriage Act, succession to the property of such person, whose marriage is solemnised under this Act and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act. However, if two persons who are Hindus get married under the Special Marriage Act, the above provision does not apply and they are governed

by the Hindu Succession Act.

### **Intestate succession**

Intestate means when a person dies without making a will, which is capable of taking effect. The property devolves upon the wife or husband or upon the relatives of the deceased in the following manner:

- If A has left no will - He has died intestate in respect of the whole of his property.
- A has left a will, whereby he has appointed B as his executor; but the will contains no other provisions - A has died intestate in respect of the distribution of his property.
- A has bequeathed his whole property for an illegal purpose - A has died intestate in respect of the distribution of his property.
- When a will is partially incapable of being operative - A has bequeathed Rs. 1000 to B and Rs. 1000 to the eldest son of C, and has made no other bequest; and has died leaving the sum of Rs. 2000.00 and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of Rs.1000.

### **Application in Inheritance in Absence of a Will under Indian Succession Act in India**

- **Hindus, Muslims, Buddhist, Sikh, Jain** - This part does not apply to the property of any Hindu, Mohammedan, Buddhist, Sikh or Jain. Mohammedan's are governed by the Mohammedan Law of Inheritance and the Hindus, Buddhists, Sikhs and Jains by the Hindu Succession Act, 1956.
- **Special Marriage Act** - Notwithstanding anything contained in the Indian Succession Act with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnised under the Special Marriage Act and to the property of the issue of such marriage

shall be regulated by the provisions of the Indian Succession Act.

However, if two persons who are Hindus get married under the Special Marriage Act, the above provision does not apply and they are governed by the Hindu Succession Act.

### **Distribution of Property In Inheritance Law – Widow/Widower**

The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules given below.

However, a widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

### **Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.**

Where the intestate has a widow-

1. If he has also left any lineal descendants, one third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained.
2. If he left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained.
3. If he has left none who are of kindred to him, the whole of his property shall belong to his widow.

Lineal descendants mean descendant born in lawful wedlock only.

### **Where intestate has left no widow, and where he has left no kindred.**

Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left

none, who are of kindred to him, it shall go to the government.

### **Rights of widower**

A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

### **Rules Of Distribution (Children, Grandchildren etc.)**

The rules for the distribution of the intestate's property (after deducting the widow's share. If he has left a widow) amongst his lineal descendants are as follows.

(Lineal descendants mean descendant born in lawful wedlock only.)

### **Where intestate has left child or children only**

Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Child or children - The word 'child' does not include an illegitimate child, but must be one born out of lawful wedlock. The words 'any child' mean and include 'children' as well.

- **Where intestate has left no child, but grandchild or grandchildren.**

Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grandchildren.

- **Where intestate has left only great-grandchildren or remoter lineal descendants.**

The property shall go to the surviving lineal descendants who are near-

est in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

- **Where intestate leaves lineal descendants, not all in same degree of kindred to him, and those through whom, the more remote are descended, are dead.**

1. If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate, who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.
2. One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants. As the case may be; such surviving child or children, or more remote lineal descendants, take the share which his or their parent or parents would have been entitled to, respectively, if such parent or parents had survived the intestate.

### **Rules of distribution – No lineal descendants**

Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) are as follows.

#### **Where the intestate's father is living.**

If the intestate's father is living, he shall succeed to the property.

**Where the intestate's father is dead, but his mother, brothers and sisters living.**

If the intestate's father is dead, but the intestate's mother is alive, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime were also alive, then the mother and each living brother or sister, shall be entitled to the property in equal shares, such children (if more than one) will take in equal shares which their respective parents would have taken if they were alive during the intestate's death.

**Where the intestate's father is dead and his mother and children of any deceased brother or sister is living.**

If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) will take in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

**Where intestate's father is dead, but his mother living and no brother, sister, nephew or niece are there.**

If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

**Where intestate has left neither lineal descendant, nor father, nor mother.**

Where the intestate has left neither lineal descendants, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him. Such children (if more than one) will take in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

**Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.**

Where the intestate has left neither lineal descendants, nor parents, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

## **Will Under Muslim Law India**

**Will is also referred to as Wasiyat**

### **Elements of a Will**

- Will is a conferment of right to ones property on another.
- This conferment of right is to take effect after the death of the testator.

As a general rule, no formality is required for making a will. It may be made either orally or in writing and it does not need to be signed or attested. Any expression of unequivocal expression will suffice. Though oral will is possible it is difficult to prove.

### **Requisites of a Valid Will**

- The testator must be competent to make the will
- The legatee must be competent to take legacy or bequest
- The subject of bequest must be a valid one
- The bequest must be within the limits imposed on the testamentary power of a Muslim

### **Applicability of the Indian Succession Act, 1925.**

The provisions of the Indian Succession Act, 1925 are not applicable to Muslims. However, a Muslim cannot claim immunity if his marriage was held under the Special Marriage Act, 1954. In such cases, the provisions of the Indian Succession Act 1925, shall be applicable even though the will was made before or after the marriage. Where a will is governed by the

Muslim Law, it will be subjected to the provisions of the Shariat Act 1937.

### **Essentials of a Will**

- The property must be capable of being transferred.
- The property must be in existence at the time of testator's death. It is not necessary that it should be in existence at the time of making the will.
- The testator must be the owner of the property to be disposed by will.

### **Revocation**

The Mohammedan Law confers on a testator unfettered right to revoke his will. He may revoke it at any time. The revocation may be:

- Expressed, or
- Implied

### **Wills Under the Indian Succession Act, 1925**

Will means the legal declaration of the intention of a person with respect to his property, which he desires to take effect after his death. It is a unilateral document and takes effect after the death of the person making it. It can be revoked or altered by the maker of it at any time he is competent to dispose of his property.

A will made by a Hindu, Buddhist, Sikh or Jain is governed by the provisions of the Indian Succession Act, 1925. However, Mohammedan's are not governed by the Indian Succession Act, 1925 and they can dispose their property according to Muslim Law.

### **Who Can Make A Will**

- Every person who is of sound mind and is not a minor can make a will.
- Persons who are deaf or dumb or blind can make a will provided they are able to know what they do by it.



- A person who is ordinarily insane may make a will during an interval in which he is of sound mind.
- No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

### **Execution of a Will**

Every person, not being a soldier employed in an expedition or engaged in warfare, or an airman so employed or engaged, or a marine at sea shall execute his will accordingly:

- He shall sign or fix his mark to the will or it shall be signed by some other person in his presence and by his direction
- The signature or mark should be so placed that it shall appear that it was intended thereby to give effect to the writing as a will
- The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the will or has seen some other person sign the will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person.

Each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.

