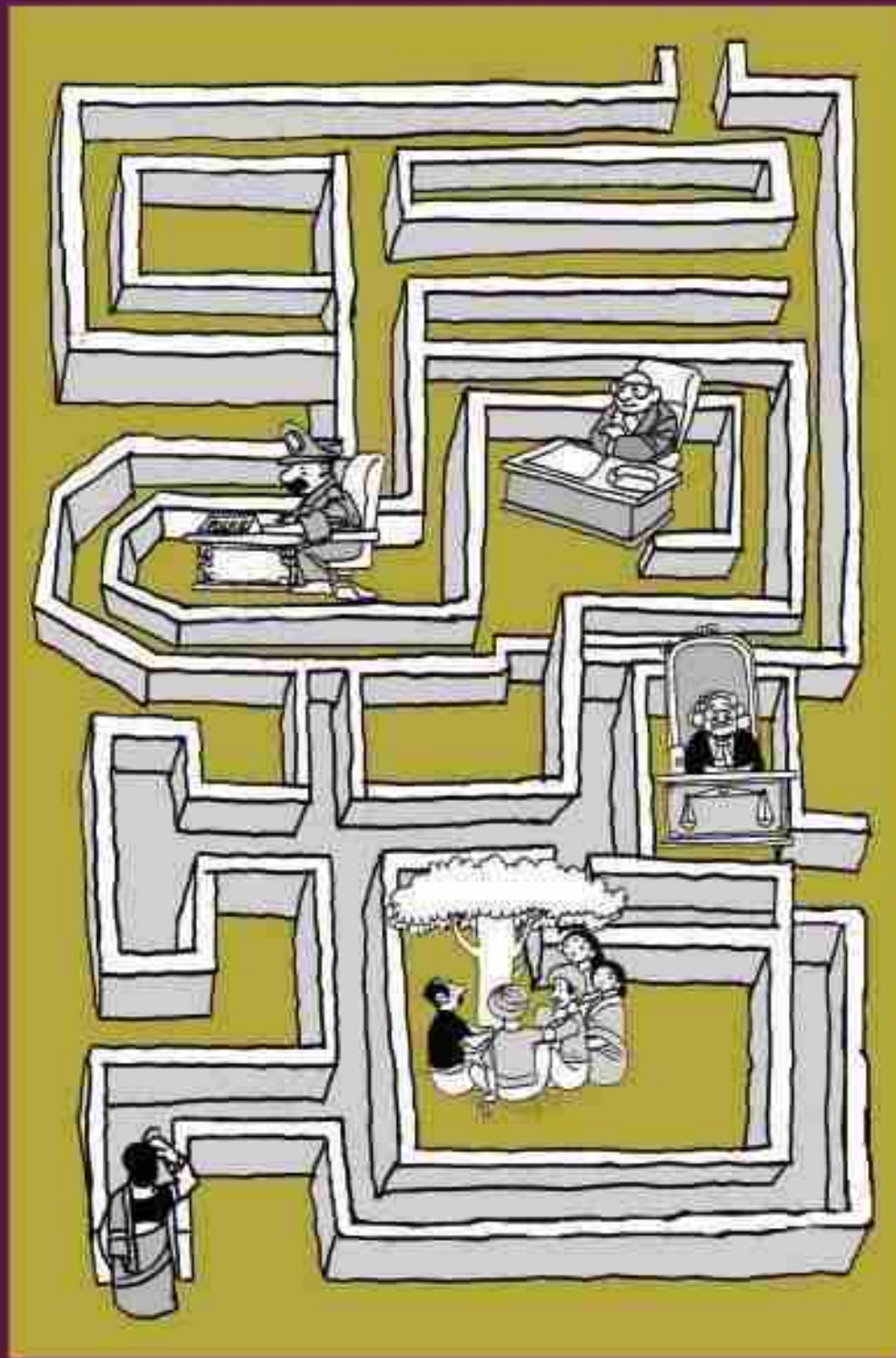


Facilitator's Guide for Community Legal Education on Women's Rights in India



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PRODUCED BY



Partners for Justice

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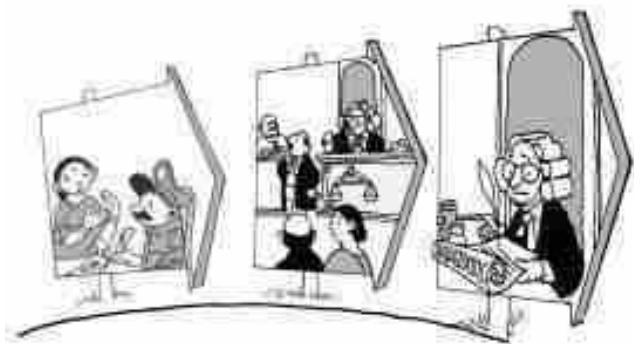
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Any errors or omissions are solely the responsibility of the authors of this Guide.

Introduction to Global Rights: Partners for Justice

Global Rights – *Partners for Justice* is a human rights advocacy group that was set up in 1978 as the International Human Rights Law Group. The organisation changed its name to Global Rights – *Partners for Justice* in 2003. Global Rights partners with local activists to challenge injustice and amplify new voices within the global discourse. With offices in countries around the world, we help local activists create just societies through proven strategies for effecting change. In all of our programmes, Global Rights emphasises promoting women's human rights and combating discrimination on the basis of race, ethnicity and sexual orientation. Global Rights works in partnership with local organisations. We assist local partners in creating and sustaining programmes for social change. As facilitator and catalyst, we offer our partners support, guidance and training to strengthen the impact and visibility of their work.

Over time, Global Rights has developed five strategies for change which define the tools we provide to our partners to reach the shared objective of creating just societies founded on the principles of human rights. The core strategies are:

- **Exposing human rights violations**
- **Community mobilisation and education**
- **Human rights lawyering and access to justice**
- **Advocating legal and policy reform**
- **International advocacy**

The core strategies are applied to all our work around the world. Our work has focused on the following areas:

- **We seek justice for victims of human rights abuses.**
- **We work to promote racial and gender equality and help people and communities feel empowered to change their societies.**
- **We work through field offices in Asia, Africa, Latin America, Europe and the United States, partnering with local human rights advocates to strengthen their effectiveness in combating abuses in their countries.**
- **We focus on developing the skills of local activists that are essential to addressing human rights concerns and promoting justice such as: documenting and exposing abuses, conducting community education and mobilisation, advocating legal and policy reform in countries and internationally, and using the Courts to increase access to justice for disadvantaged populations.**
- **As a facilitator and catalyst we help local activists to engage with the international community, including the United Nations, to further their human rights objectives.**

In 2004 Global Rights initiated a Gender and Law programme in the Indian states of Karnataka and Rajasthan to be implemented with local NGOs. The programme was supported by U.S. Agency for International Development through another international organisation called IFES based in Washington DC.

PART 1 FACILITATOR'S GUIDE

A

Overview of the Gender and Law Programme in India

B

Why is there a need to develop programmes on Community Legal Education on Women's Rights ?

C

Why a Guide ?

D

Role of the Facilitator and ideas for Facilitation



**This Guide contains ideas and information for
community legal education on women's rights**



Overview of the Gender and Law Programme in India

In January 2004, Global Rights initiated a Gender and Law programme in India to be implemented in the states of Rajasthan and Karnataka with local partner NGOs, academicians and human rights activists across both the states. They raised the following issues (which ultimately helped focus the gender and law effort of Global Rights in India).

- **Access to justice through both administrative and judicial institutions is cumbersome and problematic for women.**
- **Lack of legal literacy in community organisations and resultant negative experience in dealing with the legal system has led to a sense of dissatisfaction with the system. The need, therefore, is for consistent legal education and the creation of a locally accessible legal resource to cater to the challenges faced by the community.**
- **The state run legal aid efforts are often compromised due to difficulties in finding lawyers who are willing to litigate for little or no remuneration at the district level.**
- **Lawyers lack a human rights and gender perspective. Therefore, there is a need to create a network of lawyers at the district level, trained to solve cases from a human rights and gender perspective.**
- **The formal justice system is perceived to be expensive and inaccessible, resulting in a lack of faith in its ability to deliver justice. Therefore, as much as there is a need to make the formal legal system more accessible to women, there is also a need to strengthen informal justice mechanisms such as *nari adalats* (women's Courts) and social justice committees (in the gram panchayat) at the district level because these institutions are most often accessed by women at the village level.**

Two-pronged approach in India

Consistent with the Global Rights partnership approach, a two-pronged gender and law programme was implemented in Karnataka and Rajasthan.

1. **A Community Legal Education Programme in partnership with Mahila Samakhya in Karnataka and Urmul Trust in Rajasthan.**

Community social workers and counsellors have been trained to take on the role of community legal educators. Participants from both organisations have been introduced to gender and law, basics of the criminal justice system, rudimentary understanding of law, rights and the Constitution, personal law, property law and legal aid. The goal was to create a cadre of paralegals.

Global Rights has built the capacity of 67 community-based field workers across districts in Karnataka and Rajasthan, strengthening the effectiveness of the organisations as well as the programme participants. The paralegals

serve as liaisons by facilitating contact between distressed women, lawyers and the formal justice system. They train women in the informal justice mechanisms (eg. Nari Adalats – women’s courts run by Mahila Samakhya in Karnataka); participate in advocacy campaigns (eg. campaign against child marriage); and run community legal education programmes. The paralegals are seen as ‘nodal points’ for legal education and legal counselling and mediation on women’s issues in their communities and in this way enhance access to justice for women.

The product developed from the paralegal programme is this Facilitator’s Guide for Community Legal Education on Women’s Rights, which will assist other community based organisations (CBOs) to implement legal education programmes on women’s rights.

2. A Lawyers Fellowship Programme in partnership with Hengasara Hakkin Sangha (HHS) in Karnataka and National Law University, Jodhpur (NLU) in Rajasthan.

The Lawyers Fellowship Programme for young lawyers was implemented in both target states to create legal resources for women and CBOs and to encourage and stimulate a culture of women’s rights lawyering in the districts.

Global Rights has trained 44 district-level lawyers working on women’s access to justice spread across 14 districts in Karnataka and 9 districts in Rajasthan between January 2005 and August 2007. While the programme has largely been implemented as a fellowship programme with a small stipend support being provided to the fellows, in the second year a variation was made in Rajasthan to enable sustainability and the programme was executed as a training programme with our partner, National Law University in Jodhpur.

Lawyers attended several workshops covering both theoretical aspects as well as practical application of law. Sessions included gender issues, introduction to the women’s movement in India, women’s rights and the Indian Constitution, violence against women, international human rights law and standards for women’s rights, strategic women’s rights lawyering, and drafting applications/petitions, public interest litigation, alternative dispute resolution and client interviewing.

During and after the training period, the fellows have represented women in legal matters, engaged in legal education and advocacy programmes on women’s rights. In Rajasthan, many have campaigned for full implementation of the law against female foeticide. In Karnataka they have supported paralegals through the legal counselling centres. Lawyers work individually and with legal services authorities and local NGOs. They promote the Protection of Women from Domestic Violence Act, 2005 by educating NGOs, protection officers and magistrates and filing cases. Today the fellows have developed an identity as women’s rights lawyers.

notes

B Why is there a need to develop programmes on Community Legal Education on Women's Rights ?

When it comes to working on women's issues there is a general consensus that legal interventions are a critical tool for women's empowerment. The belief is that women are unable to access rights due to a lack of knowledge of the law and therefore increasing knowledge of rights will address the problem. The reality however is very different; mere knowledge of rights does not necessarily lead to realisation of rights. While legal knowledge is empowering, the knowledge needs to be linked to action and result in social change. Organisations working on women's rights issues need to look at women's legal rights programming in a holistic manner and not just focus on providing legal information. This goes to the very root of the issue, which is the need to develop community legal education programmes for women that will enable women to access justice, mobilise and take action on issues of importance to their daily lives rather than only receive information. Interventions by community based organisations should be action based and not just information based.

What does it mean to develop a programme on community legal education for women?

Developing a programme is more than engaging in an activity. It is a process through which an organisation or a community looks at a particular situation and a desired alternative and then develops a plan to work towards achieving the alternative.¹ **In designing a community legal education programme the following questions must be answered:**

- **Is there a need to develop a programme on community legal education? Why?**
- **Why is it necessary for women to know the law?**
- **How can a community legal education programme help women take action against violations?**
- **What kind of programme intervention will enable women to take action?**
- **Who should be involved in the design of the programme to make it most effective? How can women be involved in designing the programme to make it effective?**
- **Who will the programme target? Why?**
- **Where will the programme be implemented?**
- **How well does the organisation know the community?**
- **If the organisation has not worked in the area before or is not familiar with the community, how can it enhance its knowledge about the profile, background, customs, issues and concerns of women in the community?**

¹ *Legal rights organising for women in Africa - a trainers' manual, revised edition, produced by women in Law and Development in Africa (WILDAF).*

- **How can the community be involved in the programme? How can ownership over the programme be built in the community?**
- **With all this information, what methods and techniques would be most effective to carry out a legal education programme on women's rights in the community?**
- **What are the resources the organisation can rely on? What information does it have? What are the kinds of resources available – reading materials, resource persons in the form of lawyers etc.?**
- **How will the organisation make this programme sustainable?**
- **Does the organisation have the resources to run an effective community legal education programme?**

What should a programme for community legal education on women's rights aim to do?

Each organisation will need to determine the aim of its programme based on the needs of the community and the resources available. Some possible aims, include:

- **Empower women to understand their rights, the law and critically analyse their role and status in the family, society and as citizens.**
- **Engage women at the community level in debates and discussions on their rights which would enable greater participation in the democratic process.**
- **Engage women in discussions on analysing and articulating their needs and rights within the community.**
- **Empower women to take action against oppression and violation of rights.**
- **Enable participation of women in demanding accountability from the state and community in effective enforcement of laws and realisation of women's rights.**
- **Help tilt the balance of power and enable the creation of an environment for social change.**
- **Analyse how religion, custom, tradition, family, caste and sometimes women themselves can negatively affect women's rights.**

What are the key parameters to keep in mind in designing the programme?

- **Gender component: It is crucial to incorporate gender analysis in the training programme. Without conceptual clarity on gender issues, the understanding of rights will be incomplete. The design of the programme should address this aspect first.**
- **Relevance: It is essential that the programme and the topics be relevant to the targeted community. This requires a clear understanding of the needs of the women within the community.**
- **Social change: The change that the women are most interested in seeing must be identified and the programme developed to achieve this change.**
- **Objective of the programme: The programme needs to have a clearly defined objective based on an understanding of community needs.**



Why a Guide ?

This Guide is an outcome of the work by Global Rights: *Partners for Justice* to determine ways to integrate legal awareness and education in the day-to-day activities of community based organisations or individuals who work on women's empowerment issues.

The needs assessment carried out by Global Rights in 2004 recognised that there was no consistent or strategic approach to legal training at the community level. Community legal education was primarily done in an ad-hoc manner. Community based organisations found it difficult to upgrade the skills of their staff on legal issues. Occasional and ad hoc training sessions had limited impact. This finding was supplemented by the experiences of the community workers, who attended the legal training conducted by Global Rights' consultants. They reiterated that social interventions to address the needs of women at the grassroots level did require a reasonable understanding of the law.

It was against this backdrop that the need for this Guide was determined; a Guide that seeks to fulfil three objectives:

- 1. To create local sustainable resources and programmes for gender-based community legal education.**
- 2. To help organisations and individuals who would like to conduct community legal education workshops on gender and law.**
- 3. To help organisations and individuals create social change through gender based legal interventions.**

The Guide is a tool for community based organisations who are already implementing legal literacy programmes (with a special focus on the needs of women) or organisations who seek to introduce, develop, and create such programmes. The Guide seeks to enhance the mission of such organisations in promoting women's empowerment. It attempts to fill the gaps in existing programmes on community legal education on gender and law. It provides these organisations or institutions with tools for conducting training by involving their constituents to expand and enhance their training skills and to create sustainable programmes on community legal education.

Using this Guide effectively

This Guide is intended to be a resource which can be used by non-lawyers or persons having no knowledge of law but who have the ability and inclination to look at legal interventions to solve social problems by educating themselves on the content of the law and the procedural aspects of the law, for effective social change. The Guide ultimately aims at developing skills in issue identification, strategic approaches in dealing with the legal issues in the community and confronting situations unfavourable to women. The Guide is intended to empower staff of community based organisations

to conduct legal education programmes on women's rights and to reduce their dependency on lawyers and other resources not locally available. Therefore, this Guide is not just a legal literacy Guide – it is more importantly, a Guide that highlights the experiences of community workers. The approach of the Guide is consistent with the participatory approach adopted through the course of the programme implemented by the Global Rights' consultants when working with paralegals and has comprehensive chapters on various issues of importance to women, including property rights of women, personal laws that affect women and women's civil liberties.

When using this Guide, it is important to remember:

- **The Guide will be most effective if it is used consistently for community legal education and not just for a one-off training.**
- **The organisations intending to use this Guide should have a clear vision on the execution of the community legal education programme.**
- **The organisations should strive towards sustainability of such a programme through a well-defined set of goals and objectives.**
- **The end goal of this Guide is social change to benefit women – by creating an environment of legal awareness and access to justice.**
- **A person using this Guide should strive to constantly update himself or herself with ever changing discourses on rights and law and research on existing tools to conduct community education.**
- ***Law is not optimally utilised unless it leads to protection of rights.***

It is hoped that this Guide will help in the development of action driven and community based interventions for the benefit of women.

Structure of the Guide

The Guide focuses on the methodology to be used during training programmes. The main aim of the Guide is to help facilitators design an entire session on a particular topic or a long term training programme.

The Guide has been structured in such a way that it can be used by organisations for a long term community legal education programme as well as for independent training programmes on each topic addressed in the Guide, which are:

- 1. Gender and Law**
- 2. The Indian Legal System**
- 3. Role of the Police and the Criminal Justice System**
- 4. Women's Rights and Personal Laws in India**
- 5. Women's Rights and Violence Against Women**
- 6. Women's Property Rights**

Each topic is a separate module, and contains the following information:

- 1. Legal information and an overall perspective on the issue concerned**
- 2. Suggestions for the facilitator to design and structure the session**
- 3. Exercises to be executed during the session**



Role of the facilitator and ideas for facilitation

This section provides some pointers on facilitation. The success of any attempt at community based legal awareness will be based on the skills and knowledge that the facilitator possesses while delivering a session on gender and law. The Guide seeks to help enhance the facilitator's abilities. It is important that the facilitator deliver the sessions with the right information and perspective. This section attempts to cover certain significant pointers to be kept in mind during pre-workshop, workshop and post-workshop preparation.

The facilitator

The Guide can be used by anybody/any organisation willing to work on gender and law issues. However, the most effective impact will be when it is delivered by a person who already has some understanding of gender issues and has worked previously on women's rights concerns. The facilitator could be a person from an organisation/institution that wishes to work on community legal education on gender and law, or lawyers who wish to train on gender and law.

A facilitator using this Guide should remember that the Guide is aimed at education of adults and therefore a good strategy to follow in conducting the sessions on law is to explain the law, demonstrate the law, give exercises about the law and then summarise the learning of the group. This is called the adult cycle of learning and is good for a range of adult learning styles because it uses hearing, speaking, seeing, and repetition.

Taking time to reflect

The facilitator needs to reflect on the following questions to better prepare for training on gender and law:²

- **How much do I know about the subject that I choose to train on?**
- **What more do I need to know?**
- **Why is this subject important?**
- **What do I hope to achieve from doing this training?**
- **What are some potential issues or concerns that may come up?**
- **Do I know enough to be able to dialogue on tough issues that will crop up?**

² Adapted from *Strength in Action - an educator's guide to preventing domestic violence*. Vidya Shah with Devaki Sahdev. Breakthrough, Pg 11.

Pre-workshop preparation

Know your audience

- It is important to know who the audience is to be able to prepare the agenda for the workshop as per their needs.
- The facilitator should take time to reflect on why this workshop/session is being conducted for a particular audience. This is important as it will allow for an honest development of objectives for the workshop/session and provide clarity to the facilitator. The aims and purpose of each workshop should be clearly defined.
- The background of the audience in terms of information, knowledge, experience and exposure should not be too varied or the facilitator may face the danger of having to cater to too many different levels of knowledge which could lead to low impact.
- While designing the session, the facilitator should use the Guide to help determine which methodology to use for the session based on the needs and expertise of the audience and the time available.

Plan the programme

- The facilitator should decide what type of programme to conduct. The questions to ask are if it should be a series of workshops, a one time workshop for three days, a one-day training session or a two-hour session. While all the sections in the Guide can be used as stand-alone sections, it is important to note that each section is closely linked with the others and it would be advisable to look at the Guide from that point of view. Also, the facilitator should reflect on the impact of a one-time two-hour session as opposed to a longer and more consistent programme.

Create an agenda

- An agenda should be created before every workshop. The facilitator must read the Guide and design the agenda for the workshop. From among the exercises available in the Guide, the facilitator should select and modify the ones most suited to the context and the audience she will be training. It is not necessary to create a session exactly as is presented in the Guide. Training sessions should be designed keeping in mind the amount of time available, the number of participants and the most effective exercises to use.
- Drawing up an agenda allows the facilitator to divide sessions and allot time for each session. It also helps participants understand how the training will be run and establishes expectations.
- It is often helpful to have two agendas, one for the facilitator and one for the participants. The facilitator should have a detailed agenda listing out objectives of each session, exercises, materials required, instructions, a checklist, points of discussion and examples to be used through the course of the workshop. The participants' agenda should be the abridged agenda listing out sessions, objectives, resource persons and timings.
- The facilitator should keep in mind that often, the agenda may need to change at the last minute, given the dynamics and needs of the participants. This kind of flexibility should be allowed for any effective workshop.

Update yourself

- While the Guide gives most of the information necessary to train on the topics listed, it is important for the facilitator to stay informed on changes to the law or other advancements in promoting women's rights. Even if the facilitator is familiar with the law, it is always a good idea to re-read the law before beginning a workshop. The law is continuously changing and evolving – new developments occur. It is important to keep abreast of this as well as be in tune with the latest debates on human rights and gender issues. It is also necessary for the facilitator to do some research to update herself with the latest legal developments pertaining to the topic to be covered in a workshop. For instance, are there any new precedents on this issue? Have there been any amendments to the law? How has the Court or Police interpreted various provisions of the law?

Resource material

- Before each workshop there should be adequate preparation of resource material to be given to the participants. The material should relate to the workshop agenda. The facilitator should be familiar with and have read the material that is being given out to the participants.

Miscellaneous

- Adequate and comfortable arrangements should be made for the participants. If the workshop is held in a residential area then there should be comfortable, clean and safe spaces for all participants.
- All arrangements in the workshop room should be made before the workshop begins. Items like chart paper, boards, marker pens etc. should be procured in advance.
- The facilitator should have handy a list of ice breakers or fun exercises to conduct with the participants. The ice breakers and exercises can be used to familiarise participants with each other and establish an environment of trust where learning is encouraged. They can also be used at different points in the workshop to energise participants.

notes

At the workshop

Welcome and introduction

The facilitator should:

- **Welcome the audience.**
- **Introduce herself and the organisation she represents.**
- **Outline the objectives, the purpose and aims of the workshop.**
- **Provide an overview of the agenda.**

Getting to know each other

- **The first session of the workshop should focus on getting familiarised with the participants and also getting them to know one another.**

This can be done through various exercises which will allow participants to introduce themselves and lay out the expectations that they may have of the workshop. Some of these exercises are listed below.



EXERCISE D 1

Title: Familiarisation

Time: 20 minutes

Materials needed: Flash cards, sketch pens, markers/chalk, whiteboard/blackboard

Steps:

- Create flashcards with symbols and distribute them to the group.
- People with flashcards having the same symbol form a group.
- Once the groups are created, they have ten minutes to come up with a creative manner of introducing themselves and laying out what their expectations are for the workshop.

EXERCISE D 2

Title: Hello

Time: 20 minutes

Materials needed: Notepad, pen

Steps: Pair people up and allow them to chat for about ten minutes. While they are chatting, they should try to find a) three similarities that they share, b) three differences between them, and c) share their expectations of the workshop. Go around the room and have individuals introduce their partners.

EXERCISE D 3

Title: Memory

Time: 20 minutes

Materials needed: A good memory

Steps: The participants sit in a semi-circle. The first person introduces herself/himself with an adjective before her/his name, eg., sweet sunita. The next person should state the first person's name with the adjective and add her/his own name with an adjective. This process should continue, with each person trying to memorise all the names and adjectives that have been said before and adding their own to the list.

EXERCISE D 4

Title: Facts

Time: 20 minutes

Materials needed: Notepad, pen

Steps: Pair the people up in the room and allow them ten minutes to chat. Then ask them to introduce their partner and state one interesting fact about them.

Ground rules

Ground rules are parameters for behaviour which the group agrees to abide by during their time together. It is very important to lay down ground rules for the workshop to help encourage participation and lessen conflict. This should be done in a participative manner and, ideally, the rules should come from the participants so that there is ownership and adherence to the rules. It may help to get the participants to nominate one individual every day/each session to make sure that the ground rules are being followed. Examples of ground rules are:

- **Listen carefully**
- **Participate**
- **Don't be judgmental**
- **Kill the message, not the messenger**
- **No mobile phones**
- **Be on time**
- **Be respectful**



First Rule to Learning: Pay Attention!

The following exercises will help to develop basic parameters, rules and support for an effective workshop.

EXERCISE D 5

Title: Team Contact³

Time: 20 minutes

Materials needed: Chart paper, markers, cello tape, scissors

Steps:

- Explain to the participants that we are in a democracy and we all need to develop some rules to run the workshop effectively.
- Write down all the suggestions that come up. Review them for overlaps.
- Appoint monitors to make sure everyone respects the ground rules.
- If the group is non-literate, then symbols can be made to represent the various ground rules, for eg., a ear can be made to represent 'listening', a hand with a watch to represent 'punctuality', a mouth to represent no 'noise making'. To make it interactive the facilitator can invite the person who has suggested ground rules to come up with symbols.

EXERCISE D 6

Title: The Blindfold⁴

Time: 20 minutes

Materials needed: Blindfold

Steps:

- Take an object, (it could be anything) and place it in the room.
- Blindfold a volunteer from the group.
- The volunteer has to now locate the object in the room. The rest of the participants should assist the volunteer by giving directions.
- Once the volunteer finds the object, take off the blindfold. Take the object and put it back where you had placed it first. Now put the blindfold back on the volunteer and ask her/him to locate the object again, this time without the help of the other participants.

- When the exercise is over ask the volunteer how it felt to be guided before and then to do it on her/his own. Ask the other participants for feedback as well.
- Ask them what they learnt from the exercise and establish how we need to support and cooperate with each other through this process.

EXERCISE D 7

Title: Active Listening

Time: 20 minutes

Steps:

- Pair up the participants.
- Ask them to take turns telling each other stories about themselves which are funny and happy.
- Those listening should be instructed to pay complete attention without interrupting or talking in the middle.
- On a signal given by the facilitator, those listening should now stop paying attention, turn away, talk to someone else and do something else while their partner continues talking.
- Ask them to switch roles and do the same exercise once more.
- Once the exercise is done ask the participants how they felt when they were being listened to and how they felt when they were not being listened to.
- Ask them to identify elements of good listening and bad listening.
- Ask them to discuss what the lessons learnt are from this exercise.

³ *Violence Against Women - advocacy training material for grassroots organisations. Eds. Jenks Zakari Okwori, Oby Nwankwo and Virginia Chitanda, Global Rights - Partners for Justice (formerly International Human Rights Law Group), Nigeria, p. 12.*

⁴ *Ibid, p. 14.*



Each one can make a difference - act now!

Closing a Workshop

Recall

- At the end of every workshop, it would be useful for the facilitator to spend some time with the participants to recall the contents of the workshops and to gauge their learning. This can be done through a recap session with the participants, or to make it fun and develop a sense of competition within the group the facilitator can divide the participants into groups and conduct a quiz based on the contents of the workshop.

Follow up on action taken

- If any decisions were made by the participants to take action on a certain issue, by following up, the facilitator can ensure that there is commitment towards decisions made as well as to provide advice and support wherever needed. The organisation can also decide whether it may be necessary to ask for reports on activities conducted.

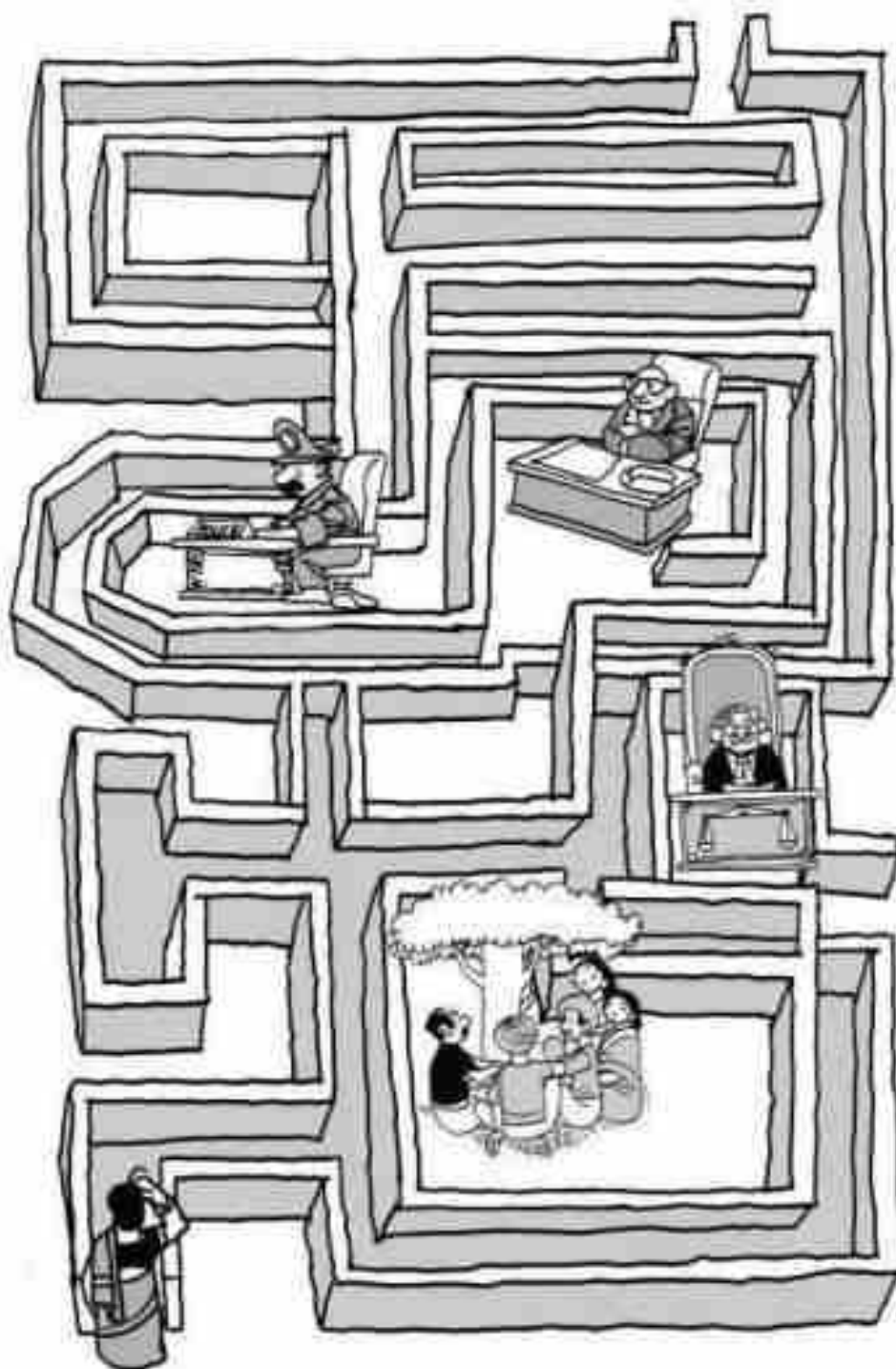
- **All workshops/training/sessions conducted should end with an evaluation to make sure that feedback is given to the facilitator. The evaluation should be done in terms of content of the workshop and the methodology used for the workshop. They will help the facilitator understand the relevance of the programme to the participants as well as how to improve on future programmes.**

1. Did you find the topics discussed in this workshop interesting and relevant? Which sessions were the most useful and why? Please specify.
2. Would you be able to link some of the issues discussed with your present work? Please specify.
3. Which sessions did you feel require improvement? Please specify.
4. Are there any topics you feel should be addressed in these workshops? Please list.
5. Do you think the facilitator was able to give a clear perspective on both the legal and non-legal aspects of the issue? Please give comments and explain in detail if necessary.
6. Did you like the methodology used in the workshop?
7. How would you follow up on the issues discussed during these two days?
8. Did you like the workshop arrangements?
9. Do you have any other suggestions that would help us for future workshops?

[illegible]

PART 2 MODULES

1
Gender and Law



Justice Gained or Justice Denied?

Gender and Law

Objectives

- **To emphasise the importance of understanding law from a gender perspective.**

Introduction

Each legal education programme should begin with a grounding on the need to understand law from a gender perspective. It should be emphasised that this is not just a working session on what the law says, but also on women's realities, how the formal justice system treats women, the nature of laws, their interpretations by Courts and their impact on women. This should be the starting point as it will lead to debate and discussion on gender concepts and on the nature of patriarchy.

This module will be divided into two parts. The first part will look at concepts of gender and patriarchy. The second part will look at the relationship between gender and law. It will also illustrate the problem of access to justice from the woman's point of view.

Gender and patriarchy

Objectives

- **To understand how gender constructs are built.**
- **To understand patriarchy and how it impacts women.**

Gender is a social attitude, built over time from artificial constructs of what it means to be male and female. For example, the belief that men are the providers and women are housekeepers is a learned concept. These conceptions are nothing but a reflection of current societal attitudes and lead to a certain gendered stereotyping which is the basis for discrimination against women. The underlying conceptualisation of such a notion of gender lies in a patriarchal understanding of differences between men and women which assumes a lower status for women. This resulting discrimination is all pervasive and affects women's realities every single day from the time they are born and, in some instances, even before they are born.

It is this discrimination that we seek to address through this Guide and through laws that are made for the realisation of women's rights. But before we move to the laws, it is important to have a more detailed look at gender based discrimination and how it impacts women.

The basis of discrimination lies in the often used word 'patriarchy'. The word literally means 'the rule of the father'. Patriarchy is derived from the unequal distribution of resources and control over them, based on male lineage. The worst impact of this is the creation of a seemingly 'powerless' community (women) which is made to derive its identity from the 'powerful' community (men). Women are constantly defined as someone's daughter,

mother or wife. Over a period of time this notion of women as property or ancillary to men and therefore inferior to men has been normalised and internalised by society at large. Any attempt to question or break away from the norm is met with stiff resistance often from both women and men. The impact on women is manifold and affects almost every part of their lives.

From the time of conception to adulthood various forms of discrimination take place in the form of female foeticide, female infanticide, child marriage, violence against women such as sexual assault, sexual harassment at work, domestic violence, dowry, dowry death, low levels of participation in public life, low access to livelihood resources etc.

Note to the facilitator

Before beginning any session on gender and law, it is important to address and unpack the question of gender. It is important to get the group to understand the concept of gender as well as discrimination based on gender. Even individuals consciously committed to equality may have learned or hidden stereotypes or prejudices. As a facilitator, this may mean assisting participants to recognise their own prejudices and assumptions based on their understanding of gender roles.

The facilitator should make sure that she is keeping the context as local as possible. The facilitator should collect some statistics on the issue of women's status at a local level before starting the exercises. If this is not possible then the facilitator should make sure she has national and international statistics.

The more individuals can identify with a particular scenario, the more likely they are to understand and internalise the information. What has been given here are just guidelines and can be modified in many ways to suit the need of the session. The session on gender has been made very interactive as it is a significant session in laying down basic concepts like patriarchy, gender and gender-based discrimination which form the foundation for understanding women's rights. This is one of the most important sessions.

To begin the discussion the facilitator should try and place the issue in the context of the local reality. This can be done through the following exercises.

notes

GENDER AND PATRIARCHY: WORKSHOP METHODOLOGY

EXERCISE 1.1

Title: Understanding Women's Status

Purpose: Understand women's status in society through local indicators

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask the group what the status of women is in their community.
- It may help to ask specifically about issues that impact women such as maternal mortality, nutrition, education, livelihoods, access to justice, The facilitator's role is to ask questions and lead the discussion in a manner where the group is able to talk about what they see as issues concerning women across the board. Once the issues are raised by the group the facilitator should ask the following questions and note all the responses on the board:
 - What is discrimination?
 - What is equality?
 - How do these impact women?
 - Why are women discriminated against?
 - What is gender discrimination?

For a more detailed examination of patriarchy and how it impacts women, Exercise 1.2 is suggested.

EXERCISE 1.2

Title: What is Patriarchy⁵?

Purpose: To clarify the concept of patriarchy

Time: 25 minutes

Materials needed: Chart paper and pens, whiteboard and markers

Steps:

- Divide the participants into five groups.
- Give one question to each group to discuss and create a presentation.

The questions are:

- What is patriarchy? Give examples of a patriarchal society and how it violates the rights of women.
- What is the current response of the community to patriarchy in the society, socialisation of boys and girls, traditions and customs, use of law in the redress of violence against women?
- How do you feel about living in a patriarchal society, the way you have been socialised, traditions and customs that have affected you and your family, and recourse to law?
- What is the impact of the patriarchal society, the socialisation process, traditions and customs, recourse to law on the life of people?
- What can we do to change the situation?

Note to the facilitator

The following are some sample answers for the facilitator to build up on while doing the session above.

Patriarchy is a social system that gives males the dominant position in society. Power lies with males and women have a lower status in society therefore often making them powerless in relation to males.

Socialisation process means the process of learning behaviour to conform to societal norms and adhere to roles set for women and men. These roles are not inherent but learnt.

To further elaborate on the impact of patriarchy and the socialisation process on women, it will help to do Exercise 1.3. This exercise will also be indicative of the discrimination that women have to face as a result of patriarchy.

EXERCISE 1.3

Title: Understanding Gender Stereotypes

Purpose:

- To illustrate how gender stereotypes are created
- To make participants aware of their own prejudices

Time: 15 minutes

⁵ *Advocacy Training Guide, Global Rights – Nigeria 2003.*

Materials needed: Whiteboard and markers, flash cards with various values and behaviour written on them such as angry, tender, competitive, homely, caring, ambitious etc.

Steps:

- Tell the participants there are two people, female and male. Ask them to name both of them.
- Now on a board draw two columns. On top of one column write the woman's name and on top of the other write the man's name.
- Ask the participants to list the words that they think describe characteristics of men and women.
- Read out each word and ask the participants to classify them as either masculine or feminine. Some of the words may fit into both columns.
- Once they have been classified initiate a discussion as to why they felt that certain values are feminine and others masculine. The questions to ask are:
 - *Why are there perceptions like this?*
 - *How do they impact men and women?*
 - *Can these perceptions be changed?*
- Once the last question is asked, the facilitator should rub off the names of the man and woman on the board and interchange them i.e., the column that listed out values and qualities belonging to a woman now has the man's name and vice versa.
- Ask them if it is possible to see the assigned values and qualities in each of the two people.

This exercise can be followed with an exercise that will look at the impact of assigning such values and qualities and characteristics to men and women.

Note to the facilitator

Once the participants have been through the above sessions, it allows them to confront or at least be aware of some of the prejudices that all of us carry. This is a critical session in creating the realisation that all of us are guilty of promoting gender bias and stereotypes. This session can be taken one step forward by focusing on the impact of this prejudice through Exercise 1.4.

EXERCISE 1.4

Title: Mapping Gender Discrimination

Purpose: To illustrate the impact of gender stereotyping on women and the impact of discrimination

Time: 10 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask the participants to use the example of the same woman who has been named in the previous exercise.
- Ask the participants to list out the various kinds of discrimination that occur against the woman from the time that she is born. Some of the following will come up:
 - *Female foeticide*
 - *Female infanticide*
 - *Lack of nutrition*
 - *No education*
 - *Unequal burden of housework*
 - *Early marriage or marriage without consent*
 - *Sexual assault*
 - *Domestic violence*
 - *Lack of sufficient health care*
 - *Lack of financial resources, property or control over these resources*
- It will help to do a comparison of the man's life with the woman's life at each stage that is mentioned. This will help illustrate that the kind of discrimination that occurs with women is missing from the life of men.
- Discussion points:
 - *Why are there some crimes that only target girls or women? How can we change this?*

Note to the facilitator

The facilitator should link the above exercise with Exercise 1.2: 'What is Patriarchy?' and point out the similarities from that exercise. It is important to focus on what and how change can be facilitated. The facilitator can also identify who benefits from this discrimination and how. Questions may arise as to why women discriminate against women. While discussing patriarchy and discrimination, it will be important for the facilitator to stress on how women and men are equally affected by patriarchy. The facilitator should begin to make the link between creating change and using the law. She can begin by asking the participants how law helps in creating social change. The responses should be recorded to be revisited later once the session has been done in a more in-depth manner. She can also encourage discussion about how law on its own is sometimes insufficient for creating social change.

Gender, Law and Access to Justice

Objectives

- **To understand how gender is linked to women's access to justice.**
- **To understand the importance of understanding law through a gender lens.**

Introduction

While Indian women have been guaranteed equality in the Constitution, the reluctance of the legal system to recognise that life experiences place women and men at different levels, means they are far from realising this right in a meaningful sense. This lack of understanding translates itself in a variety of ways.

Firstly, laws that have been made keeping in mind women's concerns have often not had their basis in the rights of women, but rather have been protective in nature. This has resulted in laws which are outdated (many of which are the legacy of the British) and cloaked in Victorian terms which seek to protect the 'chastity' and 'virtue' of good Indian women rather than adopting a rights based language. For example, in sexual assault cases, earlier Courts required women to prove their good character for a case to proceed. While the law has changed following campaigns by women's rights groups (good character is no longer a relevant issue in sexual assault cases), these questions are still raised in some Courts.

Secondly, women are hesitant to access the legal system (Police station or Courts) mainly because these spaces are hostile to women. In addition, they face a backlash from their families and communities for having overstepped their boundaries. Given this reality, the lack of gender perspective in Courtrooms, among Judges and lawyers, leads to manifold problems. While this occurs at various levels, perhaps one of the most harmful is when a lawyer representing a woman fails to even appreciate what she understands as justice. In too many cases, the advice to women is to return and live in homes that are violent towards them. In the Courtroom too, women often have to go through a negative experience due to insensitive lawyers and Judges. It is not uncommon for their experiences to border on humiliation and a re-violation of rights. It is important for lawyers, Judges and the entire Courtroom machinery to be aware of their own social prejudices, the particular impact such prejudice can have on women seeking justice and to make efforts to prevent their own prejudices interfering with women's search for justice.

Thirdly, the legal system and society does not realise that justice means different things to men and women. This means that we have to understand what women mean when they say they want justice. What is their notion of justice and how do they experience justice? The overarching problem of access to justice needs to be understood in the subjective context of the women concerned.

This is especially true in areas which are rural and semi-rural or mofussil towns. This particular problem is of significant importance to us and it is hoped that this Guide will begin to address the unique challenges facing rural and semi-rural women. Our primary vision is that the basic right to justice must be available to all.

GENDER, LAW AND ACCESS TO JUSTICE: WORKSHOP METHODOLOGY

Note to the facilitator

To be able to illustrate the impact of gender based discrimination as well as the need for substantive equality which recognises and places importance on differences between individuals due to different life experiences, the facilitator could do Exercise 1.5.

EXERCISE 1.5

Title: Illustrating Discrimination and its Impact⁶

Purpose:

- To illustrate to the participants how women's lives are different from men's lives
- To create an understanding of the need for substantive equality and a respect for differences amongst individuals

Time: 45 minutes

Materials needed: Chart paper with a truck drawn on it. Flash cards with the different rights enshrined in the Constitution written on them, pasted on the chart

Steps:

- Ask for three volunteers.
- Ask them to stand next to each other, facing the chart with the human rights truck.
- One of them is a man, one is a woman and one other person who could be from a low caste or class background or a physically challenged person.
- The instructions given to the rest of the group should be that a truck distributing human rights has come to your region. The assumption should be that the three people do not have any rights and the only way that they will get those rights is if they go up to the truck.
- The larger group is asked to come up with various obstacles that each of the three individuals will face while walking up to the truck, eg.
- **Man:**
 - i. He may not know the way.
 - ii. People may physically stop him from reaching the truck.

- **Woman:**

- i. She will be stopped by her family.
- ii. There are certain places where she will not be allowed to go.
- iii. She herself will be scared.
- iv. She may face sexual assault.
- v. When she reaches the truck the rights distributors may ask her to bring a male relative along.

- **Third person:**

- i. There will be difficulty in accessing the truck if she/he is disabled.
- ii. If the person is from a low caste or class, she/he will not be allowed within the vicinity of the truck.

- It is important to note that the obstacles that are stated for the man could be obstacles for the woman and the third person as well. Often the facilitator will notice how hard the audience will try to come up with obstacles for the man, whereas it will be very simple to come up with obstacles for the woman and the third person.
- At every obstacle stated for each of the persons, if the individual is impacted by the barrier, she/he should take a step away from the chart. For example, when an obstacle is mentioned relating to the woman she should take a step back; if the same obstacle impacts the man or the third person then they should also step back.
- At the end of the exercise, it will be observed that the man is the closest to the chart and the woman and the third person are quite far from it, maybe even outside the room.

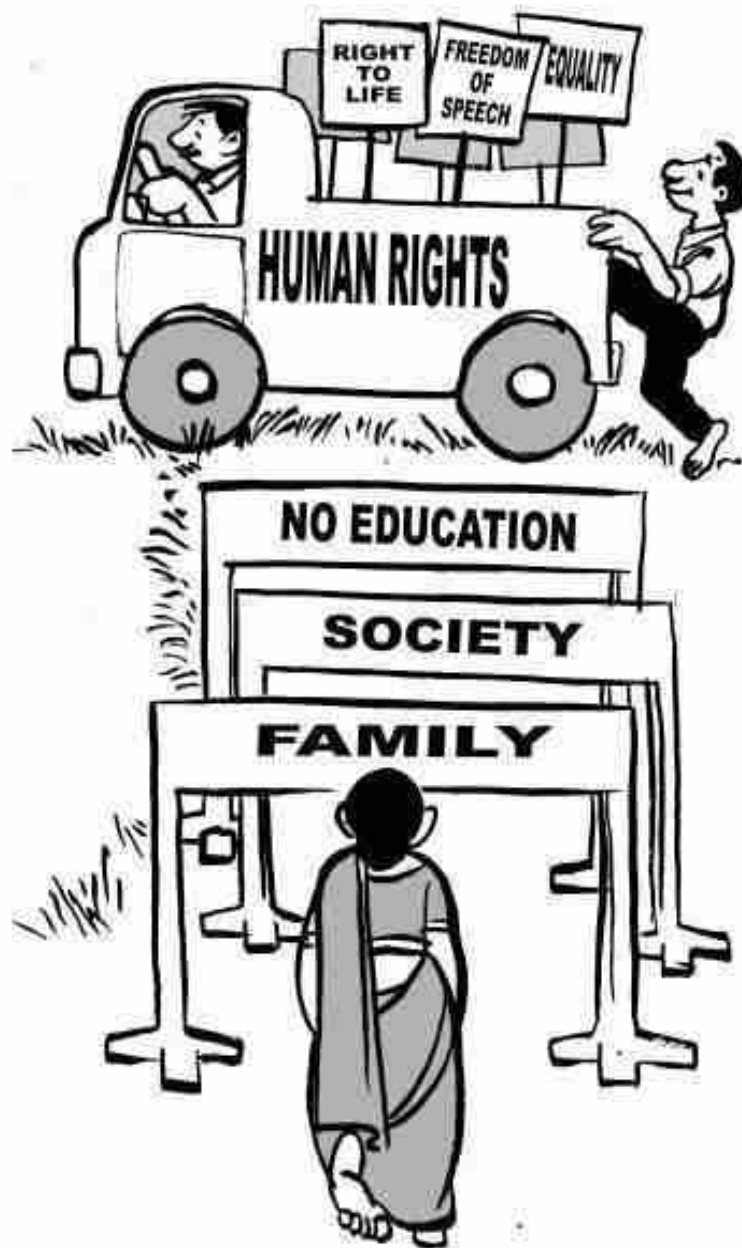
Note to the facilitator

The above exercise can work as an illustrative eye opener and it is important to do it at a carefully selected point in the workshop. The discussion points after the exercise should focus on the need for a substantive equality approach.

⁶ Conceptualised by Sakshi.

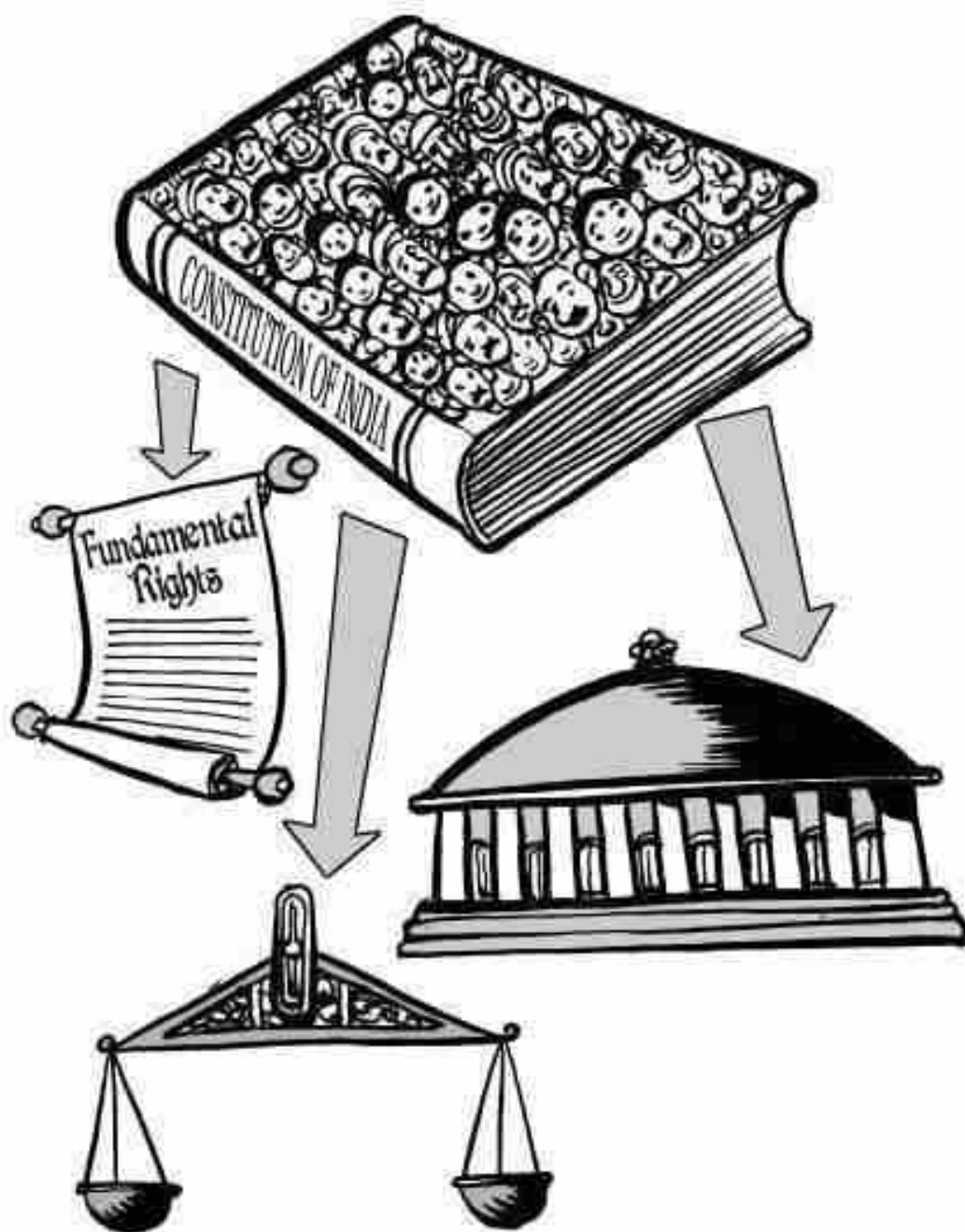
A substantive equality approach recognises that patterns of disadvantage and oppression exist in society and require that law makers and people working on women's rights issues take these issues into account in their actions. It examines the impact of law within its surrounding social context to make sure that laws and policies promote full participation in society by everyone, regardless of personal characteristics or group membership. Substantive equality requires challenging common stereotypes about group characteristics that may underlie law or government action as well as ensuring that important differences in life experience, as viewed by the equality seeker, are taken into account.⁷

⁷ <http://www.ccpcj.ca/e/rights/rights-charter.shtml#substantive>.



Women's realities; men's realities - the real difference

2 The Indian Legal System

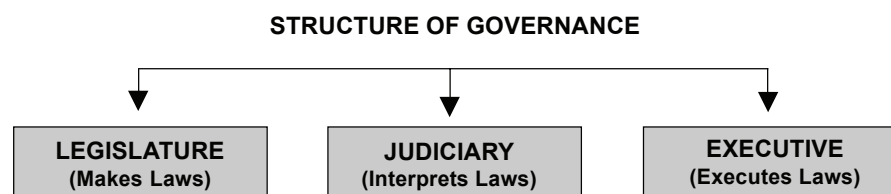


The Constitution of India - The Foundation of Law

Introduction

India is a democracy, which means that governments are elected by the people. We follow a system of representative democracy, where we elect representatives who have the power to make decisions on behalf of the people that elected them. Representatives at the central level and state level are elected by the people. At the state level, the elected representatives of the people become members of the state legislature. At the central level, the directly elected representatives of the people become members of the Lok Sabha. Members of the state legislatures also elect central representatives to represent the interests of the states and become members of the Rajya Sabha. The Rajya Sabha and the Lok Sabha together constitute Parliament at the central level, the highest law making body in the country. Because we have state and central governments, India follows a federal system of governance. The Constitution carefully separates areas of responsibility between the states and the centre.

We follow a system of separation of powers – where there are three wings of government (both at the central and state levels). The first wing of government is the legislature, which, as mentioned above, makes laws. However, working closely with the legislature is the executive wing of government. The executive is responsible for implementing the laws made by the legislature. At the central level, the executive authority is vested in the President of India but is actually exercised by the Prime Minister and his Council of Ministers. At the state level, the executive authority is vested in the Governor of the State, but is actually exercised by the Chief Minister and his Council of Ministers. The third wing of government is the judiciary which comprises Courts that interpret the law. The principle of separation of powers ensures all wings are equal and that none of the wings tramples on the power and authority of the other.



An overview of the legal system in India

What is law?

Law is a system of rules for the smooth and efficient functioning of the society as a whole i.e. a set of rules that regulates the relationship between people and the state. It is an institution that helps facilitate better relations between individuals. It plays a very significant role in bringing about an orderly society.

What are the sources of law?

In order to understand the basics of law therefore, it is important to keep in mind the following important sources of law:

- 1. The Constitution of India is by far the most important source of law. All other sources of law cannot violate or go against the provisions of the Constitution.**

The Constitution came into force on January 26, 1950. It gives due recognition to all the other sources of law listed below. It is the basic law of the land. It lays down the system of governance in our country, rights, duties and responsibilities of individuals and the State. Part III of the Constitution enumerates the Fundamental Rights guaranteed to its citizens and Part IV enumerates the Directive Principles of State Policy, those fundamental social and economic principles that should be the guiding document for any policy the government makes for its people.

- 2. Legislation passed by Parliament or state legislatures.**

Parliament (at the central level) and the state legislatures (at the state level) have the power to make laws for the entire country and the states respectively – with clear division of powers between the states and the centre. This is the primary mode of governance and any act or omission that violates the law is an invalid action and will sometimes attract some form of penalty or punishment, depending on the nature of the act or omission prohibited by law.

- 3. Rules are made by the executive based on authority given to them by legislation and therefore, these decisions or rules cannot violate or go against the provisions of the legislation that authorises these decisions or rules.**

In addition to legislation, there is also a vast body of laws known as subordinate legislation in the form of rules, regulations as well as by-laws made by Central and State Governments and local authorities like Municipal Corporations, Municipalities and Gram Panchayats. This subordinate legislation is made under the authority conferred or delegated either by Parliament or appropriate state legislatures.

- 4. Judicial decisions, particularly the decisions of the High Courts and the Supreme Court which are called 'precedents'.**

A person may approach the Court alleging violation of her specific right by another and claim redressal. The Court will look into the facts, apply the law to the facts and come to an independent conclusion. When the Court gives a decision on the matter, it becomes binding on both parties. The aggrieved party can appeal against the decision if it is legally possible to do so. However, if she/he has exhausted all opportunities to appeal to a higher body in the judiciary (the highest Court of appeal is the Supreme Court), she/he has no option but to accept the verdict as it is. Once a matter is decided by a higher Court, it binds lower Courts as 'precedent' of the Supreme Court. It becomes a precedent for all subsequent cases on the same issue, till such time as the Supreme Court changes its decision in a future case.

Example:

The Supreme Court lays down in a case that compensation can be awarded in certain cases of human rights violations, for example when the Police or other organ of the government tortures a person in its custody as a result of which the person dies. This rule, that in certain cases of human rights violations, compensation can be awarded to the immediate relative of the victim is a precedent that can be used in subsequent cases of violations of human rights by state authorities to claim compensation as a relief.

5. Customs and traditions in certain circumstances.

Customs and traditions are followed all over the country, in India. Some customs are considered law and some laws are based on religion eg. laws governing marriage or property.

Who makes laws and how are they made?

The law-making process is enumerated in the Constitution of India.

- 1. Each ministry is responsible to table a Bill in the Parliament. The Ministry of Parliamentary Affairs which is a key ministry that overlooks the work of the Parliament is responsible for ensuring that Bills are tabled and passed.**
- 2. A bill is usually drafted by the concerned department of the government through a consultative process. Comments are sought from organisations and groups that have expertise in the area. Other government bodies such as the National Commission for Women, the National Human Rights Commission, the National Commission for Minorities and several other non governmental organisations also involve themselves in the drafting process.**
- 3. The Bill can be tabled in either House of the Parliament if it is a Central Bill or either House of the State Legislature if it is a State Bill.**
- 4. The Bill will be considered to be passed in the Houses of the Parliament if both the Lok Sabha and the Rajya Sabha pass the legislation with a majority.**
- 5. When the Bill has been passed by both Houses of the Parliament, it is presented to the President for assent.**
- 6. The same procedure applies to the State Legislature with the Bill being presented to the Governor of the State.**
- 7. Once the President/Governor gives his assent, the Bill becomes the Law.**
- 8. A law approved by the President/Governor comes into effect once it is notified in the official gazette which will state the date from which the law comes into force.**
- 9. Before a law is implemented the government (centre/state) is required to make rules to elaborate in detail the content of the legislation. These rules, once finalised will be published in the official gazette and then the law can become fully operational.**

How are laws classified?

Laws are broadly classified into civil and criminal. A criminal legislation is one which criminalises an act and states the punishment for it eg. Indian Penal Code, Dowry Prohibition Act. A civil legislation is one which recognizes the rights of a person and provides remedies for eg. laws governing marriage, property, tax laws, labour law, etc.

Laws are also classified into substantive and procedural laws. Substantive law refers to policy decisions, rights, and obligations and is stated in the legislation. Procedural law is the procedure to be followed in order to secure these rights and obligations and to implement the policy decisions. For eg. the Protection of Women from Domestic Violence Act, 2005 recognizes that women have the right to reside in the matrimonial home. This right is

substantive law. In the same legislation the procedure to access this right is also laid out – a woman must file a domestic incident report and file a complaint before the magistrate. The procedure that the magistrate should follow in dealing with a case is also laid out. All this is known as procedural law.

Fundamental Rights

Objectives

- **To understand the fundamental rights as enshrined in the Indian Constitution.**
- **To understand that all human beings have basic human rights.**
- **To identify the process to claim and enforce rights.**
- **To analyse human rights/fundamental rights violations and what can be done when violations take place.**

Introduction

Individuals need certain basic human rights in order to live with dignity. These rights cannot be alienated from an individual as they are essential for survival. The Constitution defines these rights as fundamental rights. The Constitution lays down these basic rights and it also states who should protect these rights. Fundamental rights form a part of the basic human rights framework. An understanding of commonly understood universal human rights was used by the Constitution makers while drafting fundamental rights in India's Constitution.

Fundamental rights are guaranteed under the Indian Constitution in Articles 12 to 35A. Some of them are:

- **Right to life (includes livelihood, clean environment, housing, etc) and personal liberty**
- **Right to equality and equal treatment before the law**
- **Right to freedom of speech and expression**
- **Right to freedom of religion**
- **Right to freedom of movement**
- **Right to approach the Courts in India if our rights are violated.**

What is the Constitution?

The Constitution is the highest law in India. Every aspect of the functioning of the government, the relations between the Central government and the State governments, the rights and responsibilities of citizens are governed by the Constitution. Of particular importance to the issue of human rights, the Constitution articulates the 'fundamental rights' that every individual has in India.

What are Fundamental Rights?

Every individual needs certain basic needs in his or her life without which it would be difficult to lead a happy fulfilling life. These basic rights are fundamental for our existence and therefore are called fundamental rights. Therefore, if our government or any government agency refuses to protect our rights or violates them, we can go to the Courts to enforce them. In this section, we will examine the fundamental rights and freedoms guaranteed under the Constitution which are very similar to world wide recognised human rights (as enshrined in international documents such as the Universal Declaration of Human Rights).

What are the Fundamental Rights guaranteed by the Constitution of India?

A number of rights and freedoms are guaranteed in our Constitution through Articles 12 to 35A. It is important to examine many of these key provisions in the Constitution.

Definition of the State under the Constitution

Article 12 defines 'State' when it comes to determining who can violate fundamental rights. The State includes the Government, the Parliament of India and the Government and Legislature of all States in the country. Since India is a large country, various Departments and Ministries run the working of the country and it is these departments and ministries that are known as the Government. Fundamental rights are guaranteed against 'State' action and not against violation of rights by private individuals. In case of violation of rights by private individuals, the person aggrieved must seek her remedy under general law and not under the Constitution. The following are examples of agencies that will be considered to be 'State':

- **The Collector and the Tehsildar**
- **Police**
- **Municipal corporations and other local government bodies**
- **Panchayats**
- **The post office in your district which is controlled by the Post and Telegraph Department, part of the Government of India**
- **State Electricity Boards**
- **The Water Supply and Sewerage Board**
- **Companies in which the government owns a majority of the shares**

Example:

Geeta agreed to sell her house to Ratna for Rs. 50,000. Even after taking possession of the house, Ratna only gave her Rs. 35,000 and thus breached the agreement. How can Geeta enforce the agreement? This is a private wrong by a private individual and therefore Geeta cannot seek remedy under Fundamental Rights guaranteed by the Constitution. She has to make an application in the Civil Court to get back Rs. 15,000.

If Geeta had been entitled to a house under a government housing scheme and the local authorities delayed giving her the allotment even after she had completed all the formalities, she could file a petition against the Government for violation of her Fundamental Rights.

The Right to Equality

Article 14 is a general provision that guarantees 'equality' to all persons while Articles 15, 16, 17 and 18 lay down specific facets of the equality provision.

Article 14 states that all persons residing in India must be treated equally. It is important to know that it is not just citizens who need to be treated equally – but all 'persons' i.e. non-citizens, organisations, companies etc.

Equality before the Law and the Equal Protection of the Laws

Under the Constitution, equality has two elements, which are best understood through examples:

1. Equality before the law

Equality before the law means that no individual is above the law no matter what his/her rank or background.

Example:

Gopal comes from a poor family and Ram from a rich one. Two days ago Gopal was caught stealing vegetables from a vegetable vendor. At the same time Ram was caught stealing money from his boss's wallet. Both Gopal and Ram are guilty of stealing and will be tried for the offence of theft under the Indian Penal Code. The Police will not release Ram just because he is rich. Both Gopal and Ram are equal in the eyes of the law and will be punished if the offence is proved.

2. Equal protection of laws

Equal protection means right to equal treatment in similar circumstances, both in the privileges or rights conferred and in the punishment or liabilities imposed. The State cannot act in a manner that abuses this power by making differences between people where they should not. When the State acts in a manner that abuses the powers given to it then such an act is known as an arbitrary act. Unreasonable acts are arbitrary in nature and these acts can be challenged in Court.

Example:

Ganesh is brought to the Police station for questioning. His friend Rajesh is wanted for robbery. Ganesh has always been a law-abiding person and he has not heard from his friend in months. The Policemen however do not believe him and start using third degree measures on him in the hope that he will give them information. This act of the Police is arbitrary in nature and is not in accordance with the procedure prescribed by the law.

Does equality mean 'sameness'? In other words, is the State required to treat everyone equally irrespective of the circumstances?

While talking about the concept of equality it is important to remember that equality does not mean sameness. True equality needs to take into consideration that people are different due to various reasons (whether they be socio-economic or otherwise) and therefore life experiences are different for different sets of people. Equality strictly applied would in fact create inequality because it will not assist in creating substantial change for people. Keeping this in mind the government is allowed to make classifications to treat different classes of people differently. Therefore, there are circumstances where everybody cannot be treated 'equally'. Recognising these differences is called reasonable classification and the State is authorised to make it.

Equality does not mean treating everyone the same. The Government is allowed to make classifications. If classifications are not made then there will be inequality. However, the classification so made must be reasonable i.e. things which any ordinary person would think is right and not wrong.

How can we ascertain if the classification is reasonable?

In determining whether the classification is reasonable or not, the following factors need to be considered: a) What was the basis for the classification? b) Was there any relationship between the classification and the aim of the law?

Example:

Geeta has obtained 89% marks in the qualifying examination for admission into medical college but is denied admission because of a law that says that no woman should be given admission into the medical college. The law is illegal and violates the right of Geeta to be treated equally with other students. The object of having the examination is to ensure that candidates scoring good marks are admitted into the college. Therefore making categories that deny admission to girls just because they are girls is unreasonable and therefore illegal.

Non Discrimination

Article 15 of the Constitution lays down that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. It also states that no citizen can be, on the above mentioned grounds, subjected to any restriction, liability, condition or disability in accessing shops, public restaurants, hotels and places of public entertainment as well as prevented from using tanks, wells, bathing ghats, roads and public resorts which are maintained by State funds and meant for public use. Here are a few examples of what amounts to discrimination by the State.

Examples:

Discrimination on the basis of sex: Rules in a state-owned flight service said that women employees should retire from service on their first pregnancy. One of the employees, Nargis, decided to challenge this and petitioned the Supreme Court of India saying that the rule was discriminatory to her as compared to male employees who were doing the same job. The Court stated that this was discrimination based on the grounds of sex of the person.

Discrimination on the grounds of religion: Nazir was walking with his family in a public park. After sometime they went to sit on the park bench. Next to the bench was a group of Hindus. When they saw Nazir sitting down, they went up to him and told him that only Hindus were allowed to enter and use the facilities in this park.

This amounts to discrimination on the grounds of religion.

It also states that nothing in the article can prevent the State from making special provision for women and children as well as making provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Examples of special provisions under Article 15(3): Under Article 42 of the Constitution, the State is required to make provision to secure just and humane conditions of work and maternity relief. This would be consistent with the equality standard laid down in the Constitution. Special provisions for SC/ST individuals can extend to making reservations in educational institutions. As pointed out earlier, these reservations need to be reasonable – so one cannot reserve all seats for SC/ST candidates or by making reservations in super speciality courses – where the individual concerned should be able to obtain admission on merit.

Equality of Opportunity

Article 16 is related to equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It states that no citizen can be discriminated against or become ineligible with respect to employment or office under the State, on grounds of religion, caste, sex, race, descent, place of birth or residence.

To ensure equality nothing in this article can prevent the parliament from making any law requiring residence within that State when a person is looking for employment in a government office. The State can even make reservations of appointments and posts in favour of backward classes who are not adequately represented in the services under the State. The Article also states it will not affect the laws of any religious or denominational institution which states that any incumbent of an office or member of governing body connected to that institution should profess a particular religion or belong to a particular denomination.

The following factors are considered to be part of the right of equality when it comes to matters of state employment or appointment:

- a. **The right to make an application for any post under the Government and a right to be considered on the merits for the post for which an application has been made.**

Example:

Krishna who had been working in the Ministry of Agriculture for 6 years was asked to resign. When he appealed against the termination of his employment, the Government said that he was banned from applying again for employment. It did not give any reasons for doing so. Krishna went to the Supreme Court and claimed that his right to apply for appointment under Article 16(1) was violated. The Court agreed with Krishna and said that refusing to allow Krishna to apply for the post again must have a reasonable connection with the suitability of the post. The Court said that the fundamental right guaranteed by the Constitution is not only to make an application for a post under the Government but the further right to be considered on merits for the post for which an application has been made.

- b. **The State can however lay down qualifications for appointment to a post, which need to be reasonable (i.e. the qualifications must have a reasonable connection with the post).**

Example:

The State cannot lay down that a doctor's qualification is necessary when appointing a forest official. Conversely, the State can require expertise in forest matters when it comes to appointing a forest official. It could also, based on the post, state that a graduate in any field would suffice for appointment as a forest official.

- c. **The right extends to all matters of employment i.e. appointment, service conditions, salaries, increments, promotions etc.**
- d. **Equality of opportunity in matters of appointment are to be determined only between persons who are seeking the same employment.**

Example:

The educational qualifications required for the post of a college professor will be different from that required for the post of a school teacher. In such a case to raise the argument that the different educational qualifications required for the posts is akin to denying equality of opportunity, cannot be held as a valid argument. However if different educational qualifications are required from two persons applying for the same vacancy for a school teacher, then it will amount to denying equality of opportunity.

- e. **Equality of opportunity in all matters of employment includes 'equal pay for equal work'. This rule however would apply to each government agency that forms part of the State separately. An employer would violate Article 16(1) if he/she authorised unequal pay scales for identical work without any reasonable classification. However, this rule will not**

apply in case of employees working under two different authorities under the State.

Example:

Rajesh and Ganesh applied for clerks' positions in the Income Tax office and the Electricity Department in the State of Rajasthan. They both got the positions. While talking to Rajesh, Ganesh found out that Rajesh was getting a higher pay than him, even though both of them were doing the same job and had the same responsibilities. Ganesh took this matter to his superior who told him that the difference in the pay scale was due to the difference in the funding allocated by the Government for the two Departments. This differentiation is allowed under Article 16.

The rule of equality of opportunity in State employment and appointments has its exceptions to protect the interests of disadvantaged groups and to help them overcome their historical disadvantage. Consequently:

- 1. The State can reserve posts or appointments in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.**
- 2. However, with regard to conditions of service relating to employment such as salary, increment, gratuity, pension and age of superannuation, there can be no exception even in regard to the backward classes of citizens.**
- 3. The Courts will interfere where the percentage of reservation is not reasonable. The following factors will be kept in mind when looking into the percentage of reservation: employment opportunities of the general public to the cadre of service in question, the population of the entire State, the strength of the different communities, the extent of their backwardness and the like. There has to be a balance between ensuring equality of opportunity and the need to reserve appointments under the State.**
- 4. These special provisions do not confer any fundamental right upon any particular individual. They give the State the power to take positive action to fulfill its duty to alleviate inequality and protects such State action from constitutional challenge.**
- 5. Offices connected with religious or denominational institutions may be reserved for members professing any particular religion or belonging to a particular denomination.**

Other Provisions addressing Equality

Article 17 abolishes 'Untouchability' and makes its practice an offence punishable in accordance with law. Many laws such as the Prevention of Atrocities on Scheduled Caste and Scheduled Tribes Act, 1989 and the Untouchability (Offences) Act, 1955 have been enacted with the intention to punish people who treat others as 'untouchables'. Under these legislations, whoever prevents another person from using public utilities such as roads, restaurants, parks etc. or ill-treats people belonging to Scheduled Castes or Scheduled Tribes can be fined and put in jail.

