



The whole purpose of establishing a Family Court as a different Jurisdictional Court is to have a difference in approach and a difference in attitude. The attitude appropriate in handling a Civil Case or a Criminal Case is not the attitude or approach that you should have in handling a Family Court's case.

Hon'ble Mr Justice Kurian Joseph
Judge, Supreme Court of India & Chairman
Supreme Court Committee for Sensitization of Family Court Matters
(Excerpts from His Lordships's address to the Family Court Judges in Sikkim Regional Meet for Sensitization of Family Court Matters)

READING MATERIAL FOR
5 DAYS' (40 HOURS)

TRAINING MODULE

FOR
FAMILY COURT JUDGES OF INDIA

VOLUME - I

You have to be expert in dealing with dispute which are of extreme importance to the society

Hon'ble Ms Justice Indira Banerjee
Judge, Supreme Court of India & Member
Supreme Court Committee for Sensitization of Family Court Matters
(Excerpts from Her Ladyships's address to the Family Court Judges in Sikkim Regional Meet for Sensitization of Family Court Matters)



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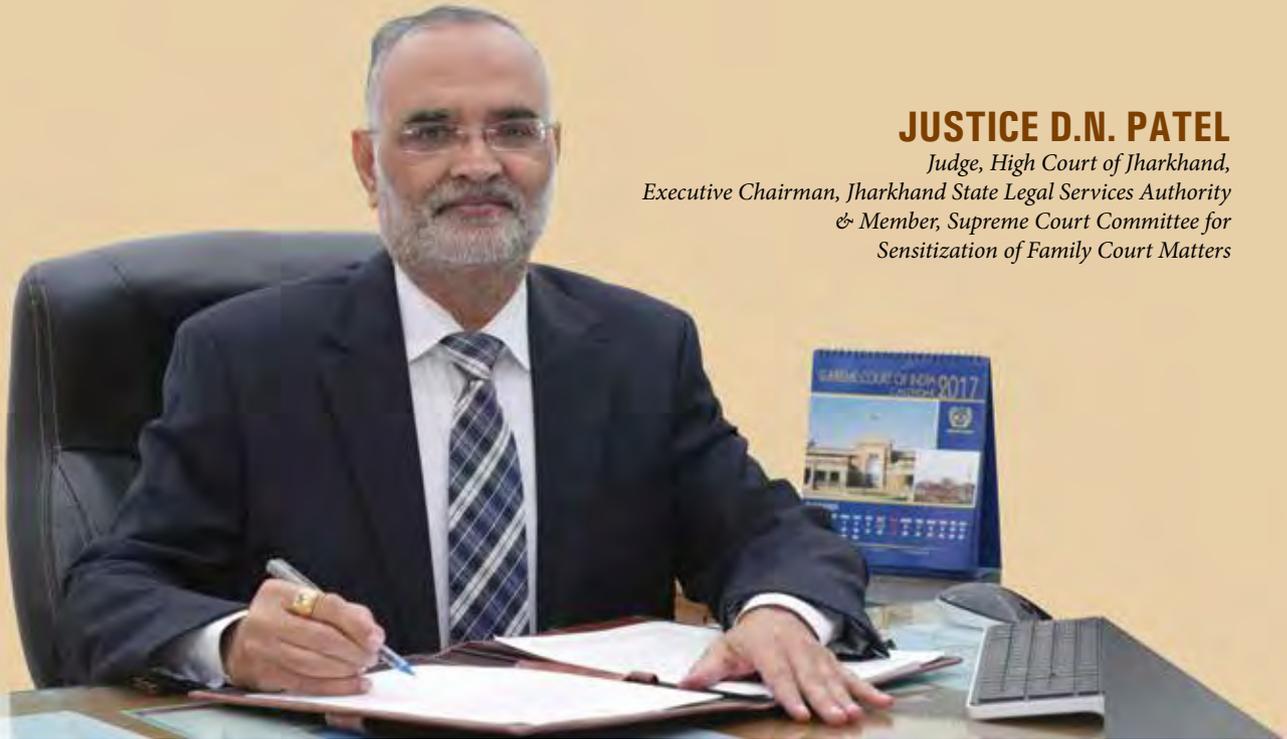
FOR

FAMILY COURT JUDGES OF INDIA

Prepared by

Hon'ble Mr. Justice D.N. Patel

Judge, High Court of Jharkhand &
Member, Supreme Court Committee for
Sensitization of Family Court Matters



JUSTICE D.N. PATEL

*Judge, High Court of Jharkhand,
Executive Chairman, Jharkhand State Legal Services Authority
& Member, Supreme Court Committee for
Sensitization of Family Court Matters*

Preface

We are aware that the 59th Law Report had given its recommendation, by the Justice Ganjendra Gadkar Ji, for having Special Courts for Family Court matters. The Law was enacted after one decade. Recommendation was made in 1974 and Law was enacted in 1984 by the Family Courts Act.

The Family Courts Act, 1984 was enacted for this very purpose for adopting a human approach. The whole purpose of establishing a Family Court as a different Jurisdictional Court is to have a difference in approach and a difference in attitude. The attitude appropriate in handling a Civil Case or a Criminal Case is not the attitude or approach a Family Court Judge should have in handling

a Family Court's case. Family Court Act, 1984 is the only Act which requires the services of Counsellors, Doctors, Social Activist, Organisations etc. Their services are to be utilized within a reasonable time.

A Family Court Judge has to be a learned man in Law, in Psychology, in History, in family and in perception. Lack of concern and Lack of patience, on the part of Family Court Judges, is not expected in present time. A Family Court Judge is expected not to have any kind of adversarial attitude in his Jurisdiction. He is not exercising adversarial adjudicatory powers but a participatory reconciliatory powers. A Family Court Judge has a role of a mediator, a role of a conciliator and a role of a settler.

A Family Court Judge has to have knowledge of Social Science, Psychology and individual perception of life. Everybody has a perception of life, a wife has a perception, a husband has a

perception, their family has a perception, a Judge has a perception. This perception is to be applied with fundamental legal common sense.

A Family Court Judge is greatest evaluator of social dynamics. A family Court Judge should view the family court matters not through a microscope but with a stethoscope.

Family court is expected to be sensitive to the issues, because it deals with the extremely delicate and sensitive matters pertaining to marriage and issues ancillary thereto. Family dispute has many dimensions, like Maintenance and Alimony, Custody of Children, Visitation Rights, Divorce, Stridhan etc., these disputes have potential to ruin the innocence of child and esteem of elders.

Never ever close the doors. Leave all doors open, because in Family Court Jurisdiction, any breakthrough can happen at any moment. Things can be changed.

It is, thus, clear that role and responsibility of a Family Court Judge is enormous. This reading material is an attempt to compile all at one place which can help the family Court Judge in living up to the expectation of Legislators and Society. I hope that this book will be of great help to Judges, lawyers and law students alike.

Wish all the duty holders under the Family Courts Act, 1984 very best !

**ॐ द्यौः आन्तिरन्तरिक्षं आन्तिः,
पृथ्वी आन्तिरापः आन्तिरो ऽधयः आन्तिः ।
वनस्पतयः आन्तिर्वि वे देवाः आन्तिर्ब्रह्म आन्तिः,
सर्वं आन्तिः, आन्तिरेव आन्तिः, सा मा आन्तिरेधि ॥
ॐ आन्तिः आन्तिः आन्तिः ॥**

*May there be Peace in Heaven, May there be Peace in the Sky,
May there be Peace in the Earth, May there be Peace in the
Water, May there be Peace in the Plants,
May there be Peace in the Trees, May there be Peace in the Gods
in the various Worlds, May there be Peace in all the human beings,
May there be Peace in All,
Peace, Peace, Peace.*



(Justice D.N. Patel)

DRAFT

FIVE DAYS'

40 Hours

TRAINING MODULE

FOR FAMILY COURTS JUDGES OF INDIA

DAY - 1

SESSION 1

9:00 AM– 11.00 AM

Human Dignity : Concept, Constitutional and Legal perspective

- *Universal Human Values*
- *Human Dignity in Indian Constitution*
- *Indian Values*

SESSION 2

11.00 AM – 1:00 AM

Basic features of Indian Civilization : Family As a Foundation

- *Family Centric Society*
- *Dharma or the Spiritual Doctrine of Duty*
- *Supremacy of Traditions*

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM



SESSION 3

1.45 PM – 3.45 PM

Establishment of Family Court Jurisdiction : Aims & Objectives

- *Paradigm Shift in Conflict Resolution : Difference in approach & attitude*
- *Reconciliation & Settlement Culture*
- *Complimentary Roles of Duty Holders :Roles, Resources & competencies*

SESSION 4
3.45 PM - 5.45 PM
Art of Conciliation

- ***Knowledge***
- ***Skill***
- ***Aptitude***

*** Tea would be served inhouse at 4.00PM**

DAY - 2

SESSION 5
9:00 AM– 11.00AM
Art of Mediation

- ***Communication Skills***
- ***Finding epi-centre of dispute***
- ***Encouraging the parties to find solutions***

SESSION 6
11.00 AM – 1:00 PM
Practical Session

- ***Case Studies***
- ***Role Play***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM



SESSION 7

1.45 PM - 3.45 PM

Marriage : An Indian Perspective

- *Marriage as an Institution*
- *Rights and obligations*
- *Generational Shift*

SESSION 8

3.45 PM – 5.45 PM

Divorce : Mend it or end it & Art of graceful separation

- *Paradigm shift in approach*
- *Rationalization of emotions*
- *Mend it or end it ; keeping it in between is lawyer's paradise*

*** Tea would be served inhouse at 4.00PM**

DAY - 3

SESSION 9

9:00 AM– 11.00 AM

Custody of Child & Shared Parenting including Visitation Rights

- *Relocation and Parental Abduction*
- *Best interest of child*
- *Parental Alienation*

SESSION 10

11.00 AM – 1:00 PM

Maintenance & Alimony including Interim Measures

- ***Social justice legislation***
- ***Aims and Objectives***
- ***Execution of Maintenance & Alimony Orders***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM



SESSION 11

1.45 PM – 3.45 PM

Art of Listening & Communication

- ***Listening***
- ***Understanding***
- ***Communication***

SESSION 12

3.45 PM - 5.45 PM

Guardianship & Adoption including CARA Guidelines

- ***Substantive laws***
- ***Procedure***
- ***Issues***

*** Tea would be served inhouse at 4.00PM**

DAY - 4

SESSION - 13

9:00 AM – 11:00 AM

Family Violence : Nature & Dimensions

- *Domestic Violence*
- *Interim Measure*
- *Beneficial Legislation*

SESSION 14

11.00 AM – 1:00 PM

Motivational Class on Never say die : Miracle can happen in last minute

- *Settlement can happen at any time in any stage*

* Tea would be served inhouse at 11.30 AM

LUNCH : 1.00 PM - 1.45 PM



SESSION 15 & 16

1.45 PM - 5.45 PM

Visit to Mediation and Conciliation Centre & Participation in Counselling

DAY - 5

SESSION 17

9.00 AM - 11.00 AM

Art of Being a good Family Judge

- *Values*
- *Ethics*
- *Approach*

SESSION 18
11.00 AM - 1.00 PM
Personal Laws in India

- ***Personal laws***
- ***Distinctions***
- ***Forums***

*** Tea would be served inhouse at 11.30 AM**

LUNCH : 1.00 PM - 1.45 PM



Session 19
1.45 PM - 3.45 PM
Understanding Conflicts

- ***Nature of Conflict***
- ***Diagnosis***
- ***Solutions***

Session 20
3.45 PM - 5.45 PM
Group Discussion

- ***Formation of participants into four Groups***
- ***Each Group to discuss for one hour on how to perform better quantitatively as well as qualitatively***
- ***15 minutes presentation/power point presentation by each Group***

END OF FIVE DAYS' TRAINING PROGRAMME

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LAW COMMISSION OF INDIA:
CONSULTATION PAPER
ON
REFORM OF FAMILY LAW

LAW COMMISSION OF INDIA: CONSULTATION PAPER ON REFORM OF FAMILY LAW

INTRODUCTION:

1.1. In June 2016 through a reference by the Government of India, the Law Commission was entrusted with the task of addressing the issues concerning a uniform civil code. The Law Commission of India has taken this opportunity to address the ambiguity that has long surrounded the questions of personal law and uniform civil code in India. This consultation paper has been an endeavour to understand, acknowledge and finally suggest potential legislative actions which would address discriminatory provisions under all family laws. In doing so, the Commission has endeavoured to best protect and preserve diversity and plurality that constitute the cultural and social fabric of the nation.

1.2. Various aspect of prevailing personal laws disprivilege women. This Commission is of the view that it is discrimination and not difference which lies at the root of inequality. In order to address this inequality the commission has suggested a range of amendments to existing family laws and also suggested codification of certain aspects of personal laws so as to limit the ambiguity in interpretation and application of these personal laws.

1.3. Whether or not 'personal law' are laws under Article 13 of the Constitution of India or if indeed they are protected under Articles 25-28, has been disputed in a range of cases the most notable being *Narasu Appa Mali*.¹ In the absence of any consensus on a uniform civil code the Commission felt that the best way forward may be to preserve the diversity of personal laws but at the same time ensure that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of family must first be

¹ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84.

codified to the greatest extent possible, and the inequalities that have crept into codified law, these should be remedied by amendment.

1.4. By virtue of being 'enacted' as laws, personal law cannot be codified in a way that contradicts the Constitution. For instance, codification of discriminatory custom regardless of how commonly acceptable they may be, can lead to crystallisation of prejudices or stereotypes. Therefore, codification of any law requires a rigorous debate and the Commission has taken only the first step in this direction. At the same time, the very act of codifying 'separate' personal laws could itself be challenged as an exercise against Article 14 of the Constitution. Therefore, it is urged that the legislature should first consider guaranteeing equality 'within communities' between men and women, rather than 'equality between' communities.² This way some of the differences within personal laws which are meaningful can be preserved and inequality can be weeded out to the greatest extent possible without absolute uniformity.

1.5. For long there has been a battle of sorts between freedom of religion and one's right to equality. While the more fundamentalist forces within the society have historically demanded an absolute right to freedom of religion whereby religious customs cannot be tested against even constitutional provisions, on the other hand are the advocates of the right to equality who suggest that the law should be blind to cultural difference when it comes to matters of human rights. Both these positions are not exclusive of one another and one has to reconcile both freedom of religion and right to equality in order to justly administer the law. Both these rights are valuable and guaranteed to every citizen of the country and to necessitate women to choose between one or the other is an unfair choice. Therefore, women must be guaranteed their freedom of faith without any compromise on

² See also, Menon, Nivedita. State, community and the debate on the uniform civil code in India. 2000.

their right to equality. At this stage these rights can be reconciled by making piecemeal changes to laws wherever necessary. The fact that secular laws such as the Special Marriage Act, 1954 also continue to suffer from lacunae suggests that even codified or religion-neutral laws offer no straightforward guarantee of justice.

1.6. At the same time, while freedom of religion and right to not just practice but also propagate religion must be strongly protected in a secular democracy, it is important to bear in mind that a number of social evils take refuge as 'religious customs' these may be evils such as sati, slavery, devdasi, dowry, triple talaq, child marriage or any other. To seek their protection under law as 'religion' would be a grave folly. For these practices do not conform with basic tenets of human rights are nor are they essential to religion. While even being essential to religion should not be a reason for a practice to continue if it is discriminatory, our consultations with women's groups suggested that religious identity is important to women, and personal laws along with language, culture etc often constitute a part of this identity and as an expression of 'freedom of religion'.

1.7. Right to equality on the other hand can also not be treated as an absolute right. In a country like ours where social inequalities plague our society and economic inequality is insurmountable it would be erroneous to presume that all citizens uniformly benefit from the right to 'equality'. Therefore 'equity' and not mere equality would mean that preferential rights and protections are maintained for vulnerable or historically subordinated sections of the society, for there is no equality in treating unequals as equals. There are various laws, affirmative action policies and schemes in this country to bring all citizens to share common ground on significant matters. In family law too, different laws were codified over time for various communities to slowly align them with constitutional values. The task began at the time of independence itself.

1.8. The category of personal law may well have evolved in colonial India, but post-independence this category was strengthened, reconstituted and reinforced. One of the foremost social legislations that were introduced in independent India was, in fact, the amendments to Hindu law. These amendments generated enormous protests in many parts of India and most notable and vociferous opposition came from the Hindu Mahasabha.³ Despite sustained protests the Hindu Law Committee continued to contemplate reforms, under the stewardship of Nehru and Ambedkar.

1.9. Ambedkar's position in the Constituent Assembly debates towards a uniform civil code was that such a code would be desirable but for the moment would remain voluntary. He recommended:

It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary [...] so that the fear which my friends have expressed here will be altogether nullified.⁴[..] This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussalmans who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors.⁵

³ Hindu Mahasabha Publication, *The Hindu Outlook* from 1941-1956. Managing editor Indra Prakash

Editor VG Deshpande: 'Hindu Code Bill Disrupts Family System and Stable Society' 29 November 1948, 'Hindus "Distressed and Disappointed"' Mahasabha Gl. Secretary on P.M.'s speech. 13 August 1951.

⁴ Constituent Assembly debates, Volume VII (here on, CAD, Vol.) 3 December 1948 p. 1979.

⁵ Ibid.

1.10. Ambedkar however, also pointed out that before the Muslim Personal Law Shariat Application Act 1937, Muslims in many parts were governed by Hindu law and even *Marumukkatayam* system of inheritance and succession which had been prevalent in many of the Southern Indian States. Tracts of the Constituent Assembly debates reveal that there was no consensus in the Constituent Assembly about what a potential uniform civil code would entail. While many thought uniform civil code would coexist alongside personal law systems, while others thought that it was to replace personal law.⁶ There were yet others who believed that a uniform civil code would deny freedom of religion. It was due to this uncertainty about what exceptions were acceptable as 'freedoms' and what exceptions would in fact deny this very freedom that led the assembly to contain the provision of uniform civil code in Article 44 of the constitution among Directive Principles of State Policy rather than Fundamental Rights. Interestingly there were also groups that staunchly opposed the Hindu Code Bill but found the uniform civil code more palatable thus betraying the lack of clarity on the potential implication of a code.

1.11. The Hindu Code Bill was a comprehensive omnibus legislation that sought to reform, unify and 'statutorise' family law for all people who were not Christians, Muslims or Parsis. While the original bill located complex links between importance of inheritance and succession rights and the right to divorce, the Bill was severely diluted in the face of strong opposition from conservative quarters of the Hindu society. The multiple drafts of the Hindu code were repeatedly revisions and increasingly watered down with each revision. It was argued that the Constituent Assembly was not

⁶ See, Constituent Assembly debates, Vol. VII. Speeches of Maulana asrat Mohani, KT Shah, B Pocker Sahib Bahadur. For discussion See also, Rochana Bajpai, 2011. *Debating difference: group rights and liberal democracy in India*. Oxford University Press. Saxena., 2016, 'Politics of personal law in post-independence India', Unpublished PhD Dissertation, University of Cambridge.

constituted by elected members but by selected members that therefore was not representative of the will of the people.

1.12. The constituent assembly agreed on putting the clause of a uniform civil code as a directive principle rather than a fundamental right. In the subsequent years there were a number of interventions by legislature, judiciary as well as civil society organisations seeking amendments to personal laws or instituting a uniform civil code. The most notable of these judgments were the *Mohd. Ahmed Khan v. Shah Bano Begum*⁷, *Jordan Diengdeh v. S.S. Chopra*⁸, and the *Sarla Mudgal v. Union of India*⁹. The court in *Shah Bano* observed:

Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which entrusted with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning.

1.13. However, the judgment does not acknowledge the history of attempts made towards reforming family laws in the country. The State is an 'enabler' of rights rather than an 'initiator', particularly in sensitive matters such as that of religious personal laws. At this stage one can conclude with conviction the Commission's initiative towards reform of family law is driven by civil society organisations, educational institutions, and vulnerable sections of the society themselves, rather than by legislative mandate.

⁷ AIR 1985 SC 945

⁸ AIR 1985 SC 935

⁹ AIR 1995 SC1531

1.14. When the Law Commission put forth its questionnaire in public domain in November 2016, for the people to respond, it received over 75,378 responses suggesting various ways in which reforms could be executed. This indicated that the public now desires a reform of the law. Majority of these responses, however, dealt specifically with the issue of triple talaq or talaq-ul-biddat, which is a one among the various other issues that need attention.

1.15. While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.

1.16. The recent Supreme Court judgment *Shayara Bano v. Union of India*¹⁰ outlawing the practice of triple talaq has taken a first step towards ending personal law practices that are discriminatory towards women but largely on the premise that triple talaq is also not an essential practice of Islam suggesting that bad in theology cannot be good in law. The court has not delved on the supremacy of fundamental rights in case of a conflict between the personal law and fundamental rights and the premise of *Narasu Appa Mali* has not been overturned.

1.17. Since battle lines are so firmly drawn on the issue of family law, it is fruitful to engage with complex issues while also keeping in view the limitations of law. While the commission is in a position to suggest amendments to various laws, many of the issues raised before

¹⁰ AIR2017SC609

the Commission were those of implementation and not the language of law itself.

1.18. There are also a number of issues that are brought up frequently in public debate but cannot be and need not be dealt with the law. For instance, in the recent case of a Kerala church where the father exploited a woman blackmailing her for the confessions she made to him led to a widespread demand for declaring the practice of confessions altogether illegal. These are precisely the type of knee-jerk reactions we must be wary of. Confessing in itself cannot be a criminal act, it's the misuse of confessions by select priests that needs to be checked. It's a far more progressive and sensible suggestion to eventually also include nuns are individuals who can hear confessions.¹¹ This need not be enforced by law, but the brought in through consensus building within communities. No legal change can satisfy all sections of the society but that does not mean that legislative changes should not be contemplated. However, it is important to separate the disease from the symptom of disease. The issue itself is not about religion for the individuals who indulged in such exploitation also do not have the patronage of any religion. Thus, such criminal cases cannot be seen as a problem with family law. The law already exists on the matter.

Sixth Schedule and exceptions and exemptions

1.19. The sixth schedule of the constitution of India provides certain protections to a number of states. While some tribal laws in fact protect matriarchal systems of family organisations some of these also preserve provisions which are not in the interest of women. There are further provisions that allow for complete autonomy on matter of family law which can also be adjudicated by the local panchayats which once again, follow their own procedures. Thus, while framing a

¹¹ Times of India. 'Let women confess to nuns, say activists: Church won't hear it'. Jul 29, 2018.

law it has to be borne in mind and cultural diversity cannot be compromised to the extent that our urge for uniformity itself becomes a reason for threat to the territorial integrity of the nation.

1.20. At the same time it is important to strengthen the local initiatives that are bringing about piecemeal changes. The efforts of Non Government Organisations that are working towards creating awareness have shown promising results. As the Commission has already indicated that the conversation that it hopes to begin on the uniform civil code will focus on family laws of all religions and the diversity of customary practices, to address social injustice rather than plurality of laws. India has historically prided itself over its diversity. Conversations on 'secularism'¹² and also 'multiculturalism',¹³ have intrigued not only philosophers, political scientists and historians but also common Indian citizens.