### **What property can be disposed by a Will?**

Any movable or immovable property can be disposed of by a will by its owner.

### **Probate of Will in India**

Probate means copy of the will certified under the seal of a Court of a competent jurisdiction. Probate of a will when granted establishes the will from the death of the testator and renders valid all intermediate acts

of the executor as such. It is conclusive evidence of the validity and due execution of the will and of the testamentary capacity of the testator.

A probate differs from a Succession Certificate. A probate is issued by the Court, when a person dies testate i.e. having made a will and the executor or beneficiary applies to the court for grant of probate. In case a person has not made a will, his legal heirs will have to apply to the Court for grant of a Succession Certificate, which will be given as per applicable laws of inheritance.

### **To whom can a probate be granted**

Probate can be granted only to the executor appointed by the will. The appointment may be expressed or implied by necessary implication.

It cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company that satisfies the conditions prescribed by the rules made by the state government.

### **Persons eligible for grant of letter of administration**

Where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person and has died intestate, the Court may grant administration of his estate to any person, who according to the rules of distribution of the estate applicable for in the case of such deceased would be entitled to the whole or any part of such deceased estate. When several of such persons apply for such administration, it shall be the discretion of the Court to grant it to any one of them. When no such person applies, it may be granted to a creditor of the deceased.

Letters of administration entitle the administrator to all rights belonging to the, intestate as effectively, as if the administration has been granted at the moment after his death.

They, however, do not render valid any intermediate acts of the administrator tending to the damage of the intestate's estate.

For obtaining a letter of administration, the beneficiary has to apply to the Court. The Court on receiving satisfactory proof of valid execution of the

will, issues letter of administration to the beneficiary. The application for letter of administration has to contain the following details:

- a. the time of the testator's death
- b. that the writing annexed in his last will and testament
- c. that it was duly executed
- d. the amount of assets which are likely to come to the petitioner's hands, and
- e. the petitioner is the executor named in the will

## **Probate of Will in India**

### **Procedure For Obtaining Probate**

A petition for probate must be filed in Court along with the will in question. It should contain the following facts.

- a. the time of the testator's death
- b. that the writing annexed in his last will and testament
- c. that it was duly executed
- d. the amount of assets which are likely to come to the petitioner's hands, and
- e. the petitioner is the executor named in the will

The application for probate shall be signed and verified by the executor or beneficiary.

The petitioner shall furnish a blank stamp paper of value equal to the requisite court fee, along with the application. The court shall grant the probate on the said stamp paper.

After receipt of the petition, the court issues notice to the next of kin of the deceased to file their objections, if any, to the grant of probate.

A general public notice is also given in a newspaper.

The petitioner is thereafter asked to establish the:

- a. Proof of death of the testator;
- b. Proof that the will has been validly executed by the testator, and
- c. Will is the last will and testament of the deceased.

### **Proof of Death:**

- Proof of death is usually shown by submission of original death certificate
- If a person was killed in an action while serving in armed forces, the official notification may be produced in proof of death of the testator.
- Where there is an air crash or sunk ship on the high seas and there is no possibility of survival and a person's body is not recovered; the court may take notice of the occurrence and be satisfied regarding the fact of death.
- Where a person disappears or is missing, such a person as per law is presumed to have died if he is not heard of for a period of seven years.

### **Issue of probate by the Court**

On the satisfaction that the will in question has been validly executed, the court will grant probate to the executor named in the will.



**Chapter**  
**IX**

**THE PROTECTION OF WOMEN  
FROM DOMESTIC VIOLENCE  
ACT, 2005**



## **What is Domestic violence?**

For the first time in India a very conclusive and extensive definition was given in PWDVA Act which conformed to the United Nations Framework and to the CEDAW to which India is also a signatory. Domestic Violence is any act or conduct of a person:

- which harms or
- injures or
- endangers
- the health, safety or well being of the ‘aggrieved person’ which includes:
  - Physical abuse
  - Sexual abuse
  - Verbal and emotional abuse
  - Economic abuse
  - Which causes harassment, harms or injures a person with a view to coerce her or anyone related to her to meet an unlawful demand for dowry or property; or
  - Which has the effect of threatening the aggrieved person or anyone related to that person; or
  - Injures or causes physical or mental harm to the aggrieved person.

( Section (3) of the PWDVA)

## **When did the law become enforceable?**

- The PWDVA was passed by the Indian Parliament in 2005 but it became enforceable only on October 26, 2006. The Rules under the Act were passed and notified in 2006. Retrospective effect: Retrospective law is one, that looks backwards or contemplates the past, af-



fecting facts or acts that existed before the Act came into effect” it is an established legal principle that criminal statutes cannot have retrospective application as they create new offences and impose penalties thereon.

- Dennison Paulraj and Ors. vs Mrs. Mayawinola (Crl OP No. 7156 of 2007) decided by the High Court of Madras on the April 2, 2008.

The wife in her application, stated that she was forced to leave the matrimonial home following continuous harassment and dowry demands by her husband and in-laws. Although she left the matrimonial home prior to the enactment of PWDVA 2005, she claimed that the threat and harassment continued.

- 'ISSUE: Whether the wife's application is maintainable as the alleged acts of domestic violence took place before the PWDVA 2005 was enacted. The husband and in-laws argued that entertaining this application would amount to giving retrospective effect to the Act, which is not permissible as the Act contains penal sections under section 31.
- Rejecting the contention of retrospective operation, the court concluded that the respondent had suffered part of the abuse after the commencement of the Act in the form of anonymous phone calls threatening violence.
- The issue of penal statutes not being retrospectively applicable does not hold true in the case of PWDVA 2005 as section 31 penalises the breach of the protection order rather than the act of domestic violence itself. A protection order can be granted only after the Act came in to force and thus, penalties on its breach cannot be said to have retrospective application.
- Sarvan kumar vs Thenmozhi [citation {MANU/TN/982802007}] the wife had filed a petition under the Act alleging continuous dowry harassment and that she had been thrown out of the shared household with her child in 2006.

- The court held that acts committed before the commencement of the Act can be the basis for filing an application under the Act. Although the alleged acts took place before the PWDV Act came in to force, since the wife and child continue to remain dispossessed from the shared household, the act of domestic and economic abuse is still continuing and shall, therefore, attract liability under the Act.

### **What was the need to have a new law when there were other civil and criminal laws available?**

### **Whom do we mean as an aggrieved person under the Act?**

The ‘aggrieved person’ has been defined in Section 2(a) of the Act as “any woman who is, or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.”

Aggrieved person includes:

- Wife, mother, daughter, sister, widow
- Second wife or any woman who is in a domestic relationship eg.:
  - Woman who believes herself to be married
  - Woman who is unmarried and is in domestic relationship

### **Whom do we mean as a respondent under the Act?**

A ‘respondent’ has been defined in Section 2 (q) of the Act as “any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act.”