Article 18 abolishes titles being conferred on any person except titles that signify a military or academic distinction (such as army ranks and professional titles such as Doctor). Titles used to be added to the names of persons (such as Diwan, Raja etc.).

Important Freedoms

Article 19 is based on allowing certain freedoms. These are the protection of certain rights:

All citizens shall have the right under Article 19 (1):

- a. to freedom of speech and expression;
- b. to assemble peaceably and without arms;
- c. to form associations or unions;
- d. to move freely throughout the territory of India;
- e. to reside and settle in any part of the territory of India; and
- f. (omitted);
- g. to practise any profession, or to carry on any occupation, trade or business.

However each of these freedoms comes with certain restrictions, which are basically concerned with respect for each other as citizens as well as protecting and safeguarding the sovereignty of the nation. These restrictions are:

- **The State can make laws to impose reasonable restriction on the freedom of speech and expression in the interest of the sovereignty and integrity of India, the security, friendly relations with foreign States, public order, decency, morality, in relation to contempt of Court, defamation or incitement to an offence. On the freedom to assemble peaceably and without arms in the interest of sovereignty and integrity of India or public order and the freedom to form associations or unions in the interest of sovereignty and integrity of India, public order or morality.**

Examples:

- *The State government prevented Mr Lahotia from entering their State as he would attempt to create a communal clash between the Hindu and Muslim communities by making inflammatory and accusatory speeches and inciting people to fight.*
- *Revathi is a social activist and she wanted to protest against the Police encounter deaths taking place in Delhi. She organised a protest outside the Headquarters of the Police station, demanding that the Police take immediate action on the perpetrators. The protest was peaceful where due permissions were taken to hold it. Revathi and the co-organisers were well within their right to hold this protest. However, if Revathi or any member of that group decided to attack the Police station and burn it, then the State could take action against the people who had assembled as their actions would be unlawful and disruptive of public peace.*
- *An association formed to kill any person or to overthrow a state government by using arms would not be entitled to the protection of the Constitution and would be treated as an illegal association.*

- **The State can also curtail the freedom to move freely throughout India in the interests of the general public or for the protection of the interests of any Scheduled Tribe.**

Examples:

- *There are some parts of the Andaman and Nicobar Islands from which the general public is banned as these areas are inhabited by Scheduled Tribes. Opening out these regions to the general public could endanger the tribes in terms of cultural practices, social well-being, territory as well as have health related consequences.*
- *A person who is being questioned by the Police in connection with any case may be asked not to leave such a place until the conclusion of the case. Such a restriction is not illegal and is to ensure that the outcome of the case is not affected by the absence of such a person.*

- **The State can also make laws in the interest of the general public on issues relating to:**
 1. the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
 2. the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Examples:

- The government can specify qualifications for some posts or vacancies in a particular profession. This is not unreasonable and is to ensure that people with qualifications and capabilities for that vacancy are chosen.
- There are certain vocations/professions that only the government can engage in, such as the defence of the country or printing money. The government has a right to either partially or completely exclude citizens from such jobs.

Protection in respect of conviction for offences

Article 20 provides for protection in respect of conviction for offences. It states that:

1. **No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.**

Example:

A law was passed saying that anyone found littering the place would be imprisoned for one month. The Collector of Tumkur district wanted to ensure that the district was kept clean. He therefore sent his officers out to get the names of the people who had littered in the past and wanted to prosecute them. This cannot be carried out as the act of littering was not an offence when these individuals committed the act of littering. If they littered after the law was passed, they could be prosecuted and imprisoned for one month.

2. **No person shall be prosecuted and punished for the same offence more than once.**

Example:

Ravi was tried for the crime of murdering Shyam, and was acquitted. Even if the prosecutors find evidence subsequently that could establish Ravi's guilt, they cannot prosecute Ravi as he has already been prosecuted and acquitted. A person cannot be tried for the same offence twice. However, this does not mean that Ravi cannot be tried for the crime of murdering someone else other than Shyam, if there is evidence to support such a charge.

3. **No person accused of any offence shall be compelled to be a witness against himself.**

Example:

Santosh was charged with theft. Since the prosecution could not find any witness against him, they asked him to be a witness. This is not a possibility in a Court of law. Santosh can be cross examined by the prosecution but he cannot be asked to be a witness in a charge against himself.

Life and Personal Liberty

Article 21 talks about protection of life and personal liberty. It states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

This provision under the Constitution is one of the most important rights provided to any person against illegal actions by the State because without our right to life, all other rights lose their meaning. Over the years, right to life and personal liberty has been broadened by the Supreme Court. Article 21 now has to be understood and interpreted keeping in mind different facets that improve the quality of life and personal liberty and not just the right to live. Provisions of various international treaties (like the International Covenant on Civil and Political Rights) have also been interpreted to be included in Article 21.

What does the right to life and personal liberty mean?

Right to life means the right of every individual to live with human dignity. It would include all those aspects of life which go to make a person's life meaningful, complete and worth living. It also includes all that gives meaning to a person's life including, his/her traditions, culture, heritage and its protection etc. The Constitution guarantees this right to every person in India whether she/he is a citizen or not.

Every person has the liberty to do what she/he wishes to do as long as it does not cause any problems to people living around him. Thus personal liberty essentially means an individual's freedom from physical restraint by incarceration.

The Supreme Court has given meaning to the terms 'life' and 'personal liberty' to include:⁸

- **Right to a better standard of living⁹**
- **Right to shelter¹⁰**
- **Right to a clean environment**
- **Right to food**
- **Right to work**
- **Right to education¹¹**
- **Right to livelihood¹²**
- **Right to hygienic conditions in the workplace**
- **The right to travel abroad, i.e., to move out of India and to return to India¹³**
- **Right to health**
- **Rights of prisoners¹⁴**
- **Right to legal aid**
- **Right against custodial violence**
- **Right to a fair and speedy trial**

Article 21A is the right to education. In 2002 the Constitution was amended to include Article 21A which states that the State will provide free and compulsory education for all children between the ages of 6 and 14.

⁸ The Supreme Court in various cases has passed judgements to elaborate the meaning of Article 21, some of which have been listed.

⁹ Francis Coralie v. Union Territory of Delhi, AIR 1978 SC 597.

¹⁰ Chameli Singh v. State of UP, (1996) 2 SCC 549.

¹¹ Mohini Jain v. State of Karnataka, AIR 1997 SC 811.

¹² Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.

¹³ Menaka Gandhi v. Union of India, AIR 1978 SC 597.

¹⁴ The Supreme Court has in its various Judgements given guidelines on how an accused person is to be treated. One such important case is the Sheela Barse v. State of Maharashtra, AIR 1983 SC 378.

Courts in India had previously recognised that the right to education was a part of right to life under Article 21. While this amendment is good because it guarantees education to children between the ages of 6 and 14 it still ignores children from the age group of 0 to 6 and from 14 to 18 years. In a country like India education should be the fundamental right of all children.

Article 22 is the right of protection against arrest and detention in certain cases. This article states that:

- a. **No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.**
- b. **Such a person shall also have the right to consult and be defended by a lawyer of his/her choice.**
- c. **Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate.**
- d. **No such person shall be detained in custody beyond the said period without the authority of a magistrate.**
- e. **These clauses shall not apply to any person who for the time being is an enemy alien or to any person who is arrested or detained under any law providing for preventive detention.**
- f. **No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported, before the expiration of the said period of three months, that there is, in its opinion, sufficient cause for such detention.**
- g. **When any person is detained under such an order, the grounds on which the order has been made should be communicated to the person. It should also give him/her the earliest opportunity of making a representation against the order. However if it is felt that such a disclosure will be against public interest then the said authority need not disclose these facts.**
- h. **Parliament may by law prescribe:**
 - Circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board;
 - The maximum period for which any person may be detained under any law providing for preventive detention; and
 - The procedure to be followed by an Advisory Board in an inquiry.

Right against Exploitation

Article 23 is on prohibition of traffic in human beings and forced labour. Trafficking means the buying and selling of human beings for various purposes. The Indian Constitution thus appoints the State as the protector of these people. Traffic of humans also includes trafficking of women and children and selling them for prostitution and sexual slavery. The Article also states that the State can impose compulsory service for public purpose. When the State does this it shall not discriminate on grounds of religion, race, caste or class.

Example:

Sandhya was twelve years old and lived with her parents and nine siblings. One day a male relative, Sadhu, came to her house and said that he would take Sandhya to the city to work as a domestic help. This would help her family monetarily. Believing him, Sandhya's family allowed her to be taken by Sadhu. Sandhya was taken to the city and sold into a brothel, where she was raped and forced to take up sex work. All contact with her family has been cut off. This is a commonly found example of trafficking and selling children into prostitution.

Article 24 prohibits any person from employing a child below the age of fourteen to work in any factory or mine that is engaged in hazardous work. The Supreme Court has asked the State to take steps to discourage families from sending their children to work by making efforts to provide employment to an adult in the family. The Court also emphasised that free and compulsory primary education for each child should be provided by the State.

Article 25 focuses on the right to freedom of conscience and free profession, practice and propagation of religion. This Article is very significant in India which is a country of multifarious religions. It allows all individuals the freedom to practise and propagate religion. However, the State can restrict any economic, financial, political or other secular activity which may be associated with religious practice. It can also provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and section of Hindus.

This Article also has two explanations, which are:

- **Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.**
- **Explanation II: Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.**

Corresponding to this Article are also Articles 26, 27 and 28.

Article 26 states that there is the right to establish and run religious and charitable institutions as well as for such institutions to manage their own affairs and own and acquire movable and immovable property.

Article 27 states that the proceeds can be used specifically for payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28 is related to the freedom as to attendance at religious instructions or religious worship in certain educational institutions. It states that no educational institution which is run solely out of State funds will provide religious instructions. This can be done in certain circumstances such as if the institution has been established under any endowment or trust which requires that religious instruction shall be imparted in such institutions and which is only administered by the State. It further states that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instructions that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given consent thereto.

Article 29 is on the protection of interests of minorities. It gives the right to all citizens to have a distinct language, script or culture of their own. It also disallows denial of admission into any State maintained or State funded educational institutions on grounds of religion, race, caste, language or any of them.

Article 30 is the right of minorities to establish and administer educational institutions. The State shall make sure that in case of a law that provides for compulsory acquisition of any property of such an educational institution, it will be done in such a way that does not restrict or abrogate the right guaranteed under this Article. The State will also not discriminate against institutions due to their minority nature.

Article 32 is the remedies for enforcement of rights. This can be done by moving the Supreme Court of India which can issue directions or orders or writs including writs in the nature of **Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.** The Parliament can also (without restricting the powers of the Supreme Court) empower any other Court to exercise the same powers as are exercisable by the Supreme Court under this Article. This right is very important to the functioning of a democracy and cannot be suspended except as provided for by the Constitution.

Example:

Hari lives in Bangalore. The Police arrested him a week ago for allegedly stealing jewellery from his neighbour's house. From the time that Hari has been in Police custody, his family has not been able to see him and they are not aware of what is happening with him and his case. When Hari's mother went to the Police station and demanded that he should be produced before the Magistrate and not be kept in illegal detention because it violated his right to life and personal liberty, the Police did not respond. In such a situation Hari's mother can petition the High Court or the Supreme Court and ask that her son's fundamental right be protected.

Against whom can we enforce fundamental rights?

Fundamental rights can be enforced only against the 'State'. When a person wants to enforce his/her fundamental rights, it can be done against any organ of the State as defined in Article 12 of the Constitution. If an individual has a claim against another individual, then she/he will have to go through the ordinary laws laid down for getting relief. In the above example, Hari's mother can file a case against the Police of that State.

Example:

A prisoner in Tihar jail wrote a letter to the Supreme Court on behalf of another prisoner complaining about a brutal assault of a fellow prisoner by the Head Warden. The letter was converted into a writ petition. The Supreme Court issued a writ of Habeas Corpus against the jail authorities to explain to the Court why such treatment was meted out to the prisoner and asking them to stop torturing the prisoner and provide proper medical care and treatment to him.

Who can file a petition to protect fundamental rights?

Under normal circumstances, it is the person whose right has been affected who has to file the petition. But, a third party can also file a petition when the person is not able to file a petition.

Example:

The government has decided to build a dam near a city. To build this dam, the government has put a notification in the newspaper that all those people who live near the area where the dam is proposed to be built will be removed from their homes and compensation paid to them. People living in this area are economically weak and belong to Scheduled Castes. This proposed dam is violating the fundamental rights of people living in the area. An organisation working with these people can file a writ petition under Article 32 on behalf of all those people asking the Court to protect their rights under the Constitution.

This petition is called a Public Interest Petition where any person can file a public interest petition on behalf of another or others who are not in a position to approach the Court directly. The Courts are also willing to relax a number of procedural requirements such as Court fees etc. Over the past several years, a number of public interest litigations have resulted in the recognition of a number of important rights:

- **Right to livelihood (Olga Tellis v. Bombay Municipal Corporation)**
- **Right against bonded and forced labour (Bandua Mukti Morcha case)**
- **Right to food (PUCL v. Union of India)**
- **Rights of rape survivors (Delhi Domestic Working Women's Forum v. UOI)**
- **Rights of survivors of child sexual abuse (Sakshi v. UOI and ors)**

What is the procedure when a petition is filed?

When a petition is filed, the High Court and the Supreme Court will listen to both parties and if they find that the government has indeed violated the fundamental rights of an individual, the Court will order the government to do something about the violation – to correct it. This order is called a writ. If after hearing the parties, the Court comes to the conclusion that the Government has not violated fundamental rights, it will dismiss the petition.

There are different kinds of writs that you can request from the Supreme Court or the High Courts.

1. Habeas Corpus

This means, 'produce the body'. Through this writ the Court asks that a person be produced before the Court and explain why he was kept in illegal detention or is missing.

Example:

If a person is arrested by the Police and not produced before the Magistrate within 24 hours, a writ of Habeas Corpus will lie against the Police. A writ of Habeas Corpus can also lie if the detained person is being tortured in Police custody or if a prisoner is being abused in the jail.

2. Mandamus

This is an order which a Court can issue to any public or Governmental authority to do a specific act in order to protect a person's fundamental rights or not to do something which could take away a person's fundamental rights.

Example:

The Supreme Court issued a writ of Mandamus to the Government asking it to frame a law to protect women against sexual harassment in their workplace. A social worker working in an organisation called Vishaka in Rajasthan was sexually assaulted by some men during the course of her work with women in Rajasthan. On behalf of her, the organisation filed a writ petition under Article 32 asking the government to protect women. The Supreme Court ordered the Government through the writ of Mandamus to frame laws on sexual harassment as soon as possible and issued guidelines to be followed by both public and private organisations to protect women from sexual harassment.

3. Quo Warranto

This is an order asking someone to show that he has a right to be in a high public position. By this writ we can ensure that no one takes up a public office without being legally entitled to it.

4. Certiorari

This order is issued to lower Courts to negate decisions which are taken in excess of their authority and which affect a person's fundamental rights.

5. Prohibition

This order is issued to stop any lower Court from taking up a case which it has no power to take up and which affects somebody's fundamental rights.

It is important to note however that when you ask the Court to protect your fundamental rights, you do not have to ask the Court to issue any particular writ. It is enough if you ask that your fundamental rights be protected. The Court will then issue directions to the State.

Finally, it is important to note that it is possible for monetary compensation to be claimed for violation of fundamental rights under certain circumstances.

Example:

Suman Behra, a 22-year-old youth was taken from his home by a Police officer to examine him in a case of theft. The next day his body bearing multiple injuries was found at the railway track nearby. The Police said that Suman was run over by the train while escaping from Police custody. Suman's mother Nilabati Behra said that the Police had killed her son. She wrote a letter to the Supreme Court seeking compensation for the death of her son. The Court treated her letter as a writ petition and appointed a commission to find out the truth. The commission, after making all the enquiries found out that the youth was killed by the Police. Nilabati Behra was awarded monetary compensation for the death of her son. The Supreme Court said that if an individual's fundamental rights are violated by the State then the State has to pay monetary compensation to the victim or his/her family.¹⁵

Rights of women in the Indian Constitution

The Indian Constitution says that there should be equality before the law and equal protection of the Law. The Constitution also recognizes that there is a need to carve out certain special rights to certain classes of people, like the Scheduled Castes, the Scheduled Tribes, women and children. Listed below are the specific mentions that have been made in the Constitution so as to provide women with equal opportunity in all areas:

- **Equality before law - Article 14.**
- **No discrimination by the State on grounds of religion, race, caste, sex and place of birth or any of it - Article 15(1).**
- **Special provisions to be made by the State in favour of women and children - Article 15(3).**
- **Equality of opportunity for all citizens in matters related to employment or appointment to any office under the State - Article 16.**
- **Securing for men and women equally the right to an adequate means of livelihood - Article 39(a).**
- **Equal pay for equal work for men and women - Article 39(d).**
- **Securing just and human conditions of work and maternity relief - Article 42.**
- **To promote harmony and renounce practices derogatory to the dignity of women - Article 51A(e).**

¹⁵ *Nilabati Behra v. State of Orissa, AIR 1993 SC 1960.*

Directive Principles of State Policy

What are Directive Principles of State Policy?

The Directive Principles aim at establishing economic and social democracy and it is the duty of the State to follow these principles when making laws.

How are the Directive Principles of State Policy different from the Fundamental Rights (FR)?

The Fundamental Rights act as limitations to State action, i.e. they tell the State what it cannot do to citizens or to individuals in some cases. Whereas the Directive Principles tell the Government what needs to be kept in mind to ensure that individuals enjoy their Fundamental Rights.

The Directive Principles are not enforceable in a Court of law. It means that a citizen cannot approach the Court in case one of the Directive Principles mentioned in the Constitution has not been fulfilled. The Court cannot declare any law void on the grounds that it goes against Directive Principles, nor can the Courts compel the State to carry out the Directive Principles, as they are based on the concept of a welfare state and thus, only if the economic resources of the State allow it can the State carry out the duties laid out in them. The Directive Principles are in the nature of guidelines to the State in formulating policies and laws.

In case of a conflict between Fundamental Rights and Directive Principles, Fundamental Rights will prevail.

What are the Directive Principles of State Policy under the Constitution?

The Indian Constitution lays down that it is the duty of the State to secure:

- **Adequate livelihood to each citizen, both men and women, equally.**
- **Ownership and control of the material resources of the community are distributed to best sub-serve the common good.**
- **The operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.**
- **Equal pay for equal work for both men and women.**
- **Protection of children against exploitation and abandonment and to ensure that they grow as healthy individuals. Also to ensure that the health and strength of workers, both men and women, are not abused.**
- **Free legal aid to citizens through legislations to ensure that they are not denied justice due to economic reasons or other disabilities - Article 39A.**
- **Support village panchayats and enable them to function as units of self-governance - Article 40.**
- **Make effective provisions for securing the right to work, to education and public assistance in cases of unemployment, old age, sickness and disablement and in other cases of underserved want - Article 41.**
- **Secure just and humane conditions of work and maternity relief - Article 42.**
- **Ensure to all workers a living wage and a decent standard of living and full employment of leisure and social and cultural opportunities - Article 43.**

- **Free and compulsory education for all children until they complete the age of fourteen - Article 45.**
- **Promote educational and economic interests of SC, ST and protect them from social injustice and all forms of exploitation - Article 46.**
- **Raise the level of nutrition and standard of living - Article 47.**
- **Protect and improve the environment and safeguard the forests and wildlife of the country - Article 48 A.**
- **Promote international peace and security, maintain good relations with other countries and foster respect for international law and treaty obligations - Article 51.**

Legal Aid and Legal Services Authority

Objectives

- **To understand the concept of legal aid and who is entitled to it.**

Introduction

While the Constitution recognizes fundamental rights of citizens, there is also recognition that in order for these rights to be realized it is the duty of the State to create systems which enable citizens to access justice. It is also a fundamental right of every citizen to enforce their rights and seek remedies. In order to make this right a reality it is the duty of the State to provide legal aid to its citizens who are unable to access the legal system for protection of their rights.

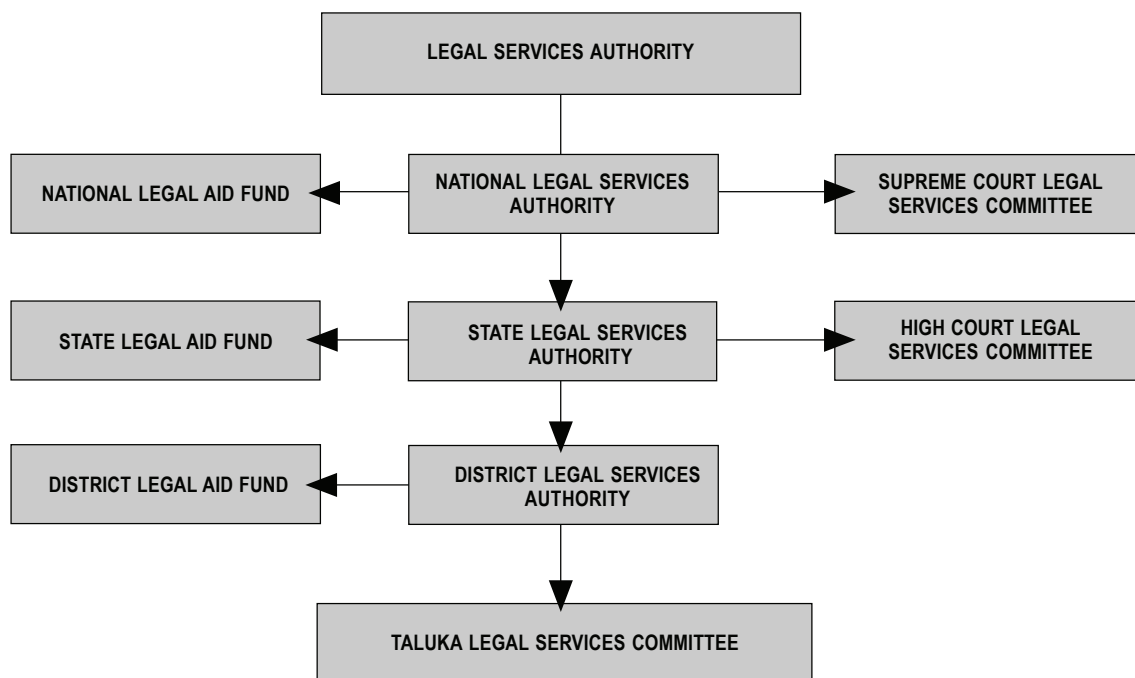
Article 39A (Directive Principles of State Policy in part IV) of the Constitution of India¹⁶ is unequivocal about the State's responsibility of creating a system of free legal aid so that economic or social or any other disability is not a barrier for a person to access law and judicial mechanisms. Upholding this spirit the Legal Services Authorities Act, 1987 was passed. The Act envisages a nation wide system of State-led legal service provision.

¹⁶ Article 39A of the Constitution of India is one of the Directive Principles enumerated under Part IV. Directive Principles cannot be enforced in the Court of law. However, they have to be taken into consideration by the government while framing policies. It is only through judicial activism over the last few decades that the Directive Principles have been read into Fundamental Rights. What this means is that while understanding the ambit of a particular Fundamental Right, the Courts have applied the spirit of the Directive Principles in ensuring protection to the rights of the individual.

Legal Services Authority

The Legal Services Authorities Act, 1987 has set up a decentralised system of legal aid in India. This means that any person who wants to avail her/himself of the services of the Authority has to approach the Legal Services Authority (LSA) in her/his own taluka or district.

The Legal Services Authority is established by the government at the central, state, district and taluka levels. At the central level is the National Legal Services Authority that decides on national level policies and programmes. Each state has a State Legal Services Authority that implements the national policies and also designs programmes for the state and establishes, supervises and monitors district and taluka level legal service committees. A fund is set up at the district, state and central levels to ensure that the authority has the necessary finances to carry out the programmes.



Functions of the Legal Services Authority

- **Legal representation in Courts for persons who are eligible for legal aid under the law.**
- **Legal literacy: Conducting regular legal education programmes on laws in the districts and talukas.**
- **Mediation, negotiation and conciliation: Any individual who does not have enough money to go through the legal processes of the formal justice system can approach the Legal Services Authority where the lawyers in the Legal Services Authority could assist in settling disputes through negotiations.**
- **Organising Lok Adalats: Lok Adalats are meant to make justice more expeditious and less expensive than formal Courts. By creating an opportunity to resolve cases through the Lok Adalats, it has been possible to decrease the overall caseload of the Courts. Lok Adalats can be set up as the need arises either at the taluka or the district level.¹⁷**

How does the Legal Services Authority perform its functions?

The responsibility of administering and monitoring the work of the Legal Services Authority is that of the judiciary. At the national level the Chair of the Legal Services Authority will be a Supreme Court Judge. At the state level it will be the responsibility of a High Court Judge and at the district level it will be the responsibility of a District Judge. In addition to the chairperson, there will be other functionaries such as a Member Secretary. In order to be easily accessible to the public the offices of the Legal Services Authority are in the Court premises. Any information at the local level can be obtained by contacting the Member Secretary or the District Judge.

¹⁷ Section 19, *Legal Services Authorities Act, 1987*.

Who is eligible for legal aid?

The following persons are eligible for legal aid under the law:

- **Person belonging to Scheduled Caste or Scheduled Tribe**
- **A trafficked person or a beggar**
- **A woman**
- **A child**
- **A person with disability**
- **A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster**
- **An industrial workman**
- **A person in custody which includes a person in custody under ITPA, 1956, Juvenile Justice Act, 1986 or Mental Health Act, 1987**
- **A person earning less than Rs. 12,000 annually if the case is before the Supreme Court and less than Rs. 9,000 annually if the case is before any other Court**

What are Lok Adalats?

In order to ensure speedy justice and to reduce the backlog of cases in regular Courts the system of Lok Adalat was developed. The Legal Services Authority has the power to set up a Lok Adalat with a sitting Judge of the District Court or the High Court as the presiding officer to decide on cases. The following kinds of cases can be taken to the Lok Adalat:

- **Property disputes**
- **Matrimonial disputes**
- **Divorce**
- **Maintenance**
- **Judicial separation**
- **Insurance claims**
- **Other civil disputes (eg. motor vehicles accident cases, debt recovery, etc.)**
- **Compoundable criminal cases (non-compoundable criminal cases cannot be taken up at the Lok Adalat)**

How does the Lok Adalat function?

Circumstances under which a case may be heard by the Lok Adalat:

A case can be heard by the Lok Adalat under the following circumstances.¹⁸ When a particular case is already before a Civil Court, that case can be transferred to be heard by the Lok Adalat:

- **If the parties agree to it; or**
- **One of the parties makes an application to the Court for referring the case to the Lok Adalat for settlement, and if such Court is prima facie satisfied that there are chances of such settlement; or**
- **The Court itself refers the matter to the Lok Adalat.**

¹⁸ Section 20, Legal Services Authorities Act, 1987.

Before the Court decides to transfer the case to the Lok Adalat, it should give a reasonable opportunity to both parties to present their case either for or against such a decision. Once the case is transferred to the Lok Adalat the presiding Judge will hear both parties and try to mediate a settlement. If the parties agree to a compromise or a settlement, the Lok Adalat proceeds to give a decision based on the settlement agreed between the parties. This decision is called an award.

What happens if the matter is transferred to the Lok Adalat, but the parties do not arrive at a settlement?

If the parties are unable reach a compromise before the Lok Adalat, the parties will have to go back to regular Court to seek a remedy. The Court will then proceed to deal with the case from the stage which was reached before such reference was made to the Lok Adalat.

What is the status of the decision/award of the Lok Adalat?

- Every award of the Lok Adalat is considered to be a decree of a civil Court. Thus, once a settlement is reached between the parties, the Lok Adalat proceeds to refund the Court fee that was initially exempted.¹⁹
- Every award made by the Lok Adalat is final and binding on all parties to the dispute and no appeal can lie to any Court against the award. This decree gives statutory backing to the finality of decisions made by the Lok Adalats.

Important things to remember about accessing the Legal Services Authority

- The service of lawyers appointed from the Legal Services Authority is free for the client. The lawyer gets a standard fee from the Legal Service Authority for taking up a case. In case a lawyer asks for a fee from the client, this must be brought to the notice of the concerned authorities (usually the District Judge).
- Court related expenses such as Court fees are exempted in a legal aid case.
- It is important to know that due to corruption in the system, sometimes the client will be expected by the lawyers to:
 - Bribe the bench clerk to ensure that the Judge hears his/her case sooner than later.
 - Pay a process fee – a fee charged on one party to issue summons or notice on the other. This fee depends on each case and there is no standard fee.
 - Bear the cost of getting documents typed or photocopied. Usually the client is expected to pay for these expenses.
 - Pay a fee to get certified copies of orders passed during proceedings. One cannot get certified copies unless one makes an application and pays a fee for this purpose.
- The above payments must not be mistaken for Court fees; these are not legal payments.
- If the lawyer appointed to a case by the Legal Services Authority does not perform or is not paying attention to the case, this must be brought to the notice of the Authority and one can ask for a change of lawyer.

¹⁹ Section 21, Legal Services Authorities Act, 1987.

National Institutions for the protection and promotion of Human Rights

In India, several legislations have been passed establishing Human Rights institutions. The Protection of Human Rights Act, 1993 established the National Human Rights Commission and State Human Rights Commissions. Important specialised institutions to ensure protection and promotion of the rights of specific groups such as women, minorities and other categories have also been established through the enactment of specific legislations. Thus, the National Commission for Women, the National Commission for Minorities and the National Commission for the Protection of Scheduled Castes and Scheduled Tribes have been established under various Acts such as the National Commission for Women Act, 1990, the National Commission for Minorities Act, 1992 and National Commission for Scheduled Castes and Scheduled Tribes, under Article 338 of the Constitution of India respectively. In this section the National Human Rights Commission and the National Commission for Women are discussed.

The origin of National Institutions for the protection of Human Rights can be traced to the United Nations Organisation. In order to carry out its mandate, innumerable treaties and conventions have been entered into between countries laying down common standards that countries must follow in their relations with other nations and with individuals within their national boundaries. However, in order to ensure compliance with these Human Rights standards, National Institutions were established within countries throughout the 1980s.²⁰ In October 1991, a workshop was organised in Paris where principles on the working of national institutions were adopted and these are known as the Paris Principles.²¹

Salient features of Human Rights institutions

- **They are administrative in nature. They are neither judicial nor law-making.**
- **As a rule, they have an advisory authority at the national and/or international level. This role may be discharged in a general way, through opinions and recommendations or through the consideration and resolution of complaints submitted by an individual or groups.**
- **They may either be established through the Constitution or through a legislative enactment.**
- **While many national institutions are attached, in some way or another, to the executive branch of government, the actual level of independence which they enjoy will depend on a number of factors including membership and the manner in which they operate.**

²⁰ <http://193.194.138.190/html/menu6/2/fs19.htm>
(accessed 13 July 2006).

²¹ *The Paris principles lay down the overarching functions of the Human Rights institutions. At the October, 1991 workshop, the participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national Human Rights instruments. These recommendations were endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54).*

The National Human Rights Commission in India

The National Human Rights Commission (NHRC) was established under the Protection of Human Rights Act, 1993 which also provides for setting up of Human Rights Commissions in the States and Union Territories.

Functions of the Commission

- **The National Human Rights Commission and the State Commissions can inquire into complaints of Human Rights violations from individuals**

affected or any person on their behalf. The Human Rights Commissions also have the power to take suo moto action (take up a matter on its own without receiving a complaint) and inquire into reports of violation of Human Rights. Any person who is aware of a Human Rights violation can make a complaint to a Human Rights Commission. If the local Police and authorities do not respond to a complaint of a Human Rights violation, complaints can be made to the Human Rights Commission.

- **The Human Rights Commission functions like a Court²² when inquiring into a complaint. In course of this function, it can investigate²³ the matter with the help of the Police or investigating agencies such as the Central Bureau of Investigation and take steps such as:**
 - Initiate proceedings against the concerned government official in case of violation of Human Rights;²⁴
 - Approach the High Court or the Supreme Court for directions or writs in the matter;²⁵
 - Recommend to the government that it grant interim relief until the matter is decided finally.²⁶
- **The National Human Rights Commission can also:**
 - Intervene in any proceeding involving allegation of Human Rights violation pending before a Court with the approval of such Court;
 - Review the Constitution or any other law in force for the protection of Human Rights and make suitable recommendations;
 - Visit jail or any other institution under the control of the state government where people are detained or lodged for the purposes of treatment, reformation or protection and recommend changes in its functioning if necessary;
 - Design and implement programmes on Human Rights education in educational institutions and utilise the media and publications in providing awareness and safeguards on Human Rights;
 - Undertake and promote research in the field of Human Rights;
 - Make recommendations for the effective implementation of treaties and other international instruments on Human Rights;
 - Review the factors, including acts of terrorism that inhibit the enjoyment of Human Rights and recommend appropriate remedial measures;
 - Encourage the efforts of non-governmental organisations and institutions working in the field of Human Rights.

²² Section 13(4), Protection of Human Rights Act (PHRA), 1993. Section 13 gives the Commission certain powers related to inquiry.

²³ Section 14, PHRA gives the Commission powers of investigation.

²⁴ Section 18, PHRA enumerates the steps the Commission can take after completing its inquiry and investigation. Section 18(1) PHRA gives the Commission the power to recommend the concerned government department to initiate proceedings against the government official.

²⁵ Section 18(2) PHRA.

²⁶ Section 18(3) PHRA.

Other activities of the Human Rights Commission that enable it to perform its functions effectively

- **The Commission acts as an oversight body in ensuring that the government does not violate human rights. The Supreme Court while deciding a case may direct the NHRC to oversee that a particular direction issued against the government is actually implemented.**
- **Special rapporteurs appointed by the Commission carry out investigations to understand the ground realities of human rights violations and document the findings that feed into research and recommendations to the government either to modify legislations or schemes to make them more effective.**
- **It follows up on complaints received and directs the concerned government or authority to initiate legal action against the public**

servant. If no action has been taken by the government concerned, the Commission has the power to take up the matter to the High Court or Supreme Court.

- The Commission can also decide to ask the government concerned to pay an interim compensation to the person whose rights have been violated until the matter is finally decided.
- The Human Rights Commission thus acts as a pressure group on the government in matters of Human Rights. There are numerous instances where the Commission has been approached by civil society groups to bring a Human Rights issue to the notice of the government.
- The Commission is mandated to undertake research in the field of Human Rights. Its research is geared towards not only ascertaining ground reality and building data-bases on issues but also using it practically at the ground level. The Commission also sponsors research projects by way of grants on certain criteria. The website of the NHRC has useful information on the on-going projects on several aspects of Human Rights.²⁷
- Human Rights literacy is among other important activities of the Commission. It conducts regular training programmes for government authorities on Human Rights issues. Several publications have been developed by the Commission in English and regional languages such as Hindi that not only give an introduction to several Human Rights issues but also aid in carrying out training. An internship programme offers a good introduction for students of law and social sciences to the area of Human Rights.

The National Commission for Women

The National Commission for Women is one of the national institutions for the protection and promotion of rights of women. It was established in 1992 under the National Commission for Women Act, 1990 with the mandate to redress the grievances of women and make effective intervention on policy matters affecting women and their rights. In addition to the National Commission for Women, several states have set up State Commissions for Women with the same mandate at the state level.

What are the functions of the Commission?

The Commission takes a multi-pronged approach in its work to promote and protect the rights of women in the country. Section 10 of the Act enumerates the broad ways in which it should function to deal with women's rights issues. These functions can be categorised into the following 5 main functions:

- **Settlement of disputes**
- **Campaigns on women's rights issues**
- **Legal reform**
- **Legal education**
- **Research and networking**

²⁷ <http://www.nhrc.nic.in/ResearchStudies&Project.htm>
(accessed on 17 July 2006).

What structures are in place in the Commission in order to carry out these functions?

For the efficient administration of the work of the Commission, it has been divided into different Cells, with each Cell carrying out a specific task. Thus the Commission works through:

- **The Complaints and Counselling Cell**
- **The Legal Cell**
- **Research and Studies Cell**
- **Public Relations Cell**

Functions of the Commission

Settlement of disputes: This can be done in two ways:

1. Complaints and Counselling Cell

The Complaints and Counselling Cell of the Women's Commission deals with complaints of domestic violence, sexual harassment, dowry, desertion, bigamy, rape, etc. In addition, complaints against authorities such as the Police for refusal to register a FIR, and other authorities for not responding to complaints and addressing issues of violation of women's rights can be made to the Women's Commission at the central and the state level.

Complaint procedure:

- **Complaints can be made either orally or in a written format or the Commission may decide to take up a matter suo moto.**
- **A complaint can also be made online by logging on to the Commission's website.**
- **A complaint should be made with details of the following:**
 - Name and address of the complainant, the victim and the accused
 - Nature of the complaint²⁸
 - Date of incident
 - If the complaint is against an NRI (Non Resident Indian)
 - The complaint in detail

What will be the response of the Commission to complaints received? The nature of response of the Women's Commission (National or State) would depend on the kind of complaint. The Women's Commission will take the following action depending on the case:

- **Police investigations are monitored and expedited;**
- **For family matters, the Commission has counsellors who deal with matrimonial disputes;**
- **The matter is brought to the notice of state authorities so as to take the required action;**
- **For grave offences, enquiry committees are set up by the Commission. These committees conduct an investigation on the spot and send recommendations to the respective departments for them to take action.**

²⁸ The following categories are provided from which one can be chosen: Bigamy, Custody of Children, Desertion, Divorce cases, Dowry Death, Dowry Harassment, Female Infanticide, Harassment, Harassment at Workplace, Kidnapping, Maintenance cases, Matrimonial Disputes, Miscellaneous cases, Molestation, Murder, Police Apathy, Police Harassment, Property (widows, parents, streedhan), Rape, Sexual Harassment, Sexual Harassment at Workplace, Shelter.

2. Parivarik Mahila Lok Adalat

In order to enable access to justice to women and ensure speedy disposal of cases the National Commission for Women has evolved an alternative justice delivery system called the Parivarik Mahila Lok Adalat. The essential feature of the Parivarik Mahila Lok Adalat is to provide for out-of-Court settlement of disputes brought to Court by women. Under the scheme, NGOs in association with the District Legal Aid Authority can organise a Parivarik Mahila Lok Adalat with the Commission's financial assistance.

Campaigning on women's rights issues: The National Commission for Women and the State Commissions routinely undertake campaigns on several women's rights issues such as child marriage, female foeticide, violence against women etc.

Legal Reform: The Legal Cell of the National Commission for Women performs the function of reviewing and investigating how legislations pertaining to women's rights are implemented in reality and make recommendations for their effective implementation to the central government. In addition, the Commission also makes suggestions for new legislations on specific women's rights issues. So far, the Commission has, among others, reviewed legislations such as the Dowry Prohibition Act, the Pre-Conception and Pre-Natal Diagnostic Testing Act, the Indian Penal Code and others, but is also helping the central and state governments to draft rules and legislations in consultation with non-governmental organisations, academicians and lawyers.

Legal Education: The Commission regularly sponsors legal awareness programmes.

Research and networking: The Women's Commissions at both the central as well as the state levels organise workshops and consultations and undertake research projects on various women's rights issues.

How can local grassroots organisations and individuals avail themselves of the services of the Commission?

There are several ways in which the National Commission for Women as well as the State Commissions for Women can make effective interventions in securing access to justice for women. Some of the practical ways in which organisations, individuals and lawyers may make use of the Commission are the following:

- **Seek the help of the State Commission in order to expedite the investigation of a case at the taluka or the district level. The State Commission on receiving a complaint contacts the concerned government department to ensure that the legal processes are being followed and the matter is attended to within a reasonable time frame under the law.**
- **The Parivarik Mahila Lok Adalat is a forum to resolve disputes at the community (village) or the taluka level without taking recourse to the formal justice mechanisms such as Courts. There is a procedure to be followed in order for this Adalat to be sponsored by the Commission. NGOs have the primary responsibility of collating information on the number of cases that can be settled under the Parivarik Mahila Lok Adalat.**
- **Legal education programmes can be organised in your community with the help of the National Commission.**

International Law

The United Nations Charter marked the birth of the United Nations Organisation, the world body that has striven to ensure that countries work with each other through peaceful means and protect the Human Rights of individuals. The purpose of the UN Charter reflected the political situation of the times. The world had just witnessed the Second World War and innumerable Human Rights violations. The UN therefore aimed to develop friendly relations between nations, take collective measures to prevent situations of war and cooperate on an international level to resolve any disputes that may arise in the future. The underlying core principle of the UN was that countries would solve disputes by peaceful means and not resort to the use of force against each other. Thus, with the birth of the United Nations Organisation, mechanisms were put in place through agencies of the UN and the International Court of Justice to enforce international law.

International Human Rights law

International Human Rights law is one part of the vast body of international law. International Human Rights jurisprudence evolved like other sub-systems of international law as a reaction to the political, social and economic events in the national and international sphere. The origin of the international Human Rights law in the modern era is considered to have begun with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. This joint Declaration by all the nations together came just after the Second World War. Countries pledged to bind themselves to ensure basic Human Rights to every individual.

In the course of the six decades since the adoption of the UDHR, innumerable treaties were signed between countries,²⁹ beginning with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These two instruments along with the UN Charter are called the International Bill of Rights - important documents that enumerate the Fundamental Rights of all people and set standards that States are obligated to incorporate in their national systems.

These conventions were followed in the 1980s by the adoption of a Convention on the Rights of the Child,³⁰ setting up a clear framework of entitlements of children and the State's obligation to ensure that these pledges are translated into national legislations in the domestic sphere and the Convention Against Torture,³¹ that put the onus on States to ensure that their national systems put in place safeguards in the enforcement mechanisms that outlawed torture and third degree measures against people.

²⁹ *The reference in this section is only to International Human Rights law. All other treaties signed before or during the period discussed here are not mentioned as it is not relevant to the discussion.*

³⁰ *Adopted in 1989.*

³¹ *The Convention Against Torture entered into force in 1987.*

³² <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed 1 August 2006). This brief overview has been taken entirely from the United Nations website.

³³ Zwingel, Susanne. The Birth of a Gender Vision. 1 November 2005. Open Democracy (http://www.opendemocracy.net/democracy-resolution_1325/cedaw_2983.jsp).

The Convention on the Elimination of All Forms of Discrimination Against Women³²

The women's question gained momentum at the international level only in the 1960s.³³ The decades of the 70s and 80s also saw the emergence of the women's movement in India. Several strands of thought and activism merged to create the contemporary women's movement in India. Opinion on these issues built up gradually during the Emergency period, and in

1977, when the Emergency was lifted, women began to organise themselves into small feminist groups. They represented different sections of the society - left leaning political groupings in academia, students' unions, trade unions, peasant groups and ordinary middle class women.³⁴

The brief view of the contemporary women's movement in India is noted here to give a perspective of the evolution of the women's movement in India at the time when efforts at the international level to secure women's rights were also being made. These efforts at the regional level also had a role to play at the international level.

The collective efforts of women's movements at the regional and international level led to the adoption and signing of the Convention on the Elimination of All Forms of Discrimination Against Women by the UN General Assembly in 1979. This Convention – popularly called the CEDAW – is the first international human rights document that explicitly defines all forms of discrimination against women as a violation of women's fundamental human rights. It is called the International Bill of Rights for Women because of the way in which it recognizes and approaches the women's question. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

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

By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- **to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;**
- **to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and**
- **to ensure elimination of all acts of discrimination against women by persons, organisations or enterprises.**

The Convention provides the basis for realising equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life - including the right to vote and to stand for election - as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

The Convention is the only Human Rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to

³⁴ *The movement energised older associations such as the Young Women's Christian Association, the All India Women's Conference and the National Federation of Indian Women and in turn drew strength from their experience in organising. The emergence of the magazine Manushi and other feminist publications signified this ferment in women's minds.*
Excerpts from <http://www.infochangeindia.org/Women/bp.jsp> last visited on January 2, 2006 - Sujatha Madhok-Stories of Change.

comply with their treaty obligations. The Convention, which entered into force on September 3, 1981, has, as of March 2004, 176 States parties. India ratified the Convention in June 1993.

What is the relevance of International Law in the domestic sphere?

The primary question that needs to be asked is the way in which international law is related to our own domestic legal system. The link between our domestic laws and international law is afforded by the Constitution of India. This link is enumerated under Article 51 of the Constitution.

CONSTITUTION OF INDIA

ARTICLE 51: PROMOTION OF INTERNATIONAL PEACE AND SECURITY

The State shall endeavour to:

1. Promote international peace and security;
2. Maintain just and honourable relations between nations;
3. Foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration.

Article 51 states that the State should take measures to respect international law and treaty obligations in its dealings with people and use arbitration as a means of resolving any disputes that may arise in its relations with other countries. The law on this matter is as follows:

1. **In order for an international treaty to be binding on Municipal Courts, the Parliament has to pass a legislation bringing that treaty into force if the international treaty affects the justiciable rights of a citizen of India.³⁵**
2. **However, there are certain circumstances where the Government of India does not have to pass legislations to effectuate an international agreement in the domestic sphere.**
 - a. If there are no national laws that contradict the international principles, then domestic Courts have to respect international law in the course of deciding a case.³⁶
 - b. The provisions of international law conventions/covenants which elucidate and effectuate the Fundamental Rights can be relied upon by the Courts in India as their facets and be enforced as such.

How has international law been adopted in the domestic framework in India vis-à-vis women's rights?

There are several cases where Courts in India have made reference to International Human Rights law in securing rights, in the context of women's rights. A prominent case in the context of women's rights which led to the formulation of the guidelines on Sexual Harrassment at the workplace is *Vishaka v. State of Rajasthan*.³⁷ A writ petition was filed by several social activists and NGOs following the brutal gang rape of a female social worker called Bhanwari Devi in a village in Rajasthan by Thakurs as punishment for having stopped a child marriage in their family. While a criminal case was filed independently of this case before the Supreme Court, the writ petition argued that this incident amounts to sexual harassment of women at the workplace.

³⁵ *Maganbhai v. Union of India*, AIR 1969 SC 783 (789-807).

³⁶ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011, *Geeta Hariharan v. Reserve Bank of India* (1992) 2 SCC 228 (para 14).

³⁷ AIR 1997 SC 3011.

The petition argued that since there was no law on sexual harassment at the workplace the Supreme Court needed to lay down guidelines in this regard. The petition pointed out that India had ratified CEDAW and that Courts in India have gone on to use the principles of International Law, such as the Convention on the Elimination of all Forms of Discrimination Against Women, 1979 (CEDAW) when the domestic law has been silent on an issue of protection of rights. The Supreme Court accepted this argument. While doing so, it held that, in the absence of domestic law which could be used to formulate measures to check sexual harassment of women at the workplace, the conventions of International Law could be effectively interpreted and used to guarantee gender equality in consonance with Articles 14, 15, 19(1)(g) and 21 of the Constitution. The usage of the International Law convention does not contradict the articles in the Constitution nor does it contradict any existing law in use, thus in such a scenario, the convention usage becomes justifiable.

The Supreme Court recognized that civil and penal laws in India did not adequately protect women from sexual harassment in workplaces. Therefore, until the Parliament passed such a legislation, the Supreme Court found it necessary to follow guidelines to ensure the prevention of sexual harassment of women. These Guidelines defined sexual harassment at the workplace and laid down duties of employers or those in senior and responsible positions at workplaces and other institutions to prevent sexual harassment and set up mechanisms for the resolution, settlement or prosecution of acts of sexual harassment. The Guidelines form the basis of the Bill to Prevent Sexual Harassment at the Workplace.

notes

THE INDIAN LEGAL SYSTEM: WORKSHOP METHODOLOGY

Origin and Sources of Law, Structure of Governance and the Indian Constitution

Note to the facilitator

Before addressing this module, the facilitator should read the legal information on the Indian Legal System. The facilitator should be familiar with the governance and justice system structures. It should be noted that there may be variations in the structures within the formal justice mechanisms in different regions. The facilitator should be aware of the systems and structures that exist in the place where the workshop is being conducted/where the participants are based.

The session should begin by creating an understanding of the following:

- **What is law?**
- **Why is it important?**
- **What are the sources of law?**

This can be done through the following exercise.

EXERCISE 2.1

Title: What is Law?

Purpose: Creating an understanding of what is law and why it is important

- To be able to identify the sources of law

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask the participants to create three columns in their note pad. In the first column they should write down individually what they did since the morning. Some of the expected responses will be:
 - *Took the bus, bought a ticket and came for the meeting.*
 - *Brushed my teeth.*
 - *Drank tea.*
- *Bought something at a shop.*

- Once the answers have been recorded on the board, ask the participants to write down, in the second column, how they feel the law has governed each of their activities since the morning.
- Once they have written down their responses record them on the whiteboard.
- The responses may be the following:
 - *Bought a ticket to travel since it is against the law to travel without a ticket.*
 - *The toothpaste that was used for brushing my teeth was bought at a shop as it is against the law to steal.*
 - *The tea that was drunk was marketed and made within certain regulations laid down by the law.*
- In the third column ask the participants to write down how the situation they described would be affected if there was no law governing it.
- The facilitator can now begin a discussion. The points of discussion will be the following:
 - *Law is an integral part of our lives and governs everything we do.*
 - *Laws are a set of rules that we follow out of a sense of duty and also the awareness that breaking a law is a crime which is taken seriously.*
 - *Laws are made for the well-being of communities and to ensure that individuals are able to live peacefully within society.*
 - *Would it be possible to live in a lawless society?*
 - *Are there unreasonable laws and unjust laws?*
 - *Who makes laws?*

Note to the facilitator

The facilitator will explain that the laws should not be arbitrary and unjustified. Laws have to be reasonable, just and fair. However, there are some laws that can be made for the benefit of a group of people due to their specific status and needs – and that such special interventions are not arbitrary but empowering to that particular community

and is an attempt to correct historical and systemic discrimination that the community may have faced. Eg., the Constitution of India says that special provisions can be made for Scheduled Castes and Scheduled Tribes due to their backward condition. Similarly, special laws could be made to uphold women's rights as well.

Anti-discrimination laws prohibit the use of invidious distinctions among individuals because of their race, ethnicity, caste or national origin. But such laws alone are often insufficient to equalise opportunities among members of these groups who have suffered historical discrimination. Where certain groups have long been disadvantaged, affirmative action is needed to level the playing field. Affirmative action is designed to eliminate present discrimination, remedy past discrimination, equalise opportunities between groups, and promote diversity.

EXERCISE 2.2

Title: Sources of Law

Purpose: Identifying sources of law

Time: 45 minutes

Materials needed: Chart paper, markers, coloured paper, clay

Steps:

- Participants are divided into three or four groups, depending on the size of the larger group.
- They are asked to identify different sources of law and creatively represent them on the chart paper.
- Participants should have a discussion on what in their opinion are the most significant sources of law.
- The following are the sources of law:
 - *Indian Constitution*
 - *Legislation/Ordinances*
 - *Rules and regulations*
 - *Judicial decisions*
 - *Personal laws - laws based on religion/custom*
 - *International Law*
- Discussion points:
 - *The importance of the Constitution as the fundamental source of law.*

- *Customs and traditions have determined a large part of Indian law and this is reflected in the Personal Laws which govern marriage, divorce and maintenance, custody and guardianship.*
- *Law is ever-changing and evolves all the time. It is a reflection of the society we live in.*
- *International Law is an important source of law as it holds the government responsible to ensure Human Rights standards are met in the country. The government is obligated to meet standards enumerated in international covenants like the Convention on Elimination of all forms of Discrimination Against Women which have been signed and ratified by India.*
- *What is the law making process in India?*
- *What is the structure of the Indian Legal System?*
- The facilitator should use the diagrams given on page 65 on the Indian Judicial System, the structure of the Civil and Criminal Courts to elaborate this discussion point.

Fundamental Rights, Public Interest Litigation and Legal Aid Services

Note to the facilitator

Prepare a note depicting the Fundamental Rights enumerated in the Indian Constitution. List out the reasonable restrictions imposed on the Fundamental Right of freedom of speech and expression.

EXERCISE 2.3

Title: Identifying and Asserting Rights³⁸

Purpose: To understand the concept of Fundamental Rights and its importance in our lives

Time: 120 minutes

Materials needed: Whiteboard and markers

Steps:

- The facilitator begins the exercise by asking the participants, "What are fundamental rights?" The responses should be noted on the whiteboard.

- The facilitator divides participants into two or four groups depending on the number of participants. Each group is to discuss situations when they asserted a certain right and stood up for themselves.
- The group will be asked to pick a situation and enact it.
- Each group will present their act in front of the larger group.
- Discussion points after each act:
 - What were the rights the participants identified and sought to assert?
 - Where did this event occur? The home or the workplace? Is the location important?
 - Why did you assert your rights? What was your driving motivation?
 - Did you make a conscious decision to do so?
 - How did you feel before, during and after?
 - Will there be a difference between a man's experience and a woman's experience or between a man and a person belonging to a marginalised community? If yes, what is the difference and why?
 - Did this experience involve having to reject a traditional and stereotyped role in order to address your needs?
 - Did you receive any encouragement or support for your actions?
 - How did people respond to your action?
 - What were the consequences of your decision?
- At the end of this session the participants will be asked to name one thing that made it possible for them to assert themselves. This could be in terms of education, information, support from family and society, association with Human Rights groups, inspiration from role models, knowledge of rights, amount of self worth, teachers and a feeling of being completely fed up. These pointers will help the participants, but will not limit them.

Note to the facilitator

In gathering the responses of the participants, the facilitator should continuously seek to make linkages between Fundamental Rights. The facilitator will discuss how the actions above support links to basic Human Rights. Eg., a support like information and education will be linked to the right to education. At this stage the facilitator will ask the participants to recall the rights that they had identified and

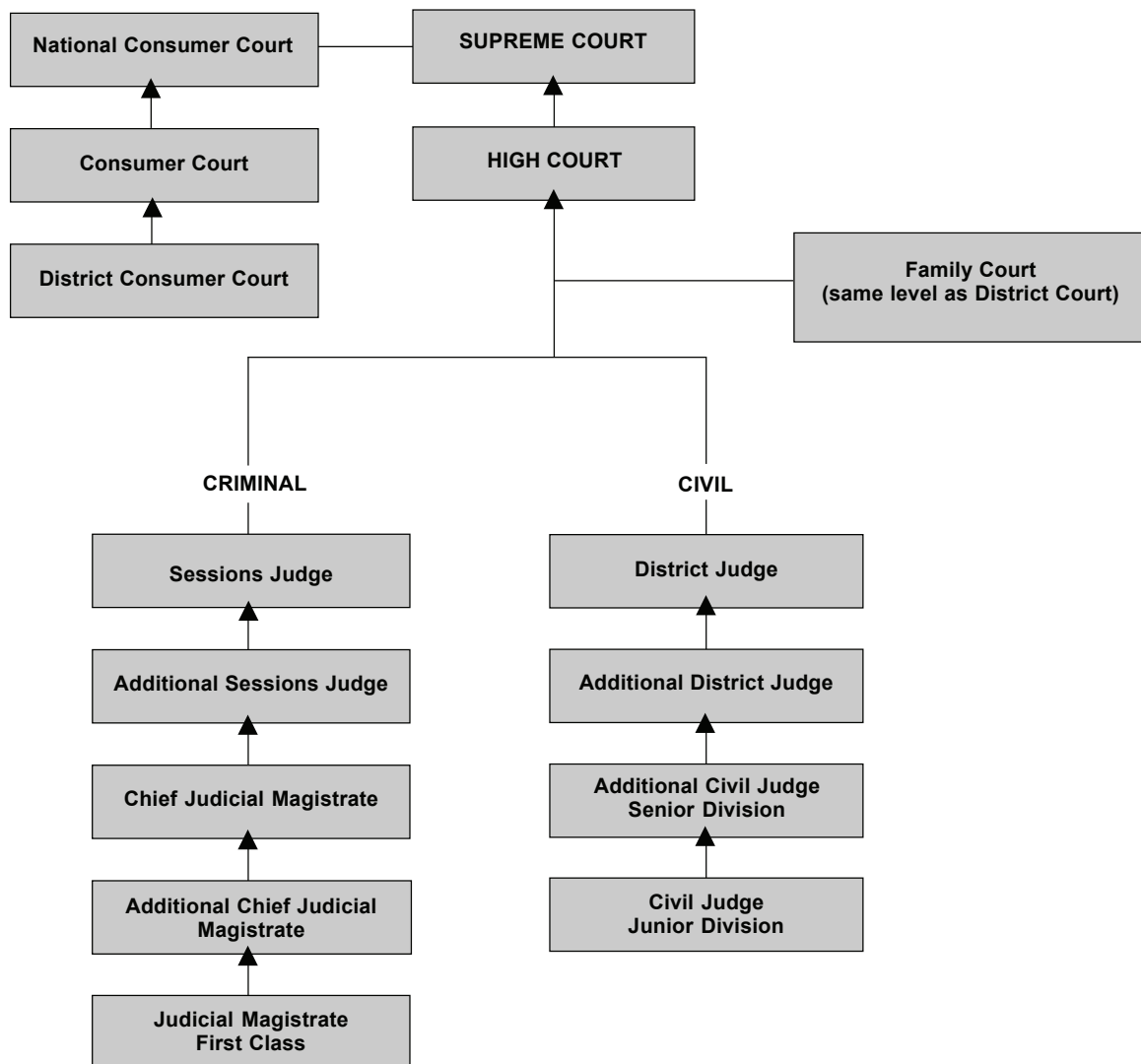
sought to assert in the two/four plays. The rights have already been listed on a flip chart. This will enable the facilitator to link the discussion to basic rights such as Right to Life, Right to Freedom, Right to Freedom from Violence, Right to Work etc. The facilitator will establish the links between Human Rights and Fundamental Rights as guaranteed under the Indian Constitution. The facilitator should use the legal information to clarify and explain each of the Fundamental Rights given in the Constitution. Special focus should be given to rights given to women.

Towards the end of the session the facilitator will do a presentation on the enforceability of Fundamental Rights. The procedure for enforcing a person's Fundamental Rights is to file a writ petition in the High Court or the Supreme Court of India. The petition can be filed either through the aggrieved person himself/herself or through a lawyer. The facilitator should remember that Fundamental Rights can be claimed only against the State. If there is a private party involved they can be included in the petition as a necessary party, but the right is claimed against the State since it is the duty of the State to protect the Fundamental Rights of its citizens.

The facilitator should talk about the concept of legal aid services in India. The Directive Principles of State Policy contained in the Constitution of India provide guidelines for the government while framing laws and policies. Right to legal aid is a constitutional mandate not only under Article 39-A but also under Articles 14 and 21 of the Constitution. Legal assistance to poor or indigent persons seeking justice cannot be denied on the basis of their economic disabilities.

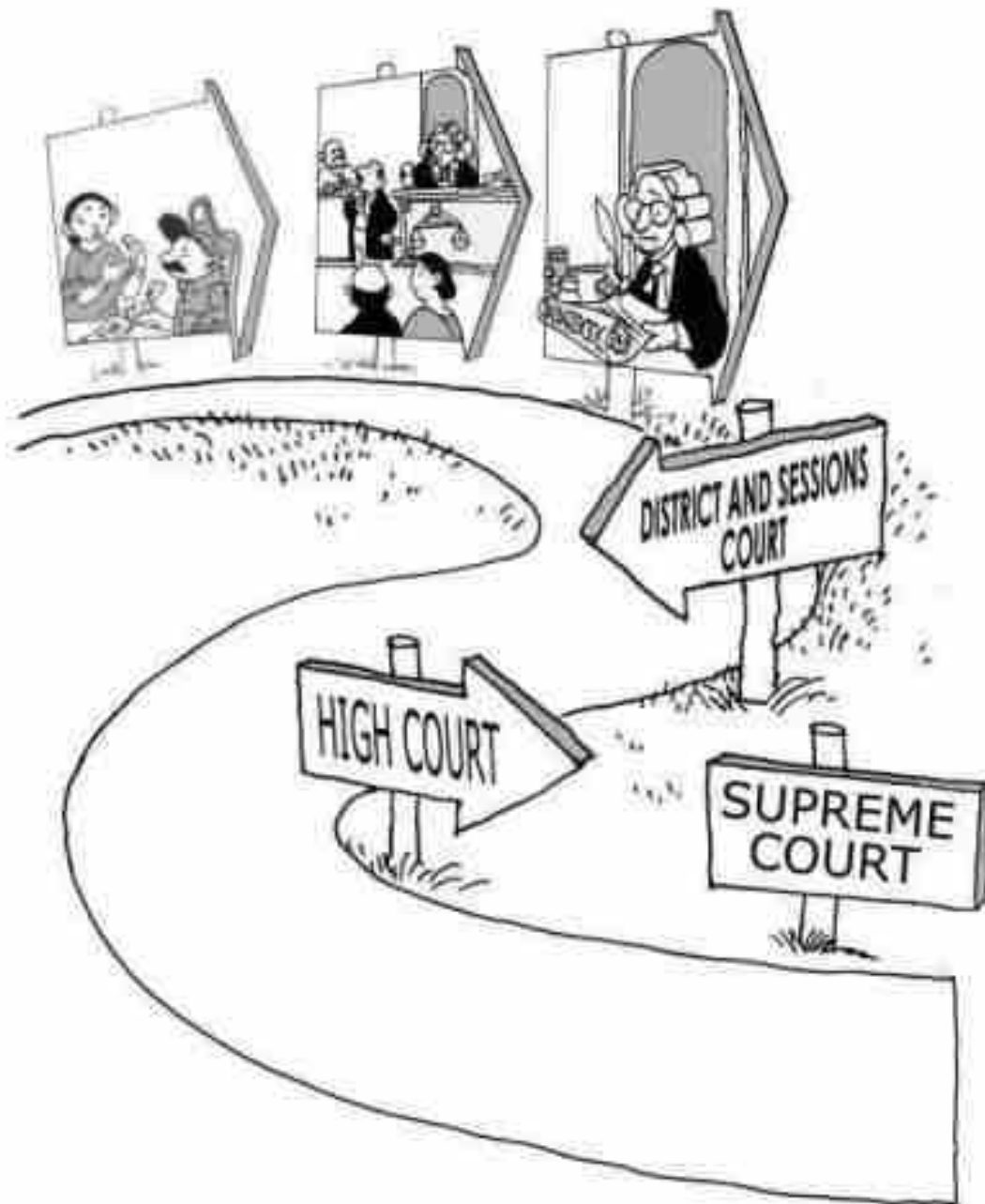
³⁸ Adapted from "Local Action Global Change" 1999 by Julia Mertus with Nancy Flower and Mallika Dutt. Published by UNIFEM and the Centre for Women's Global Leadership.

LEGAL STRUCTURE AND HIERARCHY OF JUDICIARY



3

Role of the Police and the Criminal Justice System



3

Role of the Police and the Criminal Justice System

Objectives

- To enable participants to understand their rights vis-à-vis the Police and the duties of the Police.
- To identify the rights of women vis-à-vis the Police.
- To demystify the criminal justice system and enable the participants to understand Police procedure as well as a criminal trial and the Court process.

Introduction

The Police are often the first point of contact that women have in cases of rights violation. Unfortunately, there is large scale fear and suspicion towards the Police and we often hear of instances of abuse of power by the Police. One way of changing this situation is to ensure that there is enough awareness of citizens' rights vis-à-vis the Police.

This module will help understand the criminal justice system, the rights of citizens, particularly women vis-à-vis the Police, the duties of the Police and the criminal procedure while reporting a crime, and the procedures to be followed in criminal cases in the lower Courts.

Criminal Justice System

Our contact with criminal law is something which cannot be avoided. We are bound to encounter it either as friends, family of the accused or the complainant or as something, which we see in movies, read in newspapers or deal with in Courts or with Police or lawyers. In the course of capacity building of paralegals and lawyers on 'gender and law', Global Rights realised that basic information on such issues was very important for any member of a community. In the narrow spaces in which women can talk about their Human Rights violations and generate discussion about the consequences of those abuses, it is very important to analyse women's Human Rights violations in the legal rights sphere and develop strategies. Hence, it becomes important to understand the concept of a crime and criminal law in general and also specifically in the context of violence against women.

In simple terms a crime is any act which violates criminal law. Any action only becomes a crime because law says it is a crime, eg. if murder or theft were not mentioned as punishable crimes in criminal law, they would not be crimes. It helps us understand what is right and wrong behaviour and this is determined keeping in mind the well-being of society.

Criminal law in India is mainly contained in the **Indian Penal Code, 1860**, (IPC). IPC defines a crime and lays down punishment for the crime.

There are also several other special laws, which deal with specific issues such as Dowry Prohibition Act, The Pre-Conception and Pre-natal Diagnostic Techniques (Prevention of Sex Selective Abortion) Act and much other such legislation.

Supplementing the IPC, there is the **Code of Criminal Procedure, 1973** (CrPC). This law basically lays down the procedure for Police for investigation of crimes and the procedure for Courts in trying cases etc. The CrPC is a very important component of the criminal law.

In addition to IPC and CrPC, the **Indian Evidence Act, 1872** (IEA), is a very important law because it provides what can be considered as evidence to prove a crime and who must prove it. This law helps lawyers in presenting cases and Judges in deciding cases.

The present chapter deals with the composition of the Indian Legal System and how the criminal justice system functions in our country. The chapter will focus on the legal intricacies of the pre-trial and trial procedure in dealing with a criminal case. The information provided in this chapter is not limited to any one type of criminal case and it is important to remember this information while providing legal information and discussing legal interventions, addressing the needs of victims of violence, in all the other chapters in this guide.

Legal System

There are two branches to the Indian legal system - civil and criminal. Criminal law deals with crimes and punishments and civil law deals with all other matters such as rights of people, property, marriage, tax, etc. There are separate Courts to deal with criminal cases and civil matters. Sometimes special Courts are created to deal with special matters like Family Courts, Consumer Courts, Labour Court, Tax Tribunals and Administrative Tribunals to deal with service matters. The structure of the Courts is as shown in the diagram on page 69.

Offences and Crime: Definition and Classification

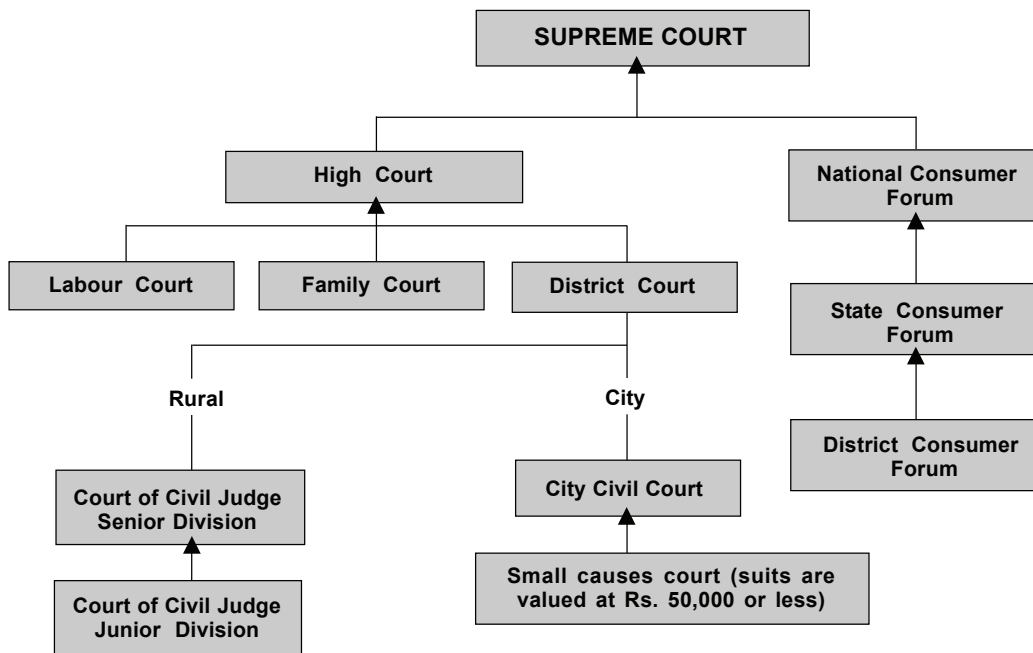
What is an offence?

An offence is anything, which is punishable or in respect of which a complaint may be made under the Indian Penal Code or any special or local law of the country. The offences are codified in the Indian Penal Code, 1860. The procedure for dealing with the criminal offence and the role of the Police with respect to investigation of the criminal offence and the trial of the offences is enumerated in the Code of Criminal Procedure, 1973.

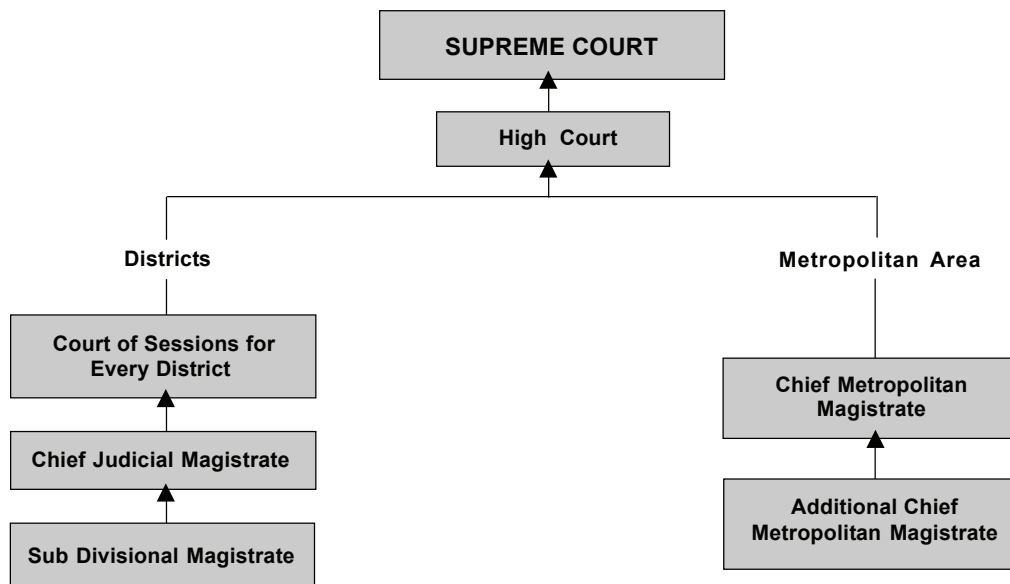
Where are crimes classified as offences?

The offences are classified into three categories in the first Schedule in the Criminal Procedure Code. The categories are cognizable or non-cognizable, bailable or non-bailable and compoundable or non-compoundable.

STRUCTURE OF CIVIL COURTS



STRUCTURE OF CRIMINAL COURTS



Cognizable and non-cognizable offences

What is meant by a cognizable offence?

A cognizable offence is one in which the Police can arrest a person without a warrant merely upon suspicion of having committed a crime. Thus in this case the Police does not require an order by a Magistrate for investigation. Some of the cognizable offences can be murder, theft, rape, domestic violence.

What is a non-cognizable offence?

A non-cognizable offence is one in which the Police officer cannot arrest any person without a warrant. In this case the Police require an order of the Magistrate to conduct investigation. Examples of non-cognizable offence would be committing forgery, causing simple hurt, dishonest misappropriation of movable property and simple cheating.

Bail, Bailable and Non-bailable Offence

What is meant by bail?

In case of bailable offence, bail means that the person has a right to be released at the time when the Police begin investigation of the offence for which she/he has been accused. In case of a non-bailable offence, a person may be released on surety by the Judge. This can happen only when the person arrested applies for bail in a Criminal Court and the Judge may decide to either grant him/her bail or reject his/her bail application. The Judge may decide to grant bail after imposing certain conditions.

What is meant by a bailable offence?

Bailable offence is an offence for which the person, who has been arrested, is entitled to bail as a matter of right. Offences such as causing hurt, confining a person, assault or using criminal force are bailable offences.

