



## Unit 5

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### Family Justice System



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## CHAPTER

## 1

# Institutional Framework - Marriage and Divorce

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- I. Nature of Family Laws in India
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## Learning Outcomes

After the completion of this chapter, the students will be able to:

- Explain the evolution of family laws and establishment of Family Courts in India
- Analyse the role of counsellors and lawyers in Family Courts
- Critically evaluate the existing gender bias in Personal Laws in India
- Compare types of marriage and conditions of a valid marriage under various family laws
- Evaluate the theories and grounds for divorce

## I. Nature of Family Laws in India

Family Laws or Personal Laws consists of family or personal matters like marriage, dowry, dissolution of marriage, guardianship, adoption, maintenance, gifts, wills, inheritance, succession, and so on. In India, religion and personal laws are largely interlinked. So Hindus, Sikhs, Jains and Buddhists follow Hindu Family laws, (Sikhs have their own marriage law but are covered under Hindu Law for other family matters); Muslims, Christians, and Parsees have their own laws; and other traditional communities, like the tribal groups, follow their own customary practices or customary laws. The Hindu law, the Sikh marriage law, the Parsee Law, and the Christian law are codified or passed by the Indian Parliament as Acts or laws. The Muslim Law is uncodified and is based on the Sharia, which is the moral and religious law primarily grounded on the principles of the Islamic religious text, the holy Quran and examples laid down in the Sunnah by the Islamic Prophet Muhammad.

To this extent, India follows a peculiar conception of a secular state; although these varied communities are one nation, they co-exist as independent and distinct communities in the matters of family laws. As described herein, unlike other laws in force in India, such as criminal and civil

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laws, family laws are not uniform. However, the Constitution of India, in Article 44, provides for a goal or aspiration for achieving a uniform civil code in family and personal matters. This provision is merely a directive or aspirational and is not enforceable by a court of law.

### A. Ancient Period

The Laws in ancient India were based mainly on religious texts such as Dharmashastras and Dharmasutras. They are Sanskrit written texts on religious and legal duties. They provided rules for the life of an ideal householder and contained the Hindu knowledge about religion, law, ethics and so on.

### B. Medieval Period

The Hindu legal system in the medieval period was also based on the *smriti* literature and the *Dharmashastra* as well other later digests. Since the medieval period, starting from the 8th century, two major schools of personal laws have been followed; Mitakshara, followed in North and South India, and Dayabhaga, followed in the Bengal region.

The Muslims follow Shariat, which is uncodified law based on Quran. The Hindu Law and the Muslim *Shariat* covered all aspects of life and did not differentiate much between morals, customs, and laws. Even during the Mughal Empire in the Indian subcontinent, between the 16th and 18th centuries, Hindus and Muslims were ruled largely by their own sets of local customs and Personal Laws.

### C. British-India

The British came to the Indian subcontinent in the early 17th century. In the initial years, they were not concerned with the various regional and local laws practiced in the subcontinent. In 1772, when the East India Company established themselves as the civil administrators, Warren Hastings, the first Governor-General of Bengal, introduced the uniform criminal law with the idea of equality before the law for both Hindus and Muslims.

However, in matters of Personal Law, he established that the laws of the holy Quran would be applicable to the Muslims, and the Shastras for the Hindus. As the British had no knowledge of the Personal Laws, they appointed the Hindu pandits and the Muslim jurists as consultants in their courts, and this led to the administration and development of the Anglo-Hindu and the Anglo-Islamic Personal Laws.

After 1864, the system of court Hindu pandits and Muslim jurists was abolished due to dissimilar interpretations and some suspicions of corruption, and the court judges interpreted the Personal Laws themselves. During the British rule, both the Anglo-Hindu personal law and the Anglo-Islamic Personal Laws continued to develop through reforms, law commissions, and mainly through case laws.

### D. Post-Independence

After India's independence in 1947, efforts were made to develop a uniform civil code for dealing with matters of Personal Law. It started with the uniform Hindu Code Bill, which attempted to combine the varied regional customs and usages. In 1951, it was shelved due to much opposition. Since the Constitution of India had adopted the word 'secular' as an important feature of the Indian republic, the uniform family law was seen as biased in favor of the Hindu majority community and unsecular.

In a similar manner, in 1955-56, the Parliament adopted and codified the four different major legislations governing the family and personal law matters of the Hindu community: Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956).



Accordingly, Christians, Parsees, and Sikhs have their own codified Marriage Acts; Muslims are governed by the Sharia; and the traditional communities continue to practice their uncoded customary laws.

As mentioned earlier, although the Constitution of India, in Article 44, provides for a goal or aspiration for achieving a uniform civil code, this has never been taken up seriously for the fear of widespread communal violence.

## II. Human Rights and Gender Perspective

There are various provisions in the Constitution of India that are specified for gender equality. The preamble (or the introduction) to the Constitution of India resolves to secure justice, liberty, equality, and dignity of all. Furthermore, Article 14 provides equal treatment before the law for every person, and Article 15 prohibits discrimination based on religion, race, caste, sex or place of birth. Thus, the idea of equality is strongly emphasized in the Constitution.

However, exceptions exist too, for example, Articles 25 and 26 of the Constitution provide for freedom of religion that includes freedom of conscience and free profession, practice and propagation of religion as well as freedom to manage religious affairs. The religious communities have used these provisions to argue that modifying their family laws would be interfering with their freedom of religion.

For those who promote the traditional religious values, the above gender equity provisions are contrary to their customary methods of law. For example, the traditional Hindu religious legal methods found in *The Laws of Manu* provide for unequal treatment of law and punishment based on gender as well as caste. Gender inequalities also exist within the Islamic legal traditions. Such competing gender inequalities of the two communities in particular, also prevented the adoption of a uniform civil code, which has continued to remain an unrealised aspirational provision in the Constitution.

The modern Hindu family laws were adopted by reconfiguring the traditional religious laws and further based on modern constitutional values. However, complete gender equity has not been achieved.

The instances of gender inequality existing in the present day Hindu family law include: 1) the Hindu Marriage Act (Section 5.iii) prescribes marriageable age for girl as 18 and boy as 21. Recently the government has proposed the marriageable age of girls to be increased from 18 to 21 years. 2) The Hindu Succession Act provides different methods of intestate (without a will) succession of property for male and female intestates; 3) the Hindu Minority and Guardianship Act (Section 6) prohibits a mother to act as a child's natural guardian unless the father is dead or otherwise disqualified; and 4) the Hindu Adoptions and Maintenance Act (Section 6) prohibits a mother to give her child in adoption unless the father is dead or otherwise disqualified.

Some examples believed to promote gender inequities in the Islamic family laws include: 1) the practice of polygamy is permitted in Islamic law; 2) the common view that a husband can divorce his wife by the triple *talaq*, and 3) a Muslim husband is to pay maintenance to a divorced wife only during the *iddat* period of three months.

There are other practical challenges in achieving gender equity in the realm of family laws, one of the foremost being lack of information about family laws that are applicable to respective communities. Most residents of rural India, know neither the minimum age of marriage nor that dowry is prohibited. Also, they are unaware of legal grounds of divorce and prohibition of the practice of bigamy or polygamy.

In Islamic law, there are three types of divorce:

**Talaq-e-Ahsan:** Talaq-e-Ahsan is the most ideal way of dissolving a marriage.

**Talaq-e-Hasan:** In Talaq-e-Hasan, talaq is pronounced once a month, over a period of three

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months. If cohabitation is not resumed during this period, divorce gets formalised after the third utterance in the third month.

**Talaq-e-Biddat or Instant Triple Talaq:** Instant Talaq or 'Triple Talaq' or 'Talaq-e-Biddat' is an Islamic practice that allows men to divorce their wives immediately by uttering the word 'talaq' three times. The pronouncement to end the marriage can be oral or written, or by electronic means i.e., telephone, SMS, email or social media.

The practice of divorce by the consecutive utterance of talaq three times i.e., Talaq-e-Biddat or Instant Triple Talaq has been deemed invalid. Under the new law, **Talaq-e-Biddat or instant triple talaq in any form –spoken, written, or by electronic means such as email or SMS** – is illegal and void, with up to three years in jail for the husband. The other two forms of talaq (divorce) – Talaq-e-Ahsan and Talaq-e-Hasan remain valid under the Muslim law.

### III. Institutional Framework - Family Courts

In 1984, the Family Courts Act was enacted for creation and functioning of family courts with expertise to deal with matrimonial and family law matters. The Act is procedural and does not override the substantive family laws, and accordingly, the rights and obligations of parties to disputes are based on the family, personal or matrimonial laws.

During the late 1980s and 1990s, many family courts were established in most major cities in India and the matrimonial and family law cases were shifted from the district, civil and criminal courts to the newly created special courts.

Family courts were created with many distinct features and goals including: 1) Reduction in formality and intimidation in litigation process; 2) Speed in justice delivery; and 3) Facilitation in conciliation and settlements.

The personal or family law subject matters that fall within the jurisdiction of family courts include: nullity of marriage (to declare a marriage as null and void); restitution of conjugal rights (if either of the spouse leaves the common matrimonial home without any reasonable excuse, then the aggrieved spouse can file a petition for restitution of conjugal rights whereby the courts asks the spouse to return back to the common matrimonial home); judicial separation (the marriage is not dissolved but suspends the marital rights and obligations); validity of marriage; matrimonial status; disputes regarding property of either of the parties or joint property; injunction arising out of marital relations; legitimacy of any person; maintenance; and guardianship, custody and access to any minor.

The relevant statutes that come within the purview of **Family Courts Act** include the following:

- The Hindu Marriage Act, 1955:** This Act codifies the marriage law of the Hindus and primarily deals with the validity and conditions for invalidity and applicability of marriage.
- Special Marriage Act, 1954:** The Act affords a special method of civil contractual marriage (and divorce) for all Indian nationals regardless of religion or faith followed by the parties. This act does not require the customary or religious rites or ceremonies of marriage to be observed.
- Dissolution of Muslim Marriage Act, 1939:** This Act explains the dissolution of marriage by women married under Muslim law and the effects of the renunciation of Islam by a married Muslim woman.
- Foreign Marriages Act, 1969:** This statute deals with marriages of citizens of India living outside India.
- The Indian Divorce Act, 1869:** The law relates to the divorce of persons professing the Christian religion.