Respondent includes:

- Father
- Brother

- Son
- Husband
- Any relative of the aggrieved person with whom she has been in a domestic relationship

Example:

Beena was married to Karan for two years. In the last month, Karan turned violent towards Beena. While Karan was not physically violent against her, his verbal abuse was terrible. Over the last six months he also started demanding that Beena, a call centre employee, turn in all her salary to him. This was prompted by Karan's jealousy of Beena's friendship with her male colleagues. He would keep tabs on all her movements and her phone calls. He once even went to her office where he created a terrible scene in front of her co-workers. Unable to stand his cruelty any more, Beena decided to file a case against him. She is an aggrieved person and Karan is the respondent.

### **What is a domestic relationship?**

'Domestic relationship' has been defined in Section 2 (f) of the Act as "a relationship between two persons who live or have, at any point in time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

Domestic relationship includes:

- The relationship of marriage
- Consanguinity, which means people related by blood
- Relationship where a man and a woman have lived together without being married. This will also apply to bigamous marriages where a man has married for the second time without getting a divorce from his first wife.
- Family members in a joint family

- Relationship by adoption

### **What is shared household?**

Under other laws covering domestic violence especially the Personal Laws, matrimonial home is the home that a woman shares with her husband, whether it is rented, officially provided or owned by the husband and his relatives. A woman has the right to remain in the matrimonial home along with her husband as long as she is married, though there is no definite law regarding this right. If a woman is being pressurized to leave the matrimonial home, she can ask the Court for an injunction or 'restraining her' from being thrown out.

In PWDVA, 2005, a shared household is used in the legislation instead of 'matrimonial home' to cover under this law all relationships that can be recognised as domestic relationships. It applies not only to legally married women but also to women who have been living with men in a domestic relationship. For example, a bigamous relationship is not recognized in law, yet the woman in such a relationship could be the victim of such violence.

Shared household is defined in Section 2 (s) of the Act and this term has been used instead of the term 'matrimonial home'. It means:

- A household where the aggrieved person lives or has lived in a domestic relationship (either singly or with the respondent)
- It includes houses which are rented or owned singly or jointly by the respondent with the aggrieved person
- It includes a household of the joint family
- Right to reside in the shared household

### **What is the right of a woman to reside in a shared household?**

This clause was put into the Act to ensure that women who face domestic violence are not thrown out of their homes and made destitute. Often women survivors of domestic violence do not have any place to go to once they have left the home or been thrown out by their husband/partner. This

happens frequently because the house may be owned by the man and is legally in his name or it could be tenanted under his name.

To safeguard against this, section 17 of the Act states that “every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.” It further states that the aggrieved person shall not be evicted or excluded from the shared household, whether or not she has any right, title or beneficial interest in the same.” It further states that the aggrieved person shall not be evicted or excluded from the shared household by the respondent unless it is done in accordance with the procedure established under the law.

Example:

Malini has been married to Satish for over six years. Right from the beginning of the marriage, Malini has had to put up with Satish’s violence towards her. After coming in contact with women working in the local legal counseling center for women, Malini has now filed a case of domestic violence against Satish. She did not do anything about this problem for many years as she has no family to return to and was economically dependent on him. When the counseling center workers informed her that she did not have to move out of her home, which is legally owned by Satish, she decided to file a case against him and continue living there with her two children. A portion of the house was demarcated for her and Satish has been prevented by the law from entering that portion of the house.

### **How can compliance be made and to whom can it be made?**

The aggrieved person can make a complaint to:

- A Police officer
- Protection officer
- Magistrate
- Service provider

Any person can give information about an act of domestic violence that

has been committed or is being committed.

Example:

Madhu knew that her neighbour Ashitha was beaten up daily by her husband Mangesh. She was not sure of what to do but when she read in the news papers about the recent enactment on Domestic Violence, she found out who the protection officer in the area was and informed her of the situation in Ashitha's house.

Under the Act, immunity is provided to people for their act in 'good faith' for reporting domestic violence. Immunity means that the person who has brought attention to domestic violence against an individual cannot be prosecuted.

Immunity will be provided to the following persons:

- Informant of acts of domestic violence
- Service providers
- Protection Officers. It should be noted in case of protection officers that sanction for prosecution is required from the state government. Protection officers can be punished with imprisonment for a term of up to one year or with a fine of Rs. 20,000 or with both, only upon failure to discharge their duties.

### **Who are the Protection officers and what are their functions?**

The Act has created two novel agencies to help the implementation of its several provisions. The first is the appointment of protection officers (PO) by the state government in each district of the state. The POs are preferably women. The functions of POs are the following:

- Assisting the Magistrate in the discharge of her/his functions
- Making a 'domestic incident report' upon receipt of a complaint of domestic violence
- Forwarding copies of the domestic incident report to the police officer and service providers of that area

- Performing such functions as may be delegated to them by the Magistrate
- Maintaining adequate information of service providers for providing legal aid, shelter, medical aid and counseling to the aggrieved person
- Making an application for insurance of a protection order at the instance of the aggrieved person
- Making available a safe shelter home to the aggrieved person
- Getting the aggrieved person medically examined if she has sustained bodily injuries; providing legal aid to the aggrieved person
- Ensuring that the order of monetary relief granted in favour of an aggrieved person is complied with and executed in her favour at the earliest

### **What is the role of others stakeholders and institutions under this Act?**

- **Police officers:** When an incident of domestic violence reaches the Police, it is the duty of the police officer to inform the aggrieved person of her rights within the Act and also about her right to file a complaint under Section 498-A of IPC.
- **Magistrate:** The Magistrate should pass orders on any application made by the aggrieved person or a protection officer or any person on behalf of the aggrieved person seeking reliefs under the Act within a period of sixty days from the date of the first hearing [section 12 (5)]. The date of first hearing should be within 3 days from the date of receipt of application by the Court [section 12(4)].
- **Service providers:** The service providers should protect the rights and interest of the ‘aggrieved person’ and her child/children by providing legal aid, shelter, medical and financial aid. They will also work in close association with the protection officers and the Magistrate.
- **Welfare expert:** The welfare expert will assist the Magistrate in dis-

charging his functions when called upon to do so.

- **Expert counsellor:** The Expert Counsellor will provide expert counselling to the aggrieved person or the respondent singly or jointly upon directions of the Magistrate.

### **Who is a service provider?**

Service providers are identified as the voluntary associations registered under the Societies Registration Act, 1860, or companies registered under the Companies Act, 1956 with the objective of protecting the rights and interests of women by providing legal aid, shelter, medical and financial aid.