What is a non-bailable offence?

A non-bailable offence is an offence for which the person who has been arrested, is not entitled to bail as a matter of right. The person can apply to the Criminal Court for bail and the Judge may grant or refuse bail. An offence such as causing grievous hurt is a non-bailable offence.

Compoundable and Non-compoundable offence

What is a compoundable offence?

A compoundable offence is one where the accused person can compensate or repay the amount of the damage done to the victim once the offence has been proved to be committed. In this case the victim financially compromises or makes a settlement with the accused person. Eg., theft offences are compoundable where the accused person can compensate the complainant.

What is a non-compoundable offence?

A non-compoundable offence is one where the victim cannot be compensated for committing the offence. This happens because the offence committed is serious or grave in nature. Eg., rape and murder are non-compoundable offences.

The Role of the Police: First Information Report, Investigation and Interrogation

If an offence has been or is being committed what can one do?

If an offence has been committed first of all the Police authorities have to be informed. The Police will register a First Information Report (FIR) or a complaint depending upon the nature of the crime. This will be followed by Police investigation of the crime.

What is a non-cognizable report (NCR)?

A non-cognizable report is a report to the Police detailing facts of an offence likely to be committed or has been committed but the person making the NCR does not want the Police to take any immediate action. The information may pertain to petty offences or the loss of any important identity documents. NCR can be made on a plain sheet of paper or filled in a standard NCR form used in some states. If it is made on a plain sheet of paper, the person making the NCR should get a copy of the NCR duly stamped by the Police officer receiving the NCR. Oftentimes NCR is referred to as an information-complaint.

What does the Police do with that information received from the complainant?

The Police has to:

- **Make a Daily Diary (commonly called DD) entry.**
- **Register a First Information Report (commonly called an FIR) in case of a cognizable offence.**
- **Go to the scene of crime.**
- **Collect evidence from the scene of the crime.**
- **Prepare a site plan.**
- **Take along a search warrant.**
- **Conduct a search and seize of certain property at the scene of the crime.**
- **Call upon two independent and respectable inhabitants of society to be witness to the search and of the seizing of the things during search.**

First Information Report (FIR)

What is an FIR?

It means the first information, which is given by any person to the Police regarding an offence which has been committed. Upon the basis of this information, the Police can begin investigation. However it is important to note that an FIR can be registered only in the case of a cognizable offence. It is the duty of the Police to register the FIR and the complainant is entitled to a copy of the FIR registered by the Police.

What is the procedure for registering an FIR?

An FIR can be registered by giving information to the Police which may be written or oral. There is no fixed manner in which the facts are provided. However all the relevant facts such as name of the person making the FIR, address, name of the accused person (if known) or the physical description of the accused person, the time and place of the incident, the manner in which the offence was committed, the eye witness/es to the offence and the possibility of the accused running away to some other place.

What can be done if the Police refuse to register the FIR?

A person can make a complaint to the higher Police officials such as the Superintendent of Police or the Deputy Commissioner of Police. If they also fail to take any action, then a complaint can be made before either the National Human Rights Commission or the State Human Rights Commission. However if still no action is taken, then one can make a private complaint before the area Magistrate. In such a case the Magistrate may call upon the Police authorities regarding the progress made by them on the facts of the case.

Private Complaint

What is a Private Complaint?

A private complaint can be made to the Magistrate by any person if an offence has been committed. The Magistrate shall examine the complainant and the witnesses present on oath. Once the Magistrate is satisfied that an offence has been committed he will send the case for investigation to the Police authorities and the Police is bound to conduct an investigation. Anyone can make a complaint. It is preferable if the complaint is made through a lawyer so as to avoid any critical omissions. This can be done in cognizable or non-cognizable offence.

How does a Magistrate take cognizance of a complaint?

The Magistrate can take cognizance of any offence upon:

- **Receiving a complaint which states that an offence has been committed.**
- **Receiving a Police report of such facts detailing an offence.**
- **Receiving information from any person, not necessarily a Police officer, that an offence has been committed.**

Investigation: Steps taken by the Police after the FIR is registered

What should the Police do after the FIR is registered?

- **Police will conduct the investigation, collect evidence, conduct search and seizure, record statements of the complainant or the witness/es who saw or heard or know about the offence, which is committed. The statement of the witness is called the 161 CrPC statement and the person making the statement is not required to sign it.**
- **Subsequently, the Police will document all the evidence and material against the accused person/s in their inner case diary. The inner case diary becomes a part of the charge sheet and will be filed before the Magistrate.**
- **No women or children can be compelled to go the Police station to record their 161 CrPC statements. The Police are required to record the statements of any male person under the age of fifteen years or women at their places of residence.**

Search and Seizure

What is the prescribed method for conducting search and seizure?

The prescribed method for conducting search and seizure is as follows:

- **The Police officer must carry a search warrant.**
- **Two witnesses are required for conducting search and seizure.**
- **The witnesses should be respectable inhabitants of the locality.**
- **The occupant of the place has a right to be present.**
- **The Police must prepare the seizure-list, which is to be signed by the witnesses. This is also called the *panchnama*. It prevents possible unfair dealings on the part of officers entrusted with search warrants.**

Arrest: Grounds and Procedure

How is an arrest made?

In order to understand the procedure for making an arrest we can have a look at the guidelines laid down by the Supreme Court in the case of *DK Basu v. State of West Bengal*. These guidelines are required to be followed by the Police in making an arrest.

- **Clear identification of the Police officer making the arrest**
The Police officers making the arrest and handling the interrogation of the person arrested should have accurate, visible and clear identification and name tags with their designations. The particulars of all such Police officers who handle interrogation of the person arrested must be recorded in a register.
- **Memo of Arrest**
The Police officers making the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be

either a member of the family of the person arrested or a respectable person of the locality from where the arrest is made. It shall also be counter-signed by the person arrested and shall contain the time and date of arrest.

- **Information to next friend or relative of the person arrested**
A person who has been arrested or detained and is being held in custody in a Police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him/her or having an interest in his/her welfare being informed. This has to be done as soon as possible when the person is arrested and is being detained at the particular place.
- **Information to next friend or relative of the person arrested living outside the district or town**
The Police must notify the time, place of arrest and place of custody of the person arrested, to his/her next friend or relative who lives outside the district or town. This can be done through the Legal Aid Organisation in the District and the Police station of the area within a period of 8 to 12 hours after the arrest.

The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
- **Entry of arrest to be made in the Police records**
An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the Police officials who have custody of the arrestee.
- **Physical examination of the person arrested: Inspection Memo**
The person arrested should, where she/he so requests, be also physically examined at the time of his/her arrest. Any major or minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the person arrested and the Police officer making the arrest. A copy of such inspection memo has to be provided to the person arrested.

The person arrested should be subjected to medical examination every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the concerned state or union territory. The Director, Health Services should prepare such a panel for all tehsils and districts as well.
- **Copies of documents to be given to the person arrested**
Copies of all the documents including the memo of arrest, referred to above, should be given to the person arrested and sent to the Magistrate for his record.
- **Assistance of a lawyer to the person arrested**
The person arrested may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
- **Information about arrest to other district or state Police headquarters**
A Police control room should be provided at all district and state headquarters where information regarding the arrest and the place of custody of the person arrested shall be communicated by the officer making the arrest, within 12 hours of effecting the arrest. At the Police control room it should be displayed on a conspicuous notice board.

Police Custody and Interrogation

What has to be done by the Police after a person is arrested?

The Police has to produce the arrested person before the Magistrate within 24 hours, which will exclude the time taken to travel from the scene of crime to appear before the Magistrate. In the case of a non-bailable offence, if the Magistrate refuses to grant bail, the arrested person is sent to judicial custody or Police custody.

Police custody

What is Police custody?

The person arrested will be kept in the Police station for interrogation and investigation purposes. The person arrested can be kept in Police custody for not more than 14 days from the date when the person has been produced before the Magistrate. After the expiry of the first 14 days, the person arrested will be remanded to judicial custody. Police custody is commonly referred to as PC. During the period of Police custody the person cannot be tortured or abused during interrogation or for the purposes of extracting a confession by the person arrested.

Judicial custody

What is judicial custody?

The person arrested stays in a state run prison and the jail warden is the custodian of the prisoner or the person under trial. This is commonly called judicial custody (JC).

Interrogation: Remand

What is meant by remand?

Remand means being sent back or sent to. The Police can ask the Court to remand the accused to Police custody for interrogation. However during interrogation, the Police cannot torture or abuse a person for extracting a confession or even otherwise. If the person arrested is tortured, then she/he can complain about it to the Court or to his/her friends and family who visit him/her in Police prison. She/he can also request for immediate medical aid and examination. The period of Police remand cannot be more than 14 days. Unfortunately due to several incidents where the Police use third degree measures, the word 'remand' has become synonymous with torture and beatings.

Types of Bail: Anticipatory and Regular

What is anticipatory bail?

The term 'anticipatory bail' means bail in anticipation of arrest. But the term itself is really a misnomer because what it contemplates is not bail, but merely an order directing the release of an accused on bail in the event of his arrest. It is a pre-arrest legal process. Thus, if a person is granted anticipatory bail and is later arrested on the accusation in respect of which the orders for release have been issued, then the person shall be automatically released on bail.

What is regular bail?

A regular bail is bail in case of a non-bailable offence. In this case the person arrested is not entitled to bail as a matter of right but she/he has to apply for bail in Court. Ultimately it is the discretion of Judge to grant him/her bail or reject his/her application for bail. If the Judge refuses to grant bail, then the arrested person is sent to Police custody for completion of interrogation or to judicial custody if the interrogation is complete.

Procedure and Consideration for grant of bail

What is the procedure for applying for bail?

The steps for making an application of bail in cases of non-bailable offences are:

- **The person arrested can make an application to the Magistrate's Court for bail.**
- **The Judge will consider the bail application and allow the Public Prosecutor to file objections to the bail application. This is followed by arguments from both sides.**
- **Ultimately it is a matter of discretion of the Judge.**
- **The Judge may impose conditions upon the person arrested while granting bail.**
- **If a person is granted bail then she/he will be asked to do either of the following:**
 - Deposit an amount in cash as specified by the Court.
 - Produce sufficient surety i.e. a person who will undertake to make the arrested person appear before the Court on each date of hearing. Surety is also required to be supplemented by documents such as salary certificate or land records or photo identity card like election card, driving license, employment identity card, passport etc.

What are the considerations for grant of bail?

There are various considerations for granting bail or rejecting bail. Some of them are as follows:

- **If the person arrested is a minor or a woman or a sick person or an infirm person then she/he may be granted bail.**
- **If the accused has no previous history of conviction or accusation of committing an offence, the Magistrate may grant bail.**
- **If the Police does not file the charge sheet within the time period specified in the Criminal Procedure Code, the person arrested is entitled to bail.**
- **In cases of heinous offences such as murder or rape, bail is not granted.**
- **In cases when the person arrested has been previously convicted of committing an offence, for which the punishment was death or imprisonment for more than 7 years, then the Magistrate cannot grant bail.**

Charge Sheet and Final Report

What is a charge sheet?

During the course of Police investigation, the Police collects evidence, conducts search and seizure and records the statements of the complainant or the witnesses. These statements are called the 161 CrPC statements and the person making the statements is not required to sign the statement. Thereafter the Police documents all the evidence and material against the accused person/s in their inner case diary. The inner case diary becomes a part of the charge sheet and is filed before the Magistrate. Once the Police investigation is complete and the Investigating Officer finds sufficient evidence against the accused person, he compiles the findings of the investigation and all the supporting documents. This compilation is called the **charge sheet**. A charge sheet includes all the documents, which have been relied upon by the Police during investigation. The charge sheet, which is prepared by the Police, is filed by the Police in Court. On the basis of the charge sheet, the Court initiates the trial against the person accused for committing an offence and charges are framed accordingly.

If during investigation it is found that there is no case, which is made out against the accused person and no material to show the accused's involvement in the case, the investigating officer files a 'B' report which is called the **Final Report** in Court.

The following steps are followed:

- **After collecting all the evidence, the Police prepares its report and presents it to the Judicial Magistrate.**
- **If the Police does not file a charge sheet within 60 days, then the accused gets bail as a matter of right in cases when the offence is punishable with less than 10 years imprisonment.**
- **In cases where the offence is punishable by death, life imprisonment or imprisonment for more than 10 years and the Police fails to file the charge sheet within the stipulated time period of 90 days, the accused is entitled to bail.**
- **Upon the findings in the charge sheet the Court will initiate trial.**

Procedure in Court: Trial and Judgement

Parties in a criminal trial

Who are the parties in a criminal case filed in Court?

In a criminal matter, the person who has filed the complaint does not have to engage a lawyer. In all criminal matters the case is filed by the **State** and is fought by the public prosecutor. This happens because in our legal system, whenever an offence is committed it is considered to have been committed against the State. It is the duty of the State to keep law and order in society and to ensure that there is peace in society. If any person does anything to disrupt this law and order, it is considered a crime against the State. Therefore, the State investigates the crime through the Police and then tries to prove the case in Court through the public prosecutor.

- **Public Prosecutor**
A public prosecutor is the person who represents the complainant.
- **Accused Person**
The person accused of having committed an offence is called the accused person.
- **Defense Lawyer**
A criminal lawyer who is called the defense lawyer represents the accused person. In our legal system it is considered that every person is innocent unless she/he is proven guilty. Therefore it is important to give the accused a chance to defend himself/herself. The accused can hire a defense lawyer to defend him/her in Court. In case the accused does not have a lawyer or cannot afford one, the Court will appoint a lawyer for the accused through the Legal Aid Services Authorities.

What happens if a complainant is not satisfied with the manner in which the public prosecutor is handling the case?

The following steps can be taken:

- **A complaint against the public prosecutor can be made to the Directorate of Prosecutions.**
- **A complaint can be made to the Court who is hearing the complainant's case.**
- **The complainant can make an application for the appointment of a special public prosecutor.**
- **In cases of sexual assault and dowry death a complainant can engage a private lawyer to assist the public prosecutor. The complainant can also take the assistance of a counsellor or a social worker if required, while attending Court proceedings.**

Who is a private lawyer?

Even though the public prosecutor represents a complainant, a complainant can hire a private lawyer who can act as a junior counsel to the public prosecutor. A lawyer hired by the complainant can represent the complainant, act on his/her behalf or submit arguments in Court only with the permission of the Court and after the approval of the public prosecutor. Mostly in cases of violence against women or children such as domestic violence and sexual assault cases, the Court allows the complainant's lawyer to represent the complainant in Court. This is so because over the years the Courts have realised that it is important to be sensitive to the needs and comfort and satisfaction of the complainant.

Who is a special public prosecutor?

A special public prosecutor is an advocate who has certain specified years of practice and specific experience and area of expertise. She/he is appointed by a District Collector on behalf of the complainant in a criminal case owing to his/her experience and expertise in a specified area of law. For instance in child sexual abuse cases, a lawyer who has reasonable years of experience and expertise in dealing with such cases can be appointed as a special public prosecutor.

Standard of Proof: Proving a case in Court

What is standard of proof?

In law there is a concept known as standard of proof for proving a case. The term means the standard or the yardstick on the basis of which a case is decided in Court. The standard of proof in a criminal case is 'beyond reasonable doubt' and in a civil case the standard of proof is 'on a balance of probabilities'.

Beyond reasonable doubt

What does 'beyond reasonable doubt' mean and who should prove this?

In a criminal case it is the duty of the investigating authorities and the public prosecutor to gather strong evidence to prove to the Judge that the offence was committed by the accused. The evidence should be so strong that there remains no doubt in the mind of the Judge that the offence was indeed committed by the accused. This is called proving the criminal case beyond reasonable doubt. As compared to a civil case, the standard of proof in a criminal case is very high, because the Indian legal system is built on the principle that 'hundred guilty persons can go free in order to save one innocent person'.

How is a case proved in Court?

The most important aspect in a criminal case is evidence. It is important that in a criminal case the public prosecutor has to be able to prove beyond reasonable doubt that the offence was committed by the accused. Hence in this scenario, the evidence needs to be strong and should pinpoint the involvement of the accused person in committing the offence.

Balance of Probabilities

What is meant by 'balance of probabilities' in a civil case?

In a civil case the lawyer has to prove to the Judge that on the basis of facts and circumstances on each side, it is possible to conclude that a right has been violated.

Example:

If 'A' wants a divorce from 'B' on the ground of cruelty, A's lawyer will have to bring to the notice of the Judge all the relevant facts and circumstances that will prove that there was cruelty by B. Thereafter, the Judge will look at the circumstances and decide on a balance of probability whether there was cruelty or not. This is unlike a criminal case where the lawyer has to prove the case beyond doubt that there was cruelty.

What does the defense lawyer do to defend the accused?

It is the job of the defense lawyer to show that the evidence brought by the public prosecutor is not perfect and pinpoint various loopholes. His job is to ask questions to doubt the case of the public prosecutor. The defense lawyer will try to put a doubt in the mind of the Judge and it is the job of the defense lawyer to convince the Judge that the evidence provided by the prosecution 'does not prove the case beyond reasonable doubt' and that the offence was committed by the accused.

Final deciding authority

Who is the final deciding authority?

The final deciding authority is the Judge. The Judge needs to be convinced that the accused committed the offence and only then will he find the accused guilty. If the prosecution does not have sufficient evidence to prove 'beyond reasonable doubt' that the offence was committed by the accused, the Judge will not be able to convict the accused.

Types of cases: summons case and warrants case

What is a warrants case?

Warrants case is a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. A Magistrate issues a warrant or a summons if she/he thinks fit, for the appearance of the accused before the Court. In case of a private complaint, a copy of the complaint has to be sent along with the summons or warrant.

What is a summons case?

Summons case means a case relating to an offence not being a warrant case. In this case, the Magistrate issues summons for the attendance of the accused in Court.

What is meant by a summons?

A summons is an order sent by the Court directing the accused person or a witness to appear before the Court on the date of hearing in a criminal case.

Procedure after filing the charge sheet

What happens after the charge sheet is filed in Court?

The following things happen after the charge sheet is filed:

- **Once the charge sheet is filed and if the accused is on bail, the Court will send a summons to the accused person to appear in Court. Subsequently, if the Court finds on the basis of the charge sheet that a case is made out against the accused person, the Court will begin the trial by framing charges against the accused person.**
- **Instead of filing the charge sheet, the Police may file a Final Report (FR) in Court stating that no case is made out against the accused.**
- **In such a case, the complainant's family is notified of the filing of the Final Report and asked to respond.**
- **The complainant may decide to file a Protest Petition, against the Final Report, before the Magistrate and challenge the findings of the Final Report.**
- **After taking into consideration the Protest Petition, if the Court feels that the Police has not carried out a proper investigation, the Court will direct the Police to conduct fresh investigation and record its findings.**
- **Thereafter, if the Court still feels that the Police investigation is proper and adequate and the findings of the Final Report are correct, then the Final Report will be taken on the Court's record and the case will be closed.**

Framing of a Charge or Discharge

What is a charge and how is it framed?

The charge shall state the offence/s of which the person/s have been accused. For instance, under a domestic violence case the accused is charged under Section 498 A of the Indian Penal Code which pertains to domestic violence. However this may not be the only provision applicable in this case and there may be instances of other provisions added along with Section 498 A, IPC. If the Judge finds sufficient evidence, upon the basis of the charge sheet, against the accused person, the Judge will frame the charge against him or her. The contents of the charge framed against the accused person are explained to him/her in a language that she/he understands and subsequently his/her plea is recorded.

What is meant by discharge?

On the basis of the findings of investigation in the charge sheet, if the Court finds no basis to proceed with the trial proceedings against the accused person, the Court will discharge the accused person. Upon discharge, if the accused person is in custody, she/he is released from custody and is not charged with committing the offence.

Recording a Plea

What is meant by recording a plea?

A person who is accused of committing an offence can take one of the following pleas:

- **A person can plead guilty; or**
- **A person can plead not guilty.**

After a person pleads either guilty or not guilty, the Court records the plea taken by the accused and initiates proceedings accordingly.

What happens when an accused person pleads guilty?

If an accused person pleads guilty the Court will record the plea taken and convict the accused person and sentence him/her according to law.

What happens if the accused pleads not guilty?

If an accused person pleads not guilty the Court will record the plea taken and proceed with the trial.

Examination and Cross Examination of Prosecution and Defense witnesses

Who is a prosecution witness?

The witnesses, which the Police examine during investigation and which they intend to rely upon during the trial, to prove the case against the accused person, are called the prosecution witnesses. This list bearing the names and addresses of such witnesses is a part of the charge sheet filed in Court. The Court summons these prosecution witnesses as per the list filed in the charge sheet.

Who is a defense witness?

A defense witness is one whom the accused person along with his/her lawyer will rely upon to build their defense. The list of defense witnesses will be filed by the defense lawyer at the beginning of the criminal trial. The Court summons the defense witness as per the list.

What is meant by examination-in-chief?

Examination-in-chief means the examination or the questioning of the prosecution witnesses and the defense witnesses. A public prosecutor will question a prosecution witness and a defense witness will be questioned by a defense lawyer.

What is meant by cross-examination?

Cross-examination means the cross questioning or examination of the witnesses whose examination-in-chief has already been conducted in Court. The prosecution witness will be questioned by the defense lawyer and the defense witness will be questioned by the public prosecutor.

Trial: Stages of a trial

Prosecution witnesses: Examination and cross-examination

After the summons are issued, what are the stages in the criminal trial?

The following are the stages in a criminal trial once the summons are issued:

- **First the summons are issued to the prosecution witnesses for their appearance in Court. This is done as per the list filed by the prosecution.**
- **If any witness fails to appear in Court even after receiving the summons, then the Court issues a warrant against him/her for his/her appearance in Court. The warrant is executed by the area Police where the witness resides.**
- **Once the prosecution witnesses appear in Court the public prosecutor examines them in court.**
- **This is followed by their cross-examination by the defense lawyer.**
- **Thus in this manner the evidence is recorded.**

Recording the evidence

What is meant by recording the evidence?

The questions asked and the answers given or the statements made by the witnesses during their chief-examination and cross-examination in Court are recorded by the Court typist in the presence of the Judge, public prosecutor and the defense lawyer in the presence of the accused person. This is called recording the evidence. Later the Court typist makes the witness read the evidence and once the witness is satisfied that everything said by him/her is correctly recorded, he/she signs the statement.

Statement of the accused

What happens after the prosecution witnesses have been examined in Court?

Once the prosecution witnesses have been examined and cross-examined in Court, the statement of the accused is recorded. The statement of the accused is basically the defense of the accused person. The accused person submits his/her defense in the statement based on what the prosecution witnesses have stated against him/her during their chief and cross-examination in Court. The statement

is filed in Court and the public prosecutor is provided with a copy of the statement. In the statement, usually the accused denies most of what the prosecution witnesses have stated and provides his/her alibi, if any, in defense. The statement is not recorded in Court and it is prepared by the defense lawyer in consultation with the accused.

Defense witnesses: Examination and cross-examination

What happens after the statement of the accused is filed in Court?

The following are the stages in a criminal trial once the summons are issued:

- **The Court issues summons to the defense witnesses for their appearance in Court. This is done as per the list of defense witnesses filed by the defense lawyer in Court.**
- **If any witness fails to appear in Court even after receiving the summons, then the Court issues a warrant against him/her for his/her appearance in Court. The warrant is executed by the area Police where the witness resides.**
- **Once the defense witnesses appear in Court the defense lawyer examines them.**
- **This is followed by their cross-examination by the public prosecutor.**
- **This leads to closing of evidence on both the sides i.e. the prosecution and the defense.**

Final Arguments

What happens after the evidence is recorded?

Once the evidence is recorded the Court declares that the evidence on both sides is being closed. This means that no more witnesses will be examined by the Court. After this, the final arguments take place.

- **Firstly the prosecution makes the final arguments. The public prosecutor submits his/her set of arguments, which is basically the reasoning, based on the evidence against the accused person for proving the case in the complainant's favour.**
- **This is followed by final arguments submitted by the defense lawyer. The lawyer will disprove the case against the accused person and build his/her arguments on the basis of the evidence given by the defense witnesses. The defense lawyer will also pinpoint any loopholes in the investigation or the charge sheet or lacuna in law to prove his/her case.**

Sentencing

What happens after the final arguments?

After listening to the arguments on both the sides, the Judge will pronounce a judgment based on the overall evidence recorded in the case and the basis of legal arguments submitted by both sides in Court. The Judge may deliver the judgment with either of the results:

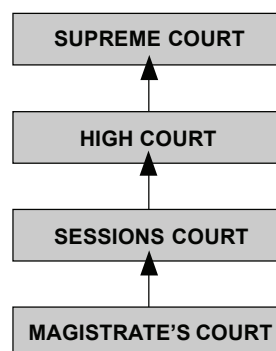
- **The Judge may find the accused guilty of committing the offence and thereby convict him/her.**
- **The Judge may find the accused person not guilty and thereby acquit him/her.**

If the accused person is found guilty and convicted, the Judge will again hear the accused person and the defense lawyer on the issue of sentencing. After hearing the submissions, the Judge will pass the sentence.

Appeals

What is an appeal?

An appeal is an application made to a Court against the order of either conviction or acquittal passed by the trial Court. The appeal is made to a Court, which is higher to the Court that has passed the order. For example if the order is passed by the Magistrate's Court, then the appeal will be filed in the Session's Court. A person can continue to file appeals if she/he remains unsatisfied even with the orders of the appellate Court till she/he reaches the highest appellate Court. Hence against the orders of the Sessions Court the appeal can be filed in the State High Court and thereafter in the Supreme Court. The hierarchy of Courts for the purposes of filing an appeal is as follows:



Revision

What is a revision?

A revision is an application, which seeks to revise any final order passed by a Court. It is filed to challenge the orders passed by any lower Court and to find out if the orders passed by the lower Court were correct or not. It cannot be filed against any interim order or direction given by a Court. The time period within which the application for revision can be filed is 90 days from the date of passing of the order.

ROLE OF THE POLICE AND THE CRIMINAL JUSTICE SYSTEM: WORKSHOP METHODOLOGY

Citizens' Rights and the Police

Objectives

- To understand the rights of citizens, especially women, vis-à-vis the Police.

Note to the facilitator

The criminal justice system has two components. One is the Police and the investigation process and the second is the criminal trial process in Court. It is advised that the facilitator deal with these aspects separately in different sessions.

EXERCISE 3.1

Title: Police and You

Purpose:

- To discuss the role and duties of the Police when a crime is reported
- To understand the procedure for Police investigation
- To define the rights of individuals vis-à-vis the Police

Time: 45 minutes

Materials needed: Chart paper, whiteboard and markers

Steps:

- The facilitator must begin the session by asking the participants if they have ever interacted with the Police and ask them to relate their experiences. The responses should be written down on the board to come back to later.
- Another way of doing this is to get volunteers from the group and ask them to enact a situation of a crime and the reaction that they get when the crime is reported to the local Police station. The following case study could be used. It is a real case that came up in a workshop held in Rajasthan in

2005. This case is an example and names have been changed. The facilitator could use any other criminal case that has come up from the participants.

Case Study:

Ganga lived in a joint family in a village in Churu, Rajasthan. The women have to walk to a nearby well to collect water every day. One day, Ganga went to fill water from the well and never came back. When her family realised she had been missing for an unusually long time, they got worried and went to the well to check if she was there. When she was not found there, they went to some of the houses in the village to ask if they had seen Ganga. At one of the houses, Phoolwati, Ganga's friend told them that she last saw Ganga by the well speaking to Ravinder. Ravinder's family lives close to Ganga's family farm and for many years there has been an on-going feud between the two families over property. Ganga's family decided to go to Ravinder's house and ask about Ganga. There Ravinder and his uncles humiliated them and asked them to leave their property immediately. What could Ganga's family do?

Using the facts of the play, the facilitator may lead the group in a discussion on crimes and Police procedures. This is best done with the assistance of a local criminal lawyer. The following aspects should be covered. Answers to these questions can be found in the legal information section of the Guide:

- How can a crime be reported?
- What are the duties of the Police?
- What is a First Information Report (FIR) and how can it be filed?
- What are the steps to be followed – can a person filing a complaint ask for a copy of the FIR?
- What can a person do if the Police refuse to register an FIR?
- What are the steps the Police will follow in investigation of a crime once an FIR is filed?
- What is a charge sheet? What is a final report?
- If a person is arrested what are the rights of that person?
- What is the difference between Police and judicial custody?
- What is remand?
- What are the rights of women with respect to the Police?
- What is a cognizable offence and a non-cognizable offence?

Trial Procedure Courts and Judgement

Objective

- To demystify the legal system for the participants.
- To understand the trial procedure.

Introduction

When a crime occurs, it is the duty of the Police to investigate the crime. The next step is to prove the crime in a Court. This is done through a public prosecutor, who will be appointed by the State to represent the complainant. This is because any crime that occurs is considered a crime against the State. The State therefore takes the responsibility of proving the crime in Court.

Note to the facilitator

This session is a complex session as it deals with various procedures that are followed in the trial Court in a criminal case. The facilitator may not be aware of all the practices which are sometime different from region to region. To have an effective session, we advise that the facilitator take assistance from a lawyer who is familiar with legal procedures in criminal cases. The facilitator could also consider arranging for the participants to visit the local criminal Court and come back to the session to discuss their observations.

EXERCISE 3.2

Title: Criminal proceedings in the Court

Purpose: To understand the procedures to be followed in criminal cases

Time: 120 minutes

Steps:

- The session is most effective if it follows a case study.
- The facilitator should ask the participants if they have any experiences or stories that they would like to share. The facilitator should pick a case study from what has been shared and proceed with the session. Below is an example of a case study that could be used by the facilitator through a role play or a story to explain the steps that are followed in a criminal trial.

Case Study 1:

Meeta and Rajesh were returning home one night after a wedding reception. On their way they saw three men beating up another man. When the three saw Meeta and Rajesh they ran away. Meeta and Rajesh took the injured person, who was almost unconscious by then, to the nearest government hospital. At the hospital the authorities refused to admit the patient saying it was a legal case and nothing could be done until a Police complaint had been filed. Meeta had been attending legal education programmes and knew that hospitals cannot refuse to take in a patient in this manner. She insisted that the hospital call the Police. Thereafter, the hospital contacted the area Police. The Station House Officer (SHO) and duty officers came to the Hospital and recorded Meeta's and Rajesh's statements. They took their address and asked them to go home. A few days later, a Police constable arrived at their home and asked them to come to the Police Station to identify the three men who had been arrested for the 'beating-up' incident. Meeta and Rajesh identified the three men. Almost four months later, Meeta and Rajesh have received a letter from the Sessions Court to appear in Court on a particular date. What should Meeta and Rajesh expect now? What are the next steps?

Case Study 2:

Rimi, a 20-year old girl was returning home from college one day, when she was stopped on the way by a gang of boys and molested. She identified them as boys from her college who were harassing her. She went to the Police station to file a complaint. The Police were reluctant to file a FIR but Rimi insisted that a FIR be filed. Rimi has been following up with the Police on the status of her case regularly. After 3 months she received a notice asking her to be present in the Police station on a certain date to identify the culprits. Rimi identified the boys and after a few months she received a notice from the Sessions Court to present herself on a particular date. What can Rimi expect to experience once the case is in Court?

Using the facts of this case the facilitator/resource person should explain the steps that are taken by the Police and the Court in a case. The facilitator should also lead a short discussion with the group on what they think will be the Court experience of a woman victim of a crime. The points to be covered are below:

- What happens when the Police file a case in Court?
- How does a Magistrate take cognizance of a complaint?
- What are the types of cases which can be filed by the Police in Court?
- Who are the parties in a criminal case? (Refer to the diagram on page 89).

- Who fights the case on behalf of the complainant and who defends the accused person in Court?
- How is a criminal case proved in Court? A person is innocent until proven guilty.
- What happens when an accused person pleads guilty?
- What happens when an accused person pleads not guilty?
- What are the steps for recording the evidence?
- What is the role of witnesses? What does hostile witness mean?
- What is a conviction? What is an acquittal?
- Can a person challenge the decision of the Court?

Notes to the facilitator

After having explained the legal procedure, the facilitator must engage the group in a discussion on their experiences in Court or about what they have read in newspapers. In leading this session, the facilitator must cover the following issues and encourage the group to discuss and come up with solutions for them.

- Discuss the challenges faced by the criminal justice system and the need for reform. For example:
 - What do you do when witnesses turn hostile?
 - What can be done if the public prosecutor is not showing interest in the case?
 - What can be done if the Police do not file a charge sheet and instead close the case?
 - Why do these things happen? How can these issues be countered?

Note to the facilitator

When such visits to the Police station or Courts are organised it would be a good opportunity for the participants to undertake a gender monitoring exercise. The facilitator could ask the participants to make notes on the procedure being followed and also to note their observations of any evident bias or disadvantage women might have. In addition, they could collect information on the number of women lawyers, prosecutors, Police personnel that were present compared to men? Was the Judge a woman? How were women witnesses/victims of crime treated? Were they treated differently from men? What was the difference?

Action Points

- **The facilitator could organise a visit to a Police station. Request the Police officials to explain the process of filing complaints and investigation and show the participants copies of FIR, charge sheet and final reports.**
- **A visit should be organised to the nearest Magistrate's Court/Sessions Court. Participants should be asked to observe the Court proceedings. Prior permission will be required for this activity.**
- **Find out which Civil and Criminal Court is present in your locality.**
- **Visit the State Human Rights Commissions and State Women's Commission or the representative of these bodies at the district level. Arrange a meeting with an official of the Commission to know the procedure for making a complaint of Human Rights violation.**
- **Visit the district/taluka level office of the Legal Services Authority to find out the procedure for applying for legal aid.**

TRIAL

Role of the Police and the Criminal Justice System 89

4

Women's Rights and Personal Laws in India



All women have certain rights within a marriage

4

Women's Rights and Personal Laws in India

Personal Laws in India

Objectives

- To understand the laws governing marriage, judicial separation, divorce, maintenance and custody.
- To understand women's rights under these laws.

Introduction

In India, laws that govern marriage, divorce, separation, maintenance, custody of children, adoption and succession to property are based on the religion a person follows. These laws are called 'Personal Laws'. Hindus follow the Hindu Marriage Act, Muslims follow the Shariat, and Christians follow the Indian Christian Marriage Act and the Divorce Act. The Special Marriage Act is a secular law. Anyone can choose to be governed by this law if they choose to register their marriage under this law. Other than Muslim law, all other Personal Laws have been codified. However, for Muslim women the law on maintenance and dissolution of marriage has been codified. (See Box on List of Codified Personal Laws). This module has been organised to make it possible for the facilitator to make the choice of conducting small sessions on different aspects of Personal Laws and issues that affect women, based on need.

CODIFIED LAWS OF MARRIAGE, DIVORCE AND SUCCESSION

- The Hindu Marriage Act, 1955
- The Hindu Adoptions and Maintenance Act, 1956
- The Hindu Succession Act, 1956 (amended in 2005)
- The Hindu Minority and Guardianship Act, 1956
- The Indian Christian Marriage Act, 1872
- The Divorce Act, 1869
- The Muslim Personal Law (Shariat) Application Act, 1937
- The Dissolution of Muslim Marriages Act, 1939
- The Muslim Women (Protection of Rights on Divorce) Act, 1986
- The Special Marriage Act, 1954 (amended in 2003)
- The Indian Succession Act, 1925

What are Personal Laws?

Personal Laws are a distinct set of laws that reflect the different religious laws, customs and traditions of the community to which the law in question applies. While a large part of the Personal Laws relates to family matters, the term also applies to other issues such as the management of Hindu religious and charitable institutions and Muslim Wakfs. These laws may be codified or un-codified and govern all family relationships such as marriage and divorce, economic security in marriage, maintenance, guardianship and custody of children, adoption of children, inheritance and succession. Customs and traditions to a large extent regulate marriage even to this day. This is visible for example, in the ceremonies and rituals performed during marriage. These ceremonies and customs find a place in the Personal Laws.

What are the various Personal Laws in our country?

There are different Personal Laws regulating each religious community. Thus Hindus, Muslims, Christians, Parsis and Jews have their distinct laws regulating marriage. The laws applicable to each religious community are as under:

Hindu Personal Law

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

Muslim Personal Law

- **The Muslim Personal Law (Shariat) Application Act, 1939**
- **The Muslim Women (Protection of Rights on Divorce) Act, 1986**
- **The Dissolution of Muslim Marriages Act, 1939**
- **The Kazis Act, 1880**
- **The other aspects are governed by the Shariat and the jurisprudential law called *fiqh***

Christian Personal Law

- **The Indian Christian Marriage Act, 1872**
- **The Divorce Act, 1869 (this used to be called the Indian Divorce Act and was renamed in 2001)**
- **The Indian Succession Act, 1939**

Parsi Personal Law

- **The Parsi Marriage and Divorce Act, 1936**
- **The Indian Succession Act, 1939**

Is there a secular law in our country?

Although Personal Laws have been framed keeping religion in mind, there is also a secular law that is in force called the Special Marriage Act, 1954 and the Guardians and Wards Act, 1890. While the Special Marriage Act makes it possible for people professing two different religious beliefs or persons not wanting to marry under religious laws to marry under this civil law, the Guardians and Wards Act regulates the law of guardianship and custody across communities irrespective of the law by which they are governed.

Hindu Personal Law

Who is a Hindu according to the Hindu Marriage Act?

Any person who is a Hindu by religion including Virashaivas, Lingayats, followers of Brahmo, Prarthana or Arya Samaj and Buddhists, Jains and Sikhs will be governed by this Act. Any person who is not a Muslim, Christian, Parsi or Jew would come under this Act. People belonging to the Scheduled Tribes are not covered by the Hindu Marriage Act unless the Government notifies that they are covered. In order to be married under the Hindu Marriage Act, both the parties to the marriage (the bride and the groom) must be Hindus.

Marriage

What is a marriage under Hindu Personal law?

Under the Hindu Marriage Act, marriage is defined as a sacrament. It is considered an essential *sanskara*³⁹ for the performance of religious duties.

What are the conditions for a valid marriage under the Hindu Marriage Act?

Section 5 lays down the conditions for a valid marriage. They are:

- **Neither party has a spouse living at the time of the marriage.**
- **The parties are of sound mind at the time of the marriage so that they can give valid consent to the marriage.**
- **Neither party is suffering from any mental disorder. This would make the person unfit for marriage or procreation.**
- **Neither party has been subject to frequent attacks of insanity.**
- **The bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years.**
- **The parties are not within the degrees of prohibited relationship unless the custom permits it. Thus, cousins, uncle and niece, aunt and nephew, siblings etc. are relationships that cannot marry *in law*. But there are a few exceptions where customs of marriage followed in a particular community are allowed. For example, although uncle and niece are within prohibited degrees of relationship as per the law and cannot marry, there are several communities in India where this custom is followed. The law recognized this and in those communities it is considered a valid marriage.**

³⁹ *Sanskara in this context refers to a sacred ceremony relating to marriage.*

- **The parties should not be 'sapindas' of each other, unless their customs allow such a marriage. Sapindas have been explained in the Act as under:**
- Sapinda relationship, with reference to any person, extends as far as the third generation (inclusive of the person) in the line of ascent through the mother, and the fifth generation (inclusive of the person) in the line of ascent through the father. The line is traced upwards in each case from the person concerned, who is to be counted as the first generation.
- **Ceremonies of marriage as per either of the party's customs should be performed.**

What are the types of invalid marriages under Hindu Personal Law?

Section 11 and Section 12 of the Hindu Marriage Act speak of invalid marriages. There are two kinds of invalid marriages recognised under Hindu law:

- **Void: When the marriage is declared void, the Court regards that the marriage has never taken place. Such a marriage does not create any rights or obligations between the parties. A marriage is void if:**
 - Bigamy: Either party to the marriage has a spouse living at the time of the marriage.
 - Prohibited Relationship: If they are within the degrees of prohibited relationship.
 - Sapindas: If they are sapindas of each other.
- **Voidable: A voidable marriage is treated as a valid marriage until one of the parties opts to nullify the marriage by making a legal application in the Court. A marriage is voidable in the following situations:**
 - Impotence: The marriage has not been consummated because of the impotence of the party against whom the petition is filed. Impotence means incapacity to consummate the marriage, i.e, to have sexual intercourse. Impotence does not signify sterility but incapacity to have normal sexual intercourse. Therefore impotence is not the same as infertility.
 - Unsoundness of mind: At the time of marriage, either party is incapable of giving a valid consent owing to unsoundness of mind.
 - Unfit for marriage and procreation of children: At the time of marriage, either party is suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and for procreation of children.
 - Insanity: At the time of marriage, either party is subject to recurrent attacks of insanity.
 - Fraud or forced consent: The consent was obtained by force or by fraudulent means. If this is the case, the Court will consider the following factors:
 - a. The suit for nullity is presented within one year of the discovery of the fraud.
 - b. In case the person filing the suit for nullity of marriage has continued to live with the spouse as husband/wife even after the discovery of fraud or when the force ceased to exist, the petition for nullity will not be entertained.
 - Pregnancy by another person at the time of marriage: The woman was pregnant at the time of marriage by a person other than the petitioner. In such a case, the Court will consider the following factors before passing an order:
 - a. The husband was ignorant of his wife's pregnancy by another person at the time of marriage.
 - b. The suit for nullity was instituted within one year of the marriage.
 - c. The husband has not engaged in sexual intercourse since the discovery of pregnancy.

Ceremonies of Marriage

What is the importance of ceremonies under Hindu law?

Section 7 of the Hindu Marriage Act lays down the manner in which a Hindu marriage may be solemnised. A valid marriage is one where all customary rites and ceremonies are performed. This provision does not specify any particular set of customary practices for a valid marriage except in case of *saptapadi*.⁴⁰ If *saptapadi* is an important aspect of marriage rituals of a community, then that marriage will be valid only after the 7th *phera* or circumambulation around the sacred fire.

Registration of Marriage

Is registration of marriage compulsory under Hindu law?

Registration of marriage is not compulsory under the Hindu Marriage Act but if a couple chooses to register their marriage they can do so. Non-registration alone does not invalidate a marriage.

It is important to note that in the past few years there has been a demand for making registration of marriages compulsory in India. Petitions have been filed in the Supreme Court asking for directions to the government to make registration of marriage compulsory across the country. Some states like Karnataka, Andhra Pradesh and Maharashtra, have already passed laws on compulsory registration of marriage. The National Commission of Women is working on developing a law on compulsory registration of marriage and is holding consultations with various groups on the issue.

What is the procedure for registration of a marriage under Hindu law?

Once the marriage ceremony is completed, an application must be made to the Registrar of Marriages with relevant documents (eg. wedding invitation, photos, signature of priest who performed the marriage and other documents that the registrar requests for proof of address, identity etc.). Witnesses to the marriage are also required. Once all the documents are presented, the registrar will give a certificate registering the marriage.

Restitution of Conjugal Rights

What is restitution of conjugal rights?

After marriage both the husband and the wife have the right to cohabit or live with each other. If either the husband or the wife moves out of the company of the other, without any reasonable cause then the law makes a provision for the aggrieved party to ask the Court to enforce his/her matrimonial rights vis-à-vis the other spouse. This may be done by filing a petition in Court seeking resumption of cohabitation. This is termed restitution of conjugal rights.

⁴⁰ *Saptapadi rites involves the bride and groom circumambulating the sacred fire while reciting significant vows/invocations with each circumambulation.*

Example:

Devi and Suraj were married for 15 years and lived happily as husband and wife. One day Suraj packed his bags and left the matrimonial home and did not return for about 12 months. He claimed he was bored in the marriage. Devi applied for a decree for restitution of conjugal rights. She was granted the order in her favour as the reasons cited by Suraj were flimsy and unreasonable.

How valid is the use of restitution of conjugal rights?

A petition for restitution of conjugal rights is often filed in case one spouse feels that the other has left him/her without any justifiable grounds and that the only relief he/she wants is for the spouse to come back. Women's rights activists have questioned the use of this provision to forcefully keep the partners together when clearly the reason for the couple to part company is either incompatibility or unwillingness to stay together.

Of late the law of restitution of conjugal rights is being used as a legal strategy by the Hindu husbands to refuse maintenance to their wives. In such a scenario a husband files a petition for restitution of conjugal rights soon after he compels his wife to leave the matrimonial home by perpetrating cruelty or torture upon her. Once the wife leaves the home, in order to sustain herself, she files a claim for maintenance in Court. At this time the husband refuses to provide any maintenance to her. The argument given by him is that despite offering to take her back and stating so in the petition for restitution of conjugal rights, the wife is unwilling to return and therefore, he is not responsible for providing for her. His argument is based on the legal principle, 'one cannot take advantage of his/her own wrongs.' In this case, as argued by the husband, the wife cannot take advantage of her own wrongs.

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

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

Example:

Hari filed a suit of restitution of conjugal rights against his wife Kamala after she left him. The Court did not entertain his suit as it was proven that Hari was a drunkard who used to habitually abuse his wife.

Where do you apply for a Court decree for restitution of conjugal rights?

Under all the personal laws an application for restitution of conjugal rights may be made to the local Family Court, or where there is no Family Court, at the District Court. If the Court is satisfied of the truth of the statements and allegations, then a decree for restitution of conjugal rights is passed.

Judicial Separation

What is judicial separation under Hindu Law?

In a marriage, either party or both parties may discontinue living with each other despite *being* legally married. This is technically called 'judicial separation' under personal laws. If a couple wants to be separated from each other, they can apply to the civil Court and make an application for judicial separation. Once the Court passes an order for judicial separation, the husband and the wife are no more bound to live with each other or co-habit. This is not the same as divorce as the order is reversible, if the husband and wife reconcile their differences and agree to live with each other again.

However, it is important to note that if no cohabitation is resumed for a period of one year or more after a decree of judicial separation has been obtained, this situation can itself become grounds for a divorce.

Grounds for judicial separation

What are the grounds upon which a decree for judicial separation may be passed?

When Section 10 is read along with Section 13⁴¹ of the Hindu Marriage Act, the following are the grounds for judicial separation:

- **Adultery:** If after the solemnisation of the marriage he/she has had voluntary sexual intercourse with a person other than his/her spouse.
- **Cruelty:** If either the husband or the wife behaves in a manner which causes physical or mental trauma or stress to the other.
- **Desertion:** A divorce may be sought on the grounds of desertion if either the husband or the wife has abandoned their spouse for a period of at least two years or more. There must be no justifiable reason for this abandonment.
- **Unsound mind:** A divorce may be sought if either spouse is incurably of unsound mind or suffering from any such mental disorder. Unsound mind would mean some form of madness or insanity.
- **Conversion:** Either spouse has ceased to be a Hindu by conversion to any other religion.
- **Leprosy:** If either spouse is suffering from an incurable form of leprosy, it is a ground for divorce.
- **Venereal disease:** If either spouse is suffering from venereal disease it is another ground for divorce.
- **Renunciation of the world:** A divorce may be sought if either spouse has renounced the world for religion.
- **Disappearance of spouse:** If the party has not been heard of as being alive for a period of seven years or more, by persons who would normally have heard.

⁴¹ Since the grounds available for judicial separation and the grounds available for divorce are the same, the grounds are discussed in detail under the grounds available for divorce.

The grounds to seek judicial separation as well as divorce are the same. Therefore, refer to the discussion on Divorce to understand each ground.

Divorce

What is divorce?

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

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

Grounds for Contested Divorce

On what grounds under the Hindu Marriage Act, can a person seek divorce?

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

- **Grounds on which both the husband and the wife can file a petition for divorce are:**
 - Adultery
 - Cruelty
 - Desertion
 - Conversion to another religion
 - Unsoundness of mind
 - Leprosy
 - Venereal diseases
 - Renunciation of the world by spouse
 - Disappearance of spouse
 - Non-resumption of co-habitation after judicial separation or restitution
- **Grounds available only for the woman**
 - Bigamy
 - Deviant sexual behaviour by husband
 - Parties not living together since decree of maintenance passed under HAMA
 - Woman has been married as a child and now wants to opt out of it
- **Divorce by mutual consent**

Grounds on which both the husband OR wife can file a petition for divorce

Adultery: Section 13(1)(i)

The Hindu Marriage Act defines adultery as the act of voluntary sexual intercourse by the respondent with a person other than his/her spouse. Thus, in order to constitute adultery, the applicant has to prove that she/he was married to the respondent and that the respondent has had sexual

intercourse with another person other than her/him. The Courts have held that one act of sexual intercourse by the respondent is sufficient to constitute adultery under this section. Proof of adultery entitles a person to seek either judicial separation or divorce.

The burden to prove adultery is on the petitioner. He or she must prove that an act amounting to adultery was committed. A mere statement is not enough; the statement should be substantiated by concrete evidence.

Example:

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

Cruelty: Section 13(1)(ia)

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

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

Cruelty is a form of domestic violence. Thus cruel behaviour may take any form including mental, physical, emotional, economic and sexual.⁴²

Example:

Sarita and Sunil have been married for two years. Sarita complains that for the last one year he has done little or nothing to help her run the household. He takes away her entire salary leaving behind only a meagre amount for domestic and her personal use. She says that he is incorrigible and inexcusably comes home late and whenever she raises this issue with him, he reacts sharply. Not only does he snub her but also abuses and slaps her. It seems like he is too full of himself to think of anyone else.⁴³ Fed up with this behaviour, Sarita has filed for divorce on grounds of cruelty. Even though he did not intend to be cruel, acts such as these are considered to amount to cruelty by our Courts. If it can be proved that the respondent is overbearing, harsh and abusive and resorts to violence, then the Courts can pass a decree of divorce in the applicant's favour.

What are the types of cruelty recognised in law?

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

- **Not maintaining the wife and children**
- **Domestic violence**
- **Sexual abuse**
- **Threat of violence**
- **Verbal abuse**
- **Demands of dowry⁴⁴**
- **Husband assaulting wife. A single act of violence may be sufficient to be an offence of cruelty⁴⁵**
- **Falsely accusing the spouse of adultery or unchastity repeatedly**
- **Persistent refusal to have sexual intercourse**

⁴² For an elaborate discussion on cruelty, refer to the section on domestic violence, dowry and dowry death.

⁴³ *Smt Asha Handa v. Baldev Raj Handa*, AIR 1985 DELHI 76.

⁴⁴ *Shobha Rani v. Madhukar Reddi*, (1988) 1 SCC 105.

⁴⁵ *Smt A P Marry v. K G Raghavan*, AIR 1979 MP 40.

- **Drunkenness**
- **False criminal charges**
- **Birth of illegitimate child**
- **Threat of suicide**

Example:

Sanjay would quarrel with his wife Seema and abuse her family members. He would put chilli powder in the children's mouths when they fell sick. He would curse the whole family. The Court granted a divorce in Seema's favour, because on all occasions, even though she continued to reside in the matrimonial home, she did not forgive Sanjay for his acts of cruelty.

Desertion: Section 13(1)(ib)

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

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

Example:

Nisha went on a trip to Nepal and due to civil strife at that time, she could not return for two years. This does not amount to actual desertion and Ajay cannot get a divorce on the grounds of desertion.

Conversion to another religion: Section 13(1)(ii)

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

Example:

Jaikrishna hates everything that is Hindu and therefore eats beef and says bad things about all the Hindu gods. He has even changed his name to Jake and goes to the Infant Jesus church every Thursday. He is still a Hindu because he has not converted to Christianity and thus his wife Suma cannot file for a divorce. Also, if he converts to any other religion such as Jainism, Buddhism or Sikhism, she still cannot get a divorce because the Hindu Marriage Act includes Buddhism, Jainism and Sikhism as a part of Hinduism.

Incurably of unsound mind or suffering from mental disorder: Section 13(1)(iii)

One of the conditions of a valid marriage is that neither party should be incapable of giving a valid consent due to unsoundness of mind. A contravention of this ground renders the marriage voidable at the instance of the other party under Section 12(1)(b).

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

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

If a person is diagnosed to be mentally ill but is able to take care of his/her daily needs and is able to lead a normal life, this will not be a grounds for divorce for the other party.

What have the Courts considered as unsoundness of mind?

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

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

Virulent and incurable leprosy: Section 13(1)(iv)

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

Venereal disease: Section 13(1)(v)

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

Renunciation of the world by entering a religious order: Section 13(1)(vi)

A divorce may be sought if either spouse has renounced the world and entered a religious order. Thus, on a petition for divorce on this ground, the petitioner must prove the following:

- **The respondent has entered any religious order.**
- **He/she has performed the necessary ceremonies.**

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

Disappearance for seven years: Section 13(1)(vii)

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

Example:

Aditya is kidnapped and not heard of for seven years. His wife remarries after this period. However it is around this time that Aditya is released and comes back home. His wife is not guilty of bigamy as the condition under Section 13(1)(vii) of the Hindu Marriage Act is satisfied. Since he had been presumed dead for the past seven years, the marriage can be dissolved.

Non resumption of co-habitation after judicial separation or restitution

When the husband and the wife have not started to live together for a period of one year or more after the decree for judicial separation or restitution order had been passed, this affords grounds to seek a divorce.

Grounds on which a Hindu wife alone may apply for divorce: Section 13(2)

The following grounds provide an option only to the woman to file for divorce against her husband. These are in addition to the common grounds enumerated above.

Section 13(2)(i): Bigamy

If the husband had another wife living at the time of the marriage. Bigamy is an offence under the Indian Penal Code and a grounds for divorce under Section 13 of the Hindu Marriage Act, 1955.⁴⁶

Section 13(2)(ii): Deviant sexual behaviour

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

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

Section 13(2)(iii): A decree of maintenance has been passed either under Section 18 HAMA (Hindu Adoptions and Maintenance Act) or under Section 125 CrPC (Criminal Procedure Code) and the parties have not been living together for over a year since the passing of that decree

There may be instances where the husband and wife have separated from each other but during such separation the wife may apply under Section 18 of the HAMA (because she continues to be 'married' to her partner) or under Section 125 CrPC.⁴⁷ After applying for maintenance under either of these provisions and getting a favourable order, the wife may continue to life separately for over one year. In this situation, she is entitled to file for a divorce.

⁴⁶ See the section on Bigamy under the Personal Laws.

⁴⁷ See the section on Maintenance which deals with Section 18 of the Hindu Adoptions and Maintenance Act and Section 125 of the Criminal Procedure Code.

Section 13(2)(iv): Repudiation of marriage

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

What are the restrictions on seeking matrimonial relief?

Taking advantage of one's own wrong

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

Examples:

- *A husband who had illicit relations with another woman, ignored and ill treated his own wife. When the wife confronted the husband regarding his affair with another woman, he hurled abuses at her and threatened to throw her out of the house. As a result both quarrelled everyday. In such a situation when the husband went to Court seeking divorce on account of mental cruelty by his wife, the Court stated that he cannot come to Court and take advantage of his own wrongs. The Court further stated that even assuming that the wife was perpetrating mental cruelty upon the husband, it was actually the husband who had incited her to quarrel with him by having an affair.*
- *A husband filed a case of restitution of conjugal rights but actually did not allow the wife to join him. After one year, the husband went to Court stating that his wife was refusing to join him and therefore he should be granted a divorce. The Court would not entertain his petition for divorce, since he was trying to take advantage of his own wrongs.*

One year bar

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

- **Exceptional hardship to the person bringing the petition to Court.**
- **Due regard to the interest of the children of the marriage.**
- **No reasonable probability of reconciliation between the parties.**

Divorce by mutual consent - Section 13B

What is divorce by mutual consent?

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

- **At the time of application, both the husband and the wife should be living separately for a period of one year or more. This does not mean that they are living in separate houses but that they have not cohabited for more than a year.**

- **Both should arrive at the decision that they are incapable of living together and have therefore agreed that the marriage must be dissolved.**

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

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

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

Law of Maintenance

IMPORTANT

The principles of maintenance, the quantum of maintenance, the provision under Section 125 of the Criminal Procedure Code, though dealt with in this part of the chapter, are partially applicable to the personal laws of Muslims and wholly applicable to the personal laws of Christians.

What is Maintenance?

The responsibility of a family to take care and provide for each other is the basis of the law on maintenance under personal laws. Maintenance under Hindu personal law is governed by three legislations and includes providing for food, clothing, residence, medical assistance, education and care for one's spouse, child or parents as the case maybe. In a marriage, the fact of marriage between two people is grounds in itself for the wife or the husband (under Hindu law only) to claim that she or he be *maintained*.

The Courts have further developed the meaning of maintenance:

- **Maintenance should include a provision for residence. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the person's life, a residence and money for other necessary expenditure.⁴⁸**
- **It should also include provision for food and clothing.**
- **Reasonable expenses for marriage in case of an unmarried daughter.**

⁴⁸ *Mangat Mal (dead) and Another v. Smt Punni Devi (dead) and Others*, (1995) 6 SCC 88.

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

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

- **Hindu Marriage Act, 1955**
- **Hindu Adoption and Maintenance Act, 1956**
- **Criminal Procedure Code - Section 125 (available only for women, children and old parents)**

Who can claim maintenance under Hindu Personal Law?

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

What are the types of maintenance under Hindu Personal Law?

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

- **Interim maintenance⁴⁹ or maintenance *pendente lite* - when a person files for judicial separation, divorce, annulment of marriage or any other matrimonial relief, the person can ask for interim maintenance in order to take care of the person's needs and expenses until the case is finally decided. (Section 24 of the Hindu Marriage Act).**
- **Permanent alimony - In a proceeding for divorce, judicial separation, annulment of marriage or restitution of conjugal rights, the Court can, on an application, make an order of permanent maintenance either to the wife or the husband towards her/his maintenance and support after the couple is divorced (or separated). This order of maintenance will hold good only during the lifetime of the applicant. It will cease to be in operation upon her/his death. Permanent alimony will be granted only if an order for divorce, judicial separation or annulment of marriage is passed. Permanent alimony can be granted either in the form of a one time lump sum amount or periodical payments.**

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

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

Example:

Nita filed for divorce under Section 13 of HMA and interim maintenance under Section 24, HMA. Nita's husband Somu alleged that Nita was having an affair with another man and therefore should not be granted interim maintenance. Courts have held in numerous decisions that as a general rule, the wife will be considered innocent, until proven guilty of any charge or counter-charge made against her, for the purposes of allowing alimony pendente lite. She will thus be entitled to interim maintenance in this case.

⁴⁹ *Interim maintenance is maintenance granted to a spouse during on-going matrimonial proceedings in Court such as divorce, judicial separation and restitution of conjugal rights. For this a separate application is required to be made along with the main petition.*

- The wife could be entitled to claim interim maintenance even though it was found that she was the second wife of her husband and therefore the marriage itself was void.⁵⁰
- The wife is entitled to alimony *pendente lite*⁵¹ whether or not the husband is entitled to decree for restitution of conjugal rights.⁵²
- To refuse interim maintenance and expenses of litigation to the wife and her minor child, merely to pressurise the wife to reconcile her differences with her husband is a misuse of the provisions of Section 24 of the Hindu Marriage Act, 1955.⁵³

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

- **The Court has to take into consideration the following factors before it decides on the quantum of maintenance:**
 - Income and property of both the parties
 - The need of the person asking for maintenance (applicant)
 - Paying capacity of the person from whom maintenance is being asked (respondent)
 - Conduct of the parties
- **Courts have laid down that the amount of maintenance fixed for the wife should be such that she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case.⁵⁴**

IMPORTANT

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

⁵⁰ *Laxmi Bai v. Ayodhya Prasad*, 1990 2 DMC 594.

⁵¹ *Pendente Lite* is a term that means 'while the case is pending'. The term is commonly used for Court orders or legal agreements that have been entered into while a legal case, like divorce, is still pending in Court. In divorce cases a *Pendente Lite* order is used to provide maintenance for a lower income spouse while the legal proceedings are still on.

⁵² *Malkiat Kaur v. Darshan Singh*, 1990 2 DMC 81.

⁵³ (*Smt Gurmeet Kaur v. Gur Raj Singh*, AIR 1989 PUNJAB & HARYANA 223.) Section 24 of the Hindu Marriage Act deals with the payment of interim maintenance and expenses of the legal proceedings to be paid to a spouse while the legal case is still on.

⁵⁴ *Jasbit Kaur Sehgal v. District Judge Dehradun*, (1997) 7 Supreme Today 642.

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

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

Section 18 applies only to the wife's application for maintenance from her husband. An application under this Section will be entertained only if the marriage between the parties subsists at the time of making the application. The rationale behind this provision is that the wife should be maintained by her husband during her lifetime due to the very fact of marriage.

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

- **He has abandoned her without good cause;**
- **He has treated her cruelly;**
- **He is suffering from a virulent form of leprosy;**

- **He is living with a second wife or has kept a concubine along with his wife in the same house or has been living with another woman in a different place;**
- **He has converted to another religion.**

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

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

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

While there are no rigid factors, the quantum of maintenance is determined by:

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

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

Maintenance for widowed daughter-in-law from her father-in-law: Section 19

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

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

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

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

Maintenance of children and aged parents by either parent/child: Section 20

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

Maintenance of dependants: Section 22

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

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

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

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

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

The Code of Criminal Procedure: Section 125

To whom does Section 125 Criminal Procedure Code (CrPC) apply?

Section 125 CrPC, is applicable to all neglected or divorced wives, abandoned children and hapless parents belonging to any religion, community or nationality or having any domicile. The right to claim maintenance under

Section 125 is available only against the husband, father or son. No other relation can claim maintenance under this provision.

Wife

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

- **A woman who has been divorced by, or has divorced her husband;**
- **A woman who after divorce, has not married again.**

The inclusion of 'divorced wife' in the definition of 'wife' is intended to prevent the unscrupulous husbands frustrating the legitimate maintenance claims of their wives by just divorcing them under personal laws. The provision does not apply to Muslim women who have been divorced. A divorced Muslim woman can now apply for maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986.⁵⁵

Child

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

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

Father or Mother

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

What is the basis for the claim of maintenance under Section 125 CrPC?

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

- **If the husband, father or the son has neglected or refused to maintain his wife, children or parents respectively:** The term 'neglect' is used to signify a mere failure on the part of a person bound to maintain his wife etc., even when no demand is made on him by the latter. Neglect or refusal to maintain may be by words or by conduct.

Example:

Pankaj and Uma were married for 5 years. After some time, Pankaj left Uma and married Suman. When Uma asked that he make provision for her maintenance, he said that he was ready to do so provided she lived in his new house with the second wife. This amounts to neglect or refusal to look after and maintain the first wife under Section 125 CrPC.

⁵⁵ See the section on Maintenance under the Muslim Personal Laws.

- **Such a person possesses sufficient means to maintain them:** The expression 'means' is not restricted to tangible means such as existence of movable or immovable property but includes earning potential, or capacity to earn. It is open to a person to show that on account of some ailment, physical infirmity, accident or prevailing unemployment, he is in fact not capable of earning anything. However prevailing unemployment is also a guise often used by men to escape their responsibility to maintain.

Example:

Aniket was married to Uma for three years. After three years the marriage ended. Uma stopped working after she got married and was dependent on Aniket for three years. When she filed for maintenance from Aniket, he left his job and petitioned the Court saying that since he did not have a job, he could not pay Uma the maintenance. The Court however, passed an order against him awarding maintenance to Uma. The Court stated that if a person is in perfect health and has means to maintain his wife then he is responsible for doing so.

- **Person claiming maintenance must be unable to maintain himself or herself:** Under Section 125(1)(a), maintenance allowance cannot be granted to every wife who is neglected by her husband or whose husband refuses to maintain her, but can be granted only if the wife is unable to maintain herself.

Example:

Girija applied for judicial separation from Rajesh and claimed maintenance under Section 125 of the Criminal Procedure Code. Girija is well educated with a degree in law. She was however not working at the time of applying for maintenance and asked Rajesh to provide for her livelihood.

Could the Court refuse maintenance just because she can earn? The Court has held that Girija is entitled to claim maintenance but her present circumstances would disentitle her to get the full amount of maintenance.⁵⁶

IMPORTANT PROCEDURAL POINTS TO REMEMBER

Only a Judicial Magistrate of the First Class can deal with and decide applications in respect of maintenance under Sections 125-128 Criminal Procedure Code. (Sections 125-128 deal with applications for maintenance, enhancement and enforcement of the order of maintenance).

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

Custody and Guardianship of Children

What laws deal with custody and guardianship of children under the Hindu personal law?

The personal laws that govern custody and guardianship are given below, but it is important to remember that a woman can also claim under the Protection of Women from Domestic Violence Act, 2005:

- **The Guardians and Wards Act, 1890:** This legislation is a secular law for appointment and declaration of guardians and applies to all people irrespective of their religious, community or caste affiliations.

⁵⁶ *Abdulmunaf v. Salima*, 1979 Cri LJ 172 (Karnataka High Court).

- **The Hindu Minority and Guardianship Act, 1956:** The Hindu Minority and Guardianship Act is an additional legislation that lays down who the guardian of the child is in law. It complements the Guardians and Wards Act and therefore while deciding an issue of custody or guardianship, both these legislations have to be read together. These two legislations do not contradict each other.
- **The Hindu Marriage Act, 1955:** In addition to marriage and divorce, the law also deals with the custody of children in Section 26 of the Act.

What are Guardianship and Custody?

Guardianship means proprietary rights of an individual over his/her child. It refers to the status of an individual vis-à-vis his/her child.

Custody denotes the responsibility of raising the child. Custody is granted as a matrimonial relief by the Court to an individual who applies for custody of his/her child.

DEFINING A CHILD

The question of custody arises only in case of a child.

A child is defined as any individual who has not attained the age of 18 years.

When do the issues of custody and guardianship arise?

In a harmonious marital relationship, the questions of custody and guardianship do not arise. It is only when both partners are unwilling to live with each other due to any reason, and they end up staking a claim over the child and apply for custody, that the issue of custody becomes important.

Who is the natural guardian of the child?

While both the legislations state that the natural guardian of the child is the father, in practice and in the decisions made by the Courts there is only one principle based on which the issue of custody of a child is decided, namely, the best interest of the child. On the question of guardianship, Courts have been deciding that the mother is also the natural guardian of the child.

Example:

The Supreme Court has in the case of Geeta Hariharan v. Reserve Bank of India,⁵⁷ held that the mother was the natural guardian of the child. Under Section 6 the father is the natural guardian but after him is the mother. The Court interpreted the term 'after him' to mean 'in his absence' and not 'after the lifetime'. The father is considered to be absent in the following circumstances:

- *Father is indifferent to the child;*
- *Child is in exclusive custody of the mother;*
- *Father is incapable to act as the guardian due to physical or mental incapacity;*
- *Both decide mutually that mother will act as the natural guardian.*

⁵⁷ AIR 1999 SC 1149 and Jijabai Gajre v. Pathankhan (1970).

What is meant by best interests and welfare of the child

While deciding who should get custody of the child in a contested case, the welfare and the best interests of the child will be taken into consideration and not the opposing claims of the parents. Some of the important observations made by Courts over the last few decades on this matter are worth noting:

- **Just because an individual is the natural guardian does not automatically entitle him to the custody of the child.⁵⁸ What will be considered is the welfare of children and the best interests of children as human beings.⁵⁹**
- **Even in a case where the father's financial status is better than the mother's, the father may not get custody as a matter of course. If the welfare of the child demands that it be with the mother, the mother will be given the custody.⁶⁰**

The only principle on which custody is decided is based on the best interests and welfare of the child.

What are visitation rights?

In case custody of the child is given to one of the parents, the other parent usually gets the right to visit the child. This is called visitation rights. Courts believe that the welfare of the child lies in maintaining relationships with both parents. Thus the child may have to spend time with the other parent either during weekends or holidays depending on the arrangement arrived at between both the parties.

What important points should a woman keep in mind when facing a problem with custody of her child?

Even though a woman may believe that she is best suited to take care of the child and that the child is happier living with her than her divorced partner, in a Family Court where the matter is decided, technical difficulties may prove to be an impediment.

Some of the precautionary measures a woman should take:

- **As far as possible, while leaving the matrimonial house on account of a matrimonial discord or violence or when circumstances warrant that she leave the matrimonial house, a woman should take her young child/children, especially children aged five years or below, along with her.**
- **In order to pre-empt a situation of being accused of kidnapping her own child (which is not possible in law), a woman planning to take physical custody of the child while not living in the same house as her partner, should do so by informing the Police by writing a note about having taken such a step so that no complications arise in the future.**
- **Once the woman has taken physical custody of the child, the woman should file for an interim order of custody till other matters related to the case, such as divorce and maintenance are resolved.**

⁵⁸ *Baby Sarojan v. SVK Nair*, AIR 1982 Ker 277, 282.

⁵⁹ *Jacob v. Jacob*, AIR 1973 SC 2090, 2100.

⁶⁰ *Sardar Bhupinder Singh v. Jasbir Kaur*, AIR 2000, MP 330.

Bigamy under the Indian Penal Code

Objective

- To understand and analyse the practice of bigamy and how it affects women.
- To know the law on bigamy.
- To develop strategies that could be implemented at the community level to counter the practice.

Introduction

Bigamy is a common problem in India even though it is a crime punishable with imprisonment for 7 years. The offence of bigamy is non-cognizable and bailable. Under all personal laws in India, monogamy is the norm. The only exception is under Muslim law which allows a Muslim man to marry up to four times. In all personal laws and the Special Marriage Act, the second marriage is void.

Note: Except under Muslim law, monogamy is the norm prescribed under all other legislations applicable in India.

How is bigamy defined under the Indian Penal Code?

Bigamy is an offence under Sections 494 and 495 IPC. Persons covered by Sections 494 and 495 are Hindus, Christians, Parsis and Muslim women only. Muslim men are allowed to have 4 wives under Muslim personal law. Section 494 IPC⁶¹ imposes punishment of up to 7 years' imprisonment and fine on any person, whether a man or a woman, who marries again while his/her spouse is living and their marriage is valid in law.

If a person marries another person, without disclosing to that person that he or she is already married, he/she can be punished with a maximum imprisonment of 10 years and a fine.⁶²

How can bigamy be proved in criminal law?

To prove bigamy under criminal law, the applicant must prove the following:

- The accused is already married;
- The accused has married a second time;
- Both marriages have been solemnised according to ceremonies required by the personal law.

⁶¹ Section 494 IPC states, "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

⁶² Section 495 IPC.

When does a marriage not constitute the offence of bigamy?

A person will not be tried for bigamy if:

- The Court has declared the person's previous marriage as null and void in law.
- Either of the spouses has been continually absent from the company of their spouse for a period of 7 years or more.

- **Either of the spouses has not been heard of by the other as being alive for the past 7 years.**
- **The person who is contracting a second marriage in the above mentioned situation (the spouse is absent and not been heard of for 7 years) has informed the person with whom the marriage is contracted of this state of affairs.**

Example:

Manu married Sandhya in 2000. He worked in the Navy. He went to Zambia and never came back. There was no news from him for 7 years. After 7 years and 2 months Sandhya married Sujai. She is not guilty of bigamy.

In what Court will a person be tried for the offence of bigamy?

The offence of bigamy is non-cognizable and bailable. That means that the person accused of bigamy cannot be arrested without a warrant. The Judicial Magistrate First Class has the jurisdiction to try the case of bigamy.

What are the conditions necessary to prove the offence of bigamy?

Whoever alleges bigamy against his or her spouse has to prove that both the first marriage of the complainant with the accused as well as the second marriage of the accused with another person is valid according to the provisions of Sections 5 and 7 of the Hindu Marriage Act, 1955.

What are the important points of consideration in Section 494 of IPC?

If a person has accused another of bigamy under Section 494, he or she is required to prove the following to the Court:

- **'Whoever marries':** That the marriage has been solemnised according to Section 5 (conditions of a valid marriage) and Section 7 (ceremonies of marriage) of the Hindu Marriage Act, 1955. All that Section 494 requires is that the marriage must be proved to have taken place according to either *saptapadi* or customary norms and thus fulfil the conditions laid down under Section 7 of the Hindu Marriage Act. Thus marriage of any nature without following the accepted customs and ceremonies will not amount to a valid marriage and hence will fall outside the purview of Section 494 IPC.
- **'Marries while having a husband or wife living':** If this important point is proved, the petitioner will be proving in effect that the accused has violated Section 5(i) of the Hindu Marriage Act. This would not only entitle the petitioner a right to seek divorce but also economic security such as maintenance and a share in the property of the husband.
- **'Such a marriage is void...and will attract imprisonment and fine':** Once points (a) and (b) are proved to the Court, the Court will pass an order that the second marriage is void and impose a punishment on the accused.