- f. **The Parsi Marriage and Divorce Act, 1936:** This law deals with marriage and divorce among the Parsis.
- g. **Muslim Women (Protection of Rights on Divorce) Act, 1986:** The Act deals with the matters of the divorced Muslim women and governs their right to maintenance from their former husband.
- h. **Muslim Personal Law/Application of Shariat Act, 1937:** This Act requires the application of the Islamic Law Code of Shariat to Muslims in India in their family or personal matters.
- i. **Hindu Adoption and Maintenance Act, 1956:** The law codifies the legal process of adopting children by a Hindu adult and the legal obligations to provide maintenance to the various family members.
- j. **The Indian Christian Marriage Act, 1872:** This law regulates the formalization of marriages among Indian Christians.
- k. **Hindu Minority and Guardianship Act, 1956:** The statute explains the guardianship relationships of Hindus involving the adults and minors as well as between people of all ages and their respective property.
- l. **Guardian and Wards Act, 1890:** This is a non-religious and universally applicable law regarding the issues relating to guardianship of a child in India.
- m. **Chapter IX of the Criminal Procedure Code, 1973 (S-125 to 128) :** This deals with the issues of maintenance of wives, children and parents.
- n. **Protection of Women from Domestic Violence Act, 2005:** This statute provides safeguards to the wife or female live-in partner against domestic violence by husband or male live-in partner or his relatives. This law also provides protection to other women living in a household including sisters, widows, or mothers.
- o. **Muslim Women (Protection of Rights on Marriage) Act 2019:** The Act made triple talaq a cognizable offence and punishable.

The Family Courts Act provides mandatory powers to the state governments to set up family courts in cities and towns with population over one million, and discretionary powers for areas with less than one million. However, some States have failed to create family courts; the reasons cited range from financial and space constraints to lawyers blocking any such move.

#### IV. Role of Women in the Creation of Family Courts

Women associations and organizations have played critical role in the creation of family courts. In the 1980s, the women's rights movement groups were vocal about legislative reforms, such as the creation of special courts to deal with family matters to curb violence against women including wife murder. These issues of gender justice were an important motivating factor for the creation of family courts.

Accordingly, family courts aimed at creating women-friendly court procedures that were less formal and more accessible to women, especially those from the marginalized section. For this the family courts intended to rely less on the traditional lawyers and to depend more on counselors to help the parties to the dispute to reach at mutually amicable solutions. The conciliators were to increase the power of negotiation of women in reconciliation and settlement in issues such as quantum of maintenance upon divorce, custody and access of children, protection against domestic violence, and right of residence in the matrimonial home.



The need to establish the Family Courts was first emphasized by late Smt Durga Bai Deshmukh after her visit to China in the year 1953, where she had the opportunity to study the working of Family Courts. She discussed the subject with Hon'ble Mr Justice M.C. Chagla of Bombay High Court and also Hon'ble Mr Justice P.B. Gajendragadkar, then the Judge, Bombay High Court. She also discussed the matter of setting up of the Family Courts with the then Prime Minister Pandit Jawahar Lal Nehru. Several women associations, welfare organisations and individuals also mounted pressure for setting-up of the Family Courts to provide a forum for speedy settlement of family related disputes.

The emphasis was on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of dispute relating to marriage and family affairs.

## V. Role of Lawyers and Counselors in Family Courts

The Family Courts Act restricts the role of lawyers and increases the role of counselors in the dispute resolution to encourage mutually amicable settlements. This is peculiar as well as contrary to the practices of other courts, which commonly employ the English legal method of practice called the adversarial system of adjudication.

In the adversarial system of adjudication, the judge plays the role of a neutral arbiter and decides based on the merits of the case presented to him/her by the lawyers of the opposing parties.

The Family Courts Act limits the role of the lawyers as legal experts or '**amicus curiae**' whom the courts may consult for opinion. The Act does away with lawyers with the hope to prevent excessive litigation costs, corruption, manipulative and subversive tactics, extended and bitter court battles and refusal to settle or compromise, and so on.

However, critics have argued that lawyers are necessary to help clients with complex cases and court procedures in which the counselors may not have that kind of expertise. Moreover, there has been no mechanism created to ensure the availability of '**amicus curiae**' or '**legal experts**' for the constant needs of courts. Accordingly, family courts have routinely allowed lawyers to represent clients.

As described earlier, the Family Courts Act has given the counselors high preference over lawyers in the family courts in order to promote efforts for settlement between the parties. However, in practice the role of counselors is mere superficial.

Majority of the States do not adequately integrate the requirement of counselors with the legal practice of family courts; the role of the counselors is limited to the task of ascertaining if the dispute can be reconciled, and even this not beyond the preliminary stage and not in the actual trial of the case.

The role of counselors in court practice is a new idea and neither the judges nor the lawyers are oriented to this concept. There exists a wide disparity among states with respect to the process adopted to appoint the counselors, their qualifications and remunerations, their role, and the counseling techniques employed. While some states have used non-governmental organizations as counselors, others have used trained personnel, individual volunteers, as well as lawyers.

## VI. Role of Counselors and Gender Issues

There are a few states such as Maharashtra, where counselors play a considerable role in promoting negotiations and settlements. Women groups contend that counselors should be trained with gender-sensitivity as the neutral stands of counselors usually ends up being anti-women, influenced by long standing patriarchal biases against women.





The women groups have demanded clearly defined frameworks for gender justice in the practice of the family courts, especially with respect to the roles of counselors in order to avoid gender biases in the process of fulfilling the statute mandate of 'speedy settlement' and 'protect and preserve' the family.

For example, in order to accomplish the mandate of 'reconciliation', some counselors coerce women to reconcile and return to the spousal home disregarding women's human dignity, physical safety and economic rights.

In other instances, where women have been physically abused and thrown out of their matrimonial homes and have demanded maintenance (under section 125 of the Criminal Procedure Code), the counselors and lawyers have regularly and successfully sought reconciliation, which is argued to be a legal trick that undermines women's claim to maintenance. Section 125 of the Code of Criminal Procedure is a safeguard that makes maintenance mandatory for neglected children and women.

Likewise, family issues are nuanced and have legal complexities; gender-sensitivity may help counselors to not merely take neutral positions but consider the unequal power relationships between men and women in reconciliation and settlement processes.

One of the major criticisms by the women groups, about the Family Courts Act and the family justice system as a whole, is that the conceptual basis of 'gender justice', the prime objective of the women's movement, is left out. Instead, the Family Courts Act focuses on 'preservation of the family' through conciliation and in a speedy manner. Women's groups have always maintained that 'preservation of family' is not synonymous with 'gender justice' or 'rights of women'.

## VII. Marriage and Divorce

### A. Marriage

Marriage is defined as a social and legal union between a man and a woman; through this institution the spouses create kinship. Kinship is a system of social organization between people who are related by blood, marriage, or adoption. Marriage is a social union because both the spouses are entitled to each other's company and conjugal rights, which are mutual rights and privileges between two individuals that arise from the state of being married. These rights and privileges include affection, companionship, co-habitation, joint property rights, and sexual relations.

If either of the spouses detaches herself or himself from the social and emotional companionship of her/his spouse without reasonable cause (i.e., sound judgment, which is just, fair and rational) then the aggrieved party can approach the court for relief. In such cases, the court may direct the accused spouse to return with the other spouse to their matrimonial home, which is called as restitution of conjugal rights.

Marriage is also a legal union as certain legal consequences follow after marriage; for example: parties get the status of husband and wife; legitimacy is conferred on children who are born after marriage; and it confers rights of maintenance and inheritance of property on husband and wife.

The majority of marriages are based on monogamy, i.e. a union between one woman and one man. Some societies have also allowed polygamous marriages, which is generally referred to multiple spouses or multiple marriages that include either multiple husbands or multiple wives. Whether monogamous or polygamous, the marriage system does not emerge in vacuum. These different forms of marriage serve a purpose. The practice of polygyny (or multiple wives) was often a strategy for increasing the population size. It also ensured that all women in the society were taken care of when men were in short numbers. Similarly, polyandry (or multiple husbands) is associated with shortage of women (sometimes due to female infanticide and poverty).

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Most societies also define marriage rules with respect to endogamy and exogamy. Endogamy is about marriage to a person within one's own group. Such group may be based on caste (a Brahmin will marry a Brahmin; a Kshatriya will marry a Kshatriya and so on), class (social categories based on economic and educational status), ethnic group (socially defined category based on common culture or nationality), or a religious group or even a village.

Exogamy is a rule that requires an individual to marry outside the tribe, family, clan, or other social unit. It is especially with regard to descent groups on the basis of descent from a common ancestor or ancestress. The group can consist of children of the same father/mother, of grandchildren of the same grandmother/father, great-grandchildren of the same great-grandparent etc., or of the descendants of these persons.

Accordingly, in exogamy, certain degree of social or relationship distance must exist; else exogamic taboo is attached to such marriages that take place within close social or relationship proximity.

As stated in the introduction of this section, different laws of marriage govern people belonging to different religions. For example, the Hindu Marriage Act, 1955, governs a Hindu marriage; the Parsi Marriage and Divorce Act of 1936 govern the marriage between Parsis; and the Christian Marriage Act, 1872, governs the Christian marriage. Muslims do not have any codified law for marriage; they are governed by their religious texts.

### Conditions of a Valid Marriage

For a valid marriage, certain conditions are to be fulfilled by the parties to the marriage. These conditions may vary from religion to religion.

*Firstly, there is a rule of monogamy among Hindus, Parsis, and Christians;* in that, they can marry only once. Their first marriage must be dissolved if they want to marry again. The dissolution of marriage can take place either by divorce (i.e., dissolution of marriage by the court) or by death of other spouse. However, Muslim law permits 'polygamy', where a Muslim man can have four wives.

*Secondly, no religious ceremony is required to constitute a valid marriage under the Muslim law.* The offer and acceptance to marry is often required of a Muslim couple. But this is not so among the other religious groups like, Hindus, Parsis, or Christians. If any Hindu marriage has been solemnized without the performance of customary rites on ceremonies prevailing in the community of either of the parties, such marriage is legally void. Hindus follow the ceremony of 'Saptapadi' or taking of seven steps before a sacred fire. Sikhs solemnize their marriage by 'Anandkaraj' ceremony where Lavan or the four hymns of Laav are performed during the four nuptial rounds. Parsi marriage must be solemnized in accordance with a ceremony called 'Ashirwad'; this ceremony binds the couple in matrimony spiritually. Both the bride and the groom promise to remain faithful to each other and to not be led astray by any external temptations.

For Christians in India, certain people are recognized as authorities under the Christian law who can perform the marriage; else the marriage is void. These include persons who have received episcopal ordination (consecration or installation by authority); any Clergyman of the Church of Scotland; any Minister (or priest) of Religion licensed under this Act to solemnize marriages. Such persons grant certificates of marriage to the Christian couples.

*Thirdly, different religions prescribe different age for marriage.* For example, Hindu, Christian and Parsi law prescribe age of 18 years for girls and 21 years for boys; Muslim law mentions age of puberty, which is generally attained at 15 years of age.

*Fourthly, a person cannot marry anyone who belongs to his or her close relations.* All the religions recognize that parties should not be within the prohibited degrees of consanguinity (prohibition of marrying certain blood relations) or affinity (prohibition of marrying certain persons with



whom relationship has arisen by marriage). For example, a person cannot marry his or her brother or sister.

*Lastly, a person must be of sound mind at the time of marriage.* The sound mind refers to the ability of individuals to understand the nature of marriage, and responsibilities towards their spouses once they get married.