1.21. The term secularism only has meaning if it can also assure that the expression of any form of 'difference', not just religious but also regional does not get subsumed under the louder voice of the majority; and at the same time no discriminatory practice hides behind the cloak of 'religion' to gain legitimacy. No religion defends discrimination or permits deliberate distortion had been observed by the Supreme Court in the *Sarla Mudgal* case;

.. ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression'.

¹² See writings of Bhargava, Rajeev. "Secularism and its Critics." (1998); Bilgrami, Akeel. *Secularism, identity, and enchantment*. Harvard University Press, 2014.

¹³ On group rights and individual rights see writings of Taylo and Habermas. Taylor, Charles. *Multiculturalism: Examining the politics of recognition*. Princeton University Press, 41 William St., Princeton, NJ 08540., 1994. Habermas, Jürgen. "Intolerance and discrimination." *International Journal of Constitutional Law* 1, no. 1 (2003): 2-12.

1.22. Thus, this consultation paper aims to point towards and problematise certain well accepted practices within the various family law regimes in India that discriminate against women. India is a diverse country and the problems of women are very often class, caste and community specific. In *Madhu Kishwar & Ors v. State of Bihar*¹⁴ the Court had observed that:

In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort.

...it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the Court.

1.23. While there is certainly a desire for change, there is also equally a need to acknowledge the hindrances to any endeavours to institute a uniform civil code. The first foreseeable problem with feasibility is with respect to the sixth schedule of the Constitution. Articles 371 (A) to (I) and the sixth schedule of the constitution of India provides certain protections or rather exceptions to the states of Assam, Nagaland, Mizoram, Andhra Pradesh and Goa with respect to family law.

1.24. The Government of India Act, 1915, was amended in 1919 adding section 52A giving exemption to the application of Indian laws to “backward tract” to be declared by the Governor-General-In-Council. In exercise of that power a large area was declared to be Backward-Tract in North-East including Garo Hill District, Naga Hills District and Khasi and Jantiya Hills District except Shillong Municipality and Cantonment.

¹⁴ 1996 AIR 1864

1.25. In Government of India Act, 1935, the analogous provision was brought substituting the Backward -Tract with “Excluded Areas” or “Partially Excluded Areas”. Indian (Provisional Constitutions) Order, 1947, retained it. While drafting the Constitution it was realised that certain laws of India would be unsuitable in other contexts as there was an apprehension of exploitation of the innocent masses by migrating communities from outside areas, more so, there was no political stability. The 6th Schedule was adopted which provides for autonomous districts and autonomous regions. The District Councils and Regional Councils have legislative competence to deal with the subjects like inheritance, succession, marriage and divorce as well as administration of justice. Such Councils can frame Rules for laying down the procedure for trial of suits and criminal cases and for execution/enforcement of Orders and Judgments.

1.26. Article 371A was inserted by Constitution (13th Amendment) Act, 1962, which provides that, no Act of Parliament in respect of:

- (i) religious or social practices of the Nagas,
- (ii) Naga customary law and procedure,
- (iii) administration of civil and criminal justice involving decisions according to Naga customary law, and
- (iv) ownership and transfer of land and its resources,

shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland, by a resolution so decides.

1.27. Thus, Article 371A contemplates a different treatment to the part of Nagaland in view of the difference between the needs of the social conditions in Nagaland and the various stages of development of different parts of the country. Articles 371 B- 371 I offer similar exemptions to other states in the North East.

1.28. In 2012 the Nagaland Assembly passed a resolution that the state may be exempted from the reservation policy. The Special Leave Petition for this is pending before the Supreme Court. Nagaland witnessed a strong protest against the provision of reservation of 33 per cent seats for women. The ground for such opposition is that the carving out of reservations for women confirms their status as inferior and in need of special protection. While this is the logic offered, it is also worth acknowledging that our Constitution provides for policies of protective discrimination because of historical injustices that have accrued to women over a long period of time.

1.29. These protective provisions help us create gender-sensitive laws rather than gender blind laws. Various Central Acts have been held to be not applicable, being in conflict with the customary law or local laws. For example, recovery of debts due to Banks and Financial Institutions Act, 1993 was held to be non-applicable being in conflict with the Rules for Administration of Justice in Nagaland, 1936. Section 1(3) of the Code of Civil Procedure, specifically provides that it shall not apply to the State of Nagaland and the tribal areas.

1.30. Similarly, the Code of Criminal Procedure (CrPC), 1973, is not applicable to the State of Nagaland and to the tribal areas. The tribal areas have been explained in section 1, as the territories referred to in paragraph 20 of the 6th Schedule of the Constitution but other than those within the local limits of the municipality of Shillong. Thus, in the city of Shillong, CrPC applies only if the alleged offence relates to the area within the municipal limits. Offences committed outside will be tried by District Council courts and Deputy Commissioners. It is so in spite of Article 50 the Constitution which provides for separation of Judiciary and Executive. The Supreme Court of India has passed several judgments orders to enforce the provisions of Article 50 of the Constitution, but the process is not yet complete.

1.31. Many of these exceptions entail the preservation of not only distinct family law systems but also various other exceptions relating to other aspects of civil law. In Nagaland, women can now inherit self-acquired property even though some tribes are sceptical of women inheriting village land and then marrying outside their tribe.¹⁵ Undoubtedly, the young generation has social attitudes and aspirations of universal and global principles which require adherence to the principles of equality and humanity. Many also argue that a uniform code may advance the cause of national integration, however, this may not necessarily be the case when cultural difference inform people's identity and its preservation guarantees the territorial integrity of the nation. Further, the law has to be within the framework of the Constitution. The constitutional exception has to be harmonised and a fair and just balance is to be struck, keeping in view societal interests.

1.32. For instance, Garo and Khasi tribes of Meghalaya are matriarchate, that is, they follow a female line of descent and property is inherited by the youngest daughter. Among the Garos, the son-in-law comes to live with his wife's parents.

1.33. While such customs may not fit 'mainstream' notions of morality these are treated as common practices in Meghalaya and such marriages are also compulsorily registered under the 'Meghalaya Compulsory Registration of Marriages Act 2012', which recognise differences in tribal cultures. Thus, secularism cannot be contradictory to plurality. It only ensures peaceful co-existence of cultural differences. In fact, if one was to look for gender-just norms, many of the tribal customs can even be instructive. For instance, among Mikirs if the girl is an heiress and an only daughter, she does

¹⁵ 'Denied for centuries, Naga women get to own land now' *Times of India*, Aug 16, 2018.

not leave her house upon marriages. The National Commission for women in its report on Status of women under tribal laws observed:

The Dimasa and Garo come under the Sixth Schedule that recognises community ownership (CPRs) but have to interact with the individual based formal laws. The Aka who are close to their tradition are governed by their customary law but the Sixth Schedule does not apply to them. Article 371A of the Constitution recognises the Angami customary law but there are indications that because of their interface with modernity men interpret it in their own favour (Kikon 2002: 176). The Adibasi whose ancestors came from Jharkhand and Chattisgarh as indentured labour to work in the tea gardens of Assam, have even lost their customary law. The Mongoloid tribes have only now started feeling an identity crisis in their move towards modernisation but the Adibasi have felt its worst effects for over a century because of land alienation that forced them to migrate to Assam. Their identity continues to be under attack.¹⁶

1.34. The Supreme Court in *T.M.A Pai Foundation v. State of Karnataka and Ors*¹⁷ reiterated that:

The essence of secularism in India is recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole united India.

1.35. Thus a 'united' nation need not necessarily have 'uniformity' it is making diversity reconcile with certain universal and indisputable arguments on human rights.

International Conventions

1.36. India is signatory to a number of international covenants and conventions for instance the **Article 16 of the Universal Declaration of Human Rights, 1948 reads as under:**

¹⁶ 'Customary Laws in The North East', National Commission for Women accessed on 12..12.2017 <http://ncw.nic.in/pdfreports/Customary%20Law.pdf>

¹⁷ (1994) 2 SCC 195.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

1.37. India is a party to this Convention and is bound to give effect to it. Even the provisions contained therein are in consonance and conformity with our constitutional scheme and particularly part III of the Constitution. Article 253 of the Constitution read with entries 10 and 14 of List 1 of the Seventh Schedule empowers the Parliament to enact a law to give effect to the said Declaration, 1948. Even otherwise, there is an assumption that the Parliament does not breach the principles of international law, including any specific treaty obligations. It may be relevant in view of the provisions contained in Article 51 (c) of the Constitution which provides that “*the State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another.*”

1.38. Indian courts are under an obligation to give due regard to international conventions and norms while interpreting domestic laws and particularly when there is no inconsistency between them and there is a void in domestic law. Even otherwise, provisions of the covenant which elucidates and go to effectuate the fundamental rights which have been guaranteed by the Constitution can certainly be relied upon by the courts. Thus, any international convention which is consistent with the fundamental rights can be read into the provisions of Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and intent therein of, to promote the Constitutional

philosophy. A Convention which incorporates principles derived from the common law of nations may also be applied as common law of India though the convention may not have been adopted by enacting legislation. A survey of Indian cases clearly shows that international law and international conventions have been used not only for interpretation of statutes, but also interpretation of the Constitution, and Indian courts have heavily relied upon the International Convention on Rights of Child, Convention of the Elimination of All forms of Discrimination Against Women, International Covenant on Civil and Political Rights, etc., as is evident from a number of judgments.¹⁸

1.39. The Commission through this consultation paper suggests a series of amendments to personal laws and further codification of certain other laws, particularly with respect to succession and inheritance. The suggestions are not limited to religious personal laws alone but also significantly address the lacunae in general secular laws such as the Special Marriage Act, 1954, Guardians and Wards Act 1869 among others.

¹⁸ *Nilabati Behra v. State of Orissa*, AIR 1993 SC 1960; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Jolly George Verghese v. Bank of Cochin*, AIR 1980 SC 470; *Kubic Dariusz v. Union of India*, AIR 1990 SC 605; *M V Elisabeth v. Haryana Investment & Trading Pvt. Ltd., Goa*, AIR 1993 SC 1014; *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203; *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011; *Vineet Narain v. Union of India*, AIR 1998 SC 889; *Apparel Export Promotion Council v. A K Chopra*, AIR 1999 SC 625; *Githa Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149; *Javed Abidi v. Union of India*, AIR 1999 SC 512; *Chairman Railway Board v. Chandrima Das*, AIR 2000 SC 988; *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, AIR 2000 SC 1274; *Dwarka Prasad Agarwala v. B D Agarwala*, AIR 2003 SC 2686; *John Vallamattom v. Union of India*, AIR 2003 SC 2902; *Suman Sood v. State of Rajasthan*, AIR 2007 SC 2774; *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.¹⁸

MARRIAGE AND DIVORCE

2.1. Marriage and divorce have had a disproportionate share in public debate among all matters of family law. Marriage is frequently theorised as the foundation of a family, and family the foundation of society. The glorification of marriage sometimes also means that there are arguments made for non-interference in personal matters, however, discrimination and even violence in intimate relationships cannot be overlooked on pretext of privacy.

2.2. There are significantly different attitudes towards how a union between two people is imagined. While in Hindu law, marriage is a sacrament, in Christian law, divorce continues to be stigmatised; in Muslim law, marriage is a contract and Parsi law registration of marriage is central to the ritual of marriage. It is important that these different attitudes are respected and not placed in hierarchy, pitting one religious attitude against another. At the same time marriage cannot be defined in religious terms alone, and religiously inspired gender roles and stereotypes cannot be allowed to come in the way of women's rights.

2.3. For instance, the relatively easier procedure of divorce under Islamic law for men and women is also reflected in the relatively open attitudes towards remarriage of divorced and widowed women, a right that most Hindu women achieved through legislation. However, once the legislation was in place, Hindu law evolved through a series of piecemeal legislative interventions on recognition of women as coparceners in 2005, recognition of diverse customs within the Hindu Marriage Act (Madras Amendment) 1967 incorporating priest-less marriages among many others. Amendments to Christian marriage and divorce laws in 2001, and Hindu Adoption and Maintenance Act, 1956 and Guardians and Wards Act, 1890, in 2010 are also examples of how once codified, personal laws can be opened up for

further public debates and scrutiny. Thus, history shows that amendments to codify personal laws is not only a tried and tested way of bringing targeted social legislation but also of developing jurisprudence on family laws.

2.4. Through codification of different personal laws, one can arrive at certain universal principles that prioritise equity rather than imposition of a uniform code in procedure which can also discourage many from using the law altogether given that matters of marriage and divorce can also be settled extra judicially. Thus, there are certain universal principles with regard to adultery, age of consent, grounds for divorce et al that can be integrated into all existing statutory provision on marriage and divorce under personal and civil laws, while the procedure for divorce, and grounds for divorce may vary between communities the Commission will address the difference in grounds of divorce available to men and women within the same community.

GENERAL CHANGES APPLICABLE TO MARRIAGE AND DIVORCE LAWS:

Adultery:

2.5. The First Law Commission (1834) under Thomas Macaulay while drafting Indian Penal Code did not include adultery as a criminal offence and instead kept it under the purview of civil law as a matrimonial offence. However, the Second Law Commission, headed by John Romilly, recommended criminal punishment for the offence, but given the social conditions of the time, excluded women from it¹⁹.

2.6. Section-497 of the Indian Penal Code, 1860 (IPC) makes the offence of adultery as a punishable offence, only for man without holding woman responsible. So, far as Jammu and Kashmir is

¹⁹ Flavia Agnes @ <http://www.deccanchronicle.com/opinion/op-ed/170218/adultery-law-deeply-flawed-must-be-dumped.html>

concerned section 497 of Ranbir Penal Code, 1932 makes the 'errant wife' also an accused along with her 'paramour'.

2.7. 'Adultery' remains a ground for divorce under various family law Acts. Under **Christian law** before the 2001 amendment in the Divorce Act, 1869, for a woman to seek a decree of divorce on grounds of adultery was insufficient until she also included 'cruelty' as a ground for divorce. However, in 2001 this was amended and both men and women were given the right to seek divorce on ground of adultery alone. Further, it also did away with the provision of 'compensation for adultery' finally acting on the recommendations of the Law Commission of India 15th report, 'Law relating to Marriage and Divorce amongst Christians in India', (1960). This provision reduced women to chattels, as adultery was something that could be compensated for almost as a compensation or 'damages' to property.

2.8. Under **Muslim law** adultery is not recognised as a ground for divorce unless it is committed with 'women of evil repute or leads an infamous life', which is included under 'cruelty'. The Dissolution of Muslim Marriage Act, 1939, also requires amendment to explicitly include adultery as a ground for divorce for both spouses. Bigamy is dealt with separately later in this chapter.

2.9. Under Section 32(d) of **the Parsi Marriage and Divorce Act, 1936** a person can file an application of divorce if the defendant, after marriage has committed the offence of adultery, fornication bigamy, rape or an unnatural offence. However, this ground of divorce is available only when the other spouse files the application within two years of discovery of the fact.

2.10. Thus, while all family laws include adultery as a ground for divorce it is important to ensure that the provision is accessible to both spouses. There have been multiple attempts by women's organisations, NGOs to reduce the offence of adultery from criminal to

matrimonial, but the provision has been preserved in the statute books, ironically, on the argument that it is 'pro-women'.

2.11. The Malimath Committee, which suggested that the offence of adultery should indeed be made gender-neutral, but it should remain punishable by two years was opposed by the National Commission of Women in 2007. The Report on Status of Women 2015 recommended a wholesale removal of this provision.

2.12. The Indian Penal Code (Amendment) Bill 1972, suggested for removing the special privilege guaranteed to woman under section 497, IPC but the Bill lapsed and could not be carried out. The validity of the provision has been challenged several times on the ground of discrimination, as the woman indulging in adultery is not an accused. However, the Supreme Court has consistently upheld its validity in *Yusuf Abdul Aziz v. State of Bombay*²⁰; *Sowmithri Vishnu v. Union of India*²¹; *V Revathi v. Union of India*²².

2.13. In *Hirachand Srinivas Managaonkar v. Sunanda*²³ the Supreme Court observed that living in adultery on the part of husband is a 'continuing matrimonial offence' and the said offence is not wiped out even on passing of decree of judicial separation, as the same merely suspends certain obligation of spouse in connection with their marriage and does not snap matrimonial tie.

2.14. In *Joseph Shine v. Union of India*²⁴ the Supreme Court, while referring the matter to Constitutional Bench, observed:

“The provision (Section 497) really creates a dent in the individual independent identity of a woman when the emphasis is laid on the connivance or

²⁰ AIR 1954 SC 321

²¹ AIR 1985 SC 1618

²² AIR 1988 SC 835

²³ AIR 2001 SC 1285

²⁴ (2018) 2 SCC 189

consent of the husband. This tantamounts to subordination of a woman where the Constitution confers (women) equal status,”

2.15. By presuming, that only women can be victims, the law takes a patronising attitude towards women. The prosecution under section 497 entirely contingent on the husband's word to the extent that a woman can practically enter into an adulterous relationship upon her husband's consent, thereby reducing her to a commodity of a man.²⁵

2.16. In the course of the correspondence between the Ministry of Law and Justice and the Law Commission, the Commission was assigned the task of undertaking a study on the provision of adultery within its report. As the judgment of the Constitution Bench in *Joseph Shine v. Union of India* is awaited, (hearing stood concluded) it is not appropriate for the Commission to make any suggestion in this regard at this stage but it urges a consideration about the utility or the lack there of, of a provision such as 497 IPC.

Compulsory Registration of Marriages:

2.17. The 270th report of the Law Commission of India on Compulsory Registration of Marriages (2017) states:

Since independence, numerous initiatives have been taken to address the issue of gender inequality. Reform initiatives taken so far have succeeded to a large extent, however, child marriages, bigamy and gender violence continue to persist in our society, despite legislations prohibiting and penalising such practices. Several disputes are pending before the courts regarding matrimonial status of the parties. Women are often denied the status of wife due to absence of record proving a valid marriage. The courts have time and again emphasised on making registration of marriage compulsory, to prevent denial of status to women and to children born out of wedlock. Instances of marriage fraud have also come to light in recent times. In the absence of

²⁵<http://www.thehindu.com/news/national/supreme-court-agrees-to-examine-adultery-provision-in-ipc/article21296775.ece>

compulsory registration, women are duped into marrying without performance of the conditions of a valid marriage. This deprives women of societal recognition and legal security. Such fraudulent marriages are especially on rise among non-resident Indians. Compulsory registration can serve as a means to ensure that conditions of a valid marriage have been performed.

2.18. From the Supreme Court's reference in *Seema v. Ashwini Kumar*²⁶, to repeated attempts by National Commission for Women (NCW) to Convention on Elimination of All Forms of Discrimination Against (CEDAW) women have repeatedly argued that registration of marriages would go a long way in addressing discrimination towards women and children. The problem of different ages of consent provided under various personal laws and repeated violation of the Prevention of Child Marriages Bill has created a situation that needs immediate attention. The Law Commission's 270th Report 'The Compulsory Registration of Marriages' (2017) recommended that the Registration of Births and Deaths Act be amended to include marriages. The report further clarified that:

Once enacted, the amended law would enable better implementation of many other civil as well as criminal laws. It would provide citizens, not new rights but better enforcement of existing rights under various family laws that grant and provide to protect many rights of spouses within a marriage. Registration of a marriage under any of the prevailing marriage Acts e.g. the Indian Christian Marriages Act. 1872; the Kazis Act, 1880; the Anand Marriage Act, 1909; the Parsi Marriage and Divorce Act, 1936; the Sharia Application Act, 1937; Special Marriage Act, 1954; Hindu Marriage Act, 1955; any other custom or personal law relating to marriage will be acceptable and a separate standalone legislation may not be required so long as an amendment is made to the Births, Deaths Registration Act to include Marriages.....

²⁶ (2006) SCC 578

This Bill would supplement the domain of family laws that already exist and is not aimed at removing, abolishing or amending specific religious/ cultural practices and laws that are accepted under personal laws prevailing in India.

2.19. The details of how this procedure will address the various anomalies in the law have been explained in the 270th report (2017) and it is suggested that the report be read along with this report on family law reforms. However, in the absence of a clear status for child marriages - be it void, voidable or valid – the required age for registration of is a question that needs to be decided separately.

Age of Consent For Marriage:

2.20. A uniform age of consent between all citizens of marriage warrants a separate conversation from a discussion about prevention of child marriages for the simple reason that maintaining the difference of eighteen years for girls and twenty-one years of age for boys simply contributes to the stereotype that wives must be younger than their husbands.²⁷

2.21. If a universal age for majority is recognised, and that grants all citizens the right to choose their governments, surely, they must then be also considered capable of choosing their spouses. For equality in the true sense, the insistence on recognising different ages of marriage between consenting adults must be abolished. The age of majority must be recognised uniformly as the legal age for marriage for men and women alike as is determined by the Indian Majority Act, 1875, i.e. eighteen years of age. The difference in age for husband and wife has no basis in law as spouses entering into a marriage are by all means equals and their partnership must also be of that between equals.

²⁷Response submitted by Anoop Baranwal and his group, 'Uniform civil code', to the Commission.

2.22. The Criminal Law (Amendment) Act 2013 now deems any intercourse under the age of eighteen years as rape. The law in such cases needs to duly consider whether criminalising all intercourse, even between the ages of sixteen-eighteen after 2013 amendment may also have the consequence of criminalising consensual intercourse. The end goal of any legislative endeavour for empowerment of women or gender justice should prioritise autonomy of women.

2.23. In *Independent Thought v. Union of India*²⁸, the Supreme Court read down Exception 2 to Section 375 of IPC that allowed the husband of a girl child — between fifteen and eighteen years of age the right to have intercourse with her. The Supreme Court dealt specifically with the exception dealing with married girls aged between fifteen to eighteen.²⁹ The Court rightly held that a child remains a child regardless of whether she is married or unmarried and therefore intercourse with a minor would be rape regardless of her marital status.

2.24. A large number of judicial pronouncements recognise persons under the age of eighteen as 'children'. To argue that marital status of a woman under eighteen years of age would have a bearing on a criminal offence such as rape would amount to holding a difference between underage women without 'distinction'.

2.25. The current interlaced legislative system often leaves unanswered gaps where in the absence of pronounced court orders, several cases seem to fall astray. Section 5(iii) of the Hindu Marriage Act, 1955 (the Act 1955) and section 2(a) of the Prohibition of Child Marriage Act, 2006 (PCMA) prescribes eighteen years as the minimum age for the bride and twenty-one years as the minimum age for the

²⁸ AIR 2017 SC 4904

²⁹ The law as it stands does not delve into whether consent of married women is significant to sexual intercourse between the partners.

groom. Hindu law recognises the marriage between a sixteen-year-old girl and eighteen-year-old boy as valid, but voidable. Muslim Law in India recognizes marriage of minor who has attained puberty as valid.

2.26. The Special Marriage Act, 1954 (the SMA 1954) also prescribes eighteen years and twenty-one years as the legal minimum for women and men respectively. However, under section 11 and 12 of the Act, 1955 marriages where one or more parties do not meet the legal minimum age are neither void nor voidable and merely liable to pay fine. Section 3 of the PCMA deems a marriage where one or more parties are minor as voidable at the option of the minor. The laws on guardianship are clear, the husband will be the guardian of his wife³⁰ minor or major. The issue also becomes relevant if the husband of the minor girl himself is a minor. The question then arises that when it comes to compulsory registration of marriage should the law encourage this tacit compliance of child marriage by allowing these “valid marriages” under various personal laws to get registered, or should the law not register these marriages which may amount to turning a blind eye allowing the activity continue unregulated. The Delhi High Court emphasized need for compulsory registration of marriage:

“... registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.”³¹

2.27. As of now, under the **Dowry Prohibition Act, 1961**, in a marriage between minors the bride’s *stridhan* lies with her father in

³⁰ See, Section 21 of The Guardians and Wards Act, 1890; section 6 (iii) of Hindu Minority and Custody Act, 1956.