Bigamy under Personal Laws

Hindu Personal Law

Section 5 of the Hindu Marriage Act lays down the conditions for a valid marriage. Any person violating these conditions automatically gives a right to his/her spouse to divorce or get judicially separated along with the right

to ask for maintenance. Further, second marriage is void under Hindu law. Under Section 11 of the Hindu Marriage Act a second marriage has no validity and is considered not to exist in the eyes of law. Thus on a petition, the Court can declare it null and void. The woman who is considered the *second wife* has no rights vis-à-vis her husband's property but is entitled to maintenance along with her children. Her children however get a share in their father's property. Under Section 13 of the Hindu Marriage Act, bigamy is a grounds for divorce.

Can a person escape the provisions of Section 494 IPC if she/he married after converting from Hinduism to any other religion?

A person cannot escape the clutches of Section 494 just because she/he has converted to another religion and then solemnised another marriage. The Courts will understand the intention behind such an act before deciding a case. Therefore, when a person converts to another religion, she/he must apply to the Civil Court and get a decree that the marriage is dissolved because of the change of religion. Unless this is done, she/he will be guilty of bigamy under Section 494 and the spouse will find a valid grounds for divorce.

Is the second wife entitled to maintenance under the Hindu Marriage Act?

Yes, the second wife is entitled to maintenance from her husband if she can prove that her marriage was solemnised according to Hindu rites and ceremonies. In a recent Supreme Court judgment it has been held as following:

Case:

The facts of the case⁶³ are as follows. Rameshwari married Rameshchandra in 1981. Before marrying Rameshchandra, Rameshwari, had got a divorce from her previous husband through the custom prevalent in her community. This was a document of dissolution of marriage executed between her and her previous husband which was then registered. During the time of her second marriage, Rameshwari told her second husband of this fact of marriage and divorce from her previous husband. According to her, Rameshchandra started ill-treating her for dowry. She then filed a petition for judicial separation and maintenance under Section 25 of the Hindu Marriage Act for herself and her daughter.

Rameshchandra claimed that his marriage with her was null and void because her marriage with her previous husband was not dissolved by the decree of the Court and therefore, since their marriage was null and void, he was not responsible to pay any maintenance under Section 25 to her and the child. The Court decided that Rameshwari's second marriage was a nullity – because dissolution of marriage under Hindu law has to be done only by the decree⁶⁴ of the Court.

However, the question before the Court was: Was the wife entitled to maintenance after the Court held that the marriage was a nullity? Under Section 25 of the Hindu Marriage Act, the Court can grant permanent maintenance to either of the spouses 'at the time of passing of any decree' or 'at any time subsequent'.

The Court holds that the expression 'at the passing of any decree' includes a decree of nullity. Thus, even if the Court decides that the marriage between two people no longer exists, it has the power to grant permanent maintenance. The expression 'passing of any decree' encompasses all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring the marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and divorce under Section 13.

The Court, in case of Rameshwari and her second marriage to Rameshchandra held, on the evidence before it, that after the second marriage, the parties lived as husband and wife and they had a considerably long married life. Also, she had not concealed the fact of the first marriage from Rameshchandra. All these circumstances stood justified in ordering Rameshchandra to grant maintenance to Rameshwari under Section 25 of the Hindu Marriage Act.

⁶³ *Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga, (2005) 2 SCC 33.*

⁶⁴ *A decree is a final order by Court.*

Muslim Personal Law

What is the stand of Muslim Personal Law vis-à-vis bigamy?

In the case of a man: Under Muslim law, a man is permitted to marry four times provided he treats all his four wives with equality. However if he is apprehensive that he will not be able to do justice between them and treat them with perfect equality, he is enjoined to marry one wife only.

In the case of a woman: A Muslim woman commits the offence of bigamy if she marries while her first husband is alive.

What legal consequences does a woman have to face in case she violates the Muslim Personal Law of monogamy to which she has to subscribe?

Muslim law does not allow a woman to have more than one husband at the same time. Contravention of this rule attracts punishment under Section 494 of the Indian Penal Code, 1860. The offspring of such a marriage is illegitimate and cannot be legitimised by any subsequent acknowledgement. Thus while a woman can be punished for bigamy under Section 494 IPC, a man under Muslim law is not liable to be punished.

Christian Personal Law

One of the conditions [under Section 60(2)] of a valid marriage in the Indian Christian Marriage Act, 1872 is that neither party must have a spouse living at the time of their marriage.

Parsi Personal Law

The Parsi Marriage and Divorce Act, 1936 recognizes only monogamy as a valid form of marriage between Parsis. Under Section 4(1) of the Act, a marriage is void if it is solemnised despite either party having a spouse living at the time of marriage and thus is a grounds for divorce for the affected party. The person guilty of bigamy can be punished under Section 494 and 495 IPC.

Special Marriage Act, 1954

The Special Marriage Act, 1954 recognizes only monogamy as a valid marriage. Under Section 4(a), neither party must have a spouse living at the time of solemnisation of marriage between them. Thus, a second marriage solemnised under the Special Marriage Act is null and void under Section 24(1) (i). Further, Section 43 of the Act criminalises second marriage and such a marriage is punishable under Sections 494 and 495 of the Indian Penal Code, 1860.

Can a Muslim man marrying under the Special Marriage Act have more than one wife?

A Muslim male who marries under the Special Marriage Act cannot marry another woman a second time on the grounds that Muslim law allows him to marry four times. Once he opts to solemnise his marriage under the Special Marriage Act, he is bound by that law and therefore has to follow the norm of monogamy under this legislation.

POINTS TO REMEMBER

- The Hindu Marriage Act, the Indian Christian Marriage Act, the Special Marriages Act and the Parsi Marriage and Divorce Act forbid a man and a woman to marry more than one.
- Only under Muslim law does a man have a right to contract more than one marriage. A woman under Muslim law however, does not have a right to marry more than one man at the same time.
- Bigamy is a crime under the Indian Penal Code, which means that a person convicted of bigamy can be imprisoned and fined.
- To prove bigamy, the validity of both marriages has to be proved to the Court.
- Even if a man keeps the second marriage secret from family, friends or neighbours for some period of time, the marriage is not valid.

RELIEF

- Bigamy is a non-cognizable and bailable offence and therefore on a complaint, a person cannot be arrested without a warrant.
- An application alleging bigamy has to be made to the Judicial Magistrate First Class in the area in which the person resides.
- Under Section 494 IPC, a person found guilty can be imprisoned for a period of 7 years with a fine.
- Under Section 495 IPC, a person found guilty can be imprisoned for a period of 10 years with a fine.
- Bigamy is grounds for a divorce under the Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, the Special Marriage Act as well as the Indian Christian Marriage Act.
- The woman can claim maintenance and/or a share in her husband's property in a case of bigamy.
- The Court can give compensation in certain cases of bigamy to the affected individual.
- The second wife does have a right to maintenance in a bigamous marriage. However the children in a second marriage have a right to maintenance as well as a share in their father's property.

Child Marriage

Objective

- **To analyse reasons for prevalence of child marriage and its impact on women's lives.**
- **To understand the law on child marriage.**
- **To understand the various factors that perpetuate child marriage, and to design strategies aimed at ending this practice.**

The issue of child marriage in India is one of the most serious problems facing women today. The intention of the law is clear – there is a minimum

age below which two individuals cannot get married. Personal laws applying to Hindus, Christians and Parsis lay down that a girl must be at least 18 years old and the boy should be at least 21 years old at the time of marriage. Under existing laws, solemnising child marriage is an offence and the person can be convicted under a central legislation called the Child Marriage Restraint Act. The law has been ineffective largely due to poor implementation combined with societal acceptance and encouragement of child marriage.

What is child marriage?

A child is an individual who has not completed the age of 18 years. A marriage of a girl who is below 18 years or a boy who is below 21 years is a child marriage and is forbidden in law.

What is the status of child marriage in India?

Personal laws and the Child Marriage Restraint Act, 1929 enumerate the law prohibiting child marriage in India.

While personal laws uniformly lay down conditions of a valid marriage (except the law applying to Muslims) and also enumerate the consequences of violation of this rule, the Child Marriage Restraint Act criminalises the aiding and abetting of marriage of children. The specific provisions under personal laws and the Child Marriage Restraint Act may be spelt out to understand the law, the status of the marriage, the legal consequences of child marriage and the rights of the parties in such a situation.

Personal laws

Under the Hindu Marriage Act, the Christian Marriage Act, the Parsi Marriage and Divorce Act and the Special Marriage Act, one of the conditions of a valid marriage is that the girl should be at least 18 years old and the boy 21 years old.

Under some legislations such as the Special Marriage Act (Section 24), the Indian Christian Marriage Act, 1872 [Section 60(1)] and the Parsi Marriage and Divorce Act, 1936 (Section 3), a child marriage is void. The legal age of marriage under Islamic personal law is 15 years. Under the Islamic law a marriage between two persons who are 15 years old or above is a valid marriage.

Although the Hindu Marriage Act lays down the conditions for a *valid* marriage, a marriage in violation of this rule is neither void nor voidable.⁶⁵ However, a Hindu woman has the option to nullify her marriage if she can prove to the Court that at the time of her marriage she was under 15 years and she repudiated her marriage before she turned 18 years old. She can then apply to the Court asking for a decree of divorce.

⁶⁵ See Sections 11 and 12 of the Hindu Marriage Act that define void and voidable marriage. Also refer *Tukaram Dhondiba Padatave v. Smt Savithri*, (2002) 1 DMC 396 (Kant).

The Child Marriage Restraint Act, 1929

The Child Marriage Restraint Act, 1929 criminalises the aiding and abetting of child marriage. Thus the only remedy available under this law is

to take criminal action against the accused. The law does not look at the issue of child marriage from a 'rights' perspective. This means that under the Child Marriage Restraint Act, the girl child cannot claim any relief (divorce, maintenance) other than file a case against her father, groom, the groom's family and others who are involved in conducting the marriage. Even realistically this law has not achieved the purpose for which it was passed in 1929.

The salient features of this law are:

- **The aim of this law:** The main aim of the Act is to prevent child marriages (which are marriages between girls below the age of 18 and/or boys below the age of 21).
- **Punishment for solemnising child marriage:** The law seeks to prevent child marriages by punishing those that aid and abet the solemnisation of child marriages.
 - Any male individual who marries a girl who is below the age of 18 years can on conviction be punished for a maximum term of 3 months and fined. The prison sentence is calculated on the basis of the age of the male (15 days if he is between 18 and 21 years and 3 months if he is over 21 years old) [Sections 3 and 4].
 - Those who aid and abet the solemnisation of child marriage are also liable to imprisonment for a maximum period of 3 months and a fine (Section 5). The aiding and abetting includes the following acts and omissions:
 - i. Permitting a child marriage to take place;
 - ii. Performing the marriage;
 - iii. Organising a mass marriage where child marriages are solemnised;
 - iv. Participating in a child marriage;
 - v. Failing to prevent a child marriage even though there is knowledge that such a marriage is taking place.
 - A woman cannot be punished under this law [Section 6(i)].
- **Child Marriage Prevention Officers:** Every state government is responsible for appointing a Child Marriage Prevention Officer in the state who is entrusted to prevent child marriage. She is responsible for ensuring that action is taken against all those who perpetrate the practice of child marriage and to carry out advocacy initiatives to sensitise the community against the practice. Usually the Deputy Director of the Department of Women and Child Development is given the additional responsibility of Child Marriage Prevention Officer.
- **Relief:** The only relief under the Child Marriage Restraint Act is to file a case of child marriage. If a person has enough reasons to believe that a child marriage will take place, he or she may also seek an injunction⁶⁶ against such an act.
- **Filing a case against a child marriage:** A case to prevent the solemnisation of a child marriage has to be filed before the Judicial Magistrate First Class. The case must be filed within one year of the offence (Section 9).

What are the remedies against child marriage?

Remedy under personal laws

Under the Hindu Marriage Act, if a woman was married before she was 15, she can have the marriage repudiated after she turns 15 and before she turns 18 years of age.

⁶⁶ *An injunction is a stop order passed by the Court to prevent any person from doing any act or action. It is a civil law remedy.*

Remedy under the Child Marriage Restraint Act

Under the Child Marriage Restraint Act, a person may file a case against the following people on the grounds that they have either aided or abetted the solemnisation of child marriage:

- **The groom**
- **The groom's family**
- **The bride's family**
- **Any other person who conducts the marriage**
- **Any person who helps in preparation of the marriage**

A woman cannot be charged under this law for the offence of child marriage. A case filed under this Act can attract a maximum sentence of imprisonment of 3 months in addition to a fine.

The Court can issue an injunction under Section 12 stopping the marriage, against the groom, the guardians and any person who conducts the marriage if it is satisfied with the information laid in front of it⁶⁷ - Section 12 (1).

No injunction can be issued unless previous notice has been given and the offender has been able to give reasons as to why an injunction should not be issued - Section 12 (2).

The Court can alter or rescind the injunction made on its own or by an application from the aggrieved - Section 12 (3).

Once the application is received the Court should ensure that the person has an early opportunity to appear before the Court. If the Court rejects the application (wholly or in part) it shall record in writing its reasons for doing so - Section 12 (4).

Finally, if a person or persons disobey an injunction knowingly they will be punished for a maximum sentence of imprisonment of three months or fined a maximum of thousand rupees or both - Section 12 (5).

Although personal laws offer some solutions for child marriage (but not under the Hindu law which is where child marriages take place more in comparison to other communities), the Child Marriage Restraint Act offers no avenues to protect the rights of parties. The amount of punishment is extremely low to have any deterrent effect. The girl cannot be expected to file a case against her own family or against the groom's family considering the circumstances in which she finds herself.

New Law on Prohibition of Child Marriages in India

Given the various loopholes in the Child Marriage Restraint Act 1929, the Central Government started working on drafting another bill to prevent child marriages. This law looked at the issue from a rights perspective, thus enumerating clearly the status of child marriage and the rights of the girl in such a situation. This bill was passed and became a law in January 2007, thereby repealing the Child Marriage Restraint Act, 1929.

⁶⁷ Those mentioned under Sections 3, 4 and 5 of this Act.

Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006 has been introduced because of recommendations made by the National Human Rights Commission (NHRC) and the National Commission for Women (NCW). The NHRC and NCW repeatedly reported that child marriages are prevalent across the country and the Child Marriage Restraint Act, 1929 was not sufficient to deal with the problem. They felt it was necessary to have a more comprehensive law which also clarified the status of a child marriage instead of on making the child marriage an offence. Therefore, the government has passed this law titled Prohibition of Child Marriage Act, 2006.

What are the main features of the Prohibition of Child Marriage Act, 2006?

- **The Prohibition of Child Marriage Act states that a child marriage is voidable at the option of the person who was married as a child. The Child Marriage Restraint Act, 1929 does not say anything about the status of the child marriage; it only says that the child marriage is a punishable offence.**
- **According to the Act, any person who was married as a child (girl below 18 and boy below 21 years of age) can file a petition before the District Court asking the Court to annul the marriage. This petition must be filed within 2 years of the person attaining the age of majority.**
- **The District Court can order the husband or his family (if the husband is a minor) to pay maintenance to the woman until she is remarried. The quantum of maintenance will be determined on the basis of the child's needs, her lifestyle and the means of income of the paying party.**
- **The District Court can also pass orders on custody and maintenance of children from a child marriage.**
- **Children born from child marriages before or after the Court nullifies the marriage are to be considered legitimate children.**
- **If a child is taken away from its family or sold and married these marriages are null and void.**
- **Upon application made by the Child Marriage Prohibition Officer or by an informer having any information about a child marriage about to take place, the Judicial Magistrate (First class or Metropolitan Magistrate) has the power to issue injunction orders to prevent this marriage.**
- **If a child marriage takes place by disobeying the injunction such a marriage is void.**
- **The Act has the following punishment provisions:**
 - **The violation of the order of injunction, stopping a child marriage, is punishable with 2 years' imprisonment and with a fine of Rs. 1 lakh, or with both. However, no order can be passed against a woman.**
 - **Any adult male (being above 18 years) who marries a child can be punished with simple imprisonment for 2 years and/or a fine of up to Rs. 1 lakh, or both.**
 - **Parents and guardians can be punished with simple imprisonment for 2 years and a fine of up to Rs. 1 lakh.**
 - **People who conduct, direct and abet a marriage can be punished with simple imprisonment for 2 years and a fine of up to Rs. 1 lakh.**

- No woman shall be punishable with imprisonment.
- The offence of child marriage is being made cognizable and non-bailable.
- **Appointment of Child Marriage Prohibition Officer by the State governments and the role of the Child Marriage Prohibition Officer is to:**
 - Prevent child marriages;
 - Investigate complaints and gather evidence to prosecute violation of the law;
 - Create awareness and sensitise the community;
 - Furnish reports and statistics on child marriage to the State Government;
 - Petition the Court for order under the Act, namely maintenance, custody and injunction;
 - The District Magistrate has been given special powers to stop and prevent marriages during days such as *Akshaya Truthya* (considered an auspicious day sometime in April-May each year, when mass child marriages are performed).

With the passing of the Prohibition of Child Marriage Act, 2006, a new amendment will be applicable under the Hindu Marriage Act, 1955. This is:

Amendments under the Hindu Marriage Act, 1955 - in Section 18 (a)

In the case of a contravention of the conditions specified in Section 5(iii)⁶⁸ the person shall be punishable with imprisonment of 2 years or with a fine of Rs. 1 lakh, or with both.

Muslim Personal Law

Who is a Muslim?

- A Muslim is a person whose religion is Islam.
- A Muslim can be a Muslim by birth or any person who has become the follower of Islam after renouncing his/her original religion.

Marriage

What is a marriage under Muslim Personal Law?

Marriage is:

- Muslim marriage called *Nikah* is a solemn contract between a man and a woman.
- It is made with the object of intercourse, procreation and the legitimising of children.
- It is a civil contract and not a sacrament.

What is the legal age of marriage under Islam?

The age of puberty is the legal age of marriage under Islam. It is presumed to be 15 years of age. Persons who have not attained puberty may be validly contracted into a marriage by a lawful guardian.

⁶⁸ Section 5(iii) of the Hindu Marriage Act, 1955 deals with conditions of validity of Hindu marriages.

What are the conditions for a valid marriage under the Muslim Marriage Act?

The following are the conditions of a valid marriage:

- **Capacity to marry:** The parties should have capacity for marriage. Every Muslim who has attained puberty and who is of sound mind may enter into a contract of marriage.
- **Age of marriage:** In case of marriage of a minor or a person of unsound mind, his/her rightful guardian can contract such a person into the marriage. For Muslims, the age of puberty is presumed to be 15.
- **Offer and Acceptance:** *Ijab* or proposal must be made by or on behalf of one of the parties to the marriage. There must be an acceptance of the proposal, or *Qabul*, by or on behalf of the other party.
- **Witnesses:** The presence of two male or one male and two female witnesses who are sane, adult Muslims.
- **Prohibited relations:** The marriage should not go against the prescribed prohibitions. They are:
 - Prohibition on the grounds of **consanguinity** (relationship through blood): A man is prohibited from marrying his consanguineous relatives like his mother, grandmother, granddaughter, daughter, sister, niece, great-niece, aunt etc.
 - Prohibition on the grounds of **affinity**: A man is prohibited from marrying any ancestors or descendants of his wife or the wife of any of his ancestors or descendants such as his mother, her grandmother, her daughter, his father's wife etc.
 - Prohibition on grounds of **fosterage** (to take care of a child): A Muslim cannot marry his foster mother, foster sister etc.
 - Prohibition on the grounds of **religion**:

For Sunni Muslims: A Muslim male can marry only a Muslim or a *Kitabiya* (Christian or Jew) woman but not an idolatress. A marriage with a Christian should however be solemnised either under the Special Marriage Act or under Christian Law. A marriage with an idolatress or a fire worshipper is not void but merely irregular. A Muslim woman can marry only a Muslim.

For Shia Muslims: A marriage between a Muslim male and a non-Muslim female is unlawful and void; and also a marriage between a Muslim female and a non-Muslim male is void. However a valid *muta* (temporary marriage) marriage may be contracted by a Muslim male with a *Kitabiya* female.
- Prohibition on the ground of **unlawful conjunction**: A man cannot have at the same time two wives who are so related that if one of them had been male, a marriage between them is not possible because of being within prohibited degrees of relationship.
- Prohibition on a **fifth marriage or subsequent marriages** while all former wives are alive.
- A man cannot marry a woman who is undergoing *iddat*. A woman should observe *iddat* after her marriage has been dissolved, during which period she should not remarry. It is to confirm whether or not she is pregnant by her former husband. If she does marry before the *iddat* period then the marriage will be an irregular marriage under Sunni law.
- **Neither registration of marriage nor any religious ceremony is necessary for a valid Muslim marriage.**

IDDAT

Iddat is an Arabic word and its literal meaning is 'counting'. Counting means the days of possible conception to ascertain whether a woman is pregnant or not. Under the Muslim law it is the period during which a woman is prohibited from re-marrying after the dissolution of marriage. The object of *iddat* is to ascertain the paternity of a possible conception by a divorced or widowed woman's former husband.

- **Shia v. Sunni Law**

Marriage with a woman observing *iddat* is irregular under Sunni law.

Marriage with a woman observing *iddat* is void under Shia law.

- **Calculation of *iddat***

- When the marriage has been consummated, and the woman is not undergoing menstruation, *iddat* is three menstrual periods.
- When the marriage has been consummated, and the woman is not undergoing menstruation, *iddat* is three lunar months.
- If the marriage has not been consummated, the woman is not required to observe *iddat*.
- If the woman is pregnant at the time of divorce, then *iddat* extends till the delivery of the child or abortion.
- When the marriage dissolves by the death of the husband, the duration of *iddat* is four months and ten days.
- If the woman is pregnant at the time of her husband's death, *iddat* continues till the delivery of the child, or four months ten days, whichever is longer.

What are the different kinds of marriage under Islam?

The following are the kinds of marriage under Islam:

***Sahih* or valid marriage**

A *sahih* or valid marriage is one which is contracted by observing all the conditions of marriage.

Effects of a *sahih* (valid) marriage:

- **A valid marriage gives rise to certain rights and duties between the parties. It creates between the parties reciprocal rights of inheritance. As regards the wife a valid marriage confers upon her the rights of dower, maintenance and residence in her husband's house and it imposes on her the duty of obedience to him and to admit him to sexual intercourse and to observe *iddat*.**

***Batil* or void marriage**

A marriage contracted in violation of some of the conditions necessary for a valid marriage is *batil* or void marriage. These conditions are consanguinity, affinity, fosterage, and marriage by a Muslim woman without divorce from a living husband.

Effects of a *batil* (void) marriage:

- **A void marriage has no legal effect. It does not create any rights or obligations between the parties. The children born of a void marriage are illegitimate.**

***Fasid* or irregular marriage**

If a marriage is contracted in violation of some other conditions, the marriage is declared only *fasid* or irregular.

These marriages are:

- **Marriage contracted without witnesses**
- **Marriage with a fifth wife when four wives are present**
- **Marriage during the *iddat* period**
- **Marriage prohibited on the grounds of difference of religion**
- **Marriage prohibited as unlawful conjunction**

Effects of a *fasid* (irregular) marriage:

- **An irregular marriage has no legal effect before consummation. If consummation has taken place the wife is entitled to dower and the children born of such marriage are legitimate and entitled to inherit their father's estate. An irregular marriage may be terminated by either party either before or after consummation by words showing an intention to separate.**

Example 1:

Javed, a Muslim, married Ganga who is a Hindu. The marriage is prohibited on grounds of religion and hence irregular.

Example 2:

Talhan married Rehana. Later he married her sister while Rehana was still living. It is an unlawful conjunction and hence the marriage is irregular.

Example 3:

Jamal married a fifth time. His second marriage was dissolved by divorce even before his fifth marriage. The fifth marriage is valid because he had only 3 wives at the time of the fifth marriage.

What is a muta marriage?

A *muta* marriage is a temporary marriage recognised only among Shia Muslims, its duration being fixed by agreement between the parties.

A *muta* marriage is contracted when a man says to a woman, "I will take the enjoyment of you for such a time, say ten days", or, "Give me the enjoyment of your person for ten days."

In a *muta* marriage also, all the conditions of a valid marriage apply.

The Sunni sect does not recognise this kind of marriage. It is void under the Sunni law.

A Muslim Shia male may contract a *muta* marriage with a woman professing the Muslim, Christian or Jewish religion, or even with a woman who is a fire worshipper, but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Muslim.

What are the conditions for the validity of a muta marriage?

There must be a definite time frame during which the relationship is to last and definite sum or thing specified as dower. If the term is fixed, but the dower is not specified, the contract is void. But if the dower is specified and term is not fixed, the contract, though void as a *muta*, may operate as a 'permanent' marriage.

What are the consequences of a muta marriage?

A *muta* marriage does not confer on the wife any right or claim to her husband's property. However, the parties may make an express agreement to inherit from the other. The children conceived while it exists are legitimate and capable of inheriting from their father.

Consequences on the expiration of the term of *muta* marriage are as follows:

- Observe *Iddat*: **A *muta* marriage is dissolved by the expiration of the term of *iddat*. On the expiration of the term of marriage, the woman has to observe *iddat*. If there has been consummation of marriage, then it is for two menstrual courses. When the wife has no menstrual courses, it is for 45 days only. If the husband dies before the expiry of the *muta* term, the wife has to observe *iddat* for four months and ten days. If the wife is pregnant, the period is prolonged till delivery.**
- Dower: **If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term. If the *muta* marriage is not consummated, the woman is entitled to half the dower. If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower.**
- Maintenance: **A woman married in the *muta* form is not entitled to maintenance under Shia law. But her right to maintenance under Section 125 CrPC is not affected.**

When does a presumption of marriage arise?

- **When a man acknowledges a woman as his wife; or**
- **When a man acknowledges that the children born to a woman are his legitimate children; or**
- **When there is continuous cohabitation between a man and a woman for a number of years.**

Example:

Amir acknowledged Saira's children as his own. Thus a marriage between Amir and Saira is presumed.

What is the 'option of puberty'?

The option of a minor on attaining puberty to repudiate (reject) a marriage contracted for him or her by any guardian during minority. A Muslim man may repudiate his marriage at any time; there is no time limit, unlike for Muslim women.

A Muslim girl is entitled to exercise the option of puberty if the following conditions are fulfilled:

- **She was given in marriage by her father or other guardian**
- **She had not attained the age of puberty at that time, which means she should have been married before she attained 15 years of age**
- **She is below 18 years of age. Repudiation must be done prior to the age of 18**
- **The marriage has not been consummated**

Example:

Rahim gave his daughter, Sahana in marriage to Abdul when she was only 12 years old. When she turned 16, Sahana repudiated the marriage when it was still not consummated. She has successfully exercised the option of puberty.

Is polygamy permitted under Islam?

Muslim law grants to a husband a right to have up to four wives at the same time provided he treats all of them equitably and impartially. He should provide for them equally and justly.

What is mehr or dower?

It is a sum of money or other property, which the wife is entitled to receive from the husband in consideration of marriage. It is a mark of respect to the wife and also a kind of security for her.

There are two kinds of dower:

- **Prompt dower, which is payable on demand.**
- **Deferred dower, which is payable on dissolution of marriage by death of the husband or by divorce.**

What does restitution of conjugal rights mean?

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

If the marriage is void (*batil*) or irregular (*fasid*) under the provisions of the Muslim law then a decree for restitution of conjugal rights will not be granted. This is provided under The Dissolution of Muslim Marriage Act, 1939.

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

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

Example:

Rahim and Laila got married under the Muslim customary law. Rahim kept harassing Laila and assaulting her. He used to treat her with cruelty. Laila finally got fed up and left him and went to stay with her parents. Rahim filed a suit in the Court for restitution of conjugal rights but he did not succeed because his wife had a reasonable cause for leaving him.

How can a Muslim marriage be dissolved?

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

Dissolution without recourse to Court

Talak

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

What are the kinds of Talak?

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

- **Revocable**
- **Irrevocable**

Kinds of *Talak* on the basis of approved forms are as follows:

- **Talak ahsun: This is done by a single pronouncement of divorce (*talak*) during a *tuhr* followed by the observation of *iddat*. It is the most favoured form of *talak* because it is revocable anytime before the expiry of the *iddat* period.**

Tuhr is the period between two successive menstruations.

Example:

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

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

Example:

Mehfuz and Shabnam got married. Mehfuz wanted to divorce Shabnam. He pronounced talak during 3 successive tuhrs. The divorce is complete and irrevocable.

- ***Talak-ul-bidaat: This consists of three pronouncements at short intervals or even in immediate succession during a single tuhr or a single pronouncement of talak during a tuhr showing clearly that the divorce is intended to take effect immediately. This form is considered sinful and is disapproved because it becomes irrevocable as soon as talak is pronounced irrespective of iddat.***

What are the grounds for divorce for a Muslim woman?

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

- **The whereabouts of her husband have not been known for a period of four years;**
- **The husband has not provided for her maintenance and she has been neglected for two years;**

- **The husband has been sentenced to imprisonment for a period of seven years or upwards;**
- **Her husband has failed in performing his marital obligations for three years;**
- **Her husband is impotent.**

Impotency of the husband

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

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

Impotency is grounds for a divorce to the wife under Dissolution of Muslim Marriages Act [Section 2(v) subject to Section 9(c)].

- **The wife must prove that the husband was impotent at the time of marriage and continues to be so.**
- **On application of the husband, the Court may pass an order requiring the husband to satisfy the Court within a period of 1 year of the order that he has ceased to be impotent, and if the husband so satisfies the Court, no decree can be passed on the ground of impotency.**

Leprosy or a virulent venereal disease

Husband is suffering from leprosy or any virulent venereal disease.

Insanity

In Muslim law the husband should be insane for a period of two years. The term insanity is used in a very wide sense. It may be continuous or with intervals. Insanity of any kind can be used as grounds for divorce and it has no restricted meaning.

Option of puberty

Under Dissolution of Muslim Marriages Act, a Muslim woman who has been given in marriage by her father or guardian before she attained 15 and who has repudiated her marriage before she turns 18 (option of puberty) can, if marriage has not been consummated, apply for a decree of dissolution of marriage.

Cruelty

The husband treating her with cruelty which may be mental or physical cruelty. Under Section 2 (viii) of the Dissolution of Muslim Marriages Act, cruelty is defined as follows:

- **"Habitual assault in making the wife's life miserable by physical ill-treatment or by a conduct short of that;**
- **association with women of evil repute or otherwise leading an infamous life;**

- **attempt to force the wife to lead an immoral life;**
- **disposing of her property or preventing her from exercising her rights therein;**
- **obstructing her in the observance of her religious profession or practice;**
- **inequitable treatment by a polygamous husband, contrary to what the Koran lays down in this behalf."**

Apostasy or conversion

The renunciation of Islam by a married Muslim woman or her conversion to another faith shall not by itself automatically dissolve her marriage.

EFFECTS OF APOSTASY OR CONVERSION

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

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

Other grounds

On any other valid and reasonable ground recognised by Muslim law.

Example 1:

Aftab and Nafiza got married. Aftab had illicit relations with another woman. Nafiza filed a suit seeking divorce and she succeeded.

Example 2:

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

Example 3:

Afsal neglected his wife Rameela and did not provide her with reasonable provision for maintenance for two years. Rameela obtained a divorce on this ground.

Example 4:

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

What is divorce by mutual consent?

Khul and Mubara'at

Divorce may take place by mutual consent of husband and wife. It is then called *Khul* or *Mubara'at*.

- **A *khul* is a divorce by consent at the instance of the wife and she agrees to give a consideration out of her property to the husband for the divorce. The consideration is mostly a part or whole of the *mehr*.**

- **Mubara'at is divorce by mutual consent where both the husband and wife desire dissolution. The offer of divorce may proceed from either party. Both *khul* and *mubara'at* operate as irrevocable divorce. Both require the observance of *iddat*.**

Example 1:

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

Example 2:

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

Talak-i-taweez

This is a form of divorce where the power to pronounce *talak* is delegated to the wife by an agreement before the marriage.

Law of maintenance

SHAH BANO'S CASE

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

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

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

Mohd. Ahmed Khan appealed against this decision.

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

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

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

Maintenance under the Muslim Women (Protection Of Rights On Divorce) Act, 1986

The law relating to divorced Muslim women is governed by the Muslim Women (Protection of Rights on Divorce) Act, 1986. This legislation was

enacted into law by the Parliament following the decision by the Supreme Court in the case of Mohammed Ahmed Khan v. Shah Bano Begum.

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

The rights of divorced Muslim women

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

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

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

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

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

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

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

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

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

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

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

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

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

Example:

Mumtaz and Ahmed got married in 1978 and were divorced in 1982. Mumtaz claimed under Section 3(1)(d), the property that was gifted to her at the time of marriage and also a scooter gifted to the respondent by her parents at the time of marriage.

The Court held that the Muslim woman divorced in 1982 could not claim under the Muslim Women (Protection of Rights on Divorce) Act, which came into force in 1986. About the claims, the Court said that in such a situation, the Muslim law of gifts would apply and not this legislation. Thus, the gold chain gifted to her at the time of marriage was her absolute property but the scooter gifted to her husband was his absolute property and could not be recovered by her.

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

IQBAL BANO'S CASE⁶⁹

Iqbal Bano of Aligarh was deserted by her husband. She claimed maintenance under Section 125 CrPC. In 1994, the Trial Court directed her husband to pay her a maintenance of Rs. 450 per month. On a revision petition in 2001, the Allahabad High Court accepted the husband's contention that as he had divorced his wife by pronouncing triple *talak*, the claim for maintenance should be made under the 1986 Act and not under Section 125 CrPC. Iqbal Bano appealed against this in the Supreme Court of India and contended that there was no bar on a Muslim woman filing a petition under Section 125 CrPC. The 1986 Act could apply only to divorced Muslim women and since her husband had not divorced her in a proper manner and had deserted her, she could claim maintenance under Section 125 CrPC.

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

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

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

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

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

- **The Family Court does not have the jurisdiction in respect of matters under the Muslim Women (Protection of Rights on Divorce) Act.**
- **There is no period of limitation prescribed for filing an application under Section 3(2) of the Act.**

⁶⁹ <http://www.hindu.com/2007/06/10/stories/2007061000251100.htm>

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

- **While making an order for maintenance against the husband, the Magistrate has to satisfy himself that:**
 - The husband has sufficient means. The Magistrate does not have to assess the means of the husband in case of payment of her *mehr* and other properties. The question of sufficient means arises only when the issue of provision and maintenance of wife and children is involved;
 - Either he has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and her children; or
 - The wife has not been paid the amount equal to the sum of *mehr* or dower; or
 - That she has not been delivered all the properties given to her before at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends;
 - The remarriage of the divorced Muslim woman during the pendency of the proceedings will also be a relevant factor while deciding the case.
- **The amount of provision and maintenance determined by the Magistrate will be based on the following:**
 - The needs of the divorced woman, which include, for example, the needs of the children who are maintained by her;
 - The standard of life enjoyed by her during her marriage;
 - The means of her former husband.

Maintenance from the relatives of the divorced woman and Wakf Board

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

Under Section 4(2), where the divorced woman does not have relatives who can provide maintenance or if none of them has sufficient means to maintain such a divorced woman, the Magistrate can order the State Wakf Board established under the Wakf Act, 1954 to pay the amount determined by the Court.

The Magistrate will make such an order if:

- **Since her divorce from her previous husband, she has not remarried;**
- **She is not able to maintain herself after the *iddat* period.**

Option to refer the matter of maintenance under Section 125 CrPC and not under the Muslim Woman (Protection of Rights on Divorce) Act.

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

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

- **The application must have been filed under Section 3(2), which seeks to**

claim maintenance against the husband. An application filed under Section 4 (claim of maintenance from relatives or the Wakf Board) will disentitle the parties to opt out of this legislation.

- **The divorced woman and her husband must declare either by an affidavit or by any other declaration in writing that they prefer to be governed by Section 125 to Section 128 CrPC.**
- **The declaration must be filed in the Court hearing the case on the date of the first hearing of the application under Section 3(2).**

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

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

Wakf Board's obligations

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

Custody and guardianship

Age of majority

Under the Muslim law the age of majority is governed by two systems:

- **Classical Muslim law**
- **Statutory law**

Under the Classical Muslim law a person is said to be a minor till he/she attains the age of puberty. The age of puberty is 15 years. However 15 years is the age of majority only for the Muslim law of marriage, dower and divorce.

The Statutory laws which regulate the age of majority of Muslims are as follows:

- **The Indian Majority Act, 1875 for purposes other than marriage;**
- **When a Muslim is under the supervision of a guardian appointed by a Court of law or under the protection of a Court of Wards, the age of majority for such a Muslim is 21 years;**
- **For filing a suit in a Court of law, the minimum age is 18 years even though the suit may relate to marriage, dower or divorce. Hence in this case a minor can file a suit only through a friend.**

Who are natural guardians under the Muslim law?

Muslim law recognises the following kinds of guardians:

- **Natural or legal guardian**
- **Testamentary guardian**
- **Guardian appointed by Court or statutory guardian**
- **De-facto guardian**

Natural Guardian

Natural Guardian is a person who has a legal right to control and supervise the activities of the child. The father is recognised as the natural guardian of the child under all the schools of Muslim law. In the absence of the father, the father's executor may also act as the natural guardian. The executor is the person appointed by the father to act as guardian of the minor child on his behalf.

In Shia law in the absence of the father, only the paternal grandfather may act as a natural or legal guardian.

Testamentary Guardian

Testamentary guardian is the person appointed as guardian of a minor under a will. Only a father or, in his absence, grandfather, has the right to appoint a testamentary guardian. A non-Muslim or a female may also be appointed as a guardian.

Guardian appointed by Court

In the absence of a natural and testamentary guardian, the Court is empowered to appoint a guardian for the protection of the minor's person or property or for both. This appointment is governed by the Guardians and Wards Act, 1890 which is applicable to all Indians irrespective of their religions.

De-facto Guardian

A de-facto guardian is one who is neither a legal guardian nor a testamentary guardian or statutory guardian but has himself/herself assumed the custody and care of a child.

Mother's right to custody of the child

Under all schools of Muslim law, the general rule is that the mother is entitled to custody or the physical possession of the child up to a certain age. This rule is based on the presumption that on account of her peculiar relationship with the child, the mother is the best person to give the natural love and affection which a child requires during its infancy including its dependence for feeding. In case of a son, the mother is entitled to the custody of the child till he attains the age of 7 years and when the child is a daughter, the mother's right to the custody continues till the daughter attains puberty (15 years). A mother is entitled to the custody of the child even if she has been divorced by the husband or has become a widow, provided she remains unmarried.

Father's right to custody of the child

The father is entitled to the custody of the child of a son below 7 years of age or a daughter below the age of puberty only in the absence of or disqualification of the mother. In case of a child/children above the stipulated age, the father is the natural guardian till the child attains the age of majority i.e. 18 years.

In the absence of the father the custody of a child belongs to the paternal male relations in the order of priority given below:

- **Full brother**
- **Consanguine brother**
- **Full brother's son**
- **Consanguine brother's son**
- **Full brother of the father**
- **Consanguine brother of the father**
- **Son of father's full brother**
- **Son of father's consanguine brother**

Rule: No male is entitled to the custody of an unmarried girl unless he stands within the prohibited relationship to her.

Christian Personal Law

Who is a Christian?

A Christian is a person who professes the Christian religion.

What are the personal laws that apply to Christians in India?

The laws of marriage and divorce that are applicable to Christians in India are:

- **Indian Christian Marriage Act, 1872; and**
- **The Divorce Act, 1869.**

Marriage

What is a marriage under Christian Personal Law?

A marriage is both a sacrament and a civil contract under Christian personal law.

What are the conditions for a valid marriage under the Indian Christian Marriage Act?

Conditions for a valid marriage under the Indian Christian Marriage Act are:

- **Age of marriage:** The man should not be under 21 years of age and the woman should not be under 18 years of age - Section 60(1);

- **Monogamy:** Neither of them should have a spouse living at the time of the marriage - Section 60(2);
- **Ceremony:** Each of the persons should say that he/she is willing to take the other as his/her lawfully wedded wife or husband in the presence of a minister of religion authorised to solemnise marriages or any other person authorised to do so under the Act - Section 60(3);
- **Witnesses:** The presence of two witnesses besides the minister of religion or any other person who is solemnising the marriage - Section 60(3).

Who can get married under the Indian Christian Marriage Act, 1872 (ICMA)?

If either one of the parties to the marriage is Christian, the couple can marry under ICMA. All Christian marriages are registered in the Church where the marriage takes place and a certificate of marriage is issued by the Church.

Who can solemnise a marriage under the ICMA?

Marriage can be solemnised in India by:

- **Any person who has received Episcopal ordination;**
- **Any clergyman of the Church of Scotland (Provided the marriage has been solemnised according to the rules, rites, ceremonies and customs of the Church in which he is a Minister or Clergyman;**
- **A Minister of Religion licensed under the Act; Any presence of a Marriage Registrar appointed under the Act.**

Dissolution of marriage

When does the marriage become null and void ?

A marriage between two Christians becomes null and void in the following circumstances:

- **The respondent was impotent at the time of the marriage and at the time of the institution of the suit.**
- **The parties are within prohibited degrees of relationship of consanguinity⁷⁰ or affinity.**
- **Either party was a lunatic or an idiot at the time of the marriage.**
- **Either party had a spouse living at the time of the marriage.**
- **The marriage can be solemnised only by persons having the authority to do so and only according to the rules, rites and customs of the Church.**
- **The Court may declare the marriage as being null and void on the grounds that the consent of either party was obtained by force or fraud.**

⁷⁰ Consanguinity means relationship by blood. Affinity means nearness which is created through marriage. The prohibited degrees of consanguinity (natural or legal) and affinity are not indicated in the Act. Whether the person is within the prohibited degree or not will depend on his/her personal law.

In case a marriage has been declared null and void because of insanity of either party, the children of such a marriage begotten before the decree is passed shall be deemed to be legitimate and shall have the right to succeed to the estate of the parent other than the one who was insane during the marriage and was competent to marry.

The same effect shall follow also if the marriage has been declared null and void on the grounds that either party had a spouse living at the time of the marriage, provided the existence of such spouse was not known and that such spouse was believed to be dead.

Example:

Peter and Mary have been married for five years. They got married in the year 2000. During this time Mary gave birth to two children. One day when Mary was at home a woman called Rose came to their house and declared that she had married Peter in 1999 and also had one child with him and that because she was not from a wealthy family, Peter sent her away and he disappeared from her life. It is only after five years when Rose came to this town to get admission for her child that she saw Peter on the road and followed him home.

On hearing this Mary was very upset and went to Court for an annulment of her marriage, The Court granted it to her and also told her that despite the annulment, her two children will be treated as legitimate children and will have all the rights of such children.

What is restitution of conjugal rights?

Section 32 of the Divorce Act, 1869 allows for either spouse to file a petition for restitution of conjugal rights. After marriage both the husband and the wife have the right to cohabit or live with each other. If either the husband or the wife moves out of the company of the other, without any reasonable cause then the aggrieved party may file a petition in Court to resume the cohabitation and this is termed restitution of conjugal rights.

In a petition for restitution of conjugal rights, the petitioner must prove that the other party has refused to live with him or her without any reasonable cause. The following have been held to be reasonable cause:

- **Where the wife refused to live with her husband because he was living with another woman and having sexual relations with her.**
- **Where the husband makes false accusations against his wife saying that the children were born to her through some other man and not him.**

What is a judicial separation?

Under Section 22 of the Divorce Act, either the husband or the wife may apply for judicial separation on the following grounds:

- **Adultery; or**
- **Cruelty; or**
- **Desertion.**

Judicial separation does not have the same effect as divorce. The above acts of adultery, cruelty and desertion should have been existing for two years and upwards.

Judicial separation entitles the parties to refuse cohabitation but does not dissolve the marriage and therefore neither of the parties to such decree can remarry during the lifetime of the other.

If the decree of judicial separation has been granted on the grounds of desertion by either party, then under Section 26, either the wife or the husband can present a petition to the Court to reverse such an order on the grounds that the decree was obtained in the absence of either the husband or the wife and that there was reasonable excuse for the alleged desertion.

On what grounds can a Christian marriage be dissolved?

Under Section 10 of the The Divorce Act, a marriage can be dissolved by a petition being presented by either the husband or the wife party to the marriage on the grounds that, since the marriage was solemnised, the respondent:

- **has committed adultery;**
- **has ceased to be a Christian;**
- **has been of unsound mind for a period not less than 2 years preceding the date of the petition;**
- **has been suffering from a virulent and incurable form of leprosy for a period not less than 2 years;**
- **has been suffering from any venereal disease of a communicable form for a period not less than two years;**
- **has not been heard of as being alive for a period of seven years or more;**
- **has wilfully refused the consummation of marriage;**
- **has refused to resume cohabitation after a decree of restitution of conjugal rights has been passed;**
- **has deserted the petitioner for a period of at least two years immediately before the date of presenting the petition; (Desertion is defined as abandonment against the wish of the person being abandoned);**
- **has treated the party filing the petition with such cruelty, which would cause a reasonable apprehension of fear that it would be harmful or dangerous to stay with the offending party any longer;**
- **has been guilty of rape, sodomy or bestiality (The wife may file such a petition against the husband).**

Bars to matrimonial reliefs

Condonation of the wrong done: If either spouse condones or forgives the other's misconduct or the wrong done by him/her, then that person will not be able to seek the remedy. In Christian law of divorce, condonation means that the person seeking relief continues to have conjugal co-habitation as husband or wife with the spouse with full consent even though his/her spouse is guilty of committing adultery. In The Divorce Act of 1869 as amended in 2001, Section 13 and 14 state that no relief is available to a person filing a petition for divorce on the grounds of adultery if such adultery has been condoned.

Maintenance

What are the grounds for maintenance under The Divorce Act, 1869?

A wife can claim maintenance under The Divorce Act as well as under Section 125 CrPC, she can claim permanent maintenance as well as interim

maintenance. In addition, under Section 37, on a petition seeking decree of dissolution of marriage, or judicial separation, the Court can order the husband to secure a sum of money towards her maintenance. However, the Court will take into consideration the following points while considering a petition for maintenance:

- **The fortune of the wife;**
- **The ability of the husband to pay;**
- **The conduct of both the parties.**

Custody and Guardianship

Who are minors?

Minors are children who have not completed the age of 18 years.⁷¹

Who can be granted the custody of the children?

The law of custody gives paramount consideration to the welfare of the child and the best interests of the child. If the welfare of the child demands that the custody should be given to the mother, even though she has no means to support herself, the Court may grant the custody of the child in her favour. In such a case the Court may order the father to pay for the maintenance of the child and the mother.

The Court however may also consider the fact of the parent being a good parent or a bad parent. In this regard, charges of adultery or bad character supported by concrete evidence may be taken into account while deciding a case of grant of custody. Wherever possible the Court will also take into account the wishes of the child, if the child is older and is able to express his/her interest to stay with either of the parents.

Special Marriage Act

What is the Special Marriage Act?

The Special Marriage Act, 1954 came into force on January 1, 1955. Some of the salient features of this legislation are:

- **Inter-religion and inter-caste marriages are allowed under this legislation unlike other personal laws that insist on the religion or caste of the parties.**
- **Marriage is monogamous without exception.**
- **Marriage is not treated as an unbreakable knot even if howsoever painful; it can be dissolved on a reasonable ground, but not arbitrarily at the option of only the husband.**
- **Government is a party to the solemnisation of this marriage, unlike other marriages. The Marriage Officer functions on behalf of the Government.**
- **Registration of this kind of marriage is compulsory.**

⁷¹ The age of majority is 18 years for both male and female under the Indian Majority Act.

What is a valid marriage under the Special Marriage Act (Section 4)?

Under the Special Marriage Act, a valid marriage is one which is performed by observing all the necessary formalities for its solemnisation and without violating any of the prescribed conditions.

The conditions relating to a **valid marriage** are as follows:

- **Neither party should have a spouse living at the time of marriage;**
- **Neither party should be incapable of giving valid consent due to unsoundness of mind, or mental disorder or recurrent attacks of insanity;**
- **The male must have completed the age of 21 years and the female must have completed 18 years of age at the time of marriage;**
- **The parties should not be within prohibited degrees of relationship unless the custom of either of the parties allows it.**

What are degrees of prohibited relationship?

Marriage with certain persons is forbidden because they are already connected with the family either by birth or marriage. The First Schedule of the Act lays down the prohibited degrees for a man in Part I and for a woman in Part II.

Prohibited relations for a man are:

- **Mother**
- **Daughter**
- **Son's daughter**
- **Sister**
- **Sister's daughter**

Prohibited relations for a woman are:

- **Father**
- **Father's father**
- **Son**
- **Daughter's son**
- **Grandson**

What is the procedure for marriage under the Special Marriage Act?

- Notice of intended marriage: **If two persons intend to marry under the Special Marriage Act, the notice of such marriage must be made in writing to the Marriage Officer appointed in each district (Section 5).
The notice given by either party to the marriage is then recorded in the Marriage Notice Book. Any person intending to inspect the notice book can do so without any fee being charged.**
- Notice: **The notice will be published and affixed in a conspicuous place in the office.**
- Objection to the marriage: **Before the expiry of thirty days from the date of publication of the notice, any person may object to the marriage on the grounds of non-fulfillment of the conditions of marriage.**

- If an objection is made: **If an objection is made, the Marriage Officer shall not solemnise the marriage and will inquire into the objection. The Marriage Officer shall not take more than thirty days from the date of objection to enquire into the matter and arrive at a decision.**
- Marriage to be solemnised within three months: **A couple giving notice under this provision, has to solemnise the marriage within three months of giving the notice to the Marriage Officer (Section 14). If they fail to solemnise the marriage within three months, the notice is considered lapsed and the Marriage Officer cannot solemnise that marriage until another notice is given by the parties of the intended marriage.**
- Place and form of solemnisation (Section 12): **A marriage under this Act can be solemnised in any form which the parties adopt.**

The marriage can be solemnised at the office of the Marriage Officer or any other place as the parties desire near the office of the Marriage Officer.

The marriage is complete and binding only when the parties say to each other in the presence of three witnesses and the Marriage Officer the following words – “I, (xxx), take (yyy), to be my lawful wife (or husband)” in a language understood by the parties.

- Certificate (Section 13): **A certificate, signed by both parties in the presence of three witnesses is entered in the Marriage Certificate Book and is conclusive proof of the fact of marriage solemnised under this Act.**

What is the procedure for registration of marriages celebrated in other forms (Section 15)?

A marriage celebrated and solemnised either before or after the coming into force of this Act in any form other than under the Special Marriage Act can be registered by the Marriage Officer if the following conditions are fulfilled:

- **A ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;**
- **At the time of registration, neither party has more than one spouse living;**
- **At the time of registration, neither party is an idiot or lunatic;**
- **The male is 21 years and the female is 18 years old;**
- **The parties are not within the prohibited degrees of relationship unless one of their customs allows a marriage within such prohibited degrees;**
- **The parties have been residing within the district of the Marriage Officer for a period of not less than 30 days when an application is made for registration of marriage under this Act.**

What is the effect of registration of marriage under the Special Marriage Act?

- **The marriage between parties, whose marriage is solemnised and celebrated under any other law, registering their marriage under this legislation will be deemed to be a marriage solemnised under this Act.**
- **Children born to a couple after the date of the ceremony of marriage will always be considered legitimate children of their parents.**

What are the types of invalid marriages under the Special Marriage Act?

Void marriage: A void marriage does not exist in the eyes of law. It does not confer the status of husband and wife on the parties. Therefore they get no rights and no obligations from such a marriage.

A petition for declaration of a marriage as null and void is to be presented by either party to the marriage against the other party during the life-time of the other party.

When the marriage is declared void, the Court regards that the marriage has never taken place. Such a marriage does not create any rights or obligations between the parties.

Voidable marriage: A voidable marriage is treated as a valid marriage until the parties to the marriage go to Court to obtain an order nullifying the marriage. The children of such a marriage will be legitimate.

What is a void marriage under the Special Marriage Act?

Under the Special Marriage Act, a marriage is void for the following reasons:

- **If either party has a spouse living at the time of marriage;**
- **If either party is incapable of giving valid consent due to unsoundness of mind, or mental disorder or recurrent attacks of insanity;**
- **The male has not completed the age of 21 years or the female has not completed 18 years of age at the time of marriage;**
- **The parties are within prohibited degrees of relationship unless the custom of either of the parties allows it;**
- **Impotence of the respondent at the time of marriage and also at the time of institution of the suit.**

What is a voidable marriage under the Special Marriage Act?

A marriage solemnised under this Act will be voidable under Section 25 for the following three reasons:

Non-consummation - Section 25(i): The first ground is that the marriage has not been consummated on account of the wilful refusal of the other party to the marriage to consummate the marriage. The consummation of a marriage requires an act of sexual intercourse.

Pregnancy at the time of marriage - Section 25(ii): If the wife was pregnant at the time of marriage by some person other than the husband it will make the marriage voidable at the option of the petitioner who is the husband.

If the husband was aware of pregnancy of the wife at the time of marriage, the marriage cannot be said to be invalid.

To sustain a petition on this ground, the husband should not have known that his wife was pregnant by a person other than him and the proceedings must be instituted within a year from the date of marriage and the couple should not have had any sexual intercourse after the facts were revealed.

Consent to marry under fraud or coercion - Section 25(iii): The third ground for voidability of marriage is that the consent of either party to the marriage was obtained by coercion or fraud.

Example:

John said he was a lecturer and he took advantage of the innocence and inexperience of Padma who was his student. They got married under the Special Marriage Act. Before marriage he told her that he earned Rs. 10,000 a month and owned a house and was well-off. He said he had no family. In reality he did not have a job and had no property at all and had a family of sisters and mother dependent on him. Padma married him under the Special Marriage Act and she found out the truth six months from the date of marriage. Since there was fraud involved the marriage is voidable and can be nullified.

However, to grant relief on this ground the following two conditions must be followed:

- **The proceedings to declare the marriage void must be instituted within one year after coercion or fraud is discovered.**
- **The petitioner should not continue to cohabit with the respondent after the discovery of fraud or when the coercion stops.**

How does one petition for divorce under the Special Marriage Act?

Neither party can present an application to the District Court within a year of entering the marriage under the Special Marriage Act (Section 29).

The Court will allow a petition to be presented within one year of the marriage under this Act only on the ground that the petitioner has suffered exceptional hardship or exceptional depravity on the part of the respondent. If the Court finds that such an application has been made by misrepresentation or concealment of the nature of the case, then it can pass a decree on the condition that it will not have effect before the expiry of one year of the date of the marriage.

In considering an application for divorce filed within one year of the marriage, the Court will always keep in mind the interests of the children and any reasonable probability of reconciliation between parties - Section 29(2).

What is restitution of conjugal rights under the Special Marriage Act?

Under Section 22, a petition for restitution of conjugal rights may be made if either party has withdrawn from the society of the other party without reasonable excuse. If the District Court to whom the application is made is satisfied that there is no reasonable excuse for withdrawing from the society of the other spouse, it can decree restitution of conjugal rights. The burden of proving reasonable excuse is on the person who has withdrawn from the society.

What are the grounds for judicial separation under the Special Marriage Act?

- **Either the husband or the wife can present an application for judicial separation:**
 - on any of the grounds on which divorce can be sought under this Act;
 - on the ground of failure to comply with a decree for restitution of conjugal rights.

- **If there are good reasons to do so, the Court may rescind the decree of judicial separation under Section 23(2).**
- **Once a decree of judicial separation is made, it will no longer be obligatory for the parties to live together.**

What are the grounds available for dissolution of marriage under the Special Marriage Act?

Either party to the marriage can present an application for divorce on the following grounds:

Adultery: If after the solemnisation of the marriage he/she has had voluntary sexual intercourse with a person other than his/her spouse.

Cruelty: If either the husband or the wife behaves in a manner which causes physical or mental trauma or stress to the other.

Desertion: An order for divorce may be sought on the grounds of desertion if either the husband or the wife has **abandoned their spouse for a period of at least two years or more**. There must be no justifiable reason for this abandonment.

Unsound mind: An order for divorce may be sought if either spouse is incurably of unsound mind or suffering from any such mental disorder due to which the spouse cannot reasonably be expected to live with the partner who is of unsound mind. Unsound mind would mean some form of madness or insanity. The expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent and whether or not it requires or is susceptible to medical treatment.

Sentenced to imprisonment for seven years or more: An order for divorce can be sought if either party is undergoing a sentence of imprisonment of seven years or more for committing an offence as defined in the Indian Penal Code.

Leprosy: Leprosy, not having been contracted from the petitioner. Leprosy in its early stages is curable. A period of time should pass (depending on the individual case) for it to be incurable. Malignant and venomous leprosy is virulent. Under the Special Marriage Act any form of leprosy can be considered as a ground. (Leucoderma which causes white spots on the skin is also a type of leprosy but it is held by the Courts that such a wide interpretation is not necessary and it is not included as leprosy).

Venereal disease: If either spouse is suffering from venereal disease which is contagious, it is another ground for passing an order for divorce.

If one of the partners **has not been heard of as being alive for a period of seven years or more**, by persons who would normally have heard.

A decree divorce may also be sought when a **decree for restitution of conjugal rights has been passed but not followed**. This means that the cohabitation has not been restored for a period of more than one year after passing the order.

If there is no resumption of cohabitation for a period of one year or upwards after the passing of the **decree of judicial separation**.

Also, there are certain grounds available only to the wife. These are:

- **If cohabitation has not resumed for one year or upwards, ever since the order awarding maintenance under Section 18 of the Hindu Adoption and Maintenance Act or Section 125 Criminal Procedure Code has been passed.**
- **If the husband has committed rape, sodomy or bestiality.**

Example:

Harish and Ratna were married for just two weeks. Right from the first day, Harish used to drink heavily and return home late at night. No amount of protest by Ratna made any difference to Harish. This is a just ground for Ratna to file for divorce under Section 27 of the Special Marriage Act.

What is divorce by mutual consent?

Both the husband and the wife may also seek a divorce, jointly, by application to the Court. This is divorce by mutual consent. The District Court can pass a decree declaring the marriage between parties to be dissolved on an application made by both parties together on the grounds that:

- **they have been living separately for one year or more;**
- **they have not been able to live together;**
- **they have mutually agreed that the marriage should be dissolved.**

What is the procedure for remarriage of divorced persons?

Section 30 provides that either of the parties to the marriage can marry again if:

- **the marriage has been dissolved by a decree of divorce;**
- **there is no right to appeal or if there is a right to appeal, then no appeal has been made within the time allotted for appeal;**
- **an appeal has been made but has been dismissed.**

What is the procedure for reconciliation between the parties?

Before passing a decree for divorce or judicial separation, the Court has to make an effort to reconcile the parties. Towards such an end, the Court can adjourn the proceedings for a period not exceeding 15 days and refer the matter to a person named by the parties, or nominate a person if the parties fail to nominate a person with directions to report to the Court whether reconciliation can be or has been effected. While disposing of the matter, the Court must have regard to the report.

Law of Maintenance

What is interim maintenance?

During any proceeding for divorce, restitution of conjugal rights or judicial separation, on an application by the wife, the Court may order the husband to make payment of expenses of the proceedings and alimony by weekly or monthly payments, where the wife has no independent means for her support. Expenses of the proceedings includes attorney and client costs.

Under the Special Marriage Act, only the wife is entitled to get interim maintenance and permanent alimony unlike the Hindu Marriage Act. The husband cannot claim maintenance under this legislation.

The basis of this provision is that it is the legal and moral responsibility of the husband to maintain his wife with the minimum requirements of the wife. The main issues and merits of the case will not be considered while granting alimony *pendente lite*.

Permanent alimony

What is the consideration for grant of permanent alimony?

The Court can order payment of permanent alimony by the husband to the wife at the time of passing of a decree or any time subsequent to the decree of restitution of conjugal rights, or judicial separation or nullity or divorce.

The wife has the right to apply for alimony under Section 37 even if the petition of the husband for divorce has been dismissed.

When an application for maintenance is not made at the time a decree is passed, an application can be made subsequent to such decree. What comes within a reasonable time frame depends on each case.

The Court may modify or nullify this order:

- **If there is a change of circumstances of either party;**
- **Under Special Marriage Act, if wife, in whose favour an order has been made has remarried or is not leading a chaste life.**

Example:

Geeta and Hari divorced in 2004. At the time the order of divorce was passed, Geeta did not apply for maintenance out of a sense of self-respect. She had a job and supported herself. However, later she lost her job and since she was hard pressed by circumstances, she had to make an application for permanent alimony. Her application is within reasonable time, whatever the gap between the order of divorce and the application.

Custody of Children

On what basis will the Court decide the custody of a child?

While making an order with respect to the custody of the child, the Court must consider the best interests of the child. The Court may also consider the wishes of the child wherever possible and if the child is old enough to make an informed preference, the Court may consider that preference. However the only principle for deciding custody is the best interest of the child

The Court can make, revoke, suspend or vary an order relating to the custody, maintenance and education of children after the passing of the decree. For this purpose, an application has to be made.

IMPORTANT PROCEDURAL POINTS TO REMEMBER UNDER THE SPECIAL MARRIAGE ACT

- Persons intending to marry under the Special Marriage Act must give the notice of marriage to the Marriage Officer appointed under the Act.
- On solemnisation of marriage under this Act, a Certificate of Marriage is given to the married couple.
- Any petition for divorce, judicial separation or restitution should be presented to the Family Court within the local limits of which:
 - the marriage was solemnised;
 - the respondent, at the time of presentation of the petition, resides;
 - the parties to the marriage last resided together;
 - in case the wife is the petitioner, the place where she is residing on the date of presentation of the petition;
 - the place where the petitioner is residing at the time of presentation of the petition in a case where the respondent has not been heard of as being alive for a period of 7 years.
- Proceedings are conducted in camera and no one is authorised to publish or print any matter in relation to such a proceeding except a judgment of the High Court or the Supreme Court published with authorisation. Violation of this rule attracts a fine.

notes

WOMEN'S RIGHTS AND PERSONAL LAWS IN INDIA: WORKSHOP METHODOLOGY

Note to the facilitator

Since sessions on personal laws are complex because of different religions and therefore different laws, it is important that each session has a clear objective. The facilitator should keep the sessions small and work with a time frame so that the participants are not overloaded with too much information as the recall of this information will be poor.

This module has been divided into 2 interlinked parts.

- **Part 1 is on (a) Marriage Laws, (b) Child Marriage and (c) Bigamy.**
- **Part 2 is on (a) Judicial Separation and Divorce, (b) Maintenance and (c) Custody.**

PART 1: Marriage Laws, Child Marriage and Bigamy

Marriage Laws

Objectives

- **To understand and be aware of laws governing marriage.**
- **To create awareness on the laws on bigamy and child marriage.**

Customs and traditions to a large extent regulate marriage in India. These ceremonies and customs find a place in the personal laws relating to marriage. Each religion has its own set of customs and practices which have been incorporated into personal laws. While there are many differences, it is important to pay attention to what is a valid marriage, a void marriage and a voidable marriage. This information helps in ensuring that women are aware of their rights and are able to claim their rights within marriage and divorce.

In our work with the communities, we found that two of the most commonly experienced

problems were of child marriage and bigamy (except under Muslim law, monogamy is the norm prescribed under all other legislations applicable in India). The problem is compounded by widespread local acceptance and even encouragement of practices like child marriage. The problems come to a head when the girl/woman wants to opt out of the marriage or has been deserted by her husband.

In this part, we will address the laws on marriage to make sure there is an understanding of what is a valid marriage and what is not. It is very important that the facilitator familiarise herself with the legal information on personal laws set out in the module to get a grip on the law.

Note to the facilitator

The first session should focus on arriving at an understanding of what personal laws are. After this the facilitator will be able to move on to defining what constitutes marriage under law. This can be done through the following exercises. The facilitator should familiarise herself with the customs and traditions that are followed in the region in which this training programme is being conducted. Depending on the audience the facilitator can choose to do sessions only on one personal law at a time. The same methodology below can be used. Examples and case studies should be created/ modified keeping in mind the personal law being dealt with in the session.

EXERCISE 4.1

Title: What are Personal Laws?

Purpose: Understand the concept of Personal Laws and the areas that they govern

Time: 30 minutes

Materials needed: Whiteboard and markers

Steps:

- If the facilitator has engaged with the group before and done the session on sources of law, ask the participants to recollect the earlier exercise on 'Sources of Law'.
- If not, then ask the participants what are the various sources of law.

Once the group identifies 'custom/tradition/religion' as a source of law, ask the participants to define custom and provide examples of customs and customary practices in their community.

- List on a chart paper/board the customary practices relating to marriage.
- Explain to the group the concept of personal laws.
- Discussion points:
 - What are personal laws?
 - What are the different personal laws that exist and who do they govern?
- Please remember that all personal laws, apart from Muslim law which is based on interpretation of the Shariat, have been codified. The Muslim law on maintenance and the right of Muslim women to divorce have been codified as well.

EXERCISE 4.2

Title: Let's talk about Marriage

Purpose: Understand what is a valid, voidable or void marriage and under what conditions a marriage is called valid, voidable or void

Time: 120 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask for a few volunteers and give them 10 minutes to prepare and put up a skit depicting a marriage ceremony in their community; or if the facilitator is covering different personal laws in the same session she can divide the participants into different groups and ask each group to play the part of one religious group and to present a play depicting the marriage ceremonies of that group. Give each group 5 minutes for the presentation.
- After the presentations lead a discussion on the importance of ceremonies of marriage and link this to the concept of validity of marriage.
- Ask the group to list the conditions for a valid marriage.
- Note responses on the board/chart. The facilitator must then lead the group to discuss the concept of a void and voidable marriage.

- The following examples can be used to clarify the concept of void/voidable marriage. This has to be interactive so that any doubts any participant has is addressed.

Example 1:

Suman is 17 years old and Ravi is 20 years old.

They fall in love and want to get married, but since they are from different castes they know their families will not approve of the marriage. They run away from the village and go to a temple in the city and exchange garlands.

They come back to the village and tell their families that they are married. Is this a valid marriage? Why or why not?

This marriage is not valid because firstly both of them are below the legal age of marriage. Secondly, the ceremonies as per customs of either of the two parties have not been followed in this marriage and therefore it is not a valid marriage.

Example 2:

Neelu and Ashok were married. At the time of the marriage Neelu was told that Ashok had a job with a private company and earned well, and that he had completed his graduation.

After marriage Neelu found out that Ashok did not have a job and was not educated. Is this a valid marriage?

This marriage is a voidable marriage since Neelu can file for nullity of marriage under the Hindu Marriage Act after discovery of the fraud. She should however take this action within one year of knowledge of the fraud.

Example 3:

Radha and Thomas wanted to get married. They lived in Mumbai. They had heard that they could have a Court marriage, so they went to the Courthouse. They met a lawyer there and told him they wanted to get married.

The lawyer said he could help them. He prepared a document on stamp paper and asked Radha and Thomas to sign it. He charged them Rs. 500 and told them that now they were married. Is this right?

The term 'Court marriage' has been made popular by Hindi films. In law there is no such thing as a Court marriage. When people refer to a Court marriage they mean a registered marriage. In order to have a registered marriage, Radha and Thomas should have gone to the Office of the Registrar of Marriages and followed the procedure of filing an application, giving notice and then signing the relevant paper in front of witnesses and the Registrar. The Registrar would then give them a certificate of marriage as proof.

Example 4:

Sampath and Nirmala have been married for one year.

He left the town and went to Mumbai in search of a job.

He started to work in Mumbai in a factory where he met Geeta who is his co-worker and married her.

Which marriage is valid?

Under the Hindu Marriage Act, the marriage to Geeta is void, which means it will be treated as if

it never happened. This is because bigamy is illegal and Sampath cannot marry Geeta without legally divorcing his first wife.

Example 5:

Ravi and Rashmi are both 24 years of age. They have not been married before. Both of them are mentally sound and are not related to each other. Their marriage is a valid marriage under the Hindu Marriage Act.

Example 6:

Shahrukh wants to marry his niece Jahana. But they are within degrees of prohibited relationship, that is, they are related in such a way that marriage between them is not permitted under Muslim Personal laws. If the marriage were to take place it would not be valid.

Example 7:

Reshma and Anish got married six months back in Court. Reshma has since found that Anish is mentally unsound and this fact was concealed at the time of marriage. She chooses to nullify her marriage which is considered valid under the Hindu Marriage Act because she does not want to live with Anish. This is called a voidable marriage.

Example 8:

Talhan marries Rehana. Later he marries her sister while Rehana is still alive. Under Muslim Law such a marriage is considered irregular.

Example 9:

Jamal married a fifth time. His second marriage was dissolved by divorce even before his fifth marriage. The fifth marriage is valid because he had only 3 wives at the time of his fifth marriage and under the Shariat a man can have four legitimate wives.

EXERCISE 4.3

Title: Registration of Marriages

Purpose: Understand the importance of registration of marriage irrespective of the law that applies to you

Time: 45 minutes

Materials needed: Chart paper, whiteboard and markers

Steps:

- This exercise will be a discussion on proof of marriage, records and registration.
- Ask the group how many of them have any records of their marriage.
- Can the group think of situations where they have to prove that they are married – eg: getting a passport, claiming benefits under government schemes, if the husband dies, claiming pension and other benefits, matrimonial disputes in Court.

- Divide the participants into two groups. One group is to focus on why registration of marriage is important. The other group will focus on why it is not important. Each group takes 10 minutes. When they come back have a debate between the two groups.
- The facilitator should note the points on the board.
- From the points that have come up talk about the need to register marriages. Ask participants if they have heard of instances where women have found it difficult to prove they were married. Discuss and analyse why this happens and get the group to find a solution. Eg. women often do not have access to the relevant records – the marriage certificate, nikahnama, photos etc. What do women need to do to ensure they have access to these important records?
- Discussion points:
 - Are marriages usually registered in your community?
 - Do you think it is helpful for the woman to register her marriage? What is its significance?
 - Do you know where the office of the Registrar of Marriages is situated?
 - What is the procedure to register a marriage?

PROOF OF MARRIAGE

- Registration certificate.
- Photos of marriage ceremony, witnesses who attended the marriage.
- Important to remember even if there are no photos and no registration, in situations of matrimonial disputes the Court will see based on facts of the case if the parties have lived as husband and wife, and based on this will decide if there was a marriage.

Child Marriage

Note to facilitator

The session on child marriage can be conducted with children as well as adults. The exercises given below, as with all of the exercises in this Guide, can be modified to suit different audiences.

As an initial step, the facilitator can start the session by asking the group if child marriage takes place in their community. Encourage the group to come up with a case they would have heard of or know of. Alternatively, the facilitator could use the case study in the exercise given below.

EXERCISE 4.4

Title: Child Marriage

Purpose: To understand how child marriage is a rights violation issue

- To understand its impact on women

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- The facilitator should either get a case study on child marriage from the group or use the case study given:

Case Study:

Shanta was only 13 when her parents forced her to leave school and married her to a man twice her age. At 15, Shanta had a baby girl. She is now 18 years old and has returned to her parents' home because her husband has been ill-treating her and she has been falling ill regularly. She thinks he is going to marry someone else and leave her.

- The group can be divided into two groups. Each group will answer the following questions:
 - Why do they think Shanta was married when she was 13?
 - Would it be any different if Shanta was married at 15 instead?
 - What have been the consequences on Shanta's life?
 - Have any of her rights been violated? If yes, list these rights.
 - Is child marriage really a problem?
 - Who is responsible for the practice of child marriage?
 - Why is it difficult to stop this practice?