Criteria	Hindu	Muslim	Christian	Parsi	Sikh
Age	Girls - 18 years Boys - 21 years	Age of puberty-15 years	Girls - 18 years Boys- 21 years	Girls - 18 years Boys- 21 years	Girls - 18 years Boys- 21 years
Monogamy	Essential	Polygamy upto 4 wives is allowed. Polyandry is not allowed	Essential	Essential	Essential
Prohibited relationships	Sapinda Relationships, Consanguinity And Affinity	Consanguinity and affinity based	Consanguinity and affinity	Consanguinity and affinity	Consanguinity and affinity
Sound mind-when a person can judge the consequences of his/her act	Both parties	Both parties	Both parties	Both parties	Both parties
Religious ceremonies	Saptpadi (seven steps around the fire)	Civil contract-offer, acceptance and consideration (husband pays a sum of money-mehr/ dower; in return wife promises to follow the husband)	Priest-certificate of marriage	Aashirwad ceremony	4 laav

## B. Concept of Void and Voidable Marriage

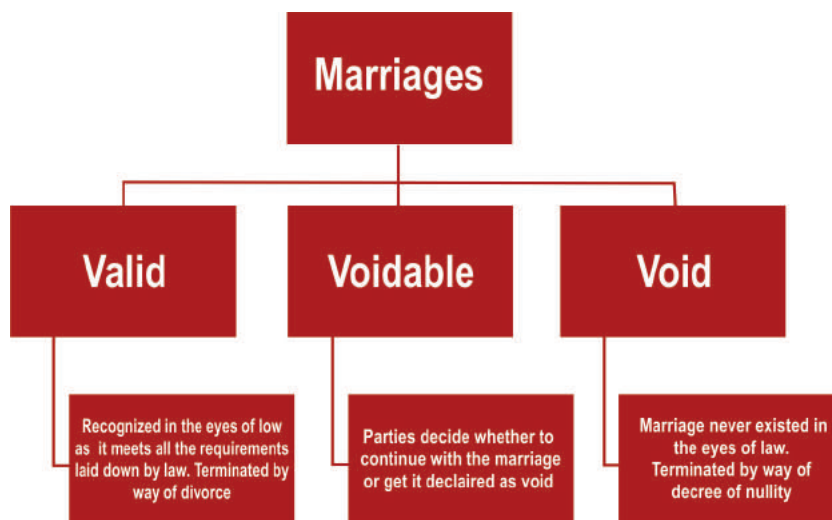
When all the conditions prescribed by the Personal laws, as discussed above, are fulfilled and there is no legal impediment, the marriage is considered as valid. A party may contravene any of the above-mentioned conditions. In such case, different status would be ascribed to the marriage i.e. void or voidable marriage. Such status of void or voidable marriage is dependent upon the nature of conditions so violated.

A voidable marriage is a perfectly valid marriage as long as it is not annulled (set aside) by any court of law. Only the aggrieved party to the marriage can file the petition for annulment. The court can annul the voidable marriage by passing a decree of nullity.

A void marriage is no marriage.



The word ‘marriage’ describes that the two persons have undergone the ceremonies of marriage; the ceremonies being a pre-requisite to a valid marriage.



The Hindu Marriage Act, 1955 makes the distinction between void and voidable marriage. It provides *three grounds for void marriage*:

First, marriage with any person falling within sapinda relationship (if one is a lineal descendant of the other person as far as third generation in the line of ascent through mother and fifth generation in the line of ascent through father including the persons whose relationship is being tested) is void. Blood relations are covered under it; for example, a person cannot marry his maternal or paternal uncle’s daughter.

*Second*, one cannot marry with any person falling within the ambit of prohibited relationship (one cannot marry persons with whom relationship has arisen by marriage). For example, there cannot be marriage between uncle and niece or aunt and nephew. The concept of prohibited relationship is wider than sapinda relationship as it covers relationship by blood as well as by marriage.

*Lastly*, if any Hindu re-marries during the lifetime of his or her spouse then the second marriage is void.

The Hindu Marriage Act also provides *four grounds for voidable marriages*.

*Firstly*, if marriage cannot be consummated due to impotency of one spouse, then, other spouse can get it annulled. Here, impotency does not mean barrenness or sterility (inability to have child) rather it is failure to have sexual intercourse.

*Secondly*, when the consent for marriage is obtained by force or fraud, then the aggrieved party can get the marriage annulled.

*Thirdly*, the pre-marriage pregnancy of wife (when the wife is pregnant before marriage by some person other than the husband) is another ground for voidable marriage. But husband must be ignorant of this fact at the time of marriage.

*Lastly*, unsoundness of mind is also a ground for voidable marriage.

### Muslim Law

Under Muslim law, void marriage is known as ‘Batil’ marriage. The term ‘nullity’ (non-existence) is applicable to void marriage as marriage does not exist from the very beginning and court





merely passes a declaration as to its nullity.

*There is no concept of voidable marriage under Muslim law* rather they recognize concept of irregular (Fasid) marriages. Irregular marriage is that, which can become valid if the defect is cured. For example, marriage with fifth wife is irregular and can be regularized if any of the earlier four wives either dies or obtains divorce from the husband. Irregular marriages are recognized only by the Sunnis and not by the Shia sect among the Muslims. The concept of void marriage is also recognized under the Muslim family law.

Marriage is void on grounds of polyandry, consanguinity, affinity and fosterage.

*Polyandry* means that a married woman cannot contract a second marriage during the subsistence of the first marriage.

*Consanguinity* means prohibition of marrying certain blood relations. For example, a Muslim cannot marry his mother, grandmother, daughter, granddaughter, paternal and maternal uncles and aunts etc.

*Affinity* means prohibition of marrying certain persons with whom relationship has arisen by marriage. For example, a Muslim cannot marry wife's mother or grandmother, wife's daughter (from another husband) or granddaughter if his marriage with wife is consummated.

*Fosterage* means when a woman, other than the mother of the child, has suckled a child under the age of two years, the woman becomes the foster mother of the child. A man cannot marry his foster-mother or her daughter, or his foster sister.

### Christian Law

The Indian Divorce Act, 1869, governs Christians. It also provides for nullity of marriage. But *the Act does not distinguish between void and voidable marriage*. It only states that marriage may be declared as null and void on certain grounds.

First, aggrieved party can get the decree of nullity on ground of impotency of other spouse at the time of marriage.

Secondly, decree of nullity can be obtained if parties are within the prohibited degrees of consanguinity or affinity.

Thirdly, marriage may be revoked if the former husband or wife of either party was living at the time of marriage.

Lastly, it may be annulled if either party was of unsound mind at the time of marriage.

### Parsi Law

Parsees do not recognize this distinction between void and voidable marriage. Under the Parsi Marriage and Divorce Act, 1936, declaration as to nullity of the marriage can be obtained in one situation where consummation of marriage is impossible due to natural causes.

## C. Divorce

### Theories of Divorce

Marriage is a social institution. There is a social interest in its protection and preservation. But sometimes it is not possible for the parties to continue with their marriage. As a consequence, concept of divorce came into being.

**Divorce is the termination of a marital union.** It results in the cessation of matrimonial tie between husband and wife. The status of husband and wife ceases after divorce. The concept of

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divorce has evolved in the form of different theories. Situations like adultery (sexual intercourse outside wedlock), cruelty, and desertion (when one spouse leaves the other spouse of never coming back) affects the very foundation of marriage. The divorce on these grounds merely enables the other party to put to an end to the form from which substance has already been destroyed.

Divorce is regarded as a mode of punishing the guilty party who had rendered him or her unworthy of consortium. This gave rise to the **guilt or offence theory of divorce**. According to this theory, a marriage can be dissolved only if one of the parties to marriage has, after its solemnization, committed some matrimonial offence. The offence must be one that is recognized as a ground of divorce.

The **guilt theory** on the one hand implies that there is a **guilty party**, i.e. a party who has committed matrimonial offence and on the other **an innocent party** who is a victim.

Later on insanity was added as a ground of divorce. Insanity did not fit in within the framework of guilty or matrimonial offence theory, as the party suffering from insanity could hardly be called a guilty party. This led to **renaming of the guilty theory** as **fault theory**. If one of the parties has some fault in him or her, marriage could be dissolved, **whether that fault is his or her conscious act or providential**.

Another theory is the theory of **divorce by mutual consent**, which originated due to the loopholes in the fault theory of divorce. The biggest drawback of the fault theory has been the presumption that there is one innocent party and one guilty party. Sometimes, husband and wife are not able to live together and there is no fault of either of them. In that case both of them are left with no remedy. Thus, a new theory had to be evolved where marriage could be dissolved by mutual consent of both the husband and the wife where they are not able to live together. Divorce by mutual consent means that the law recognizes the situation where parties can also obtain divorce by mutual consent. But mutual consent alone will not automatically terminate the relationship. It is essential to obtain a decree of the court.

For example, under the Hindu Marriage Act, 1955, parties must live separately for a period of one year or more before filing a joint petition. Then, after filing of petition, there will be a **cooling off** period for six months during which the court will not examine the petition. Thereafter, the parties have to file a joint motion to initiate the divorce proceedings.

In the landmark case of *Amardeep Singh v. Harveen Kaur*, the Supreme Court stated that it is not compulsory to wait for a cooling off period of 6 months as proposed under Section 13 B (2) of the Hindu Marriage Act.

Even the Parsi Marriage and Divorce Act, 1936 provides this ground. But there is no requirement of filing of joint petition under it.

The concept of divorce by mutual consent is also recognized under Muslim law in the form of Khula (redemption) and Mubarat (mutual release). In *Mubarat*, both the parties mutually decide to release each other from marital bond. In Khula, offer is from the wife's side and she has to pay consideration (voluntarily giving away something of monetary value in exchange for a promise) to the husband in lieu of acceptance.

The next theory is the theory of **ir-retrievable breakdown of marriage**. Divorce by mutual consent requires the consent of both the parties, and if one of the parties withholds his or her consent, divorce can never be obtained. Therefore, with the passage of time there arose a necessity for another ground that gave birth to this new theory of ir-retrievable breakdown of marriage. The basic postulate of 'breakdown theory' is that, if a marriage has broken down without possibility of repair (or irretrievably) then it should be dissolved without looking at the fault of either of the party.



In 1964, the Archbishop of Canterbury appointed a Committee under the Chairmanship of Dr. Mortimer Bishop of Exeter to look into the matter. The Mortimer Committee in its report recommended that the 'breakdown of marriage' should be the sole ground of divorce replacing all the fault grounds of divorce. The Committee defined such breakdown of marriage as such failure in the matrimonial relationship, or such circumstances adverse to the relationship that offers no reasonable probability of comfort and support.

The Matrimonial Causes Act, 1959 of the Commonwealth of Australia, provides that, if a decree of restitution of conjugal rights is not complied with for a period of one year, then either party may seek divorce.

Further, a divorce could also be obtained on the ground that the parties have not resumed cohabitation for a period of one year or more after a decree of judicial separation.