³¹ 2012 (6) AD (Delhi) 465

law and husband who stand as trustees till she attains the age of majority. Though the law wishes to exterminate underage marriages, such marriages remain a harsh reality in India and therefore a conversation about 'trustee' of *stridhan* needs to be had so that women are not denied their access to *stridhan* once they attain majority, regardless of the success achieved in preventing child marriages.

2.28. Further, **Medical Termination of Pregnancy Act, 1972**, section 3 provides that at the time of termination of pregnancy if the wife is a minor consent of the husband is required. However, on occasion that the husband himself is a minor, the consent stands vitiated. Thus, all these laws operate on the belief that child marriage is a reality in India and till the time such marriages are common the existing laws must be updated so as to not contradict other existing laws.

Grounds for Divorce

2.29. The Law Commission in its 71st Report 'Hindu Marriage Act, 1955' (1978), dealt with the concept of irretrievable breakdown of marriage in substantial detail. The report mentions that in as far back as 1920, New Zealand was the first of the Commonwealth countries to introduce the provision that a three-year or more separation agreement was ground for filing a petition in the courts for divorce. In 1921, in the first case of the granting of divorce on these grounds in New Zealand, the court laid down that when matrimonial relations have, in fact, ceased to exist it is not in the interest of the parties or in the interest of the public to keep a man and woman bound as husband and wife in law. In the event of such a separation, the essential purpose of marriage is frustrated and its further continuance is not merely useless but mischievous. This formulation has become a classic enunciation of the breakdown principle in matrimonial law.

2.30. The Law Commission in the 1978 report observed that restricting divorce to matrimonial disability results in an injustice in cases where neither party is at fault, or if the fault is of such a nature that the parties do not wish to divulge it and yet the marriage cannot be worked out. It refers to a situation where the emotional and other bonds, which are the essence of marriage, have disappeared and only a façade remains. This commission echoes the suggestion that where a marriage has ceased to exist both in substance and in reality, divorce should be seen as a solution rather than a taboo. Such a divorce should be concerned with bringing the parties and the children to terms with the new situation and working out a satisfactory basis for regulating relationships in the changed circumstances. Not to dwell on the ‘wrongs’ of the past.

2.31. In the case of *Naveen Kohli v. Neelu Kohli*³², the Supreme Court held that situations causing misery should not be allowed to continue indefinitely, and that the dissolution of a marriage that could not be salvaged was in the interest of all concerned. The court concluded that the husband was being mentally, physically and financially harassed by his wife. It held that both husband and wife had allegations of character assassination against them but had failed to prove these allegations. The court observed that although efforts had been made towards an amicable settlement there was no cordiality left between the parties and, therefore, no possibility of reconnecting the chain of marital life between the parties.

2.32. Much is spoken about the misuse of section 498A of IPC, 1860. Simplifying the procedure for divorce would discourage lawyers from invoking section 498A as a means to secure a quick exit. Very often, women wanted to exit a difficult marriage are encouraged to use section 498A as a way to expedite divorce proceedings. While registering a police complaint, sections 498A and 377 IPC are used by

³² AIR 2006 SC 1675

women only because of the prevailing marital rape exception. It is therefore important to take into account the reasons why certain provisions are overused and acknowledge that often this happens because of the lack of other provisions in the law to address the specific nature of grievances.

2.33. After *Arnesh Kumar v. State of Bihar*,³³ there are strict guidelines to ensure that there are no frivolous complaints under section 498A IPC. However, the problem of its overuse can only be truly addressed by understanding what is the exact nature of grievance that underlies the complaint. Simplifying divorce procedures will ensure that unhappy couples can exit their marriage rather than resorting to criminal law provisions only to separate.

2.34. In a recent judgement the Court has reiterated that in cases of mutual consent the period of cooling off could be waived in certain circumstances. The Court in **Amardeep Singh v Harveen Kaur**³⁴ stated:

Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

2.35. Encouraging a simplified procedure for divorce is imperative for sustaining a healthy perception of marriage which is free of any discrimination or violence. Simplifying the procedure for couples where no reconciliation is possible would also be beneficial in curbing the false allegations against parties, which are often made in order to hasten the process of divorce. Lengthy procedures incentivise the use

³³ AIR 2014 SC 2756

³⁴ AIR 2017 SC 4417

of severe grounds such as cruelty and adultery rather in order to secure a divorce which may have been prompted merely by inability of the partners to find mental, emotional or physical compatibility.

2.36. Lastly, given that matrimonial suits take years to conclude often results in individuals spending a substantial part of their lives fighting in courts whereas they could give their lives a second chance if the divorce is amicably concluded³⁵. Further, the children of such wedlock would also not be caught up in the whole process.

2.37. The Marriage Laws (Amendment) Bill, 2010, proposed that under the HMA 1955 and the SMA 1954 there should be a ground of irretrievable breakdown of marriage for divorce, provided that the wife has a right to oppose such petition on the grounds of grave financial hardship. The maintenance of child(ren) born out of the marriage should be consistent with the financial capacity of the parties to the marriage. The Bill also provides that after filing for divorce by mutual consent, the six months waiting period should be done away with. The Bill for Irretrievable Breakdown of Marriage was introduced in Parliament in 2013 addressing many of the problems of the 2010 bill. However, due to the reasons explained in next part, it lapsed.

Community of Property upon Divorce and Maintenance

2.38. The Bill for Irretrievable Breakdown of Marriage of 2013 lapsed and faced criticism over the fact that while allowing for immediate and unilateral divorce left women in a particularly vulnerable position. To address this there needs to be a robust doctrine for recognising the community of property of all self acquired

³⁵ It is important that we address the problem of violence- physical, mental, economic in a marriage to address the larger problem of young people growing up with the notion that such violence is normal to a marriage. Normalisation of male aggression and emphasis on hyper-masculinity is as harmful for boys as it is for girls. Introducing irretrievable breakdown of marriage as a ground for divorce will safeguard children from being caught in long drawn court proceedings over a divorce which often necessitate the levying of grave accusations on both parties in order to secure divorce.

property, acquired after marriage. All property acquired after marriage of either spouse be treated as a unit between the couple. It is often women, who compromise on careers in order to support families, they also contribute in most households in India to a major share of housework which is never calculated in monetary terms. The society inadequately values housework and further for working women, childbearing results in a career break which affects their employment in a way that it does not affect their husband's career. Therefore, it is important that regardless of whether the wife 'financially' or 'monetarily' contributes to the family income, her contribution to a household in terms of household labour, home management, and child bearing and care should entitle her to an equal share in a marriage and thus all property for income gained after marriage should be divided equally upon divorce. This does not mean that inherited property will also be included in this division but its value can be taken in to account by the court for determining maintenance and alimony.

2.39. The idea is not a novel one, nor is it new to India. In 1938 there was a report called 'Women's Role in Political Economy' which discussed women's contribution to a household in substantial detail and argued for its calculation in economic/ monetary terms.³⁶

2.40. Under the United Kingdom law in the case of *White v White*³⁷, the courts rely on the principle of equality of division to both parties, ensuring they receive their rightful share of the matrimonial property on divorce or dissolution of partnership. Lord Nicholls had stated "there should be no bias in favour of the money-earner and against the home-maker and child-carer".³⁸

³⁶ Banerjee, Nirmala. "Whatever happened to the dreams of modernity? The Nehruvian era and woman's position." *Economic and Political Weekly* (1998): WS2-WS7.

³⁷ (2000)UKHL 54

³⁸ *Ibid.*

2.41. However, this principle does not automatically translate to an 'absolute' equal split of property at the end of the relationship, both the Court as well as the legislature recognises that in a number of cases such a yardstick may bring an unfair burden to one of the parties.

2.42. Thus, it is important to retain the discretion of the Court in such cases but the availability of a 'no fault divorce' must accompany community of self-acquired property. The Hindu Marriage Act, 1955, Special Marriage Act, 1954, the Parsi Marriage and Divorce Act, 1936, the Dissolution of Muslim Marriages Act, 1939 can be amended to reflect this.

Rights of Differently-Abled Persons in Marriage:

2.43. The Personal Laws (Amendment) Bill, 2018, proposes to amend the Christian Divorce Act, 1869, Section 10 (iv); the Dissolution of Muslim Marriages Act, 1939, Section 2 (vi); the Hindu Marriage Act, 1955, Section 13 (iv) the Special Marriage Act, 1954 Section 27 (g) and the Hindu Adoptions and Maintenance Act, 1956, Section 18 (2)(c) to remove leprosy as a ground for seeking divorce or as a ground to deny maintenance. Not only the disease is now curable but it is also common, and maintaining such a provision amounts to discrimination against individuals suffering from this condition.

2.44. Leprosy, however, is one in many ways that the laws may intentionally or unintentionally discriminate against persons with disability. There have been multiple occasions on which a parent with disability is unable to negotiate custody of children. A submission made by The Equals Centre for Promotion of Social Justice offers fine comparative review of how various countries have systematically moved towards incorporating provisions that end discrimination towards persons who are differently abled. Further, India having

ratified the UN Convention on the Rights of Persons with Disabilities in 2007 is also obligated to respect, protect and fulfil the rights of persons with disabilities:

Respect: Refrain from interfering with the enjoyment of the right

Protect: Prevent others from interfering with the enjoyment of a right

Fulfil: Adopt appropriate measures towards full realization of the right

2.45. This is particularly important given that mental health is inadequately addressed in our country, and therefore despite no law specifically preventing the access of persons with disability to a marital or familial life, they continue to be in a disadvantaged position, for example:

1. Persons with visual impairments cannot read the documents associated with the execution of personal laws;
2. Persons with speech and hearing impairments cannot communicate with authorities and officials;
3. In general, attitudinal barriers portray women with disabilities as inferior and often leads to situations where they are married to men who are already married and are made to provide childcare and other domestic work, with no rights as a “second wife”.
4. Persons with disabilities, particularly women, are denied inheritance either directly (excluded from Wills) or indirectly (not given their share of the property);

5. Women with disability are subjected to non-consensual sterilization by their families or by the institutions that they are residing in.
6. Women with intellectual, developmental and psychosocial disability (mental illness) who fall pregnant have their pregnancies terminated on the grounds that they cannot take care of their children or a fear that the disability will pass on.³⁹

Thus, in order to move towards a more inclusive framework of rights, the general reference to terms such as ‘unsound mind’, ‘lunacy’, ‘mental disorder’, need to be broken down and analysed further.

2.46. The explanations under section 13 (1) (iii) of the Act, 1955 and in section 32 (bb) in Parsi Marriage and Divorce Act, 1936 needs to be opened up such that each definition can be narrowed to exclude forms of illnesses that can be cured or controlled with adequate medical treatment or counselling.

Presumption of Marriage for Cohabiting Couples:

2.47. The law is well settled on the question of presumption of marriage for couples cohabiting. In *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*,⁴⁰ this was affirmed relying upon a large number of precedents.

2.48. The issue of maintenance, therefore, is also settled given as the claim for maintenance of wife or presumed wife will be identical. It

³⁹ Position Paper on Inclusive Personal Laws
For the Law Commission of India Report on the Uniform Civil Code, April, 2018, The
Equals Centre for Promotion of Social Justice; see also *Suchita Srivastava and Ors.*
v. Chandigarh Administration, AIR 2010 SC 235

⁴⁰ AIR 2010 SC 2685.

is also urged that a greater study be initiated into rights of all persons who are cohabiting as a conjugal unit.⁴¹

HINDU LAW

2.49. The Hindu Marriage Act, 1955 brought with it some significant reforms, but remained far from satisfactory. Reform of Hindu law which has historically been celebrated as a watershed moment, has in the recent decades also been viewed with a critical lens, which highlighted that codification of Hindu law in essence was a codification of North Indian upper caste morality.⁴²

2.50. In the subsequent decades the law saw a number of amendments where the law was forced to incorporate customs and other forms of solemnisation of marriages that did not necessarily entail 'saptapadi' or other Brahmanical norms. For instance, the Hindu Marriage (Madras Amendment Act), 1967 enabled couples married under Suramariathai customs of a priest-less marriage to register their marriage under the Act, 1955.⁴³ Thus, the significance of the Act, 1955 lay in the fact that it made religious customs and practices amendable, and these practices, in order to prevail had to meet the test of constitutionality.

2.51. Despite codification, there remained areas where inequality between men and women continued that these practices if tested against the fundamental rights under the constitution may not hold

⁴¹ At a later stage the possibility of a civil partnership must be assessed. It needs to be debated alongside the moves to enact a 'transgender bill'. The broader definitions of 'man' and 'woman' that the law now presumes, should now imply that matrimonial rights must also be accessible all persons inhabiting these legal definitions. We urge deeper consultation with the LGBTQI communities to take this conversation forward.

⁴² Som, Reba. "Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?." *Modern Asian Studies* 28, no. 1 (1994): 165-194. Sinha, Chitra. *Debating Patriarchy: The Hindu Code Bill Controversy in India (1941-1956)*. Oxford University Press, 2012. Newbiggin, Eleanor. "The Hindu Code Bill and the making of the modern Indian state." PhD diss., University of Cambridge, 2008.

⁴³ Anandhi, S. "Women's Question in the Dravidian Movement c. 1925-1948." *Social Scientist* (1991): 24-41.

good. Slowly but surely through legislative attempts to codify fair and acceptable laws to govern marriage, and Supreme Court's attempt to nullify the unfair traditions and the civil society movement's tireless campaign in highlighting the problems in personal laws, India is now taking small steps towards creating a more egalitarian society.

2.52. Nowhere in the Hindu texts does one find support for practices such as *Maitri Karaar* or *Draupadi-vivah*, yet these practices prevail as 'customs'. Before the codification of Hindu law in 1950s there were a number of prevailing provincial legislations governing marriage and divorce among Hindus. With challenges to statutes such as Prevention of Hindu Bigamous Marriage Act, 1946, there emerged cases that not only informed, but also in many ways defined the boundaries of personal law and had a significant bearing on the relationship between religion and the state. In *State of Bombay v. Narasu Appa Mali*⁴⁴ the Court laid the ground for the degree to which the State could intervene in religious practices under religious 'personal law'. The Bombay High Court concluded:

A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.

2.53. While the intervention was worded largely as 'social reform', the court also clarified that there was a distinction between religious faith and religious practice. While the former warranted protection by the State, the latter had to face the constitutional test. What practice qualified as reform-worthy or worth preserving often depended on whether it entailed a 'criminal' offence or not.

⁴⁴ AIR 1952Bom 84

2.54. However, the boundary between 'civil' and 'criminal' law is a porous one and what would constitute 'criminal' at a particular point in history could be revisited in the course of time. For instance, the condemned practices such as dowry were 'criminalised' over time. Therefore, in *Narasu Appa Mali* the Court took the view that the regulation if not a total banning of bigamy among Hindus was in line with the social, political and even economic demands of the time. Therefore, concluding that such an intervention finds its basis in democratic social movements.

2.55. Even though there remains substantial controversy over whether the judgment of *Narasu Appa Mali* is binding in its conclusion that personal laws cannot necessarily be tested against fundamental rights guaranteed in the Constitution because there is uncertainty about whether personal laws in fact qualify as 'laws in force'. However, the more persevering legacy of the case should in fact, be that it categorically held that practices not 'essential' to religion need not be preserved as personal law of that religion, as bigamy was held to be not 'essential' to Hinduism.

2.56. However, soon after *Narasu Appa Mali*, the Hindu Marriage Act, 1955, abolished bigamy among Hindus. Six different legislations were passed by Parliament between the years 1954 and 1956, which codified Hindu family law, and also the Special Marriage Act, 1954 to govern cross-community marriages. Polygamy was banned and divorce was introduced and women's right to inherit property was also supported. The significant achievement of codification of family law was that despite the imperfect nature of the legislation,⁴⁵ once written in the form of statutes the Hindu law Acts served to open up new public discussions and debates on various aspects of religion and the

⁴⁵ Agnes, Flavia. "Hindu men, monogamy and uniform civil code." *Economic and Political Weekly* (1995): 3238-3244.

ways in which these could be contradicted or reconciled with constitutional provisions and in particular with Fundamental Rights.

Repudiation of marriage:

2.57. The 1955 Act has seen a number of amendments since its enactment. However, one particular provision has escaped amendment even as it contradicts the Prohibition of Child Marriage Act, 2006 (PCMA). Section 13(2) (iv) of the Act, 1955 provides that a girl given in the marriage before the age of fifteen years, has an option to repudiate the marriage after attaining fifteen years of age but before she is of eighteen years of age.

2.58. Under PCMA, however, the window for repudiation of a child marriage is not limited to fifteen-eighteen years of age. Section 3(3) provides that either party, who was given in the marriage before attaining the age of eighteen years, can repudiate the marriage. The party also has a span of two years, after eighteen years of age, to avail this remedy.

Restitution of Conjugal Rights:

2.59. Section 9 of the HMA 1955, provides for the restitution of conjugal right. While hearing the petition of divorce the Bombay High Court even suggested that women 'should be like Sita' and follow their husbands everywhere⁴⁶. In the current context when a number of women are as educated as men are and are contributing to their family income, the provision of restitution of conjugal rights should not be permitted to take away these hard-earned freedoms. In *Suman Kapur v. Sudhir Kapoor*⁴⁷ the Supreme Court cited women's focus on their careers as 'neglect' of their household responsibilities. If women

⁴⁶ See, <https://timesofindia.indiatimes.com/city/mumbai/A-wife-should-be-like-goddess-Sita-Bombay-HC/articleshow/13054421.cms>;
<http://www.womensviewsonnews.org/2012/05/bombay-high-court-judge-tells-woman-to-be-like-sita/>

⁴⁷ AIR 2009 SC 589

are given equal opportunity to study it should be presumed that they will seek equal opportunity to advance their careers and as a corollary, men should not just cooperate but contribute actively towards household activities and responsibilities such as management of household, childcare and equal partners in marriage, rather than misusing the provision of restitution of conjugal rights to force their wives to cohabit.

2.60. In *Bhikaji vs. Rukhmabai*, 1885 Rukhmabai a physicist, had refused to cohabit with the man she was married to in her childhood. Justice Pinhey observed that English law would not apply in this case because it presumed that a marriage would have been solemnised between two **consenting** adults and so far as Hindu law was concerned, there was no precedent for forcing cohabitation. While the appeal to the decision was allowed in the re-trial, restitution of conjugal rights remains a colonial inheritance which finds no precedent in Hindu law before it was codified under the HMA.⁴⁸

2.61. In *T Sareetha v. Venkatasubiah*⁴⁹ the Andhra High Court had struck down Section 9 of the HMA 1955 but this view was disapproved by the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chaddha*⁵⁰. The conjugal relations in a marriage are indeed significant, and are well safeguarded under 'grounds available for divorce' and the forced nature of cohabitation must be discouraged socially and also reflected in the law. The Madras High Court in *NR Radhakrishna v. Dhanalakshmi*⁵¹ and the Delhi High Court in *Swaraj Garg v. RM Garg*⁵² also agreed that in the modern day, it cannot be presumed that wifely duty is fulfilled by following their husbands everywhere and it is an unreasonable ask.

⁴⁸ Ee also, Sarkar, Tanika. "Rhetoric against age of consent: Resisting colonial reason and death of a child-wife." *Economic and Political Weekly* (1993): 1869-1878.

⁴⁹ AIR 1983 AP 356

⁵⁰ AIR 1984 SC1562

⁵¹ (1975) 88 LW 373

⁵² ILR(1979)1 Del 41

2.62. The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 had also recommended that restitution of conjugal rights had no relevance in independent India and the existing matrimonial laws already protects conjugal relations, as denial of consummation is recognised as ground for divorce.⁵³ The report, under the leadership of Pam Rajput highlighted the fact that this provision was only being used to defeat maintenance claims filed by wives and served little purpose otherwise. The Commission echoes the recommendation of the Committee in this regard and suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA,1954, and section 32 of Indian Divorce Act, 1869.

Bigamy upon Conversion

2.63. Anthropological evidence has shown that bigamous arrangements among Hindus continue to exist and have local recognition despite their being a law against it. In fact, data suggests that many Hindus convert to Islam in order to practice bigamy as highlighted by the *Sarla Mudgal v. Union of India*⁵⁴ in 1994. Such conversion takes place despite there being clarity on the fact that another marriage of a spouse by conversion would not be considered valid if the previous partner of the spouse continues to remain of the religion under which the marriage was solemnised.

2.64. The Law Commission 18th Report 'Converts' Marriage Dissolution Act, 1866' (1961) had dealt with rights of spouses in the case of conversion in substantial detail. The report had clarified that conversion from a monogamous religious to a polygamous one did not by itself dissolve the marriage. This however needs to be clarified by

⁵³ The Report by High Level Committee on Status of Women, *Ministry of Women and Child Development* 2015. Chaired by Pam Rajput.

⁵⁴ AIR 1995 SC 1531

statute rather than on a case to case basis. The Law Commission's 227th Report Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings (2009) had exclusively dealt with the subject of bigamy by conversion. The existing law on bigamy, section 494 Indian Penal Code (IPC) provides that a person shall be punished with the imprisonment, which may be extend to seven years, if he/she marries during the lifetime of their spouse.

2.65. This also carved out the exception where marriage with such husband or wife has been declared void by a court of competent jurisdiction, or falls within the ambit of sections 107-108 of the Evidence Act of 1872, i.e. that the husband or the wife has not been heard of for seven years. Section 495 IPC, further provides that if the offence of bigamy is committed by not disclosing the fact of former marriage, to the person with whom the subsequent marriage is contracted, it shall be punished with imprisonment which may be extend to ten years and fine. With regard to this the recommendation of the Committee on Status of Women, Ministry of Women and Child Development (2015) are very relevant, as it recommended making such marriages void.

2.66. The report further highlighted that often women tend to be on the receiving end of a society's disapproval of bigamy. Often the second wife whose marriage is declared void suffers without maintenance and bears the burden of maintaining her children who are deemed illegitimate. Therefore, the report further recommended that,

“Section 16 should be amended to include all children born out of wedlock and not just those from void and voidable marriages. Further the term ‘illegitimate’ should not be used in any statute or document.”

2.67. Thus, the Law Commission reiterates the recommendations of the previous reports⁵⁵ and urges swift legislative action on clarifying a precedent that has repeatedly been upheld by the courts.

SIKH LAW:

2.68. There has been a long-standing demand for registering marriages under the Anand Marriage Act, 1909 (the Act 1909), for Sikh couples, who do not wish to use the provisions of the HMA 1955. This was enabled in a limited way by the Government of Delhi and Sikh marriages can now be registered under the Act, 1909 instead of the Act, 1955.⁵⁶ After the 2012 Amendment it is no longer necessary to register the marriage under Registration of Births Deaths and Marriages Act of 1969, however in this respect the Law Commission of India's recommendations in 270th Report 'Compulsory Registration of Marriage' (2017) must apply.