### **What relief is provided to the aggrieved person under this Act?**

The reliefs for aggrieved persons under this Act have been listed in Section 18-22 of the Act. They are as follows:

Protection orders will ensure the followings:

- Restrain the respondent from committing any act of domestic violence on the aggrieved person
- Debar the respondent from entering the workplace or school of the aggrieved person
- Prevent the respondent from harassing or stalking or contacting the aggrieved person in any manner or by any electronic medium
- Restrain the respondent from alienating any assets held jointly or singly by the aggrieved person or himself
- Restrain the respondent from causing violence to the aggrieved person's dependants or relatives

In case there is a breach of the protection orders, the penalty will be imprisonment for up to one year or a fine of up to Rs. 20,000 or both. This offence is cognizable and non-bailable.

### **Residence orders**

- Restrain the respondent from dispossessing the aggrieved per-



son from the shared household

- Restrain the respondent or his relatives from entering the shared household or a portion of the shared household
- Restrain the respondent from alienating the shared household
- If required, direct the respondent to provide the same level of alternate accommodation to the aggrieved person

### **Monetary relief**

- The respondent may be directed to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.

### **Custody orders**

- Temporary custody of the aggrieved person's child or children may be granted to the aggrieved person.
- Visitation rights will be granted to the respondent only if it is in the interests of the child.

### **Compensation orders**

- The respondent may be directed to pay compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of the respondent upon the aggrieved person.

### **Counseling**

- The Magistrate has discretionary power to direct the respondent or the aggrieved person singly or jointly to undergo counseling by an expert.

### **Where can the application for reliefs be filed?**

The application can be filed in the Court of the Judicial Magistrate of the first Class or the Metropolitan Magistrate where the:

- Person aggrieved permanently or temporarily resides or carries on business or is employed; or
- The respondent resides or carries on business or is employed; or
- The cause of action has arisen.

### **How can the effective implementation of PWDV Act be insured?**

The Act casts a duty on the state government and the central government to ensure effective implementation of the Act. The duties are as follows:

- Publicity through public media including the television, radio and the print media.
- Periodic sensitisation and awareness training to the central government and state government officers including police officers and members of the judicial services.
- Effective co-ordination between the services provided by concerned ministries and departments dealing with law, home affairs including law and order, health and resources to address issues of domestic violence.
- Protocols put in place for the various ministries and courts concerned with the delivery of services to women under this Act.

The central government and state government should allocate adequate funds to carry out the provisions of the Act.

For the effective implementation of the PWDVA, it is crucial that full time, fully endowed and empowered protection officers are appointed in each district of a state. Protection officers play a key role within the scheme of the PWDVA in ensuring that the objectives of the Act are fulfilled. Unfortunately, in most parts of country, the child development project officers under the ICDS have been given additional responsibilities of a Protection officer. The absence of dedicated, well trained protection officers equipped with funds and facilities will severely limit women from seeking redress under the PWDVA. Considering the high incidence of violence against women in Madhya Pradesh, it is imperative for the state to follow

the model adopted in Andhra Pradesh, Delhi and Haryana, where qualified and fulltime protection officers have been appointed and have been given infrastructure and funds to facilitate their work.

**Some of the views expressed:** Domestic violence is a form of gender-based violence intended at subordinating women. Domestic violence is perhaps the most universal, yet one of the most invisible forms of violence against women.

Domestic Violence affects:

- Personal Laws;
- Affect marriage, property rights, guardianship, custody rights and maintenance;
- Personal Laws are based on religious practices;
- While some of the laws are codified some are uncodified and understood to form customary practices of communities. *Note: India's declaration to Art.5(a) CEDAW states it's policy of non-interference in the personal affairs of any community without its initiative and consent.*

## II. Obstacles to implementation

- Personal Laws relating to marriage, divorce and inheritance governed by laws of the specific community overshadow constitutional guarantees of equality.
- Discriminatory provisions under Personal Laws deny equal protection or equality before the law.
  - Triple talaq practice giving unilateral power of divorce to men
  - Hindu women have the right to guardianship only in the absence of the male guardian
  - Discriminatory property rights under the Hindu Law persist even after amendments

- India's declaration to Art.5(a) CEDAW states it's policy of non-interference in the personal affairs of any community without its initiative and consent.
- Individual challenges to discriminatory provisions by women's movement have succeeded in positive interpretation of the legislations providing relief to women.

### **Geeta Hariharan's Case**

Challenging Hindu law on unequal guardianship rights as Hindu Minority and Guardianship Act stated fathers as the "natural guardian" and after him the mother, the challenge led to a ruling that the term "after him" did not mean the death of the father rather in his absence or by his consent. The government has since changed passport application forms and allow application for passports to women on behalf of their children in case of divorce.

### **Mary Roy's Case 1986(1) SCR 371**

Discriminatory provisions of Travancore Christian Succession Act for equal succession rights since the law put an upper limit of Rs. 5000 on the inheritance of the daughter, leaving the entire estate to the son were challenged. While the Act was repealed, it was so done on the ground of the Indian Succession Act coming into force rather than subjecting the discriminatory provisions to the test of equality.

### **Madhu Kishwar vs State of Bihar (1996) 5 SCC 125**

A tribal law dis-entitling tribal women from inheriting land as being discriminatory was challenged. The court read down the discriminatory provisions and ruled that women could assert a right of occupation against male inheritors but not alienate it.

### **Daniel Latifi Case**

Challenged discriminatory provisions on maintenance for Muslim women

Although the court did not strike down the law, it held that unless Muslim women are paid not just a provision for the iddat period (three months) but a reasonable and fair provision for life. The provision would be liable to be struck down. The advantage of the challenge was to gain substantial rights to maintenance for Muslim women.

However, none of the discriminatory laws have been struck down in entirety on the basis of violating fundamental rights of women.

### **III. Problems in implementation**

- Institutional bias and lack of political will in implementing policies and legislations

(Despite specific provisions under PWDVA, protection officers have not been appointed yet in all states. States that have identified protection officers have “deputed” officials as opposed to the required “full-time” appointments)

- Inadequate legal aid to support litigation

(Despite legislations mandating provisions of legal aid, women are often unable to avail of the services. Services are also often not of quality)

- High cost of litigation deters court action by women
- Lack in awareness of rights amongst community prevents women from taking or sustaining action.
- Inadequate responses and lack of co-ordination by multi-agencies in combating violence and discrimination

### **Challenge to the constitutionality of the PWDV Act, 2005**

The challenges were filed in various High Courts, inter alia on the ground that the Act, by providing reliefs only to women, in violation of the constitutional right to equality.