The Parsi Marriage and Divorce Act, 1936; Hindu Marriage Act 1955 and Special Marriage Act 1954 also has this ground.

In 1960's an agitation started to reform English law of divorce. This agitation produced a rapid response in India, which led to 1964 amendment in the Hindu Marriage Act, 1955. It tried to introduce the 'breakdown principle' along the lines of Australian Matrimonial Causes Act, 1959.

However, **this ground in its entirety has not been specifically included in the Hindu Marriage Act, 1955** but Supreme Court has, in the case of *Naveen Kohli v. Neelu Kohli*, 2006, strongly recommended that ir-retrievable breakdown of marriage should be made a ground for divorce. The Indian parliament has introduced Marriage Laws Amendment Bill, 2010 with the aim of making ir-retrievable breakdown of marriage as a ground for divorce in the Hindu Marriage Act, 1955.

### Grounds for Divorce

Different laws of divorce govern people belonging to different religions. The Hindu Marriage Act, 1955, governs divorce among Hindus. The Parsi Marriage and Divorce Act, 1936 governs the divorce among Parsis. The Indian Divorce Act, 1869, governs divorce among Christians. Muslims do not have a codified law for marriage and divorce; they are governed by their religious texts.

Decree of court is required for dissolution of marriage by divorce. But Muslims are an exception to this rule. In Muslim law, husband enjoys special privilege in the area of divorce. He can divorce his wife at his will without citing any reason. Earlier, the Muslim wife had no corresponding right of divorce. It is only after passing of Dissolution of Muslim Marriage Act, 1939 that wife has been conferred right to obtain divorce.

The Hindu Marriage Act, 1955 governs Hindus in matters of marriage and divorce. Both husband and wife are entitled to file petition for dissolution of marriage. This petition can be filed on grounds of adultery (sexual intercourse outside wedlock), cruelty (conduct of such a nature that it is not possible for the aggrieved party to live with the spouse who has committed that act), desertion (physical separation as well as intention to leave the matrimonial home permanently on the part of deserter), unsoundness of mind (mental disorder of such a kind that it is not possible for the petitioner to live with the respondent) and so on.

Parsis as well as Christians recognize adultery, cruelty, desertion and unsoundness of mind as grounds of divorce. The Indian Divorce Act, 1869 governs Christians in matters of divorce. Under this Act, husband can file petition of divorce only on the ground of adultery on the part of wife, whereas wife can file petition on the above-mentioned grounds. If husband is guilty of rape or sodomy or bestiality, then wife can file petition for divorce. This remedy is available to Hindu, Parsi and Christian wife.

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## D. Matrimonial Rights and Obligations

Marriage confers on husband and wife certain marital rights and obligations like conjugal rights, rights of maintenance and inheritance. These are discussed below.

### i. Conjugal Rights

Marriage confers conjugal rights on the parties. These are the rights and privileges arising from the marital relation, especially the mutual rights of companionship, aid, and sexual relations. The basis of this right is 'consortium', which means an association or alliance, or a legal right of one spouse to have comradeship and support with the other.

Parties get right of cohabitation. 'Cohabitation' means the act or state of dwelling together, or in the same place with one another. The living together of a man and woman is supposed to be the quintessence sexual relationship. It means an emotional and physical intimate relationship, which includes a common living place known as 'matrimonial home'.

### ii. Right of Maintenance

A man, who marries, takes on an obligation to support his wife out of his earnings or other income in a style, commensurate with his total income. This obligation remains in force for the duration of the marriage and sometimes longer, even if the wife has an adequate income of her own. Earlier, there used to be division of work between husband and wife. Husband used to earn livelihood and his duty was to maintain and protect the wife. Wife's duty was to live under roof and protection of the husband.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956. In assessing the amount of maintenance, the Court takes into account various factors, like financial position and liabilities of the husband.

There does not exist such parallel right for the husband. But, if any matrimonial dispute is brought before the Court, then the Hindu Marriage Act, 1955 provides that either husband or wife who has insufficient means can claim maintenance pendent lite (maintenance during pendency of the proceedings) as well as permanent alimony (maintenance at the time of final disposal of the case), which is different from litigation expenses.

In fixing the quantum of permanent alimony, the Court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Parsi Marriage and Divorce Act, 1936 also recognizes the right of husband as well as of the wife to claim maintenance pendent lite as well as permanent alimony. The parameter for granting the maintenance is same as in the case of Hindus.

Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands. Failure on the part of the husband to pay maintenance to wife entitles her to obtain divorce from the husband.

The Indian Divorce Act, 1869 governs maintenance rights of a Christian wife. This Act does not apply to any of the above-mentioned categories i.e. Hindus, Muslims and Parsis. The provisions of this Act are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendent lite and permanent alimony.

### iii. Right of Inheritance

When one person dies without making a will, his property devolves (passes on) under the





law of succession. When two persons get married, they get mutual rights of inheritance. Different laws of succession govern persons belonging to different religions. Under the Undivided Hindu family, if a male or female dies without making a will, then the property is distributed as per rules of succession prescribed in the Hindu Succession Act, 1956. Under the Act, both husband and wife are included in the category of most preferred heirs. Both of them can make a will of his or her separate properties and can give them to anyone. But, the ancestral property has to be disposed off according to the Hindu Succession Act, 1956.

Under Muslim law, in the case of death of wife, the share of husband is 1/4th of the property when there is a son or child of a son; but when there is no such child then husband is entitled to 1/2 of the estate of wife. In case of the death of the husband, the share of the wife is 1/8th when there are children; but if there are no children, then her share increases to 1/4th. Under the Muslim law, there is a restriction that a Muslim cannot dispose of by a will more than 1/3rd of his property.

#### iv. Matrimonial Property

Property and gifts received at or about the time of marriage belongs jointly to the husband and wife. But, there are certain properties belonging exclusively to each one of them. For example, there is a concept of 'stridhan' in the Hindu law. Any gifts given to wife by her parents and in-laws exclusively belongs to her. She deals with it the way she likes.

Concept of 'dower' under Muslim law is another example of such property, which belongs exclusively to the wife. Dower is a sum of money or property that the wife is entitled to receive from the husband in consideration of marriage. In fact, it would be more correct to say that dower is an obligation imposed upon the husband as a mark of respect for the wife.

### E. The Prohibition of Child Marriage Act, 2006

Minor is a person who has not completed the age of 18 years under the Indian Majority Act, 1875. With respect to the age of marriage, the Hindu Marriage Act, 1955, the Parsi Marriage and Divorce Act, 1936 and the Christian Marriage Act, 1872 has prescribed the age of 18 years for girls and 21 years for boys.

In India, child marriages (marriage which takes place before a girl attains the age of 18 years, and 21 years in case of boys) were prevalent. When the Hindu Marriage Act, 1955 was drafted, it did not affect the validity of child marriages. Only some minor penalties (15 days simple imprisonment or fine which may extend to 1000 rupees) were imposed; else, large number of marriages would fall under category of void or voidable marriages.

The Prohibition of Child Marriage Act, 2006 has changed the position in this regard. It has made child marriage voidable. Rigorous imprisonment of 2 years or fine, which may extend up to one lakh rupees, may be imposed in case of contravention of any provision of this Act. But even now, child marriage is valid.

The Prohibition of Child Marriage (Amendment) Bill, 2021 proposes to increase the marriageable age of girls from 18 to 21 years to bring parity in the marriageable age of the girls and boys. The Bill adds that the provisions of the Act shall have an overriding effect over any other law, custom, usage or practice governing the parties to the marriage.

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## VIII. Exercises

Based on your understanding, answer the following questions:

**Q-1** Give one point of difference between the following –

1. Exogamy and endogamy
2. Void and voidable marriage
3. Monogamy and polygamy
4. Marriage and divorce

**Q-2** Write brief notes on-

1. Fosterage
2. Significance of Article 44
3. Role of Lawyers and Counselors in Family Courts
4. Gender inequality in Hindu Family Law
5. Objectives of Family Court

**Q-3** Answer the following questions-

1. Give any two examples of gender inequality in the Islamic family law.
2. Explain the grounds for voidable marriage provided in the Hindu Marriage Act.
3. What is divorce? What are the various grounds for divorce?
4. What are the conditions for a valid marriage?

**Q-4** Identify the marital right and explain-

1. The obligation of a man to support his wife out of his income
2. Devolution of property after the death of spouse in Hindu and Muslim laws

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## CHAPTER

## 2

# Child Rights

## Contents

- I. Child Rights
- II. Right to Education
- III. Right to Health
- IV. Right to Shelter
- V. Child Labour
- VI. Sexual Abuse
- VII. Juvenile Justice
- VIII. Exercises

## Learning Outcomes

After the completion of this chapter, the students will be able to:

- Explain the meaning of child
- Explain various rights available to a child
- Critically evaluate child sexual abuse
- Summarise the importance of Juvenile laws

## I. Child Rights

Etymologically, the term 'child' is derived from the Latin word '*infans*', which means the one who does not speak. According to the Convention on the Rights of the Child of 1989, *a child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier*. In India, a person is deemed to be a major on attaining the age of 18 years under the Indian Majority Act, 1875. The law, policy, and practice of child welfare has undergone a significant change from a historical perspective.

Earlier, there was the concept of authority and control where the father had absolute rights over his children. After this, the welfare principle was reflected in the dominant ideology of the family. The Indian traditional view of welfare is based on *daya*, *dana*, *dakshina*, *bhiksha*, *ahimsa*, and *tyaga*. It was believed that welfare of children depended upon these values. It was only during the twentieth century that the concept of children's right emerged. This shift in focus from the 'welfare' to the 'rights' approach is significant.

The rights approach is primarily concerned with issues of social justice, non-discrimination, equity, and empowerment. The rights perspective is embodied in the United Nations Convention on the

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Rights of the Child 1989, which is a landmark in international human rights legislation. India ratified the Convention on the Rights of the Child in December, 1992. This convention gives all those basic human rights to children that will enable them to achieve their full potential. These include civil, economic, social, cultural, and political rights. The civil rights include protection from torture and maltreatment. Making of special rules governing the circumstances under which children may be deprived of their liberty also constitutes part of civil rights. The economic rights include the right to ensure proper development and protection from exploitation at work. The social rights include the right to the highest attainable standard of health services, protection from sexual exploitation and the regulation of adoption. Right to education is included in cultural rights.

## II. Right to Education

Education is the transmission of the values and accumulated knowledge of a society. It helps children in knowing their culture, moulding their behaviour in the ways of adulthood and directing them towards their eventual role in society. Right to education is one of the fundamental rights in the Constitution of India under Article 21 A (inserted by 86th constitutional amendment). It provides that the state shall provide free and compulsory education to all children between the age of six to fourteen years (6-14 years). The state also has to promote the educational and economic interests of the weaker sections of the society, and, in particular of the Scheduled Castes and the Scheduled Tribes. The mandatory duty of the state to make effective provisions for securing the right to education is subject to its economic capacity and development. Moreover, a fundamental duty has been imposed on the parent or guardian to provide opportunities for education to his child or ward between the age of six to fourteen years (6-14 years) under Article 51 A sub clause (k) (inserted by 86th constitutional amendment).