2.69. On March 15th 2018 in Pakistan, the Punjab government enacted the Punjab Anand Karaj Marriage Act, 2018. Under the Act all marriages between Sikhs should be registered as Sikh Marriages, it also laid down definition of who was recognised as 'Sikh' and that Guru Granth Sahib be recognised as the last and eternal-living guru. Under this Act, they provide for an arbitration council which the couple can approach for seeking Dissolution of Marriage. The council first takes the necessary steps towards facilitating reconciliation, however, if after ninety days the dispute is not resolved the marriage can be dissolved by order of the Chairperson of the arbitration council.

2.70. The Anand Marriage Act, 1909 in India, however, lacks a provision for divorce and couples therefore rely provisions of the

⁵⁵ The 227th Report (2009); the Status of Women, Ministry of Women and Child Development (2015)

⁵⁶ L-G gives nod to notify Anand Marriage Act for Sikhs. Press trust of India, 02-02-2018.

Hindu Marriage Act, 1955. There has also been a demand for codifying provisions for a divorce but no steps have been taken towards creation of a provision for dissolution of marriage. While the provisions of the Hindu Marriage Act can be accessed for seeking divorce, the Commission's suggestions to changes to Hindu Marriage Act, 1955 such as community of property, provision for a no-fault divorce will therefore also apply to Sikh marriages.

MUSLIM LAW:

2.71. Parts of Muslim personal law codified in 1937 as the Muslim Personal Law (Shariat) Application Act, 1937 as well as the Dissolution of Muslim Marriages Act, 1939 in many ways led the reforms in religious family laws. Muslim law not only recognised women as absolute owners of property, but also have built in rights for women to divorce. Attempts towards codification were made in 1960s by Nehru along with the AAA Fyzee who proposed the idea of a Muslim Law Committee. However, this was later dropped owing to opposition within the community and the then Law Minister A K Sen responded to a question about this committee in Parliament that it was felt that the committee is not necessary at that moment.⁵⁷ After this, mostly it was the judiciary that offered progressive interpretation of what the Quranic texts could have desired or intended.

Maintenance

2.72. On the vexed question of maintenance of the divorced wife in Muslim law the Supreme Court in *Bai Tahira v. Ali Hussain Fiddalli Chothia*⁵⁸ and *Fazlunbi Bivi v. Khader Vali*⁵⁹ observed that there was no contradiction between Muslim personal law and Section 125 of the

⁵⁷ 'Amendments to Muslims law, No Committee Proposed', *Times of India*, 21st August 1963. See Saumya Saxena, 'Commissions, Committees and Custodians of Muslim Personal Law in Post-Independence India', *Comparative Studies in South Asia Africa and Middle East*, (Forthcoming December, 2018).

⁵⁸ AIR 1979 SC 362

⁵⁹ AIR 1980 SC 1730

CrPC that contained the provision for maintenance of children, parents and wives and the definition of wife included a divorced wife.

2.73. This judgement, in effect laid down the procedure for how maintenance issues were to be dealt with in circumstances when women were threatened with destitution. This precedent was also relied upon in the *Fazlunbi v Khader Vali* case, emphasizing a 'merciful' reading of the provisions of Muslim law to extend greater protections to women and provide them with adequate maintenance upon divorce that extended beyond three months 'iddat' period.

2.74. *Mohammad Ahmad Khan v. Shah Bano Begum*⁶⁰ though not substantially different from *Fazlunbi* or *Bai Tahira*, the judgement as well as the subsequent decision to enact the Muslim Women's Protection of Rights on Divorce Act 1986, triggered large scale protests across the country. The case led to the crystallisation of the binary opposition between right to 'freedom of religion' and right to 'equality'. In 1986 while many organisations applauded the judgement, the political context of the time led to an equally strong backlash against any perceived interference with Muslim personal law. Thus, it is worth noting that the judgement itself was not attempting any reinterpretation of Muslim personal law as it stated:

2.75. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of *iddat*. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. *Thus there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.* Aiyat No. 241 and 242 of 'the Holy Quran' fortify that the Holy Quran imposed an obligation on the Muslim

⁶⁰ AIR 1985 SC 945

husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of Quran.

2.76. The Muslim Women Protection Rights on Divorce Act, 1986 however, overturned this judgement. The Act although was subjected to much criticism, it also provided a number to compensatory schemes⁶¹ which in effect served to enhance judicial discretion in matters of Muslim Personal Law.

2.77. The 1990's were a significant period for the development of the debates on personal law. Even while there was no national legislation that surfaced in the period, there were significant court rulings in the decade that informed the debate on family laws. The judgements in the *Sarla Mudgal v. Union of India*⁶², and the *Ahmedabad Women's Action Group v. Union of India*⁶³, and the *Danial Latifi v. Union of India*⁶⁴, produced widely different but critical rulings on the nature and scope of religion even within the category of personal law.

2.78. In *Danial Latifi* which challenged the perception that Muslim personal law, after the enactment of Muslim Women's Protection of Rights on Divorce Act, 1986 did not offer sufficient maintenance to divorced Muslim women beyond the *iddat* period. It clarified that the term '*mata*' which was translated to English language to imply 'maintenance', in fact, implied a 'provision for maintenance'.

...the word provision in Section 3(1)(a) of the Act incorporates *mata* as a right of the divorced Muslim woman distinct from and in addition to *mahr* and maintenance for the *iddat* period, also enables a reasonable and fair provision and a reasonable and fair

⁶¹ Flavia Agnes, 2012. 'From Shahbano to Kausar Bano: Contextualizing the 'Muslim Women' within a Communalized Polity.' *South Asian Feminisms*, pp. 33-53.

⁶² AIR 1995 SC 1531

⁶³ AIR 1997 SC 3614

⁶⁴ AIR 2001 SC 3958

provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Bano's case, actually codifies the very rationale contained therein.

2.79. This implied that the first responsibility of maintenance of a divorced Muslim woman lay on her husband who would make a provision for maintenance within (rather than for) three months; failing which the responsibility would lie on the parents and relatives of the woman in order in which they would inherit her property and failing that it would be the responsibility of the Waqf board to maintain her. However, the 'provision' was enforceable only against the husband which was interpreted as the responsibility lying with the spouse.

2.80. While the procedure for seeking maintenance may be settled under Muslim law, the principle of 'community of property' upon divorce must also apply here, as discussed in the earlier section on irretrievable breakdown of marriage. Maintenance claims are frequently flouted by husbands, and qazis as well as judicial magistrates have had limited success in having even the *meher* amount paid⁶⁵. Particularly in cases where women themselves initiate divorce, alimony becomes very difficult to negotiate and judicial delays and expenses contribute to women withdrawing their claims. Therefore, the idea of community of (self acquired) property is crucial when unilateral divorce is permitted. The Act, 1939, needs to be amended to reflect this.

⁶⁵ Sylvia vatuk, 'marriage and its discontents: Women, Islam and Law in India' 2017

Divorce

2.81. On the question of triple talaq or *talaq-ul-biddat*, the Courts have expressed their disapproval of the practice in multiple observation even before it was formally set aside in 2017.⁶⁶ In *Shamim Ara v. State of Uttar Pradesh*⁶⁷, the Court dealt with the issue of triple talaq in substantial detail. In this case the Supreme Court relied on the observation of the Kerala High Court in *A.Yousuf Rawther v. Sowramma*⁶⁸. The Kerala High Court observed that the statute must be interpreted to further a 'beneficent object'. The Supreme Court further observed that '*Biddat*' by its very definition has been understood as a practice that evolved as an aberration and it has been held to be a practice that was against the principles of Sharia, against the Quran and the *Hadees*. Further, it has been argued here that what has been deemed to be a practice that is bad in theology, cannot be good in law. The 1937 Act was brought in precisely to curb practices that are antithetical to the Sharia. If the source of Sharia is to be found in the Quran, and the Quran has no mention of the practice of triple talaq or *talaq-ul-biddat* then the practice has no religious sanction.

2.82. However, the observation of the Supreme Court in *Shamim Ara* over triple talaq was *obiter dicta* in a matter that was primarily concerning payment of maintenance of the divorced wife. It is for this reason that the judgment did not become binding and the practice continued till August 2017, when it was categorically set aside by the Supreme Court.

2.83. In *Shayara Bano v. Union of India*⁶⁹ the Court further held that section 2 of the Muslim Personal Law (Shariat) Application

⁶⁶ *Shayara Bano v. Union of India*, AIR 2017 SC 4609

⁶⁷ AIR 2002 SC 3551

⁶⁸ AIR 1971 Kerala 261

⁶⁹ AIR 2017 SC 4609

Act, 1937, falls squarely within Article 13(1) of the Constitution. Therefore, the practice of triple talaq which finds no anchor in Islamic jurisprudence and is permitted only within a limited sect of Hanafi school of Sunni Muslims, is not a part of Sharia and therefore is arbitrary. The section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 through which the power and procedure for dissolution of marriage by triple talaq is said to be derived (by the respondents), is declared void (only to the extent that procedure is 'arbitrary'). Once this is struck down the arbitrariness of this procedure ceases to be a part of personal law and therefore does not qualify for protection under the fundamental rights guaranteed under Articles 25-28 of the Constitution.

2.84. Giving affirmative answer on the question that whether or not the Act, 1937 is violative of fundamental right, to the extent that it enforces the practice of triple talaq, Justice Nariman observed that since the practice permits to break the matrimonial tie by the husband, without even any scope of reconciliation to save it⁷⁰, it is unconstitutional. The practice now should be squarely covered under the Domestic Violence Act, 2005, and in case abandonment of wife is caused through pronouncement of triple talaq, should be covered under the 2005 Act's provisions on economic abuse, right to residence, maintenance among others.

2.85. Thus, in this case it is revealed that sometimes religious edicts and fundamental rights desire the same thing- triple talaq had the sanction of neither. **Therefore, the issue of family law reform does not need to be approached as a policy that is against the**

⁷⁰ See also: In *Must. Rukia Khatun v Abdul Khaliq Laskar*, (1981) 1 GLR 375 held that the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

religious sensibilities of individuals but simply as one promoting harmony between religion and constitutionalism, in a way that no citizen is left disadvantaged on account of their religion and at the same time every citizen's right to freedom of religion is equally protected.

2.86. The conflict within personal laws here is not merely between fundamental rights of equality and that of freedom of religion as it is popularly framed. It is, in fact, located even within each personal law code. For example, as the Shamim Ara pointed out, in reference to triple talaq there is also a conflict between what the true sources of personal law propagate and the way in which anglo-religious laws were codified.

2.87. Section 2 of the Act, 1939 provides for a number of grounds based on which women can seek divorce. Men on the other hand are not required to qualify their decision under any of these grounds. Therefore, uniformly applying the grounds available under the Act, 1939 to both men and women will have greater implications of ensuring equality within the community rather than equality between different communities. The same applies to the law on bigamy.

2.88. It is important that men and women both have access to the same rights and grounds for divorce. The Act, 1939, should also contain 'adultery' as a ground for divorce and should be available to both men and women.

2.89. *Mubaraat* or mutual consent is not covered under the Act, 1939 because generally when the Act was available only to women as a judicial divorce it assumed that *mubaraat or talaq* had not taken place and that is why the wife has to resort to the provisions of the Act 1939. Validity of the section 2 of the Act 1937, is also under challenge

before the Supreme Court, it is desirable to deal, with the issue at hand after it is finally decided⁷¹.

2.90. Any man resorting to unilateral divorce should be penalised, imposing a fine and/or punishment as per the provisions of the Protection of Women from Domestic Violence Act, 2005 and anti-cruelty provisions of IPC,1860, especially section 498 (Enticing or taking away or detaining with criminal intent a married woman). Bringing an end to the practice of triple talaq should automatically curb the number of cases for *Nikah Halala*⁷². Since triple talaq is **already outlawed**, pronouncing of triple talaq in one sitting has no effect on marriage. In cases of divorce given by *talaq-e-ahsan* mode, or a *mubaraat*, or *khula* reconciliation should be available to spouses. A number of *Nikahnamas*⁷³ have been floated from time to time and many of these provide a blueprint of what a 'model' *Nikahnama* could look like. A document, Women Living Under Muslim Laws, was an effort to provide comparative law on how Muslim women's rights have evolved in Islamic countries.⁷⁴ These contain discussions on not only model *Nikahnamas* but also explanations about how a contractual nature of marriage recognised under Muslim Personal law could in fact be beneficial for women if the terms of the contract are genuinely negotiated and agreed on by both parties. The *Nikahnama*, discussed by Zeenat Shaukat Ali in her book, *Marriage and Divorce in Islam*⁷⁵, can be considered alongside *Nikahnamas* recommended by the All India Muslim Personal Law Board (AIMPLB) and by various other organisations. The *Nikahnama* itself can be broadened to constitute

⁷¹ *Sameena Beguma v. Union of India*, WP(C) No. 222/2018; *Nafisa Khan v. Union of India*, WP(C) No. 227/2018.

⁷² The matter is before the Constitutional Bench in *Sameena Beguma v. Union of India*, WP(C) No. 222/2018; *Nafisa Khan v. Union of India*, WP(C) No. 227/2018

⁷³ Civil societies, such as Muslim Women's Rights Network, Majli, Awaaz-e-Niswaan, Bharatiya Muslim Mahila Andolan and Bebaak Collective, working for the Muslim Women's rights, also advocates for the same.

⁷⁴ www.wluml.org/

⁷⁵ Ali, Z.S., 1987. *Marriage and Divorce in Islam: An Appraisal*. Bombay: Jaico Publishing House. See also, Vatuk, Sylvia. *Marriage and Its Discontents: Women, Islam and the Law in India*. Women Unlimited, an associate of Kali for Women, 2017.

the 'Muslim Marriages Act', and the Dissolution of Muslim Marriages Act, 1939, can be amended to include suggestions made in the first section which are common for all marriage laws with respect to grounds for divorce, community of property and the Act will apply to both men and women. The changes community of property would entail for other inheritance laws has been discussed in the last chapter.

Polygamy

2.91. There are various arguments on the 'morality' aspect of polygamous relationships and whether it should be prevented for the benefit of women or because the society simply deems it to be immoral.⁷⁶ In the majority of the cases in the Indian context it is clear that women have had no say in their husband's second or subsequent marriages. Thus, the prime and paramount consideration while dealing with polygamy is the interest of women. Polyandrous relationships where consent of the wife has not been taken are violative of her marital rights. Further, in bigamous relationships, where men are permitted more than one wife and is a blatant violation of equality.

2.92. Although polygamy is permitted within Islam, it is a rare practice among Indian Muslims, on the other hand it is frequently misused by persons of other religions who convert as Muslims solely for the purpose of solemnising another marriage rather than Muslim themselves. Comparative law suggests that only few Muslim countries have continued to protect the right to polygamy but with strict measures of control.

⁷⁶ The matter is pending before the Constitutional Bench of the Supreme Court in *Sameena Beguma v. Union of India*, WP(C) No. 222/2018; *Nafisa Khan v. Union of India*, WP(C) No. 227/2018

2.93. In Pakistan law has been successful in preventing bigamous marriages as tough procedures are in place for its regulation. In 2017 the subordinate Court of Lahore gave a progressive interpretation to the provision of 2015 family law enactment on bigamy and held that a second marriage conducted without the permission of the existing wife amounts to 'breaking the law'. Lahore court, orders the man to serve a six-month jail term and pay a fine of 200,000 Pakistani rupees.⁷⁷

2.94. In Pakistan, the law prohibits contracting a marriage during the subsistence of an earlier marriage. If, in exceptional circumstances such a marriage is to be contracted, an application in writing to the Arbitration Council has to be made. The application so made, shall also have prior permission of the existing wife/ wives. The Council will record its decision in writing, whether granting such application or not, and such decision shall be final. However, if the husband marries without the permission of the Arbitration Council, he shall be liable to pay the entire amount of dower to his existing wife/ wives, immediately. And on complaint he can be convicted for the same.

2.95. The Law Commission of India in its 18th Report 'Covert's Marriage Dissolution Act, 1866' (1961), acknowledged for the first time the international context of Islamic laws. The report highlighted that reforms relating to Muslim Personal law such as enforcement of monogamy by imposing restrictive conditions for polygamous arrangements had been carried out in various countries such as Morocco, Algeria Tunisia, Libya, Egypt, Syria, Lebanon and Pakistan.⁷⁸ The practice however, continued to prevail in Saudi Arabia, Iran, Indonesia and India.⁷⁹

⁷⁷<https://www.reuters.com/article/us-pakistan-marriage-court/pakistan-makes-landmark-ruling-against-man-for-second-marriage-idUSKBN1D15GG>

⁷⁸ The 18th Law Commission's 18th Report on 'Covert's Marriage Dissolution Act, 1866 (1961)

⁷⁹ Ibid.

2.96. The Law Commission of India in 227th Report 'Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings' (2009), discusses how the section 494 applies to persons under various personal laws and also to Muslim women:

As regards the Muslims, the IPC provisions relating to bigamy apply to women – since Muslim law treats a second bigamous marriage by a married woman as void – but not to men as under a general reading of the traditional Muslim law men are supposed to be free to contract plural marriages. The veracity of this belief, of course, needs a careful scrutiny.

2.97. The Sachar committee report of 2004 was also a significant step in this direction, which took stock of the status of Muslims in India. It also referred to problems of health and education.⁸⁰

2.98. Under the India Administrative Service (cadre) Rules, 1954, the Central Civil Services (Conduct) Rules 1964 bigamy attracts penalties. These conduct rules provide that a person who has contracted a bigamous marriage or has married a person having a spouse living shall not be eligible for appointment to such services – Rule 21. The All India Services (Conduct) Rules 1968 also place restrictions on members of any such service – Rule 19. The 227th report states:

Both the Rules, however, empower the government to exempt a person from the application of these restrictions if the personal law applicable permits the desired marriage and “there are other grounds for so doing.” These provisions of Service Rules apply to the Muslims and their constitutional validity has been upheld by the Central Administrative Tribunal and the courts. See, e.g., *Khaizar Basha v Indian Airlines Corporation*, New Delhi AIR 1984 Mad 379 [relating to a

⁸⁰ Social, Economic and Educational Status of the Muslim Community, 2006

similar provision found in the Regulations framed under the Air Corporation Act 1953].

2.99. It is therefore suggested that the *Nikahnama* itself should make it clear that polygamy is a criminal offence and section 494 of IPC and it will apply to all communities. This is not recommended owing to merely a moral position on bigamy, or to glorify monogamy, but emanates from the fact that only a man is permitted multiple wives which is unfair. Since the matter is sub judice before the Supreme Court, the Commission reserves its recommendation.

CHRISTIAN LAW:

2.100. Early 1960s are characterised by productive discussions on family law reform which was also the global trend in the period. Globally, the late 1960s witnessed a focus on family law reform.⁸¹ In Canada, the 1968 Divorce Act attempted to include 'formal equality' between spouses, the American senate popularised ideas of 'rehabilitative alimony' in the 1970s; and in 1969 Britain enacted the Divorce Reform Bill. In Italy the Divorce law was passed in 1974, after a controversial and heated debate on the subject and strong objections from Vatican City. In India as well, there was hesitation on the subject of divorce.

2.101. The 15th Law Commission Report 'Law relating to Marriage and Divorce Amongst Christians in India' (1960) did not culminate in successful legislation and faced opposition from the Catholic Church. In early 1960s the amendments to the Indian Christian Marriage Act, 1892, were introduced in Parliament but the Bill lapsed. In 1969 the Indian Divorce Act, 1869 was amended but this did not accommodate most of the concerns raised by the Law Commission in its 15th Report.

⁸¹ For a brief account on how the period of decolonisation 1950s and 1960s globally experienced debates on retention or replacement of religious laws, in Egypt, Malaysia, Indonesia, see Narendra Subramanian, 2010. 'Making family and nation: Hindu marriage law in early postcolonial India.'

It is owing to the failure of legislative intervention that family law has largely been interpreted by the Courts in India. The Courts in many ways have had to lead the way to reform of the personal laws. Even while Courts hesitate in directly asking the legislature to enact, a series of cases from *Sarla Mudgal* to the minority judgment in *Shayara Bano*, have urged the legislature to look into the inequalities within family laws because a fair law would always be far more useful than a case by case delivery of justice.

2.102. One may find lack of consistency in the matter of women's right in the decision of Court. In the case of *Dawn Henderson v.D Henderson*⁸², where a husband forced his wife into prostitution, the court admitted the evidence of 'cruelty' as a ground for divorce but rejected the divorce petition for want of sufficient evidence of adultery by the husband. While for a husband a divorce on ground of cruelty alone was sufficient but for the wife cruelty along with adultery had to be proved in order to get a divorce.⁸³

2.103. In 2001 reformation of the Act,1869 took place. This debate was focussed on the reform of Christian Personal Law and attempted to do away with a number of discriminatory provisions such as compensation for adultery, and the fact that women needed to supplement adultery with cruelty or another ground while pleading a ground of divorce, but the same was not the case for the husband. While the amendments addressed a number of discrepancies, the government also conceded to recognition of certain exceptions. For instance, despite the majority of the population of Nagaland being Christian, the State was granted an exception and the amendments to the Act,1869, are not applicable. This was owing to the Naga Accord

⁸² AIR 1970 Mad 104

⁸³ See also, Kapur, Ratna, and Brenda Cossman. *Subversive sites: Feminist engagements with law in India*. Sage Publications, 1996. See also, Parashar, Archana, and Amita Dhanda. "Redefining family law in India: essays in honour of B. Sivaramayya." (2008). Agnes, Flavia. "Protecting women against violence? Review of a decade of legislation, 1980-89." *Economic and Political Weekly* (1992): WS19-WS33, for a critique of law and how legal intervention also has limitations, and codified standardised laws have not always translated to justice for women.

signed in the year 1961 to ensure the territorial integrity of India in exchange for granting exceptional status to Nagaland with respect to domestic or personal laws that applied in the State⁸⁴.

2.104. In 2001 Amendment the clause of two-year separation had been preserved by Parliament keeping in mind that the Christian community and in particular the Catholic community had not been historically in favour of divorce. Showing consideration to such religious sentiments, the government had, in fact, hesitated even from the use of the term divorce altogether referring to it instead as 'dissolution of marriage'.⁸⁵ However, many Christian women's organisations have argued that the period for confirmation of a decree of divorce is significantly longer than for the couples of other religions. A writ petition is also pending before the Supreme Court, questioning the two years separation period⁸⁶. This can be rectified and brought in line with the SMA, 1954.

PARSI LAW

2.105. The Parsi community's personal law has remained largely untouched so much so that it continues to preserve the jury system for hearing divorce cases. In the recent case filed by Naomi Sam Irani⁸⁷, Parsi law's jury system has been challenged before the Supreme Court. The bench sits only twice in a year to confirm divorces and it entails a jury to oversee the divorce proceedings despite the fact that the jury system has been abolished in India several decades ago for all other cases in 1950's and 60's. Section 18 of Parsi Marriage and Divorce Act, 1936 (the Act, 1936) provides for Constitution of special Court in Mumbai, Chennai and Kolkata where

⁸⁴ See discussion sixth schedule, Introduction.