## **Aruna Parmod Shah vs UOI**

WP (CrI.) 425/2008, HC of Delhi, (Decided on 07.04.08)

The petition challenged the constitutionality of the PWDVA, 2005 on two grounds:

- The gender-specific nature of the Act, by excluding men, is arbitrary and, hence, violates Art. 14 of the Constitution.
- The definition of “domestic relationship” contained in section 2(f) of the Act is objectionable. The petitioner contended that the placing of “near or like marriage” status (relationship in the nature of marriage) at par with ‘married’ status leads to the derogation of the rights of the legally-wedded wife.

### **Dismissal of first contention**

- “There is a difference class and legislation and reasonable classification.” If the legislature reasonably classifies persons for legislative purpose so as to bring them under a well defined class, it is open to challenge on the ground of denial of equal treatment that the law does not apply to other persons.
- The gender-specific nature of the PWDVA 2005 was held to be reasonable classification in view of the object that the Act seeks to achieve and, hence, was held to be constitutionally valid.

### **Dismissal of second contention**

“There is no reason why equal treatment should not be accorded to a wife as well as woman who has been living with a man as his ‘common law’ wife or even as a mistress.”

- “Like treatment to both does not, in any manner, derogate from the sanctity of marriage since an assumption can fairly be drawn that a ‘live-in-relationship’ is invariably initiated and perpetuated by the male.”

- The Court appears to acknowledge the vulnerability of women and their lack of negotiating the capacity within such a relationship.
- The Court also noted that the social stigma in such cases is usually faced by women although both partners are parties to the relationship.
- Live-in relationship: M.Palan Vs Meenakshi Madras High Court: 27.02.2008
- The Act does not contemplate that that the aggrieved person and the respondent should live or have lived together for a particular period or for few days. Both the parties were in sexual relationship and one can infer that both of them seems to have shared household and lived together at least at the time having sex by them.
- Therefore, the contention made by the respondent that the provisions of the Act are not applicable on them is not maintainable.
- Maintenance orders were passed.
- The second wife must be afforded protection from violence within the home.
- The court reiterated the principle that a man must not be allowed to take the advantage of his own wrongs and defeat the rights of a woman in good faith not knowing the existence of the first marriage.
- Suresh Khullar vs Vijay Kumar Khullar, AIR 2008 Delhi
- Smt Narinder Pal Kaur Chawla vs Shri Najeet Singh Chawla, AIR 2008 Delhi 7
- Vandana vs T Srikanth and others. (2007) 6 MLJ 205 (Mad.) The Madras High Court gave a broad interpretation to the terms 'shared household' and said wife was entitled to reside in the shared household even if the parties had not lived together in the

shared households even for a day after their marriage.

- SR Batra and Anr vs Taruna Batra, (2007) 6 MLJ 205 (Mad.)
- The Supreme Court interpreted the expression 'Shared Household' under section 2(s) of the PWDVA and held it to mean a 'House belonging to or taken on rent by husband, or house which belongs to the joint family of which husband is a member.'
- Praveen Mehta vs Inderjit Mehta, AIR 2002 SC 2582 In contract to instances of physical cruelty, mental cruelty is often established only by inferences drawn from surrounding facts and circumstances.

### **Mohd Hoshan vs State of Andhra Pradesh, (2002) 7 SCC 414**

The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether mental cruelty was established or not.





# Chapter

# X

## **DOMESTIC VIOLENCE: WORKSHOP METHODOLOGY**



## Note to the facilitator

It is important to start this session with a clear understanding of what constitutes domestic violence. From here, the session could proceed to understanding the law on the issue. The first exercise illustrates the need to understand domestic violence as a human rights issue. The second exercise helps to arrive at a common understanding of what constitutes domestic violence.

### EXERCISE 1

**Title:** Domestic Violence as a Human Rights issue

**Purpose:** To understand that Domestic Violence is a Human Rights issue

**Time:** 60 minutes

**Materials needed:** Whiteboard and markers, case studies

#### Steps:

Draw four columns on the board. The first column should be 'Violence against Women, second column should be 'Perpetrators', the third column should be Victims and the fourth column should be Rights Violated.'

The facilitator should ask participants to look at the life of a woman from the time she was a foetus to adulthood and what are the various forms of violence that happen against her, e.g., female foeticide, female infanticide, sexual harassment, rape, domestic violence, etc.

Once they have listed out all the violations, ask them to name the perpetrators of each of the violations, as well as the victims.

Examples of perpetrators are: men, uncle, mother-in-law, husband, boy-friends, etc. Examples of victims are usually women.

Once this is listed, ask them to identify which are the rights that have been violated in each row. The facilitator can link up this session with the session on fundamental rights and rights guaranteed to women in the Indian Legal System.

Once the chart is in place, the facilitator should use the following discussion points:

Many of the perpetrators are people who are related to the woman such as husband, boyfriend, father, uncle, etc. Apart from sexual harassment at the workplace, almost all the other violations listed can and do happen within the four walls of the home. This household space, which is also considered the safest space, is in fact, responsible for large-scale violence against women.

Domestic violence occurs frequently and takes on many forms. It is a violation of human rights of women. The concept of 'family' is held so sacred in our culture that women who do opt to walk out of violent households are often seen as 'bad' women. The expectation is that women 'adjust' to violent situations, so as to keep the sanctity of the family alive, sometimes at the cost of their lives.

## EXERCISE 2

**Title:** Defining Domestic Violence

**Purpose:** To arrive at a common understanding of domestic violence

**Time:** 60 minutes

**Materials needed:** Whiteboard and markers, case studies

**Steps:**

- Divide the larger group into three or more small groups depending on the number of participants.
- Each small group will be given a situation that has been prepared by the facilitator.
- The facilitator can use the following questions to give focus to the group discussions.

– Should women put up with certain types of behaviour for the larger good of their families?

- What would be behaviour that would certainly classify as domestic violence?
- On what basis does one decide what constitutes or does not constitute domestic violence? Who decides this?
- What are the possible responses that women get when they complain or talk about domestic violence?

### **Case Study 1**

Madhu was married to Ganesh for five years and they had two daughters. Ganesh and his family had been harassing Madhu, taunting her for not producing a male child. When she got pregnant once again, her mother-in-law took her to the doctor and had her examined, illegally. They found out that Madhu was pregnant with a baby girl. Ganesh and his family started pressuring Madhu to have an abortion. Ganesh said that he would throw her out of the house if she did not have the abortion. Madhu also found out that the family was looking for another girl for Ganesh to get married for the second time. Is this domestic violence? What should Madhu do in this situation?