The Right of Children to Free and Compulsory Education Act was passed by the Parliament in 2009. Some of the salient features of the Act are as given here. The Act ensures that children get education irrespective of their economic condition. It provides for free and compulsory education to all children in the age group of six to fourteen years (6 -14 years).


The financial burden for the implementation is to be shared by state and the central government on basis of the **Sarva Shiksha Abhiyan program** of the central government. It also provides for 25% reservation for economically disadvantaged communities in all private and minority schools. The private schools have to face penalty for violating any provision of this Act.

## III. Right to Health

Health is a state of complete physical, mental, and social well-being. It is not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition. Healthy development of the child is one of the basic needs and the ability to live harmoniously in a changing environment is essential for such development. The extension to all people of the benefits of medical, psychological and related knowledge is essential for the most comprehensive attainment of health.





RIGHT TO HEALTH - JUDICIAL CONTRIBUTION	The World Health Organization (WHO) is a specialized agency of the United Nations that is concerned with international public health
<p>Consumer Education and Research Centre v. Union of India, (1995): Right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution.</p> <p>Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996): Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is, thus, of paramount importance.</p>	 <p>World Health Organization</p>

A constitutional duty has been imposed on the state to ensure that the health and strength of workers, men, and women, and the tender age of children are not abused. It has to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. Moreover, their childhood will be protected against exploitation. The health of infant and mother has to be protected by maternity benefit. The primary duty of the state is to improve public health; secure justice and humane conditions for work; extension of sickness, old age, disablement and maternity benefits are also contemplated. Further, the state's duty includes prohibition of consumption of intoxicating drinking and drugs that are injurious to health. A mandatory duty has been imposed on the state to protect and impose a pollution free environment for the good health of its citizens.

#### IV. Right to Shelter

Right to shelter includes adequate living space, safe structure, clean and hygienic surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads. It is a place where a person has opportunities to grow physically, mentally, intellectually and spiritually. Thus it includes the entire infrastructure necessary to enable an individual to live and develop as a human being.

These components are discussed by the Supreme Court in the case of **Chameli Singh v. State of U.P.**, (1996). In **Shantistar Builders v. Narayan Khimalal Totame**, (1990) the Supreme Court held that the right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. There is a difference between the need of an animal and a human being for shelter. For the animal, it is the bare protection of the body whereas for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect i.e. physical, mental and intellectual. Thus, right to shelter has become an integral part of the right to life.

#### V. Child Labour

Child Labour means labour by the child i.e. when the child is made to work. There are a number of factors to determine whether a particular kind of work can be called as 'child labour' or not. These factors include a child's age, nature and hours of work, and the conditions under which such work is performed etc. Labour that jeopardises the physical, mental or moral well-being of a child is known as 'hazardous work'. Such labour deprives children of their childhood, potential and dignity.

The International Labour Organization (ILO) was founded in 1919. It was the first specialized agency of the United Nations to deal with the labour issue. ILO started the International Programme on the



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Elimination of Child Labour (IPEC) in 1992. Its main objective is progressive elimination of child labour.

The Constitution of India has provided the right against exploitation as a fundamental right. A child who is below the age of 14 years cannot be employed in any factory or mine or engage in any other hazardous employment (Article 24). A duty has been imposed on the state to ensure that tender age of children is not abused. The state has to ensure that these children are not forced by economic necessity to enter into any occupation unsuited to them.

The Child Labour (Prohibition and Regulation) Act was enacted in 1986. The objectives of this Act are: banning the employment of children, who have not completed their fourteenth year, in specified occupations and processes; laying down procedures to decide modifications to the schedule of banned occupations or processes; and regulating the conditions of work of children in employment where they are not prohibited from working.

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A National Policy on Child Labour was formulated in 1987. This policy provides for strict enforcement of Child Labour Laws. The focus under this policy is on the General Developmental Programs on child labour. It provides for starting of projects in the areas having high concentration of child labour. In pursuance to this policy, the National Child Labour Project (NCLP) scheme was launched in 1988. The Scheme envisages running of special schools for children withdrawn from work.

In 2006, legislature has also taken steps towards the total elimination of child labour; it brought child domestic workers up to 14 years of age working in hotels, *dhabas*, eateries, and in the entertainment industry within the purview of the Child Labour (Prohibition and Regulation) Act, 1986.

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## VI. Sexual Abuse

Child Sexual Abuse involves any sexual activity with a child. Sexual abuse is inappropriate sexual behaviour with a child. It could be interaction between a child and an adult or older child, in which child is used for the sexual stimulation of the Perpetrator (wrong doer). It includes fondling a child's genitals, making the child fondle the perpetrator (wrong doer) genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation. Perpetrator uses deception, threats or other coercive methods to engage the child and maintain their silence.

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A person under the age of 18 years may also commit sexual abuse. There is significant disparity in age, development, or size, rendering the victim (i.e., child) incapable of giving consent. Child sexual abuse is broad enough to include extra-familial (outside a family) abuse as well as inter-familial (within family) abuse.

An Act has been passed by the Parliament in 2012 to deal with this problem - the Protection of Children from Sexual Offences Act, 2012 ..(POCSO Act, 2012). This Act protects children from offences of penetrative sexual assault (penetration of penis or any object or part of body into the vagina, mouth, urethra or anus of child), sexual assault (touching vagina, penis, anus or breast of child with sexual intent or making a child to do so), sexual harassment (uttering words, making sounds or gesture or exhibiting any body part or making a child to do so), and use of child for pornographic purposes (using a child in any form of media for the purposes of sexual gratification).

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Education programs for children are created to create awareness among children. These programs focus on two main goals: primary prevention (preventing the abuse from occurring), and detection (encouraging children to report past and current abuse). The parents play an important role in empowering their children to protect themselves. Accordingly, the prevention of child sexual abuse begins with social awareness, plus the recognition that expertise, energy, and money are needed to alleviate (mitigate) the conditions that produce child sexual abuse.

School based sex education for children is appealing because it has the potential to reach large



number of young people. Parental competency programs target at risk parents (poor, young, single) and at risk children with the goal of providing training and social support before any abuse can occur.

## VII. Juvenile Justice

The word 'juvenile' has originated from the Latin word 'Juvenilis', which means 'of or belonging to youth'. Juvenile justice is the area of criminal law applicable to persons who are not old (mature) enough to be held responsible for criminal acts. A child is born innocent. The environmental factors that have stirred criminal tendencies in the child should be held responsible. The removal of these factors might turn the juvenile into a person of stature and excellence.

### History of Juvenile Justice System in India

The primary legal framework of juvenile justice law in India was the **Juvenile Justice Act 1986**, which provided protection, treatment and rehabilitation of children and delinquent juveniles and for the adjudication of certain matters related to the disposition of delinquent juveniles.

The General Assembly of the United Nations adopted a Convention on the Rights of Child on 20th November 1989. This convention seeks to protect the best interest of juvenile offenders. The Convention states that to protect the social reintegration of juveniles, there shall be no judicial proceedings and court trials against them. The Convention led the Indian Legislation to repeal the Juvenile Justice Act, 1986 and to make a new law. Thus, Indian Legislation came up with a new Act which was called The Juvenile Justice (Care and Protection of Children) Act, 2000.

The Juvenile Justice (Care and Protection of Children) Act, 2000 was amended twice – first in the 2006 and later in 2011. The amendments were made to address the gap and loopholes in the implementation. The increasing number of cases of juvenile crimes in recent years and frightful incident of **Delhi Gang Rape Case, Mukesh & Anr v. State for Nct of Delhi & Ors (2017)** triggered major changes in the criminal justice system of India. The Juvenile Justice (Care and Protection of Children) Act, 2000 was replaced soon by **The Juvenile Justice (Care and Protection) Act, 2015**.

The Juvenile Justice (Care and Protection of Children) Act, 2015 is the primary legal framework for juvenile justice in India. It has brought within its ambit 'children in need of care and protection' and 'children in conflict with law'. A **'child in need of care and protection'** means a child who is found without any home and ostensible means of subsistence. It includes a child who is mentally or physically challenged or suffering from terminal or incurable diseases with no one to look after him or her. It also embraces those children who are likely to be grossly abused, tortured or exploited for the purpose of sex or other illegal acts. It includes children having parents who are unfit to exercise control over them. It also incorporates children who do not have parents and no one is willing to take care of them. It also includes a child who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or is likely to be abused for unconscionable gains; or a victim of any armed conflict, civil commotion or natural calamity. A child who is found begging or is a child living on the streets or a working child has also been included in this category.

A **'child in conflict with law'** means a juvenile (person who has not attained the age of 18 years) who is alleged to have committed an offence (violation or breach of law) and has not completed eighteenth year of age as on the date of commission of such offence.

This Act also provides for proper care, protection and treatment to juveniles by catering to their developmental needs. It has adopted a child-friendly approach in the adjudication and disposition of matters in the best interest of children. It also aims at ultimate rehabilitation through various institutions established under this enactment. It has tried to lay down a uniform framework for juvenile justice in the country.

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The Supreme Court in the case of **Sheela Barse v. Secretary, Children's Aid Society** held that children should not be made to stay in observation homes for too long, and as long as they are there, they should be kept occupied. The occupations should be congenial and intended to bring about adaptability in life, self-confidence, and development of human values.

In the case of **Sanjay Suri v. Delhi Administration**, a news report described the ill treatment meted out to minors in the Tihar Jail in Delhi in connivance with the jail staff. The writers of this report then moved the Supreme Court seeking relief on behalf of the child prisoners. The Court appointed the district judge to make an inquiry and give report to the court. His report disclosed that adult prisoners subjected children to sexual assault. They feared that if their names were disclosed, they would be victimized. The court passed several orders based on the report. Some juvenile undertrial prisoners were ordered to be released immediately. Some convicted minors were freed on parole (conditional release of a prisoner) for one month. The judgment stressed the need to generate a sense of humanism in jail administration.

Salient features of the **The Juvenile Justice (Care and Protection) Act, 2015:**

- The Juvenile Justice Act divided the crimes into three different categories i.e. petty offences, serious offences and heinous offences.
- Juvenile Justice Boards are constituted in every district to deal with children in conflict with law. The board comprises of a metropolitan judge and judicial magistrate with two social workers.
- Excluding the offence of heinous crimes, for all other cases, the juvenile will get institutional care for a maximum of three years by the Juvenile Justice Board.
- If a minor between the age of 16-18 years is accused of committing a heinous crime (Whether a crime is heinous or not is determined by the Juvenile Justice Board on a case to case basis), then under the amended law, the minor can be tried as an adult.