⁸⁵ *Lok Sabha debates* The Indian Divorce (Amendment) Bill, 2001 Act No. 51 of 2001. 30 August 2001 to 24 September 2001. Law Minister, Arun Jaitley: 'I am correcting myself and I am preferring to use the words 'dissolution of marriage' because of the factors, particularly in a large section of Christians says that the marriages are not really intended to be divorced.' *Lok Sabha debates*, Col. 389-90.

⁸⁶ *Albert Anthony v. Union of India*, WP(C)No. 127/2015

⁸⁷ *Naomi Sam Irani v. Union of India & Anr.*, W.P(C) 1125 of 2017

the respective Chief Justice of the High Court has the power to appoint a judge who would then decide on issues of maintenance, alimony, custody of children etc. with the aid of five other appointed delegates.⁸⁸

2.106. The requirement of a jury to confirm divorce is not only archaic but also tedious and complicated. The procedure for divorce should entail citing of available and recognised grounds, subsequent to which the divorce may be confirmed as done under the Special Marriage Act, 1954. Not only does this cause inordinate delays and inconvenience to people living outside metropolitan cities, but also these systems discourage inter-community marriage. The approach of the Commission, towards these reforms is not to attain similarity of procedure, but to address the 'delay' and 'discrimination'. Once this is achieved, all procedures, ceremonies, customs, even if different will lead to the same end.

2.107. For Parsis, the procedure of divorce not only needs to be simplified, but also marrying outside the community should estrange persons from their religion nor should they have to forfeit their inheritance rights. The very idea that upon marriage a woman must discard her religious or social identity and acquire only that of her husband goes against the idea of equal partnership in marriage. Not only should women have a right to follow their customs, rites and rituals, but also they should be under no obligation to give up their maternal or paternal surname.

2.108. All grounds recognised under Parsi Marriage and Divorce Act, 1936 may remain as they are, the only amendment may be with respect to procedure of divorce. In the Parsi Marriage and Divorce

⁸⁸ <https://timesofindia.indiatimes.com/india/sc-seeks-centres-response-on-quashing-jury-system-for-divorce-in-parsi-community/articleshow/61882239.cms>

Amendment Act, in 1988, mutual consent was recognised as a ground for divorce, however, the Act does not recognise irretrievable breakdown of marriage as ground for divorce or community of property which should be incorporated.

2.109. Further, section 33 which applies in the case where the ground for divorce is adultery, makes the person with whom the adultery was committed, a co-defendant. This should be deleted. Marriage is premised on an understanding between two individuals, while adultery should remain a ground for divorce for both parties, the inclusion of the third person for purposes of compensation, only serves to commoditise the person who has committed the adultery as though compensation monetary or otherwise is settlement for damages. Under no religion it is permissible that a husband can treat his wife as chattel. The issue of adultery as discussed earlier is sub judice before the Supreme Court.⁸⁹

SPECIAL MARRIAGES ACT, 1954

2.110. While the SMA, 1954 has often been considered a model law, it suffers from various serious lacunae. One of the major problems highlighted in the series of consultations held by the Commission was that the 30-day notice period after the registration of marriage under the Act is often misused. The 30-days period offers an opportunity to kin of the couple to discourage an inter-caste or an inter-religion marriage. It is of paramount importance in the current scenario that couples opting into cross-community marriages are adequately protected. While previous Law Commission's 242nd Report 'Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Traditions): A Suggested Legal Framework' (2012) have discussed honour killings and the power of the *Khap Panchayats*, it is important to ensure that at least, willing couples can access the law to exercise their right to marry when social attitudes are against them.

⁸⁹ *Joseph Shine v. Union of India* WP(CrI) No. 194/2017

2.111. Recently, the procedure for registration under SMA, 1954, was challenged in the Punjab and Haryana High Court in *A & Anr. v. State of Haryana & Ors.*⁹⁰ and the court strongly urged the State to modify the Court Marriage Check List (CMCL) so that inter-religious marriages are promoted and not hampered.

2.112. It is suggested to the State of Haryana to suitably modify and simplify the CMCL to bring it in line with the Act by minimal executive interference. It may restrict the list to conditions which account for fundamental procedure avoiding unwarranted overload of obstructions and superfluity. The State is not concerned with the marriage itself but with the procedure it adopts which must reflect the mind-set of the changed times in a secular nation promoting inter-religion marriages instead of the officialdom raising eyebrows and laying snares and land mines beneath the sacrosanct feet of the Special Marriage Act, 1954 enacted in free India to cover cases not covered by any other legislation on marriages as per choice of parties for a court marriage.

2.113. Thus, while the 30-day period was retained, bearing in mind that this would also aid in transparency, particularly if facts about previous marriage, real age, or a virulent disease were concealed from either spouse, the object of the Act was to enable couples to marry by their own will and choosing. Increasingly, with moves to announce such a notice online, or with registrars directly contacting parents of the couple, the purpose of the Act, 1954 is being defeated.

2.114. The Commission urges a reduction of this period to bring the procedure in line with all other personal laws, where registration of under Hindu Marriage Act, 1955 can be attained in a day and signing of a Nikahnama also confers the status of husband and wife on the

⁹⁰ CWP No. 15296/2018(O&M), decided on 20/07/2018

couple immediately. This procedural tediousness forces couples to adopt alternate measure of marrying in a religious place of worship or converting to another religion to marry. Moreover, it also discourages couples from registering their marriage altogether because marriages outside the purview of the Act, remain valid even without registration, or marriage may take place anywhere (jurisdiction). Steps for the protection of the couples can be taken, if there is reasonable apprehension of threat to their life or liberty, and the couple request for the same⁹¹. Thus, the requirement of a thirty days notice period from sections 5, 6, 7, and 16 needs to be either deleted or adequate protections for the couple need to be in place.

2.115. All other general amendments such as introduction of irretrievable marriage as ground for divorce and community of property discussed earlier must also be incorporated in the SMA,1954.

⁹¹ *Shashi v. PIO Sub-divisional Magistrate Civil Lines*, CIC/SA/A/2016/001556

20. The Commission (CIC) recommends both the Governments Union and States, to consider:

a) Incorporating a column or leaving sufficient space for declaration in the application form for registration about reasonably apprehended threat to their life or liberty for exercising their choice and request for protection, and direct Marriage Officers to get the report from the concerned Station Housing Officer after due enquiry of the allegations of threat and secure their lives, if SHO concludes the threat is prima facie real, or

b) Take any other adequate measures to offer protection to would be partners, including taking up the draft Bill referred above with necessary changes.

21. The Commission, as per Section 19(8)(a)(iv), require public authority i.e., the Marriage Officers or SDMs, to:

a) incorporate declaration about apprehended threat in the application form, and provision for due enquiry by SHO, b) provide necessary protection in the standard operative practice or procedure,

c) add a warning against assaulting the liberty of would be partners in the form of notice for solemnization & registration of marriage, and d) ensure wide reach to the mandatory notices to be issued under law, by placing the same on the official website, in an easily accessible link, highlighting under the title of 'marriage registration notices' as that is mandatory duty of public authorities under Section 4(1)(d) to facilitate the interested persons (including parents or guardians) to know and raise objections, if any, to safeguard the interests of the partners to the proposed marriage.

CUSTODY AND GUARDIANSHIP

Introduction: Welfare and best interest of the Child to be the paramount consideration.

3.1. Emphasising the importance of the childhood of a human being, Universal Declaration of Human Rights (UDHR), 1948, under Article 25 proclaims that childhood is 'entitled to special care and assistance'. Similar, concern also finds place in the preamble of the Convention on the Right of the Child (CRC), 1989.

3.2. The CRC, 1989, further emphasised on the principle of 'best interest of the child'. While laying down different provisions for the protection of the child, Article 3 (1) of CRC also stipulates that for an institution⁹², while taking actions for the welfare of the child, its primary consideration shall be the best interest of the child. Article 9(1) further provides that a child should not be separated from his/her parents, except in situations where such separation is in best interest of the child⁹³. Thus, the principle can be applied in a variety of circumstances and to a certain extent makes a number of laws on custody and guardianship personal or general irrelevant, since this principle should prevail even if the 'law' privileges a particular sex in determining matters of custody.

3.3. The principle is rooted in all statutory and personal laws in India. For example, section 13 of the Hindu Minority and

⁹² See, Article 3(1):- 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.

⁹³ Article 9 (1):- States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

See also, Articles 9(3); 37 (c); 40(2) (b) (iii).

Guardianship Act 1956, stipulates that whenever a court appoints a guardian for a Hindu minor, the principle of best interest of the child shall be the paramount consideration. The section further specifically mentions that no party can claim a right if it is violating the principle and is against the welfare of the child.

3.4. The Guardians and Wards Act, 1890, under section 17 lays down that while appointing the guardian of a minor the court has to keep in mind the welfare of the minor. For the same, the court shall consider factors, such as, age and sex of the child.

3.5. The Supreme Court of India, over time, has also acknowledged the 'principle of best interest of the child' to be the paramount consideration, especially in the matter related to the custody or guardianship of a minor. The separation of a couple does not affect the couple alone, it also affects their child(ren). The magnitude of the impact on a child may vary from mild to extreme, varying from case to case. Embroiled in the legal battle, parents might be clouded by their own interest and might not be in a position to think what is best for the child; at this point, the role of the court becomes crucial. The court has to determine the issue of custody and the guardianship of the minor, considering the best interest of the child. Contents of the list of 'best interest of the child' are not exhaustive in nature; rather vary from case to case, as every child and his/her requirements are unique in themselves.

3.6. The Supreme Court of India, has used the principle very carefully, with sensitivity to the particularities of each case. The Court has not relied on any strict formula, rather it has arrived at an understanding of 'best interest' with the passage of time. The cases discussed below are illustrations of how in different cases the Court has employed the principle.

Order of Custody of Child is Interim in Nature

3.7. Order passed while deciding the custody of a child, is interim in nature. If the court is of the opinion that over time the needs of the minor have changed and variation in the order would be in the best interest of the child, the court may do so. Deeming an order passed as final, and sticking to it, is against the spirit of the principle of best interest of the child⁹⁴.

3.8. In *R.V. Srinath Prasad v. Nandamuri Jayakrishna & Ors.*⁹⁵, the apex Court noted that the custody proceedings are sensitive matter and while deciding it a balance has to be maintained between the sentiments and approach of the parties. The guiding principle, however remains the best interest of the child. A custody order passed, therefore, can never be final in nature. On multiple occasions, the Supreme Court has observed that with the change in the circumstances, the wards can seek for alteration in the order of custody proceedings⁹⁶.

3.9. In *Dhanwanti Joshi v. Madhav Unde*⁹⁷, the Court while applying the principle of *res judicata* in custody matter observed that before changing the order it must be established that the arrangement made by the previous order was not in the welfare of the child. However, in *Dr. Ashish Ranjan v. Dr. Anupma Tandon*⁹⁸, the Court opined that the mutual agreement between the parties could not be a ground for not admitting a fresh application for the custody of a minor. It is against the principle of the welfare of the child. The Court

⁹⁴ See: *Rosy Jacob v. Jacob A. Chakramakkal*, AIR 1973 SC 2090.

⁹⁵ AIR 2001 SC 1056

⁹⁶ See: *Jai Prakash Khadria v. Shyam Sunder Agarwalla*, AIR 2000 SC 2172; *Mausami Moitra Ganguli v. Jayanti Ganguli*, AIR 2008 SC 2262; and *Vikram Vir Vohra v. Shalini Bhalla*, AIR 2010 SC 1675

⁹⁷ (1998) 1 SCC 112

⁹⁸ (2010) 14 SCC 274 See also, *Vivek Singh v. Romani Singh* AIR 2017 SC 929; *Jitender Arora v. Sukriti Arora* (2017)3SCC 726; *Ruchika Abbi v. State (NCT of Delhi)*, AIR 2016 SC 351.

further noted that the doctrine of *res judicata* is not applicable in the case of custody of a minor.

Best Interest of the Child Supersedes Any Other Legal Right

3.10. In *Dr. (Mrs.) Veena Kapoor v. Shri Varinder Kumar*⁹⁹, the Court made it clear that “*the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.*” In *Surinder Kaur Sandhu v. Harbax Singh*¹⁰⁰, while giving the custody of minor boy to his mother, the Court stipulated that laws cannot overlook the settled principle that welfare of the child is of the paramount consideration.

3.11. The Court *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr.*¹⁰¹, again laid down that the legal rights of the parties are not to be taken into consideration, but the case is to be decided “*on the sole and predominant criterion of what would best serve the interest and welfare of the child.*”

3.12. There have been instances where the Supreme Court has awarded the custody of the minor not to the father but to the grandparents, solely keeping the best interest of the child as the guiding principle. In *Anjali Kapoor v. Rajiv Bajjal*,¹⁰² the Court took into consideration the fact that the child was living with the grandparents for a long time and the environment was conducive for his growth. Therefore, the custody of the child was handed over to the grandmother, rather than the father. Similarly, in *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekram*¹⁰³, the Court stating the welfare of the child to be the paramount consideration and not the legal rights

⁹⁹ AIR 1982 SC 792

¹⁰⁰ AIR 1984 SC 1224

¹⁰¹ (1987) 1SCR175

¹⁰² AIR 2009 SC 2821

¹⁰³ (2010) 10 SCC 31

of the parties, the custody was given to the maternal grandfather and not to the father.

Wishes of the Child(Ren) Should Be Taken Into Consideration

3.13. Along with other factors, the wishes of the minor should also be given a serious consideration. Regard should be given to the child's opinion, if s/he can understand her/his welfare. In *Purvi Mukesh Gada v. Mukesh Popatlal Gada & Ors.*¹⁰⁴, the Supreme Court, beside other factors, also took into consideration the wishes of the minors and accordingly, awarded custody to the mother. The Court observed that the children of a particular age (seventeen and thirteen in this case) "*are better equipped, mentally as well as psychologically, to take a decision*". The Court noted that though the minors wanted to be with both the parents, but if asked to choose one, they preferred their mother. Thus, these preferences cannot be ignored by the court.

3.14. The Court further offered a word of caution that the tutored and pre-prepared statements of the minor are not be considered as their wishes, and importance has to be given to their level of maturity and their surroundings et al. The Court has to be satisfied that the preference of the child is free from any undue influence.

3.15. For the fair application of the principle, the position of both the parents should also be equal as far as possible, which can be enabled through community of (self acquired) property upon divorce. The law should not give preference to one parent over the other. The following parts deal with such provisions under law, where the legal position of the parents is not equal. It is further followed by the suggestions, wherever required, to make a just case for both the parties, so that the principle of best interest of the child can be applied fairly.

¹⁰⁴ AIR 2017 SC 5407

THE GUARDIANS AND WARDS ACT, 1890

3.16. The Guardians and Wards Act, 1890 (the Act, 1890) governs the principle of the custody and guardianship of a minor. The Act, 1890 is a secular Act, implemented with a view to govern the guardianship and custody matters in colonial India. The Act, 1890, is based on the foundation that both ancient Hindu law and English law recognise 'the king' to be the '*parens patriae*', the same position has now been taken by the Courts. They have the sole responsibility to look after the welfare of the minor falling under their care¹⁰⁵.

3.17. Another objective of the Act, 1890 was to consolidate all the laws and rules regarding the custody and guardianship of the minor. The laws were scattered in different Acts, such as Act 40 of 1858; Act 09 of 1861; Act 20 of 1864; and Act 13 of 1874, which deal with custody and guardianship governing minors of different nationality. The defects in different laws and regulations were highlighted by the courts and need was expressed to have a consolidated Act with the rules of custody and guardianship of the minors, applicable to the whole of Indian territory, without exception. The Act, 1890 was largely based on the framework of the Act 13 of 1874. It further superseded all other Laws and regulations regarding the subject¹⁰⁶. However, the Act, 1890 put in an exception for personal laws. Taking into consideration of the plurality of the Indian society, the Act directs the court to decide the matter in sync with the personal laws of the parties¹⁰⁷.

3.18. With the change in the time and structure of the society, the principle of guardianship has also changed. Declaring the best

¹⁰⁵ The Guardians and Wards Act, 1890, Introduction.

¹⁰⁶ Id. Statement of Object and Reasons.

¹⁰⁷ Section 6.

interest of the child to be the paramount principle governing the custody of the child, the court does not let any other right or law prevail over it. As, the welfare of the minor and his/her future is at stake and not the preferential rights of one party or the other.

3.19. Thus, it becomes important to address any kind of inequality present in the Act, which is applicable to all communities and the current version could conflict with the welfare of the child. For instance, section 7 of the Act, 1890 gives power to the Court to appoint/declare guardian of a minor or their property. Section 19 (a) states that if the husband of the minor is not unfit, then the Court cannot appoint any other person as her guardian. The problem in the section is twofold. First, as the wife is being treated as the property of the husband. Secondly, the section does not take into consideration the welfare of the husband in case he is also a minor. If a minor cannot be a competent party to enter into a contract, making him a guardian by giving him the responsibility of another person is also unfair. Further, Section 21 not only gives the guardianship of the wife to a minor husband, but also make him guardian of the child born from wedlock.¹⁰⁸

3.20. Thus, it is suggested that section 19 (a) should be deleted, and mother or father of the minors be their guardians. Section 21 also needs to change to the extent that a husband is not regarded as the guardian of the wife, and both the parents equally share responsibility of the child born from such wedlock.

HINDU LAW:

HINDU MINORITY AND GUARDIANSHIP ACT, 1956

3.21. The Hindu Minority and Guardianship Act, 1956 (the Act, 1956), codified the law regarding the principles of custody and

¹⁰⁸ Age of marriage has been discussed in the chapter on marriage and divorce.

guardianship of a Hindu minor.¹⁰⁹ Section 6 of the Act, 1956 discusses who can be the natural guardian of a minor's person as well as their property. The section appoints father and after him the mother as the natural guardian of a boy and unmarried girl. The guardianship of the illegitimate boy and unmarried girl is however with the mother and after her the father. However, the expression mother and father do not include stepmother and stepfather. The provision, further, appoints husband as the guardian of his wife.

- **The Father, and after him**

Section 6 (a) remained in controversy for a long time since the plain reading of the law portrays that father is the natural guardian of the minor. In addition, it is only when he dies; mother could be the natural guardian. Thus, on the face of it the sub clause violates the doctrine of equality enshrined in Articles 14 and 15 of the Constitution. The Articles give equal protection to all before the law and prohibits any kind of discrimination based on the religion, race, caste, sex, or place of birth.

3.22. In *Githa Hariharan v. Reserve Bank of India*¹¹⁰, question arose as to whether section 6(a) of the Act, 1956, discriminates between father and mother on the sole basis of sex.

Section 6(a) of the HMG Act and Section 19(b) of the GW Act are violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right, as a natural guardian of the minor, is made cognizable only "after" the father...¹¹¹

3.23. The Court held that in case of custody or guardianship, the welfare of the child is of the paramount importance and therefore, no

¹⁰⁹ The Hindu Minority and Guardianship Act, 1956, Statements of objects and reasons.

¹¹⁰ AIR 1999 SC 1149

¹¹¹ Ibid. Para 5

such preferential right can be given to any party. The Court further held that the word '*and after him*' should be read as '*in the absence of*'. It observed:

Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word "after" in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor...¹¹²

...The word "**after**" **need not necessarily mean "after the lifetime"**. In the context in which it appears in Section 6(a), **it means "in the absence of"**, the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever...¹¹³ (emphasis added)

3.24. The judgment was considered to be gender just and gave Hindu women equal right in matters of custody and guardianship. However, a closer reading of the judgment indicates that the father is the default guardian, and only after him could the mother be a natural guardian during a father's lifetime. The Court has listed various situations where the father is alive but is *absent* from the life of the minor or is not taking care of the affairs relating to the minor. The relevant paragraphs of the judgment reads:

If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural

¹¹² Ibid. Para 8

¹¹³ Para 10

guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a).¹¹⁴

While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations **where the father is not in actual charge** of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the **father for any other reason is unable to take care of the minor** because of his physical and/or mental incapacity, **the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be “absent”** for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act.¹¹⁵ (emphasis added)

3.25. The judgment addresses situations where either one of the parties is at fault. However, what happens when both the parents are equally taking care of the minor and are fit for the custody and guardianship of the minor? How then would section 6(a) of the Act, 1956 be applied? By default, the father will be given preference, as he is alive and not absent from the life of the minor. Even if the principle of paramount interest of the child is applied, the father would be the first choice according to the language of the said section read with the judgement.

3.26. Further, the sub-clauses (a) and (b) of the section 6 seem to be indicating two different perspective of the same person. On the one hand, sub-clause (a) is indicating that a mother is to be treated inferior to the father; whereas sub-clause (b) stipulates that if the child is illegitimate, mother shall be the natural guardian of the

¹¹⁴ Para 10

¹¹⁵ Para 16

minor. Therefore, when the child is legitimate, mother is considered incapable to be the child's guardian but is deemed capable when the child is illegitimate.

3.27. The logic behind the sub-clause (b), may be that if and when tracing the father of a child born out of the wedlock is difficult the mother should be the guardian. Again, the responsibility is been given to the mother when either the father is not traceable, or is not ready or unable to take the responsibility. In other words, the father is *absent* from the scene. However, ideally where both the parties are fit and deserving, for the fair application of the principle of welfare of the child, they should be on an equal footing in law.

3.28. The Law Commission of India in its 133rd report: 'Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of The Welfare Principle' (1989), while examining the section 6 (a), observed that:

...the provisions of contained in section 6(a) of the Hindu Minority and Guardianship Act is extremely unfair and unjust and has become irrelevant and obsolete with the changing times. ...

3.29. The Law Commission's 133rd report accordingly recommended:

...The concerned provisions, therefore, deserve to be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally,' having equal rights in respect of a minor and his property. The provision according preferential treatment to the father vis-à-vis the mother has to be deleted and has to be substituted be a provision according equal treatment to the mother...

3.30. The Law Commission of India in its 257th report: 'Reforms in Guardianship and Custody Laws in India', (2015), recognised that to maintain equality between the parents, the preferential rights, based

on the gender stereotypes, have to be curbed.¹¹⁶ It is important that parents are not only equal in terms of roles and responsibilities but also with regard to rights and legal position of the parents.¹¹⁷ The Law Commission recommended:

... this superiority of one parent over the other should be removed, and that both the mother and the father should be regarded, simultaneously, as the natural guardians of a minor.

3.31. The concept of welfare being paramount is already captured in Section 13 of the 1956 Act. Thus, it is suggested that, the sub-clause (a) of section 6 should be amended. The language of the provision should be constructed in such a manner that the same does not reflect gender bias, in any way. Instead of using term father or mother the term “parents” should be used to leave no room for the interpretation of the law in such a manner that it gives preferential right to one parent over the other.

Guardianship of women

3.32. Manu, one of the ancient Hindu law givers, in *Manu Smriti*, stated that a woman should be guarded throughout her lifetime and the duty is of the male member of the family. In the every ‘new phase’ of the woman, the author appoints a ‘guard’. He prescribed:

पिता रक्षति कौमारे भर्ता रक्षति यौवने ।

पुत्रो रक्षति वार्धक्ये न स्त्री स्वातंत्र्यमर्हति ॥

Meaning,

... Her **father** guards her in childhood, her **husband** guards her in youth, and her **sons** guard her in old age, a woman is not fit for the independence¹¹⁸. (Emphasis added)

¹¹⁶ Para 2.3.8 of 2015

¹¹⁷ Id.