### **Case Study 2**

Suresh and Geeta have been married for almost 15 years. Both of them are working in an engineering firm. They met in engineering college and have been together ever since then. Geeta has however been quite unhappy in her marriage. She and Suresh are placed at the same level and also earn the same amount of money. Suresh expects her to hand over her entire salary to him every month. Geeta has no control over her own earnings. All the investments are handled by Suresh and are in his name. She is given a small amount of money every month as pocket money. To buy groceries, she has to request Suresh for money. She feels quite humiliated about this. Is this domestic violence?

### **Case Study 3**

Sujata had been living with Imtiaz for many years. They had a four years

old son, Rehaan. Imtiaz was very violent and very often beats up Sujata. One day, having enough, Sujata decided to seek some advice. She went to a family counselor who said, “if you file a divorce case against your husband because he is cruel to you, it may take at least four years in court to get a judgement. Why don’t you just adjust with him? You have coped with the violence for five years, I am sure the violence will phase out with time. Just think about your four-year-old son. Rethink your decision to leave your husband.” Is this domestic violence? What should Sujata do?

After the presentations, have a discussion on the various forms of domestic violence.

Share with the participants the definition of domestic violence given in the Protection of Women from Domestic Violence Act, 2005.

### **Note to the facilitator**

The facilitator should do a presentation of the Protection of Women from Domestic Violence Act, 2005 (DV Act 2005). To prepare for this, the facilitator should use the legal information section. She should also state that women have several legal options such as legal separation, divorce as well as pursuing a criminal complaint under Section 498A of CrPC. It is important that after a presentation is done on the DV Act, 2005, an exercise be conducted to ensure that the provisions and strategies to be used under the Act are clear. This would be especially useful if the training is being done with lawyers. It would also be best to get a practicing lawyers to help clarify the legal strategies. The case studies could be given to the participants as an overnight exercise.

### **Statistics on domestic violence**

In a study conducted on ‘Domestic Violence during Pregnancy’ at the government medical college and hospital, Chandigarh from January 2004 to December 2004 it was found that:

- The incidence of domestic violence was drastically high in women who were society unsupported;

- The level of education and employment of the woman had no impact on the incidence of abuse;
- The perpetrator of the abuse was the intimate partner (husband) in 48.2%, the husband's mother in 61.3%, and the husband's sister in 22.6% of the cases of domestic violence.
- International Centre for Research on Women suggests that 80% men from Punjab think violence is justified if the wife is 'disrespectful' and 60% justify it if the wife 'does not follow instructions.'

National Crimes Record Bureau Crime Clock 2004 statistics are as follows:

- Every nine minutes a husband or his relatives commits cruelty on a woman.
- Every 29 minutes a woman is raped.
- Every 53 minutes a woman is sexually harassed.
- Every 75 minutes a woman is killed for dowry.

### EXERCISE 3

**Title:** How to use the Protection of Women from Domestic Violence Act, 2005

**Purpose:** To understand the provisions of the PWDVA, 2005

**Time:** 60 minutes

**Materials needed:** Whiteboard and markers, case studies

**Steps:**

- This is an overnight exercise.
- Divide the participants into four or more small groups. Give each group a copy of the DV Act 2005.



- Each group must read the case and answer the question that is asked in each case using the provisions of the DV Act 2005.
- Each group must prepare their responses and do presentations the next day in front of the larger group.
- Respond to each case study and the strategies that have been discussed. It is important to have a lawyer who is well aware of the Act as a resource person.

### **Case Study 1**

Madhu was married to Ganesh for five years and they had two daughters. Ganesh and his family had been harassing Madhu, taunting her for not producing a male child. When she got pregnant once again, her mother-in-law took her to the doctor and had her examined, illegally. They found out that Madhu was pregnant with a baby girl. Ganesh and his family started pressurising Madhu to have an abortion. Ganesh said that he would throw her out of the house if she did not have the abortion. Madhu also found out that the family was looking for another girl for Ganesh to get married for the second time. Is this domestic violence? What should Madhu do in this situation?

### **Case Study 2**

Radha is 20 years old. She is the adopted daughter of Sita Devi and Man Singh who have two biological sons. In the last five years, both Sita Devi and Man Singh died. Radha lives with her brothers who are both married, with children. In the last two years, Radha has been ill-treated by her brothers and their families who want to throw her out of the joint property in which they reside. Radha had been told by her parents that they have ensured her some property in their will. However, Radha has not seen this will. She is afraid for herself and also fears physical violence from her family. How can you use the PWDVA, 2005 to protect Radha's rights?

### **Case Study 3**

Rukmini has filed for divorce from her husband Rajkumar on grounds of

cruelty. She lived with him for five years during which he was abusive and violent towards her. Rukmini has paid for the house in which Rajkumar is currently residing. Her husband is pressurizing her to take back the case. She has also sought maintenance from him. So far no order has been passed and it has been over a year. How can you use the PWDVA, 2005 to assist Rukmini?

### **Case Study 4**

Rizwana and Mihir have been living together for two years. They were in a relationship and not married. Mihir is a pilot and travels a lot. In the last six months Rizwana has noticed a change in Mihir. He frequently gets angry. One day he lost his temper and beat her up very badly. The neighbours, hearing her screams, come to her rescue and took her to the hospital for treatment. Rizwana is very scared to go back to her home. She wants to leave Mihir. How can you assist her using the PWDVA, 2005?

### **Note to the facilitator**

To end this session, it would be effective to do an exercise on myths and facts related to domestic violence. It will help to tie up the discussions and concretise concepts with the participants.

### **EXERCISE 4**

**Title:** Myths and facts on domestic violence

**Purpose:** To clarify various myths

**Time:** 45 minutes

**Materials needed:** Whiteboard and markers

#### **Steps:**

- This exercise can take the form of a debate.
- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.

- Each group should take turns to argue a myth and the other group should counter it. Each argument and counter-argument should last five minutes. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts listed below are merely indicative and the facilitator can contextualise them depending on the audience and the cases that have come up.

## **Myths and facts on domestic violence**

**Myth:** Domestic violence is only when a husband beats his wife.

**Fact:** Domestic violence has many different forms. It can be physical, mental, psychological, economic and sexual. Being abused may not only include physical violence, but a victim may be abused verbally, emotionally, and/or psychologically. These forms of abuse can be just as terrifying and debilitating and often result in feelings of low self-esteem, depression, and loneliness for the victim.

**Myth:** Domestic violence is a private matter.

**Fact:** Domestic violence is a crime with serious repercussions on women.

**Myth:** A man abuses a woman only under the effect of alcohol or stress.

**Fact:** Batterers frequently make excuses for their violence, claiming loss of control due to alcohol or drug use, or extreme stress. Although drug and alcohol abuse may intensify existing violent behaviour, it does not cause domestic violence.