SOME OF THE CRITICAL RIGHTS VIOLATED DUE TO CHILD MARRIAGE ARE

Right to life

Right to choice

Right to education

Right to freedom of expression

Right to freedom from sexual abuse

Reproductive rights

Right to good health

CEDAW Article 16 recognizes the rights of women to enjoy marriage and family life and the right to enter into marriage only with free and full consent.

Convention on the Rights of the Child

- Some of the responses that the facilitator should be prepared for are:

Response: Child marriage is not wrong, it is a custom.

Facilitator: Not all customs are in the interest of the person affected by them. Sati was also a custom, but law made it a crime and society has rejected the custom as it was recognised to be an inhuman act.

Response: It decreases the financial burden on parents who may have to pay huge dowries for older girls. The children can get married off in mass marriages which will be less expensive for the parents.

Facilitator: Giving and demanding dowry is a crime.

Response: As per practices in some regions, the girls can get married very early but are not sent to the husbands' house until puberty.



Say NO to Child Marriage

Facilitator: The impact of child marriage should be understood in the context of the overall well-being of the child. It is not just an issue of the physical health but also psychological health of the affected girl child. In addition it violates her right to make choices for her life. Her education suffers and she is unable to live a life that she might have chosen for herself were she not married

- At the end of this exercise, make a presentation on the law prohibiting Child Marriage.

Note to the facilitator

The facilitator must encourage the group to analyse this situation also in the context of rights of women, particularly the right of choice. It is important to talk about sexual abuse and violations that happen in the guise of child marriage. A child is not mentally or physically prepared for marriage. It often leaves her open to sexual, mental and physical abuse.

EXERCISE 4.5

Title: Stop Child Marriage

Purpose: To develop an action plan to prevent child marriage

Time: 120 min/overnight exercise

Materials needed: Chart paper and pens

Steps:

- Divide the participants into groups and provide them with chart paper and pens if necessary.
- Each group is to develop a strategy/ campaign that they can implement in their community to stop the practice of child marriage in their area.
- In developing the strategies the groups need to do the following:
 - Clearly define the objective of the campaign.
 - Who will the campaign target?
 - What are the activities that will be undertaken to implement the campaign?
 - What are the hurdles they anticipate?
 - How will they overcome these hurdles?
- Once the presentations are made, get the group to assign responsibilities to implement the strategy.

Or

- Based on all the discussions they have had, ask the group to develop a play that they can perform in the village.

Bigamy

Note to the facilitator

While dealing with this part of the module, the facilitator should be sensitive to the fact that there may be women participants who could be in bigamous marriages. While discussing this issue the facilitator should emphasise that women who are in bigamous marriages are often unaware that their partner had been married or were led to believe that the other marriage had been annulled. Sometimes women are forced into the marriage. Participants are likely to come up with examples where the woman in the second marriage was aware that the man is married and still went ahead with the marriage. In that case the facilitator should state that in the past, among Hindus bigamy was common and several communities believe in this custom. However, under existing law, the second marriage is void and bigamy is a crime.

EXERCISE 4.6

Title: Discussion on Bigamy

Purpose:

- To analyse the impact of bigamy
- To discuss the law on bigamy

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- The facilitator should invite the participants to talk about how women in the community are affected by bigamy. This should be listed on the board.
- Discussion points – The facilitator should ask a series of questions in order to assess the participants' depth of understanding of the law, of their cultural beliefs, etc. This will allow the facilitator to better address the issues of most relevance to them and to clarify any legal issues:

Reasons for the practice of bigamy.

 - What reasons do men use to marry the second time?

- Do women often know that the man is already married?
- Why do women agree to be second wives?
- How does the second marriage of a man affect the first wife?
- How does it affect the second wife?
- What does the law say on the subject?
- What is the status of the second marriage?
- What are the rights of the second wife? Can she claim maintenance? Does she have the right to property?
- What are the rights of the first wife and her children?
- How can marriage be proved?
- What are the difficulties associated with trying to take legal action in cases of bigamy?
- If a woman knows that her husband is planning to marry again what can she do?
- The facilitator can also use the following case study to initiate a discussion on bigamy and engage the participants in a debate and come up with a possible remedy for the situation. What happens when the remedy has a negative impact for the woman who has been deceived as well as the violator (the husband)?

Case Study:

Arun and Geeta were married for 10 years and had three children from their marriage. They lived in a village and Arun used to live in a city because of his work and would visit the village twice a month. One day, Geeta's son was very ill and she had to take him to the hospital in the city. She tried to contact Arun but she could not reach him. Geeta's brother who was with her managed to get information about Arun's place of work. He went there and got the address to Arun's house. When Geeta went to that address, she found that Arun was living there with a woman and two children. Arun informed her that this other woman was also his wife and the children were his.

- The facilitator can engage the participants in a debate on the pros and cons of compulsory registration of marriage or get the participants to organise such a debate in the community.

THE NATIONAL COMMISSION FOR WOMEN IS IN FAVOUR OF THE COMPULSORY REGISTRATION OF MARRIAGES FOR THE FOLLOWING REASONS:

- Prevention of child marriages and to ensure minimum age of marriage
- Prevention of marriages without the consent of the parties
- Check bigamy/polygamy
- Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.
- Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband
- Deterring men from deserting women after marriage
- Deterring parents/guardians from selling daughters/young girls to any person including a foreigner under the garb of marriage

PART 2 : Judicial Separation and Divorce, Maintenance and Custody

Judicial Separation and Divorce

Objectives

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

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

Note to the facilitator

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

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

The facilitator should seek to address the following questions:

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

EXERCISE 4.7

Title: Myths and Facts on Divorce

Purpose: To clarify what is understood by the term divorce

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- The facilitator can start the session with a discussion on the meaning of the term divorce. The following questions may be asked:
- *What does the group understand by the term divorce?*
- *Under what circumstances do people consider the option of a divorce?*
- *Do women look for options other than divorce?*

- *How do they think their community would react to a separated or divorced woman?*
- The purpose of the discussion is to allow the facilitator to assess the level of understanding in the group on what constitutes divorce. This discussion can be used as a starting point to address and clarify misconceptions and myths associated with divorce in the group. The facilitator can use the box on myths and facts given below.

MYTHS AND FACTS

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

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

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

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

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

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

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

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

Note to the facilitator

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

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

EXERCISE 4.8

Title: Grounds for Judicial Separation and Divorce

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

Time: 60 minutes

Materials needed: Chart paper and pens

Steps:

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

The following examples can be used:

Group 1: What does cruelty mean? Ask the group to talk about different examples from their experience and what they have heard in the community. Ask the group to list different instances of cruelty.

Group 2: What does adultery mean? How can it be proven?

Group 3: What does it mean to be of unsound mind? On what basis can you decide that a person has mental illness?

OR

EXERCISE 4.9

Title: Grounds for Judicial Separation and Divorce

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

Time: 60 minutes

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

Steps:

- The facilitator will have to prepare the cases in advance and write them on small slips of paper. This exercise can be done in two ways:
- First: If the group is small (10-15 people) the facilitator can put all the slips in a bowl and pass it around the group. Play some music, and when the music stops the person who has the bowl has to pick a slip of paper, read the case and state his/her opinion on it. The larger group can then spend a few minutes discussing the view expressed by the person.

OR

- Second: If the group is large (25-30 people), then divide the participants into groups and get them to discuss the cases and come up with their opinion and solutions.

The case studies that could be used are given below:

Case Study 1:

Seeta has been married to Prakash for 3 years. Six months ago Prakash was accused of raping the neighbour's daughter. A case was filed and Prakash was found guilty and sentenced to seven years in prison. Seeta is very upset about finding out that her husband is a criminal and comes to you for help. What advice will you give her?

Case Study 2:

Rekha has been married to Ganesh for 4 years. She has a 3 year old son. Ganesh does not work after the factory he worked in shut down. Rekha, an accountant in a bank, is the sole earning member. Ganesh expects her to hand over her salary to him and Rekha has to ask him for money in order to run the house. Ganesh has been pressuring Rekha to ask her father to give her a plot of land. Rekha's family has already given Ganesh a scooter and Rs. 2 lakhs in cash demanded at the time of their marriage. Ganesh does not beat Rekha, but he has turned into an alcoholic. He shouts at her, calls her names and they have regular arguments over these issues. When he is drunk he forces her to have sex with him. Rekha has heard from her friends and neighbours that Ganesh has been seen in the company of different women and Rekha suspects that he is having extra-marital relations as well. Rekha has noticed that the child has started to develop some behavioural problems – the child is often moody, cries a lot and falls ill often because of which Rekha has to take leave from her office and this is affecting her professional life. Rekha wants a way out of this situation and seeks advice. Ask the group to identify if there is cruelty in this case and to list the different instances of cruelty.

Case Study 3:

Mary and John were married for 2 years. John then got a job in a city far away. For about six months after leaving home he used to write letters to her. But after that she did not hear from him. She tried to contact the office where he worked. They said he had left the job and they did not know his whereabouts. Her in-laws were unable to help her since they had not heard from him either. Mary managed to get a job as an anganwadi worker. It is now seven years since she heard from him. She is now a nursery school teacher in her village and the new head master of the school is interested in marrying her. Mary is also interested, but does not know what she should do. What do you think she should do?

Case Study 4:

Sheela was 14 years old when she was married to Rakesh who was 19 years old. She did not want to get married but her parents forced her. Sheela is now 17 years old and does not want to remain in the marriage to Rakesh. What can she do? Can she get a divorce?

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

Note to the facilitator

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

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

Maintenance

Objectives

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

Introduction

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

Topics to be covered in this session:

- **What is maintenance?**
- **Who is entitled to maintenance?**
- **How can a woman secure maintenance?**
- **How is maintenance calculated?**
- **What happens when maintenance is not paid?**

- **Rights of maintenance under different personal laws.**
- **Where can a petition for maintenance be filed?**

Note to the facilitator

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

EXERCISE 4.10

Title: Discussion on Women's Right to Maintenance

Purpose: To understand what rights women have to claim maintenance

Time: 60 minutes

Materials needed: Chart paper and pens / Whiteboard and markers

Steps:

- Ask the group the following questions and list all the responses:
 - *What does the group understand by the term maintenance?*
 - *Who is entitled to claim maintenance?*
 - *Who is entitled to pay maintenance?*
 - *How can a woman secure maintenance? Does she always have to go to Court?*
 - *Under what circumstances can a woman claim maintenance ?*
 - *What are the difficulties and pressures that are faced by a woman claiming maintenance from family, from community, legal system, husband?*
- Respond to each of the responses that have been given.
- Additional discussion points:
 - *Court procedure takes a very long time. How can a woman seek maintenance? Can she seek the help of village elders, NGOs, social workers, women's collectives, etc?*
 - *On what basis can a woman decide how much maintenance she is going to claim?*
 - *If a woman is not aware of her husband's wealth and sources of income, what should she do?*
 - *What can she do if the man refuses to pay or he does not pay regularly?*

- How can women's groups support and help in these cases?
- If the man does not have a regular source of income or he decides to quit his job, how can the woman ensure that he pays?
- If he has some property – can some settlement be worked out?

Custody

Objective

- **To understand a woman's right to custody of her children.**

Introduction

Custody and guardianship are contentious issues in a situation of divorce and separation. The purpose of the session is to bring to the notice of the woman her rights with regard to her children at the time of separation or when she decides to leave the house and the strategies she needs to adopt with regard to keeping her children.

EXERCISE 4.11

Title: Discussion on Women's Right to Custody

Purpose: To understand what women's rights are to custody

Time: 60 minutes

Materials needed: Chart paper and pens, whiteboard and markers

Steps:

- Ask the group if they have had to deal with the problem of securing custody of their children. If the person is comfortable she can be asked to volunteer her story.
- Alternatively, the facilitator could begin the session by sharing a case study:

Case Study:

Nagesh and Prema have been married for five years and have two children. Nagesh is the son of a very wealthy landlord. Prema's parents own a small plot of land and manage to survive with the yield from the land. Everybody in the village was talking about Prema's good fortune for getting such a 'good alliance'. Prema was happy for the first six months after her wedding, but slowly her

husband and in-laws started to ill-treat her and badmouth her family. After 4 years of marriage, Prema gave birth to a girl. A year later she had a son. Her husband's abusive behaviour increased and when she told him that she was going to leave him and take the children he threatened her saying that if she left him she would not see her children again. Since he came from a well-to-do family and could provide for the children the Court would never give her custody of the children. Prema is now worried and even though she wants to leave she is afraid that she will lose her children and she has no means of taking care of them.

- Ask the group to advise Prema in this case. What must she do? Identify the possible challenges she will face.
- The facilitator should lead the group in a discussion on the law and cover the following aspects:
 - What is the meaning of custody?
 - Does the mother have custody over her children?
 - On what basis will the Court decide the matter of custody?
 - What is the meaning of welfare of the child?
 - Is the character of the mother important in deciding custody matters? Please remember to mention that often men say that their wives are of bad character and therefore should not have custody of the child.
 - What is the right of maintenance of the child? Till what age is it the duty of the father to provide for the child?
 - What can a woman do when she is threatened that her child will be forcibly taken away from her?

Action Points

- **The facilitator can get a lawyer practicing family law to come in at the end of the session, so that she can clarify doubts that participants have on specific cases and seek specific legal advice.**
- **If the group feels that marriage registration is important, discuss with them what steps they could take at the community level to make this a reality. Eg., working with the village panchayat to encourage a practice of registration of marriages.**
- **The facilitator can make an appointment with the Registrar of Marriages in her area and take the women to visit the office of the Registrar and seek information on the procedure for registration of marriage.**

Grounds for Divorce

	Hindu Law		Christian Law		Special Marriage Act	
Grounds for divorce	Husband	Wife	Husband	Wife	Husband	Wife
Adultery	Yes	Yes	Yes	Yes	Yes	Yes
Desertion for a period of 2 years	Yes	Yes	Yes	Yes	Yes	Yes
Imprisonment for 7 years or more					Yes	Yes
Cruelty	Yes	Yes	Yes	Yes	Yes	Yes
Incurably of unsound mind or has been suffering continuously or intermittently from mental disorder	Yes	Yes	Yes – for a continuous period of two years before presentation of petition	Yes – for a continuous period of two years before presentation of petition	Yes	Yes
Suffering from venereal disease in communicable form	Yes	Yes	Yes – for 2 years	Yes – for 2 years	Yes	Yes
Suffering from virulent and incurable form of Leprosy	Yes	Yes	Yes – should have been suffering for 2 years	Yes – should have been suffering for 2 years	Yes	Yes
Person not been heard of as being alive for 7 years or more	Yes	Yes	Yes	Yes	Yes	Yes
Wilfully refuses to consummate marriage and marriage has not been consummated			Yes	Yes		
Husband guilty of rape		Yes		Yes		Yes

Grounds for Divorce (continued)

	Hindu Law		Christian Law		Special Marriage Act	
Grounds for divorce	Husband	Wife	Husband	Wife	Husband	Wife
Order of maintenance has been passed against husband and there has been no cohabitation between husband and wife after the order was passed		Yes – If no cohabitation after 1 year of order being passed				Yes – If no cohabitation after 1 year of order being passed
No cohabitation even after an order of judicial separation has been passed	Yes – if no cohabitation even after 1 year of order being passed	Yes – if no cohabitation even after 1 year of order being passed			Yes – if no cohabitation even after 1 year of order being passed	Yes – if no cohabitation even after 1 year of order being passed
No restitution of conjugal rights even after an order being passed	Yes – if no restitution even after 1 year of order being passed	Yes – if no restitution even after 1 year of order being passed	Yes – if no restitution even after 2 years of order being passed	Yes – if no restitution even after 2 years of order being passed	Yes – if no cohabitation even after 1 year of order being passed	Yes – if no cohabitation even after 1 year of order being passed
Conversion to another religion	Yes	Yes	Yes (if Christian converts to another religion)	Yes (if Christian converts to another religion)		
Has renounced the world	Yes	Yes				
Divorce by mutual consent	Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court. No petition for divorce can be filed within 1 year of marriage		Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court on the grounds that they have been living separately for 2 years and they have mutually agreed that the marriage should be dissolved		Both husband and wife can mutually agree to get a divorce and file a petition in the District Court or Family Court. No petition for divorce can be filed within 1 year of marriage	

notes

5 Violence Against Women



Any form of Violence Against Women is unacceptable

Objectives

- To understand the different forms of violence against women and their impact on women.
- To study the law on various forms of violence against women.

Introduction

Violence is the result of unequal power equations between men and women. It stems from patriarchy. These power differentials arise from certain socio-cultural and economic norms that perpetuate power hierarchies and become embedded in society, family and community. The resultant power hierarchies create lesser access to resources and agency for women, making them more vulnerable. They also take away their independence, the power to take decisions and the right to choose. For example what a woman is allowed to wear, how much she is allowed to study, where she is allowed to work and also what rights she has vis-a-vis reproduction are controlled by sources external to her such as her family and society.⁷²

The experience of violence for men and women is very different as it is highly influenced by the sex of the person and gender considerations. While doing a session on violence against women, if a complete gender analysis is not done it will encourage the belief that biological differences between men and women are the basis or justification for discrimination and violence against women. It is important to understand how socialisation also works towards creating this gender hierarchy. In India, Violence Against Women (VAW) is embedded in deep socio-cultural roots that emphasise the false belief that men are superior to women.⁷³ This has led to corresponding problems, like the preference for sons and viewing girls as an economic burden which has in turn led to discriminatory and violent practices like female foeticide, domestic violence and dowry death. Much of this violence is inflicted on women in their own homes.

A gender analysis allows us to see the difference in the lives of men and women. It allows a study of the difference in gender roles and highlights the different roles and behaviour of men and women that are based on gender attributes.

Note to the facilitator

In the session on Violence Against Women the facilitator's role is to draw attention to a gender analysis of why violence occurs against women. This is necessary because working on issues of Violence Against Women does not automatically amount to taking gender into account. Adopting a gender perspective would mean differentiating between what is biological and what is socially and culturally constructed.⁷⁴

The facilitator should draw from the module on Gender and Law, as this chapter focuses on a gender analysis to understand its impact on women.

⁷² Unifem report on VAW sponsored by Citizen's Initiative, Ahmedabad, April 2002.

⁷³ Ibid n.3.

⁷⁴ Ibid n.3.

GENDER AND VIOLENCE: WORKSHOP METHODOLOGY

Gender and Violence

Objective

- **To develop a clear understanding of the forms of Violence Against Women.**
- **To explain the link between Violence Against Women and gender discrimination.**
- **To discuss and analyse myths about Violence Against Women.**
- **To analyse the impact of violence on mental health.**

Note to the facilitator

The session on gender and Violence Against Women must be initiated with a discussion aimed at enabling the group to come to a clear understanding of the different forms of violence targeted at women. The following exercises will help.

EXERCISE 5.1

Title: Defining VAW (Adapted from Local Action, Global Change, 1999, Julie Mertus with Nancy Flowers and Mallika Dutt, pg. 92)

Purpose: To understand the term Violence Against Women and its various manifestations

Materials needed: Copy of UN Declaration on Violence Against Women, whiteboard and markers

Time: 20 minutes

Steps:

- Ask the participants to brainstorm on what they understand by the term VAW. The facilitator must write the views of the participants on a board or chart paper.
- Ask one of the participants to read out the definition of Violence Against Women in the UN Declaration on VAW. The facilitator will note the main points in a separate column on the board.
- Then ask the participants if they can see any similarities or differences between their understanding and the descriptions in the UN definition.

UN DECLARATION ON VIOLENCE AGAINST WOMEN

Violence Against Women is: Any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life.

Violence Against Women shall be understood to encompass, but not limited to physical, sexual and psychological violence occurring in the family and in the community, including battery, sexual abuse of female children, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women. Non-spousal violence, violence related to exploitation, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking of women, forced prostitution and violence against women perpetrated and condoned by the State.

Note to the facilitator

While leading the above discussion, the facilitator should encourage the participants to provide specific examples and instances. Through these examples the facilitator can lead the participants, to arrive at a common definition of VAW. This is a necessary starting point for the session as it will clarify various doubts that exist on the nature of violence.

Often the misconception is that violence is only physical and that certain forms of violence such as slapping and pushing are acceptable. Unless physical violence causes grievous injury it is often not taken seriously. Apart from this, it is important to clarify that there is mental and psychological violence as well and this manifests itself in many ways.

After having established an understanding of Violence Against Women, the facilitator must enable the group to understand the link between gender discrimination and Violence Against Women. This can be done through a discussion with the group.

The role of the facilitator is to challenge the thinking of the participants, always asking the question WHY? The participants should be encouraged to think and come up with answers for themselves. This exercise will depend upon the knowledge and information that the facilitator possesses on the questions asked. The facilitator should make sure that the discussion is rounded off well so that participants do not feel that some of the questions they had were not answered. It is possible that some issues or questions will come up which the facilitator feels could be answered at a later stage in the workshop. These questions/issues should be written down on

a chart paper and put up on a wall to be dealt with later, with explanations.

It is important for the facilitator to tackle certain issues that are bound to come up especially when the participants feel that there are certain types of violence that are acceptable and 'not serious'.

The facilitator can use some of the pointers from the box on Violence Against Women to assist in this exercise.

EXERCISE 5.2

Title: Perpetuating VAW

Purpose: To understand attitudes that perpetuate VAW

Time: 20 minutes

Materials needed: Newspaper clippings from last week highlighting various forms of violence against women, including domestic violence, eve teasing, sexual assault, acid attacks, female foeticide, killing women etc, board/chart paper, and pens/markers/chalk.

Steps:

- The facilitator will begin the session by asking participants if they read newspapers. Why do people read newspapers?
- Once they have answered the question, the slide/chart can be shown to the participants. The participants should be given a minute to observe what is on the chart/slide. The facilitator should then ask the participants to share their thoughts.

Expected responses:

- VAW has various forms.
- VAW occurs to women/girls of all ages.
- Sexual assault is rampant.
- Existing laws are ineffective in curbing VAW.
- The legal system does not do anything. There is a lack of political will.
- The facilitator should raise the following points of discussion with the participants:
 - Why is there violent behaviour towards women?
 - What are the different kinds of crimes targeted at women?
 - How are these different from crimes against men?
 - How does society perceive violence against women?

- Looking at the chart/slide where do they think violence occurs the most?
- How do we look at violence within the house – specifically how is it perceived by the family, society, Police and legal systems? Is there a tendency to dismiss violence as trivial?
- Who is responsible for Violence Against Women?
- What is the responsibility of the State?
- How does violence impact women/girls?

Note to the facilitator

There is a tendency to dismiss domestic violence as a 'private' matter which should be dealt with within the boundaries of the home. The 'private' space of the home is where often the most horrific violations of women take place such as marital rape, mental and physical violence, dowry related harassment and even child sexual abuse. Violence is often dismissed as trivial and the argument used is that women should learn how to 'adjust'.

It is important to focus on the fact that what may seem inconsequential to someone else is perceived in a completely different manner by the woman who is the victim of violence. Violence is a subjective experience and women's experience of it should be respected rather than trivialised. This trivialisation affects women in the worst way especially when it comes to the issue of access to justice. The decision on what constitutes violence and what does not is often informed by multiple identities and influences in a person's life.

When we speak of access to justice, some of the key players are lawyers, Judges and the Police. Their own personal beliefs, which are formed by a long process of socialisation, are bound to impact women who are trying to get relief from violent situations. For a Judge or a Police constable, a woman's complaint of mental cruelty may not seem important enough to constitute violence. Similarly a slap too may not appear to them as a violent act. But for the woman who has had to face these situations it may seem like the worst form of violence and a rights violation, yet she is at the mercy of how it is interpreted by someone else. Her own experience and understanding of the situation does not really matter.

To understand this better the facilitator could do a short experiential role play with volunteers. The participants could be asked to list out what they feel are less important forms of violence. Then the facilitator could ask for volunteers to conduct a role play on this, which should also show what a lawyer, a Police officer or a Judge would say in such a situation. At the end of the role play the facilitator should ask the person who played the victim how she felt and ask the participants what they felt that the woman would go through in such a situation.

The last part of the session on gender and violence will aim at dealing with myths and facts. The next two exercises can be contextualised and used by the facilitator.

A research study carried out by Sakshi, a women's rights organisation, in 1997, illustrated the extent of gendered belief systems and attitudes towards women that deny women access to justice. The study was conducted with 109 Judges from across India from District Courts, High Courts and the Supreme Court of India. It clearly illustrated how patriarchal attitudes allow for male violence to go unchallenged. Even where women have experienced severe forms of violence, they are usually blamed for 'provoking' it. 68% of Judges felt that provocative attire was an invitation to rape. Some of the other disturbing findings were that half the Judges felt that women are to blame for the violence they face from their spouses because they continue to stay with their abusers.

VIOLENCE AGAINST WOMEN

VAW is a social problem caused by cultural prerogatives assigned to men by sexism. A patriarchal culture encourages belief in male superiority and entitlement to the service, obedience, loyalty and subservience of women partners and authorises men's violence towards women in the service of those entitlements. Power that is assigned to men, especially in intimate relationships, sustains social control of women in that society. Violence is an expression of patriarchal values which are embedded in cultural myths such as, "rape is provoked by 'loose' women" or that "domestic violence is a private matter".

There are different kinds of VAW. This begins from the time that a girl child is conceived and goes on through adulthood. It will help to take the participants back to Exercise 1.4 'Mapping Discrimination' to be able to illustrate the various forms of VAW.

Violence in society is faced by both men and women; however, there are certain forms of violence targeted at women, especially sexual violence. For example, in times of war or in case of conflict or riots, it has been observed that women are most often the worst targets of violence, especially sexual violence. The burden of maintaining the concept of 'izzat' or honour of a nation, community, family, religion seem to rest on women's shoulders, constantly making them victims of violence. Women become the easiest targets when one wants to extract revenge or dishonour a certain community. Such violence is a manifestation of patriarchal values of control and sexual domination of women. Some examples of this are:

In Gujarat in 2002, there was widespread sexual violence against women of the Muslim community. A fact finding mission found large scale political and Police complicity which has led to the complete ghettoisation of the Muslim community in Gujarat.⁷⁵

Since the humanitarian crisis began in 2003, women in the western Sudanese state of Darfur have been subjected to rape and other forms of gender-based violence perpetrated by the government-backed Janjawid militia, as well as other armed troops. In many cases, women have been publicly raped in front of their husbands, relatives or the wider community.⁷⁶

Abduction, rape, and sexual slavery are also systematic and widespread in the conflict in Sierra Leone.⁷⁷ In 1998 the UN International Criminal Tribunal for Rwanda (ICTR) handed out the first conviction for genocide by an international Court. This was following the genocide that occurred in Rwanda in 1994 which resulted in the deaths of an estimated 800,000-1,000,000 people. The mass extermination was carried out mostly against ethnic Tutsis and moderate Hutus. The ICTR verdict was significant because it was the first time that an international Court had punished sexual violence in a civil war and the first time that rape was found to be an act of genocide to destroy a group.

⁷⁵ *How has the Gujarat Massacre affected minority women: Survivors Speak (Fact Finding report by Syeda Hamid, Ruth Manorama, Marie Thekaekara, Sheba George, Farah Naqvi, Malini Ghosh sponsored by Citizen's Initiative, Ahmedabad, April 2002.*

⁷⁶ <http://www.amnestyusa.org/women/rapeinwartime.html>

⁷⁷ *Ibid.*

Note to the facilitator

The facilitator should ensure that participants understand that these women's rights are independent and fundamental rights guaranteed by the constitution and cannot be controlled by family, society or culture. These rights have been upheld by the country through various conventions such as CEDAW, CRC, ICCPR and ICESR to name a few.

The facts could be shared through multiple tools such as role plays, case stories or power point presentations.

EXERCISE 5.3

Title: Myths and Facts on VAW

Purpose: To address myths related to various forms of VAW

Time: 30 minutes

Materials needed: Whiteboard and markers, previously prepared myths and facts on VAW

Steps: This exercise can take the form of a debate.

- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.
- Each group should take turns to argue a myth and the other group should counter it. Each argument and counter-argument should last 5 minutes. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts listed below are merely indicative and the facilitator can contextualise them depending on the audience and the cases that have come up.

MYTHS AND FACTS ON VIOLENCE AGAINST WOMEN

Myth: Women are the biggest enemies of other women.

Fact: Women are part of the same society in which we live. They also have the same prejudices and socialisation that all of us internalise. Being born women does not automatically make them understand the situation of other women. In many cases, where women have been perpetrators of violence against other women, these women are safeguarding their own resources. Being dependent on male members of their family such as the son or the husband also leads many women to tow the patriarchal line within their own homes.

Myth: Women provoke violence.

Fact: Nobody wants violence meted out to them. Women have a right to live as they wish, without anyone being violent towards them. This includes dressing the way they want, saying what is on their mind and working where they want.

Myth: The mother-in-law is to blame for dowry harassment.

Fact: It is not just the mother-in-law who is to blame but anyone, including the husband, who does not make any attempt to stop dowry harassment, and encourages this behaviour towards women.

Myth: Violence is rare and happens only in some cases.

Fact: Violence can be mental, physical, sexual and economic. There is violence when women are denied independent rights such as the right to good health, reproductive rights, economic rights, rights to a safe workplace etc. Violence is a subjective concept and varies from woman to woman. A World Bank⁷⁸ study shows that the impact on health burden resulting from rape and domestic violence accounts for nearly one in five health years of life lost to women between the ages of 15 to 44 in both developed and developing nations. Globally the health burden (or impact on women's health) from gender based violence against women (age 15 to 44) is comparable to the burden of other risk factors and diseases such as HIV, tuberculosis, cancer, childbirth and cardiovascular diseases.⁷⁹

Myth: Alcoholism is the reason for violence.

Fact: Alcoholism cannot be used as an excuse for violence, nor can it be condoned. There is no justification for violence against women under any circumstance. It is a woman's right to live a life free of any form of violence.

Myth: Violence against women does not happen in our region.

Fact: Violence occurs in all regions, religions, castes, classes and communities.

Myth: Violence only happens to women who are too modern and do not listen to their husbands and families.

Fact: Violence occurs to women irrespective of modernity or tradition. It is a woman's right to live how she pleases without others passing judgment on her. Finding excuses like this are only reflective of the extent to which society will go to justify patriarchal values.

⁷⁸ World Development Report, 1993. World Bank.

⁷⁹ <http://www.unfpa.org/intercenter/violence/effects3a.htm>

Female Foeticide

Objective

- To develop an understanding of female foeticide and analyse reasons for its prevalence.
- To develop an understanding of the law on female foeticide and the role that women can play in the effective implementation of the law.
- To debate the role of women and the group in eliminating the practice of female foeticide.

Introduction

One of the most fearsome problems in India is the growing trend of female foeticide. There is an increased use of advanced scientific techniques to find out the sex of a foetus. Given the low value of girl children, and the lack of implementation of the anti-foeticide law, ethical and technical malpractices have led to a boom in female foeticide. While development and education are making the world friendlier towards women, they are also at the same time being used to discriminate against women.

This section will focus on the issue of female foeticide and the legal aspects of tackling the problem.



Act now to stop female foeticide

What is female foeticide?

Female foeticide is the practice of aborting a foetus when sex determination tests reveal that the foetus is female.

What is a pre-natal diagnostic test and how does it result in female foeticide?

A pre-natal diagnostic test basically refers to tests like ultrasonography or other tests which are conducted on pregnant women to detect abnormalities and defects in the foetus. In the process of testing for abnormalities it is also possible to find out the sex of the foetus.

In the days before these tests were available, people used to practice female infanticide - killing a new-born baby girl, or based on superstition they would determine that the pregnant woman is carrying a girl and in order to prevent the pregnancy, induce a miscarriage. Now people are using the newly available and affordable scientific techniques like pre-natal diagnostic tests to determine the sex of the foetus. If the foetus is female an abortion is performed.

Why is female foeticide prevalent in India?

Female foeticide in India has its grounding in cultures and customs that tend to propagate the view that daughters are burdens, thereby placing a lower value on them than on sons who are seen as the future providers and lineage bearers. Listed below are some of the reasons for female foeticide in India:

- **The desire to have sons as they are considered more valuable.**
- **Prevalence of dowry – people do not want daughters because they will have to pay a dowry for them at the time of their marriage.**
- **The two-child norm of the government has resulted in increased female foeticide because if people are to have only two children they would prefer sons.**
- **The sex determination test is done easily and is affordable.**
- **It is easy to get an abortion.**
- **Unethical doctors and medical professionals have made it easy for female foeticide to flourish.**

Why is female foeticide a problem?

- **Female foeticide is a problem because it has its basis in discrimination against women and is a violation of basic human rights.**
- **A pre-natal sex determination test which is done with the intention of preventing the birth of a female child is a form of violence against women.**
- **Women are put under tremendous pressure to produce male children regardless of the fact that this is beyond their control. Many families force a woman to undergo a sex determination test which is followed by an abortion in case the foetus is female. This causes many problems for the health of the woman, both physically and psychologically.**
- **Sex selective abortions are so frequent and widespread that they**

contribute greatly to the skewed sex ratio in India, especially in some parts of the country like Haryana.

- **A decrease in the number of women in society increases violence against women and leads to problems such as forced marriages, bride selling, increase in dowry demands, kidnapping for marriage etc. We are already seeing the negative consequences of practices like female foeticide and infanticide in states like Haryana, parts of Rajasthan and other areas where these practices are widespread.**
 - There are some villages in Rajasthan where there are so few women that they are forced to marry several men.
 - In some places, since there are fewer girls available for marriage, child marriages have increased.
 - Newspaper reports say that in some parts of Haryana, men are buying brides from other states such as Assam and West Bengal because they are not able to find women to marry in their own areas. The women who have been purchased are treated very badly and have to undergo physical and mental abuse. They are so far away from their homes, they are not even able to go to their parents for support and help.

How do we know if there are fewer women in society than men?

In order to measure the population of India, the Government counts the number of people in the country once every 10 years. This process is known as the **census**. Once this data is collected, the Government calculates the **sex ratio** which is the ratio of the number of women to every 1,000 men. Similarly, the government also tries to determine the **child sex ratio**. This is done through a calculation of the number of girls for every 1,000 boys in the age group of 0-6 years. This analysis is done across the country, district by district. For instance, in the 2001 census the child sex ratio was 927 girls for every 1,000 boys in the 0-6 age group. This meant that there are 73 missing girls for every 1,000 boys in India. Unfortunately this trend is continuing in India.

Law on female foeticide

The main laws on female foeticide and infanticide are covered under the Indian Penal Code (IPC) and The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (amended in 2002). A related law is the law on termination of pregnancy in India, called the Medical Termination of Pregnancy Act, 1971 (amended in 2002). This law has also been covered in this section and it is important to know the provisions of both the laws and provisions under the IPC to effectively work on the issue of female foeticide.

Indian Penal Code

There are several provisions in the Indian penal code which make female foeticide a crime. These are:

- **Section 314 IPC: If someone is trying to cause a miscarriage in a woman and this results in the death of the woman, it is a crime and is punishable with imprisonment for 10 years and/or a fine. If the miscarriage was being performed without the consent of the woman, the punishment could be life imprisonment.**
- **Section 315 IPC: If a person does something to prevent a child being born alive or does something to ensure that the child dies immediately**

after it is born she/he can be punished with imprisonment for 10 years or a fine, or both. But if a child dies in a case where the life of the mother is being saved, it will not be considered a crime.

- Section 316 IPC: If a person commits an act which results in the death of an unborn child this is a crime which can be punished with imprisonment for 10 years and a fine, or both.

Example:

Ramesh tried to kill Kamala who was pregnant. Kamala did not die but her child did. Ramesh is guilty under Section 316 IPC.

- Section 317 IPC: If a mother or father of a child below 12 years of age intentionally leaves the child in some place to abandon the child, they can be punished with imprisonment for seven years, or a fine or both.
- Section 318 IPC: If someone secretly disposes of the body of a child or intentionally conceals the birth of a child, she/he can be punished with imprisonment for 2 years or a fine, or both.

Pre-Conception and Pre-Natal Diagnostic Techniques (Prevention of Sex Selection) Act, 1994 (PCPNDT)

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in 1994, with the intention of preventing female foeticide. This law was amended in 2002 and the name of the law was changed to Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The amendment was necessary due to poor implementation of the old law and also to take care of new technological developments.

If the practice of female foeticide is to be stopped there have to be restrictions on all the persons involved in this practice namely, medical professionals, clinics, people in general and also people who sell ultrasound and other machines:

- **Clinics, medical personnel and sale of machines⁸⁰**

Pre-natal diagnostic techniques cannot be conducted in any clinic, laboratory or genetic counselling centre unless the place is registered. Even a mobile unit has to be registered.

Only qualified medical persons can do tests - Gynaecologists, Medical Geneticists, Paediatricians, Registered Medical Practitioners, Radiologists.

Medical personnel are prohibited from doing sex-selection tests.⁸¹

- **The sale of ultrasound machine etc., to persons, laboratories, clinics etc. not registered under the law⁸² is prohibited.**

- **Places:**

A pre-natal diagnostic test cannot be conducted in any place which is not registered.

The registration certificate must be displayed prominently on a board in the centre, clinic or laboratory.

All centres, clinics, laboratories must display prominently a notice in English and in the local language that sex-determination tests and the disclosure of the sex of the foetus is prohibited. If a registered centre or clinic engages in sex selection and sex determination tests, the registration can be cancelled and the persons prosecuted under the law.

- **Medical professionals.**

⁸⁰ Section 3 of the PCPNDT Act, 1994 - accessed on June 10, 2007.

⁸¹ Section 3A added by PCPNDT amendment Act, 2002.

⁸² Section 3B, added by PCPNDT amendment Act, 2002.

When can an ultra-sound or sonography be conducted?

A pre-natal diagnostic technique can be conducted only to determine any abnormalities in the foetus⁸³ and the test can be conducted only if the following conditions are fulfilled:

- **The age of the pregnant woman is above thirty-five years.**
- **The pregnant woman has had two or more spontaneous abortions.**
- **The pregnant woman has been exposed to drugs, radiation, infection or chemicals.**
- **The pregnant woman or her spouse has a family history of mental retardation or physical deformities or any other genetic disease.**
- **Any other condition that the central supervisory board set up in the Act may add.**

All clinics and medical professionals have to maintain detailed records of tests performed and the reasons why the tests were done.

A pre-natal diagnostic procedure cannot be conducted unless:

- **all known side and after-effects of the procedures are explained to the pregnant woman;**
- **written consent to undergo the procedures is given by the pregnant woman in the language which she understands; and**
- **a copy of her written consent is given to the pregnant woman.**

Once a test is completed, no person can communicate to the pregnant woman or her relatives the sex of the foetus by words, signs or in any other manner.

Examples:

- *Pointing to the picture of a girl after the test was conducted is illegal.*
- *Meeting the family of the patient after the test and remarking that the mother and child are healthy and the family should await Lakshmi⁸⁴ in their house.*
- *Remarking that they will have a burden on their shoulders from now on.*
- *Using the phrase "Jai Shri Ram" or "Jai Mataji"⁸⁵ to inform the family.*

All of the above are illegal and against the law. If it is a first time offence it is punishable with imprisonment of 3 years and a Rs. 10,000 fine, but any subsequent conviction awards a punishment of imprisonment for 5 years and a Rs. 50,000 fine

Restrictions on husband and relatives

Nobody, including relatives/husband of the pregnant woman, can ask for or encourage any pre-natal diagnostic tests on her except for reasons permitted under the law.

Nobody, including a relative or husband of a woman, shall seek or encourage the conduct of any sex-selection technique on her or him or both. Punishment: Any person who seeks the help of a medical professional, clinic or centre to do a pre-natal diagnostic test or a sex selection test to determine the sex of the foetus will be punished under law for a first time offence with imprisonment of 3 years and a Rs. 10,000 fine, but any subsequent conviction is punishable with imprisonment of 5 years and a Rs. 50,000 fine.

⁸³ Section 4, PCPNDT Act, 1994.

⁸⁴ Lakshmi is the Goddess of Wealth in the Hindu religion. Indicating that Lakshmi will visit your home is to hint that the foetus is female.

⁸⁵ These references are indicative of male and female gods.

Restrictions on publishing and advertising

Advertising and publicising facilities for sex selection and sex determination tests are illegal under the law; no person, organisation, counselling centre, clinic or laboratory is allowed to do this.

Example:

A board on a bus which says, "If you want a male child, contact _____" or "Want to know whether boy or girl, quick and easy. No surgery required."

This advertisement is clearly illegal. Advertisements in newspapers, on boards, radio, TV or in any other form are illegal. Punishment is 3 years' imprisonment and a fine.

Implementation

Central Supervisory Board

A Central Supervisory Board will be constituted by the government consisting of eminent persons including health professionals. This Board will have the following functions:

- **Advising the government on policy matters relating to pre-natal diagnostic testing, sex selection techniques and misuse of the law.**
- **Reviewing and monitoring the implementation of the law.**
- **Creating public awareness on the issue.**
- **Laying down a code of conduct for medical personnel working in genetic counselling centres, clinics and laboratories.**
- **Overseeing the performance of various bodies under the Act and ensuring their effective implementation.**

State Supervisory Board and Union Territory Supervisory Board

Each state and union territory will constitute a Board that will have the following functions:

- **Creating public awareness on the issue.**
- **Reviewing the activities of the appropriate authorities and recommending action against them.**
- **Monitoring the implementation of the Act and making recommendations to the Board.**
- **Sending consolidated reports of various activities undertaken at the state level to the Board and the Central government.**

The Appropriate Authority

The implementation of the PCPNDT Act is in the hands of the 'Appropriate Authority' which is appointed under the Act with offices all over the country. The facilitator will need to find out who has been appointed as the Appropriate Authority in the area – it is usually the Chief District Medical Officer. The role of the Appropriate Authority is to:

- **grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;**

- **enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;**
- **investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;**
- **seek and consider the advice of the advisory committee (under Sub-Section V of the Act) on application for registration and on complaints for suspension or cancellation of registration;**
- **create public awareness against the practice of sex selection or pre-natal determination of sex;**
- **supervise the implementation of the provisions of the Act and rules;**
- **recommend to the Board/State Board modifications required in the rules in accordance with changes in technology or social conditions;**
- **take action on the recommendations of the advisory committee after investigation of complaint for suspension or cancellation of registration.**

The powers of the Appropriate Authority are:

- **Summoning of any person who is in possession of any information relating to violation of the law relating to female foeticide.**
- **Production of any document or material object relating to the above.**
- **Issuing of search warrants for any place suspected to be using sex selection technique or pre-natal sex determination.**

The Advisory Committee

An advisory committee will be constituted for each Appropriate Authority to aid it in its functions. It will consist of medical experts, legal experts, social workers and state government/union territory officials.

Complaints

Complaints of violations of the law can be made by any person or social organisation, or even a group of people.

- **Complaints are to be made to the concerned Appropriate Authority or any person performing the role of the Appropriate Authority as authorised by the government.**
- **It is the duty of the Appropriate Authority to investigate complaints and take the cases to Court.**
- **If the Appropriate Authority does not take action on a complaint the person who has made the complaint can directly approach the Court after 30 days of informing the Appropriate Authority of the alleged offence and telling the Appropriate Authority that she/he will directly approach the Court if no action is taken within this time period.**
- **Once a complaint is made in Court the matter is a crime and the public prosecutor takes over the case.**
- **The offence under the PCPNDT Act shall be tried only in a Court of the Metropolitan Magistrate or a Judicial Magistrate of the First Class.**

Medical Termination of Pregnancy Act, 1971

While discussing foeticide it is necessary to understand the law on abortion in India. In 1971 a law was passed called the Medical Termination

of Pregnancy Act, (MTP), which made it possible for women to have abortions under certain circumstances and only through registered medical practitioners.

Who can perform an abortion?

Only a registered medical practitioner whose name is entered in the state medical register and who is trained in gynaecology and obstetrics can perform an abortion. Termination of a pregnancy by any other person is an offence which is punishable under IPC with **rigorous imprisonment of minimum 2 years and maximum 7 years.**

When can a pregnancy be terminated?

- **When the length of the pregnancy is not more than 12 weeks.**
- **If the period of pregnancy is more than 12 weeks and less than 20 weeks, an abortion can be performed only after getting the opinion of 2 registered medical professionals which clearly state that:**
 - continuing the pregnancy would risk the life of the pregnant woman or cause grave injury to her mental or physical health; or
 - if the child is born there is a risk of the child having serious physical or mental abnormalities.

The opinion of two medical practitioners is not required in cases where the doctor feels that termination of pregnancy needs to be done immediately to save the life of the woman.

Rape: pregnancy caused as a result of sexual assault can be terminated under law because it is considered that the trauma of sexual assault and the resultant pregnancy will cause grave injury to the mental health of the woman.

Failure of methods of family planning used to limit the size of the family is also grounds for terminating a pregnancy; the law considers the trauma of having an unwanted pregnancy as causing grave injury to the mental health of the woman.

Who can give consent for the termination of a pregnancy?

- A pregnancy can be terminated only with the consent of the pregnant woman.
- **If the woman is mentally ill or she is below 18 years of age, a pregnancy can be terminated only with the written consent of her guardian.**

Where can an abortion be performed?

Pregnancy cannot be terminated anywhere and everywhere. It is an offence to perform abortions in any place other than in:

- **a hospital established and maintained by the government;**
- **a place approved by the government to perform abortions.**

If an abortion is conducted in any place other than the above, the person who conducts the abortion is punishable with **rigorous imprisonment of minimum 2 years and maximum 7 years.**

Any person who is the owner of the place which is not approved for abortion (meaning a person who heads the place and is responsible for operating and maintaining the place), will be punishable with **rigorous imprisonment of minimum 2 years and maximum 7 years.**

How can we know whether the abortions have been performed for genuine reasons and not as a result of sex selection?

Under MTP doctors and hospitals have to maintain detailed records of all pregnancies terminated:

- **All the documents such as the consent given by a pregnant woman for termination of her pregnancy, the certified opinion of the doctors that the abortion is necessary and the intimation of termination of pregnancy must be:**
 - put in a sealed envelope;
 - the sealed envelope should be sent by the registered medical practitioner to the head of the hospital or owner of the approved place or the Chief Medical Officer of the state, and the letter must be marked 'secret'.
 - A weekly statement of cases of medical termination of pregnancy is required to be sent to the Chief Medical Officer by the head of the hospital or the owner of the approved place.
 - A record of women admitted for medical termination of pregnancy must be maintained in an Admissions Register.

If all these records are duly maintained, they can assist the Appropriate Authorities appointed under the PCPNDT Act to monitor the abortions that are being carried out. If, for instance, there are too many cases referred by a particular doctor or the reasons stated are essentially the same, a pattern is showing up. The Appropriate Authority can then investigate and take action against the doctor and hospital under the PCPNDT Act.

What are the problems in implementing the law?

The problem of female foeticide is similar to child marriage. Most people understand that it is wrong and illegal, yet it is still done as the fear of being caught and prosecuted is minimal. One of the reasons for this has been the abysmal failure in implementing the law. The problems in implementing the PCPNDT Act are the following:

- **People do not come forward to make complaints.**
- **It is hard to prove that a test and a subsequent abortion have been done.**
- **The only people who are in a position to confirm if the test was done and if an abortion was conducted are those directly involved in the activity, namely the woman, husband and family members. Since they have committed an offence they are not likely to complain.**
- **If a woman is forced to undergo a test, she may complain but these cases are rare.**
- **The only way the perpetrators of this crime can be held responsible is if people act socially and report the crime.**

FEMALE FOETICIDE: WORKSHOP METHODOLOGY

Note to the facilitator

The module on female foeticide should be conducted after sessions on VAW and after having established the link between gender discrimination and violence against women.

EXERCISE 5.4

Title: Why does female foeticide occur?

Purpose: To understand what female foeticide is and its impact

Time: 30 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask the participants to discuss what happens in their community and in their homes when it is announced that a woman is pregnant. What kind of discussions take place? Is there a desire for a boy? Use the following discussion points:
 - *Are there different ceremonies for the birth of girls and boys?*
 - *Is there a greater desire for boys than girls? Why?*
 - *What kind of pressure and fears does a pregnant woman experience to produce a male child?*
- The facilitator must follow this discussion by making a presentation on falling child sex ratios across the country. Ask the participants for their observations and thoughts on why the child sex ratio in the country is skewed. Use the following discussion points:
 - *What reality do the child sex ratios reflect?*
 - *What is female foeticide?*
 - *Why does it occur? Do they know of any instance in their own environment of female foeticide?*
 - *How does female foeticide occur?*
 - *What do they think is the role, position and impact of such an incident on women?*

Note to the facilitator

The facilitator should lead a discussion on the consequences of female foeticide and clarify concepts such as sex determination and sex selection.

The following aspects could be covered:

- Explain the meaning of sex determination and differentiate between this and sex selection.
- Explain the concept of sex determination and how technology which was meant to work for the health of the woman is being misused.
- Highlight stories from the newspapers like the wells filled with aborted fetuses that were discovered in Haryana.
- The impact of foeticide on women giving impetus to forms of VAW such as trafficking, polygamy, sexual abuse and increased VAW.

Note to the facilitator

In order to conduct this session effectively, the facilitator can collect newspaper cuttings of recent articles on female foeticide from regional newspapers.

The end of the session on foeticide should focus on the Pre-Conception and Pre-Natal Diagnostic Testing Act. In order to make the participants familiar with the law a presentation could be made, covering the following points:

- *What is the objective of the PCPNDT Act?*
- *Who can conduct tests? Where can these tests be conducted?*
- *What are the obligations of clinics that conduct ultrasonography and other tests?*
- *When can these tests be conducted?*
- *Is the consent of the pregnant woman necessary? Should the doctor explain what the tests are and if there are any side effects of these tests?*
- *Is there a prohibition on revealing the sex of the foetus? What are the restrictions on the doctors?*

- Can the husband or relatives ask for tests to be conducted? What is the punishment for husbands and relatives?
- Is there a prohibition on advertisement? What is the punishment for advertising?
- What is the punishment for violation of the law?
- Who is responsible for the implementation of the law?
- Who can make complaints about violation of the law?

SEX RATIO 1991

927 females per 1,000 males in the 0-6 age group. This means that there are 73 missing girls for every 1,000 boys in India.

SEX RATIO 2001⁸⁶

Males account for 52% of the population, while 48% of the population is female.

There are 933 females per 1,000 males. This means there are 67 missing girls for every 1,000 boys in India.

A study⁸⁷ in Tamil Nadu by the Community Service Guild of Madras found that "female infanticide is rampant" in the state, though only among Hindu (rather than Muslim or Christian) families. "Of the 1,250 families covered by the study, 740 had only one girl child and 249 agreed directly that they had done away with the unwanted girl child. More than 213 of the families had more than one male child whereas half the respondents had only one daughter."

"In Jaipur, capital of the western state of Rajasthan, pre-natal sex determination tests result in an estimated 3,500 abortions of female fetuses annually," according to a medical college study.⁸⁸

Most strikingly, according to UNICEF, "A report from Bombay in 1984 on abortions after pre-natal sex determination stated that 7,999 out of 8,000 of the aborted fetuses were females. Sex determination has become a lucrative business."⁸⁹

⁸⁶ www.indiaonline.com

⁸⁷ www.gendercide.org (Malvika Karlekar, "The Girl Child in India: Does she have any Right?", *Canadian Woman Studies*, March 1995).

⁸⁸ *Where killing baby girls 'is no big sin'*. Dahlburg. 1994.

⁸⁹ <http://www.gendercide.org>. Zeng Yi et al., "Causes and Implications of the Recent Increase in the Reported Sex Ratio at Birth in China," *Population and Development Review*, 19: 2 [June 1993], p. 297.

The child sex ratio of the number of girls for 1,000 boys between ages of 0-6 in **Karnataka** in 1991 was 963 (rural) and 954 (urban). In 2001 it was 951 (rural) and 939 (urban).

Action Points

- **Screen the documentary 'Atmaja' which is on the issue of female foeticide. Invite a local NGO member or lawyer who has been working on the issue of female foeticide to talk about reasons for non-implementation of the Act.**
- **Find out who the Appropriate Authority is in your area and what the person has been doing to implement the Act. Ask to see the register of clinics and records of complaints. Ask if the Appropriate Authority has appointed an advisory committee.**
- **If the advisory committee has been appointed, find out who the members are. Meet them and find out what they have been doing and if meetings are taking place.**
- **Develop a plan to spread awareness on the consequences of female foeticide to the rest of the women in the village.**
- **Set up watchdog groups within communities to ensure that foeticide is not taking place.**

Sexual Assault - Rape

Objectives

- To provide a clear understanding of the definition of rape.
- To highlight and clarify various myths around rape.
- To illustrate the experience of survivors of rape.
- To create an understanding of the rape laws in India.

Introduction

Rape is forced or manipulated sexual intercourse with a woman without her consent, under threat of harm to herself or other(s), through misrepresentation or where she has not been in a position to give her consent for any reason such as illness or intoxication. Rape is a crime. Rape is not a crime of passion or sexual desire. It is a display of violence, power, control and aggression over women.

Marriage is NOT the solution to rape



The solution is JUSTICE for the woman

What is rape?

Rape occurs when a man forces a woman to have sexual intercourse with him when she does not consent to this or it is against her will. The Indian Penal Code defines rape and also lays down the punishment for rape.⁹⁰ It is said to be rape in the following circumstances:

- **When a man forces a woman to have sex with him against her will and without her consent.**

Example:

Kanta is a housewife who lived with her husband and two children. One morning, after seeing off her husband and children, Kanta finished her cooking. At around 11 o'clock the door bell rang. She found Deepak, her husband's cousin standing outside the door. She invited him in and asked him to be seated while she made him a cup of coffee. While she was making the coffee, Deepak came up behind her and putting his arm around her told her that he was attracted to her. He also said that he felt that Kanta was also attracted to him, and since her husband was not at home they should have sexual intercourse. On hearing this Kanta slapped his face and shouted at him to leave immediately, saying that she was not attracted to him. Enraged, Deepak slapped her back many times, all the while shouting that he knew she loved him and that she was not accepting this fact because she was married. He was not ready to understand that when a woman says 'no' she actually means 'no' and not 'yes'. Kanta tried to protect herself and hit out as much as she could. But despite all her struggles Deepak forced himself upon her and raped her.

- **Where a woman may have consented under the man's threat of physical injury or death to either her or someone else she knows.**

Example:

Meenakshi's husband died two years ago, and since then she has been working as a clerk in a hospital. She is the only bread-winner in her family and looks after her old mother and her son who is only 3 years old. One day Ramesh, who is also a clerk at the same hospital, asked her to help him do an inventory in the store room. Ramesh is also the leader of the workers' union and considered to be a fairly powerful person. When Meenakshi went into the room with Ramesh, he locked the door behind her and started hugging her and trying to take off her sari. When Meenakshi threatened to scream and tried to push him off her, he pulled out a knife and told her that he would cut her face if she did not consent. He also told her that he would kill her son if she put up any resistance. Knowing Ramesh's bad reputation and fearing for her own life as well as that of her son's, Meenakshi consented to having sexual intercourse with Ramesh.

- **When a woman has had sexual intercourse with a man because she believes that they are married, when the man knows that this is not true.**

Example:

Tara and Rishi were in love with each other. However, whenever Tara spoke to Rishi about marriage he always made excuses. The reason for this was that Rishi was already engaged to another girl, but Tara did not know this. Rishi was very keen on having sex with Tara but she always refused saying that she would have sex with him only when they were married. One night Rishi took Tara to a nearby temple and put sindoor on her forehead. He told her that he was marrying her in the presence of God and nothing could come in their way now. Believing that they were now married Tara went with him to a hotel where they had sexual intercourse. They stayed with each other for a week and after that Rishi said that he had to go away on a business trip. Tara went back to her house expecting to see Rishi in a week's time. However, more than a month later Tara had still not heard from Rishi. Not knowing what to do, Tara found the address of Rishi's parents' house and went there only to discover that soon after leaving her Rishi had married his fiancé. Tara went to the Police station and told them her story. It was here that she was told that what had happened to her was rape.

- **When the woman gives her consent but is of unsound mind, in a state of intoxication or has been administered a substance by the man or any other persons whereby she is unable to understand the nature and consequences of what she has given consent to.**

⁹⁰ Section 375 IPC defines rape and Section 376 IPC provides the punishment for rape.

Example:

Kriya was studying in college. At the end of the final semester and exams the batch decided to spend a weekend in a farmhouse on the outskirts of the city to celebrate the end of college. As soon as they arrived the party began. Many of the students had brought liquor with them. Being a teetotaler Kriya kept away from the liquor and was enjoying herself dancing with her friends. One of the male students, Raghu, started dancing with her. After sometime he went away and brought her a soft drink. Kriya drank the soft drink and immediately started feeling giddy. Raghu helped her upstairs to a bedroom where Kriya lost consciousness. When she woke up the next morning, her body felt bruised and was hurting. She was also shocked to find that she was not wearing any clothes. Horrified Kriya turned around to see that Raghu was also sleeping on the same bed. It was then that Kriya realised that Raghu had mixed something in her drink which made her unconscious, following which he had raped her.

- **When she is under 16 years of age, with or without her consent.**

Example:

Lara was a ninth standard student aged 13. Every day Lara travelled to school by bus. It was here that she met a young man, Nitin. Nitin was 23 years old and worked in a bank. He was fascinated by Lara's beauty and character and she also slowly began reciprocating his feelings. They started to meet often after school in a restaurant nearby. Lara's friends kept telling her that Nitin was too old for her. One day Lara and Nitin had sexual intercourse. This was with Lara's consent. Some of Lara's friends got to know of this and her mother was told. Her mother being a lawyer filed a case of rape against Nitin as he had had sexual intercourse with a minor girl under the age of 16.

SECTION 375 IPC

RAPE OCCURS WHEN A MAN HAS SEXUAL INTERCOURSE WITH A WOMAN:

- without her consent;
- against her will;
- by threat of bodily harm or death;
- by cheating her into believing she is married to him;
- when she is of unsound mind, is intoxicated or under the influence of a stupefying drug;
- with or without her consent when she is below the age of 16;

Exception: Sexual intercourse by a man with his own wife is not rape if the wife is more than 15 years of age.

Penetration is sufficient to constitute rape. Penetration has been interpreted by case laws to mean penile-vaginal penetration.

What is the punishment for rape?

The punishment for rape is given in Section 376 of the Indian Penal Code. The standard punishment for rape is **imprisonment for not less than 7 years and up to 10 years**. This punishment may also extend to **life imprisonment**. However, there are some exceptions.

- **Marital Rape: In India we do not yet have a law that recognizes marital rape for women of all ages. The rape laws are fairly contradictory when it comes to the issue of marital rape. While it does not clearly state that sexual assault within marriages is a crime, it has created a few situations in which men can be punished for sexual assault against their wives. These situations depend upon the age of the girl at the time of sexual assault. They are listed below:**
 - If a man has sexual intercourse with his wife and the age of the wife is more than 12 and less than 15 years it is considered rape and the punishment is imprisonment for 2 years or a fine, or both.

Example:

Basavappa who is 18 years old married Kanta who is 14 years old. If they have sex, Basavappa can be punished with 2 years' imprisonment because his wife is less than 15 years of age.

- If a man has sex with his wife who is below 12 years of age it is rape and he may be punished with 10 years' imprisonment.

In some cases of rape, the punishment given is rigorous imprisonment for 10 years and maybe life and the guilty person must also pay a fine. These are the following:

- **Custodial Rape: Custodial rape occurs when the 'victim' is in custody or under the protection of someone who is an agent of power. For example, if a person is arrested he/she is in the custody of the Police. If a person is in jail he/she is in the custody of the jail authorities. Children in remand homes and women in short stay homes and other institutions are in the custody of the authorities running these institutions. People in hospitals are in the care of hospital authorities. Custodial rape under the IPC has been defined in the following manner:**
 - When a woman is sexually assaulted by a Police officer within a Police station or any station house.
 - When a Police officer sexually assaults a woman who is in his custody or in the custody of a subordinate Police officer.
 - When a public servant taking advantage of official position sexually assaults a woman in his custody or in the custody of a public servant subordinate to him.
 - When the staff of jail, remand home, or any women's/children's institution commits sexual assault on any inmate.
 - When the staff of a hospital sexually assaults a woman in the hospital.

If a rape occurs in any of these places by officials/staff of these places, it is known as custodial rape and is seen as abuse and misuse of their power. It is worthwhile to note that the changes in the rape laws to bring in a stricter punishment for custodial rape came after the Mathura rape case⁹¹ and many other cases that were reported of persons in authority abusing their powers over women in their custody.

- **Gang rape: Gang rape is a situation when a woman has been sexually assaulted by one or more than one person from amongst a group of persons. The important thing is that in such situations each of the persons within the group will be deemed to have sexually assaulted the woman even if each one of them did not actually have sexual intercourse with her. For example, if five men catch hold of a woman and only one sexually assaults her in order to, for instance, humiliate her husband because of some old vendetta, all the five men will be imprisoned for a minimum of ten years.**
- **Rape of minors: Rape of a girl under the age of 12.**
- **Rape of pregnant women: Rape of a pregnant woman while knowing that she is pregnant.**
- **Sexual intercourse by a man with his wife during separation:**
 - If a man has sexual intercourse with his wife: and
 - the wife has been separated from him; and
 - if the sexual intercourse was without her consent.

⁹¹ The Mathura rape case (Tukaram v. State of Maharashtra, (1979) 2 SCC 143) was a landmark case which catalysed various changes in the rape laws in India bringing in sections on custodial rape and changes in the Indian Evidence Act.

The man can be punished with imprisonment for up to 2 years and a fine (Section 376A IPC).

- **Sexual intercourse by a public servant with a woman in his custody:**

- If a public servant takes advantage of his official position; and
- induces or seduces a woman in his custody or in the custody of a public servant subordinate to him to have sexual intercourse with him.

If such sexual intercourse does not amount to the offence of rape under Section 375, the public servant can be punished with imprisonment for up to 5 years and a fine (Section 376B IPC).

- **Sexual intercourse by the superintendent of a jail, remand home, etc:**

- If the superintendent or manager of a jail, remand home or any such institution established under the law, or of a women's or children's institution takes advantage of his position to have sexual intercourse with an inmate of the institution.

If such sexual intercourse does not amount to the offence of rape under Section 375, the superintendent or manager can be punished with imprisonment for up to 5 years and a fine (Section 376C IPC).

- **Sexual intercourse by management or staff of a hospital with any woman in the hospital:**

- If any person on the management or staff of a hospital takes advantage of his position and has sexual intercourse with any woman in the hospital.

If such sexual intercourse does not amount to the offence of rape under Section 375, the person will be punished with imprisonment for up to 5 years and a fine (Section 376D IPC).

THE MINIMUM SENTENCE FOR RAPE IS:

- Rape: 7-10 years' imprisonment with liability of a fine.
- Custodial rape, gang rape, rape of pregnant women, rape of minors: 10 years' imprisonment with liability of a fine.
- Sexual intercourse with wife whose age is more than 12 years and less than 15 years: 2 years' imprisonment with liability of a fine.
- Sexual intercourse with separated wife without her consent: up to 2 years' imprisonment and a fine.
- Sexual intercourse not amounting to rape by a public servant, superintendent of a jail or women's or children's homes, hospital management **and other persons who are in custody of women**: 5 years' imprisonment and a fine.

Are there any other laws that address other forms of sexual assault on women?

There are other sections within the Indian Penal Code which try and address other forms of sexual assault which may not fall under the rape laws in India. These sections are:

- **Section 354 IPC: The section addresses any attempts and acts that look at any kind of assault or criminal force that has been used to outrage the modesty of a woman. The punishment for this crime may extend to a period of 2 years or a fine or both. This offence is a cognizable and bailable offence with a punishment with imprisonment for 2 years, with a fine, or both.**

Example:

A woman went to get water from the village well early in the morning. A man came up and pulled her hand and tried to drag her away, but she started shouting for help and struggling to get away. The man hit her, trying to get her to stop screaming. He pulled her sari and tore her blouse. The man is guilty of outraging the modesty of the woman.

The term 'modesty' has not been defined in the Indian Penal Code. In a recent case decided by the Supreme Court of India,⁹² the Court defined modesty in the following terms:

"...The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object...."

- **Section 509 IPC: The section says that any person who makes a word, gesture or acts while knowing that it is being heard or seen by the woman and is insulting to her modesty can be punished with a sentence which could extend to a year or a fine or both. This offence is a cognizable and bailable offence punishable with imprisonment for 1 year, or a fine, or both. Eg. Making obscene gestures and comments to a woman on the street or anywhere or writing letters to a woman with obscene words and pictures.**
- **Section 377 IPC: This law states that it governs unnatural sexual offences against the order of nature. It is important to note that there is a movement in India that is calling for the repeal of this outdated and archaic law as it prejudices the State against the rights of people having same sex relationships and is discriminatory in nature. This law ignores the issue of consensual sexual relations between adults. The punishments listed out in Section 377 are harsh and the offence is a cognizable and non-bailable offence punishable with imprisonment for life or imprisonment for 10 years with a fine.**

What have been the recent attempts to redefine the rape laws?

In an attempt to redefine rape laws in India, a writ petition was filed by a women's organisation, Sakshi, (Sakshi v. UOI and ors, AIR 2004 SC 3566). The petition asked the Supreme Court to:

- **Expand the limited definition of sexual intercourse as provided under Section 375 IPC to include all forms of penetration and not just penile-vaginal penetration. This is so because crimes of sexual violence that do not fall under the limited understanding of 'sexual intercourse' are treated as lesser offences falling under the purview of Section 359 IPC (outraging the modesty of a woman) and Section 377 IPC (unnatural sexual offences).**
- **Introduction of child-friendly and sensitive procedures in the Courtroom.**

The Supreme Court held the following:

- **The Court rejected the organisation's plea for expansion of the definition of 'sexual intercourse,' saying that it would cause too much confusion in the minds of prosecuting agencies and the Courts.**

⁹² *Ramkripal S/o Shyamlal Charmakar v. State of Madhya Pradesh Criminal Appeal No. 370 of 2007 (Arising out of SLP (Crl.) No. 5881 of 2006), Decided On: 19.03.2007.*

- **On the issue of child-friendly procedures, the Court gave the following directions:**
 - During trials of child sexual abuse or rape cases a screen or some other arrangements would be made, where the victim or the witnesses would not have to directly see the accused.
 - In such cases the questions related to the case to be asked of the victim will be given in writing first to the presiding officer of the Court who will put them in a language that is clear and not embarrassing.
 - While giving testimony in Court the victim of child abuse or rape should be allowed sufficient breaks as and when required.
 - The Court also held that the provision of an in camera trial (as provided for under the criminal procedure code in Section 327) would apply to laws governing rape as well as two other sections in the IPC which are Section 354 IPC (outraging the modesty of a woman) and Section 377 IPC (unnatural sexual offences).

Assistance to sexual assault survivors

Broad parameters were laid down by the Supreme Court of India in the *Delhi Domestic Working Women's Forum v. Union of India*, 1994 (4) SC (Scale) 608, for assistance to survivors of sexual assault:

- **The complainants of sexual assault should be provided with competent legal representation from an advocate who will be able to guide and inform the complainant adequately on the case. The Court also stated that it is important that the same advocate work on her case from start to finish ensuring continuity in the case.**
- **Legal assistance will have to be provided in the Police station itself to be able to immediately guide and counsel the complainant.**
- **The Police should inform the complainant of her right to a lawyer before any questions are made pertaining to the complaint of sexual assault. The Police report should state that she had been informed of this.**
- **A list of advocates willing to work on these issues should be kept at the Police station to be handed out to complainants who do not have a lawyer.**
- **The advocate will be appointed by the Court upon application by the Police, but to prevent any delay the Court has also said that the advocates are authorised to act in the Police station before the Court permission is obtained.**
- **Anonymity of victims will be maintained in all rape trials.**
- **It is necessary to set up a Criminal Injuries Compensation Board to help rape victims.**
- **Compensation shall be awarded by the Court to the victim through this Board on conviction.**

Precautions to be taken by a sexual assault survivor⁹³

- **The victim should narrate the incident to a family member or friend.**
- **The victim should try not to bathe or wash clothes as evidence will be lost because of this.**
- **The victim should take a family member or a trusted person along with her to the Police station and give detailed information of what happened.**

⁹³ *Our Laws, Vol 9. Marg.*

- **It is very important to mention that sexual intercourse occurred. Ensure that this is mentioned in the FIR.**
- **It is the victim's right to get a free copy of the FIR.**
- **Ensure that the Police immediately take the victim for a medical examination. It is their duty.**
- **Ensure that the victim gets a copy of the medical report from the doctor.**
- **The clothes of the victim will be taken away by the Police for examination of the presence of semen, blood or hair of the man.**
- **The victim should ensure that the clothes are placed in a sealed packet by the Police and she gets a receipt of all the clothes that have been sealed.**
- **If the Police refuse to lodge an FIR the victim can complain to a senior Police officer or to the Magistrate.**
- **The victim can also contact the District Collector, State Women's Commission, the National Commission of Women or the National Human Rights Commission to complain about this.**

Medical Evidence

Medical evidence has in the past been an important part of rape trials. Courts have often taken the position that if there is no proof of physical assault, there is no evidence pointing to a rape having been committed. This has often been used as a reason to acquit accused persons. This fact has been worsened by untrained and insensitive medical personnel handling medical examinations. Corroboration by medical evidence does play a disproportionately large role in rape cases. Given this situation, it is important to pay attention to a recent judgment passed in the Supreme Court in 2000.⁹⁴

Facts of the Case:

A minor girl aged around 15 years was raped by the accused. The medical examination established that sexual intercourse had taken place. The girl's age was placed at 15 years with a plus or minus of 3 years. The trial Court convicted the accused under Section 376 and awarded him a prison sentence of 7 years.

On appeal to the High Court, the accused was acquitted as it could not be established beyond doubt that the victim was 15 years of age and there was no physical injury.

When the case went to the Supreme Court, the accused was held guilty and sentenced to a reduced prison term and a fine. The Court held the following in this case:

- *When there is a doubt in the case, it has to be a reasonable doubt and should not be an excuse in favour of acquittal of the accused.*
- *Refusal to act on the victim's statement of what had happened because there was no corroboration of it in terms of evidence is an injustice to the victim.*
- *Absence of evidence does not make the victim an accomplice in the crime and in case the Court doubts the victim's statement it should try its best to find evidence.*
- *Absence of injury on the victim's body does not indicate that her complaint of rape is false. This is dependent on the facts and circumstances of each case.*

This is not to say that medical evidence is not needed in rape cases, but to state that it is not the only evidence that is required as has been demanded by Courts very often.

In the event that a woman has to be assisted with a medical examination after a sexual assault has occurred it will be important to ensure that the following aspects are brought to light. The examination of the survivor and

⁹⁴ *NK v. State of Rajasthan, (2000) 5 SCC 30.*

the accused should be conducted in such a way that it answers the following questions:

- **Is the accused capable of committing sexual intercourse?**
- **Is there medical examination that is confirming this?**
- **Has sexual intercourse taken place recently?**
- **Are there any signs of physical injury or of stupefying drugs?**
- **Have all relevant specimens been taken to confirm the allegations and to assist in identifying the parties involved?**
- **Has the survivor's current state of mind when she was brought in for the medical examination been recorded?**
- **The date, time and place of the alleged acts.**
- **The time of the first complaint and an explanation for any delay.**
- **What clothing was removed from the body of the survivor and by whom and when?**
- **Was any force used by the accused, where and how?**
- **Was any pain experienced at the time of the event or after that?**
- **What were the relative positions of the accused and the victim?**
- **Did ejaculation take place either within or outside the vagina?**
- **Was any form of contraception used?**
- **Did the victim struggle, scream or injure the accused in anyway?**
- **Has the victim changed clothes, washed any clothes or her own body since the event?**

From Rape Laws to Sexual Assault Draft Bill

In 1978 a young tribal girl called Mathura was raped by local Policemen near Bombay. The rapists were acquitted on the basis of a judgement⁹⁵ which spoke of Mathura's character and also decided that she could not have been raped since she was 'habituated to sexual intercourse' and also did not have any injury marks on her body and therefore the incident was a 'peaceful affair'.