¹¹⁸ The Laws of Manu Penguin Classics, 197

3.33. Women are not guarded when they are confined in a house by men who can be trusted to do their jobs well; but women who guarded themselves by themselves (sic) are well guarded¹¹⁹.

3.34. Similarly, another law giver, *Narad*, considers the wife to be the property of the husband and stipulates that if a person takes in the widow of a sonless dead man, he also becomes liable for his debts (even if he is dead)¹²⁰. Thus, for every valid transaction on her behalf, prior consent of the husband is deemed necessary in this text.¹²¹

3.35. *Kamasutra* also depicts the character of the women in line with its contemporary literature. The content of the text is considered to be advance in nature,¹²² but there are many instances where the character of the woman is woven on the same lines as those in *Laws of Manu* and *Narada*. Chapter five of the book five¹²³ illustrates a list of women who can be 'taken' by the men in power. One of the categories indicated by the author is that of **the woman who are not guarded** by anyone or **who wander around without claim of any man** to her¹²⁴. Such a statement emphasises women are not to be left unguarded and unclaimed and their agency and autonomy is not only undermined but demolished in this writing.

3.36. Section 6 of the Act, 1956 seems to have been constructed on the above understanding. A plain reading of the section indicates that

¹¹⁹ Id. 9.12

¹²⁰ Julius Jolly, Translator. *Naradiya Dharmasastra*; or, the Institutes of Narada (1876)

¹²¹ Ibid.

¹²² See, Wendy Doniger, *On the Kamasutra*, 131 On Intellectual Property 126-129 (Spring, 2002).

¹²³ Wendy Doniger and Sudhir Kakkar, *Vatsayan Kamasutra*, 108(2002)

¹²⁴ Id. 122

*the man in charge of threads may take **widows, women who have no man to protect them**, and wandering women ascetics; the city police-chief may take the women who roam about begging, for he knows where they are vulnerable, because of his own night-roaming's ; and the man in charge of the market may take the women who buy and sell.*

a woman does not have authority on herself. She is to be under the guardianship throughout her life. A father and after him mother, is to be the guardian of an unmarried daughter and a husband to be the guardian of his wife.¹²⁵ Relevant portion of the said sections are:

- (a) in a case of a boy or ***an unmarried daughter***-the father and after him, the mother...
- (b) in case of illegitimate boy or ***illegitimate unmarried daughter***: the mother, and after her the father;
- (c) in the case of ***married girl***- husband;...
(emphasis added)

3.37. One of the ideas behind bringing a codified Hindu Law was to do away with the discrimination against the women¹²⁶. While the law has now recognised certain rights, it has, at the same time either bluntly or latently, kept women at the lower pedestal than men. The notion, men being superior and thus in control, still persists.

3.38. The section comes in conflict with other laws as well. One such example is the right to adopt by unmarried woman. Section 8, of the Adoption and Maintenance Act, 1956 (after amendment of 2010) gives right to an unmarried woman to adopt a child¹²⁷. However, if according to section 6, of the Act, 1956, the woman is under the guardianship of her father/mother can she be declared as the guardian of another person? If she does not have autonomy of self, can she accept the responsibility of a minor?

3.39. While the Act, 1956 considers women to be under the guardianship of another, the Indian Courts have repeatedly

¹²⁵ Report of High Committee on the Status of Women, Government of India, Ministry of women and Child Development, New Delhi, June 2015

¹²⁶ The BN Rau Committee Report, 1947.

¹²⁷ Section 8 Capacity of a female Hindu to take in adoption. –

Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."

emphasised that once a girl attains majority she has the full autonomy of herself. In *Lata Singh v. State of Uttar Pradesh*¹²⁸, the Supreme Court observed that two consenting adults could marry the life partner of their choice, or even a 'live in relationship' if they choose. A major girl is free to marry anyone she likes or "*live with anyone she likes*".¹²⁹

3.40. In *S. Khushboo v. Kannimaal*¹³⁰, the apex Court held that two willing adults engaging in sexual act outside the institution of marriage is not an offence, though the society might not approve of the same, but that does not make it an offence. The Court ruled that morality and criminality are not co-extensive, and recognised the autonomy of a major girl. A close reading of the judgment, reflects that once an individual attains majority, irrespective of their sex, they are free to make their own choices and not be 'guarded' by anyone. While deciding the case *Shakti Vahini v. Union of India*¹³¹, the Supreme Court held that two contesting adults could marry the person of their choice. The right is vested on them by the Constitution of India and any infringement of the right is a violation of the Constitution.

3.41. While emphasising the right to freely marry and condemning the offence of honour killing, the Court deliberated the importance of the 'individual liberty, freedom of choice and one's own perception of choice'.

The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid

¹²⁸ AIR 2006 SC 2522

¹²⁹ *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522

¹³⁰ AIR 2010 SC 3196

¹³¹ AIR 2018 SC 1601

provisions of law, the life of a person is comparable to the living dead ... The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. ... life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

3.42. The Law Commission of India, in its 242nd report: 'Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework', (2012), while emphasising on the importance of self-autonomy, was of the view that:-

The autonomy of every person in matters concerning oneself - a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well-being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary¹³².

3.43. There is one other related aspect of child marriage that has to be examined. To curb the evil of the child marriage, the first Act was enacted in the year 1929 i.e. the Child Marriage Restrained Act, 1929, followed by the Act of Prohibition of the Child Marriage, 2006 (the Act, 2006). But, still the desired prohibition on child marriage is not yet accomplished. Child marriages are still common, and near about 46% of the female children are married before attaining the age of majority¹³³. The Act, 2006 does not deal with the situation where the

¹³² Para 4.1

¹³³ National Family Health Survey-3 (2005-2006) referred in *Independent Thought v. Union of India*, AIR 2017 SC 4904; see also: United Nations Children's Fund, Ending Child Marriage: Progress and prospects, UNICEF, New York, 2014, in the

husband is also a minor. Section 6(a) declares that guardianship of a minor boy is with his father and after him, with his mother; at the same time under sub-clause (c) he is given the guardianship of another person i.e. his wife, in case a marriage is being solemnised. The question does arise as to how a minor can have the guardianship of another minor? Giving responsibility of a person to another, who himself is not legally responsible for his own conduct, is contradictory. It is therefore, suggested that Section 6 (c) be deleted and word unmarried be omitted from the section.

Natural Guardian of Adoptive son

3.44. Even in the year 2018 section 7 of the Act, 1956 provides only for the guardianship of adoptive son only. It is silent about the guardianship of an adoptive girl. The Law Commission of India in its 257th report 'Reforms in Guardianship and Custody Laws in India' (2015) recommended the desired change in the language of the section, and to include 'adoptive girl' as well.

3.45. Section 7: This section provides that the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. The language of this section is incongruous in that it refers only to the natural guardianship of an adopted son, and does not refer to an adopted daughter. ... The Commission merely corrects this by amending the Hindu Minority and Guardianship Act, 1956 to be in consonance with the Hindu Adoptions and Maintenance Act, 1956.

survey it was found that India alone is the home of one third of the total global population of the girls married before attaining 18 years of age; District-level study on child marriage in India: What do we know about the prevalence, trends and patterns? New Delhi, India: International Centre for Research on Women(2015); National Health Survey-4 (2015-2016)

3.46. It is further recommended that the language of the law be changed and shall read as recommended for section 6 (a) and recommendations of the 257th report be given affect.

MUSLIM LAW

3.47. The Shariat Application Act, 1937, provides that in the matter of custody and guardianship, the Muslim personal law shall be applicable.¹³⁴ The rules governing the matters of custody and guardianship under Muslim Law, however, are not expressly codified and are thus governed according to the prevailing customs and usages.

3.48. The custody and guardianship of a minor though varies among different schools of Muslim personal law, but the common thread running under the is application of the principle of best interest. For example, Shafai jurists observes that:

“The right to custody is not for an imbecile person, nor for those indulging in immoral acts. For this right is essentially about protecting the interest of the child. It is not in the interest of a child to put him/her under the care of a debauched person.”¹³⁵

3.49. According to *Hanafi* law, the mother will take care of her daughter until she comes of age i.e. has her menses. Son will be under his mother's care until he is able to eat, drink, dress and

¹³⁴ The Muslim Personal Law (Shariat) Application Act, 1937 Section 2:-

“ Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

¹³⁵ See: Al-Majmu, 18, 320, Kitab Al- Nafgat, Bab Al-Hizana; see also, Hashiya Al-Sawi ala Al-Sharah Al-Sagir, 2,759, Bab Wujub Nafqa ala Al-Ghair, Al-Hizana, Sharah Zad Al-Mustanqa li Al-Shinqiti, 9,344, Bab Al-Hizana, Maney Al-fisq, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB]

attend to the call of nature on his own. After this, his father will have the right to bring him up. Since there could be some difference of opinion about the stage when son could accomplish the above basic necessities on his own, jurist have the fixed the age of 7 years. So, mother is entitled to bring up her son until he is 7 years old.¹³⁶ While examples such as:

“The important point is that if the carer (mother) is engrossed in immorality or sinfulness in a way that may adversely affect the child, she will lose her right. Otherwise, she has a greater right to bring up her child until he/she develops some understanding.”(Radd Al-Mukhtar, 3,557 Bab Al-Mizana, see also Hidayah, 2,284).

3.50. This also highlights the welfare of the child as the under lying concern, but these can also be easily biased against the mother such that if mother marries someone who is not child's mahram, she will lose her right to custody. This deserves to be reconsidered. Before going into the principles of custody and guardianship, it would be important to recognise the definition of a minor under Muslim personal law.

Who is a Minor?

3.51. The Indian Majority Act, 1875, (the Act, 1875) as a general rule, under section 3 declares that a person of eighteen years of age is a major. At the same time, giving enough space to the communities to practice their personal laws, section 2 of the Act, 1875, specifies an exception, to the said rule under section 3. Section 2 stipulates that provisions contained in the Act, 1875, are not to affect the capacity of a person to act in the matters of marriage, dower, divorce and adoption¹³⁷ and it shall also not interfere with the religion or religious

¹³⁶ (Al-Durr Al-Mukhtar 3,566, Bab Al- Hizana See also. Al-Hidayah 2,284, Al-Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind iftiraq Al-Zawjayn.) in Ibid.

¹³⁷ The Indian Majority Act, 1875, Section 2 (a)

rites of the citizens of India¹³⁸. The Muslim Personal Law (Shariat) Application Act, 1937, also states that Muslim personal law shall govern the matters relating to marriage, divorce, dower, guardianship and others¹³⁹.

3.52. Under Muslim personal law, the age of majority is calculated based on the attainment of puberty. The moment a child attains puberty he/she is said to be major in the eyes of the personal law and is considered competent to perform independently in case of marriage, divorce and dower.¹⁴⁰ The age prescribed for determining majority differs among the various schools of Muslim law. For example, the Shias consider a boy to attain puberty at the age of fifteen years and a girl at the age of nine or ten years.¹⁴¹ Whereas, the Hanafi school consider it to be fifteen years of age for both the sexes.¹⁴² Syed Ameer Ali also states that the age of majority for the Shia and Sunni schools should be same, and be fifteen years of age¹⁴³. In line of the Ameer Ali, Mulla also writes that the age of puberty, where the evidence of puberty is not available, would be based on the completion of the fifteen years of age.¹⁴⁴ Therefore, the common agreement is, a person is said either to be major when he/she attains puberty or on completion of the age of fifteen years.

3.53. Puberty is considered only for the purposes of contracting a marriage, or determining dower and deciding divorce. In the matters related to the property, the provisions of the Indian Majority Act, 1875, governs the person and one is said to be major after attaining

¹³⁸ Id. Section 2(b)

¹³⁹ The Muslim Personal Law (Shariat) Application Act, 1937 Section 2

¹⁴⁰ Mulla on Mohammedan Law, Dwivedi Law Agency

¹⁴¹ Mulla on Mohammedan Law Chapter 15 Guardianship pp 406, Dwivedi Law Agency

¹⁴² Id.

¹⁴³ Syed Ameer Ali, Mohammedan Law.

¹⁴⁴ Mulla's Principles Of Mohammedan Law Article 251(3) explanation

Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

the age of eighteen (18) years.¹⁴⁵ However, given that the age of attaining puberty may be contingent on diet, genes, region, maturity among many other factors, it may be more beneficial- for the purposes of law to recognise a common age for majority at 18 years.

3.54. Although such a recommendation may also compromise on the agency or freedom of teen-aged children in choice of partners, and this is exacerbated by the fact that parents even after their children acquire majority, frequently deny their children their partners of choice; it is equally important to understand that marriage between minors even by consent is regressive because children may not fully comprehend, understand the consequences of their choices.¹⁴⁶

Concept of Guardianship

3.55. There are three types of guardianships recognised under Muslim Personal Law. Guardianship:-

- a) of a person;
- b) in marriage;
- c) of property.

The guardians of property under Islamic law are rarely appointed;¹⁴⁷ an appointed executer (*wasī*) is the guardian of the property.¹⁴⁸

Guardianship of a person

3.56. The concept of custody (*hadanah*) and guardianship (*Wilayah*) mixed in the different parts of the Quran. Mahdi Zaharaa and Normi A. Malek describes the relationship between custody and guardianship as a “*complex structure of rights and duties distributed*

¹⁴⁵Mulla on Mohammedan Law, pp 407

¹⁴⁶ (Recommendation with regard to the concept of age of minority is discussed in the chapter on the marriage and divorce.)

¹⁴⁷ Mulla on Mohammedan Law, pp 404

¹⁴⁸Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship, pp 196

between entitled person".¹⁴⁹ Custody, in terms of rights and duties, is more inclined towards the duties and responsibilities. It is the duty and responsibility of the custodian to look after the child and ensure the overall development of the child. The guardian on the other hand is given the power to take major decisions for the future of the child, ranging from education to marriage, to career choices.¹⁵⁰ He takes all decisions on behalf of the minor and supervise the child even when he/she is in custody of the mother or any other female relatives.

Principles Governing Custody (*hadanah*) and Guardianship (*Wilayah*)

3.57. the Hanafi school, the mother is to be the custodian of the minor for a specified period. In case of a boy, the mother shall be the custodian by default if the child is below the age of seven years. Whereas in case of a girl, mother gets custody till the time girl attains puberty¹⁵¹. After which the custody and the guardianship of a boy above seven years of age and of unmarried girl above puberty is transferred to the father. In the absence of the mother, following female relations are entitled for the custody of the minor.

- (i) Mother's mother, how high so ever;
- (ii) Father's Mother, how high so ever;
- (iii) Full Sister;
- (iv) Uterine Sister;
- (v) Consanguine Sister;
- (vi) Full Sister's Daughter;
- (vii) Uterine Sister's daughter;
- (viii) Consanguine Sister Daughter;
- (ix) Maternal aunts in the same order as sisters;
- (x) Mother's father;

¹⁴⁹ Mahdi Zaharaa and Normi A. Malek "The Concept of Custody in Islamic Law" Arab Law Quarterly, Vol 13, No. 2(1998), pp. 155-177

¹⁵⁰ Id.

¹⁵¹ See, Al-Durr Al-Mukhtar 3,566, Bab Al-Hizana See also. Al-Hidaya 2,284, Al-Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind iftiraq Al-Zawjayn, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB]

- (xi) Paternal aunts in the same order as sisters;
 - (xii) Paternal aunts of mother and father in the same order,
- and in the absence of them.

(a) to the following female paternal relations in order;

- (i) Father;
 - (ii) Nearest paternal grandfather;
 - (iii) Full brother;
 - (iv) Consanguine brother;
 - (v) Full brother's son;
 - (vi) Consanguine brother's son;
 - (vii) Full paternal uncle;
 - (viii) Consanguine paternal uncle;
 - (ix) Full paternal uncle's son;
 - (x) Consanguine paternal uncle's son,
- and in the absence of them.

(b) To the following relation in order:

- (i) Uterine brother;
- (ii) Uterine brother's son;
- (iii) Father's uterine brother;
- (iv) Maternal uncle; and
- (v) Mother's uterine brother.

Provided that a male relation be within the prohibited degrees of a girl.

3.58. The rules applicable in Shia law, are different. Here, the mother is entitled for the custody of a boy until the age of two years and of the girl until she attains seven years of age. The custody after the prescribed period dwells upon the father and after him to the grandfather how highsoever.¹⁵² The rationale given is that after birth,

¹⁵² Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

a two-year period is sufficient for breast-feeding a boy, after which he needs the guidance of his father.

3.59. The mother might have the custody of the child but the father has the guardianship. Entitling him for the right to take any decision for the future of the child. He has the ultimate authority to decide matters regarding future of the child be it his/her education, or contracting marriage. That is why mother living far from the residence of the father was one of the grounds for the disqualification of the mother for taking custody.¹⁵³ In *Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner*¹⁵⁴, the Supreme Court, observed that during the lifetime of the father, mother cannot be the guardian of the minor to accept a gift on his behalf.

...we are of the view that where the father of a minor is alive, the mother of a minor cannot be appointed as a guardian of a minor to accept the gift on his behalf.¹⁵⁵

3.60. Thus, during the lifetime of the father, mother cannot technically accept a gift for the minor, or take any other decision for the welfare of the child as a guardian. The role prescribed here indicates the typical division of the labour based on gender. It flows from the notion that a man is provider of the family and he has the ultimate responsibility to protect them; on the other hand, a woman is to look after the house and the needs of the children.¹⁵⁶ This may have been acceptable in a specific context or a point in history when these rules were laid down. However, with time such gender stereotypes have been challenged.

3.61. If both the spouses are earning then the financial responsibility of the child should also be shared. At the same time mother should also have the equal right to decide the matter related to

¹⁵³ Mulla's Principles of Mahomedan Law, section 354(2)

¹⁵⁴ (2000) 8 SCC 507

¹⁵⁵ Id. para 2)

¹⁵⁶ See, Nivedita Menon Seeing like a feminist, Penguin India, ed. 2012

the welfare of the minor. She should not only be there to take physical or emotional care of the child, but also have equal say in the matters deciding the future of the minor.

3.62. The earlier discussion on the best interest of the child indicates that the court does not take into consideration the personal law of the parties, when it comes to determining the custody of the child¹⁵⁷. It does not adhere to the principles prescribed in the personal law or even for that matter preference given in any statute.

3.63. It is therefore suggested that a Muslim mother should also be treated as the natural guardian of the minor, both the parents should be at an equal footing. Further, in the matter of custody a father should also get an equal opportunity to be considered as a custodian. Thus, in the absence of a clear codified law on custody of children the principle of best interest of the child should continue to be of paramount consideration.

Guardianship in marriage

3.64. The other type of guardianship, Muslim Personal Law talks about is 'guardianship in marriage'. The guardian has the right to contract the marriage of a minor. If the guardian is of the opinion that the marriage is for the welfare of the minor, then he has the right to contract such marriage. Even the consent of the minor, whose marriage is to be contracted, is not relevant. This form of marriage is called '*jabar*' marriage.¹⁵⁸ Under this the guardian can impose the marriage on the minor, before he/she attains puberty.¹⁵⁹ However, this too would be covered by the overriding effect of the Prevention of Child Marriages Act, 2006. The Court is not entitled to appoint a guardian for the marriage, though it can appoint a guardian for

¹⁵⁷ See, Flavia Agnes, Custody and Guardianship of Minors, available at <https://flaviaagnes.wordpress.com/>

¹⁵⁸ Mulla on Mohammedan law

¹⁵⁹ See: Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

person or property. In some cases, the *kazi* can act as a guardian for the purpose of marriage.¹⁶⁰

Who can contract the marriage of a minor

3.65. Under Hanafi school the father has the right to contract the marriage of the minor. After him the right dwells upon the father's father, how highsoever. In the absence of these two relations, the right is further given to the brother and other male relations on the father's side in the order of inheritances. In the absence of all the above mentioned male relations the right belongs to the mother, maternal uncle or aunt.¹⁶¹ Under Shia law, however, the right is vested upon the father and after him the father's father how highsoever.¹⁶²

3.66. The consent of the minor is not relevant, even the consent of the mother is not acknowledged. The right of the mother over her child is given preference when there is no male relation from paternal side. Allocation of right in such a manner indicates as underlying assumption that a mother is not capable of taking the decision for the welfare of the child and therefore if there is any possibility of locating a 'male' member, preference is given to him, to exercise the right. However, after the Prohibition of Child Marriage Act, 2006, the child marriage has been prohibited and also made punishable. Now, the father or the grandfather or as the case may be, do not have any 'right' to give their minor children in marriage.¹⁶³

CHRISTIAN LAW:

3.67. The statutes codifying the Christian laws do not deal with the concept of custody and guardianship. The reason might be that they are covered under the Indian Divorce Act, 1869 and the Guardians

¹⁶⁰ Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

¹⁶¹ Mulla section 271 pg. 233(Act sort of); Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship, 209

¹⁶² Mulla on Mohammedan law page 412(book)

¹⁶³ See also *Yunusbhai Usmanbhai Shaikh v. State of Gujarat*, 2016 CriLJ 717

and Wards Act, 1890. The above said two statutes somewhat cover guardianship and custody under Christian Law.

The Indian Divorce Act, 1869

3.68. Chapter XI of the Indian Divorce Act, 1869 (the Act 869), contains sections 41 to 44 for the custody of a minor. The sections give the sole authority to the Court to decide the matter of the custody of a child for affecting the doctrine of welfare of the child. The provisions do not seek a final decision in the matter relating to custody but suggest reviewing the orders and such conditions from time to time, according to the need of the minor.

3.69. The provisions deal with two situations where the question of custody of the minor may appear. First, where the parents of the concern minor have applied for the decree of judicial separation¹⁶⁴ and second where they have applied for the dissolution or nullity of the marriage.¹⁶⁵

3.70. Section 41 of the Act 1869 stipulates the power of the Court to give interim orders for the custody of the minor with regard to his/her maintenance and education, in cases where the proceedings are ongoing. The Court has the power to make such decisions from time to time. Section 42 provides that on attaining the decree of the judicial separation the parents can approach the Court for the custody of the child. The Court on receiving such application may make such orders regarding the custody, maintenance and education of the minor.

3.71. Section 43 similarly deals with the situation where the proceedings for decree of dissolution or the nullity of marriage are still pending. Sections 44 deals with the application of the parents in case

¹⁶⁴ Section 41 of the Act, 1869.

¹⁶⁵ Section 43 of the Act, 1869.

where the decree of dissolution or the nullity of the marriage has been finalised.

3.72. The Act 1869 further provides the Court with an option to keep the child under its protection if it appears to be the need at that point of time. The proviso to section 41 further states that the application with respect to the maintenance and education of the minor shall be decided within the period of sixty days, from the date of notice served to the respondent.

3.73. The provisions laid down in the Act 1869 endorse the principle of best interest of the child and do not talk about the preferential right of one parent over the other. Thus, leaving no room for gender inequality. The matter related to the guardianship of minor are dealt under the provisions of the Guardians and Wards Act, 1890.

PARSI LAW

3.74. The law governing guardianship for the Parsi community is the Guardians and Wards Act, 1890. Section 49 of the Parsi Marriage and Divorce Act, 1936, (the Act 1936) provides that the court has the power to decide the interim custody of the child. The court can, from time to time prescribe such terms and conditions, which it deems necessary for the welfare of the child. The court can also pass order with regard to the maintenance and education of the minor.