**Myth:** A husband is violent only to a nagging or a complaining wife.

**Fact:** Victims never control a batterer's use of violence. Victims are not to be blamed nor do they ever deserve such abuse. Whatever problems exist in a relationship, the use of violence is never justified or acceptable.

**Myth:** A man abuses a woman only when he is uneducated and poor.

**Fact:** Studies of domestic violence have consistently found that battering occurs among all types of families, regardless of income, profession, religion, ethnicity, educational level or race. However, the fact that victims and abusers from the lower income group are over-represented in calls to Police, battered women's shelters and social services may be due to lack of other resources.

**Myth:** Since young children are worst affected by a broken relationship, a woman should continue to stay in the violent relationship.

**Fact:** It is worse for a child to be brought up in a home which is scarred with domestic violence. The repercussions of this will last through the lifetime of the child. Violence often occurs in a cycle which is often endless. Exposing children to this kind of trauma will impact them for life. It is better to be able to provide a safe and secure home rather than continue a relationship which is damaging for all those who are included in it.

**Myth:** A woman is the worst enemy of a woman.

**Fact:** Women are part of the same socialisation processes that we all go through which allows for the belief that men are the more powerful sex. Often a woman's complete dependency on the males in her family may make her seem like an enemy to another woman.

**Myth:** A woman can always leave a violent relationship.

**Fact:** There are many reasons why it is difficult for a victim to leave:

- The partner may have used violence when the victim tried to leave in the past.
- The victim may not be aware about available resources to assist her while leaving.
- If the victim is financially dependent upon the abuser and leaves with their children, she is likely to face severe hardships.
- Social and Judicial systems may have been unresponsive, in-

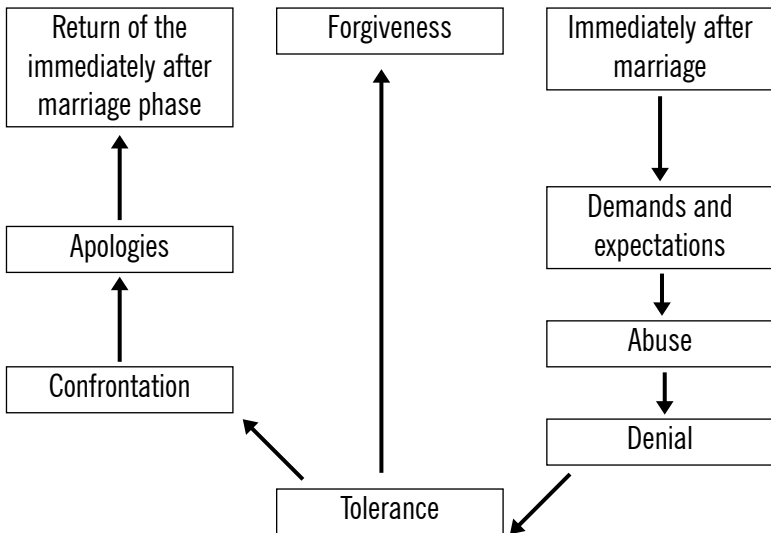
sensitive or ineffective in the past.

- Religious, cultural, or pressures from the family may make the victim believe that it is her duty to keep the marriage/ relationship together at all costs.
- The victim's emotional ties to the abuser may still be strong, supporting the hope that the violence will end.
- For most of us, the decision to end a relationship is not an easy one.

**Myth:** Men who are violent are usually mentally ill.

**Fact:** Violent men or batterers get their messages from society. The message is that violence is an effective manner of achieving power and control over their partners. Such behaviour is also learned from the batterer's own life experiences, especially during childhood. Phases of domestic violence: The circular form depicts a cycle of abusive behaviour.

### Marriage (Arranged/Loved)



## Note to the facilitator

Closely related to the issue of domestic violence is the problem of dowry and dowry death. As per the National Crime Records Bureau Crime Clock 2004 statistics, “Every 75 minutes a woman is killed for dowry.” The act of giving and taking dowry was penalized in 1961 through the Dowry Prohibition Act. Legal reform addressing dowry was introduced in the 1980s in the Criminal Laws and the investigative procedures. In 1983, section 498A was introduced in the Indian Penal Code (IPC) to penalise domestic violence and cruelty towards a woman by her husband and her in-laws. This was followed by the introduction of section 304B on dowry deaths, in IPC, in 1986. The section prescribed punishment of seven years to life imprisonment for those found guilty of killing a woman within seven years of her marriage. Section 304B was supplemented by amendments already made in 1983 in Section 174 of the Criminal Procedure Code (CrPC) of 1973. Section 174 CrPC enforced investigations by a Magistrate on suspicious bridal deaths, which till that time were being investigated only as suicides.

Through the module on domestic violence, it will be necessary to address the issue of dowry and dowry death. Using the legal manual, the facilitator should try and address the following points in a presentation:

- Definition of dowry.
- Difference between dowry and stridhan.
- Punishment for giving and taking dowry.
- What is a dowry death?
- How can demands of dowry or previous violence by the deceased woman’s husband or his relative be proved?
- What can be done if a woman is being harassed for dowry?
- What is the procedure for investigating unnatural death of a woman within seven years of her marriage?
- What is a dying declaration and why is it important?

- Who can record a dying declaration?
- What is the procedure to be followed?
- What is the punishment for dowry harassment and dowry death?
- Who can fight a case on behalf of the deceased woman? Why?

### **Action points**

- Make a poster depicting different forms of domestic violence and the legal remedies available for the woman.
- Identify ways in which the participants can assist women facing domestic violence.
- Create a list of local and state level service providers including lawyers, organisations, hospitals and police stations for assisting the victims of violence.
- To fight the practice of dowry, the facilitator may suggest that the participants may form collectives or coalitions of people in their community who pledge to neither take nor give dowry.
- The participants may get a resolution passed in the Gram Sabha in the villages or in the residential welfare associations in the city stating that they will not allow the practice of dowry in their area.
- Initiate a campaign in the community to encourage young people in the community to take a stand against dowry.
- Prepare posters and paint slogans on Panchayat office walls against the practice of dowry.
- Discussion forums could be organized in the villages/ women's collectives.

**Chapter**

**XI**

**UNIFORM CIVIL CODE**





## Session methodology

### Exercise

Objective: At the end of the discussion on Personal Laws, there should be a small discussion on the necessity of a uniform civil code along the following lines noted below:

- The emphasis placed by feminists on an Egalitarian Civil Code instead of UCC, acknowledging the fact that uniformity does not necessarily mean equality.
- A discussion centered around the issue that, even though we have Uniform Criminal Laws, Property Laws etc, why is it that for matters relating to marriage, divorce, succession etc we are bound by Personal Laws, despite the fact that Personal Laws of most religions, not just Islam, discriminate against women and do not give women an equal status.