This case gave rise to a campaign on the need to re-look at attitudes while deciding rape cases. The most controversial question was of course regarding the consent of the female. In most cases, the victim found it impossible to prove that she had not consented to the act and the burden of proving this was on the woman.

A campaign for gender sensitive rape laws began. Following this, in 1983, the legislature prescribed a minimum sentence of seven years' imprisonment in rape cases. Besides, an important provision was added to the laws on rape. This section introduced the concept of what were considered to be more aggravated forms of rape and prescribed a minimum of ten years for these cases. Furthermore, in such cases, the imprisonment had to be of a rigorous nature only. These included custodial rape by a Police officer within the premises of a Police station; rape by a public servant or his junior while taking advantage of his official position; rape by an official in a jail or remand home of an inmate; rape by someone on the staff of a

⁹⁵ *Tukaram v. State of Maharashtra*, AIR 1979 SC 185; (1979) 2SCC 143; 1978 CrLJ 1864; 1979 SCC 143.

hospital of a woman in the hospital; rape of a pregnant woman; rape of a girl under 12 years of age and gang rape.

A major reform was also made in The Indian Evidence Act (IEA) as the legislature took into consideration the difficulty for the victim to prove absence of consent especially in cases of custodial rape. So a special section was added - Section 114A of the IEA - in cases of custodial rape, gang rape and rape of a pregnant woman, if the victim states in Court that she did not consent, then the Court shall presume that she did not consent and the burden of proving consent shall shift to the accused.

More reform came when it was realised that a person in authority can get a woman to have intercourse with him 'willingly' by offering handsome rewards in return. A superintendent of a jail can offer better living conditions to a woman prisoner if she 'willingly' submits to him. Such cases will not amount to rape; nevertheless they do signify abuse of official position. For such cases four special provisions - 376A, 376B, 376C and 376D - were added to the IPC and a punishment of five years' imprisonment provided. This provision now means that if a person in authority has had sexual intercourse with a woman in his custody, he will first have to prove that the woman in question had consented. If he cannot prove this he will be guilty of custodial rape and will have to undergo a minimum rigorous imprisonment of ten years. Secondly, even if he is able to prove that the woman did consent, he may not be charged with custodial rape but he can be imprisoned for five years under Sections 376B, 376C and 376D.

Section 155(4) of the IEA, provides that if in a rape case the woman is shown to be of immoral character then her evidence will not be taken into account. Yet consider Section 54 of the same Act. Among other things it says that in cases of rape, the fact that the accused person has a bad character is irrelevant.

Recently, taking the above into consideration, the Lok Sabha passed the Indian Evidence (Amendment) Bill, 2002, which seeks to delete Section 155(4) of the archaic Indian Evidence Act, 1872, which permits the person accused of rape to prove that 'the victim was of generally immoral character'. The amendment Act bars the cross-examination of the victim in order to determine her character.

The new sexual assault draft bill looks at various aspects. These are: the provision of separate and speedy trials for heinous crimes such as child rape, expanding the definition of rape from the restrictive definition of penile-vaginal penetration and also procedural issues that impede women's access to justice in cases of sexual violence - evidentiary requirements, cross-examination and judicial procedures.

What happens if there is a compromise?

What if the accused agrees to marry the victim; will this save him?

Rape is a non-compoundable offence, which means that even if the victim and the accused agree and come to any compromise the case will not be withdrawn. A non-compoundable case is where no compromise can be made; this only shows that the law sees rape as a very serious crime.

Therefore, even if the accused offers to marry the victim and the victim agrees, it does not mean that the rape case will be withdrawn. The trial will

take place and if the crime is proved the accused will be convicted. In some cases the Courts have reduced the jail sentence because the accused has offered to marry the victim. Often the accused is advised by his family or his lawyers to offer to marry the raped girl; this is done with the intention of getting a lighter punishment. It must be realised that the crime of rape is non-compoundable. A compromise out of Court has no meaning and cannot be used as an excuse to reduce the punishment for the crime.

It must be remembered that the offer of marriage does not take away the crime. A rape case is not withdrawn and cannot be closed just because of an offer to marry or because of any other compromise between the parties. It is also important to understand that no woman would want to marry a man who has sexually assaulted her. It is her right to get justice and nobody, including her family or community or panchayat should put pressure on her to marry the rapist. This is a false sense of restoring the honour of the woman. The focus should be on punishing the rapist and not on worsening the situation of the woman by forcing her to marry him. In some cases that have come to our notice where the community, family and panchayat have forced the women to marry the man, she has ended up committing suicide.

THINGS TO REMEMBER

- It is important to file a FIR as soon as possible after the incident.
- The important issue to be proved in rape laws is the lack of consent of the woman.
- In cases of custodial rape, gang rape and rape of a pregnant woman, once it is proved that there was sexual intercourse between the accused and the victim, if the victim states in Court that she did not consent, then the Court shall presume that she did not consent and the burden of proving that there was consent shifts to the accused.
- In rape cases the character of the woman is irrelevant (Section 155(4) of the Indian Evidence Act). The defense is also not allowed to gather evidence or cross examine the victim with an aim of finding out about her previous sexual history, character or conduct as it is irrelevant (Section 146 of the Indian Evidence Act). It is not relevant if she is a prostitute, or has boy friends. The clothes she wears are also not relevant.

Attempt to rape – is this a crime?

Yes, **attempt to rape** is also a crime and a case can be filed **under Section 511 of IPC**. This section deals with attempt to commit an offence. Even in the case of an attempt to commit rape it is necessary to file a FIR as soon as possible, and a medical examination should be conducted, because it is difficult to prove an attempt to rape.

Usually the punishment for an attempt to commit an offence is half of the longest term of imprisonment provided for the offence eg. 10 years' imprisonment is the punishment for rape, therefore attempt to rape would mean punishment for 5 years. A fine can also be imposed in cases of attempt to rape.

SEXUAL ASSAULT: WORKSHOP METHODOLOGY

Rape

Note to the facilitator

While doing a module on rape laws, the focus should not only be on the laws but also on reasons for rape and the experiences of rape survivors. This is important to highlight because there is institutionalised insensitivity towards survivors of rape. This begins at home with the family and is replicated with the Police and finally the Courts. The following are some exercises that can be used to demonstrate the experience of justice for rape survivors. It is also an effective exercise that will allow many myths surrounding rape to come up and be clarified by the facilitator later.

EXERCISE 5.5

Title: Defining Rape

Purpose: To create an understanding of the term rape

Time: 60 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask for 4 volunteers and ask them to enact a case study. The volunteers will play the role of Seema (the girl who was raped), Nasma (the social worker), Mamta (mother of the girl) and a Policeman.

Case Study:

Seema and Vinod are two young people who live in a village. Vinod often expressed his interest in Seema and she also reciprocated this as she too liked Vinod. They met a few times secretly in the fields near the village. One day Seema's parents had to go to a nearby village to attend a wedding. They told Seema that they would return the next day. Seeing an opportunity to meet, Seema and Vinod decided to meet each other in the evening in Seema's house. Seema was very happy that she would be meeting Vinod and dressed up in her favourite salwar kameez. When Vinod came, they sat down on the charpoy to talk. After some time, Vinod tried to kiss Seema. Seema felt shy but did not resist or ask him to stop. Soon Vinod was pushing her back on the bed. She got alarmed and asked him to stop. Vinod did not stop even when Seema tried to push him away. She was scared that if she screamed, her neighbours would hear her and so she kept quiet. She also did not put up a big fight against Vinod because she was scared that he would hurt her. Against her will and consent,

Vinod proceeded to have sexual intercourse with Seema. When he was ready to leave, he told her that she should not tell anyone what had happened or she would live to regret it and in any case no one would believe her. The next day Seema's parents returned. Her mother, Mamta found that Seema was very quiet and pensive. When she caught her weeping alone, she asked her daughter what was wrong. Seema, unable to keep the truth from her mother, told her what went wrong. Her mother was very angry and started shouting at Seema. Once she calmed down, she took Seema to a social worker, Nasma, working in an NGO in the village. Mamta had attended one or two training programmes conducted by the NGO in her village and she felt that Nasma would be able to advise her on the situation.

The volunteers are asked to enact the following situations:

- Situation 1: Discussions between Mamta, Nasma and Seema. What would be the immediate response of the family and community to this situation?
- Situation 2: Based on advice, Mamta decides to file a Police complaint and goes to the Police station. Enact the situation at the Police station.
- Come back to the plenary and ask the participants and the volunteers for their thoughts. Note down their thoughts on the board.
- Discussion points:
 - Was this a situation of rape? If yes, why? If not, why?
 - Did sexual intercourse take place with Seema's consent?
 - Does the group think that Seema invited Vinod's advances?
 - What are the typical responses of the community when there is a situation of rape in the village?
 - If this case had gone to the village panchayat instead of the Police station what would be the advice of the panchayat?
 - Is it relevant to discuss the character of the woman in a situation like this?
 - Does it matter what she was wearing?
 - Is it better for a woman to marry her rapist rather than see him punished?

- The facilitator should note down all the responses from the group on the board/chart paper and lead a discussion with the group to address these issues.
- It should be clarified at this stage that what transpired between Vinod and Seema was indeed rape.
- It cannot be eclipsed by the fact that Seema invited Vinod to her house and also allowed him to kiss her.
- The facilitator must emphasise the fact that there was no consent given to Vinod and the sexual intercourse was against Seema's will.
- It should be pointed out that Seema has a right to say no and Vinod needed to respect the right.
- If there is a counter argument, that Seema did not physically resist him or scream, it must be added that fear itself often does not allow women to scream out or physically resist the man who is raping her.
- It maybe effective to ask the person role playing 'Seema' what she feels when people make comments about her and hearing the reactions of the audience. Note down what she is saying on the board to illustrate to the participants the attitudes that survivors of rape have to deal with.
- Similarly ask people playing 'Vinod' and others what they feel when they play the characters assigned to them. This will be important in illustrating the difference in power that will emerge between 'Vinod' and 'Seema'.

Note to the facilitator

The following exercises will focus on understanding the experiences of a rape survivor in dealing with the Police and Courts. There are two exercises here that the facilitator could use depending on her level of comfort with the participants. These exercises can be used by the facilitator at various points in the session on rape. It will allow the facilitator to demonstrate effectively what rape survivors have to go through.

The next exercise can be used to demonstrate the attitudes and insensitivity that survivors of rape go through in society, Police and Courts. The facilitator should draw a parallel between both the situations. The time that this exercise is done with the group should be carefully chosen. It will be ideal at a time when the participants are talking about women's experiences after rape has been committed.

EXERCISE 5.6⁹⁶

Title: Liar!

Purpose: To illustrate the experiences that a rape survivor is subjected to vis-a-vis the Police

Time: 20 minutes

Materials needed: Whiteboard and markers

Steps:

- The facilitator should walk up to one participant and ask her to hand over either her purse or watch or anything else that she has on her person which may look expensive, like a necklace or earrings.
- Tell the participant that she was travelling by bus this morning during peak hours and was robbed of her purse/watch. She now has to go to the Police station to lodge a complaint.
- For the role play, the facilitator should act as the Policeman. The role play starts with the participant coming to the Policeman to lodge the complaint.
- The facilitator should ask the participant questions like this:
 - *How do I know that your item was stolen?*
 - *Why should I believe you?*
 - *You provoked the theft by travelling with such an important item during peak hours in a crowded bus. Don't you know that thefts like this happen all the time?*
 - *I cannot lodge an FIR as I do not have enough proof.*
 - *You are dressed like a rich person, so you deserved to have the item stolen. You provoked it.*
 - *Do you have any witnesses?*
 - *Did you not resist the attack?*
 - *If you had a suspicion about someone on the bus why did you not shout or try and catch him? You must be lying.*
- Once the role play is over, do a 'check in' with the participant and record on the board what she is feeling. Possible responses are anger, humiliation, frustration and helplessness. Also invite responses from the plenary on what they thought of the behaviour of the Policeman and the participant.

⁹⁶ Adapted from Sakshi workshops.

EXERCISE 5.7

Title: Myths and Facts on Rape

Purpose: To clarify various myths related to rape

Time: 60 minutes

Materials needed: Myths and Facts on Rape

Steps:

- This exercise can be done through a debate.
- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.
- The session should begin with each group taking turns to argue a myth and the other group countering the myth. This should not be for more than 5 minutes each. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts given below are merely indicators for the facilitator who can contextualise them depending on the participants and the cases that have come up.

⁹⁷ <http://www.heartlink.org/directors/resources/A000000198.cfm>.

MYTHS AND FACTS ABOUT RAPE

Myth: Rape can only happen with a stranger.

Fact: Rape most often happens by someone known to the victim. A rapist may be a family member, friend, caretaker, acquaintance or partner.

Myth: Rape is an expression of sexual desire.

Fact: Rape is an expression of violence, not sexual desire. It is motivated by the need to dominate, control and degrade the victim. This act of aggression is often triggered by feelings of anger or violence. Some rapists punish their victims out of a need to release pent-up anger or frustration. Others have deep feelings of inadequacy that are relieved by their ability to control and dominate another person. This display of aggression is due to low self-concept, doubts about masculinity, and feelings of social distance or general unhappiness. In reality, many rapists state that during the rape they felt no sense of sexual stimulation or arousal.⁹⁷

Myth: Some women deserve to be raped as they provoke it.

Fact: No one deserves to be raped. This thinking shifts the blame from the attacker to the victim, faulting her for her dress, behaviour or whereabouts. Victims of non-sexual assault are not subjected to such attitudes, and neither should rape victims. In actuality, physical appearance or actions have little to do with who gets raped. Infants, elderly women and females of all income groups and living arrangements can be raped. A woman who goes out alone or after dark is not 'asking' to be raped. Some women are raped in their own home. Open areas in daylight or automobiles are also common places for rapes to occur. No woman is responsible for the behaviour of a rapist merely because she happens to be in a particular place at a given time or with a certain person. Saying that a woman deserved to be raped because of the kind of clothes she is wearing is also false. A woman has a right to wear whatever she pleases without expecting to be raped. If this were the case, can one explain why women in traditional outfits such as salwar kameez, sari and burkha get raped? The rapist chooses to rape and is solely responsible for that choice and the act.

Myth: Rapists are mostly 'sick' men.

Fact: This is just providing an excuse for men to rape. Most rapists show no signs of mental illness.

Myth: Men rape because they need sex and are unable to control their sexual desires.

Fact: This is a myth that the Courts too have often used to acquit rapists or to allow them lower sentences. The truth is that most rapists plan their attacks well in advance. A man may watch a woman for a while to learn her daily routine. This myth is also indicative of terrible double standards. This standard says that it is ok for a man to express his sexual desire through a gruesome crime like rape, but a woman dressing the way she wants is not acceptable.

Myth: It is impossible for a man to rape his wife.

Fact: Marital rape is a reality. Being married to a person does not take away a woman's choice to decide when she would like to have sex or not. Women are forced to have sex all the time by their husbands. This is rape. Unfortunately in India, the laws do not recognize marital rape unless a man has sexual intercourse with his wife who is less than 12 years of age, in which case he could be awarded 10 years' imprisonment.

Myth: Death is better than life for a woman who has been raped.

Fact: This is the most damaging attitude that society has towards women. Survivors of rape need the support of their family and friends to move forward and are entirely capable of leading a fulfilling and productive life after such an incident has occurred. This attitude reeks of double standards that are set for women. A survivor of rape did not choose to be raped, yet she is condemned as better off dead. At the same time, the Courts and society find many reasons to justify the act of rape by a rapist. This attitude has to change.

Note to the facilitator

The following exercise is an experiential exercise that will allow participants to observe the insensitivity of Courtrooms towards women who have survived rape.

This exercise is best done at a time when some participants have raised myths about some women deserving to be raped, provoking rape or of women raising false allegations of rape. It will also demonstrate the lack of language that women possess to be able to articulate what has happened to them. It is important to remember that the issue of women lying or trying to get revenge by framing somebody for rape could come up. This exercise could be used to show how difficult it is for women to talk about sexual violence because of lack of language, socialisation, stigma and shame. Given this reality, most women would not want to go through the experience of having to talk about sexual assault in a Courtroom.

The facilitator should remember that this exercise should be done only once a sense of comfort has developed amongst all the participants. It is also an effective exercise to carry out with lawyers to allow them to understand the attitudes that survivors of rape are put through in Courtrooms by both lawyers and Judges.

EXERCISE 5.8⁹⁸

Title: Break the Silence

Purpose: To illustrate the challenges women face when they seek justice in sexual assault cases

Time: 20 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask all participants to close their eyes for a minute. After a minute of silence ask them to visualise in their mind a pleasurable sexual moment that they shared with a partner or spouse.
- After two minutes, ask them to open their eyes and ask any participant if they would like to share what they visualised.
- As expected there will be silence in the room. You can ask them the reason for the silence. A possible response is that these thoughts are very personal and cannot be shared with everyone. It is also possible that some of the participants may take offence and express their anger at being asked to share such thoughts. If anybody is willing to share such thoughts, thank them for their courage and ask why amongst all the people sitting in the room, only one person had the courage to share. Record the responses on the board.

- Respond to what has been said keeping in mind some pointers given below.
- Discussion points:
 - When it is difficult for most people to share even a positive and pleasurable sexual experience, survivors of rape are expected to give detailed narrations of the experience of rape repeatedly in Courts.
 - Women are forbidden from sexual language and articulation due to socialisation and a pervasive culture that looks down upon and stigmatises women who live beyond established and discriminatory social norms.
 - The same norms do not apply to men.
 - The belief is that the honour or 'izzat' of a society rests on the moral behaviour of women, therefore policing is necessary.
 - This socialisation and double standards maintained in society make it very difficult for women to talk about the experience of rape. The Courtroom experience is coloured with feelings of shame, guilt and stigma. Women are made to feel that they are to blame for the rape. This reality makes it very difficult for women to even complain of rape. Therefore the possibility of women lying about rape is remote.

Note to the facilitator

The facilitator should inform participants about the law on rape as stated in the Indian Penal Code. The facilitator should have prepared for this session by reading up the legal section on rape in the legal information section. In addition to explaining the law, in this session it is also important to highlight what needs to be done in order to ensure that a case is filed properly. This should be done in the form of a presentation using the information from the legal information section on rape.

Action Points

Get a criminal lawyer to explain to the participants the process to be followed under the criminal justice system.

⁹⁸ Adapted from Sakshi workshops.

Child Sexual Abuse

Objectives

- **To discuss the prevalence of and provide information on Child Sexual Abuse (CSA).**
- **To develop an understanding of the term Child Sexual Abuse.**
- **To understand the impact of Child Sexual Abuse and how it affects the rights of a child.**
- **To understand the existing legal framework.**

Introduction

Child Sexual Abuse⁹⁹ (CSA) is any behaviour by an older or more powerful person on a child for his/her sexual gratification. This includes both touch as well as non-touch forms, including, but not limited to:

- **Exhibitionism**
- **Voyeurism**
- **Making the child touch the offender's private parts**
- **Touching the child's private parts**
- **Forcing or tricking the child to watch pornography**
- **Sexual intercourse (vaginal/anal/oral)**

A child is any person who is below 18 years of age.

Are Child Sexual Abuse and child rape covered under Indian law?

Child Sexual Abuse is widely prevalent in India. This form of sexual assault is one of the worst since children are not mentally, emotionally or physically prepared to participate in sexual activity. Apart from this, children are also not able to fully comprehend the activity to be able to give any form of consent and are often coerced into sexual activity or may be unable to understand what is happening to them. While there is no specific law in India on Child Sexual Abuse, there is an attempt to address it within the rape laws in the Indian Penal Code.

- **Section 375 IPC: Rape occurs if a man has sexual intercourse with a girl who is less than 16 years of age. There is one exception to this which says it is not rape if a man has sexual intercourse with his own wife who is not less than 15 years of age.**
- **Section 376 IPC: This section lays down punishment for those who commit rape on minor girls. It extends from a period of 2 to 10 years' imprisonment with the liability of fine depending on the circumstances of the rape. If a man has sex with his wife who is less than 15 and more than 12 years old, he can be imprisoned for 2 years. In other cases where a man is not married to a woman, the sentence for having sexual intercourse with minors is 10 years in prison.**
- **Section 377 IPC: This section addresses sexual abuse by sodomy and lays down a punishment extending to 10 years' imprisonment with the possibility of a fine.**
- **Section 354 IPC: This section is also used to protect the rights of children against Child Sexual Abuse.**

⁹⁹ *Tulir, Research on prevalence and dynamics of child sexual abuse, 2006.*

Are children adequately protected against Child Sexual Abuse by Indian law?

- **It has been strongly felt that children are not adequately protected against Child Sexual Abuse by Indian law. This is largely because there is no attempt to differentiate the experience of a child from that of an adult.**
- **In the Courtroom too the child survivor of sexual abuse is treated exactly the same as an adult. This entails the child having to repeatedly narrate her experiences in a Courtroom full of strangers. There is also no difference in the manner in which the cross examination of a child is done from that of an adult. This child-unfriendly process scars children for life.**

Apart from this, a significant problem with the laws that address Child Sexual Abuse is that case law has interpreted the word 'penetration' to mean penile-vaginal penetration. In child sexual abuse cases, the victim being very young is often penetrated not by the penis but through other means such as fingers and objects. Given the technical difficulty in classifying what has happened to the child as 'rape', the cases often get thrown under Section 354 (outraging the modesty of a woman), Section 509 (insulting the modesty of a woman) and Section 377 (unnatural sexual offences) which are seen as lesser offences than rape and also have more lenient sentences. While dealing with the issue of Child Sexual Abuse we need to move away from this viewpoint which understands Child Sexual Abuse only in terms of penetration.

- Children are treated like adults in the Courtroom.
- The cross examination occurs in front of the accused.
- The word penetration has been interpreted to mean penile-vaginal but in the case of children many different forms of penetration occur.
- Since different forms of penetration occur the case is treated under lesser offences and not under the rape law.
- Absence of language with children to talk about abuse.
- Disbelief in its existence.

THE 2007 NATIONAL STUDY ON CHILD ABUSE, UNDERTAKEN BY THE PRAYAS INSTITUTE OF JUVENILE JUSTICE, IN COLLABORATION WITH THE GOVERNMENT OF INDIA FOUND THAT:

- 53.22% of children have faced sexual abuse. The report says that most children do not report the matter to anyone. Half of the cases of sexual abuse (50%) were committed by people known to the child or in a position of trust and responsibility.
- While 41.17% of children in the 5-12 age-group complained of being forcibly kissed, the figure came down to 25.73% in the 13-14 age-group. Similarly, around 25.86% of teenagers reported being forced to exhibit their private parts; the relevant figure for those below 12 was 35.86%.
- Around 37.25% of children in the younger age-group, and 27.61% of teenagers, were sexually abused during travel. As much as 41.33% of children in the 5-12 age-group and 25.29% in the 13-14 age-group reported abuse during marriages and other family ceremonies.
- Around 70% of abused children have never reported the matter to anyone.
- Cases of procurement of minor girls increased by 37.9% in 2003 (171 compared to 124 in 2002). The highest number of cases was reported from Bihar (47).
- Although incidence of child rape has declined between the periods 1999 and 2002, from 3,153 cases to 2,532, the unofficial number may have been higher since many cases may have not been reported. So is the case with kidnapping and abduction.

IMPACT OF CSA

- There is no one particular sign that sexually abused children display. It varies from child to child. Some of the signs are emotional stress, low self worth, anxiety or behaviour problems. Some children show serious problems of distress such as feeling depressed, being highly anxious, showing repeat sexualised behaviour, self-loathing, aggressiveness and confused thoughts. Sexually abused children exhibit more distress than non-abused children, yet no one sign is common to most children (Saywitz et al 2000). Signs of distress may also come a year or many years later. Research links Child Sexual Abuse with psychological problems such as depression, anxiety, post-traumatic stress and/or poor self-esteem. Some children (studies suggest that more than 50% of those who have been sexually abused) show one or more signs that look similar to post-traumatic stress disorder such as isolated flashbacks, and repetitive play or bedtime problems such as nightmares, bedwetting, sudden changes in wanting to sleep with parents, or being afraid of the dark.
- Child Sexual Abuse can impact on a person's ability to develop trust, intimacy, sexuality, and self determination in adult life.
- Child Sexual Abuse can impact on a person's social and personal relationships as they may have an increased sense of hopelessness, a sense of weakness to make positive changes in the world, and are unable to relate to others.

CHILD SEXUAL ABUSE: THE REALITY¹⁰⁰ IN INDIA

- It was found that 42% of boys and girls reported Child Sexual Abuse. 76% women interviewed by RAHI said that they had been abused as children.
- 11-15 years is the age of onset of abuse for most girls and boys. The significance of this is that victims were almost always in the care or company of some family member, caretaker or known person.
- 71% of the abusers were family members, relatives or acquaintances.
- 15% of boys and girls say that they suffered severe forms of Child Sexual Abuse. Severe forms of Child Sexual Abuse have been defined by Tulir as oral sex, sexual intercourse, making the child touch the offender's private parts, making the children take off their clothes and looking at them or taking their pictures.
- Most children do not disclose their experience of abuse. 62% of the children did not disclose or seek help.
- The RAHI study indicates that the main reasons given for not telling anyone about the abuse were: wanting to forget it happened (23%), fear of what people would think of them (14%), self-blame for the abuse (11%), and not having anyone to trust (11%). Only 3% did not tell because the abuser had threatened them. Only 1% did not tell because they were bribed by the abuser.
- Self-blame went up as the 'seriousness' of the abuse increased; 37% of those who were molested blamed themselves compared to 50% of those whose abuse involved penetration.
- 64% of those whose abuse involved penetration made total disclosure; 20% made partial disclosure.
- Where families placed great emphasis on virginity and equated it with purity, virtue and family honor (*izzat*), the victims felt a greater sense of shame, self contempt and anger, and felt compelled to keep quiet about the abuse.
- Many of the respondents who feared the person abusing them continued to feel it at the present time. Those who felt anger wished they could retaliate. Those whose desire for revenge (or justice) did not materialise began feeling helpless.
- Asked what they expected as a result of the abuse, 31% called for prevention; 17% said society needed to talk about sex; 13% said women should fight back compared to 3% who said girl children should learn martial arts; 8% said victim assistance should be available; 14% said abusers should be punished; 1% said abusers should be helped.
- Long-lasting effects of the sexual abuse were: lack of self-confidence, inability to express feelings, inability to trust people, feeling angry at the world most of the time. Other effects included: avoiding sex or compulsively seeking it out, experiencing chronic aches and pains, use of drugs and alcohol.
- The Tulir study shows that at least 42% of our children will face some form of sexual abuse before they turn 18.

¹⁰⁰ This is a compilation of three different studies by three organisations, Tulir (2006, Chennai), RAHI (1998, New Delhi), Samvada (1996, Bangalore). The Tulir study was done in Chennai with 2211 XIth standard students from various schools in Chennai Corporation Zone. The RAHI study was carried out with 600 women college students in Delhi. The Samvada study was done with high school students in Bangalore.

CHILD SEXUAL ABUSE: WORKSHOP METHODOLOGY

Note to the facilitator

The module on Child Sexual Abuse (CSA) can be done along with the module on rape or it could be done as a stand-alone session. The reason a module has been put in on Child Sexual Abuse is because we find that often when a session on sexual assault is being done, Child Sexual Abuse comes up and it should be addressed. The facilitator should be up-to-date with the issue of CSA - both legal as well as social issues.

EXERCISE 5.9

Title: Defining Child Sexual Abuse (CSA)

Purpose: To understand the nature of Child Sexual Abuse

Time: 30 minutes

Materials needed: Whiteboard and markers

Steps:

- Ask participants if they have heard of cases of Child Sexual Abuse.
- Encourage the group to speak of examples they have heard of from their village or read about in the newspaper or heard of on television. If so, what do they consist of?
- The facilitator could get the group to start talking by referring to some important cases that have been highlighted in the media in the recent past.
- The facilitator could also provide them with details of a case that she is aware of.
- Once these responses are on the board, the facilitator should give the definition of Child Sexual Abuse given above and match it with what the participants have said.

EXERCISE 5.10

Title: Presentation - Prevalence of Child Sexual Abuse

Purpose: To understand the large-scale prevalence and impact of Child Sexual Abuse

Time: 20 minutes

Materials needed: Whiteboard and markers or LCD projector, charts

Steps:

- Provide information on CSA to the participants.
- This can be done in the form of a presentation. A series of studies have been done in the country on CSA and these have been provided to you. These studies are from different regions in the country and the facilitator could either use all of them or a few statistics that are indicative of the problem.
- The facilitator must provide the necessary information to establish the prevalence of Child Sexual Abuse in our society and also talk about the impact of such a violation.

Note to the facilitator

While doing this session it may be useful to bring in a resource person – maybe a doctor or a psychologist who has had experience in dealing with these cases.

HOW TO RECOGNISE CHILD SEXUAL ABUSE?

As a parent how do you deal with CSA?
What can be done in case there is a suspicion of child sexual abuse?

- Ask the child if something is troubling him/her, whatever it may be. Tell the child that you are there for him/her and if anything bad is happening to him/her it can be stopped.
- Listen carefully to what the child is saying. It may be over a period of time, so it is important to keep an eye on the child and pick up on his/her behaviour. A child may deny CSA simply because he/she may not possess the language to articulate what is happening to him/her or may be too scared or ashamed to reveal what is happening.
- If the child says that he/she is being sexually abused tell him/her that you believe him/her and immediately remove the child from the vicinity of the person who is abusing him/her.

EXERCISE 5.11

Title: Myths and Facts on Child Sexual Abuse

Purpose: To clarify various myths related to Child Sexual Abuse

Time: 60 minutes

Materials needed: Whiteboard and markers

Steps:

- This exercise can be done through a debate.
- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.
- The session should begin with each group taking turns to argue a myth and the other group countering the myth. Each argument and counter-argument should not last more than 5 minutes. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts given below are merely indicative and the facilitator can contextualise them depending on the participants and the cases that have come up.

MYTHS AND FACTS ON CHILD SEXUAL ABUSE

Myth: Child Sexual Abuse is a western problem.

Fact: Child Sexual Abuse is as much a reality in our country as it is anywhere else. Statistics show that a majority of our children face CSA in different forms. Use the statistics that have been provided in the boxes above.

Myth: Boys are not sexually abused.

Fact: Boys are also sexually abused. The Tulir study shows that 48% of the boys interviewed said that they were sexually abused.

Myth: CSA only happens in poor and illiterate families.

Fact: CSA happens across classes and communities. The Tulir study in fact shows that the prevalence of CSA in upper and middle class families was higher than in lower and lower middle class families.

Myth: CSA does not take place in joint families.

Fact: This belief comes from the idea that there is greater supervision of children in joint families. It should be remembered that along with this, there is also a larger number of persons who have access to children.

Note to the facilitator

The facilitator should inform participants about the law on Child Sexual Abuse as stated in the Indian Penal Code. The facilitator should have prepared for this session by reading up the section on Child Sexual Abuse in the legal information section. In addition to explaining the law, in this session it is also important to highlight what needs to be done in order to ensure that a case is filed properly. The facilitator should also be aware of and inform the participants about the Supreme Court guidelines on child-friendly procedures to be followed in Child Sexual Abuse cases (see page 184 of this Guide).

This should be done in the form of a presentation.

Action Points

Invite an organisation that has worked on the issue of Child Sexual Abuse to talk about the process to follow when a case of Child Sexual Abuse occurs.

Sexual Harassment at the Workplace

Objective

- To develop an understanding of what constitutes sexual harassment at the workplace.
- To analyse the myths around sexual harassment at the workplace.
- To know the law on sexual harassment at the workplace and understand the limitations of the law.

What is sexual harassment at the workplace?

Sexual harassment is any unwelcome words or action of a sexual nature. Sexual harassment at the workplace is when a woman working in any workplace or institution is being subjected to unwelcome sexual advances, sexually suggestive behaviour or request for sexual favours against her will.



Sexual harassment at the workplace is a serious human rights violation

Sexual harassment has been divided into two forms:

- **Quid pro quo: This literally means 'this for that'. It means seeking sexual favours in exchange for employment benefits such as promotions and higher wages.**

Example:

Hema was told by her senior Narayan that he would only give her a good evaluation if she came out for dinner with him.

- **Hostile work environment: In this case there may be no overt request for sexual favours, but the work environment of the woman is made uncomfortable for her by various actions and innuendoes.**

Example:

Ishrat did not like going to work because her colleague Raj who sat opposite her constantly stared at her, complimented her and occasionally also tried to touch her while passing her in the corridors.

Is there a law in India that addresses the issue of sexual harassment at the workplace?

In 1997 The Supreme Court of India in a landmark judgment called Vishaka v. the State of Rajasthan laid down guidelines to be observed by all workplaces and institutions, formal and informal, to address the issue of sexual harassment at the workplace. Since there is no legislated law on the issue as yet, the Supreme Court of India directed that "...the guidelines would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field." This means that the Supreme Court guidelines would be treated as the law until such time that legislation was passed to address the issue of sexual harassment at the workplace.

What are the main points in the Guidelines?

The main points in the guidelines are the following:

Definition of sexual harassment at the workplace: As per the Supreme Court of India, in a landmark ruling given in Vishaka v. the State of Rajasthan, sexual harassment at the workplace is defined as: Any such **unwelcome sexually determined behaviour** (whether directly or by implication) as:

Physical contact and advances

Example:

Mumtaz worked as a tailor in a garment export unit. The supervisor at the unit was Tabrez. Mumtaz always felt uncomfortable around Tabrez because he would find any excuse to brush past her and touch her even when not required. Once he purposely blocked the door when she was trying to pass through, pinned her against the wall and asked her why she was always in a hurry.

A demand or request for sexual favours

Example:

Lata worked as a daily labourer on a construction site. She had two children and her husband also worked on the same site. Both their wages barely keep the family from starving. One day Lata was called by the contractor to his room. When she went to the room she found the contractor was smoking and had a bottle of liquor opened in front of him. The contractor told

her that he thought she was a good worker and wanted to raise her wages. He proceeded to tell her that he would do this only if Lata had sex with him. Lata was shocked and flatly refused, at which the contractor told her threateningly that it was really her only choice or else he would throw her out of her job.

Sexually coloured remarks

Example:

Shruti was working in a call centre. She worked along with many others on the night shift. The employees often took coffee breaks together and also ate dinner together. There was a group of employees, both men and women, who used to crack obscene jokes with each other within the larger group. Most of the people in the group did not mind this and actively participated in sharing and listening to the jokes. Shruti however was very uncomfortable with this and a couple of times told them to stop. Because of this the group started calling her 'prude' and 'boring'. They also said that this was the problem of having female colleagues since they just cannot take a joke. The lack of understanding made Shruti feel that she indeed had a problem and she began to avoid her friends at work and even started taking sick leave to avoid going to work.

Showing pornography

Example:

Many women employees working in a bank complained about pictures of nude women that were stuck on the lift doors and on the bathroom walls. They also often found sexually demeaning language written on the walls of the bathrooms, sometimes with names of specific women employees.

Any other unwelcome physical verbal or non-verbal conduct of a sexual nature

Example:

One day Pramila was called by a colleague Karthik to have a meeting on a project that they were working on together. While they were discussing the project Karthik took an orange in his hand and slowly started rubbing it in a circular motion. He also started rolling his eyes from her face to her neck to her breasts, while continuing his poorly veiled motion. Pramila was disgusted at his behaviour and left, not knowing how she could do anything to stop Karthik from behaving in a sexually harassing manner.

The definition given by the Supreme Court, for the first time understood sexual harassment at the workplace as a human rights violation and also defined it from the subjective realities of each individual woman. This ensured a definition of sexual harassment that is broad enough to encompass all women's experiences. Sexual harassment depends on how the person being harassed is affected, and not the harassers' intent.

Definition of a workplace: Any government, public or private enterprise. This has been interpreted to mean educational institutions, hospitals as well as informal work areas.

Definition of a worker: Any woman who is drawing a salary or honorarium or is doing voluntary work.

The complaints mechanism: The Guidelines state that every workplace should have a complaints mechanism which will ensure time bound treatment of complaints. The Guidelines call for the setting up of complaints committees. These committees should have the following structure:

- **A woman chairperson.**
- **An NGO or other body who is familiar with the issue of sexual harassment at the workplace.**
- **Half the members of the committee should be women.**

- **The complaints committee should make an annual report to the Government department concerned of all complaints and action taken by them.**

What are the duties and responsibilities of the employers?

The complaints mechanism: It is the responsibility of the employer to ensure that the complaints committee as structured under the Supreme Court Guidelines is set up within the organisation.

Preventive mechanisms: All employers or persons in charge will take preventive steps against sexual harassment at the workplace. These steps should be the following:

- **Clearly prohibiting sexual harassment as defined in the Guidelines and ensuring that all workers are aware of this.**
- **Creating appropriate work conditions to promote respect for a healthy workplace.**
- **An organisational policy on sexual harassment should also be created and circulated and made public to all employees/workers.**

Awareness: Create awareness on the Guidelines within the workplace.

Workers' initiatives: Employees should be allowed to raise issues of sexual harassment at the workplace in internal meetings with other workers and employers.

Criminal proceedings:

- **The onus of ensuring the setting up of such complaints committees lies with the employers.**
- **The onus is on the employer to ensure that where such conduct amounts to an offence under the Indian Penal Code or any other law, the employer should initiate appropriate action under that specific law.**

Third party harassment: It is the responsibility of the employer or person in charge to take all steps necessary to assist workers who are affected by third party sexual harassment.

What are some of the essential points that need to be put in a policy on sexual harassment at the workplace?

- **Provide a clear definition of what constitutes sexual harassment at the workplace.**
- **Provide conditions under which conduct is considered harassing.**
- **Clearly state the organisation's stand on sexual harassment at the workplace.**
- **Provide clear information on the complaints mechanisms and procedures to be followed.**
- **Provide names and contacts of point persons to be contacted in case of a complaint.**
- **Clearly specify a time period, preferably a maximum time period of three months, within which period the inquiry conducted by the designated complaints committee will be completed.**
- **Make public the consequences and penalties that will be imposed on perpetrators of sexual harassment.**

How has Vishaka changed the way that we understand sexual harassment at the workplace?

Before Vishaka the only manner in which sexual harassment at the workplace could be addressed was under two criminal laws:

- **Section 354: Outraging the modesty of a woman**
- **Section 509: Insulting the modesty of a woman**

Both these laws would ensure the journey of a woman through the various stages of criminal law which in India often results in the acquittal of the accused and a prolonged humiliation for women wherein they have to repeatedly prove that a sexual offence had occurred with them.

After 1997, the Guidelines have adopted a human rights perspective wherein they pay respect to women's subjective realities. This means that there is no standardisation of the manner in which sexual harassment could be experienced; rather it respects the fact that one woman's experience could be different from another woman's experience. The Guidelines also focus on prevention through awareness raising. Significantly the Guidelines also enforce an institutional and time bound mechanism that will address sexual harassment complaints rather than the lengthy and moralistic criminal procedures.

What should you do when a complaint of sexual harassment comes to you?

- **Ensure that the complainant begins to document her case, putting in dates, time and events. This should be as clear and detailed as possible.**
- **Tell the complainant to confront the harasser and ask him to stop his behaviour. This can be done in writing.**
- **Ask the complainant to disclose the harassment to a family member as well as a trusted colleague at work who may be called on to depose in front of the complaints committee.**
- **Send the documentation by registered post to the management/ employer/human resource department.**
- **Ask for the complaint to be referred to the complaints committee.**
- **If no complaints committee exists inform the employer or the concerned person in charge that they are duty bound to institute a complaints committee on the basis of the Supreme Court Guidelines.**
- **Ensure that the complaints committee members' backgrounds are bona fide. In case there is a suspicion that the members are not going to be fair and neutral in the proceedings make sure the complainant asks for a change in writing.**
- **Also ensure that the third party on the complaints committee is a person who is from an NGO and is well informed on the issue of sexual harassment at the workplace.**
- **Ensure that the complaints committee functions within a time bound period and maintains anonymity of the proceedings of the case.**
- **In case the complainant is being victimised within the organisation for complaining about the case, complain about this in writing to the committee as well as the employer or concerned persons.**

- **If the organisation refuses to set up a complaints committee, refer the case to the State Women's Commission, National Commission of Women or the National Human Rights Commission as per your assessment of the case.**
- **Counsel the person and advise her that the sexual harassment is not her fault and she should not feel guilty about it at all.**
- **In case the management does not accept the recommendations you should bring this to the notice of the State Women's Commission and other statutory bodies as required.**
- **Place emphasis on written documentation because often cases of sexual harassment at the workplace are difficult to prove given the lack of witnesses.**

THINGS TO REMEMBER ABOUT SEXUAL HARASSMENT AT THE WORKPLACE

- Even one incident of sexual harassment is enough to report it to the complaints committee.
- Women of all ages, backgrounds, posts, from the informal or the formal sector can be subjected to sexual harassment at the workplace.
- Sexual harassment does not necessarily only involve physical touching; it can be through conversation, innuendos, pornography, staring and e-mails.
- The Supreme Court Guidelines are legally binding and must be enforced.
- Every single workplace, formal or informal, educational institution or any other is obligated to set up a complaints committee to deal with sexual harassment at the workplace.
- Preventive mechanisms are very important and must be part of the duty of any workplace towards the workers.
- A complaints committee should not exist only for the term of dealing with the sexual harassment complaint. Responding to a writ petition filed by Medha Kotwal Lele and others,¹⁰¹ the Supreme Court of India directed that the complaints committee would be deemed to be an enquiry authority for the purposes of the Central Civil Services (Conduct) Rules, 1964 and the report of the complaint committee should be deemed to be an inquiry report under the CCS rules. It is a permanent committee that has recently been given the status of an inquiry committee in a recent writ petition called Medha Kotwal Lele v. the Union of India. This is important to remember because the recommendations given by complaints committees have in the past not been adhered to by organisations as they do not have the same status as an enquiry committee whose recommendations are binding as per the conduct rules and regulations of government and private bodies.

¹⁰¹ *Medha Kotwal Lele & ors. v. Union of India & ors WP (CRL) Nos 173-177/1999 decided on 26/4/2004.*

SEXUAL HARASSMENT AT THE WORKPLACE: WORKSHOP METHODOLOGY

Note to the facilitator

This session should first clarify what is sexual harassment at the workplace. The facilitator should begin the session by asking the participants what they understand by sexual harassment at the workplace. She should place it within their context and get them to talk about stories that they have heard of or know about. This can be followed with an exercise to define sexual harassment at the workplace.

EXERCISE 5.12

Title: Defining Sexual Harassment at the Workplace

Purpose: To arrive at a common understanding of what constitutes sexual harassment at work

Time: 45 minutes

Materials needed: Chart paper, marker, pens

Steps:

- Divide the participants into four small groups. Give each group a case study and ask them to decide whether what has happened in the case study is sexual harassment at the workplace. They should further create a definition for the following:
- What is sexual harassment at the workplace?
- What is a workplace?
- Who is an employer?

Case Study 1:

Ashwini who was looking for a job, got an interview with a leading call centre in her town. When she went for the interview, she found that the person interviewing her would be her supervisor on the job. He began by complimenting her on her appearance and told her that she would fit in very well in the organisation. He proceeded to interview her on her experience and qualifications. Just before he ended the interview he told Ashwini that he would be able to help her get the job even though competition was stiff, but for that Ashwini would have to be very friendly with him. Ashwini was confused as to what he meant; she was feeling uncomfortable about what had transpired. Is this sexual harassment at the workplace?

Case Study 2:

There is an NGO in your village that works with a federation of women (Sangha). The women are trained to work with the villagers on various health issues. They also work with young girls on education. The Sangha women recently launched a campaign against child marriage in the village. This move has not been appreciated by some powerful members of the

village who feel that this is interference with the tradition of the villagers. One day, Mahalakmi and Sumitra, two Sangha women who are active in the anti child marriage initiative were returning home from a Sangha meeting. They had to cross some fields on their way home. In the fields, they were attacked by some local men who used sexually explicit language with them and also molested them. They were then let go with the threat that this was just a sample of what would happen to them if they continued to work on the anti child marriage campaign. Is this sexual harassment at the workplace?

Case Study 3:

The local school is a co-educational school. It was noticed that some of the girls in the school had been absent for a long time. When the parents were asked what the problem was, they said that the girls just did not want to go to school. One of the teachers from the school went to the home of one of the girls to find out what was wrong. The girl student told her that she did not like coming to school because of one particular teacher. This teacher kept making remarks which offended her terribly. He would ridicule the girl students saying that they were wasting their time coming to school since they would get married soon after and start producing babies. He also kept making derogatory remarks about women and referred to the girl students as 'darling'. Is this sexual harassment at the workplace?

Case Study 4:

A female worker in a tailoring unit for a garment export house reported that two other male workers would often crack obscene jokes with each other. They would do this near her. She felt very uncomfortable with it but did not know what to do, since they were not saying it to her. Is this sexual harassment at the workplace?

- When the cases have been discussed, ask the small groups to share their discussions with the larger group. Note down points on the board and open it up for discussion.
- Discussion points:
 - Sexual harassment at the workplace is a human rights issue. All women have a right to an environment that is free from sexual harassment. Sexual harassment is discrimination against women.
 - Sexual harassment is determined by the woman's experience and not on the basis of the motive of the accused.
 - The experience of sexual harassment at the workplace is subjective. Every woman experiences it differently. What may seem like sexual harassment to one person may not seem like that to another, but it is important that every woman's individual experience be respected and paid heed to.
 - Sexual harassment is any conduct that is sexual in nature and is unwelcome.

EXERCISE 5.13

Title: Myths and Facts on Sexual Harassment at the Workplace

Purpose: To clarify various myths related to sexual harassment at work

Time: 60 minutes

Materials needed: Whiteboard and markers

Steps: This exercise can take the form of a debate.

- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.
- Each group should take turns to argue a myth and the other group should counter it. Each argument and counter-argument should last 5 minutes. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts listed below are merely indicative and the facilitator can contextualise them depending on the audience and the cases that have come up.

Note to the facilitator

The facilitator should inform participants about the Supreme Court guidelines on sexual harassment at work. The guidelines are known as the Vishaka guidelines. The facilitator should have prepared for this session by reading up the section on sexual harassment at the workplace in the legal information section.

Action Points

Each participant should:

- **find out if their workplace has a complaints committee on sexual harassment;**
- **set up sexual harassment complaints committees where they do not exist;**
- **create small pamphlets on the law and distribute them at workplaces and institutions;**
- **conduct awareness raising sessions on sexual harassment at the workplace.**

These are some of the action points that can be discussed at the end of this session.

MYTHS AND FACTS ON SEXUAL HARASSMENT AT THE WORKPLACE¹⁰²

Myth: Sexual harassment is rare.

Fact: Sexual harassment is extremely widespread. It touches the lives of 40 to 60% of working women, and female students in colleges and universities. Almost all working women have either heard of sexual harassment happening to other women workers or have faced it themselves.

Myth: The seriousness of sexual harassment has been exaggerated; most so-called harassment is actually trivial and harmless flirtation.

Fact: Sexual harassment can be devastating. Studies indicate that most harassment has nothing to do with 'flirtation', or sincere sexual or social interest. Rather, it is offensive, often frightening and insulting to women. Women are often forced to leave schools or jobs to avoid harassment; many experience serious psychological and health-related problems like depression, insomnia, panic attacks, head aches, acidity, and blood pressure related problems and in some cases even commit suicide. It affects the employer also as it often leads to absenteeism and less productivity in the employee.

Myth: Many women make up and report stories of sexual harassment to get back at their employers or others who have angered them.

Fact: Research shows that less than 1% of complaints are false. Women rarely file complaints even when they are justified in doing so as our society does not make it easy for women to talk about sexual violence due to the stigma attached to it.

Myth: Sexual harassment is normal behaviour and a woman should feel complimented.

Fact: Sexual harassment is about power, a tactic to dominate by embarrassment or degradation. It is not an expression of healthy human relationships. In the majority of cases, sexual harassment involves men harassing women.

Myth: If you ignore harassment, it will go away.

Fact: It will not. Simply ignoring the behaviour is ineffective; harassers generally will not stop of their own accord. Ignoring such conduct may even be perceived as condoning or encouraging it.

Myth: I will not be able to compliment someone without being accused of sexual harassment.

Fact: Compliments in and of themselves are not generally considered sexual harassment, but when in doubt of how your behaviour will be perceived, then do not compliment. It is the impact of, not the intent behind a behaviour or remark that counts.

¹⁰² *Sexual Harassment at the Workplace - A Guide, Sakshi 1999.*

Domestic Violence

Objectives

- To identify the forms of violence women face at home.
- To identify constraints which prevent women from dealing with a situation of domestic violence.
- To challenge the myths surrounding the issue of domestic violence.
- To analyse solutions which a woman can avail herself of in a situation of domestic violence.
- To discuss the ways in which the new law on domestic violence will work in India.

Introduction

Domestic violence is one of the most common forms of violence faced by women. Unfortunately it often goes unreported and undetected. This is primarily because it occurs within the 'private' sphere and women fear social stigma if they do report violence occurring at home. Many women are also economically dependent on their partners/spouses and this too makes it difficult for them to speak out against domestic violence.



**Securing women's rights against domestic violence -
The Protection of Women from Domestic Violence Act, 2005**

Over the years there has been increased awareness of the problem of domestic violence. This has led to work on legal reform recognising domestic violence as well as laying out remedies and relief for women who have survived this form of violence as well as punitive action against perpetrators of such violence.

What is domestic violence?

The most comprehensive definition of domestic violence has been framed under the Protection of Women from Domestic Violence Act, 2005. The legislation defines domestic violence.

Domestic violence is an act, commission or omission or any conduct of the respondent which:

- **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 physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or**
- **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**
- **Threatens the aggrieved person or any person related to her by any conduct mentioned in clauses (a) and (b); or**
- **Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.**

A single act of commission or omission may constitute domestic violence.

The Courts have also held that the following amounts to domestic violence:

- **Persistent denial of food**
- **Insisting on perverse sexual conduct**
- **Constantly locking a woman out of the house**
- **Denying the woman access to children, thereby causing mental torture**
- **Physical violence**
- **Taunting, demoralising and putting down the woman with the intention of causing mental torture**
- **Confining the woman at home and not allowing her normal social intercourse**
- **Abusing children in their mother's presence with the intention of causing her mental torture**
- **Denying the paternity of the children with the intention of inflicting mental pain upon the mother**
- **Threatening divorce unless dowry is given**

How is domestic violence characterised?

Indian law has characterised various forms of domestic violence as **crimes**. It also punishes all those who are proved to be involved in one way or another in harming or causing injury to the woman seeking protection from any form of violence.

A further change was made in the law in 2005 when the issue of domestic violence began to be looked at from a civil law perspective. One of the reasons for this has been that even after domestic violence has been defined as a crime not many women complain against their husbands because they are dependent on their partners or husbands for food and shelter. Therefore women's groups demanded a civil remedy against domestic violence in India. These remedies and reliefs recognise the right of a woman to reside in the shared household or matrimonial home and to have custody of children, amongst many other reliefs provided. This new law is called the Protection of Women from Domestic Violence Act (2005). It shall be discussed in greater detail in the forthcoming pages.

What legislations are available to people for protection from domestic violence?

Protection from and remedies for domestic violence may be sought under the following legislation, both under criminal as well as civil law.

Under Criminal Law

Substantive law: These laws define particular offences and provide punishment for each:

- The Dowry Prohibition Act, 1961 **which makes it an offence to demand and give dowry either before, at the time of or after the wedding.**
- Sections 498-A and 304-B of the Indian Penal Code **punish the act of cruelty on part of the husband and his relatives as well as causing the death of a woman owing to harassment in relation to dowry.**

Apart from these, there are general provisions of law that are used, depending on the facts and circumstances of the case, such as:

- **Section 302 IPC defines murder and provides punishment for it.**
- **Section 312 IPC punishes the person who has caused a miscarriage.**
- **Section 313 IPC punishes the person who has caused a miscarriage without the consent of the woman.**
- **Section 320 IPC defines grievous hurt.**

In a large number of cases, and depending on the circumstances, while filing a complaint, the person is charged under these general provisions.

Procedural law: These laws in the Indian Evidence Act, 1872 and the Criminal Procedure Code aid the Court during trials.

- **Section 113-A and Section 113-B IEA and Section 174 of the CrPC.**

Under Civil Law

Cruelty is a ground for divorce under Personal Laws:

- **Section 13(1) (IA) of the Hindu Marriage Act, 1955.**

- **Section 27(d) of the Special Marriage Act, 1954.**
- **Section 10(x) of the Divorce Act, 1898.**
- **Section 2(viii) of the Dissolution of Muslim Marriage Act, 1939.**

Cruelty under Section 13(1)(ia) of the Hindu Marriage Act, Section 27(d) of the Special Marriage Act, Section 10(x) of the Divorce Act has not been defined. However, Section 2(viii)¹⁰³ of the Dissolution of Muslim Marriage Act does define cruelty.

Dowry Prohibition Law

Demand for dowry has its origins in customary practices such as *stridhan*, during which gifts were given to daughters at the time of marriage. The purpose of this was to assist the daughter in setting up her house. Over time this concept has been corrupted to its current and violative form which in many cases has led to the murder of wives by their husbands and his relatives.

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

What is dowry?

Section 2 defines 'dowry'. It means any property or valuable security given or agreed that it will be given by one party to another party to the marriage, either directly or indirectly:

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

In principle, if any dowry was given to the wife either before, at the time of or after the marriage, such property is to be returned to her within three months of the date of marriage or receipt of dowry or the woman attaining the age of 18. Failing to return the dowry can attract a punishment of imprisonment for 6 months to 2 years and a fine of Rs. 5,000 and Rs. 10,000. If the woman dies before receiving the dowry, then the dowry will be transferred to her heirs.

What constitutes an offence under the Act?

Under Section 4 of the Act, demanding, giving or taking dowry in relation to marriage is a criminal offence. There are three instances when the offence can take place.

- **Before the marriage: If dowry is demanded even before the woman and the man become the 'bride' and the 'bridegroom', it would constitute an offence under Section 4 of the Dowry Prohibition Act, 1961.¹⁰⁴**

Example:

Geeta and Ram, who are in their mid-20s, are to be married soon. Soon after the marriage was fixed by the parents of Ram and Geeta, the two families met again to discuss the other

¹⁰³ Refer to the section on 'Grounds for Divorce' in the Personal Laws module in this Guide.

¹⁰⁴ *L V Jadhav v. Shankarrao Abasaheb Pawar and Ors, (1983) 4 SCC 231.*

issues regarding the marriage. Ram's uncle, in the course of talking about the expenses, suggested that Geeta's father give them at least a car and some money since they were spending so much money on the wedding. Geeta's father complained about this because when both the families met the first few times, Ram's family had said that they will not ask for any money or property from Geeta's parents. Ram's father denied that he was party to the discussion between Geeta's father and Ram's uncle.

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

- **At the time of marriage: If the bride is handed a list of ornaments and household articles such as a refrigerator etc. at the time of settlement of marriage between the two families, that would also amount to a dowry demand.¹⁰⁵**
- **After marriage: If the demand for dowry is made after the marriage, this would also be an offence under Section 4 of the Dowry Prohibition Act, 1961. The dowry need not only be money; it can be any valuable security or property.**

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

What is not dowry under the Act?

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

For whose benefit is dowry given?

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

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

What happens if dowry is not transferred to the woman?

If a person does not transfer the dowry received on behalf of the woman within the time period mentioned in Section 6, he shall be punishable with imprisonment for less than 6 months, but which may extend to 2 years or a fine which shall not be less than Rs. 5,000, but which may extend to Rs. 10,000, or with both.

¹⁰⁵ *Madhu Sudan Malhotra v. Kishore Chand Bhandari and ors, 1988 (SUPP) SCC 424.*

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

If a woman dies before the dowry is transferred to her then the heirs of the woman shall be entitled to claim it from the person holding it. But if a woman dies within seven years of her marriage under unnatural circumstances the property will:

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

What is the difference between dowry and stridhan?

The difference between dowry and *stridhan* is:

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

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

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

- **Punishment for giving, taking or abetting the giving or taking of dowry: If any person gives, takes or abets the giving or taking of dowry, he shall be punished with imprisonment for a term which shall not be less than 5 years and with a fine which shall not be less than Rs. 15,000 or the amount of the value of such dowry, whichever is more.**
- **Penalty for demanding dowry: If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, any dowry, he shall be punishable with imprisonment for a term between 6 months to 2 years and a fine which may extend to Rs. 10,000.**

Who can be held responsible?

Any person who gives or takes or abets the giving or taking of dowry can be punished under this legislation. This means that the parents of the girl as well as the boy and any one related to them who demands or gives dowry can be held responsible.

How is the law relating to prohibition of dowry implemented?

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

Their duties are:

- **to see that the provisions of this Act are complied with;**

- **to prevent, as far as possible, the taking or abetting the taking of, or the demanding of, dowry;**
- **to collect any evidence that may be necessary for the prosecution of persons committing offences under the Act.**

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

IT IS ESSENTIAL TO MAKE A LIST OF ALL THE GIFTS RECEIVED AT THE TIME OF THE WEDDING

- There should be two lists of the gifts given to the bride by her parents, in-laws, friends or relatives etc.
- The list of gifts given to the groom should be kept by him.
- The list of gifts given to the bride should be kept with her.
- This list should be made at the time of the wedding or immediately after the wedding.
- The list should be in writing.
- There should be a brief description of each gift in the list.
- The approximate value of the gift should also be written.
- The name of the person giving the gift should also be written.
- If the giver is a relative then the relationship to the bride or groom should be mentioned.
- The list should be signed by the bride and the groom.
- If the boy and girl are illiterate then after the list is read to them, their thumb impressions should be put on the list.
- If the bride and groom wish, the list can also be signed by any relative or person who has attended the wedding.

LOOPHOLES IN THE DOWRY PROHIBITION ACT, 1961

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

THINGS TO REMEMBER: AS A PARALEGAL, WHAT CAN YOU DO TO PREVENT DOWRY?

- Educate Sangha women and kishoris on the evil of dowry and the law.
- In meetings speak about the courage of other women who have refused to get married on the day of the marriage, because of a dowry demand by the groom.
- Inform women that dowry is their property and if they are leaving their matrimonial home they should take the property that belongs to them.
- When cases of dowry harassment come to you, complain to the Dowry Prohibition Officer in your district.
- Find out the address and contact details of the Dowry Prohibition Officer.
- Keep in touch with the officer and regularly follow up on reported cases.
- Find out who are the members on the advisory board at the district level and find out what work they are doing to stop dowry harassment in your district.

Cruelty in Criminal and Civil Law

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

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

What is Section 498-A of the IPC?

This section deals with the problem of cruelty faced by a woman from her husband or his relatives. This section was introduced into the IPC in 1983 in order to deal with the huge problem of dowry harassment that women were facing across the country. If found guilty a person will be punished with imprisonment for 3 years, and pay a fine.

What is Section 113A of IEA?

If a case comes before the Court where a woman has committed suicide within 7 years of marriage, the Court has to decide if the husband or any relative of the husband has abetted this crime. If there is evidence to show that the woman was treated with cruelty, the Court will presume that the husband or relative has abetted the suicide. This means that now the burden of proving that they did not treat the woman in a cruel manner and that they did not abet the suicide falls on the husband or relative.

What is Section 304B IPC?

This section deals with dowry death and says that if a woman dies in unnatural circumstances within 7 years of her marriage and there is evidence that she was subject to dowry harassment before her death, it will be considered a dowry death. The punishment for dowry death is imprisonment from a minimum of 7 years, up to life imprisonment.

What is Section 113B Indian Evidence Act?

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

What is the definition of cruelty under Section 498A?

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

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

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

- *Drinking and coming home late at night coupled with beating and demanding dowry has been taken to amounting to cruelty.*
- *A married woman committed suicide by pouring kerosene and burning herself. In her dying declaration she said that her husband used to beat her after drinking liquor, for which he used to borrow money from the villagers. The Court said that this amounted to cruelty within the meaning of this section.*
- *In a case of suicide by a girl within a year of her marriage, the victim was subjected to abuse, humiliation and mental torture. She was branded a woman who brought ill luck from the very beginning of her married life because an elderly member in the in-laws' family died soon after her marriage. Her mother-in-law suggested that she end her life. To add to her misfortune her first conception aborted and her mother-in-law told her that she had swallowed her own baby and that she should commit suicide. Her husband used to come home drunk and abused and assaulted her on occasions. The bridal presents brought by her were branded as goods of inferior quality. Both her husband and her mother-in-law were convicted under Section 498A.*

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

Why is it difficult to get convictions under Section 498A? Why is it difficult to get a complaint lodged under Section 498A?

- **Women are often reluctant to go and file a complaint in the Police station.**
- **Even when complaints are filed, they withdraw cases when the husband compromises.**
- **Police discourage women from filing FIRs for domestic violence; they advise the woman to adjust to the husband and his family.**
- **Police do not take complaints of domestic violence seriously, even though the law is very strict.**

THINGS TO REMEMBER

- A complaint under 498A must be made within 3 years of the act of cruelty (the time period within which complaints can be filed is known as limitation period); a woman cannot file an FIR against her husband because he beat her five years ago. However, it is very important to remember that usually cruelty happens over a period of time and is always continuous. It is important to file a complaint based on the most recent act of cruelty.
- The offence is non-bailable and non-compoundable (compromise is not allowed). If a case is filed and goes to Court, but in the meantime the husband and wife have come to a compromise, this should be brought to the notice of the Court. Courts have often allowed a compromise and dismissed the case.
- Punishment: Imprisonment for up to three years and a fine.

What are the other options to deal with domestic violence?

In addition to criminal law, a woman also has a civil option and she can ask for several things:

- **Cruelty is grounds for a judicial separation and divorce under personal laws.**
- **A woman can also claim maintenance for herself and her children.**
- **She can ask for an injunction against the husband or relatives so that they do not harm her interests.**
- **She can ask for custody of children.**

Is there a difference in the interpretation of 'cruelty' under Personal Laws and Criminal Law?

First and foremost it is important to remember the difference in procedure between Criminal Law and Civil Law. A crime is an act committed against the State. Therefore there is always punishment associated with it and therefore the standard of proof is higher.

The difference in the approach to understanding 'cruelty' under Section 13(1) (a) of the Hindu Marriage Act, 1955 and Section 498-A IPC is one of standard of evidence required. While under criminal law, cruelty has to be proved *beyond reasonable doubt*, in matrimonial cases, cruelty has to be proved on the *balance of probabilities*. In cases where the Courts have had to define cruelty, the definition depends on the facts of each case.

The example below will help us understand this difference.

Example:

Shobha and Madhukar married in 1982. Although their relationship was initially good, according to Shobha, Madhukar and his parents started demanding dowry despite Rs. 17,000 and a scooter given to them during their wedding.

Since the relationship went sour, Shobha applied for divorce on the grounds of cruelty. She alleged that constant demands for dowry from her mother-in-law and her husband created an apprehension in her mind that her mother-in-law would harm her. This, according to her amounted to cruelty.

The issue in question

The question before the Court therefore was: Do the acts on the part of Madhukar and his mother amount to cruelty as per Section 13(1) (ia) of the Hindu Marriage Act, 1955? While examining the case, the Court sought to distinguish between cruelty under Section 13(1) (ia) of the Hindu Marriage Act (Civil Law) and Section 498-A IPC (Criminal Law).

The judgment of the Court

Based on the facts the Court decided that Shobha was subjected to cruelty by her husband and her mother-in-law. The decision was based on a letter written by Madhukar to Shobha where he said that there was nothing wrong with his parents asking for some money from her and these things were very common. In her evidence before the Court, Shobha said she was afraid that her husband's family would hurt her because these dowry demands were made almost every day. According to the Court, this behaviour by Shobha's husband and mother-in-law and the apprehension of harm was enough to prove cruelty. The Court gave Shobha a divorce.

'CRUELTY' DISTINGUISHED IN CRIMINAL AND CIVIL LAW

Under Criminal Law, to prove cruelty under Section 498 A, it has to be proved that the accused harassed the aggrieved party to meet any unlawful demand for money.

But, in matrimonial cases, the word 'cruelty' has to be understood in the ordinary sense of the term. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. It is sometimes easier to establish cruelty in matrimonial cases than in criminal cases.

What are the advantages and disadvantages of using the Criminal Law option?

Advantages ¹⁰⁶	Disadvantages
Violence may stop because of fear of Police. The relief in Criminal Law is more immediate. As soon as the violence occurs if a complaint is filed, action can be taken. Punishment. Less expensive – no Court fee, no lawyer needed. Case will be fought by the public prosecutor.	Getting Police involved may increase the violence at home. Many trips to the Police station if FIR is not filed. Compromise is allowed only in a few cases. Once the case starts the victim has little control over the case. The only relief the victim will get is the punishment of the accused. There is no other benefit, except in some cases compensation may be paid. Evidence is required. Proving a criminal case is difficult. The victim will have to be present in Court for hearings.

What are the advantages and disadvantages of using the Civil Law option?

Advantages ¹⁰⁷	Disadvantages
The victim can choose the remedy she wants: divorce, custody of children, separation, maintenance and injunctions if necessary. Cases are easier to prove and people are more willing to be witnesses. Can compromise or settle at any stage.	No fear of Police for the abuser. Proceedings may be expensive – may need to pay Court fee and will need a lawyer. The victim will have to build her case since she is fighting the case. Therefore she will have to bring witnesses herself. Cases take time; there is no immediate relief. No punishment.

Section 304-B IPC: Dowry Death

What are the relevant legal sections connected with dowry death?

Section 304B of the Indian Penal Code and Section 113B of the Indian Evidence Act deal with the crime of dowry death.

What is dowry death?

If the death of the woman is caused under the following circumstances it is called 'dowry death', and such husband or relative shall be deemed to have caused her death.

- **The death of the woman is caused by any burns, bodily injury, or unnatural causes (a post mortem report will prove this); and**

¹⁰⁶ *Law of Domestic Violence – User's manual for women. Edited by Indira Jaising, Lawyers Collective, Universal law Publishers, 2001.*

¹⁰⁷ *Ibid.*

- **The death has occurred within 7 years of her marriage (can be proved by marriage certificate and wedding photos). If it is not possible to prove that the death was within 7 years of marriage then a case for murder can be filed under Section 302 IPC; and**
- **The woman was being treated cruelly and was harassed for dowry by her husband or any relative (it must be proved and can be proved by letters or communication to friends and her relatives. Even photos to show that dowry was taken will help).¹⁰⁸**

THINGS TO REMEMBER

When dealing with cases under Section 304-B, the Courts make use of a tool of evidence to help decide a case. Section 113-B was introduced in the Indian Evidence Act to make it easier to prove dowry death.

When a case comes before a Judge, he has to decide whether a person has committed dowry death of a woman.

If the prosecution can show that soon before her death such woman has been treated in a cruel manner and has been harassed for dowry by the accused, the Court will presume that the accused had caused the dowry death of the woman.

It is now up to the accused to prove to the Court:

- That there was no harassment for dowry;
- That he was not responsible for the death of the woman and she did not die in unnatural circumstances and the accused was not responsible for her death.

If a person cannot be convicted of dowry death is it possible to convict him for cruelty under Section 498A IPC?

If for some reason the accused cannot be convicted for dowry death because the prosecution is not able to prove a case under Section 304A, it is possible for a Court to convict the accused for cruelty under Section 498A.

Example:

When Ram married Geeta he asked for a car and some amount of money at the time of the marriage. Her parents decided to give this dowry for their daughter's happiness. A few months after the marriage, the dowry demands started again. Ram was starting his own business and needed some money to invest. Then came Ram's sister's wedding and they needed money for the grand reception for their only daughter's marriage. Things were very bad for Geeta. She was being scolded for insignificant matters such as not serving the food hot or not getting up early in the morning. Ram's family threatened to throw her out of the house if she did not bring more money from her father. The abuse reached such an extent that Geeta decided to go back to her parents' home. A few days before she was to return, Geeta's parents were told that she had died – in her sleep. Not even a year had passed since Geeta and Ram were married.

If this case came to you how would you deal with it?

Three issues come up in this situation

- **Geeta has repeatedly been asked for dowry by Ram's family.**
- **After the marriage, the demands for dowry did not stop.**
- **She died within one year of their marriage under unusual circumstances when both the families knew that she did not have any medical problems and was a young woman in her mid 20s.**

¹⁰⁸ *Ibid* n. 104.

Applying laws to the case

The question in this case is whether the acts and behaviour of Ram and his family amount to cruelty under Section 498-A IPC. Can Ram and his relatives be convicted of causing dowry death under Section 304-B? What if Ram and his relatives successfully prove that they were not responsible for the death of Geeta, and are acquitted by the Court? What can Geeta's family do if they know for sure that Ram had a significant hand in Geeta's death?

It is important to remember that both Section 498A and Section 304B IPC relate to dowry – one is cruelty in relation to dowry and the other is dowry death. Even where cases are filed for dowry death it is important to remember to also book a case under Section 498A so that if for some reason dowry death cannot be proved, you can at least prove cruelty under Section 498A and the guilty can be held responsible.

In the above case, the circumstances in the case narrated above **prove beyond reasonable doubt** that Ram and his family were involved in Geeta's death. The Courts have said that in a number of cases, even if a person is not charged under Section 304-B (dowry death), he or she can be convicted under Section 498-A for cruelty.

Who can file a complaint of dowry death?

If a death has occurred the foremost responsibility for filing a complaint is with the parents of the girl. This is because they are more informed about the background leading to the death of the girl. If the parents are not comfortable in dealing with the Police, they can seek help from a local organisation working on issues of women. Any other person in the neighbourhood, who is aware of such a death, may also file a complaint.

PROCEDURE/INVESTIGATION IN DOWRY DEATH CASES

If any woman commits suicide and it appears that someone else is responsible for her death, report to the Police immediately. On receiving this information the SHO of the Police station must take the following steps:

- The nearest Executive Magistrate must be informed immediately.
- The Police officer must draw up a report of the apparent cause of death.
- To determine the cause of death, the Police officer must go to the place where the body of the deceased person is.
- The report should be made in the presence of two or more respectable inhabitants of the neighbourhood.
- The report should contain the cause of death describing the wounds, burns and other injuries found on the body.
- The report must be signed by such Police officer and two persons present at that spot where the incident has taken place.
- This report should then be sent to the District Magistrate or the Sub-Divisional Magistrate.
- The body must be sent to the civil surgeon or other appointed medical officer for examination (Section 174 of the Criminal Procedure Code asks the Police officer that this be done).
- If the Police does not take these steps or refuses to take them, you must immediately report to higher officials.

General provisions under the Indian Penal Code

Section 304-B and Section 498-A IPC were added to the Indian Penal Code with the objective of protecting women from abusive families and punishing those who killed their wives in connection with dowry demands. However, there are certain cases where it might be difficult to prove that the death of the woman was caused due to dowry harassment and cruelty. In such a situation, instead of bringing the case under these specific provisions, the person or his family/relatives are charged under the general provisions of law.

Section 302 IPC – Punishment for murder

In some cases it may not be possible to prove that the death of the woman was related to the cruelty or harassment for dowry and therefore it may not be possible to file a case under Section 304B, in which case charges can be filed under Section 302. The section punishes murder in general. Violence against women culminating in murder may not always be related to dowry demand; it can be related to other motives eg.:

- **The husband suspecting wife of infidelity.**
- **The husband wanting to marry another woman.**
- **The wife considered as an 'inauspicious' woman etc.**

Under the Indian Penal Code, there are other general provisions such as the one on 'attempt to murder', 'criminal intimidation', 'outraging the modesty of a woman' and several others pertaining to 'hurt' *that must be included in filing an FIR depending on an individual case*. These are usually not included in the FIR.