3.75. The Act, 1936 does not discriminate between parents. However, section 50, stipulates that in case of adultery committed by the wife, the court can pass a decree of divorce or judicial separation. In that case, if any property is devolving upon the wife, one half of the same can be reserved for the welfare of the child(ren). The section is discriminatory simply for not providing the same for the father. This

matter is also sub-judice before the Supreme Court in the matter of *Naomi Sam Irani v. Union of India & Anr.*¹⁶⁶

¹⁶⁶ W.P. (C) no. 1125 of 2017

ADOPTION

4.1. According to Black's law dictionary, adoption is a juridical act creating between two persons certain relations purely civil, of paternity and filiations. Adopted child is someone who is not the natural child of the parents but has become a true child by a legal action.¹⁶⁷ Adoption of children is a socio-legal concept it has existed in India and abroad since ancient times. It primarily meant that a parent- child relationship was established where none existed. The child of one set of parents became the child of another set of parents, as if it were a natural born child.¹⁶⁸

4.2. In *Corpus Juris Secundum*,¹⁶⁹ volume 2 'adoption' in legal contemplation is an act by which the parties thereto establish the relationship of parent and child between persons not so related by nature, and which, in all respects, severs the natural relations existing between the child and its parents, although in a narrower sense it is restricted to the act of the person taking the child. It is further contemplated that adoption is a practice of great antiquity. It appears to have been known to the Egyptians, Babylonians, Assyrians, Greeks, and ancient Germans, and among the Hebrews, probably not recognised by their system of jurisprudence but was undoubtedly well-known.¹⁷⁰

¹⁶⁷Black's Law Dictionary 8th Edition.

¹⁶⁸ HM Billimoria, *Child Adoption A Study of Indian Adoption 1* (Himalaya Publishing House 1st edn 1984).

¹⁶⁹ *Corpus Juris Secundum* is an encyclopaedia of U.S. law containing an alphabetical arrangement of legal topics as developed by U.S. federal and state cases. *Corpus Juris Secundum* provides basic but clear statement of each area of law including areas of the law and provides footnoted citations to case law and other primary sources of law.

¹⁷⁰ *Manuel Theodore v. Unknown*, 2000 (2) Bom CR 244.

Babylonia Code of Hamurabi¹⁷¹

4.3. One of the earlier legal texts referring to adoption is the Code of Hammurabi. This code dating from 18th century BC contains many features that are still relevant to modern adoption law. The code established that adoption was a legal contract that could only be executed with the consent of the birth parents. The code of Hammurabi granted adopted child equal rights to those of birth children.¹⁷² The code also contained several norms that differ from modern practices such as punishment for adoption children for attempting to return to their birth families and the adoption could also be annulled on various conditions. The adoption contract could also be dissolved by a court at the request of adopted persons, if the adoptive parent failed to teach the adopted person a trade or if the adopted person has not been properly reared by the adoptive family. If the adoptive parent remarried and decided to dissolve the contract with the adopted child, the latter was entitled to inherit one third of a child's share in goods but had no claim to the house or land of the adoptive family moreover only adoption of male child was permitted.

Roman Law on Adoption

4.4. Adoption termed as *adoptio* or *adoptatio* meant a relation of a child and a parent that arose through taking in of a child, commonly a boy, by a married couple, for purposes of inheritance of the estate. Adoption, in its specific sense, was the ceremony by which a person

¹⁷¹ The diorite stela of Hammurabi was found in 1901 at the excavations of the ancient

city of Susa capital of Elam contains 282 laws, which cover all areas of social life including a few sections related to adoption regulations. It is assumed that these laws were

written during the reign of the Babylonian king Hammurabi (1792-1750 B.C.).

¹⁷² Child Adoption Trends and Policies UNITED NATIONS, New York (2009) *available at:*

http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf (last visited on March 09.2018).

who was in the power of his parent (in *potestate parentum*), whether child or grandchild, male or female, was transferred to the power of the person adopting him. It was given effect under the authority of a magistrate (*magistratus*). The person to be adopted was emancipated (*mancipatio*) by his natural father before the competent authority, and surrendered to the adoptive father by the legal form called in *jure cession*.¹⁷³

Adoption in Ancient India

4.5. In India 'Adoption' has been practised for thousands of years. Among Hindus, historical epics such as Mahabharata and Ramayana have recorded adoption among saints and royals, who were adopted and also did adopt. One of the main motivations for adoption has been the importance attached to producing a son. The son enabled the father to pay off the debts he owed to his ancestors.¹⁷⁴

4.6. Twelve kinds of sons are named in Dharmasastras. The most desirable is the natural son (*aurasa*) the legitimate biological son of a man and his lawful wife.¹⁷⁵ Manu declares the natural son to be paradigmatic (*prathamakalpita*), while all the others are substitutes (*pratinidhi*), necessitated by the fact that someone must perform the family rites. The final type of son which finds mention in the social and legal history of India is the adopted son i.e. *Dattaka*, *Datta*. After the natural born son, adopted son was most important in both theory and practise. Adoption entailed both legal and religious processes.

¹⁷³ William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray, London, 1875) (last visited on March 09, 2018).

¹⁷⁴ Billimoria H.M., *Child Adoption A study of Indian Experience* 6 (Himalaya Publishing House, Bombay, 1st edn., 1984).

¹⁷⁵ Ludo Rocher, *Studies in Hindu Law and Dharamshastras* 613 (Anthem Press, New York, 1st Edn., 2012).

Dattahoma is the special rite that formalises the act of legally categorising a male, usually but not always a boy.¹⁷⁶

Statutory law on adoption

4.7. The absence of a general law for adoption has caused dissatisfaction among many willing individuals and families. As a result of this there have been instances where people had to knock the doors of the courts to facilitate the adoption.

4.8. First step to introduce secular law on adoption of children (not merely as wards) was introduced in the form of Adoption of Children's Bill 1972. It was first introduced in Rajya Sabha in 1972 but in the year 1972 itself it was dropped as it received stern opposition from the newly formed All India Muslim Personal Law Board and also from the Parsis. Adoption of Children's Bill was again introduced in Lok Sabha on December 16, 1980. It contained an express provision of non-applicability to the Muslims, however, it could become a law as the Bill lapsed.¹⁷⁷

4.9. Personal laws of Muslims, Christians, Parsis and Jews do not recognise complete adoption. As non-Hindus do not have an enabling law to adopt a child those desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardian and Wards Act, 1890. However, the child taken in guardianship would not have the same status as that of a biologically born child.

¹⁷⁶Patrick Olivelle and Donald R Davis Jr. (eds.), *The Oxford History of Hinduism :Hindu Law :A New History of Dharamshastras* 156- 159 (Oxford University Press ,United Kingdom, 2018).

¹⁷⁷*Lakshmi Kant Pandey v. Union of India* 1984(2) SCC 244.

Guardians and Wards Act 1890

4.10. The Act 1890 recognises only guardian-ward relationship. It does not provide same status as that of a natural-born child. Under the Act 1890 the child becomes a ward not an adopted child. Anyone under the age of eighteen years can be ward and both spouses can be guardians. Once the individual turns twenty-one they lose the status of a ward. The child does not have the same status as that of a biological child and also does not have the right of inheritance. But the male Guardian can bequeath to wards through a will, but any 'blood' relative of the male guardian can contest this will. Unlike the Hindu Adoption and Maintenance Act 1956, there are no age restrictions for single males/females to take a child in guardianship. Also, the guardians or the Courts can revoke the guardianship; likewise the Court or any competent authority can appoint guardians.

4.11. This Act 1890 is applicable as a prerequisite for inter-country adoptions as well. In case a foreigner wants to adopt an Indian child, he/she must first become the legal guardian of the child and when the court is convinced that parents are fit to adopt a child the said parents can legally adopt a child within two years after the arrival of child in their country as per their adoption laws.¹⁷⁸

HINDU LAW

Hindu Adoption and Maintenance Act 1956

4.12. Hindu law treats an adopted child equivalent to a natural born child. The Hindu Adoption and Maintenance Act, 1956 extends to only the Hindus defined under section 2 of the Act, and include any person, who is a Hindu by religion, including a *Virashaiva*, a *Lingayat*

¹⁷⁸ *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469, See also: Adoption law in India available at: helegiteye.in/2016/12/05/adoption-law-india/

or a follower of the *Brahmo*, *Prarthana* or *Arya Samaj*, or a *Buddhist*, *Jaina* or *Sikh* by religion, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jain or Sikh.¹⁷⁹

4.13. This Act 1956 deals with the capacity to adopt, capacity to give in adoption, effect of adoption etc. The Act 1956 does not recognise adoption by a Hindu male or a female if such person is of unsound mind or minor. A Hindu male shall adopt a child only with the consent of his wife except where the wife has relinquished the world or is of unsound mind or she has converted to another religion. Only the father, mother and guardian shall have the right to give a child in adoption and no one else. The Act further specifies that only unmarried Hindu shall be taken in adoption unless the custom or usage permits to the contrary. The Act 1956 stipulates certain conditions for adopting a child for both males and females separately.

4.14. In *Amrendar Man Singh v. Sanatan Singh*¹⁸⁰ The Privy Council observed:

Under Hindu Law the purpose of adoption is the religious efficacy of sonship, it was recognised as a duty which every Hindu owes to his ancestors for continuance of lineage and solemnisation of necessary rites.

4.15. In *V.T.S Chandrasekhara Mudaliar v. Kulandainsh Mudaliar*¹⁸¹ the Supreme Court observed:

Among Hindus the substitution of a son was for a spiritual reason and consequent devolution of property merely accessory to it.

¹⁷⁹Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), section.2.

¹⁸⁰AIR 1933 PC 155.

¹⁸¹AIR 1963 SC 185.

4.16. In *Hem Singh v. Harnam Singh*¹⁸² the Supreme Court retreated the same view observing that the substitution of son is for a spiritual reason. Thus, adoption has been given importance in Hindu religion due to the spiritual and religious connotations attached to it. Although many of ancient texts overwhelmingly emphasise adoption of sons, owing to the emphasis on producing a male progeny among Hindus, this has largely been remedied in terms of law but change in social attitudes is coming about at a slower pace.

4.17. The Hindu Adoption and Maintenance Act was amended by the Personal Laws Amendment Act 2010¹⁸³ which included a provision granting right to married women to take a child in adoption. Moreover, the parent of the child shall have identical rights for giving their child in adoption, but only with permission of the other parent. Therefore, the Act recognised the rights of woman as equal to those of a man. Certain aspects of Hindu Adoption and Maintenance Act and the Juvenile Justice (Care and Protection) Act 2000, are in disagreement, this is discussed later in the section on the JJ Act.

MUSLIM LAW

4.18 Adoption was common among the Arabs before Islam, and remained valid during early days of Islam until it was prohibited under the Quranic edict

..... nor hath he made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But the God sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more equitable in the sight of God. And if ye know nor their fathers then (they are) your brethren in the faith and your clients.¹⁸⁴

¹⁸²AIR 1954 SC 581

¹⁸³ Personal Laws (Amendment) Act, No. 30 of 2010.

¹⁸⁴ Sura Ahzab, XXXIII, verse 4-5

4.19 Parentage confers upon the child the status of legitimacy. It can be established in the natural father and mother of the child. Adoption is not recognised in the Sharia under the quranic ruling mentioned herein above¹⁸⁵. In Islam the tie between parents and children can only exist between children born to a lawfully married couple. This tie cannot be established verbally or through any other contract. Nor can there be the mother-son tie between a boy and a woman based on his utterance alone. Allah declares:

Those among you who divorce their wives by zihar (likening their wives to their mothers or another woman in a prohibited relationship) should realise that they are not their mothers. Their mothers are those who gave birth to them. Those guilty of zihar use dishonourable and (use) false words. [Al-Mujadalah, 58:2]¹⁸⁶

4.20 It states further that if one calls someone his son or considers him so, this does not establish the father-son tie between the two. Rather, the Quran proclaims:

Allah has not made your adopted sons as your own sons. These are only words from your mouth. However, Allah speaks the truth and guides to the right path. Call (the adopted sons) by the names of their fathers. In the sight of Allah this is just. If you do not know their true fathers, then regard them as your brothers in faith and your allies. (Al-Ahzab 33:4-5)

4.21 In Islam it is unacceptable to sever the relationship between adopted child and his/her biological parents, the legal relationship between child and parent should not be broken merely for the sake of supporting child's life beyond his/her own family circle due to the fact that genealogical relationship between two persons cannot be separated by any means.¹⁸⁷ This is also reflected in inheritance law

¹⁸⁵ Jamal J.Nasir, *The Islamic Law of Personal Status*, 2nd edn. Graham and Tortman Ltd. London.

¹⁸⁶ Reference Supplied by consultation paper of the All India Muslim Personal Law Board, dated July 30, 2018.

¹⁸⁷RatnaLukito, *Legal Pluralism in Indonesia* 139-140(Routledge Press, New York, 2013).

where natural children cannot be easily disentitled from inheritance and only 1/3rd of one's property can be willed, the rest would devolve as per the law.

4.22 **Islamic law instead of adoption practices “*kafala*” system under which child is placed under a kafil/ foster parent which provides for the well-being of a child including financial support and is legally entitled to take care of the child.** There are multiple cases where children of deceased relatives have been adopted by families and these children have certain rights as wards and in many cases, they can be given some share in assets and properties through ‘hiba’ or gift. But these children do not become legal heirs.

4.23 There is substantial emphasis upon protection and care of orphans in Islamic jurisprudence.¹⁸⁸ It mentions also specific provisions for maintenance of destitute relatives, but does not recognise adoption for it may also be construed as an injustice to natural heirs. There have also been fears expressed about the uncertain relationship that may exist between a male adopted child and the female members of his adoptive family, where hijab-observing women members may not be comfortable with the presence of a non-mahram.

4.24 There are two modes of filiation known to the law: as a rule, the law treats the natural father as the father of the child, and by acknowledgment of paternity.¹⁸⁹ However, historically there have been exceptions where the adoption has been enabled in certain ways.¹⁹⁰

(a) By Custom: if there is some custom prevailing among Mohammadan community then that may be by force of law (sic). Among some Hindu converts to Islam the custom of adoption still prevails. But the burden of proof that such custom is prevailing is on the person who asserts but

¹⁸⁸(see Al-Bahr Al-Raiq, 4,843, Bab Al-Hizana), (Musnad Ahmad, 4,281, Hadith No. 861)

¹⁸⁹ *Muhammad Allahdad v. Muhammad Ismail*, (1886)ILR 8All234

¹⁹⁰ Dr Rakesh Kumar Singh, *Textbook on Muslim Law*, 218, Universal Law Publishing Ltd, New Delhi, edn. 2011.

after coming into force of Muslim Personal Law Shariat Application Act 1937, such custom seems to have abrogated because custom will prevail over the provisions of Muslim law except to the extent they have been abrogated by section 3(1) of this Act and if declaration is made as required by it the custom shall stand abrogated.

(b) By Law: if some provision of any Act permits adoption then it may have the force of law.¹⁹¹ Section 29 of the Oudh Estates Act 1869 permitted a Mohammaden Talukdar to adopt a son.

4.25 Custom of adoption has been prevalent amongst many classes of Muslims in India it has been prevalent in Punjab¹⁹², Sindh¹⁹³, Kashmir.¹⁹⁴ However, it is to be examined as to whether such an act continued even after commencement of Shariat Act 1937.

4.26 In *Maulvi Mohammad v. S Mohboob Begum*¹⁹⁵ the Madras High Court has held:

If in fact the custom of adoption is prevailing it can be pleaded and proved. If such custom or usage is proved there is no need of any declaration to be made under section 3(1) of the Shariat Act, 1937 by anyone concerned so as to rule out the existence of custom of adoption. But where the Shariat Act is not applicable, a Muslim may adopt under the customary Law, if it prevails, an instance is given of Jammu and Kashmir State where the Shariat Law is not applicable, a Muslim may adopt under the customary law. "Pisarparwardhah" is the term which is used for the adopted son.

However, after the Application of J&K Muslim Personal Law (Shariat) Application Act 2007 such custom of adoption stands abrogated and Shariat Act is applicable in the State of J&K¹⁹⁶.

¹⁹¹ *Nur Mohd. v. Bhawan Shah & Anr*, AIR 1936 Lah 465.

¹⁹² See: *Khair Ali Shah v. Imam Shah* AIR 1936 Lah 80.

¹⁹³ See: *Usman v. Asat* AIR 1925 Sind 207.

¹⁹⁴ See: *Yaqoob Laway & Ors. V. Gulla & Anr.* 2005(3) JKJ 122.

¹⁹⁵ AIR 1984 Mad 7.

¹⁹⁶ *Ahad Sheikh v. Murad Sheikh & Ors* 2012(4) JKJ 860 HC.

4.27 In *Sunder Shaekhar v. Shamshad Abdul Wahid Supariwala*¹⁹⁷ the claim of the appellant that he had been adopted by one Haji Mastan Mirza in 1994, before his death, stood rejected by the High Court of Bombay on the grounds that the appellant failed to prove the factum of adoption. Performance of last rites of the deceased by the appellant were irrelevant as there was no such requirement in Muslim law. Moreover, the application of Shariat Act 1937 did not recognise adoption. Thus, under Islamic law adoption is not recognised as a mode of affiliation however there are certain exceptions to the same i.e. custom, or by law but ambiguity remains on the matter. Among Muslims the concept of ‘acknowledgment of paternity’ is the nearest comparison to adoption.

4.28 While concerns affecting inheritance and family dynamics are understandable, an enabling law for adoption remains voluntary and an act that parent/s consent to undertake bearing in mind that the adopted child will be of a different and often unknown lineage. Enabling voluntary act such as the Juvenile Justice (Care and Protection of Children) Act, 2015 for adoption does not erode upon Muslim personal law on adoption, but simply provides a provision for people who do not wish to accept the religious objections to adoption and are willing to let their adopted child inherit as their own offspring would. In this respect, codification of Muslim law on adoption would only confirm that under Islamic jurisprudence does not, for a variety of reasons permit adoption. While followers of the faith may choose to accept this as a matter of faith, there must remain a provision in the law under which willing couples may adopt.

4.29 In *Shabnam Hashmi v. Union of India*¹⁹⁸ the Supreme Court observed that though the concept of adoption is prohibited under Muslim law, the Juvenile Justice (Care and Protection of Children)

¹⁹⁷ 2014(2)BomCR195

¹⁹⁸ AIR 2014 SC 1281.

Act, 2000 as amended in 2006 is a secular and enabling legislation that has been enacted for the welfare of children. It enables any person to adopt a child. The existence of Muslim Personal Law will not prevent a Muslim to apply under the Act 2000. Thus, a Muslim may choose to be governed by personal law and may not adopt a child or he may choose to be governed by the Act 2000 and may adopt a child. So as far as the position is concerned today a Muslim may choose to be governed by the Juvenile Justice (Care and Protection of Children) 2015 and take a child in adoption.

CHRISTIAN LAW

4.30 While no laws of adoption as such are found formulated in the Old Testament, it does find mention in scriptures.¹⁹⁹ In Exodus 2:10²⁰⁰ Moses becomes son of Pharaohs' daughter. In Ruth 4:16²⁰¹ Naomi adopts son of Boaz and Ruth. In the New Testament, there are references to adoption as sons in Rom, 8:15, 23, Gal. 4:5.²⁰² There is further an interpretation and reference that a Slave, if adopted as a son would inherit his master's property in a phrase addressed to Slaves in Col. 3:24²⁰³. The idea of adoption has also been linked to the idea of the Holy Spirit in the New Testament and Rom. 8:23 speak of waiting for adoption as sons wherein Paul regards adoption as a promise for future.

¹⁹⁹ *Manuel Theodore v. unknown* 2000 (2) BomCR 244.

²⁰⁰ Exodus 2:10 available at:

<https://www.biblegateway.com/passage/?search=Exodus+2%3A10&version=NIV> (last visited on March 13, 2018).

²⁰¹ Ruth 4:16 available at: <http://biblehub.com/ruth/4-16.htm> (last visited on March 13, 2018).

²⁰² Galatians 4:5 available at:

<https://www.biblegateway.com/passage/?search=Romans+8%3A15%2CRomans+8%3A23%2CRomans+9%3A4%2CGalatians+4%3A5%2CEphesians+1%3A5&version=NIV> (last visited on March 13, 2018).

²⁰³ Colossian 3:24 available at: <http://biblehub.com/colossians/3-24.htm> (last visited on March 13, 2018).

4.31 There is no specific statute enabling or regulating adoption among the Christians in India. Here too, adoption can take place from an orphanage by obtaining permission from the courts under Guardians and Wards Act. In *Sohan Lal v.A.K Mauzin*²⁰⁴ for the first time customary law on adoption came to be recognised by the Lahore High Court observing:

In the case of (a) Punjabi convert Christians it may be possible to prove the customary right of adoption applicable to them as members of their original caste.

Adoption among Kerala Christians:

4.32 There is an ancient custom of Adoption amongst the Syrian Christian of Travancore where in case a person dies leaving behind daughter(s) with no son, then when the youngest daughter gets married, her husband would become the adopted son of his father-in-law and assume the latter's family name. He would also generally reside with his wife in her natal home along with her parents.²⁰⁵

4.33 In *Philips Alfred Malvin v. T.J. Gonsalvis*²⁰⁶ the Kerala High Court held that it is an admitted fact that the Christian Law does not prohibit adoption, also canon law recognises adoption, and adoption by Christian couple was therefore declared valid. In *Maxin George v. Indian Oil Corporation*,²⁰⁷ same view was taken by the division bench of Kerala High Court. However, the court explained that an abandoned child fostered by a couple does not get the status of an adopted child unless the formalities of adoption takes in the physical act of giving and taking of the child and the giver of the child is duly competent in that role.

²⁰⁴ AIR1 1929 Lah 230.

²⁰⁵ Anthropology of Syrian Christians *available at*:
https://archive.org/stream/AnthropologyOfTheSyrianChristians/Anthropology%20Of%20The%20Syrian%20Christians_djvu.txt.(last visited on August 17,2018).

²⁰⁶ S.A. No. 375/92J

²⁰⁷ 2005(3)KLT57

4.34 An initiative towards adoption was taken by the Christian community of India way back in the year 1995 in the form of a Bill known as the 'Christian Adoption and Maintenance Act of 1995'. It had the support of the Catholic Bishops Conference of India as also of the various other Christian denominations throughout the country. However, in spite of the readiness of Christian community in the country to accept the bill on Adoption and Maintenance the bill could not be enacted.²⁰⁸

PARSI LAW

4.35 There is no legislation for the adoption of children by Parsis in India. In Parsi community the only custom which comes near adoption is to designate a "palak" son. Under this custom a widow of a childless Parsi can adopt a child on the fourth day of her husband's death simply for the purpose of performing certain annual religious ceremonies. However, the adopted child acquires no property rights.²⁰⁹

4.36 The Adoption Bill of 1972 aiming to provide for an enabling law on Adoption was opposed by the Bombay Zoroastrian Jashan Committee which formed a special committee to exempt Parsis from the Bill.²¹⁰ This bill was twice tabled in the Parliament in the 1970's but could not enter into the statutory books.

4.37 Thus, for willing couples the JJ Act of 2015 should serve as an enabling legislation for couples willing to adopt, the child would inherit as a natural born child. The variation in inheritance laws has been addressed in the final chapter which would ensure that personal

²⁰⁸ *Manuel Theodore Desouza v. Unknown*, Para 21, (2000) 3 Bom CR 244.