## VIII. Exercises

Based on your understanding, answer the following questions:

- The United Nations convention on the Rights of Child gives all basic rights to a child that will enable them to achieve their full potential. Explain the cultural and social rights available to a child.
- What is the status of education as a right? How did it acquire this status?
- Is there any legislation in India dealing with child labour? Name the relevant legislation. Aditi hired a 12 year old girl to help her with the domestic household chores. Can she be prosecuted for child labour? Explain giving legal reasons.





## CHAPTER

## 3

## Adoption

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- I. Adoption
- II. Minor custody and Guardianship
- III. Exercises

## Learning Outcomes

After the completion of this chapter, the students will be able to:

- Explain Adoption
- Contrast between the laws of guardianship under various religions
- Differentiate between the types of guardians

## I. Adoption

## A. What is Adoption?

**Adoption is the act of establishing a person as parent to one who is not in fact or in law his child.** It is the means by which a legal relationship is established between the parent and child who are not so related biologically. It is also defined as a process by which people take a child who was not born to them and raise him or her as a member of their family.

Earlier, the objective of adoption was mainly to secure performance of funeral rites and to preserve the continuance of one's lineage.



Did you know that Steven Paul Jobs was born on February 24, 1955, to Abdul fattah Jandali and Joanne Schieble, and was adopted by Paul and Clara Jobs?

## B. Statutes governing Adoption

**The Hindu Adoption and Maintenance Act, 1956**

In India, the only statute governing adoption is the **Hindu Adoption and Maintenance Act, 1956**. Its ambit is confined only to Hindus.

The law codifies the legal process of adopting children by a Hindu adult and the legal obligations to provide maintenance to the various family members.

**Law on adoption for other religions/ communities:**

There is no law on adoption for Christians, Parsis, and Muslims. A person belonging to these communities has to get himself appointed as guardian under the Guardians and Wards Act, 1890. This Act applies to all communities and castes.



The court will take into consideration the personal law of the minor while appointing or declaring a person as guardian under the Guardians and Wards Act, 1890. Once a person is appointed or declared as a guardian, he has to abide by the provisions of the Guardians and Wards Act, 1890.

## II. Minor Custody and Guardianship

### A. Who is a Minor?

Minor is a person who has not completed the age of 18 years under the Indian Majority Act, 1875.

### B. Who is a Guardian?

A Guardian is a person who has rights and duties with respect to the care and control of a minor's person in relation to body or property (estate or wealth of minor).

These rights of guardian include the right to determine the child's upbringing in regard to religion, education, and other matters such as the disposal of properties and so on. A guardian is vested with the duty to act for the welfare of the minor. The welfare of the child is paramount consideration for the court in matters pertaining to custody and guardianship of the child.

In matters of custody and guardianship every community has its own laws.

### C. The Guardians and Wards Act, 1890

This is a non-religious and universally applicable law regarding the issues relating to guardianship of a child in India.

The Guardians and Wards Act, 1890 was passed during the British period. This Act has authorized the court to appoint guardian for a minor child. The child may belong to any community.

### D. The Hindu Minority and Guardianship Act, 1956

The Hindu Minority and Guardianship Act was enacted in 1956. This Act has codified the law relating to custody and guardianship of children belonging to the Hindu community.

Guardian includes the following:

- ❖ a natural guardian
- ❖ a guardian appointed by the will of the minor's father or mother
- ❖ a guardian appointed or declared by a court

### E. De-jure and De-facto guardians

A guardian can be de-jure (authority vested by law) or de-facto (exercising power without being legally established).

#### Types of De-jure guardians

De-jure guardians can be of three types, they are:

- Natural guardians (by birth): Generally, father and mother are recognized as natural guardians of the child
- Testamentary guardians: Guardians appointed by will
- Certificated guardians: Guardians appointed by the court under the Guardians and Wards Act, 1890 are known as Certificated guardians



## F. Natural Guardian

Natural Guardian of a Hindu minor: Section 6 of Hindu Minority and Guardianship Act, 1956 provides that the natural guardian of a Hindu minor boy or unmarried girl in respect of the minor's person as well as in respect of the minor's property is the father, and only after him, the mother. The mother is entitled to guardianship 'after' the father. Here, the term 'after' means 'in the absence of'. Ordinarily, the custody of a minor child who is below the age of five years is given to the mother.

Thus, a functional guardian (person who is looking after the welfare of the child and actually taking care of him) will be given responsibility of the guardianship. It is immaterial whether that person is a father or mother. The paramount consideration is the welfare of the child.

### Position under Muslim Law

Muslims do not recognize mother as a guardian, whether natural or otherwise. But she has the '**right of hizanat**', which is the right of the mother to have custody of the child during early childhood.

A guardian appointed by 'will' is known as a testamentary guardian. Under the Hindu Minority and Guardianship Act, 1956, both the parents can appoint a testamentary guardian for the child.

### Position under Muslim Law

But it is not so among Muslims. In Muslim law, only father has power to appoint a testamentary guardian. The mother has no such power.

## III. Exercises

Based on your understanding, answer the following questions:

**Q-1** The Act that codified the law relating to custody and guardianship of children belonging to the Hindu community is known as:

1. The Guardians and Wards Act, 1890
2. The Hindu Minority and Guardianship Act, 1956
3. The Hindu Adoption and Maintenance Act, 1956
4. The Hindu Marriage and Divorce Act

**Q-2** Which of the following communities has a law on Adoption?

1. Christians
2. Parsis
3. Hindus
4. Muslims

**Q-3** Anisha's (a minor) father appointed Anisha's aunt as her guardian in his Will under the Hindu Minority and Guardianship Act, 1956. Anisha's aunt is a:

1. Testamentary Guardian
2. Natural Guardian
3. De facto Guardian
4. Certificated Guardian

**Q-4** Shanaya is a five year old Muslim girl. Her parents are separated. Which parent will get custody of the child and why?

**Q-5** Anuj is the son of Neeta and Neelesh Pandey. The couple separated and both are eager to seek

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the custody of Anuj. Who will be Anuj's guardian under Hindu law? Explain the position of both the mother and father.

**Q-6** Angad, a minor sikh was staying in Delhi with his parents who were involved in a bitter battle over his custody. Explain with relevant provisions as to who will get his custody?

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## CHAPTER

## 4

# Property, Succession and Inheritance

## Contents

- I. Concept of Property: Joint Family Property and Separate Property
- II. Inheritance and Succession
- III. Intestate Succession
- IV. Rules relating to Intestate Succession
- V. Testamentary Succession
- VI. Exercises

## Learning Outcomes

After the completion of this chapter, the students will be able to:

- Explain the concept of property, succession and inheritance
- Differentiate between types of succession
- Apply the rules regarding intestate succession in different religions
- Draft a sample Will

## I. Concept of Property: Joint Family Property and Separate Property

The term property is derived from the Latin term 'proprietat' and the French equivalent 'proprius' which means a thing owned.

### Types of Property

There are two kinds of property:

- a) Joint family property- Property acquired by joint funds of the family is known as joint family property. All the needs of the family are fulfilled from it.
- b) Self-acquired property - Property acquired by self-exertion or labour is known as self-acquired property. Thus, it includes property by one's own learning.

### What is Learning?

**Gains of Learning Act, 1930:** It defines 'learning' as education whether elementary, technical, scientific, and special or general.

It defines 'training' as every kind of training, which is usually intended to enable a person to pursue any trade, industry, profession or vocation in life.

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## II. Inheritance and Succession

### What is Inheritance?

Inheritance is one of the means of acquisition of property. Inheritance means the right of an heir (to succeed to property on the death of an ancestor) by way of succession. Different laws of succession govern persons belonging to different religions.

After the death of the owner, all rights belonging to the deceased with regard to the property are divisible into two classes, namely:

1. Inheritable rights, and
2. Un-inheritable rights

**Inheritable rights:** A right is inheritable if it survives its owner. It remains functional even after the death of the person to whom it belongs and devolves on his/her legal representative. For instance, proprietary rights (rights attached to property) like debts are inheritable rights.

**Un-inheritable rights:** A right is not inheritable if it dies with the person. For instance, personal rights (rights associated with the person) are not inheritable as they extinguish with the death of the deceased.

### What is Succession?

Succession is **the process in which property is transferred upon someone's death**. It is also used to refer to the estate a person leaves behind at death.

There are two ways of succession i.e. *intestate succession* and *testamentary succession*.

### Who is an Heir?

The persons on whom the property devolves are called the heirs of the deceased. A person who is entitled to inherit property after the death of the intestate is known as heir.

### Who is a Testator?

*Testator* is a person who has made a legally valid will before death.

### What is a Will?

A legal declaration of a person's wish regarding the disposal of his or her property or estate after death.

# PASSIVE

# EUTHANASIA



On 9 March 2018, the Supreme Court of India made a landmark judgment permitting passive euthanasia under strict guidelines in the country.



Supreme Court of India legalised passive euthanasia by means of withdrawal of life support to patients in a permanent vegetative state. Passive euthanasia allows withdrawal of medical treatment with the intention to expedite the death of a terminally-ill patient.

In the landmark verdict, the Supreme Court also ruled that in specific circumstances, a person has the right to decide against artificial life support by creating a living will. The Supreme Court has attached strict conditions for executing a living will that was made by a person in his normal state of health and mind.

The Supreme Court declared the right to die with dignity as a fundamental right within the ambit of the right to live with dignity. It held that the right to life and liberty under Article 21 of the Constitution of India also includes the right to die peacefully and with dignity.

The judgment was delivered on a PIL filed by NGO Common Cause for an individual's right to make a living will document for passive euthanasia. However, the debate to legalise passive euthanasia got triggered in a 2011 Supreme Court judgment in the case of Mumbai nurse Aruna Shanbaug, who was in a permanent vegetative state for more than 40 years.

## Testamentary Succession

When a person disposes off his property by making a will, it is known as testamentary succession. A person can make a will only of his/her separate property. *Testamentary succession* is governed by the Indian Succession Act, 1925.

In testamentary succession, the law empowers a person to determine, during his lifetime, the disposition of the property that he leaves behind him after his death. The law respects the will of the deceased and secures its enforcement (to compel observance and obedience to that will). A person who determines the disposition of his property in this way is said to have made a will.

## III. Intestate Succession

A person who dies without making a will is known as intestate and succession to his property is known as intestate succession.

In Intestate Succession, the property devolves according to the law or custom by which the deceased is governed.

If a Hindu dies intestate i.e. without making a will, then, both separate property as well as joint family property passes on to his heirs in accordance with the Hindu Succession Act, 1956.

Under Hindu law, a son had a birthright in joint family property. The Hindu Succession (Amendment) Act, 2005 was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956. Now, under the Hindu Succession (Amendment) Act, 2005, daughters have inheritance rights equal to those of sons from properties of their fathers, grandfathers and great grandfathers.

## Muslim Law

Muslims do not have any codified law for intestate succession. They are governed by rules contained in religious texts. They do not make any distinction between ancestral and self acquired property. The right of an heir comes into existence on the death of the ancestor.