Section 306 IPC – Punishment for abetting the commission of suicide by another person

The punishment for the crime of abetment to suicide is maximum imprisonment of up to 10 years and a fine. In order to prove a case under Section 306, the following aspects must be fulfilled:

- **There must be a suicide; and**
- **The suicide must have been as a result of abetment by the accused in any of the following ways:**
 - **Instigating the victim to commit suicide.**
- **Engaging in conspiracy with others for the commission of suicide.**
- **Intentionally aiding any act or illegal omission, in the commission of suicide.**

Example:

Prem Chand used to regularly demand money from his wife Rita; they used to fight everyday. In the middle of a fight one day when she said to him, "death is better than living this life with you", Prem Chand replied that he would be relieved if she died that day. After that, Rita set herself on fire and died. Prem Chand was held guilty of "instigating the victim to commit suicide".

Example:

Girish and Kamala were married. Girish used to harass Kamala, asking her to bring dowry from her father. One day, tired of this abuse, Kamala set herself and her three children on fire. A case was filed for abetment of suicide and the trial Court held that the husband wilfully created an atmosphere which forced Kamala to commit suicide. The Court convicted Girish and sentenced him to 7 years' rigorous imprisonment. The Supreme Court upheld the conviction and the sentence.¹⁰⁹

¹⁰⁹ *State of Punjab v. Iqbal Singh, AIR 1991 SC 1532.*

THINGS TO REMEMBER IN CASES OF DOMESTIC VIOLENCE AND DOWRY DEATH

It is always very important to register the FIR under the correct section of IPC – in case of a dowry death please ensure that the case is filed under Section 304B. Very often a case of dowry death is registered as a simple suicide and a case is filed against the husband and relatives under Section 306 for abetment of suicide. This is wrong.

In a criminal case, proof of the incident is most important. If you need to prove a case, you need to be sure of the ingredients of the case and produce evidence based on that. Therefore the following can be useful:

- **Photos to show evidence of marriage**
- **Marriage certificate if marriage is registered**
- **Photographs to show that dowry was given**
- **Neighbours and relatives as witnesses**
- **Letters/phone calls to family and friends**
- **Complaints made to the Police station**
- **Previous medical records and doctors and nurses can be witnesses**
- **In case of dowry death make sure the inquest is conducted properly**

Who can help in cases of domestic violence?

In India women rarely go to the Police for assistance. When a woman is faced with domestic violence, the last thing she will do is pursue a legal option. She will either go to her parents for help, or if she does not get any assistance there, she will go back to her husband and suffer. Only if things get very bad does she usually leave the house and seek the assistance of any other agency. There are many organisations that can assist women:

Non-governmental organisations/women's help lines and counselling centres

Women approach NGOs to seek various forms of assistance such as counselling, conciliation, medical assistance and sometimes even shelter.

- **It is important for NGOs and counselling centres to be aware of short stay homes in their region.**
- **NGOs need to know the law on domestic violence and must also liaise with the Police often so that they can seek the support of the Police if required.**
- **The counsellor must not make decisions for the woman. All options must be given so that the woman can take her own decision on what to do.**
- **The counsellor should seek the assistance of a doctor or a lawyer when necessary.**

State Women's Commission

- **A woman in distress can make an application for help to the State Women's Commission in her state.**

- The Women's Commission will review the case and may issue a notice to the parties to appear before it and may even investigate the case.
- Most State Women's Commissions have a complaints cell which can be approached for help.
- The Commission will investigate and offer solutions and in some cases even assist in conciliation between the parties.
- The State Commission has no power to enforce a decision. It is not a Court, nor is it the Police.

Police – 'Crime Against Women' cell

- A woman has the right to file an FIR; it is the duty of the Police to register an FIR for any case if the woman wants to file one.
- Sometimes, a woman may want to file a complaint but does not want to take any criminal action. This usually happens in domestic violence cases where the wife wants to scare the husband a little bit but does not want to actually take criminal action. A woman can file a complaint and write on the complaint that she is merely recording an incident and "does not want any action to be taken at this time".
- A woman can always ask the Police to assist her, especially when she wants to retrieve her *stridhan* from her husband's house.
- If a woman has written the complaint on a piece of paper she should take it to the Police station and the Policeman will take the complaint, stamp it and give her a copy.
- It is the duty of the Police to convert the complaint into an FIR – if a woman wants to take criminal action, she should insist on filing the FIR and always remember to ask for a copy of the FIR. This is very important.
- All Police stations have a daily diary. All complaints that come to the Police station are entered into the daily diary. A woman should make sure that her complaint is entered in the daily diary.

Vimochana study on unnatural deaths in Bangalore¹¹⁰

A two and a half year long study by a Bangalore based women's rights organisation, Vimochana, on unnatural dowry deaths in Bangalore city from 1997 to 1999 revealed the following:

- A large number of deaths were being classified in Police records as 'accidents' under 'UDR' (Unnatural Death Register). The category of 'dowry deaths' in a technical sense only included those cases that had been booked by the Police under the relevant sections of the law. The 'accident' cases that were closed for want of evidence, however, were largely due to 'stove-bursts' or 'kitchen accidents'.
- Vimochana alleged that a large number of murders and suicides, punishable under law, were being made to look like 'accidents' by the husband and members of his family. These cases were closed by the investigating Police officers for want of hard evidence of a crime.

¹¹⁰ <http://www.hinduonnet.com/fline/fl1617/16170640.htm>.

- **Most cases get registered under 'stove bursts'.**
- **Its victims are generally young (Vimochana's study looks only at the death of married women between the ages of 18 and 40).**
- **In a large number of cases the death occurs within the first two years of marriage.**
- **In most cases, the woman would have undergone mental and physical harassment prior to her death.**
- **The special laws that are in place to deal with atrocities against women are undermined at every stage of investigation at both the Police and judicial levels.**
- **The average time taken for a case to be disposed of is six to seven years.**
- **There is a high rate of acquittals in cases of dowry murders or suicides.**

The reasons are:

- **Families of the victims, ignorant of the law and its procedure, get demoralised with the long wait before a case can be decided.**
- **Money plays a major role. Since most of the aggrieved families are poor, they are willing to make out-of-Court settlements. It is common to find that during the trial, they will suddenly change their story and say that the victim had a health problem or that her death was an accident.**
- **Another reason, is the 'perfunctory Police investigation' that spoils the case right from the start.**
- **The half-hearted presentation of cases by the prosecutors who are burdened with 10 to 12 cases at any given point of time is yet another reason for the high rate of acquittal.**
- **However, the most important reason is the liberal view taken by the judiciary in cases of dowry deaths.**

LOOPHOLES IN THE DOWRY PROHIBITION ACT, 1961

- The term 'in connection with marriage' in the definition of dowry is usually difficult to prove in a dowry harassment or death case. The parties more often tend to hide the problem by saying that what was given to their daughter was gifted to her and was not dowry.
- Imposing liability on the bride's family could result in less reporting of dowry harassment by the woman and her family.
- The prohibition of the act of demanding dowry 'directly or indirectly' raises the issue of proving the demand of dowry indirectly.
- In many circumstances, it is difficult to prove the connection between the death of the woman and the cruelty that was its cause.
- Seven years is an arbitrary time frame within which the presumption of dowry death is to be inferred. Newspapers have reported that husbands have waited for seven years before they killed their wives.

THINGS TO REMEMBER

The Dowry Prohibition Act, 1961 is a central legislation applicable to the whole of the country. It aims to stop the practice of dowry in all its forms.

1. Following the inadequacy in the Dowry Prohibition legislation, amendments were brought in 1983 and 1986. Sections 498-A and 304-B were added to the Indian Penal Code, Sections 113-A and 113-B were added to the Indian Evidence Act and Section 174 was added to the Criminal Procedure Code.

2. If a person is acquitted under Section 304-B (dowry death) or Section 306 (abetting the suicide of a person), it does not mean that he or she will also be acquitted under Section 498-A. Since there is an essential link between all these three substantive provisions, the Courts in dowry related cases, have convicted persons under one of the provisions (usually Section 498-A, since in the other two cases, the victim is usually dead).

3. Related to point 2 made above, in a petition before the Court, even if charges are not framed under Section 498-A, the Court can convict the person under this section. Any harassment or abuse that causes grave injury or death to the person and can be linked to demands of dowry, is an offence. Therefore, although it cannot be proved that the death (if that is the charge) was not caused by the accused person he can be convicted for harassment and abuse.

4. Section 174 of the Criminal Procedure Code provides that if a Police officer is informed of a suicide, he must make an investigation and draw up a report of the apparent cause of death and injuries to the deceased. If the suicide is by a woman within 7 years of her marriage, the officer must submit his report and the deceased body for further investigation. This provision is linked to Section 306 IPC and is intended to help the Court in cases of dowry related offences.

5. Section 302 IPC is a general provision and punishes murder. The section punishes murder in general. Violence against a woman culminating in her murder can be related to motives other than unsatisfied dowry demands:

- The husband suspecting wife of infidelity.
- The husband wanting to marry another woman.
- The wife considered as an 'inauspicious' woman etc.

On the other hand, in some cases there may be insufficient evidence to prove that cruelty or harassment of the wife was connected with a dowry demand, excluding therefore the application of Section 304 B.

6. The Dowry Prohibition Act, 1961 has many loopholes. Since the offence is usually caused in the confines of the family and family members do not reveal the atrocities committed by their own family, it becomes difficult to prove offences.

Protection of Women from Domestic Violence Act, 2005

In a significant legal development for women's rights, on September 13, 2005 the President of India gave his assent to a new law called the Protection of Women from Domestic Violence Act 2005 (PODVA). The Government of India, after intense lobbying and networking by women's rights organisations approved the said legislation which was finally brought into force in the country on October 28, 2006. The objective of this legislation is to provide emergency civil remedy¹¹¹ to women who are victims of violence in the home.

¹¹¹ The need for civil law on Domestic Violence: The Campaign of the Lawyers Collective (Women's Rights Initiative) in *The Lawyers Collective, Women's Rights Initiative, Only her word: A national campaign for a law on Domestic Violence, Lawyers Collective and supported by UNIFEM, June 2004, pg. 45.*

The need for a civil remedy for victims of domestic violence is based, among others, on the following factors:

- **Violence against women in an intimate relationship in the matrimonial household with no option to escape the violent situation due to dependency on their husbands/partners.**
- **The belief that the woman's place is in her husband's home, no matter how violent the relationship is.**
- **Lack of security and the freedom to move out for such women.**
- **Property rights skewed in favour of men, making it difficult for women to move away from violent relations and take independent decisions.**

The main features of the PODVA, 2005

What is the definition of Domestic Violence under PODVA, 2005?

PODVA, 2005 expands the definition of 'domestic violence'. The definition of 'domestic violence' now conforms to the United Nations framework for model legislation on domestic violence and to CEDAW to which India is a signatory.

Section 3 of the Act has a very clear definition of the term 'domestic violence'. It is any act, omission, commission or conduct of a person:

- **which harms or injures or endangers the health, safety or well being of the 'aggrieved person' which includes:**
 - physical abuse
 - sexual abuse
 - verbal and emotional abuse
 - economic abuse
- **which causes harassment, harms or injures a person with a view to coerce her or anyone related to her to meet an unlawful demand for dowry or property; or**
- **which has the effect of threatening the aggrieved person or anyone related to that person; or**
- **injures or causes physical or mental harm to the aggrieved person.**

Who is an 'aggrieved person'?

The 'aggrieved person' has been defined in Section 2(a) of the Act as "any woman who is, or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent".

Aggrieved person includes:

- **Wife, mother, daughter, sister, widow**
- **Second wife or any other woman who is in a domestic relationship eg.:**
 - Woman who believes herself to be married
 - Woman who is unmarried and is in a domestic relationship

Who is the 'respondent'?

A 'respondent' has been defined in Section 2 (q) of the Act as "any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act."

Respondent includes:

- **Father**
- **Brother**
- **Son**
- **Husband**
- **Any relative of the aggrieved person with whom she has been in a domestic relationship**

Example:

Beena was married to Karan for two years. In the last month, Karan had turned violent towards Beena. While Karan was not physically violent against her, his verbal abuse was terrible. Over the last six months he also started demanding that Beena, a call centre employee, turn in all her salary to him. This was prompted by Karan's jealousy of Beena's friendship with her male colleagues. He would keep tabs on all her movements and her phone calls. He once even went to her office where he created a terrible scene in front of her co-workers. Unable to stand his cruelty any more Beena decided to file a case against him. She is the aggrieved person and Karan is the respondent.

What is a 'domestic relationship'?

'Domestic relationship' has been defined in Section 2 (f) of the Act as "a relationship between two persons who live or have, at any point in time, lived together in the shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

Domestic relationship includes:

- **The relationship of marriage**
- **Consanguinity, which means people related by blood**
- **Relationship where a man and a woman have lived together without being married. This will also apply to bigamous marriages where a man has married for the second time without getting a divorce from his first wife**
- **Family members in a joint family**
- **Relationship by adoption**

What is a 'shared household'?

Under other laws covering domestic violence especially the personal laws, matrimonial home is the home that a woman shares with her husband, whether it is rented, officially provided or owned by the husband and his relatives. A woman has the right to remain in the matrimonial home along with her husband as long as she is married, though there is no definite law regarding this right. If a woman is being pressurised to leave the matrimonial home, she can ask the Court for an injunction or 'restraining order' protecting her from being thrown out.

In PODVA, 2005, shared household is used in the legislation instead of 'matrimonial home' to cover under this law all relationships that can be recognised as domestic relationships. It applies not only to legally married women but also to women who have been living with men in a domestic relationship. For example, a bigamous relationship is not recognised in law, yet the woman in such a relationship could be the victim of such violence.

Shared household is defined in Section 2 (s) of the Act and this term has been used instead of the term 'matrimonial home'. It means:

- **A household where the aggrieved person lives or has lived in a domestic relationship (either singly or with the respondent)**
- **It includes houses which are rented or owned singly or jointly by the respondent with the aggrieved person**
- **It includes a household of the joint family**
- **Right to reside in the shared household**

What is the right to reside in the 'shared household'?

This clause was put into the Act to ensure that women who face domestic violence are not thrown out of their homes and made destitute. Often women survivors of domestic violence do not have any place to go to once they have left the home or been thrown out by their husband/partner. This happens frequently because the house may be owned by the man and be legally in his name or it could be tenanted under his name.

To safeguard against this, Section 17 of the Act states that "...every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same". It further states that the aggrieved person shall not be evicted or excluded from the shared household by the respondent unless it is done in accordance with the procedure established under the law.

Example:

Malini has been married to Satish for over six years. Right from the beginning of the marriage Malini has had to put up with Satish's violence towards her. After coming in contact with women working in the local legal counselling centre for women, Malini has now filed a case of domestic violence against Satish. She did not do anything about this problem for many years as she has no family to return to and was economically dependent on him. When the counselling centre workers informed her that she did not have to move out of her home, which is legally owned by Satish, she decided to file a case against him and continue living there with her two children. A portion of the house was demarcated for her and Satish has been prevented by the law from entering that portion of the house.

How can complaints be made and to whom can they be made?

The aggrieved person can make a complaint to:

- **A Police officer**
- **Protection officer**
- **Magistrate**
- **Service provider**

Any person can give information about an act of domestic violence that has been committed or is being committed.

Example:

Madhu knew that her neighbour Ashitha was beaten up daily by her husband Mangesh. She was not sure of what to do but when she read in the newspapers about the recent enactment on Domestic Violence, she found out who the Protection Officer was in the area and informed her of the situation in Ashitha's house.

Under the Act immunity is provided to people for their act in 'good faith' for reporting domestic violence. Immunity means that the person who has brought attention to domestic violence against an individual cannot be prosecuted.

Immunity will be provided to the following persons:

- **Informant of acts of domestic violence**
- **Service providers**
- **Protection Officers. It should be noted in the case of Protection Officers that sanction for prosecution is required from the state government. Protection Officers can be punished with imprisonment for a term of up to one year or with a fine of Rs. 20,000, or with both only upon failure to discharge their duties**

Who are Protection Officers and what are their functions?

The Act provides for the appointment of Protection Officers (PO) by the state government in each district of the state. The POs should preferably be women. The functions of the POs are the following:

- **Assisting the Magistrate in the discharge of her/his functions.**
- **Making a 'domestic incident report' upon receipt of a complaint of domestic violence.**
- **Forwarding copies of the domestic incident report to the Police officer and service providers of that area.**
- **Performing such functions as may be delegated to them by the Magistrate.**
- **Maintaining adequate information of service providers for providing legal aid, shelter, medical aid and counselling to the aggrieved person.**
- **Making an application for issuance of a protection order at the instance of the aggrieved person.**
- **Making available a safe shelter home to the aggrieved person.**
- **Getting the aggrieved person medically examined if she has sustained bodily injuries; providing legal aid to the aggrieved person.**
- **Ensuring that order of monetary relief granted in favour of an aggrieved person is complied with and executed in her favour at the earliest.**

What is the role of other persons and institutions?

- **Police Officer: When an incident of domestic violence reaches the Police, it is the duty of the Police officer to inform the aggrieved person of her rights within the Act as also about her right to file a complaint under Section 498-A of IPC.**
- **Magistrate: The Magistrate should pass orders on any application made by the aggrieved person or a Protection Officer or any person on behalf of the aggrieved person seeking reliefs under the Act within a period of sixty days from the date of its first hearing [Section 12 (5)]. The date of**

first hearing should be within 3 days from the date of receipt of application by the Court [Section 12 (4)].

- **Service Providers: The service providers should protect the rights and interests of the 'aggrieved person' and her child/children by providing legal aid, shelter, medical and financial aid. They will also work in close association with the Protection Officers and the Magistrate.**
- **Welfare Expert: The welfare expert will assist the Magistrate in discharging his functions when called upon to do so.**
- **Expert Counsellor: The expert counsellor will provide expert counselling to the aggrieved person or the respondent singly or jointly upon directions of the Magistrate.**

Who are the Service Providers?

Service providers are identified as the voluntary associations registered under the Societies Registration Act, 1860, or companies registered under the Companies Act 1956, with the objective of protecting the rights and interests of women by providing legal aid, shelter, medical, financial aid.

What reliefs are provided for the aggrieved person under this Act?

The reliefs for aggrieved persons under this Act have been listed in Section 18-22 of the Act. They are the following:

Protection orders will ensure the following:

- **Restrain the respondent from committing any act of domestic violence on the aggrieved person.**
- **Debar the respondent from entering the workplace or school of the aggrieved person.**
- **Prevent the respondent from harassing or stalking or contacting the aggrieved person in any manner or by any electronic medium.**
- **Restrain the respondent from alienating any assets held jointly or singly by the aggrieved person or himself.**
- **Restrain the respondent from causing violence to the aggrieved person's dependants or relatives.**

In case there is a breach of the protection orders, the penalty will be imprisonment for up to one year or a fine of up to Rs. 20,000, or both. This offence is cognizable and non-bailable.

Residence orders

- **Restrain the respondent from dispossessing the aggrieved person from the shared household.**
- **Restrain the respondent or his relatives from entering the shared household or a portion of the shared household.**
- **Restrain the respondent from alienating the shared household.**
- **If required, direct the respondent to provide the same level of alternate accommodation to the aggrieved person.**

Monetary reliefs

- **The respondent may be directed to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.**

Custody orders

- **Temporary custody of the aggrieved person's child or children may be granted to the aggrieved person.**
- **Visitation rights will be granted to the respondent only if it is in the interests of the child.**

Compensation orders

- **The respondent may be directed to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of the respondent upon the aggrieved person.**

Counselling

- **The Magistrate has discretionary power to direct the respondent or the aggrieved person singly or jointly to undergo counselling by an expert.**

Where can the application for relief/s be filed?

The application can be filed in the Court of the Judicial Magistrate of the First Class or the Metropolitan Magistrate where the:

- **person aggrieved permanently or temporarily resides or carries on business or is employed; or**
- **the respondent resides or carries on business or is employed; or**
- **The cause of action has arisen.**

How can the effective implementation of the Act be ensured?

The Act casts a duty on the state government and the Central Government to ensure effective implementation of the Act. The duties are as follows:

- **Publicity through public media including the television, radio and the print media.**
- **Periodic sensitisation and awareness training to the central government and state government officers including Police officers and members of the judicial services.**
- **Effective co-ordination between the services provided by concerned Ministries and Departments dealing with law, home affairs including law and order, health and human resources to address issues of domestic violence.**
- **Protocols put in place for the various Ministries and Courts concerned with the delivery of services to women under this Act.**
- **The Central government and state government should allocate adequate funds to carry out the provisions of the Act.**

Criminal and evidentiary procedure relating to inquest, post mortem and dying declaration in cases of dowry deaths

In criminal cases, evidence is the most important aspect to prove a case. The Criminal Procedure Code (CrPC) and Indian Evidence Act are two legislations that lay down the entire law on criminal and evidentiary procedures. It is in these legislations that law relating to inquest, post mortem and dying declarations in cases of unnatural death has been laid down. These two legislations also lay down the responsibilities and duties imposed on Magistrates and Police officers in cases of unnatural deaths.

The term unnatural death includes 'dowry death' as defined in Section 304 B of the Indian Penal Code.

Inquest and Post Mortem: Section 174 and 176 of the Criminal Procedure Code

What duties are imposed on the Magistrate and Police in cases of unnatural deaths?

Under the Criminal Procedure Code, the Police officers as well as Magistrates have to ensure that all necessary steps of investigation are conducted. These steps are inquest and post mortem of the body and recording of evidence of the eye-witness/es of the death.

What is an inquest?

The power of carrying out an inquest is given under Section 174 CrPC. This section says that if a person:

- **has committed suicide; or**
- **has been killed:**
 - by another person; or
 - by an animal; or
 - by machinery; or
 - by an accident; or
- **has died under suspicious circumstances, thus raising a reasonable suspicion that some other person has committed an offence, then the Police officer has to report this event to the nearest Executive Magistrate.**

The Executive Magistrate then has to take the following steps:

- **Go to the place where the dead body is kept.**
- **Conduct an investigation and make a report of the apparent cause of the death in the presence of two respectable inhabitants of that locality.**
- **The Magistrate's report shall include wounds, fractures, bruises and other marks of injury found on the body.**

- **The Magistrate's report shall state in what manner and by what weapon or instrument (if any) such marks appear to have been inflicted.**
- **The Magistrate's report shall be signed by the accompanying Police officers.**

What is a post mortem?

Post mortem is a procedure where the dead body is examined to understand what caused the death. Usually a civil surgeon appointed by the State Government carries out a post mortem. It involves a general examination of the body and various tests (eg. in case of death by poisoning or in case of any unnatural death).

In what cases is a post mortem to be conducted?

When the Police officer concludes on the facts of the case that murder has been committed or it is a case of suicide, he has to report it to the Executive Magistrate. This report is then shown to the District Magistrate who has to order that a post mortem be conducted in the following cases:

1. Suicide by a woman within 7 years of her marriage.
 2. Case related to the death of a woman within 7 years of her marriage in any circumstances raising a reasonable suspicion upon death.
 3. Case related to the death of a woman within 7 years of her marriage and her relative has suspicion regarding her death.
 4. Case of a doubt regarding the cause of death.
 5. Police officer for any reason considers it important.
- **The Post Mortem shall be conducted by the nearest civil surgeon.**
 - **In the cases of aforesaid categories 1 and 2, the Magistrate may also hold an enquiry into the cause of death.**
 - **The Magistrate shall record evidence taken by him in connection with the case and shall inform the relatives of the deceased woman to be present at the time of the inquiry.**

What is a dying declaration?

- **A dying declaration is those relevant fact statements made by a person:**
 - who is on the verge of death; or
 - expects that she/he will die soon; and
 - Knows the cause of his/her immediate death.
- **These statements can help convict the accused person/s if they are responsible for the immediate cause of death of the dying person.**
- **These statements are a very important part of the case and are used as evidence against the accused.**
- **Dying declarations are based on the principle that 'a person who is about to die will only speak the truth'.**
- **Dying declarations are made under Section 32 of the Indian Evidence Act.**

What amounts to a dying declaration in Criminal Law?

The following is admissible in Court as a dying declaration:

- **Statements made by a dying person in the presence of a Magistrate.**
- **Statements made in the form of 'complaints' to the Police officer by a person apprehending death, soon before the death, alleging harassment and demand for dowry are admissible as dying declarations.**
- **An oral or written statement or gestures or signs by a person who is unable to communicate, in the presence of a Magistrate.**
- **An FIR lodged by the victim can be admitted as a dying declaration, if she died soon after doing so.**

What is the duty of the Court in handling a dying declaration?

With regard to a dying declaration, the duty of the Court is to ascertain:

- **The statements actually made in the declaration.**
- **Identity of the persons named in the dying declaration.**
- **Whether the deceased was in a fit state of mind while making the dying declaration. In order to test the reliability of the dying declaration, the circumstances like the opportunity of the dying person for observation, her capacity to remember the facts and being in a fit state of mind should be taken into account. However with regard to fit state of mind, eyewitness/es account shall prevail over medical opinion.**

IMPORTANT LEGAL POINTS RELATED TO DYING DECLARATIONS

- It is best if dying declarations are recorded in the presence of a Magistrate. A Police officer or a doctor (if the person is in a critical condition and may die soon) can also record statements if they can explain why the Magistrate was not available.
- Dying declarations to Police officers are not encouraged since it is believed that the investigating officers are naturally interested in the success of the investigation.
- Dying declarations should preferably be in question and answer form.
- They should be recorded as far as possible in the words and language of the deceased in the presence of the Magistrate.
- It is important that dying declarations are recorded in the language of the deceased and not translated into some other language.
- The names of the accused persons or some other identification in terms of relationship of the deceased with the accused persons should be necessarily mentioned in the dying declarations.
- Dying declarations if proved true, can be the sole basis of conviction of the accused persons.

DOMESTIC VIOLENCE: WORKSHOP METHODOLOGY

Note to the facilitator

It is important to start this session with a clear understanding of what constitutes domestic violence. From here, the session could proceed to understanding the law on the issue. The first exercise illustrates the need to understand domestic violence as a human rights issue. The second exercise helps to arrive at a common understanding of what constitutes domestic violence.

EXERCISE 5.14

Title: Domestic Violence as a Human Rights issue

(Adapted from Strength in Action - An Educator's Guide to Preventing Domestic Violence by Vidya Shah and Devaki Sahdev, in Breakthrough, page 25)

Purpose: To understand that Domestic Violence is a Human Rights issue

Time: 60 minutes

Materials needed: Whiteboard and markers, case studies

Steps

- Draw 4 columns on the board. The first column should be Violence against Women, second column should be Perpetrators, the third column should be Victims and the fourth column should be Rights Violated.
- The facilitator should ask participants to look at the life of a woman from the time she was a foetus to adulthood and what are the various forms of violence that happen against her, e.g., female foeticide, female infanticide, sexual harassment, rape, domestic violence etc.
- Once they have listed out all the violations, ask them to name the perpetrators of each of the violations, as well as the victims.
- Examples of perpetrators are: men, uncle, mother-in-law, husband, boyfriends etc. Examples of victims are usually women.
- Once this is listed ask them to identify which are the rights that have been violated in each row. The facilitator can link up this

session with the session on fundamental rights and rights guaranteed to women in Module II of the Indian Legal System.

- Once the chart is in place, the facilitator should use the following discussion points:
 - Many of the perpetrators are people who are related to the woman such as husband, boyfriend, father, uncle etc.
 - Apart from sexual harassment at the workplace, almost all the other violations listed can and do happen within the four walls of the home.
 - This household space, which is also considered the safest space, is in fact responsible for large scale violence against women.
 - Domestic violence occurs frequently and takes on many forms.
 - It is a human rights violation for women.
 - The concept of 'family' is held so sacred in our culture that women who do opt to walk out of violent households are seen as 'bad' women.
 - The expectation is that women 'adjust' to violent situations, so as to keep the sanctity of the family alive, sometimes at the cost of their lives.

EXERCISE 5.15

Title: Defining Domestic Violence

Purpose: To arrive at a common understanding of domestic violence

Time: 60 minutes

Materials needed: Whiteboard and markers, case studies

Steps:

- Divide the larger group into three small groups depending on the number of participants.
- Each small group will be given a situation that has been prepared by the facilitator.
- The facilitator can use the following questions to give focus to the group discussions.

- Should women put up with certain types of behaviour for the larger good of their families?
- What would be behaviour that would certainly classify as domestic violence?
- On what basis does one decide what constitutes or does not constitute domestic violence? Who decides this?
- What are the possible responses that women get when they complain or talk about domestic violence?

Case Study 1:

Madhu was married to Ganesh for 5 years and they had two daughters. Ganesh and his family had been harassing Madhu, taunting her for not producing a male child. When she got pregnant once again, her mother-in-law took her to the doctor and had her examined, illegally. They found out that Madhu was pregnant with a baby girl. Ganesh and his family started pressurising Madhu to have an abortion. Ganesh said that he would throw her out of the house if she did not have the abortion. Madhu also found out that the family was looking for another girl for Ganesh to get married a second time. Is this domestic violence? What should Madhu do in this situation?

Case Study 2:

Suresh and Geeta have been married for almost 15 years. Both of them are working in an engineering firm. They met in engineering college and have been together ever since then. Geeta has however been quite unhappy in her marriage. She and Suresh are placed at the same level and also earn the same amount of money. Suresh expects her to hand over her entire salary to him every month. Geeta has no control over her own earnings. All the investments are handled by Suresh and are in his name. She is given a small amount of money every month as pocket money. To buy groceries, she has to request Suresh for money. She feels quite humiliated about this. Is this domestic violence?

Case Study 3:

Sujata had been living with Imtiaz for many years. They had a 4 years old son, Rehaan. Imtiaz was very violent and very often beat up Sujata. One day, having had enough, Sujata decided to seek some advice. She went to a family counsellor who said, "if you file a divorce case against your husband because he is cruel to you, it may take at least four years in Court to get a judgment. Why don't you just adjust with your husband? You have coped with the violence for five years, I am sure the violence will phase out with time. Just think about your four-year-old son. Rethink your decision to leave your husband." Is this domestic violence? What should Sujata do?

- After the presentations, have a discussion on the various forms of domestic violence.
- Share with the participants the definition of domestic violence given in the Protection of Women from Domestic Violence Act, 2005.

Note to the facilitator

The facilitator should do a presentation of the Protection of Women from Domestic Violence Act, 2005 (DV Act 2005). To prepare for this the facilitator should use the legal information section. She should also state that women have several legal options such as legal separation, divorce as well as pursuing a criminal complaint under Section 498A CrPC. It is important that after a presentation is done on the DV Act, 2005, an exercise be conducted to ensure that the provisions and strategies to be used under the Act are clear. This would be especially useful if the training is being done with lawyers. It would also be best to get a practising lawyer to help clarify the legal strategies. The case studies could be given to the participants as an overnight exercise.

STATISTICS ON DOMESTIC VIOLENCE

In a study conducted on domestic violence during pregnancy at the Government Medical College and Hospital, Chandigarh from January 2004 to December 2004 it was found that:

- The incidence of domestic violence was drastically high in women who were socially unsupported;
- The level of education and employment of the woman had no effect on the incidence of the abuse;
- The perpetrator of the abuse was the intimate partner (husband) in 48.2%, the husband's mother in 61.3%, and the husband's sister in 22.6% of cases.

International Centre for Research on Women suggests 80% men from Punjab think violence is justified if the wife is 'disrespectful' and 60% justify it if the wife 'does not follow instructions'.

National Crimes Record Bureau Crime Clock 2004 statistics are as follows:

Every 9 minutes a husband or his relatives commits cruelty on a woman.

Every 29 minutes a woman is raped.

Every 53 minutes a woman is sexually harassed.

Every 75 minutes a woman is killed for dowry.

EXERCISE 5.16

Title: How to use the Protection of Women from Domestic Violence Act, 2005

Purpose: To understand the provisions of the PODVA, 2005

Time: 60 minutes

Materials needed: Whiteboard and markers, case studies

Steps:

- This is an overnight exercise.
- Divide the participants into four small groups. Give each group a copy of the DV Act 2005 and one case study.
- Each group must read the case and answer the question that is asked in each case using the provisions of the DV Act 2005.
- Each group must prepare their responses and do the presentations the next day in front of the larger group.
- Respond to each case study and the strategies that have been discussed. It is important to have a lawyer who is well aware of the Act to be a resource person.

Case Study 1:

Madhu was married to Ganesh for 5 years and they had two daughters. Ganesh and his family had been harassing Madhu, taunting her for not producing a male child. When she got pregnant once again, her mother-in-law took her to the doctor and had her examined, illegally. They found out that Madhu was pregnant with a baby girl. Ganesh and his family started pressurising Madhu to have an abortion. Ganesh said that he would throw her out of the house if she did not have the abortion. Madhu also found out that the family was looking for another girl for Ganesh to get married a second time. Is this domestic violence? What should Madhu do in this situation?

Case Study 2:

Radha is 20 years old. She is the adopted daughter of Sita Devi and Man Singh who have two biological sons. In the last five years, both Sita Devi and Man Singh have died. Radha lives with her brothers who are both married, with children. In the last two years, Radha has been ill-treated by her brothers and their families who want to throw her out of the joint property in which they reside. Radha had been told by her parents that they have ensured her some property in their will. However Radha has not seen this will. She is afraid for herself and also fears physical violence from her family. How can you use the PODVA, 2005 to protect Radha's interests?

Case Study 3:

Rukmini has filed for divorce from her husband Rajkumar on grounds of cruelty. She lived with him for five years during which he was abusive and violent towards her. Rukmini has paid for the house in which Rajkumar is

currently residing. Her husband is pressurising her to take back the case. She has also sought maintenance from him. So far no order has been passed and it has been over a year. How can you use the PODVA, 2005 to assist Rukmini?

Case Study 4:

Rizwana and Mihir have been living together for 2 years. They were in a relationship and not married. Mihir is a pilot and travels a lot. In the last 6 months Rizwana has noticed a change in Mihir. He frequently gets angry. One day he lost his temper with her and beat her up very badly. The neighbours, hearing her screams, come to her rescue and took her to the hospital for treatment. Rizwana is very scared to go back to her home. She wants to leave Mihir. How can you assist her using the PODVA, 2005?

Note to the facilitator

To end this session, it would be effective to do an exercise on myths and facts related to domestic violence. It will help to tie up the discussions and concretise concepts with the participants.

EXERCISE 5.17

Title: Myths and Facts on Domestic Violence

Purpose: To clarify various myths related to domestic violence

Time: 45 minutes

Materials needed: Whiteboard and markers

Steps:

- This exercise can take the form of a debate.
- Divide the participants into two groups. Give one set of myths to one group and the other set of myths to the other group.
- Each group should take turns to argue a myth and the other group should counter it. Each argument and counter-argument should last 5 minutes. At the end of each round, the facilitator should clarify the myth with the facts.
- The purpose of having a debate is to make sure that the participants themselves question the myths that come up.
- The myths and facts listed below are merely indicative and the facilitator can contextualise them depending on the audience and the cases that have come up.

MYTHS AND FACTS ON DOMESTIC VIOLENCE¹¹²

Myth: Domestic violence is only when a husband beats his wife.

Fact: Domestic violence has many different forms. It can be physical, mental, psychological, economic and sexual. Being abused may not ever include physical violence, but a victim may be abused verbally, emotionally, and/or psychologically. These forms of abuse can be just as terrifying and debilitating and often result in feelings of low self-esteem, depression, and loneliness for the victim.

Myth: Domestic violence is a private matter.

Fact: Domestic violence is a crime with serious repercussions on women.

Myth: A man abuses a woman only under the effect of alcohol or stress.

Fact: Batterers frequently make excuses for their violence, claiming loss of control due to alcohol or drug use, or extreme stress. Although drug and alcohol abuse may intensify existing violent behaviour, it does not cause domestic violence.

Myth: A husband is violent only to a nagging or a complaining wife.

Fact: Victims never control a batterer's use of violence. Victims are not to blame nor do they ever deserve such abuse. Whatever problems exist in a relationship, the use of violence is never justified or acceptable.

Myth: A man abuses a woman only when he is uneducated and poor.

Fact: Studies of domestic violence have consistently found that battering occurs among all types of families, regardless of income, profession, region, ethnicity, educational level or race. However, the fact that lower income victims and abusers are over-represented in calls to Police, battered women's shelters and social services may be due to a lack of other resources.

Myth: Since young children are worst affected by a broken relationship, a woman should continue to stay in the violent relationship.

Fact: It is worse for a child to be brought up in a home which is scarred with domestic violence. The repercussions of this will last through the lifetime of the child. Violence often occurs in a cycle which is often endless. Exposing children to this kind of trauma will impact them for life. It is better to be able to provide a safe and secure home rather than continue a relationship which is damaging for all those who are included in it.

Myth: A woman is the worst enemy of a woman.

Fact: Women are part of the same socialisation processes that we all go through which allows for the belief that men are the more powerful sex. Often a woman's complete dependency on the males in her family may make her seem like an enemy to another woman.

Myth: A woman can always leave a violent relationship.

Fact: There are many reasons why it is difficult for a victim to leave:

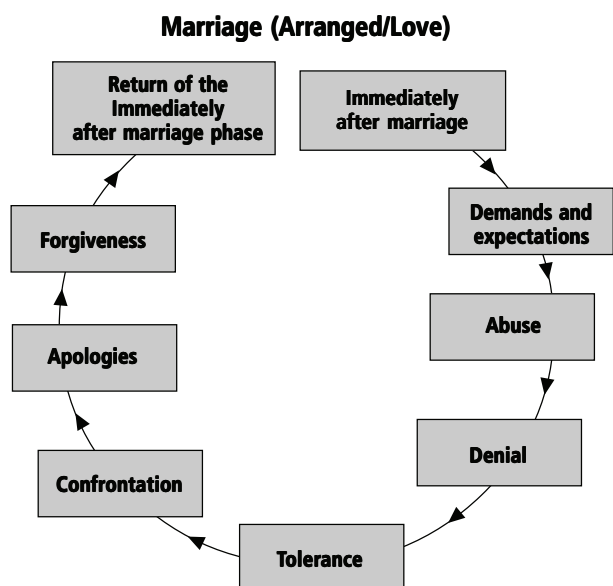
- *The partner may have used violence when the victim tried to leave in the past.*
- *The victim may not know about available resources to assist her in leaving.*
- *If the victim is financially dependent upon the abuser and leaves with their children she is likely to face severe hardships.*
- *Social and justice systems may have been unresponsive, insensitive or ineffective in the past.*
- *Religious, cultural, or familial pressures may make the victim believe that it is her duty to keep the marriage/relationship together at all costs.*
- *The victim's emotional ties to the abuser may still be strong, supporting the hope that the violence will end.*
- *For most of us, the decision to end a relationship is not an easy one.*

Myth: Men who are violent are usually mentally ill.

Fact: Violent men or batterers get their messages from society. The message is that violence is an effective manner of achieving power and control over their partners. Such behaviour is also learned from the batterer's own life experiences, especially during childhood.

¹¹² Some of this material has been taken from http://www.bghealth.org/myths_&_facts.htm, <http://www.clarkprosecutor.org/html/domviol/myths.htm>

Phases of domestic violence: The circular form depicts a cycle of abusive behaviour



Note to the facilitator

Closely related to the issue of domestic violence is the problem of dowry and dowry death. As per the National Crime Records Bureau Crime Clock 2004 statistics "Every 75 minutes a woman is killed for dowry". The act of giving and taking dowry was penalised in 1961 through the Dowry Prohibition Act. Legal reform addressing dowry was introduced in the 1980s in the criminal laws and the investigative procedures. In 1983, Section 498A was introduced in the Indian Penal Code (IPC) to penalise domestic violence and cruelty towards a woman by her husband and her in-laws. This was followed by the introduction of Section 304B on dowry deaths, in IPC, in 1986. The section prescribed punishment of 7 years to life imprisonment for those found guilty of killing a woman within 7 years of her marriage. Section 304 B was supplemented by amendments already made in 1983 in Section 174 of the Criminal Procedure Code (CrPC) of 1973. Section 174 CrPC enforced investigations by a Magistrate of suspicious bridal deaths, which till that time were being investigated only as suicides.

Through the module on domestic violence, it will be necessary to address the issue of dowry and dowry death. Using the legal manual, the facilitator should try and address the following points in a presentation:

- **Definition of dowry.**
- **Difference between dowry and stridhan.**
- **Punishment for giving and taking dowry.**
- **What is a dowry death?**

- **How can demands of dowry or previous violence by the deceased woman's husband or his relative be proved?**
- **What can be done if a woman is being harassed for dowry?**
- **What is the procedure for investigating unnatural death of a woman within 7 years of her marriage?**
- **What is a dying declaration and why is it important?**
- **Who can record a dying declaration?**
- **What is the procedure to be followed?**
- **What is the punishment for dowry harassment and dowry death?**
- **Who can fight a case on behalf of the deceased woman? Why?**

Action Points

- **Make a poster depicting different forms of domestic violence and the legal remedies available for the woman.**
- **Identify ways in which the participants can assist women facing domestic violence.**
- **Create a list of local and state level service providers including lawyers, organisations, hospitals and Police stations for assisting the victims of violence.**
- **To fight the practice of dowry the facilitator may suggest that the participants may form collectives or coalitions of people in their community who pledge to neither take nor give dowry.**
- **The participants may get a resolution passed in the Gram Sabha in the villages or in the residential welfare associations in the city stating that they will not allow the practice of dowry in their area.**
- **Initiate a campaign in the community to encourage young people in the community to take a stand against dowry.**
- **Prepare posters and paint slogans on Panchayat office walls against the practice of dowry.**
- **Discussion forums could be organised in the villages/women's collectives.**

6

Women and Property Rights



Women have equal right to property - respect it.

6

Women and Property Rights

Objectives

- To understand the concept of property and what right to property means for women.
- To analyse the challenge faced by women in accessing property rights in reality.
- To understand the property rights of women as enumerated in law in India.
- To design a programme in your community that will enable women to not only know their property rights but also make it possible for them to access those rights.

Introduction

The law of succession in India is considered Personal Law, therefore just like marriage and divorce, the law governing succession is based on the religion that the person follows. Hindus follow the Hindu Succession Act, Muslims follow Muslim law and all other religious groups and people who are married under the secular Special Marriage Act follow the Indian Succession Act.

Succession among Hindus

Women's right to property in Hindu law has been a contentious issue. Over the years the position of women with respect to their property rights has slowly changed:

- Under Hindu law, prior to 1937 a woman did not have the right to own property; she did not have the right to any property except her *stridhan*.
- In 1937 a law called the Hindu Women's Right to Property Act was passed. This law made it possible for a woman to have limited interest in property, apart from her *stridhan*. This meant that when a man died, his property would go to his widow so that she could maintain herself from her husband's property. She had a limited right of ownership in property, which meant that she could not own it completely, but she could use the property to take care of herself until she died or until she remarried.
- In 1956, the Hindu Succession Act was passed. This law improved the position of women to a great extent. Now, a woman has the right to own property completely. She is an absolute and full owner and the law also gave the woman an equal share in the property of her husband. She could get the same share in the property as her children would get.
- BUT, even these developments were not sufficient for women, because under the fundamental principle of Hindu law, men got a share in their ancestral property by birth, but women only got a share in their father's self-acquired or husband's property. So, men not only had a share in the ancestral property, but they also got a share in the father's property. Women on the other hand did not get a share in the ancestral property by birth; they only got a share in the property of their dead father or husband. This position is unequal.

While a woman did not have a right to ask for partition of the joint family property, she did enjoy certain rights on the joint family property such as the right to residence. Till the property was divided, the woman enjoyed the rights to use the joint family property, but upon partition, the woman did not get a share in the property. Only the coparceners did. This concept violated the fundamental right to equality as envisaged in the Constitution.

- **In order to correct this inequality several states amended the Hindu Succession Act so that women in their states had the same and equal right to property as men. Andhra Pradesh made this change in 1985, Tamil Nadu in 1989, Maharashtra and Karnataka in 1994. So now in these states a woman has a right in ancestral property from birth, and she can ask for partition of ancestral property etc.**
- **In 2005, after looking at the developments and progress made by these four states, twenty years after the women in Andhra Pradesh got equal right to property, the Government of India introduced in parliament a legislation to amend the Hindu Succession Act, to give equal property rights to women from birth. On August 16, 2005 the Rajya Sabha passed this law and women across the country now have equal right to property. The Hindu Succession (Amendment) Act, 2005 (39 of 2005) came into force from September 9, 2005.**

What is the Hindu Succession Act?

The Hindu Succession Act is the law that governs intestate succession. This means that if a person dies without writing a will and that person is a Hindu, the property of the person will be distributed according to the law laid down in the Hindu Succession Act.

A **Will** is a document in which a person states how he wants his property disposed of after his death. The Hindu Succession Act (HSA) applies to Hindus, Buddhists, Jains and Sikhs.

To whom does the Hindu Succession Act not apply?

- **The HSA does not apply to non Hindus.**

Example:

Radhika and Rahul are both Hindus. They had a Hindu marriage ceremony and then had their marriage registered under the Special Marriage Act. The property law applicable to them would be the Hindu Succession Act.

- **If a Hindu marries a non Hindu, the property law applicable to them is the Indian Succession Act.**

Example:

Rupa a Hindu, married John a Christian, and their marriage was registered under the Special Marriage Act. The property law applicable to Rupa and John will be the Indian Succession Act.

- **If two Hindus get married under the Special Marriage Act without undergoing any ceremony under Hindu law or custom, the property law applicable to them is the Indian Succession Act.**

Example:

Suraj and Sunita did not have a Hindu marriage ceremony. They had a registered marriage under the Special Marriage Act. The property law applicable to them is the Indian Succession Act.

Are there different types of property under Hindu Law?

There are two different kinds of property under Hindu Law:

- **Coparcenary property/joint family property; and**
- **Self-acquired property.**

Property can be **immovable** – like land and house, or **moveable** – like money, furniture and other things that people own and can be moved from place to place.

What is coparcenary/joint family or ancestral property?

In order to understand Hindu property law it is important to be familiar with a few terms. In ancient times the Hindu family was seen as one unit which consisted of several family members. The head of the family is known as *Karta*. This concept of a joint family and *Karta* developed in order to ensure that property remained within one family and with people who had the same blood. This concept has carried on into modern times. Today, even if people no longer live in a joint family, the concept of joint family property still continues. The words **ancestral property**, **joint family property** or **coparcenary property**, all mean the same thing. A joint family essentially means a man, his wife, his unmarried daughters, his male descendents, their wives and unmarried daughters.

Coparcenary or joint family or ancestral property means the property that belongs to the group of people called the coparceners.

Who are coparceners?

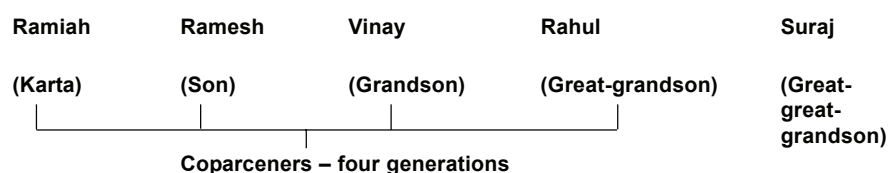
In Hindu law a male child born in the family is considered to be a coparcener and therefore has a share in the property. The right of a coparcener in a joint family property cannot be taken away by the father or even the other coparceners; it is a right by birth. In 1984 a state amendment was brought about in the Hindu Succession Act which gave unmarried women the right to be coparceners. Since September 2005, all women in India have a right of a coparcener.

Are all male children coparceners?

Coparceners are a set of people who are three generations from the holder of property (technically it would be four generations if you include the holder of the property).

Example:

If Ramiah is the oldest member of the family and he has ancestral property, his son, his grandson and his great-grandson would be the coparceners. Ramiah's great-great-grandson would not be part of the coparcener unit because he is the fifth generation from Ramiah. However if Ramiah were to die then his great-great-grandson would become part of the coparcenary unit.



Can a woman be a coparcener?

Yes, a woman can be a coparcener. Historically in Hindu law, women were not allowed to be coparceners. BUT, the Constitution of India guarantees equality to men and women and therefore this law has also started to change. Since 1984 several states like Andhra Pradesh (1985), Karnataka (1994), Tamil Nadu (1989) and Maharashtra (1994) amended the Hindu Succession Act in their states to make it possible for a woman to be a coparcener. Following the example of these states, the Government of India has also amended the Hindu Succession Act to give women all over the country equal right to property. Since September 9, 2005 all over the country all women have the right to be coparceners just like women in Andhra, Karnataka, Tamil Nadu and Maharashtra.

The right of a woman to be a coparcener will start from the date the law was changed. The change in Karnataka came into effect on July 30, 1994¹¹³ Therefore in Karnataka:

- **A woman who was unmarried as of July 30, 1994 will be considered as a coparcener;**
- **A woman who was married before July 30, 1994 will not have a coparcenary right in ancestral property. She will only get a share from her father's property;**
- **If ancestral property has been partitioned before July 30, 1994, a woman cannot claim a right as a coparcener in the ancestral property – she will only be entitled to her share from her father's property.**

PLEASE NOTE

Although the amendment to the Hindu Succession Act to allow women as coparceners came into effect on September 9, 2005, certain states made the change prior to 2005 - Andhra Pradesh made this change in 1985, Tamil Nadu in 1989, Maharashtra and Karnataka in 1994. The right of a woman to be coparcener will start from the date the law was changed in each of the states and for states that did not make an amendment prior to 2005, the effective date shall be September 9, 2005.

What are the features of a coparcenary?

- **Under Hindu Law a coparcener could only be a male, but now the Hindu Succession Act has been amended and women have also been given the right to be coparceners. Therefore, women also have a share in the joint family/coparcenary property by birth.**
- **A person cannot be a coparcener by an agreement or arrangement.**
- **All coparceners jointly own and enjoy the property. No person can claim that a specific item or thing belongs to them until partition takes place.**

Example:

A father lives in a four bedroom house with his three sons and their wives and children. Each son has one separate room for his family. The sons cannot claim that the rooms they live in belong to them and that it is their individual property. The property belongs to everyone until there is a partition.

- **A coparcener gets a share in the joint family property on his or her birth, but this share keeps changing based on the birth/death of other coparceners. The rights of a coparcener are clearly defined only when there is a partition.**

¹¹³ Section 6A, 6B and 6C, Karnataka amendment to Hindu Succession Act, 1994.

- While the coparceners have the right to a share in the joint family property by birth, the other members of the joint family also have some rights such as the right to residence of a female member such as mother, daughter, wife etc. The joint family property is available for all until partition takes place.
- A coparcener (once he or she has attained 18 years of age) has the right to ask the *Karta* of the family for a partition of the property at any time. In case the family does not agree, a partition suit can be filed in a Court of law.
- A coparcener on his/her own cannot sell/mortgage the property. This can only be done by the *Karta* of the family under some circumstances.

What is self-acquired property?

Self-acquired property is the property which an individual has created or which has been inherited from someone other than his/her father or a gift received from someone.

Example:

- Salary earned by a person from a job
- Property received by way of a prize or scholarship
- If Venkaiah received property from his mother's father, this would be his self-acquired property
- When Suman's father died he gave Suman a house which was part of his self-acquired property. This house will be Suman's self-acquired property and will not form part of the joint family property

What is the difference between joint family property and self-acquired property?

- Joint family property cannot be bequeathed through a will; only self-acquired property can be bequeathed through a will.
- Joint family property cannot be given away by any of the coparceners. For example, a gift of a joint family property would not be valid.

What are the rights of a coparcener in a joint family property?

- Right by birth in the property.
- The ownership of the property is joint, therefore the property is to be enjoyed jointly and the liabilities such as debts also have to be borne jointly. The property cannot be generally given away without the consent of all coparceners.
- Right of survivorship – this means that the share of a coparcener in a joint family property keeps changing, based on births and deaths in the family.

Example:

Ram has 3 children – Nagesh, Shubha and Ravi (none of them were married and had no children) so therefore in the joint family property they each had 1/4 share. But if Ram dies, the share of the others becomes 1/3 each in the property. This right of the surviving coparceners to increase their share is called the right of survivorship.

- Right to ask for accounts.
- Right to ask for partition.

- **Right to stop improper actions by other coparceners which are against the interest of the joint family property.**
- **Right to have other property – self-acquired property.**

What are the property rights of a woman under Indian Law?

A woman has several rights depending on who she is – as a married daughter, as an unmarried daughter, as a widow, as a widowed daughter-in-law, as a sister and as a mother.

- **Today a Hindu daughter is considered a coparcener and thus enjoys the right to ancestral property by birth.**
- **Right to maintenance under Section 125 CrPC.**
- **Right to maintenance under Section 18 of the Hindu Adoption and Maintenance Act.**
- **Right to maintenance under Section 25 of the Hindu Marriage Act.**
- **Right to maintenance can be claimed by a widowed daughter-in-law under Section 19 of the Hindu Adoption and Maintenance Act.**
- **Right to residence (a daughter has the right to reside in her father's house if she is unmarried, deserted by or separated from her husband, or is a widow).**
- **Right to *stridhan*.**
- **Right to a share in husband's property and father's property.**

How is property distributed under the Hindu Succession Act?

The rules for distribution of the property of a Hindu male are different from the rules for distribution of property of a Hindu female.

Distribution of property of a Hindu male

Self-acquired property

- **If a Hindu man has written a will then his self-acquired property will be divided as per the will.**
- **If there is no will then the property will be distributed:**
 - firstly, among his Class I heirs;
 - secondly, if there are no Class I heirs, the property will be distributed to Class II heirs;
 - thirdly, if there are no Class II heirs then the property will be distributed among the agnates of the deceased person. Agnate refers to two people who are related by blood or adoption wholly through males;
 - lastly, if there is no agnate, the property will be distributed among the cognates of the deceased. Cognate is a relation between two people either by blood or adoption but not through males.

Ancestral property

- **When a Hindu male dies leaving behind an interest in his ancestral property, his interest in the property will be distributed among surviving coparceners by the rule of survivorship.**
- **BUT, if the male dies leaving behind any female relative mentioned in the list in Class I heirs or any male relative mentioned in Class I heirs who can claim through a female relative, in this case the property will devolve either through testamentary/intestate succession as per the Hindu Succession Act.**
- **For the purpose of this section the share of the Hindu male in the property would be the share that would have been allotted to him had there been a partition at the time of his death.**
- **The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter.**
- **The share of the pre-deceased child - of a pre-deceased son or of a pre-deceased daughter - shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter.**

Principles for distributing property among Class I heirs

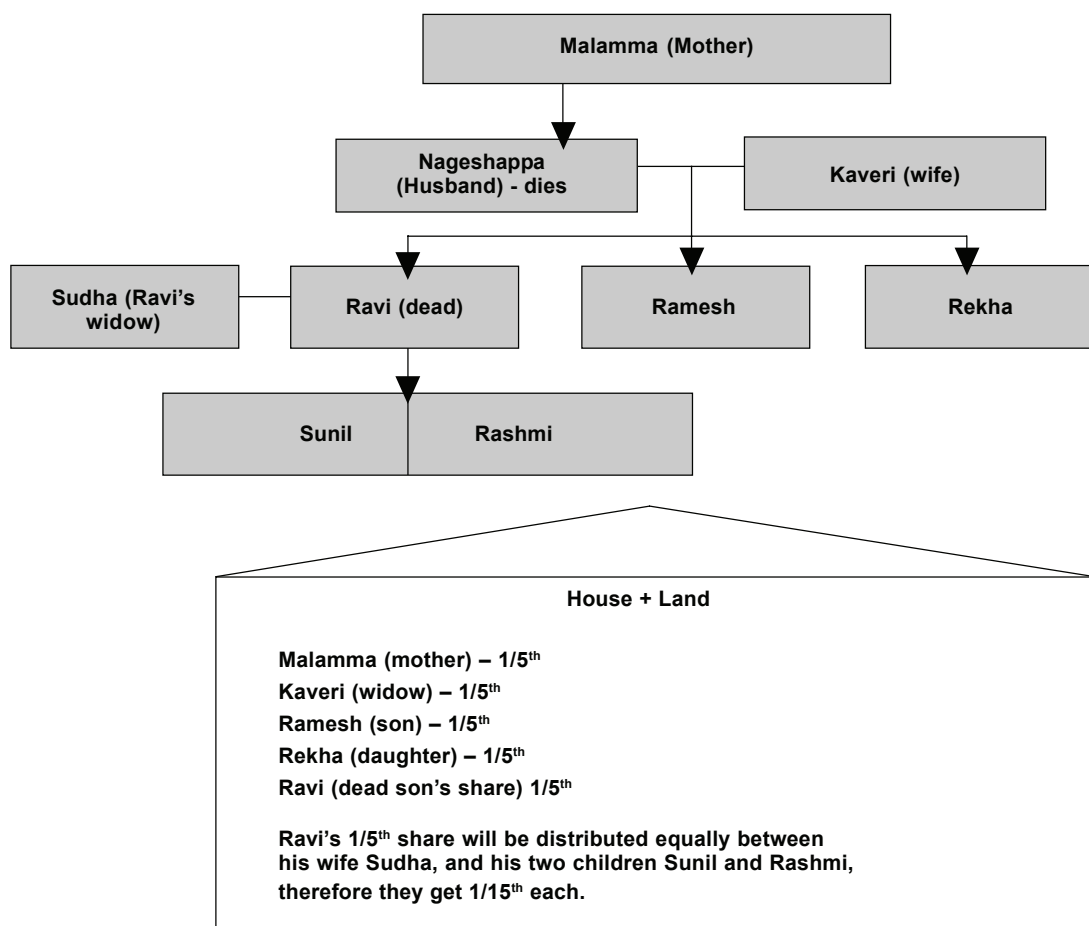
- **Widow gets one share;**
- **The sons, daughters and mother get one share each;**
- **Heirs of each branch of a pre-deceased son or daughter get one share each;**
- **The property is distributed such that the widow of the pre-deceased son and the children all get one share each;**
- **The children of a pre-deceased daughter get equal portions.**

CLASS 1 HEIRS ARE:

- i. Son
- ii. Daughter
- iii. Widow
- iv. Mother
- v. Children of a pre-deceased son
- vi. Children of a pre-deceased daughter
- vii. Widowed daughter-in-law
- viii. Children of a pre-deceased grandson
- ix. Widowed grand-daughter-in-law

Example:

Nageshappa was a government servant and when he died in 1989 he left behind his mother Malamma, his widow Kaveri and his son Ramesh and daughter Rekha. His other son Ravi had died but Ravi's wife and two children were alive. Nageshappa had one house which he had inherited from his father and he also had a plot of land which he had purchased from his own money. Since Nageshappa died without a will his property would be divided as follows:



Principles for distributing property among Class II heirs

There are nine entries under Class II heirs. Property must be shared equally among people mentioned in each entry. It will only be possible to move from one entry to the next if there are no heirs alive who are mentioned in that entry.

Example:

The first entry under Class II heirs is the father. If the father of the deceased is alive then the property will go to him. However, if the father is dead then the property must be shared equally between the persons mentioned in entry II. Only if none of the persons mentioned in entry II are alive will the property go to those persons mentioned in entry III, etc.

CLASS II HEIRS ARE:

- i. Father
- ii. (1) Son's daughter's son (2) Son's daughter's daughter (3) Brother (4) Sister
- iii. (1) Daughter's son's son (2) Daughter's son's daughter
(3) Daughter's daughter's son (4) Daughter's daughter's daughter
- iv. (1) Brother's son (2) Sister's son (3) Brother's daughter (4) Sister's daughter
- v. Father's father; father's mother
- vi. Father's widow; brother's widow
- vii. Father's brother; father's sister
- viii. Mother's father; mother's mother
- ix. Mother's brother; mother's sister

Property of a Hindu female

Any property of a Hindu female is considered her own and absolute property. This includes all types of moveable and immovable property, for instance:

- **salary earned and anything purchased by a woman;**
- **property received as inheritance or at partition;**
- **property received in lieu of maintenance;**
- **arrears of maintenance;**
- **gifts from any person before marriage, at marriage and after marriage.**

But, any property given to a woman with a restriction will not be her absolute property and the conditions of such a transfer will prevail.

Example:

If Ramesh gives his house to his sister Rekha, saying she has the right to use it for 3 years, this does not become her absolute property. She will have to give it back to Ramesh after 3 years.

Distribution of the property of a Hindu female

Self-acquired property

If there is a will the property will be distributed as per the conditions laid down in the will. In case there is no will the property will devolve in the following manner:

- **Firstly, to sons and daughters (including children of pre-deceased sons and daughters) and the husband.**
- **If there is no one from the above category then secondly, to the heirs of the husband.**
- **If there is no one from the second category then thirdly, to the mother and father.**
- **If there is no one from the third category then fourthly, to the heirs of the father.**
- **If there is no one from the fourth category, then last to the heirs of the mother.**

But, if the Hindu female inherited property from her mother or father and she has no sons or daughters or any grandchildren then this property will go to the heirs of her father.

If the Hindu female inherited property from her husband or her father-in-law and if she dies without leaving behind a son, daughter or any grandchildren, then the property will go to the heirs of the husband.

The reason behind this rule is to ensure that the property goes back to the source from where it came in case the woman does not leave behind any children or grandchildren.

Ancestral property

Today women have equal share in ancestral property from birth just like men. The general rule of inheritance of ancestral or joint family property is the rule of survivorship. This means that if a woman coparcener dies, then her interest in the joint family property will go to the surviving members of the coparcenary.

BUT, if the woman leaves behind a child or the child of a pre-deceased child, then her interest in the coparcenary property will devolve by testamentary succession (through a will) or intestate succession under the Hindu Succession Act (as described above) and the rule of survivorship will not be followed. The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter.

The share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter.

How can property rights be enforced?

In Hindu law, ancestral property is held jointly by all the coparceners. Even if the property is in the name of the *Karta*, the other coparceners have a share as per the law. But, this share is a notional share; a person cannot claim that one aspect of the property belongs to him.

Example:

If there is an ancestral house and there are several coparceners, they all have a share in the house. While the law is clear that they have a share, one coparcener person cannot claim that a specific part of the house, like a bedroom, belongs to him unless there is a partition.

Partition of joint family property

In order to get the real benefit of a share in ancestral property and to enforce the right in ancestral property a person can ask other members for a partition. If they agree to a partition, the property will have to be divided and distributed. The division and distribution will take place on the basis of the principles that we have discussed in the previous pages. There is no need to go to Court if everyone agrees. A woman as a coparcener has the right to ask for partition of the property.

Sometimes, one person may want to partition the property and the others would like to continue as a joint family. In this case, if the family agrees, they can give the person his or her share of the property and the rest of them can continue as a joint family property.

Family arrangement

It is also possible to have a family arrangement which does not follow the principle of distribution that the Hindu Succession Act lays down. The law says that every coparcener has a share in the property, but if all the members agree, they can make a different arrangement and then decide to divide the property as per that arrangement.

Filing a case in the Civil Court

Sometimes, people are not able to agree to a family arrangement and the family is not willing to do a partition. In this case the only option is to go to Court and file a case asking the Court to partition the property. A woman also has the right to file a case for partition of the property as a coparcener.

What are the rights of children born from a void or a voidable marriage and of illegitimate children?

Rights of children born from a void/voidable marriage

The Hindu Marriage Act (Section 16) and the Special Marriage Act (Section 26) were amended in 1976 to make a very important change. The law today recognizes that children born of a void marriage (for example - children of a second wife) and children born of a voidable marriage where the parties to the marriage have gone to Court and had the marriage nullified, are legitimate children. The reason for this is that, if the marriage had in fact been a legal marriage the children would have all the rights of legitimate children. Just because the marriage is void/voidable the children should not suffer.

The children born out of a void/voidable marriage have the following rights:

- **Right to maintenance until the age of majority.**
- **Right to the property of their mother and father only. They do not have the right to property of any other person.**

Rights of illegitimate children

Under the Hindu law, in the *shastras* illegitimate children had several rights, but since the enactment of the Hindu Succession Act and the Hindu Adoptions and Maintenance Act of 1956, the rights of illegitimate children have been curtailed and they are very limited.

- **Right to maintenance**
 - **An illegitimate Hindu child has the right to claim maintenance from the father and the mother until he or she is 18 years of age. This right is available under the Hindu Adoptions and Maintenance Act.**
 - **If the father or the mother is dead and the illegitimate child is below 18 years of age, the child has the right to maintenance from the property of the deceased person. Therefore the heirs of the deceased person should maintain the illegitimate child.**

Example:

Ramiah is married to Kanaka and has two sons called Kumar and Kiran. Ramiah also had an illicit relationship with Revathi but they never got married. He has a son from Revathi called Ritesh who is 12 years old. Under law, Ramiah has to give maintenance to Ritesh until he is 18 years of age. If Ramiah dies leaving behind property, then his heirs (Kanaka, Kumar and Kiran) have the obligation to give maintenance to Ritesh until he turns 18 years old.

- **No right to inherit from father but has the right to inherit property from the mother's side such as:**
 - **Property of the mother – self-acquired and ancestral property.**
 - **Property of brothers and sisters (born to the same mother).**
 - **The mother can inherit from an illegitimate child but a father cannot inherit from an illegitimate child.**

What are the impediments to women accessing their property rights?

The law recognizes the equal rights of women to property. While the law is clear on women's right to property, there are several problems with the way society looks at the right to property of women:

- **Women themselves are very reluctant to ask their fathers and brothers for property because they feel it will disturb the harmony in the family.**
- **In the parents' home people feel that when a woman gets married dowry is given and that she is only entitled to that much and not any more.**
- **In her in-laws' house, she is often abused and misused upon the death of the husband and no property is given because she is seen as the outsider.**

What are the common questions that we hear regarding women's right to property?

Question 1: Is it true that a married woman has no right to her father's property? Women are often refused property because they were given money and gifts during marriage.

Answer: A woman is entitled to a share in her father's property just like her brothers. It does not matter if money and gifts were given at the time of her marriage.

Question 2: I am a widow and have nowhere to go. Do I have the right to stay in my in-laws' house or my father's house?

Answer: Mother, grandmother, unmarried/separated/divorced daughters, widowed daughter-in-law all have the right to live in the family house and they cannot be thrown out of the family home. A woman has the right to live in her in-laws' and her parents' home.

Question 3: What can a person do if her brothers or her in-laws are threatening to throw her out of the house?

Answer: The woman can approach the Court and ask for an order from the Court to protect her and to stop her from being thrown out of the house – this is called injunction.

Question 4: In many cases in-laws take away the jewellery of the woman saying it belongs to the family and then throw the woman out of the house. Is this correct?

Answer: Jewellery given to a woman is her *stridhan*. It is her personal property and no one else has any claim over it. All gifts and property given to a woman before her marriage, during her marriage and after her marriage are her *stridhan*; dowry given to a woman is also her *stridhan*. They are her personal property.

Question 5: Can a woman ask for partition of property?

Answer: A woman is considered as a coparcener in the ancestral property and therefore she has the right to ask for partition of the ancestral property.

Muslim Property Law

Muslim law in India is governed by mainly two schools of law. These are the Hanafi and the Shia School of Law. Muslim property rights are derived from these schools of law and are governed by relations to a male or female. Under Hanafi law only those will be considered heirs who are related to the deceased person through a male. Under Shia law, even those will be considered heirs who are related to the deceased person through a female. In India, the majority of Muslims are Sunni and therefore governed by the Hanafi school of law, while a small percentage are Shia and governed by the Shia school of law which is known as the Ithna Ashari Shiite School.¹¹⁴

HOW HAVE CUSTOMS CHANGED UNDER ISLAMIC LAW RELATING TO INHERITANCE?

BEFORE ISLAMIC REFORMS:

- Females could not inherit
- The nearest male agnates used to inherit property
- Descendants were preferred over parents and other ascendants

AFTER ISLAMIC REFORMS:

- Females are allowed to inherit land as the Koran introduced a new class of legal heirs constituting female and aged parents
- Husbands and wives have been made each other's legal heirs
- Parents and ascendants are entitled to inherit even in the presence of descendants
- Normally the share of the female is half of that of a male

What is succession of property?

Succession is the sequence in which one person after another succeeds an estate or title from a deceased person. Succession to property of a deceased person can either be testamentary or intestate.

- **Testamentary succession: The testamentary succession is called a legacy and takes place through a will.**
- **Intestate succession: Intestate is called inheritance where property is divided legally between the legal heirs of the deceased. Upon the death of a Muslim person, there are three instances in which the property is divided. In the first instance the property is used to pay off any debts or government dues that the person may have had as well as his funeral expenses. In the second instance, it is divided as per the will left behind by the deceased. In the third instance, the remaining property is called heritable property. This is inheritance.**

What is heritable property?

Heritable property is property which is available to the legal heirs for inheritance. The legality of the heirs is pre-decided by the Hanafi and the Shia law, depending upon their relationship to the deceased.

¹¹⁴ Mulla's Principles of Mohammedan Law (Hidayatullah and Hidayatullah), 2004 and The Muslim Law (Dr R K Sinha 1995).

Is there a birthright that Muslims enjoy to inheritance?

Unlike Hindu law, Muslim law does not recognize right by birth. There are various rules that need to be followed. Inheritance often depends upon the context of the situation. Different persons inherit different shares of property on pre-decided rules which focus on the degree of relation with the deceased person. There are also different categories of persons who will stand to inherit such as the 'residuaries' and 'distant kindred'. This will be explained further. Inheritance opens only after death and no Muslim may be an heir while the person is still living.

What is the doctrine of representation and does it exist in Muslim law?

As per this doctrine, the son of a pre-deceased son represents his father for purposes of inheritance.

Example:

A has two sons, R and F. R has one son I. F has one son T. F dies before his father. His father, A also dies. In such a case, T will represent F and will have the same share to property as F may have had if he was alive. Muslim law does not recognize this doctrine. So actually T will have no right in property. Under Muslim law the heir closer to the deceased excludes the heir who is more remotely related to the deceased.

How does succession of property happen?

Succession of property occurs through two means; Per Capita and Per Strips.

- **Per Capita succession: This means per head, the property will be divided equally amongst the number of heirs.**
- **Per Strips succession: This means that the several heirs belonging to different branches of the family will derive their share only from the amount of property that has been allotted to their branch of the family and not from the total amount of property left behind by the deceased.**

Does Muslim law recognize primogeniture?

Primogeniture is the principle under which the eldest son of the deceased enjoys certain privileges. Muslim law does not recognize the rule of primogeniture and all sons are treated equally. One exception to this rule is made under Shia law which states that the eldest son is entitled to inherit the garments, sword, ring and Koran of the father if he is of sound mind.

Do unborn children and step-children have a right to inheritance?

Step-children cannot inherit property of their step-parents. Step-parents can also not inherit property from their step-children. Consanguine¹¹⁵ and uterine¹¹⁶ children can inherit from each other. Unborn children do have inheritance rights depending on their relationship with the deceased and also providing they are born alive.

¹¹⁵ Children of one father and different mothers.

¹¹⁶ Children of one mother and different fathers.

Can a missing person's property be inherited?

As per Hanafi law it was said that a missing person would be considered dead only after he would have reached the age of 90 upon which his property

would be opened for inheritance. However, under Section 108 of the Indian Evidence Act, it was changed to presume that if a Muslim man has been missing for at least 7 years and if it could not be proved that he was alive, the person would be legally presumed to be dead and his property would be opened for inheritance.

What is 'escheat' and does it apply in Muslim law?

Escheat is the reverting of property to the State in case there are no legal heirs to the property. The State is considered the ultimate heir of every deceased person. Where a deceased person does not have any legal heirs under Muslim law, his properties are inherited by government through the process of escheat.

Can a Muslim person who is married under the Special Marriage Act, 1954 inherit under Muslim law?

When a Muslim person marries under the Special Marriage Act, 1954, his property will not be governed by Muslim law. It will be governed under the provisions of the Indian Succession Act, 1925.