### What is Uniform Civil Code?

Uniform Civil Code essentially means unifying all these “Personal Laws” to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. A Uniform Civil Code of India administers the same set of secular laws to govern all people irrespective of their religion, caste and tribe. This supersedes the right of citizens to be governed under different Personal Laws based on their religion or caste or tribe. Such codes are in place in most modern countries.

### What is the position in India?

There is no Uniform Civil Code in India but a Uniform Criminal Code. The Criminal law is equally applicable to all the citizens irrespective of which religion they have an affiliation with. However, in the case of Personal Laws there is no uniformity. The laws relating to marriage, judicial separation, divorce, maintenance, adoption, guardianship, custody and succession governing the Hindus, Christians, Muslims and Parsis are different

and varies from one religion to the other. The various laws governing them have been discussed in the introduction chapter. Thus it is clear that there is no uniformity in all Personal Laws and they confer unequal rights depending on the religion and the gender.

### **What are the provisions in the Constitution of India for Uniform Civil Code?**

Directive Principles of the State policy: Article 44, Uniform Civil Code for the citizens: The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. However, it is only a Directive Principle of the state, therefore it cannot be enforced in a Court of Law. It is the prerogative of the State to introduce Uniform Civil Code.

#### **In Sarla Mudgal vs Union of India (AIR 1995 SC 1531):**

*“The Successive Governments till-date have been wholly re-miss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.<sup>35</sup> We, therefore, request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and “endeavour to secure for the citizens a uniform civil code throughout the territory of India”. We further direct the Government of India through Secretary, Ministry of Law and Justice, to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a “Uniform Civil Code” for the citizens of India.”*

*“...A unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the Personal Law of the Minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women. The Government may also consider feasibility of appointing a Committee to enact*

*Conversion of Religion Act, immediately, to check the abuse or religion by any person.”*

In 2003, the Supreme Court in *John Vallamattam vs Union of India*, AIR 2003 SC 2902, observed “We would like to state that Article 44 provides that the State shall endeavor to secure for all citizens a Uniform Civil Code throughout the territory of India. It is a matter of great regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a Common Civil Code in the country. A Common Civil Code will help the cause of national integration by removing the contradictions based on ideologies.”



## CONCLUSION

---

Women's energies are directed primarily at recognising and describing the oppression against them. Because the discrimination against them is so apparent that women can no longer be content to leave it to other people meaning thereby that they are the agents of change and should be prepared to fight for it. Where women desire to win they need to learn how to argue their case which they cannot unless and until they are conversant with the degree of inferiority and dependence they are subjected to and empowered towards it.

As soon as the marriage takes place, which is considered one of the sound social institutions to bring harmony and integration in social fabric, the woman becomes susceptible to subjugation. At this point gender empowerment develops an understanding of the situation of women in society and the concepts of gender equality and gender justice. Legal empowerment provides the practical framework within which women can realise actual equality and justice. It develops an understanding of their roles as citizens and critically analyses different laws and the law and decision making processes. Choice of choosing whom to will marry a right that is guaranteed to them as citizens of this democratic country is rarely exercised by her. And one that will make divorce easier for those who want to opt out of marriage? These are not mutually exclusive choices. But because they have a direct impact on the lives of millions of women and men, they cannot be rushed through without adequate thought and debate. On the former, there is still some discussion and no conclusion yet. On the latter, strangely enough, the government seems to have made up its mind and is contemplating introducing a new provision in The Hindu Marriage Act that will permit divorce under "irretrievable breakdown of marriage."

The incidence of divorce would not include a much higher percentage of desertions that routinely occur, where men leave their wives and children and live a bigamous life without any fear that the law will ever catch up with them. Such women are left in limbo, still legally married, unable to go

with another relationship, and left without financial support. In a country where poverty and illiteracy are common, the figures if ever collated of such women would be staggering.

Justice Choudhry in *T. Sareetha Vs Venkata Subbaiah* AIR 1983 AP 356 has aptly observed: *“A decree for restitution of conjugal rights constitutes the grossest form of violation of an individual’s right to privacy. It denies the woman of her free choice when and how body is to become the vehicle for procreation of another human being. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear misunderstanding between the parties.”*

Dowry, divorce, maintenance, adoption and custody of children and succession rights vis a vis women in our society are peculiar and needs to be constantly reviewed. PWDVA is a first step towards it where women have put forward their experiences and asked for a legislation. It still needs to be reviewed.

## **BARE ACTS FOR REFERENCE**

---

- The Hindu Marriage Act, 1955
- The Hindu Adoptions and Maintenance Act, 1956
- The Hindu Minority and Guardianship Act, 1956
- The Hindu Succession Act, 1956
- The Kazis Act, 1880
- The Muslim Personal Law (Shariat) Application Act, 1937
- The Dissolution of Muslim Marriages Act, 1939
- The Muslim Women (Protection of Rights on Divorce) Act, 1986
- The Muslim Women (Protection of Rights on Divorce) Rules, 1986
- The Indian Christian Marriage Act, 1872
- The Divorce Act, 1869 ( Prior to the amendment in 2001 this Act was called the Indian Divorce Act, 1869)
- The Indian Succession Act, 1939
- The Parsis Marriage and Divorce Act, 1936 Guardian and Wards Act, 1890
- Protection of Women from Domestic Violence Act, 2005
- Guardian And Ward Act, 1890



**R**easons for this Training Module: Rights of Women Under the Personal Laws in India, is covering all the Personal Laws applicable in India in legal perspective. The handbook spread over eleven chapters is well articulated with exercises and methodology to conduct the sessions on the above mentioned topic. It has been an earnest endeavour while writing this handbook that it serves as a course for imparting knowledge to the paralegals on the Personal Laws applicable in India and how it affects a woman once she is married. This Training Module has been designed to:

- Augment the capabilities of potential trainers/facilitators/resource persons in conducting programmes on Personal Laws in India for paralegals.
- To empower the paralegals with special emphasis on women to realise and understand their position in relation to the law applicable to them
- To empower women to bring about social and economic development, and ensuring gender and social justice within the Personal Laws governing them.
- To acquaint women with knowledge about the Personal Laws applicable in India, in the light of the Constitutional provisions, state government Acts, Rules and Executive Orders if any.
- To help them acquire legal knowledge and the necessary skills in having access to court and actively take part for development of gender justice.
- To strengthen delivery of justice system by developing a cadre of barefoot lawyers in rural areas

**HRLN**

Human Rights Law Network

576, Masjid Road, Jangpura, New Delhi-14

Phone: +91-11-24379855/56

publications@hrln.org www.hrln.org



European Union



Dan Church Aid