## Other Religions

The Indian Succession Act, 1925, governs intestate succession of Christians and Parsis. Every religion has its own rules of Intestate succession, but there are certain concepts that are common to all religions.



For example, A person who is entitled to inherit property after the death of the intestate is known as an Heir. These heirs could be of three types, i.e., Ascendants, Descendants, and Collaterals.

### A. Heirs - Ascendants, Descendants, and Collaterals

Ascendants are the ancestors of a person both on the paternal and maternal side. The immediate ascendants are father and mother. It includes father (F), Mother (M), paternal grandfather (FF), paternal grandmother (FM), maternal grandfather (MF), maternal grandmother (MM), etc. There is no limit to degrees of ascent.

Descendants mean the offspring of a person. The immediate descendants of a person are his or her sons and daughters. It includes son (S), daughter (D), grandson (SS), granddaughter (SD), great grandson (SSS), great granddaughter (SSD), etc. There is no limit to degrees of descent.

Collaterals are descendants in parallel lines, i.e., from a common ancestor or ancestress. For instance, brothers, sisters, and their children how low so ever, paternal and maternal uncles and aunts and their children how low so ever are all collaterals. These heirs can relate to each other by full blood, half blood or uterine blood.

### B. Relation by full blood, half blood and uterine blood

**Relation by full blood:** Two persons are related to each other by full blood when they have the same father and same mother.

**Relation by half blood:** Two persons are related to each other by half blood when they have the same father but different mothers.

**Relation by uterine blood:** Two persons are related to each other by uterine blood when they have the same mother but different fathers.

The rules pertaining to intestate succession are more or less similar in all the communities whereby first preference is given to the husband or wife of the deceased and their lineal descendants. In their absence, the preference is given to collaterals that are close to the deceased. In their absence, property goes to remote agnatic heirs and then to cognatic heirs.

However, every religion has adopted a different way of determining the disposition of property.

## IV. Rules Relating to Intestate Succession

### A. Rules of intestate succession of a Hindu Male:

Heirs belonging to a Hindu male are classified into four categories i.e. class I, class II, agnates and cognates.

- Class I heirs are the most preferred heirs and include mother, wife, son as well as daughter and their descendants upto the third generation.
- Class II heirs include father, brother as well as sister and their children, maternal and paternal uncles and aunts, maternal and paternal grandfather and grandmother etc.

Class II heirs will inherit property only in absence of Class I heirs.

- If there are no heirs belonging to Class I or Class II then property goes to agnates.

#### Who are Agnates?

When two persons are related by blood or adoption wholly through males, they are called agnates. For example:





The son of a great grandson (son, grandson, great grandson being dead)

P ⇒ S ⇒ SS ⇒ SSS ⇒ SSSS1

In the above diagram, S is son of P, SS is son of S and grandson of P, SSS is son of SS and great grandson of P, SSSS1 is son of SSS and great great grandson of P. Here, SSSS1 is agnate to P as he is tracing relation wholly through males i.e. his father (SSS), grandfather (SS), and great grandfather (S). No female has intervened in-between.

In case, all the above-mentioned heirs i.e. Class I, Class II and agnates are absent then property will go to cognates.

### Who are Cognates?

When two persons are related by blood or adoption but not wholly through males, they are called cognates.

#### For example:

P ⇒ F ⇒ FM ⇒ FMF1

Father of paternal grandmother i.e. FMF1 is a cognate as female (father's mother) has intervened in between. In the above diagram, F is father of P, FM is mother of F and paternal grandmother of P, FMF1 is father of FM. Here, FMF1 is cognate to P as a female has intervened in between, i.e., father's mother (FM).

## B. Rules of intestate succession of a Hindu Female

If a female Hindu dies intestate then heirs are divided into five categories. The heirs in earlier categories are preferred over the heirs in later categories.

- The first category includes husband, son, daughter and children of a pre-deceased son and daughter.
- The second category includes heirs of the husband.
- Father and mother fall under the third category.
- Heirs of father and mother are covered under fourth and fifth category respectively.

## C. Rules of intestate succession among Muslims

There is no codified law for Muslims in the area of succession. They are governed by their religious texts.

### Rules of intestate succession among Sunni Muslims

Among Sunnis, heirs are divided into three categories i.e.

- Sharers (Quranic heirs),
- Residuaries (agnatic heirs), and
- Distant kindred (uterine heirs)

Sharers are the most preferred heirs. First of all, sharers are allotted their Quranic shares. If something is left behind after allotting shares to them, then, it goes to residuaries. If their shares exhaust the entire estate, then sharers exclude residuaries and distant kindred. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which distant kindred will inherit with the sharer: when there

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is only one sharer i.e. the wife or husband of the deceased and no other sharer or residuary exist.

### Rules of intestate succession among Shia Muslims

Among Shias, heirs are divided into two categories i.e.

- Heirs by consanguinity and
- Heirs by marriage i.e. husband and wife

### Heirs by consanguinity

Heirs by consanguinity are further subdivided into three classes:

- Class I includes parents and children.
- Class II includes grandparents, brothers and sisters, and their descendants etc.
- Class III includes paternal and maternal uncles and aunts of the deceased, and of his parents, grandparents etc.

Among the heirs by consanguinity, the first group excludes the second and the second group excludes the third. The claimants in both the categories i.e. heirs by consanguinity and heirs by marriage succeed together, if there are heirs of both the categories.

## D. Rules of intestate succession under the Indian Succession Act, 1925

- The Indian Succession Act, 1925 is a central legislation and is applicable to every person, unless they are governed by any law particularly applicable to them. This Act is not applicable to Hindus and Muslims. Christians and Parsis are governed by this Act.

Rules of intestate succession among Christians under the Indian Succession Act, 1925:

- Among Christians, the first preference is given to the spouse of the deceased and his lineal descendants i.e. children, grandchildren, great grandchildren or their remoter lineal descendants.
- When there are no lineal descendants then property passes on to the spouse of the deceased and those who are kindred (consanguinity is the connection or relation of persons descended from the same stock or common ancestor) to him.
- If there are no lineal descendants or one who is kindred to him, then the entire property goes to his or her spouse.
- In the absence of such a spouse, property passes on to lineal descendants or to those who are kindred to him.

### Rule of Escheat

A rule of escheat is applicable in all the communities. If no heir is present then property goes to the Government by this rule.



## V. Testamentary Succession

### Testamentary Succession under Muslim Law

An executor under Mohammedan law is called a wasi, derived from 'wasiyyat', which means a will. A Muslim who is of sound mind and who is not a minor, may make a valid will.

No particular form is required to make a valid will. Any unequivocal expression of a testamentary nature will suffice. It may be made either verbally or in writing. Any property which is capable of being transferred and which exists at the time of the testator's death, may be disposed off by a will. Needless to say, property that belongs to another cannot be bequeathed by a will.

A Muslim can dispose off only one third of his property, which is left after the payment of his funeral expenses and his debts. The balance two thirds of the property goes to the heirs of the deceased.

### Testamentary succession among Hindus, Parsis and Christians

The rules relating to testamentary succession among Hindus, Parsis and Christians are contained in the Indian Succession Act, 1925. This Act does not deal with substantive law, such as what property may be transferred or what estates and interest may be created.

The Indian Succession Act, 1925 primarily deals with formalities related to the following matters:

- Execution (Validation of a legal document by the performance of all necessary formalities)
- Revocation (to recall, withdraw, or reverse the will)
- Revival (restoration to use, acceptance, activity, or vigor after a period of obscurity)
- Interpretation (an explanation or conceptualization) of wills
- The grant of Probate (the process of legally establishing the validity of a will before a judicial authority) and other legal representations, powers and duties of the Executors (a person who is appointed by a testator to execute the testator's will.)

*Administrators* are persons authorized to manage an estate, especially when the owner has died intestate or without having appointed executors.

However, it is a secular law that is applicable to each and every community in matters of testamentary succession.

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## SAMPLE WILL

1. I \_\_\_\_\_ d/s/o \_\_\_\_\_ resident of \_\_\_\_\_ aged \_\_\_\_\_ years hereby write my final will and testament. Any wills written previously are hereby revoked under the laws of India. I am writing this will freely and under no duress. I am of sound mental and physical health and in a position to comprehend what I write in this will. I am married to \_\_\_\_\_ and we have two children namely \_\_\_\_\_ aged 20 years and \_\_\_\_\_ aged 25 years.
2. As of today, I own the following which I would like to bequeath by the virtue of this will.
  - o One 4 BHK flat located at \_\_\_\_\_ with area 1500 sq. feet bought on 24th November 2008 for Rs. 75 lacs;
  - o Cash amounting to Rs. 10 lacs in fixed deposit at \_\_\_\_\_ bank;
  - o 1 Honda city car bought in the year 2015;
  - o 1 fortuner car bought in the year 2018;
  - o Gold jewellery weighing approximately 300 grams lying in SBI locker located at \_\_\_\_\_.; and
  - o 1000 TATA power share certificates amounting to Rs. 10 lacs.
3. All the assets owned by me are self-acquired properties. No one else has any right, title, interest, claim or demand whatsoever on these assets or properties. I have full right, absolute power and complete authority on these assets, or in any other property which may be substituted in their place or places which may be Acquired or received by me hereafter.
4. It is my wish and desire that after my death all my assets as mentioned above, will devolve upon my wife \_\_\_\_\_ who shall then become the sole and absolute owner thereof to the exclusion of my other legal heirs. However, in the event, my wife predeceases me then all my assets will devolve upon my children equally, absolutely and forever to the exclusion of any other legal heir.
5. That all my loans and liabilities including but not limited to taxes, penalties, cess, charges etc. of whatsoever nature whether existing or created after my death shall be repaid and discharged by my wife or my children as the case may be out of my aforementioned assets.
6. I have made this will in full consciousness without any pressure, coercion, undue influence, mistake of any kind and with bonafide intent to avoid any dispute, misunderstanding or litigation that may arise between my legal heirs after my death.
7. I have carefully read and understood the contents of this will and the same is being signed by me in the presence of two responsible persons who will be the attesting witnesses.  
In witness whereof I \_\_\_\_\_ have this to be my last will and set my hand on this \_\_\_ day of \_\_\_\_\_ in the presence of the under mentioned witnesses each of whom have simultaneously signed in my presence and in the presence of each other.

WITNESSES:

- 1.
- 2.