PEOPLE WHO ARE EXCLUDED FROM INHERITING PROPERTY ARE:

- Any person who causes the death of another is excluded from inheritance. Under Hanafi law, this means death caused either wilfully or negligently. Under Shia law, this means death only where it has been caused intentionally.
- A person who is illegitimate cannot inherit the father's property but is entitled to inherit the mother's property, as well as properties of mother's relatives as long as they did not become relatives after she got married.¹¹⁷
- In certain parts of the country daughters are also excluded under local custom or some enactment. Eg. Amongst the Gujars and Bakerwals of Kashmir it is a custom that daughters cannot inherit land in the presence of any male descendant of the grandfather.

PEOPLE WHO ARE INCLUDED IN INHERITING PROPERTY ARE:

- People with physical deformities as well as those who are considered insane and immoral can inherit.
- In the words of the law, adulterous women can inherit.

Can an heir stand to inherit if either he/she or the deceased converted from Islam to another religion?

Under the Caste Disabilities Removal Act, 1850, renunciation of religion by an heir cannot be made grounds to disbar him/her from inheritance of property. A converted heir will continue to be governed by the Personal Laws under which he/she came before the conversion. So a person who ceases to be Muslim can still inherit from his/her Muslim relative. However, the religion of the deceased person is important because properties devolve under the Personal Law to which the propositus belonged just before his/her death.

¹¹⁷ *Bafatun v. Bilaiti Khanum*
(1903) 30 Cal 693.

Example:

In KP Chandrasekhar v. Govt of Mysore, the propositus converted to Islam from Hinduism before she died. The Hindu brother laid claim to the property but was denied it by the Courts because he was not an heir under Muslim personal law. Since the Hindu brother here was not the 'convert' he was not covered.

Do Muslim women in India have rights to property?

Under Muslim law in India, women are entitled to property. All schools of Islamic law recognize that women have a right to inheritance in immovable property, even though this is still unequal to the rights that Muslim men have. The share of the male is usually double that of the female. The justification has been made on the basis that the female heir is entitled to maintenance and *mehr* from her husband. Muslim women can gain property through mainly three means:

- **succession;**
- ***mehr* or dower; and**
- ***hiba* or gifts.**

THINGS TO REMEMBER IN MUSLIM INHERITANCE LAWS

- Inheritance is not a birthright and it opens only after death
- No distinction is made between movable and immovable property as well as ancestral and self-acquired property
- The concept of joint family is not known to Muslims. When a Muslim dies his property is inherited by legal heirs and it travels down from there. All properties, whether acquired by a Muslim himself or inherited by his ancestors, are regarded as an individual property and may be inherited by legal heirs¹¹⁸
- If all heirs claiming property are equally near in relation to the deceased they all have an equal right in the property
- A male takes double the share of the female
- A nearer heir excludes the remoter one
- The doctrine of representation is not recognized under Muslim Property Law
- Muslim Property Law does not recognize primogeniture

What are the main principles in Hanafi or Sunni Law of Inheritance?

Under Hanafi law of inheritance there are three classes of heirs. These are:

- **Sharers: Those who are entitled to a prescribed share of the inheritance. The sharers will get their prescribed share in the property after the funeral expenses, debts and legacies have been paid off. The share that each person gets depends on the context of the situation and the relation of each sharer to the propositus.¹¹⁹ Under Hanafi law the sharers have traditionally been male. However after the Islamic reforms, women too have been included as Koranic heirs though their share is usually half that of males.**
- **Residuaries: If there are no sharers or there has been a residue of property left after filling the share that the sharers are entitled to, then the remaining property or the whole property will be given to the residuaries. If there is residue left and there is no residuary, then the**

¹¹⁸ *Our Laws – Muslim Marriage Law and Right to Property, MARG 2004.*

¹¹⁹ *Propositus means a deceased whose property is subject of inheritance.*

residue is returned to the sharers. This is called 'return' or *radd*. Neither the husband nor the wife is entitled to the *radd* if there are any other heirs.

- Distant kindred: If there are no sharers or residuaries then the property is divided amongst distant kindred. These are again classified into four categories of people who are related to the deceased by blood.
- There are also successors who are unrelated by blood. These are:
 - Successor by contract: If there is a default in sharers, residuaries and distant kindred then the inheritance devolves upon the 'Successor by Contract'. This is a person who gains the right to inherit the property of the deceased on the consideration of an undertaking given by him to pay any fine or ransom to which the deceased may have become liable.
 - Acknowledged kinsmen: This is a person who is not related by blood but in whose favour the deceased made an acknowledgement of kinship, not through himself, but through another.
 - Universal legatee: This is a person to whom the deceased has left his whole property through a will.
- Escheat: On the failure of all heirs and successors that have been specified, the property of the deceased Sunni Muslim escheats to the government.
- Step-children: Step-children do not inherit from step-parents and vice versa.
- Illegitimate child: An illegitimate child is considered to be the child of its mother only and stands to inherit from the mother and her relatives. They can also inherit from the child. But it has been held that an illegitimate son cannot inherit from a legitimate son.
- Missing person: When a Muslim person has been missing for seven years the burden of proving that he is alive is on the person that affirms that the man is alive. This is when the persons who would naturally have heard of him when he was alive have not seen or heard from him in seven years.

¹²⁰ *Gender and Legal Rights in Landed Property in India*, Bina Agarwal. *Women Unlimited*, 1999, 37 – 38.

¹²¹ *Daughters were made Koranic heirs after the Islamic reforms in law.*

¹²² *The Hanafi School of law is based on the principle of inheritance travelling from male relatives of the deceased. This male relative is called the agnatic heir.*

RIGHTS OF MUSLIM WOMEN UNDER THE HANAFI SCHOOL OF LAW¹²⁰

- An only daughter will receive 1/2 of the deceased parents' estate, when there is no son, and can be excluded by no other heir. This is because she is a Koranic¹²¹ heir.
- If there are two or more daughters and no sons then they jointly get a 2/3 share which is divided equally between them.
- If there is a son, then the daughter ceases to be considered a Koranic heir and will now be considered an agnatic¹²² co-sharer, which means she will get only half of what the son gets.
- Sons and daughters can be excluded by no other heirs.
- Husbands and wives are considered Koranic heirs and they too can be excluded by no other heir.
- A widow will receive 1/4 or 1/8 of the share depending upon whether there is a child or a son's descendants. A widower will receive 1/2 or 1/4.
- If there is more than one widow then their collective share will be 1/8 of the total inheritance. This will have to be shared equally between all the widows.
- Consanguine and uterine sisters are considered Koranic heirs but can be excluded by male agnatic descendants and ascendants depending on the circumstances.

What are the main principles in Shia law of inheritance?

Under the Shia law of inheritance heirs are divided into two groups. These are:

- Heirs by consanguinity: **There are three classes of such heirs and inheritance has been prioritised as given below. These are:**
 - 1) Parents, children and other lineal descendents.¹²³
 - 2) Grandparents (True and False),¹²⁴ brothers and sisters and their descendents.
 - 3) Paternal and maternal uncles and aunts of the deceased and of his parents and grandparents.
- Heirs by marriage: **The husband or wife is never excluded from succession. The husband or the wife inherits property along with the nearest heirs who are related by blood. The wife usually gets half of what is entitled to the husband.**
- Categories of inheritors: **Unlike Hanafi, the heirs under Shia Law of Inheritance are divided under sharers and residuaries. They do not have a classification for distant kindred. There are nine sharers (husband, wife, father, mother, daughter, uterine brother, uterine sister, full sister,¹²⁵ consanguine sister). The remaining are the residuaries.**
- Distribution of property: **If the deceased leaves only one heir, then the heir gets all the succession. In the case of the heir being the wife, then as per older view, she is entitled only to 1/4 of the inheritance and the remaining will go to the government. In case the deceased leaves two or more heirs, the first step will be to assign the husband's or the wife's share. The remaining estate will be given to successors as per rules that have been laid down.**
- Doctrine of Return (*Radd*): **If there is a residue left and there are no residuaries, then the remaining inheritance is given to the sharers as per each one's share in the succession. The husband and wife are not entitled to a return or *radd*.**
- Escheat: **if there are no natural heirs, then the estate of the deceased escheats to the Government.**
- Eldest son: **The eldest son, if of sound mind, is exclusively entitled to the wearing of the father's apparel, his Koran, sword and ring.**
- Illegitimate child: **An illegitimate child does not inherit at all, even from his mother or her relations, nor do they inherit from him.**

¹²³ *Descendants are persons who belong to lower degrees than the propositus. Eg., son's son or son's son's son, or son's daughter.*

¹²⁴ *True grandparents are paternal or agnatic grandparents and false grandparents are maternal or cognate grandparents.*

¹²⁵ *A full sister or a full brother are brothers and sisters who have the same father and the same mother.*

¹²⁶ *Ibid n.118.*

RIGHTS OF MUSLIM WOMEN UNDER THE SHIA LAW OF SUCCESSION¹²⁶

- The outstanding difference between Hanafi and Shia Laws of Succession is that, under Shia law, no relative of the deceased male is excluded on the basis of their sex or because he or she is related to the deceased through a female.
- Males and females who are related to the deceased in an equal degree are placed on the same footing though women continue to inherit 1/2 of what the male gets.
- A childless widow is only entitled to 1/4 share in the value of trees and buildings standing on the husband's estate as well as in his movable property including debts due to him.

Wills under Muslim Law

The law on wills has evolved from the *Hedaya* and the *Fatwa Alamgiri*. These were composed in the 12th century and the 17th century. Every Muslim of sound mind and not a minor can dispose of his property by a will. The Indian Majorities Act IX of 1875 deems a person who has completed 18 years of age as a major. In the case of a minor whose person or property has a guardian appointed to it or whose property is under the supervision of a Court of Wards, then the Act states that the age of majority will be considered at 21. This Act supersedes Muslim Law which assumed majority at the age of 15.

How can wills be made under Muslim Law?

A will or *Vasiyat* can be made either verbally or in writing. This holds good as long as the intention of the testator¹²⁷ is sufficiently ascertained. A Muslim will which is in writing does not need to be signed or even if signed does not need to be attested. The reason for this is that wills can be made orally also. It is problematic to prove an oral will and it must be proven with utmost precision. The Court has to be able to infer for itself that the will is precise and the intentions of the testator are clear. The Court also needs to be satisfied with the contents of the directions given in the will.

Can a will be invalid?

A will can be invalid in the following circumstances:

- **A bequest made to a single heir is not valid unless consent has been given by other possible heirs after the death of the testator. If only one other possible heir consents and the rest do not, then only the share of the heir that consents may be included in the inheritance of the heir that has been named in the will. Neither inaction nor silence can be the basis of assuming consent.**¹²⁸
- **Under Shia law, a will made by a person who has then subsequently committed suicide will not be considered a valid will.**
- **A bequest to an unborn person is invalid but a bequest can be made to an unborn child provided that the child shall be born within six months of the date of the will.**
- **If the legatee¹²⁹ dies before the testator then the legacy will lapse.**
- **A bequest is not invalid if the thing that is to be bequeathed does not exist at the time of making the will. However, it should exist at the time of the death of the testator.**
- **Similarly if a conditional bequest has been made then the conditions are void. An alternative bequest is held to be valid.**

Example:

If the testator writes in his will that in case a son is born to him after his death then his property should go to him and in case the son dies then the property should be bequeathed to the son's son.

¹²⁷ *The testator is the person who is willing the property.*

¹²⁸ *Narunnissa v. Sheik Abdul Hamid AID 1987 Karnataka, 222.*

¹²⁹ *The legatee is the person who stands to inherit the legacy.*

Is there a limit to the amount of inheritance that can be bequeathed by a testator?

There is a limit to the amount of inheritance that can be bequeathed. A Muslim cannot dispose of more than a third of the surplus of his or her

estate that is left over after payment of funeral expenses and debts unless all the heirs consent to it. But if a Muslim woman has no blood relations and her husband would be the only heir, then she can will 2/3 of her property in his favour.¹³⁰

Can a bequest be revoked?

A bequest may be revoked either through expression which is oral or written. It can also be revoked through an implication. This means an act that holds that the bequest no longer stands.

Example:

If the testator has some land which he has bequeathed and then proceeded to build a house on the land, or he sells the land, then that bequest does not hold good any more.

A bequest can also be revoked if there is a subsequent bequest made which bequeaths the property to another person. However if there is a subsequent bequest made to another person of the same property in the same will then it will not be considered a revocation and property will be divided amongst both the legatees in equal shares.

Dower or mehr

Before the advent of Islam in Arabia, marriages amongst Muslims were contracted by a sort of purchase of the girl from her guardian. A man who wanted to marry a girl had to pay a certain amount of money to the guardian of the girl as a price for marrying the girl. This bride price could be paid in the form of property or money and was decided upon by the man and the guardian of the girl, right before the marriage. This form of marriage was called Ball Marriage in Islam. The price that was paid was termed as *mehr* or dower.

Additionally there was another type of marriage practiced at the time which was termed a Beena Marriage. The only difference here was that the price or compensation given was paid to the girl herself and not her guardian. This concept of dower or *mehr* has been retained in Islam and continues as a practice even today. Thus the practice of dower or *mehr* where a price for marriage is paid to the woman herself is the practice of dower in Islam today.

What is dower?

It is important to understand that dower as it is practiced today is not treated as a sale of the girl for a price. It is paid as a token of respect to the woman while marrying her. Thus *mehr* or dower is that sum of money or property which a Muslim wife is entitled to get from her husband as a token of respect towards her.

What is the importance of dower to a marriage?

Dower or *mehr* is extremely crucial to a marriage in Islam. It is a compulsory practice that cannot be ignored for a valid marriage. Thus under Muslim Law there cannot be a marriage without dower. The husband must

¹³⁰ *Our Law – Muslim Marriage Law and Right to Property, MARG 2004.*

pay something to the wife as a mark of respect towards her whether or not this has been decided before the marriage or not. If there is any agreement between husband and wife that the wife will not claim dower, such an agreement is void and the right to dower remains in spite of such an agreement. If the wife dies before the payment of the dower, then her legal representatives are entitled to the dower amount.

Once the right to dower has been vested it is never lost. Dower is so crucial to the marriage that even under the following circumstances a wife's right to dower is not lost:

- a. if she renounces Islam;
- b. commits suicide;
- c. commits adultery;
- d. commits the murder of her husband.

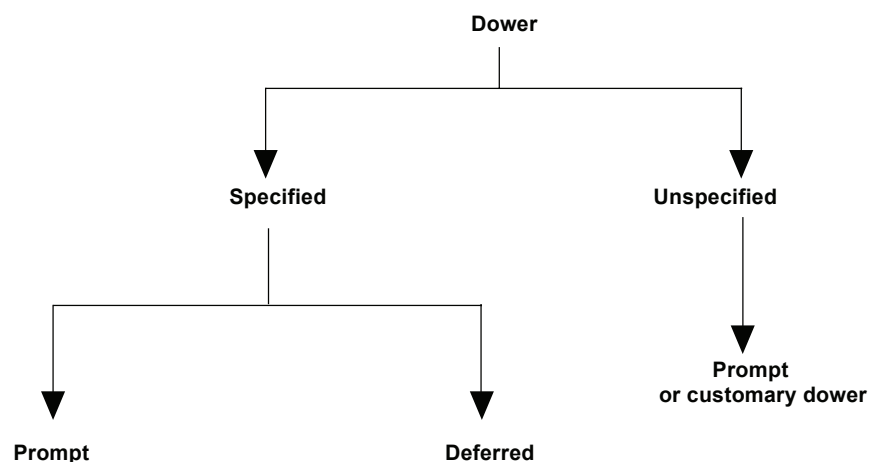
These are mere extreme offences used as examples. It is only to show that however heinous the crime may be the wife can never be denied her dower.

What is the purpose of the practice of dower?

The object of dower is not to put a price to the marriage between the man and woman. Dower has two important purposes:

- **Dower is the money or property given to the wife for her exclusive use. She has final claim over it and it is in her control. This means that a woman would have some amount of money of her own as security if ever the husband chooses to divorce her or she finds herself in need. She always has some amount of wealth to support herself.**
- **Dower also serves as a way to restrict the husband from pronouncing *talak* without valid reason. A particular type of dower called deferred dower, is that amount of money that has to be paid at the time of divorce. This deferred dower would restrict the husband from divorce. It may be noted that there is a common practice among Muslim families to fix the amount of dower extremely high so that he may not pronounce *talak* baselessly.**

This diagram explains clearly the different types of dower or *mehr*.



What are the different types of dower under Muslim Law?

Under Muslim law dower is classified based on two criteria:

- **Whether it has been fixed by the families of the bride and groom, or if it is determined by the operation of law.**
- **Whether the dower may be claimed by the wife at any time or if it can be claimed only upon the dissolution of marriage.**

If the dower has not been specified by the parties at the time of marriage, it is called unspecified or proper dower. Proper dower is fixed by the Court of law.¹³¹ When the dower is decided upon by the families of the bride and groom before the marriage itself, this is termed as specified dower.

If the dower is specified it may either be prompt or deferred. A prompt dower may be demanded by the wife any time after the marriage. Deferred dower can be demanded by her only upon the dissolution of marriage.

While the Court fixes proper dower, the following principles of law are taken into consideration:

- **The personal qualification of the wife;**
- **The social position of the wife's father;**
- **The custom or the tradition which prevails in the wife's paternal family in respect of the amount of dower, that is to say, the examples of dower which had been fixed earlier in the family. In determining the amount of dower, the custom which prevails in the wife's paternal family is an important consideration.**

Should dower be specified orally or in written form?

A dower may be settled either orally or may be specified in a written agreement (*mahrnama*). Sometimes the amount is simply referred to in the contract of marriage.

Who may fix the dower amount payable by the husband?

Dower amount may be fixed by the guardian. When the parties are sane and have attained puberty, they are competent to settle the amount of dower themselves. The dower amount may also be settled by the father or guardian on behalf of the minor boy.

What may be settled as dower?

Anything of value may be settled as dower. It may be a certain sum of money or a specific property. Any kind of property may be fixed as a dower. Money or property specified as dower must be in existence at the time of fixing the dower. If any property that does not exist is settled as a dower, the law shall presume that no dower has been fixed.

What is the amount of dower that is fixed?

Any sum of money or property of any valuation may be settled as specified dower. There is no maximum limit for it. Generally the common practice is to fix an excessive amount of dower. This acts as indirect control restricting the husband's right to pronounce *talak*.

¹³¹ *In the case of Hamira Bibi v. Zubaida Bibi, AIR 1916 PC 46, it was observed that dower is such an essential element of the status of marriage under Muslim law that when it is unspecified at the time the marriage is contracted, the law declares that it must be decided on based on defined principles. Thus the Court will determine it.*

Can the dower amount be changed subsequent to the marriage?

At any time after the marriage, the husband and wife may lawfully enter into a contract for increasing the amount of dower payable by the husband. That means to say that the dower amount fixed at the time of marriage may be increased subsequently and the wife is entitled to claim this additional or increased amount from the husband.

However the amount of specified dower can never be reduced by the husband after the marriage. But the wife may herself voluntarily agree to reduce the amount payable to her as dower from the husband. This is termed as voluntary remission of dower. This operates to reduce the dower amount payable after marriage. This is completely at the option of the wife.

When does dower become payable?

Specified dower may either be prompt or deferred.

- **Prompt dower means that the husband must pay the dower amount as soon as the wife makes a demand for it. The important elements of such prompt dower are:**
 - It may be demanded by the wife any time she likes, whether the consummation of the marriage has taken place or not.
 - As soon as it has been demanded by the wife, the husband must pay it promptly or immediately. If any delay is caused in the payment of the dower, the wife is entitled to get interest for the period during which the dower has been unpaid.
 - The wife may refuse consummation till the husband pays the prompt dower. This is provided the marriage has not already been consummated by then.
- **Deferred dower is that dower which is paid by the husband after the happening of some particular event. Deferred dower is payable under two circumstances:**
 - Upon the dissolution of the marriage. This may happen either by divorce or upon the death of the husband.
 - Upon the happening of a specified event previously agreed upon by the parties to the marriage. This is usually under the circumstance of *talak* taking place.

Although deferred dower becomes payable according to the above two provisions, the husband may pay the dower amount earlier as well.

Can the dower amount payable be forfeited by the wife?

The dower amount may or may not be enforced by the wife against her husband. She may decide not to claim her dower amount from the husband. This act is termed as remission of dower.

The wife may remit the whole or part of her specified dower. After a lawful remission, the husband is not legally required to pay that amount to the wife. However remission of dower by the wife must be lawful. It is lawful if the following conditions are fulfilled:

- **The wife must be an adult and sane at the time of remission of dower.**
- **The remission of dower by the wife must be made with her free consent. It must be made voluntarily without any threats or undue influence.**¹³²

¹³² *In the case of Nurannessa Khanum v. Khaje Mohammed Sakroo, (1919) 47 Cal 537, the widow remitted her dower while the dead body of her husband was still lying in front of her. It was held by the Court that the remission of dower was not valid because she was in great mental distress at the time and her consent was not free.*

RULES IN MUSLIM LAW TO BE APPLIED WHILE DOWER IS PAID

- **For a valid marriage**
- If the marriage has not been consummated, the wife is entitled to get only half of the amount specified. Where the dower is unspecified, she is entitled to get a nominal amount as decided by the Courts.
- If a marriage has not been consummated and is finally dissolved by either of the parties using their option of puberty, then nothing is paid as dower to the girl.
- If the marriage has been consummated, the wife is entitled to get the full amount of the specified dower.¹³³ Where the dower is unspecified, the wife is entitled to get the dower as prescribed by an order of the Court.
- **For an irregular marriage**
- In an irregular marriage, if the marriage has not been consummated, the wife is entitled to get nothing as dower.
- Where an irregular marriage has been consummated and the dower is specified, the wife is entitled to get either Specified Dower or the Proper Dower, whichever is less. But if the dower is unspecified in an irregular marriage, the proper dower is payable to the wife.

Remission of dower must be in writing

Remission of dower may be absolute or conditional. The remission of dower is conditional if the wife relinquishes her right to dower in return for something being done for her by the husband instead.

What are the rights of a woman when her dower is not paid by the husband?

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

¹³³ *Dower specified by the families before the marriage is contracted.*

Gift or *hiba*

What is gift under Muslim Law?

Gift is the gratuitous transfer of property between living persons. It is governed by the provisions of The Transfer of Property Act of 1882 when the gift is made by non-Muslims, and by Muslim Personal Law when the gift is made by Muslims.

Muslims refer to gift as *hiba*. Gift or *hiba* has been associated with religion and has also been included in the Shariat Act of 1937. It is regulated only by the provisions of Muslim Personal Law when the gift is made by Muslims.

Hiba is an unconditional transfer of ownership in an existing property made immediately and without consideration. Gift is a transfer of property by an action of parties and not by an operation of law.

Who are the persons involved in making a gift?

The parties to a gift are the donor and the donee. The donor is the person giving the gift and the donee the person receiving the gift.

Does a gift need to be made in writing?

A *hiba* may be made orally or in writing.¹³⁴ Under Muslim law registration and writing is not essential for a valid gift to be made.

What are the essential pre-requisites to making a valid gift under Muslim Law?

There must be free consent of the donor for a valid gift to be made. It must be made voluntarily and not under any threat or force. The donor must have complete understanding of what he/she is doing before the gift is made.

- **Competency of a donor:** The essential requirements for a competent donor are:
 - Must be an adult. He or she must be above 18 years of age.
 - Must be of sound mind.
 - Must be a Muslim in order for it to be a *hiba* and be governed by Muslim law.
- **Acceptance by the donee:** Acceptance of the gift is essential for it to be valid. Once a gift is made it must be accepted. Acceptance shows the intention of the donee to take the gift from the original owner and become the new owner of the property. Gift without acceptance is not valid and complete.

In order to be a competent donee the only essential requirement is that he or she must be alive at the time of the declaration of the gift. The donor may be a person of any religion, sex, age or state of mind.

An unborn child is a competent donee provided it is born alive within 6 months from the date on which the gift was made. It is absolutely necessary that the child be already conceived when the declaration of the gift is made. Otherwise the gift is completely void and cannot be made valid even if conception takes place at a later date and a living child is born subsequently.

¹³⁴ *Illahi Aamsuddin v. Jaitunbi Maqbul*, (1994) 5 SCC 476. In *Mohammed Hisabuddin v. Mohammed Hesamuddin*, AIR 1984 Guwahati 41, a Muslim woman made a gift of her immovable properties to her son. The gift was written on ordinary paper and not registered. The Guwahati High Court held that the gift was valid because under Muslim law writing and registration is not an essential condition for validity of the gift.

What does Muslim Law say about registration and attestation of the gift?

Registration of the gift is not compulsory under Muslim Law. The gift is valid even if the gift is not attested or registered. However, it is a common practice among Muslims in India to register their gifts, since this acts as a form of evidence of the gift being made.

What can be the subject matter of a valid gift?

Any kind of property which is owned by the donor, at the time of making the gift, can be the subject matter of a gift. It may be movable or immovable property. There are certain things which must be recognized and specified as well. They are:

- **Gift of future property, which is property not yet in existence, is not valid. One cannot make a gift of any kind of property that is not yet in existence at the time of making the gift.**

Example:

As a Muslim, I cannot make a valid gift today of a plot of land which I am going to own only next year.

- **A Muslim cannot make a valid *hiba* of property that he/she is going to inherit some time in the future.**

Example:

On the death of the father, the son will inherit some properties. However the son cannot make a gift of those properties, until he has actually inherited them, by the death of the father.

- **Gifts of debts due, tenancy rights, right to collect rents and other such actionable claims is allowed and valid in Muslim Law.**
- **Gift of insurance policy is not valid under Muslim Law because this would be a conditional gift which is not valid under Muslim Law.**
- **Gift of *mehr* or dower by the wife is allowed. However the gift of dower can be made only by the wife to the husband. Gift of *mehr* or dower to any other person is not valid. There are two rules important in Muslim Law with regard to gifting of *mehr* to the husband. They are:**
 - The wife may make a gift of dower to the husband, either revoked conditionally or unconditionally. If the gift is made conditionally then the gift will be withdrawn if the conditions are not fulfilled.
 - The gift of dower to a dead husband is also valid. It serves to remove the right of a widow to claim dower.

What is revocation of the gift?

Revocation of the gift means the gift is withdrawn and the donor does not want to make the gift anymore. Revocation of the gift is possible at any time, by mere declaration, before the delivery of possession of property of the gift. After delivery of possession of the property, the gift cannot be revoked by mere declaration.

However the gift may be invalidated by an order of the Court. The Court may declare the gift as invalid, on the grounds of mistake of fact, or that the consent of the donor was not free or any other sufficient cause. Thus a decree of the Court of law is essential to invalidate a gift. Without it the gift continues to be valid.

Under Shia Law, a gift may be revoked by mere declaration of withdrawal, even after delivery of possession of the gift.

There are however, certain gifts that are irrevocable and cannot be invalidated by the donor once made. A gift by a husband to a wife or wife to a husband cannot be revoked. However it is important to note that under Shia Law specifically, such a gift can be revoked by mere declaration.

Succession under the Indian Succession Act

A mix of customary law, state legislation and the general Indian Succession Act, 1929 governs succession to property among Christians in India. What law applies to a particular Christian community thus depends on the laws that have been passed by the respective state governments and union territories and the customary law in force at the time. The Indian Succession Act was passed in 1929 to bring about some uniformity in application of the law.

Thus, as far as property rights of Christians are concerned, only one legislation among the several others is considered here for the sake of clarity. In order to know what your rights are, it would be best to refer your matter to a lawyer who is well versed in dealing with property rights of Christians at your place of residence.

Note to the facilitator

Limitations of this section: Only devolution of property in the absence of a will or testament is discussed in this part of the manual. The section of the Indian Succession Act that talks about wills has been included in a separate section.

Who does the Indian Succession Act, 1925 (ISA) cover in its application?

The ISA is a secular law. As the law stands today, Christians, Jews and Parsis follow the Indian Succession Act, 1925. Hindus, Buddhists, Sikhs, Jains and Muslims are not governed by this law. As we have seen in earlier chapters, they are governed by the Hindu Succession Act, 1956 and the Muslim Law of Succession respectively. The ISA enumerates the law of intestate and testamentary succession governing Christians, Jews and Parsis and those marrying under the Special Marriage Act, 1954. However, two Hindus who choose to marry under the Special Marriage Act are governed by the Hindu Law of Succession and not by the ISA.

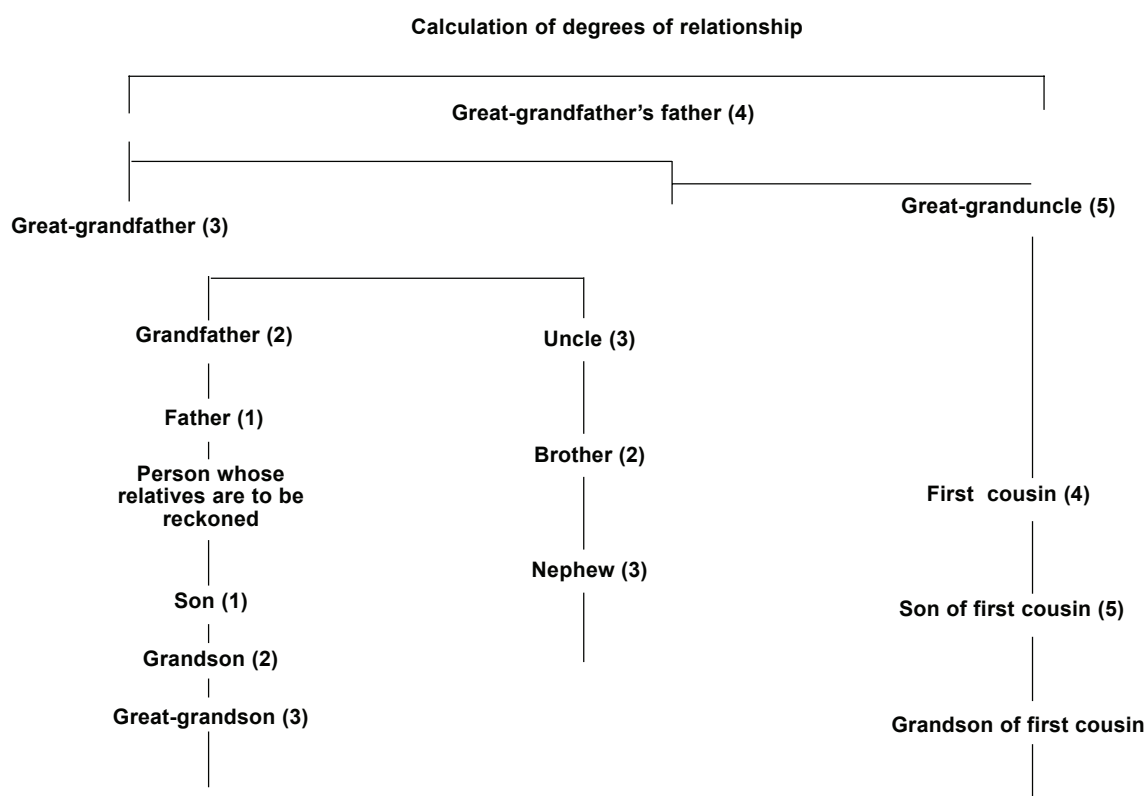
Important terms to remember before understanding the actual devolution:

- **Intestate: A person is called intestate in law when he or she dies without making a will. This means that his or her property devolves on his or her heirs according to the law laid down in the Indian Succession Act.**

As a principle, property of a particular person devolves on the person who is the nearest in relation to the deceased. Therefore, the farther the person is in relation to the dead person, less are his or her chances of claiming a portion of the property.

- **Consanguinity: A consanguine relation is a relation between two people who have descended from the same stock or a common ancestor. It is a blood relationship. There are two kinds of consanguinity; lineal consanguinity and collateral consanguinity.**

- **Lineal consanguinity:** Lineal consanguinity is a relation of persons who have descended from the common ancestor through a direct line from the other. Eg. Man, his father, his grandfather in the ascending line; or between a man, his son, his grandson in the descending line.
- **Collateral consanguinity:** Collateral consanguinity between two people is when one is related to the other from the same ancestor but not through a direct line. Eg., Man and his nephew.
- **Half blood relationship:** A half blood relationship is when a person is related to another through the same father but not the same mother.
Example:
Suman and Peter divorced in 2000. They had a son, Mohan. A year after their divorce, Peter married Geeta. They have a daughter, Isabella from this marriage. The relation between Mohan and Isabella is half blood relationship, since they have the same father but different mothers.
- **Full blood relationship:** A full blood relationship is where the children are born out of the same set of parents.
- **Uterine blood relation:** Two persons are considered to have a uterine blood relationship when they have the same mother but different fathers.
- **Degrees of relationship:** Below is a description of the mode of devolution and the share of claimants. Before the actual devolution is explained, one has to understand how the degrees of relationship are calculated under the ISA.



One can understand the following from the chart above:

- **The number within brackets is the number of degrees.**
- **Succession rights in favour of collaterals are recognized only up to six degrees of ascent plus descent, ie till the second cousins. Collateral relatives standing in remoter degrees are not entitled to succeed following this limit.**

Devolution of property under the Indian Succession Act, 1925

The following are the salient features of the legislation:

- **A uniform scheme of succession is provided irrespective of the sex of the intestate. There is no difference between:**
 - Those that are related through their father and those that are related through their mother.
 - The person related to the deceased by half blood and the one related to the deceased by full-blood.
 - Those that are actually alive at the time of the death of the intestate and that is in the womb but who is subsequently born alive.
 - All blood relatives whether full blood, half blood or uterine blood [Section 27 (b)].
- **Consanguinity is the determining factor for title to succession and relations by affinity are excluded by the list of heirs.**
- **The preference of succession is determined in terms of nearness in relation to the deceased. Accordingly, surviving spouse and lineal descendants are made the primary heirs. (Section 33).**
- **The only gender discriminatory provision is the exclusion of the mother in the presence of the father. (Sections 42 and 43).**

What are the most important aspects of devolution of property under the Indian Succession Act?

The three most important aspects of devolution of property under the Indian Succession Act that need to be remembered are the following:

- **The status of the widow.**
- **Devolution of property among lineal descendants.**
- **Devolution of property among collateral descendants.**

The status of the widow

Any property that devolves in the absence of a testament needs to consider primarily the share of the widow and only then the share of all others. As a rule of thumb, the widow gets a third of property under the Indian Succession Act. Only after setting aside the widow's share will the other descendants' share be calculated [Section 33(a)].

Devolution of property among lineal descendants

Sections 37-40 enumerate the rules for distribution of the property among the lineal descendants of a person who has died without writing a will.

It must be remembered always that in case of devolution of property to the lineal descendants (and the kindred), calculation has to be done keeping in mind the existence (or not) of the widow. The widow is entitled to the husband's property (and vice versa) before the lineal descendants and the kindred. Sections 37-40 lay down the rule keeping in mind this important consideration.

The property devolves according to the following order:

- **One-third of the property is kept aside for the widow (or the widower).**
- **The remaining two-thirds of the property is shared among the lineal descendants.**
- **From among the lineal descendants, the child or children of the deceased take equal share in the remaining property.**
- **If the deceased does not leave behind his/her children but leaves behind grandchildren, then all the grandchildren take his/her property in equal shares.**
- **If the deceased leaves behind descendants not in the same order - that is, if the deceased leaves behind children as well as grandchildren, then the property is first divided among the children in equal shares. The grandchildren then divide equally among themselves that share of the property which comes to the hands of their parent.**

Devolution of property where there are no lineal descendants

Sections 42 to 48 lay down the law of succession in case a person dies without a will leaving behind no lineal descendants.

The property devolves according to the following order:

- **One-third share in the deceased property goes to his widow.**
- **If the deceased is survived by his father, then after calculating the widow's share, rest of the property goes to his father to the exclusion of all others (Section 42).**
- **If however, the father of the deceased is not alive at the time of devolution, but his mother and siblings are alive (but not their children), then the mother and the siblings take equal shares (Section 43).**
- **If the father of the deceased is not alive at the time of devolution, but his mother and siblings are alive including their children (that is, the niece and nephew of the deceased) then the mother and the siblings take equal shares. The nieces and nephews divide the share of their parent equally among themselves (Section 44).**
- **If the deceased is survived only by his mother and no other descendants (eg. Father, brother, sister, niece, nephew), then the whole of the property will devolve on his mother (Section 46).**
- **If on the other hand, only the siblings of the deceased are alive to the exclusion of his father and mother, then the property is divided equally among the siblings (Section 47).**
- **If the deceased is not survived by either his lineal descendants or parent or siblings, then the property is divided among his relatives who are in the nearest degree of kindred to him (Section 48).**

Example:

Girish dies leaving behind him his grandparents and no other relatives standing in the same degree or nearer degree of kindred to him. The grandparents are related to him in the second degree and therefore will take the property in equal shares. They will exclude any of Girish's uncle or aunts who are related to him in the third degree.

Wills under the Indian Succession Act, 1925

The Indian Succession Act, 1925 governs the process of writing and making wills.

What is a will or a testament?

When a person decides to dispose of his or her property according to his or her desire and direction **through a written document**, it is called testamentary disposition of property and people gaining from that testament, are said to acquire property through testamentary succession.

A will is also called a testament and therefore a person making the will is usually called the **testator** in law.

There are four essential characteristics of a will. They are:

- **The document purporting to be a will must be a legal document properly executed and attested.**
- **The declaration should relate to the property of the testator which she or he wants to dispose of. For example, if the document contains no reference to the disposal of the property, but merely appoints a manager to manage the property, then it is not a will.**
- **The declaration as regards the disposal of the property of the testator must be intended to take effect after his or her death.**
- **The essence of every will is that it is revocable during the life-time of the testator.**

REMEMBER...

A person making a will cannot dispose of any property that he or she could not have disposed of through intestate succession. In other words property to which you have no legal ownership cannot be willed away.

What is a codicil?

A codicil means an instrument made in relation to a will. The functions of a codicil are:

- **To explain, alter or add to what is contained in the will and which is deemed to form part of the will.**
- **It is a supplement to a will or an addition made by the testator, and is usually annexed to the will. It is considered part of the will.**

Example:

Charles made a will with ten clauses in it. A year later, he wanted to make changes in the tenth clause. He has two options - (i) to make a fresh will, and (ii) to make a codicil to alter the clause in question and clarify in the codicil itself that the other nine clauses stand unaltered.

In the same manner, if Charles wants to add another clause to the already existing ten clauses, he can either make a fresh will with eleven clauses, and revoke the one made earlier or make a codicil containing only the new clause, clarifying that this clause is in addition to all the ten clauses of the will.

All the provisions of the Indian Succession Act, 1925 applying to the attestation, and execution etc. to the will also apply to codicils.

Who can make a will?

Section 59 of the Indian Succession Act 1925, speaks about the person who is capable of making a will. A person making a will must be:

- **Of sound mind;**
- **Above 18 years of age;**
- **Have the memory and intelligence to understand the extent of his/her property.**
- **For a will to be valid, the state of mind of the person is reckoned at the time of making the will, and not before or subsequent to.**
- **A woman can dispose of her property by will, which she could alienate by her own act during her life.**
- **A person who is deaf or dumb or blind can also make a will if he/she is able to understand the implications of the legal document he/she is preparing.**
- **A person who is not ordinarily insane can make a will during the interval in which he/she is of sound mind.**
- **A person cannot make a will while he/she is in an intoxicated state or is ill and because of either of these conditions, unable to understand the implications of such an act.**

A WILL IS VOID WHEN:

- A part or the entire will is caused by fraud, or coercion. Then it is a void document (Section 61 ISA).
- A bequest is made:
 - *On a condition that is impossible to perform;*
 - *For which the fulfilment of the condition is contrary to law.*

How does one prepare a will?

A will is usually written to pre-empt possible future souring of relations due to squabbling for a share of property and to ensure that property is transferred to certain people who are chosen by the testator. To ensure that there are no legal problems or questions raised on the validity of the will, it is advisable that certain standards be adhered to while writing a will. These are:

- **Always consult with a lawyer.**
 - Approach a lawyer for any assistance in writing a will and make sure that you write a will in the lawyer's presence.
 - If it is not possible to write a will in the presence of a lawyer, make sure you ask the lawyer to read through it to ensure compliance in law.
- **Use clear, simple and unambiguous language.**
- **The will should be in writing.**
 - There is no particular form of will prescribed in law. It is not necessary to use technical words. The intention of the maker of the will must be clear and it is therefore best to use simple language.

- A will need not be written on a stamp paper. It should be sufficient if it is written on a good quality, durable plain paper.
- **Registration and execution.**

Registration

Under the Indian Succession Act 1925, registration of a will is not compulsory. However there are certain advantages of registering a will.

The Indian Registration Act, 1908 is the legislation that deals with registration of the document under Section 17, but does not mention that a will has to be **necessarily** registered.

Once a will is registered under Section 17 of the Indian Registration Act, 1908:

- **The will cannot be ordinarily tampered with, stolen, damaged or mutilated.**
- **The record of the will is kept in the office of the Registrar and therefore in safe custody.**
- **Under Section 57(2) of the Registration Act, the will can be examined or a copy of the will taken only by the testator or her agent. It is only after the death of the testator that a certified copy of the will is given to any person applying for it.**

Execution

Execution of a will means to bring the will into force or carrying the will into effect. Section 63 of ISA lays down the formalities required to execute a will. In order to execute a will, it is important to sign and attest the document.

- **Signature**
 - The testator has to sign it or make a mark on it (e.g. a thumb impression) if he or she cannot write his or her name.
 - If the testator cannot fix her or his mark, then it should be signed by some other person in her or his presence and by her or his direction.
 - The signature or the mark has to be made in such a manner that it appears that it was intended to give effect to the writing as a will.
- **Attestation: Attestation means to affirm to be correct, true or genuine**
 - The will has to be attested by a minimum of two witnesses.
 - These two witnesses must be present while the testator signs the document.
 - The testator must personally acknowledge the signatures made by the witnesses.
 - No specific form of attestation is necessary for giving effect to the document as a will.
- **List of all properties and relatives**
 - A list should be made of testator's relatives who would be entitled to his/her properties on intestacy and to whom the bequests are proposed.
 - A list of all properties which remain after all debts and liabilities must be made, so that there is a clear idea of how to distribute the property.

- The name and address of the testator should be written.
- The name of the executor in the will should be clearly mentioned.

What are the consequences of executing a will?

Once a will is executed according to Section 63 of ISA, the following consequences follow:

- **It becomes a valid document capable of being enforced after the death of the testator.**
- **If any alteration or obliteration is made to the will before it is executed, it becomes part of the final will, but if alterations are made after the will is executed, such alterations do not have any effect on the execution of the will.**
- **Moreover, such an altered will is considered to be duly executed if the signature of the testator and the witnesses are put:**
 - in the margin or some other part of the will, opposite to or near such alteration; or
 - at the foot or end of or opposite to a Memorandum which refers to such alteration and is written at the end or some other part of the will.

Example:

Harry by his will, bequeaths Rs. 1,000 to Sarita. Later, he cancels Rs. 1,000 and writes Rs. 5,000 over it. This cancellation is neither signed by Harry nor attested by witnesses. The alteration is void, and the original bequest takes effect, i.e., Sarita will get Rs. 1,000.

Can a will once made be revoked? Under what circumstances is a will revocable?

To revoke a will is to withdraw the will or make it void. A will may be revoked under the following circumstances:

- **The marriage of the testator.**
- **Another will or codicil has been created.**
- **A person intends to revoke the will and gives it in writing.**
- **By the testator or by some other person in the testator's presence and directed by him/her burning, tearing, or destroying the will.**

Example:

Girish has made a will. Afterwards, in order to distribute his share of property in a different manner, he makes another will. This new will revokes the old one.

Can a will or codicil once revoked be revived?

Under Section 73 of ISA, once a person revokes a will, it cannot be revived again unless:

- **It is re-executed.**
- **An intention is shown to revive the will.**
- **A codicil is prepared reviving the will.**

What properties can be disposed of in a will and to what extent?

Under Section 59 of ISA, all those people to whom the ISA applies can make a will of the totality **of their property**¹³⁵ as there are no restrictions on the power of a person to make a will under this law. The Act has not placed any impediments or restrictions on their power to make a will of their property.

Ancestral and self-acquired property

As the law applies to Christians, the question may arise as to whether a Christian can dispose of his or her ancestral property or self-acquired property. The Indian Succession Act does not make a distinction between ancestral and self-acquired property. This means that a person cannot be denied her rightful share from the whole of the property that has been passed from one generation to another in the pretext of the property being either ancestral or self-acquired.

A person does not have the power to bequeath any property to religious or charitable uses, unless he or she has executed a will:

- **not less than twelve months before his/her death; and**
- **deposited the will in a safe custody within six months from its execution (Section 118 of ISA).**

What is probate? To whom is probate granted?

Probate means the copy of a will certified under the seal of a competent Court with a grant of administration to the estate of the testator. A probate is a document issued under the seal of the Court and under the signature of a proper official such as the District Judge or the Registrar of a Court.

According to Section 222 of ISA, a probate can be granted only to an executor appointed by the will. Also, a probate cannot be granted until after the expiry of seven clear days from the day of the testator's death.

Once a probate is granted it means:

- **The original will has been proved on a certain date.**
- **A certified copy of the will is attached to it.**
- **It is conclusive as to the appointment of the executor.**
- **It is also conclusive as to the validity and contents of the will.**
- **However, it does not confer upon the executor any title to property.**

The grant and the copy of the will together are called the probate. Without the copy of the will attached, it is not a probate.

¹³⁵ *The following properties generally form the subject matter of a will: Annuity, belongings, books, car, business, debts, estate, furniture including paintings, household goods and income including dividends and shares, jewellery, land, money.*

Effect of grant of probate

Sections 272 and 273 of ISA speak of the consequences of grant of probate:

- **It is conclusive evidence of the capacity of the testator to make the will and the fact and validity of the will. Thus, when once a**

probate is granted, no suit can be filed for a declaration that the testator was not of sound mind.

When the testator dies, questions may arise as to the authenticity of the will. For example, relatives claiming through the testator may allege forgery of the attestations, fraud, duress or the sound state of mind of the testator. It therefore becomes necessary to prove that the will is genuine. A will has to be proved by the propounder (who wants the will to be considered) according to Sections 67 and 68 of the Indian Evidence Act. He or she, who produces the will before the Court and wants the Court to rely upon the same, has to prove that:

- The will in question is the legal declaration of the intention of the deceased;
- The testator when executing the will was in a sound disposing state of mind; and
- The testator had executed the will of his own free will and was not pressurised by someone else when he executed the will.
- The signatures on the document made by the witnesses are genuine or the document which has been written by the testator is also genuine. This can be proved for example by calling a person who signed the document, or calling the person in whose presence the document was signed or written or by calling a handwriting expert.
- Since attestation of the document is a legal formality under Section 63 ISA, one of the attesting witnesses may be called to prove the execution of the document.
- If a will is already registered under Section 15 of the Indian Registration Act, 1908, then the Court does not have to call the attesting witness to prove execution.
- It is a conclusive fact of the genuineness of the will and the appointment of the executor.

What are letters of administration?

In case a person with property dies without making a will or having made the will, does not name the executor, a Court having jurisdiction to grant probate (the district Court) will grant to the proper person an authority called **letters of administration** by which the grantees, the administrator acquires all the powers similar to those of the executor under Section 217 of ISA.

If a Christian has died intestate, then all those people connected with him either by marriage or consanguinity are entitled to obtain letters of administration of his or her estate.

Section 219 of ISA enumerates the class of people who may be granted letters of administration by the Court in the following order:

- **The widow of the deceased unless she is disqualified (lunacy, adultery). The widower has the same right of administration of her estate as the widow has in respect of his estate.**
- **Person who would be 'beneficially interested' in the estate. If the mother of the deceased were alive, she would exclude all other relatives to administer the estate.**
- **Those who stand in equal degree of kindred to the deceased.**
- **A creditor if no person connected to the deceased by marriage or consanguinity is alive.**

WOMEN AND PROPERTY RIGHTS: WORKSHOP METHODOLOGY

Note to the facilitator

The facilitator may find that conducting a session on property rights is vast and complex. In order to make the sessions relevant to the group, the facilitator should discuss the rights of women and the law in the context of real life situations and problems faced by women in the community. The legal information section will provide necessary inputs to prepare for these sessions. It could be useful also to include a lawyer or a revenue officer from the area to be a resource person to address specific legal issues raised by the group. The facilitator must remember that since property laws are based on religion it will not be possible to cover all laws in a short session. The facilitator is therefore encouraged to pick the sessions relevant to the group and do them first.

The facilitator must also remember that there are two aspects to property law - one is the succession and the other the practical aspect of registration and title. The process for registration of property and the systems followed to establish title, etc. vary from state to state. A facilitator conducting a session on property laws must remember this and must be familiar with these processes. The assistance of a lawyer may be sought to answer questions since procedural law is also involved in property matters.

This session is a general introduction to property rights. The basic idea is to get the group to start thinking about access to property and what it means for women. The facilitator must encourage the group to analyse and reason why accessing property rights is a challenge for women. The group should be encouraged to share experiences that they have or have heard of. This should be followed by an explanation of the property law that is being addressed.

EXERCISE 6.1

Title: What is property?

Purpose: To understand what is meant by the term property

Time: 30 minutes

Materials needed: Whiteboard and markers, chart paper and pens

Steps:

- The facilitator should open the discussion with participants and note down the main comments on the board or chart paper.
- The facilitator may guide the discussion by using the following questions:
 - What is property?
 - How do you know that something belongs to you? What does one mean when one says "I own this property" or that "This property is in my possession"? Is there a difference between these two sentences?
 - Do you own any property? If yes, can you give some examples? If no, why not? What do you think are the reasons you do not have property?
 - Do women have a right to property?
 - Why is property important, especially for women? Will having property make a difference to the status of a woman in the family and community?
 - How can you acquire property? (Eg. purchase, succession, gift, etc)
 - In India, is it easy for woman to own property? Even when they own property do they have control over property?
- It would help for a discussion on law if the following five questions are answered in this step.

Column I

What is property?

Column II

Who owns property in your family?

Column III

Give examples of the kind of property owned by any/all members in your family.

Column IV

Do women have an *effective right* in the property they own? Why not?

Column V

Do women have a legal right to property? By what practical steps can they enforce their legal right?

PROPERTY LAWS IN INDIA:

- A. The Hindu Succession Act, 1956 – applicable to Hindus, Jains, Buddhist, Sikhs.
- B. The Indian Succession Act, 1925 – applicable to Christians and people married under the Special Marriage Act.
- C. Muslim Law of Inheritance – applicable to Muslims.

The law of wills.

EXERCISE 6.2

Title: Property Laws in India

Purpose: To understand the various property laws in India

Time: 60 minutes

Materials needed: Legal information on property laws, case studies, whiteboard and markers

Steps:

- The steps followed here can be repeated for the Hindu Succession Act 1956, Indian Succession Act, 1925 and Muslim Laws of Inheritance.
- The facilitator should use case studies to explain the laws. Examples of cases studies are given below.
- Use the legal information section to address the questions in the cases studies.
- This can be done in the form of group work, by giving cases to the participants and a copy of the law.
- Presentations will be made to the larger group and the facilitator will clarify the law. It is important that the facilitator have a property lawyer who is aware of these laws present to assist her.

Case Studies for Hindu Succession Act, 1956

Case Study 1:

Geeta is an unmarried woman and lives with her mother, her brother Suresh and his wife, Rani. Her father used to work in a government office and died of a heart attack suddenly six months ago. The family owns the house in which they live and also ancestral property in the village. Geeta's father died without making a will.

- Do Geeta and her mother have a right to property?

- What is their right? What is their share in the property?
- If Geeta were married, would the situation have been different?
- Assume Geeta is married and has been abused by her husband. She leaves her husband's home and comes to live with her family. As long as her father was alive things were fine in the family. But now, Suresh and Rani want to live independently and want Geeta and her mother to move out of the house. What can Geeta do in this situation?
- If Geeta has a right in the property, what are the challenges Geeta will face in securing the property?

Case Study 2:

Reena was married to Ramesh and they lived in a joint family with Ramesh's parents and brothers. Ramesh used to work as a driver in a factory. Ramesh died in a car accident a year ago when their son was 10 and daughter was 12 years old. Reena has been hearing conversations in the house about selling the family property. She is worried about her future since she does not know if her in-laws will give her or her children any property.

- What are Reena's and her children's rights to the family property?
- What can Reena do to secure these rights?
- What can Reena do if her in-laws refuse to provide for her and her children?
- In addition to the family property, do Reena and her children have the right to any other property?

Case Study for Indian Succession Act, 1925

Case Study 3:

Lisa's husband Daniel, passed away without creating a will. Daniel had a lot of rubber plantations. He has two brothers who have been vying for his property. Lisa is worried that they will take away the property from her. She has a three year old daughter, Rachel.

- What share of property is Lisa entitled to under the Indian Succession Act, 1925?

Case Study for devolution of property under Muslim Laws on Property

Case Study 4:

Mumtaz and Mehtab are brother and sister. Their parents Rafiq and Tabassum, recently passed away in an accident. There was no will left behind. Mumtaz is 30 and Rafiq is 29. Rafiq is married with one daughter. Mumtaz is also married with one son.

- How will the property be divided between Rafiq and Mumtaz?
- Are Mumtaz's and Rafiq's children entitled to any share in property? When will they be able to claim it?

EXERCISE 6.3

Title: How to write a will

Purpose: To understand the main components of a valid will or testament

Time: 45 minutes

Materials needed: Whiteboard and markers, chart paper and pens

Steps:

- Ask participants what they understand by a will.
- Divide them into 2-3 groups, depending on the numbers, and ask them to draft a will.
- Once the groups are ready, ask them to present the will to the larger group.
- Compare the will drafted by the group to a legally valid will and point out the common mistakes people make when they draft wills.
- Lead a discussion on the law of wills which answers the following questions:
 - What is a valid will?
 - Does a will necessarily have to be written on a stamp paper?
 - What precautions should a person take while making a will?
 - Should a will be registered? What are the benefits of registration?
 - Can a will be changed?
 - How can a will be enforced? What must a person do to give effect to a will?
 - Can a will be challenged?

Note to the facilitator

The facilitator should have a discussion on enforcement of property rights. This discussion should be linked to the first step where the participants identified the challenges that women face in securing their right to property. In leading the discussion the facilitator must encourage the group to analyse the specific problems and try and find solutions for them.

Question: It is not possible for a woman to file a case in Court because she has no money and the cases take very long to be resolved.

The facilitator's response could be, "It is true the Court process in civil cases takes a very long time, so is there any other way? Can the woman try to negotiate a family

settlement that will secure her rights? Family arrangements are valid in law. An agreement can be signed based on the rights of each of the parties and the woman can be given her due share and the property can be registered as per the arrangement."

Question: If the family cannot come to any settlement and the woman is not able to negotiate herself, what can she do?

Get the group to talk about collective action. Can a women's collective or a local NGO or a mediator who the woman is comfortable with help her secure her rightful share? If nothing works, the ultimate is to go to Court.

Note to the facilitator

This is a session that will raise many questions from the participants like those listed below. It may be useful to identify a good lawyer to participate at the end of the session to answer these specific questions:

- **When can a person ask for partition of property?**
- **What documents are important in order to prove title to the property?**
- **Is registration of property after partition important?**
- **Is it difficult for women to control property that legally belongs to them? What are ways in which this can be avoided? What precautionary measures can one take?**
- **Who is a nominee? What rights to property does the nominee have?**
- **Are illegitimate children allowed a share in parents' property?**

Action Points

Ask the group to look at the list of reasons they put down as being a bar on accessing the right to property and get them to come up with practical solutions that they can implement in their own lives in order to overcome these.

Glossary

Accused person	a person accused of having committed an offence is called the accused person.
Affinity	means nearness which is created through marriage.
Aggrieved person	as defined under the Protection of Women from Domestic Violence Act, 2005, is any woman who is, or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.
Agnate	refers to two people who are related by blood or adoption wholly through males.
Akshaya Truthya	is one of the most auspicious days in the Hindu calendar and occurs sometime in April-May each year. It is believed that ventures initiated on this day will be successful and several marriages, particularly mass marriages, are undertaken on this day. It is also a day when child marriages take place.
Anticipatory bail	means bail in anticipation of arrest. When a person accused of a crime believes that he/she may be arrested, the person can file for bail in anticipation of arrest under Section 438 of CrPC. If the person is granted anticipatory bail by the Court it means that the person cannot be arrested by the Police, but the person can be called for investigation.
Appeal	is an application made to a higher Court against the order of a lower Court.
Bail	means the release of a person from custody or prison upon security given for the person's appearance in Court on an appointed date or upon an undertaking given by sureties to produce the person in Court on such a date.
Bailable offence	is a type of offence. If a person has been arrested for a bailable offence that person is entitled to bail as a matter of right. There is no need to file an application before the court for bail; the Police can give bail in case of a bailable offence.

Balance of probabilities

is the burden of proof that needs to be satisfied in civil cases. The lawyer has to prove that on the basis of facts and circumstances it is more likely than not that a wrong has happened or a right violated.

Ball marriage

before the advent of Islam in Arabia, a man who wanted to marry a girl had to pay a bride price in the form of property or money to her guardian. This form of marriage was called *Ball* Marriage in Islam. The price that was paid was termed *mehr* or dower.

Batil

is a void marriage, contracted in violation of some of the conditions necessary for a valid Muslim marriage.

Beena marriage

before the advent of Islam in Arabia, a man who wanted to marry a girl had to pay a bride price in the form of property or money to the girl herself and not her guardian. This concept of dower or *mehr* has been retained in Islam and continues as a practice even today.

Bequest

is the disposition of property by a will.

Beyond reasonable doubt

is the burden of proof that has to be satisfied in a criminal case. The prosecuting lawyer should prove to the Court that there is absolutely no doubt that only the accused committed the crime.

CEDAW

Convention on the Elimination of All Forms of Discrimination Against Women.

Certiorari

is an order issued by the Supreme Court or the High Court to quash the orders passed by a lower Court that violates fundamental rights.

Charge sheet

is the final report of the Police filed before the Criminal Court after investigation of a crime if the Police find sufficient evidence against the accused person.

Civil law

deals with matters such as rights of people, property, marriage, tax, etc. There are separate Courts to deal with civil matters.

Codicil

is a supplement or addition to a will that explains, modifies, or revokes a previous will provision or that adds an additional provision. A codicil must be signed and witnessed with the same formalities as those used in the preparation of the will. It is considered part of the will.

Cognate	is a relation between two people either by blood or adoption but not through males.	Defense witness	is one whom the accused person along with his/her lawyer will rely upon to build their defense.
Cognizable offence	is one in which the Police can arrest a person without a warrant merely upon suspicion of having committed a crime.	Deferred dower	in a Muslim marriage, is payable by the man to his wife on dissolution of marriage upon death of the husband or by divorce.
Collateral	between two people is when one is consanguinity related to the other from the same ancestor but not through a direct line. Eg., Man and his nephew.	Directive Principles of state policy	aim at establishing economic and social democracy and it is the duty of the State to follow these principles when making laws.
Compoundable offence	is an offence where the accused person can compensate or repay the amount of the damage done to the victim once the offence has been proved to be committed.	Domestic relationship	is a relationship between two persons who live or have, at any point in time, lived together in the shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.
Consanguinity	a relation between two people who have descended from the same stock or a common ancestor. It is a blood relationship. There are two kinds of consanguinity - lineal consanguinity and collateral consanguinity.	Dower	is that sum of money or property which a Muslim wife is entitled to get from her husband as a token of respect towards her and is for her exclusive use.
Contested divorce	where one spouse has to prove a matrimonial wrong on the part of the other in order to get a divorce.	Divorce	is the dissolution of the legal relationship of marriage where the spouses will cease to be husband and wife.
Coparcener	has a share by birth in the property of a joint family. This share is not a quantified one but changes with births and deaths within the joint family. Every coparcener has the right to be in joint possession and enjoyment of joint family property.	Dowry	means any property or valuable security given or agreed that it will be given by one party to another party to the marriage, either directly or indirectly, before, at the time of or after the marriage.
CRC	Convention on the Rights of the Child.	Examination-in-chief	is the examination or the questioning of the prosecution witnesses and the defense witnesses.
Criminal law	deals with crimes and punishments. There are separate Courts to deal with criminal cases.	Executor	is the person appointed by the father to act as guardian of the minor child on his behalf.
Cross examination	is the cross questioning or examination of the witnesses whose examination-in-chief has already been conducted in Court. The cross examination is done by the opposite party's lawyer.	Fasid	is an irregular Muslim marriage contracted in violation of some conditions.
De-facto guardian	is one who is neither a legal guardian nor a testamentary guardian or statutory guardian but has himself/herself assumed the custody and care of a child.	Final report	during investigation, if it is found that there is no case, which is made out against the accused person and no material to show the involvement of the accused in the case, the investigating officer files a 'B' report which is called the Final report in Court.
Decree	is a final order passed by a Court.		
Defense lawyer	is a criminal lawyer who represents the accused person.		

FIR	means the first information report which is given by any person to the Police regarding an offence which has been committed. Upon the basis of this information, the Police can begin investigation. An FIR can be registered only in the case of a cognizable offence.	Ijab	or proposal must be made by or on behalf of one of the parties to the marriage in a Muslim wedding.
Foeticide	is the act of deliberately destroying a foetus.	Infanticide	the act of killing of an infant; the practice of killing a newborn infant.
Full blood relationship	is a relationship where the children are born out of the same set of parents.	Injunction	is a stop order passed by the Court to prevent any person from doing any act or action. It is a civil law remedy.
Fundamental Rights	are certain basic rights laid down in the Constitution, which all individuals need, to live with dignity. They are rights which cannot be alienated from an individual as they are necessary for survival.	Intestate	if a person dies without making a will. This means the property of the person will go to his/her heirs as per the law.
Gram panchayat	local government at the village level in India.	JC	means judicial custody, where the person arrested stays in a state run prison and the jail warden is the custodian of the prisoner or the person under trial.
Guardianship	means proprietary rights of an individual over his/her child.	Judicial separation	in a marriage, is when either party or both parties discontinue living with each other despite being legally married. This is technically called judicial separation.
Habeas Corpus	means, 'produce the body'. Through this writ the Court asks that a person be produced before the Court and explain why he was kept in illegal detention or is missing.	Khul	is a divorce by consent in a Muslim marriage at the instance of the wife and she agrees to give a consideration out of her property to the husband for the divorce. The consideration is mostly a part or whole of the <i>mehr</i> .
Half blood relationship	is a relationship when a person is related to another through the same father but not the same mother.	Kitabiya	Christian or Jew.
Hiba or gift	is the gratuitous transfer of property between living persons. It is governed by the provisions of The Transfer of Property Act of 1882 when the gift is made by non-Muslims, and by Muslim Personal Law when the gift is made by Muslims. Muslims refer to gift as <i>hiba</i> .	Legacy	is the testamentary succession and takes place through a will.
ICCPR	International Covenant on Civil and Political Rights.	Lineal consanguinity	is a relation of persons who have descended from the common ancestor through a direct line from the other. Eg. man, his father, his grandfather in the ascending line; or between a man, his son, his grandson in the descending line.
ICESR	International Covenant on Economic, Social and Cultural Rights.	Mandamus	is an order which a Court can issue to any public or Governmental authority to do a specific act in order to protect a person's fundamental rights or not to do something which could take away a person's fundamental rights.
Iddat	is an Arabic word and its literal meaning is 'counting'. Counting means the days of possible conception to ascertain whether a woman is pregnant or not. Under the Muslim law it is the period during which a woman is prohibited from re-marrying after the dissolution of marriage.	Mehr	is that sum of money or property which a Muslim wife is entitled to get from her husband as a token of respect towards her and is for her exclusive use.

Mubara'at	is divorce by mutual consent in a Muslim marriage where both the husband and wife desire dissolution.	Parivarik Mahila Lok Adalat	is an alternative justice delivery system which ensures speedy access to justice. The National Commission for Women the <i>Adalat</i> which provides out-of-Court settlement of disputes brought to Court by women.
Muta	is a temporary marriage recognised only among Shia Muslims. The duration of the marriage is fixed by agreement between the parties.	Patriarchy	literally means 'the rule of the father'. Patriarchy is derived from the unequal distribution of resources and control over them, based on male lineage.
Mutual consent divorce	where both the parties state that it is impossible to continue to live together and mutually opt out of the marriage.	Pendente Lite	is a term that means 'while the case is pending'. The term is commonly used for Court orders or legal agreements that have been entered into while a legal case, like divorce, is still pending in Court.
Nari adalat	is a community based alternate dispute resolution mechanism supported by Mahila Samakhya run by women for women. It is a forum where women can seek justice and mediation and negotiation support.	Per Capita succession	means per head, the property will be divided equally amongst the number of heirs.
Natural guardian	is a person who has a legal right to control and supervise the activities of the child. The father is recognized as the natural guardian of the child under all the schools of Muslim law.	Personal Laws	is a distinct set of laws that reflect the different religious laws, customs and traditions of the community to which the laws in question applies.
Nikahnama	is the document on which a Muslim marriage, which is a solemn contract between a man and a woman, is recorded.	Per Strips succession	means that the several heirs belonging to different branches of the family will derive their share only from the amount of property that has been allotted to their branch of the family and not from the total amount of property left behind by the deceased.
Non-bailable offence	is an offence for which the person who has been arrested, is not entitled to bail as a matter of right. The person can apply to the criminal Court for bail and the Judge may grant or refuse bail. An offence such as causing grievous hurt is a non-bailable offence.	Phera	is the circumambulation around the sacred fire during the <i>saptapadi</i> ritual in a Hindu marriage.
Non-cognizable offence	is one in which the Police officer cannot arrest any person without a warrant.	Precedents	are judicial decisions, particularly the decisions of the High Courts and the Supreme Court. Once a matter is decided by a higher Court, it binds lower Courts as 'precedent' of the Supreme Court. It becomes a precedent for all subsequent cases on the same issue, till such time as the Supreme Court changes its decision in a future case.
Non-cognizable report	is a report to the Police detailing facts of an offence likely to be committed or has been committed but the person making the NCR does not want the Police to take any immediate action.	Primogeniture	is the principle under which the eldest son of the deceased enjoys certain privileges.
Non-compoundable offence	is one where the victim cannot be compensated for committing the offence. This happens because the offence committed is serious or grave in nature, for example rape and murder.	Procedural law	refers to the various procedural matters which allow one to enforce or implement or protect substantive laws.
Option of puberty	is the option of a minor on attaining puberty to repudiate (reject) a marriage contracted for him or her by any guardian during minority.	Probate	means the copy of a will certified under the seal of a competent Court with a grant of administration to the estate of the testator.
Panchnama	is the seizure-list, which is to be signed by the witnesses.		

Prohibition	is an order from a higher Court to a lower Court stopping the lower Court from taking up a case which it has no power to take up and which affects a person's fundamental rights.	Sahih	in Muslim law is a valid marriage – a marriage contracted by observing all the conditions of a Muslim marriage.
Prompt dower	is payable by a Muslim man to his wife on demand.	Sanskara	refers to a sacred ceremony relating to a Hindu marriage.
Propositus	is a deceased person whose property is the subject of inheritance.	Sapinda	with reference to any person, extends as far as the third generation (inclusive of the person) in the line of ascent through the mother, and the fifth generation (inclusive of the person) in the line of ascent through the father. The line is traced upwards in each case from the person concerned, who is to be counted as the first generation.
Prosecution witness	is a witness who appears for the prosecution to support the case against the accused.	Saptapadi	is a rite in Hindu marriage which involves the bride and groom circumambulating the sacred fire while reciting significant vows/ invocations with each circumambulation.
Public Interest Petition	can be filed by any person on behalf of another or others who are not in a position to approach the Court directly. Over the past several years, a number of public interest litigations have resulted in the recognition of a number of important human rights.	Sex ratio	is the ratio of the number of women to every 1,000 men.
Public prosecutor	is the person who appears on behalf of the State and represents the complainant before the Court in a criminal case.	Sindhuvani Mahila Salaha Kendra	legal counselling centres for women set up and run by Mahila Samakhya in Karnataka.
Qabul	is the acceptance of the proposal of marriage in a Muslim marriage.	Special Public Prosecutor	is an advocate who has certain specified years of practice and specific experience and area of expertise who is appointed by a District Collector on behalf of the complainant in a criminal case owing to his/her experience and expertise in a specified area of law.
Remand	means to send back or recommit.	Socialisation process	means the modification from infancy of an individual's behaviour to conform to demands of social life and adhere to roles set for women and men by social constructs and these beliefs of the roles of men and women are learned and not inherent to male or female identities.
Repudiation of marriage	is a process by which a woman who was married before she turned 15 years of age can, before she turns 18, ask that the marriage be nullified by making an application to the Court.	Specified dower	is when the dower is decided upon by the families of the bride and groom before the marriage itself.
Restitution of conjugal rights	is a petition filed in Court by one spouse, seeking resumption of cohabitation.	Standard of proof	means the standard or the yardstick on the basis of which a case is decided in Court. The standard of proof in a criminal case is 'beyond reasonable doubt' and in a civil case the standard of proof is 'on a balance of probabilities'.
Respondent	is any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief, under the Protection of Women from Domestic Violence Act, 2005. In general civil laws, a respondent is the opposite party in Court.		
Revision	is an application, which seeks to revise any final order passed by a Court. It is filed to challenge the orders passed by any lower Court and to find out if the orders passed by the lower Court was correct or not.		

State	when it comes to determining who can violate fundamental rights, the State includes the Government, the Parliament of India and the Government and Legislature of all States in the country. Since India is a large country, various Departments and Ministries run the working of the country and it is these departments and ministries that are known as the Government.	Testamentary	testamentary succession is called a legacy and takes place through a will.
Stridhan	is property given to or for the daughter voluntarily at the time of marriage or any property which the wife owns prior to her marriage and is brought into the matrimonial house.	Testamentary guardian	is the person appointed as guardian of a minor by a father or, in his absence, grandfather under a will in Muslim law.
Substantive law	refers to the policy decisions, the rights and obligations that the legislature casts upon people and government.	Testator	is the person who is willing the property.
Summons	is an order sent by the Court directing the accused person or a witness to appear before the Court on the date of hearing in a criminal case.	Tuhr	is the period between two successive menstruations.
Summons case	is a case relating to an offence not being a warrant case. In this case, the Magistrate issues summons for the attendance of the accused in Court.	Uterine blood relation	is a relationship between two persons who have the same mother but different fathers.
Suo moto	upon one's own initiative.	Quo Warranto	is an order asking someone to show that he has a right to be in a high public position. By this writ we can ensure that no one takes up a public office without being legally entitled to it.
Talak	in a Muslim marriage means 'taking off of the marriage tie by appropriate means'.	Visitation rights	when custody of the child is given to one of the parents, the other parent usually gets the right to visit the child. This is called visitation rights.
Talak ahsun	is done by a single pronouncement of divorce (<i>talak</i>) during a <i>tuhr</i> followed by the observation of <i>iddat</i> .	Void marriage	does not exist in the eyes of law. It does not confer the status of husband and wife on the parties. Therefore they get no rights and no obligations from such a marriage.
Talak hasun	this consists of three pronouncements of <i>talak</i> made during successive <i>tuhrs</i> , with no intercourse taking place during the three <i>tuhrs</i> .	Voidable marriage	is treated as a valid marriage until the parties to the marriage go to Court to obtain an order nullifying the marriage.
Talak-i-taweez	is a form of divorce in a Muslim marriage where the power to pronounce <i>talak</i> is delegated to the wife by an agreement before the marriage.	Warrants case	is a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years.
Talak-ul-bidaat	consists of three pronouncements at short intervals or even in immediate succession during a single <i>tuhr</i> or a single pronouncement of <i>talak</i> during a <i>tuhr</i> showing clearly that the divorce is intended to take effect immediately.	Writ petition	is a petition filed before the superior courts like State High Courts and the Supreme Court, for seeking remedies for a person/s against the arbitrary or illegal actions of any authority or the lower Court. There are five kinds of writs, namely <i>certiorari</i> , <i>habeas corpus</i> , <i>mandamus</i> , <i>prohibition</i> and <i>quo warranto</i> .

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