TESTATOR

Name:

Signature:





## VI. Exercises

Based on your understanding, answer the following questions:

- Q-1** X, a hindu male, dies leaving behind a farm house that he purchased out of his own earnings and a flat that he acquired from his father. The heirs left behind after him included his mother, wife, brother and two sons. He bequeathed the house and farm house by way of a will in favour of his younger son and nothing for his elder son. Answer the following:
- Identify the two types of properties and the mode of disposing off both the types.
  - Is the above Will valid? If not, distribute the property of X amongst his heirs giving all the applicable rules.
- Q-2** What do you mean by inheritance? Differentiate between inheritable and uninheritable rights with relevant examples.
- Q-3** Differentiate between Testamentary and Intestate Succession.
- Q-4** A dies without an heir. She has left behind substantial property that is self acquired through her own learning. By what rule will her property be disposed of and who will acquire the property?
- Q-5** You are a practicing lawyer who is an expert in creating wills. Draft a Will for your client who is a Senior Vice President in a Company. She is married with two daughters. She owns a house in a posh locality in South Delhi, has share holdings, jewellery and fixed deposits and money in the savings account. She has two cars. She also has an old help who has been working for her for the past 25 years. She wants to divide her property equally between her husband and children. She also wants to ensure that she provides for some amount to her old help in her will.

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CHAPTER

5

## Prevention of Violence against Women

### Contents

- I. What is Domestic abuse/violence?
- II. International Legal Framework
- III. Laws in India on Prevention of Violence against Women
- IV. Exercises

### Learning Outcomes

After the completion of this chapter, the students will be able to:

- Understand the concept of violence against women
- Trace the evolution of laws on violence against women in India
- Critically evaluate the laws for protection of women in India

### I. What is domestic abuse/violence?

Domestic abuse, also called 'domestic violence', can be defined as a pattern of behavior in any domestic relationship that is used to gain or maintain power and control over another.

Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behavior that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone. Domestic abuse can happen to anyone of any race, age, sexual orientation, religion, or gender. It can occur within a range of relationships including couples who are married, living together or dating. Domestic violence affects people of all socio economic background and education level.

Domestic violence is largely forbidden in the Western countries. However, in many countries domestic violence is either legally recognized or socially acceptable. For example, the United Arab Emirates' laws allow the man the use of limited physical means to discipline his wife and children. Domestic violence is also a socially acceptable practice, including by women themselves, in many developing countries like Jordan, Guinea, Zambia, Sierra Leone, Laos, and Ethiopia.

### II. International Legal Framework

The concern for 'violence against women' including violence in intimate relationships, has significantly existed in international discourses and legal frameworks. The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) is a United Nations treaty that defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. CEDAW is often referred to as the international bill of rights for women and has 99 countries, including India, as signatories who have committed themselves to undertake

various measures to end discrimination against women in all forms. In 1992, the CEDAW Committee recommended that any form of discrimination or violation of women's rights amounts to violence and that the State is responsible for such violence committed both by state as well as private individuals.

The UN Declaration on Elimination of Violence against Women was adopted in 1993 and defines 'violence against women'. It is defined as *any gender-based violence acts that result in, or are likely to result in, physical, sexual or psychological harm or suffering to women*. The violence acts include threats of such actions as well as coercion or arbitrary deprivation of liberty. These acts may occur either in public or in private life. Such violence might happen within the family and includes battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation. They may also occur outside the family in the general community and such violence may include rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women, and forced prostitution.

When violence is committed or overlooked by the state it also amounts to 'violence against women'. India is a party to the Declaration on Elimination of Violence against Women. In 1996, the UN Commission on Human Rights created the UN Model Legislation on Domestic Violence with the objective of serving as a drafting guide for comprehensive legislation on domestic violence at States levels.

It defines **domestic violence** as: *all acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts.*



### III. Laws in India on Prevention of Violence against Women

#### A. Protection of Women from Domestic Violence Act (PWDVA), 2005

- Prior to 2005, the concept of 'domestic violence' was not recognized under the Indian law as a special category.
- In 2005, the Indian Parliament adopted the Protection of Women from Domestic Violence Act (PWDVA) with the objective of providing effective protection to the women who are victims of violence occurring within the family or anyway connected with the family sphere.
- The idea of 'domestic violence' was borrowed mostly from the international legal framework. India is party to both the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) as well as the UN Declaration on Elimination of Violence



against Women, 1993, and the PWDVA conforms with the UN Model Legislation on Domestic Violence.

- The adoption of PWDVA addresses two important concerns;

Firstly, the family law reforms of the 1980s like the Family Courts Act, focus more on the need to 'preserve the family' at all costs. Hence, it does not emphasize on ending violence against women in the private sphere. PWDVA helps to address violence occurring in the private sphere.

Secondly, before 2005, domestic violence against women was considered 'cruelty' and was punishable under the criminal law and they formed grounds for divorce under the family laws. However, there was no comprehensive law providing civil remedies for domestic violence for women, like, monetary reliefs or compensation as well as other services that aid women who are sufferers of domestic violence.

- PWDVA adopts a comprehensive definition of domestic violence and includes physical abuse as well as other forms of violence within the family that is manifested and affects the woman. The definition is provided in Section 3 of the Act and reads as: *any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it ...*
  - a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
  - b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
  - c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
  - d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.
- PWDVA recognizes how domestic violence affects women at multiple levels and provides various support services to women to help deal with the situation. They are:
  - ❖ Mandatory assistance by medical facilities and shelter homes
  - ❖ Provision for legal aid
  - ❖ Counseling on the direction of the court
  - ❖ Protection Officers and Service Providers to maintain a list and facilitate access

The salient features of **PWDVA** are as follows:

- a) The PWDVA is a civil law except Sec-31 & 33 where criminal proceedings are involved. Its primary objective is to provide compensation as well as support to the woman. This is contrary to criminal law, which intends to primarily punish the perpetrators. Enforcing criminal laws depend on the State, the police, and the prosecution lawyer. As a civil law, PWDVA is victim- driven; she has direct access to the court. The rights and reliefs under PWDVA can only be initiated with the consent of the woman.
- b) PWDVA describes 'domestic relationships' broadly to include, wives, mothers, sisters, daughters, and live in partners. All of these are provided protection by the PWDVA.
- c) The protection under the PWDVA is not limited to the matrimonial home but covers 'shared householder' to include mothers, sisters and daughters as well.





- d) PWDVA provides for 'Stop Violence' orders that offer emergency reliefs to stop violence immediately. PWDVA is an additional law and allows women to enforce other laws, such as the divorce laws as well.
- e) For the effective implementation of this law, PWDVA offers both access to justice as well as access to support systems. It provides for Protection Officers to operate as a nexus between the court and the woman to ensure accessibility to the justice system. These protection officers are usually women. Their role includes assisting women in filing for applications seeking various reliefs, assisting the magistrate in discharge of his functions, making women aware about their right to get free legal aid and providing women shelter homes, medical services etc.
- f) PWDVA also envisages Service Providers, i.e. non- governmental organizations who voluntarily register under the Act, to deliver her with essential support she might require, such as shelter and medical facilities. Service Providers are crucial, as women often would feel more comfortable approaching an NGO rather than the police or state authorities.
- g) PWDVA stipulates for the 'single window clearance system' to aid women in accessing the justice system. This allows woman to use PWDVA to enforce other civil reliefs under other laws as well, such as the criminal law. For example, she can use one PWDVA suit to enforce her right to not be dispossessed when a divorce petition is pending (Section 498 A of the Indian Penal Code). This helps her avoid filing of multiple of suits in various forums.
- h) PWDVA provides that the magistrate may, at any stage of the proceedings of the case, direct either one or both the parties to the suit to undertake counseling with any member of the service provider who holds the required qualification and experience of counseling. Women groups are critical to the counseling provision as it is often seen as a tool for preserving marriage and placing the woman back in the violent situation.
- i) PWDVA puts responsibility on the Central and State Governments for training and sensitization of the general public as well as the state authorities including the judiciary.

In the matters of violence against women, international legal standards, discussed in the earlier paragraphs, have played inspirational role for the Indian stakeholders including the judiciary, the lawmakers, as well as the numerous women groups. PWDVA itself has drawn heavily on those international legal standards. However, even prior to the enactment of the PWDVA, the Indian judiciary has relied on the international legal framework to draw inspiration in deciding and providing civil remedies to cases concerning violence against women.

## B. Sexual Harassment of Women at Workplace : Prevention, Prohibition, and Redressal

### Protection of Women from Sexual Harassment Act, 2013 (POSH Act)

POSH Act was enacted with the objective of making workplaces safer for women by preventing, prohibiting and redressing acts of sexual harassment against them in the workplace. The law was made effective in the whole of India on December 9, 2013, by the Ministry for Women and Child Development.

#### History of the POSH Act:

- Many women's rights groups and non-governmental organizations demanding action against sexual harassment towards women at the work place, filed a case, **Vishakha and others**



**v. State of Rajasthan and others**, in the Supreme Court in the interest of women's protection as a public interest litigation or social action litigation. The origin of this case dates back to 1992. Then, a low-caste woman in her 50s, Bhanwari Devi, who worked as a social or grass roots worker with the Rajasthan Government's women development project, was gang raped by a group of upper-caste men because she tried to stop the devious practice of child marriage. The trial court acquitted (set free of charge of offense) the accused offenders stating also that upper-caste men could not have raped a low-caste woman, and also because all, including the village authorities, doctors, and the police rejected her allegation. Then, in the absence of any Indian law dealing specifically with violence against women, the Supreme Court referred to the UN Convention on the Elimination of All forms of Discrimination against Women and delivered a set of standards, also called the **Vishakha guidelines**, which included the following:

- It is the onus of the employer to include a rule in the company code of conduct for preventing sexual harassment.
- Organizations must establish complaint committees that are headed by women.
- Initiate disciplinary actions against offenders and safeguard the interests of the victim.
- Female employees shall be made aware of their rights.

For the very first time, the Supreme Court recognized obvious legislative insufficiency and recognised sexual harassment at workplace as a violation of human rights. According to the Vishakha judgment, until a legal structure on the topic is formulated and adopted, the Vishakha Guidelines established by Article 32 of the Constitution will have the force of law and must be obeyed by organizations in both the commercial and public sectors.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act of 2013 is based on Vishakha guidelines and aims to create a mechanism for redressal of Sexual Harassment complaints at workplace.

## IV. Exercises

Based on your understanding, answer the following questions:

**Q-1** Provide answers briefly for the following-

1. What is CEDAW?
2. What is PWDVA? State the support services provided to women under PWDVA.
3. What guidelines were issued by the Supreme Court in Vishakha & others v. State of Rajasthan?
4. Trace the evolution of POSH Act, 2013 in India.

**Q-2** The concern for 'violence against women' including violence in intimate relationships has significantly existed in international discourse and legal frameworks.

1. Which United Nations treaty defines Violence against women?
2. How had Indian Parliament reacted to the rising cases of domestic violence?
3. State a few salient features of the Act.

**Q-3** You are a legal studies teacher in a school. You have been asked to conduct a session relating to sexual harassment at workplace. In the session you have to make teachers and staff aware about the laws relating to sexual harassment and various guidelines passed by the Parliament to protect women against violence for prevention of the same citing relevant judgments and acts.

Write an article or create a presentation covering all the points/ issues in the session relating to sexual harassment at workplace.





**Central Board of Secondary Education**  
Shiksha Kendra 2, Community Centre, Preet Vihar, Delhi-110092