²⁰⁹K.B Aggarwal , *Family law in India* 185(Kulwar Law International, New York,2010).

²¹⁰Asha Bajpai, *Child Rights in India, Law Policy and Practise*, (Oxford University Press, New Delhi 3rd edn.,2017).

laws do not disentitle from inheritance a child who is adopted under the JJ Act, 2015. Since this report suggests largely a common framework for all inheritance and succession rights, the difference in personal law codes of parents and the adopted child, or whether the child is of any gender, would not be relevant.

PERSONAL LAWS AMENDMENT ACT 2010

4.38 The Act 2010 was enacted to amend the Guardians and Wards Act, 1890 and the Hindu Adoptions and Maintenance Act, 1956. Before the 2010 Amendment a married Hindu woman was legally incapable of adopting a child by herself even with the consent of her husband, while a male Hindu was capable of doing so. The wife could only 'consent' to the adoption, she could not adopt on her own. In *Malti Roy Chowdary v. Sudhindranath Majumdar*²¹¹ the Calcutta High Court observed that the Hindu wife has no capacity to adopt when the husband is alive even when he consents to it leaving consent solely in the domain of male husband.

4.39 In the case of *Brajendra Singh v. State of MP*,²¹² a question arose whether adoption by a married woman is valid without the consent of her husband. In this case, a differently-abled woman was living with her parents because her husband had abandoned her. She adopted a male child overtime but the Court invalidated the adoption stating that 'living like a divorced woman' and 'being a divorced woman' both cannot be equated. This gender discrimination was removed by amendment in the Hindu Adoption and Maintenance Act 1956, through Personal Laws (Amendment) Act 2010.²¹³

²¹¹ AIR 2007 Cal 4.

²¹² AIR 2008 SC 1058.

²¹³ THE PERSONAL LAWS (AMENDMENT) ACT, 2010 NO. 30 OF 2010 [31st August, 2010.]

International Conventions and Covenants:

4.40 India is a signatory to various International Conventions pertaining to Child and Children welfare. Declaration on Social and Legal Principles relating to Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally²¹⁴ 3 December 1986. The relevant Articles are as follows:

Article 3: The first priority for a child is to be cared for by his or her own parents.

Article 4: When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute-foster or adoptive-family or, if necessary, by an appropriate institution should be considered.

Article 13: The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.²¹⁵

Convention on the Rights of the Child²¹⁶ was adopted and ratified by India on 20th November 1985. The preamble to this covenant has referred to various other declarations and conventions with regard to a child.

Article 20: Speaks about the special protection of child and assistance by State to children in need of special care and protection. Such care could include Kafala System, foster placement and regard being paid in his upbringing to his religious, cultural, ethnic background.

4.41 In *Manuel Theodore D'Souza* case²¹⁷ the Bombay High court while referring to the fore mentioned Articles to which India is signatory also revealed a gloomy picture of how the State has yet to

²¹⁴ 41/85. Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally available at:<http://www.un.org/documents/ga/res/41/a41r085.htm> (last visited on March 28th 2018).

²¹⁵ *Ibid.*

²¹⁶ Convention on Rights of Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

²¹⁷ *Manuel Theodore v. Unknown*, 2000 (2) Bom CR 244.

frame laws in line with these conventions even after ratifying it. In spite of a secular provision in form of a Juvenile Justice (Care and Protection of Children) Act 2015 the country is yet to frame a full legislation exclusively dealing with adoption encompassing religion and in reality adhering to the conventions and declarations and giving a true meaning to it.

4.42 The Law Commission therefore suggests that in the interim, the JJ Act be made more comprehensible and accessible. A look at these conventions illustrates the commitment of the international community towards the protection of children and their childhood. Effort should be made to effectively integrate these conventions in the national policy on children.

JUVENILE JUSTICE ACT: AN ENABLING LEGISLATION:

4.43 The lead in the development of the secular law on adoption was laid down by the *Lakshmi Kant Pandey* case.²¹⁸ The Court in dealing with the issue of adoption provided for elaborate guidelines to protect the interest of child. A regulatory body was recommended to be setup i.e. Central Adoption Resource Agency (CARA) which would lay down norms both substantial and procedural in inter as well as intra country adoption.

4.44 The Juvenile Justice (Care and Protection of Children) Act 2000 recognised adoption as one of the ways to facilitate the rehabilitation of children. The former Act 2000 introduced a separated Chapter IV under the head 'Rehabilitation and Social Integration' under it a provision for Adoption was also included as a means to rehabilitate and socially reintegrate children. Section 41 of the JJ Act of 2000 was substantially amended in 2006 which gave a prominent role to the courts in matters of adoption. The amendment also added a definition of adoption, and major changes were made in the other sub-

²¹⁸ 1984(2) SCC 244.

sections of Section 41 of the former JJ Act, 2000. The CARA, as an institution, received statutory recognition.²¹⁹ 'Juvenile Justice Rules' 2007 were framed to give effect to the provisions of the JJ Act 2000. Thus, the Act acted as a secular provision facilitating adoption irrespective of religion. The JJ Act was amended again in 2011 and stands repealed by Juvenile Justice (Care and Protection of Children) Act 2015 (2 of 2016). The Act 2015 has also streamlined the adoption procedures for abandoned, orphaned and surrendered children.

4.45 Some of the features of the JJ Act 2015 are as follows

- Adoptive Parents should be financially and physically sound, a single or divorced parent may also adopt.²²⁰
- A Single Parent (male) shall not be eligible to adopt a girl child.²²¹
- Disabled children will be given priority for adoption.²²²
- Illegal adoption is a punishable offence with imprisonment fine or both.²²³

Central Adoption Resource Authority Regulations 2017

4.46 The Adoption in India is regulated by the Central Adoption Resource Agency (CARA), Adoption Regulations 2017 have been framed under section 68(c) of the JJ Act 2015, and supersede the Guidelines Governing Adoption of Children, 2015.²²⁴

4.47 It provides a broad framework according to which adoption is to be regulated whether it is within country adoption or inter country adoption. It covers within its ambit, the adoption of orphan, abandoned, surrendered children, step parent and also adoption by relatives.

²¹⁹ *Shabnam Hashmi v. Union of India*, AIR 2014 SC 1281.

²²⁰ See Section 57 of the Act 2015: Eligibility of Prospective Adoptive Parents.

²²¹ See Regulation 5 (c) of Adoption Regulations, 2017.

²²² Ibid.

²²³ See Section 80: Punitive Measures For Adoption without Following Prescribed procedures.

²²⁴ Adoption Regulations available at:

http://cara.nic.in/PDF/Regulation_english.pdf (last visited on June 29, 2018).

4.48 CARA facilitates all adoptions under the Act 2015 through Child Adoption Resource Information and Guidance System. Necessary safeguards for all adopted children have been taken care of by maintaining their records and ensuring post adoption follow up. While having consultations with the various stakeholders there were certain apprehensions raised by some that since adoption involves making new relationships between a father and child, mother and child and which are not biological relationships there is a possibility of developing non-consensual sexual relationship, strange relationship between the adopted child and the adoptive parents.

4.49 Moreover, this is one of the many reasons given within Muslim law while prohibiting adoption. It is pertinent to mention that the new CARA regulations have taken care of this issue by mandating that the minimum age difference between the child and the adoptive parents shall not be less than twenty-five years of age.

4.50 The age criteria for prospective adoptive parents have been waived off in case the adoption is by a relative or by a step-parent. There has been substantial criticism of the CARA regulations 2017, as well which is worth flagging. One of the principles governing adoption has been that preference should be given to put children in adoption with an Indian citizen as the child will grow in familiar socio-economic cultural environment. However, given the diversity within the country, there is no real study that substantiates that within-country adoption would help child preserve its biological social practice.²²⁵ The conscious and deliberate attempt to promote one form of adoption leads to an unscientific hierarchy and disadvantage to some.²²⁶

²²⁵S Aarathi Anand, Prerna Chandra, "Adoption Laws Need For Reforms" 37, *EPW* 3891(2002).

²²⁶*Ibid.*

4.51 CARA functions as information centre both at the pre-adoption stage and post adoption stage. It cooperates with the diplomatic missions abroad to watch over the welfare of children given in inter- country adoption.²²⁷ The new online method provided by the CARA regulations, however, also has its loopholes as it is based on an image-based approach (photos of adoptive children will be put on CARA website along with child's study and medical examination) this can be seen as being insensitive to children put in for adoption and also unfair to the prospective adoptive parents who do not have access to online communication or familiarity with English language. Further, it is very impersonal method. The new CARA guidelines therefore leave gaps provoking more deliberation and adjustments. The long-term goals of finding homes for disabled children and older children, and motivating more citizens to adopt requires focus.²²⁸

4.52 It can be said that the Juvenile Justice (Care and Protection of Children) Act 2000 and its subsequent amendment in 2006, 2011, and re-enactment in 2015 is a major step towards recognition of a child-centric legislation which allows for adoption of orphans, abandoned and surrendered children by parent/s irrespective of their religious status. Juvenile Justice Act 2015 spells out a detailed procedure for adoption providing for accountability, transparency and auditability of children entering into the adoption stream.

4.53 At the same time this process of adoption is riddled with corruption lack of administration sensibility and pressure of political appointees without the required expertise in regulatory bodies which needs to be addressed. Given the number of babies waiting to be adopted, adoption agencies strongly advocate the creation of a robust

²²⁷ See CARA Regulations 2017, chapter IV Adoption Procedure for Non-Resident Indian, Overseas citizen of India and Foreign Prospective Adoptive Parents

²²⁸ Editorials, "Adopting a New Approach" *EPW* 50, Issue 45-46, 2015.

and clear adoption law with the choice available to all citizens to adopt.²²⁹

4.54 In *Re Adoption of Payal @ Sharinee Vinay Pathak* ²³⁰ a question arose before the Bombay High Court, whether a Hindu couple governed by the Hindu Adoptions and Maintenance Act, 1956, with a child of their own can adopt a child of the same gender under the provisions of the Juvenile Justice Act of 2000. the Bombay High Court observed:

Adoption is a facet of the right to life under Article 21 of the Constitution. The right to live that is asserted is, on the one hand, the right of parents and of individual women and men who seek to adopt a child to give meaning and content to their lives. Equally significant, in the context of the Juvenile Justice Act, 2000, the right to life that is specially protected is the right of children who are in need of special care and protection. The legislature has recognized their need for rehabilitation and social integration to obviate the disruptive social consequences of destitution, abandonment and surrender. There is legislative recognition of adoption as a means to subserve the welfare of orphaned, abandoned and surrendered children.

4.55 The court on the question of conflict between the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act, 2000 stated that both must be harmoniously construed observing:

The Hindu Adoptions and Maintenance Act, 1956 deals with conditions requisite for adoption by Hindus. The Juvenile Justice Act of 2000 is a special enactment dealing with children in conflict with law and children in need of care and protection. While enacting the Juvenile Justice Act 2000 the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. The focus of the legislation is on the

²²⁹ Editorial, "Expanding Adoption laws" 45 *EPW* 8 (2010).

²³⁰2010(1) Bom CR434.

condition of the child taken in adoption. If the child is orphaned, abandoned or surrendered, that condition is what triggers the beneficial provisions for adoption. The bar on adoption of same sex child in the Hindu Adoption and Maintenance Act will pave the way for Parents to look to a more secular provision like the JJ Act 2015.

4.56 “Best Interest of the Child” has been the guiding principle in deciding the adoption and custody matters which is a progressive step in the broader perspective of having uniformity in adoption laws. India is signatory to various Conventions and covenants relating to a Child. One such being the *Declaration on Social and Legal Principles relating to Protections and Welfare of Children with Special Reference to Foster Care and Adoption Nationally and Internationally*²³¹, Article 3, 4 and 15 of the Convention places emphasis on Foster and Adoption where child’s parents are unavailable. India is yet to frame a full legislation exclusively dealing with Adoption.

4.57 The major flaw with the Act 2015 is that the Act is primarily drafted for rehabilitation and reformation of delinquent juveniles. It may incidentally deal with the concept of adoption but it is inadequate in addressing the jurisprudential questions on adoption. The Commission strongly suggests the use of the term ‘parents’ in place of ‘mother and father’ in adoption provisions under the JJ Act, so as to enable individuals of all gender identities to avail of the Act.²³² Importantly, the Commission also recommends that the word ‘child’ should replace son and daughter so as to ensure that intersex children are not excluded from being adopted.

4.58 It is further suggested that let the Juvenile Justice Act 2015 remain the central statutory law on adoption and this can be resorted to by the parents who wish to adopt. Juvenile Justice Act 2015 caters

²³¹ 41/85, came into force on December 3rd 1986.

²³² Consultations with organisations such as LABIA, Forum Against Oppression of Women showed valuable studies on ways in which the provisions could be made more inclusive.

to the need of child's right to a family and is applicable to all irrespective of caste, creed, religion or region.

Inheritance Rights of the Adopted Child

4.59 A look at the definition of "adoption" in the definition clause in Act 2015 gives us a quite fair idea that the adopted child is equated with a biological child and is entitled to same rights and privileges that a biological child will get.²³³ Also after Act 2015 has come into force the question of inheritance has been well settled. Article 63 states that:

A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family: (emphasis added).

4.60 So combined reading of the definition of adopted child and section 63 of the Act 2015 suggests that the adopted child is kept on a same pedestal as a natural born child and shall be subject to same rights and obligations as are bestowed on the natural born child.

Inheritance Rights from Step Parents

4.61 Under the present law child or children of spouse from an earlier marriage surrendered by the biological parent can be adopted by the step parent. In case of "step-parent adoption", the couple including one of the biological parents will have to register with Child

²³³For detailed discussion of a natural Heir see Chapter on inheritance and Succession.

Adoption Resource Information and Guidance System. They will also need consent of other biological parent for adoption and file application in court for adoption order. Once the formalities are completed, the adopted child of the step parent will have the same rights as that of a biological child which will include the right of inheriting the property of step parent.²³⁴

4.62. It is important to see the adoption from the humanitarian perspective rather than through the lens of religion.²³⁵ For individuals unwilling to adopt for religious reasons, it is suggested that that personal law be left untouched, however, for those willing to adopt, the option should remain open. It was held by the Kerala High Court that right of a couple to a child is a constitutional right which flows from Article 21.²³⁶ However the same was not approved by the Supreme Court in *Shabnam Hashmi v. Union of India*²³⁷ wherein the court stated that now is not an appropriate time for the 'right to adopt' and 'right to be adopted' to be declared as a fundamental right or that it comes within the preview of Article 21 of the Constitution, however, the Court showed the way forward for willing couples of all religions to adopt. In *Stephany John Backer v. State*²³⁸ the Supreme Court relaxed the rigour of the guidelines of the Central Adoption Resource Authority, as the proposed adoption was beneficial to the child.

4.63 The JJ Act 2015 serves the citizen's interest and is a welfare legislation which must be resorted to by all till the time something substantial on adoption is placed on the statute books. Given the extremely high instances of child abuse in the country, it is understandable that the law on adoption has remained strict, However, the procedures should not be so tedious as to discourage

²³⁴ See Adoption Regulations 2017, rule 52

²³⁵ Prema Chandra and S Arthi Anand , " Adoption Laws Need Reform" 37 *EPW*, Issue 38, 2002.

²³⁶ *Philips Alfred Malvin v. YJ Gonsavalis & Ors*, AIR 1999 Ker 187.

²³⁷ *Shabnam Hashmi v. Union of India* , AIR 2014 SC 1281.

²³⁸ AIR 2013 SC3495.

couples from adopting. The current law even after the amendments under the Act 2015 does not permit a male adult to adopt a female child. It is suggested there should be a provision of adoption to a single parent irrespective of gender and gender identity of the child as well as the parent. The Commission urges that there is a need to have further studies into why and how adoption by single male has been dealt with globally so that it can be incorporated in the national framework on adoption.

MAINTENANCE OF CHILDREN

4.64 Maintenance can be defined as the periodic monetary sum paid by one spouse for the benefit of other on separation or on dissolution of marriage it is also referred to as alimony or spousal support. It also means amount payable by a parent to his child for his personal living expenses and also means the support one person is legally bound to give to another for their living.

4.65 The concept of 'maintenance' in India is covered under section 125 of the Code of Criminal Procedure, 1973 and under laws relating to marriage and divorce as well as under various personal laws. This concept further originates from Article 15(3) of the Indian constitution which envisaged that the State can make special provision for women and children. This is further reinforced by Article 39 of the Constitution, that states that the State shall direct its policy towards ensuring that all citizens, both men and women have equal access to means of livelihood and children and youths are given facilities, opportunities in conditions of freedom and dignity.²³⁹

²³⁹ Wandaia Syngkon, "Maintenance For Wife And Children Section 125 of the Code of Criminal Procedure" 6 JBM &SSR.

HINDU LAW

4.66 The law of children's maintenance applicable to Hindus, Jains, Buddhists and Sikhs, is contained in the Hindu Adoptions and Maintenance Act, 1956²⁴⁰ and Hindu Marriage Act 1955²⁴¹.

4.67 Section 20 of Act 1956 specifically deals with the maintenance of children and aged parents. It imposes an obligation upon the parents equally to maintain the children, legitimate and illegitimate, and daughters till they get married.²⁴² In *State of Haryana v. Santra*, AIR 2000 SC 1888, the court observed that the obligations to maintain these relations is personal, legal and absolute in character and arises from the very existence of the relationship between the parties. A claim for maintenance under the section can be made by an illegitimate child born of adulterous intercourse,²⁴³ or a child born of a void marriage.²⁴⁴

4.68 Section 19 of the Act 1956 imposes, on the Hindu father-in-law, an obligation to maintain his widowed daughter-in-law, whether minor or major, if the latter cannot maintain herself out of her own income or out of her late 'husband's estate or her parents' estate or from her own son or daughter or their estate.²⁴⁵

4.69 The obligation is, however, subject to his having a coparcenary property in his possession so, if he has considerable self-acquired property or income, but no ancestral property, he need not provide any maintenance to his widowed daughter-in-law, even if minor and destitute. However, the Punjab and Haryana High Court has stated that she is entitled to claim maintenance from the father-

²⁴⁰ The Hindu Adoption and Maintenance Act, 1956, Act 78 of 1956.

²⁴¹ The Hindu Marriage Act, 1955 Act 25 of 1955.

²⁴² Ibid.

²⁴³ *Kalla Maistry v. Kanniammal*, AIR 1963 Mad 148.

²⁴⁴ *Sollomon v. Jaini Bai*, AIR 2004 Mad 210.

²⁴⁵ Ibid.

in-law's self-acquired property or from his donee.²⁴⁶ Also if the father in law is dead the obligation will not pass on to the mother-in-law²⁴⁷.

4.70 Under section 24²⁴⁸ of Act 1956 a Hindu child who ceases to be a Hindu by conversion to another religion loses all his right to claim maintenance from anybody. This provision seems to be incorrectly positioned and it is conflict with the Caste Disabilities Removal Act, 1850.

4.71 In case of marriage outside one's religion, daughters were frequently disentitled from inheritance if they changed their religion, and it remained unclear under what personal law, such a case would be decided if property or maintenance were to be claimed. This also dissuaded Muslims from registering their marriage because registration meant that succession law would apply differently. To address this, we have dealt with the problem of maintenance under chapters on marriage and succession laws. The changes to maintenance have to be read along with provisions such as 'community of property acquired after marriage' in deciding divorce and the various amendments to succession and inheritance laws.

4.72 The Hindu Marriage Act 1955 also deals with the Maintenance of Children. Section 26 of the Act 1955, empowers the courts to grant various remedies relating to maintenance, education, and custody of the children. The term children under this section seems to include not only legitimate children but also those deemed to be legitimate by operation of section 16,²⁴⁹ and also those children whose parent's marriage was the subject matter of any proceedings under Hindu Marriage Act. The test of jurisdiction under the present section is the parenthood not the legitimacy of the child. The

²⁴⁶*Balbir Kaur v. Harinder Kaur*, AIR 2003 P&H 174.

²⁴⁷*Jagdev Singh v. Paramjit Kaur*, 2017(2)RCR(Criminal)272.

²⁴⁸See section 24:Claimaint to maintenance should be a Hindu.

²⁴⁹See section 16:Legitimacy of children of void and voidable marriages.

children's best interest should be given the foremost importance while dealing with the above issues.²⁵⁰

4.73 Under Special Marriage Act, 1954, a similar provision exists which empowers the court to pass order regarding custody, education and maintenance of children while entertaining the matrimonial dispute.²⁵¹

MUSLIM LAW

4.74 Under Muslim Law maintenance has been defined as follows:

The Arabic equivalent of maintenance is *Nafqah*, which literally means what a person spends for his family. In its legal sense maintenance signifies and includes three things (i) Food (ii) Clothing (iii) Lodging. Fatwa-i-Alamgiri says "Maintenance comprehends (sic) food, clothing and lodging, though in common parlance its limited to first."²⁵²

4.75 It is the father who has the absolute liability to maintain his children and is not affected by his indigence so long as he can earn. He is bound to maintain them, even if they are in their mother's custody. A father is liable to provide maintenance to (a) minor children of either sex (b) un married daughter (c) married daughter if she is poor (d) Adult son, if he is indigent.²⁵³

4.76 A father is not bound to provide separate maintenance to his minor son²⁵⁴ or unmarried daughter²⁵⁵ who refuses to live with him without reasonable cause. Further father's obligation is not lessened even if the child is in the custody of the mother. A father is not bound

²⁵⁰Satyajeet A Desai, Mulla Hindu Law, 1055 (Lexis Nexis 24thedn. Gurgaon 2010).

²⁵¹Section 38 Custody of Children, THE SPECIAL MARRIAGE ACT, 1954.

²⁵² Aqil Ahmad Mohammedan Law 232, (Central law agency, 25thedn. 2015)

²⁵³Ibid at 232.

²⁵⁴*Dinsab Kasimsab v. Mahmad Husen*, (1994) 47 Bom.L.R.345.

²⁵⁵*Bayabai v. Esmail*, [1941] Bom.643.

to maintain an illegitimate child but under Hanafi Law a mother is under a legal obligation to support her illegitimate minor children²⁵⁶

Children's maintenance in absence of Father

4.77 In case children are minor or adults unable to make a living, and their father dies, the obligation to provide for them falls on the grandfather.

Know that if father dies, in proportion to the share in inheritance, the child's mother and paternal grandmother will be responsible for maintenance. Grandfather will bear two-third and mother one-third expenses. According to one report only grandfather will provide maintenance²⁵⁷.

4.78 It will be applicable only when grandfather and mother will be in positions to provide maintenance. If either of them is unable, the other one will be responsible. For instance the eminent Hanafi jurist, Allama Sarkhasi observes:

If one is needy, he will be excluded, and the next heir will provide maintenance in proportion to his/her share in inheritance.²⁵⁸

4.79 Going by this principle, if grandfather too, dies, the next of kin will provide maintenance. This viewpoint is endorsed by Shafai jurists. Further if father is not there or unable to pay maintenance, grandfather will be responsible for this: Imam Shafai observes that:

Father will bear maintenance of children until they come of age, and in the case of daughter until she menstruates. After this he is not obliged. However, if the child is disabled and not able to support himself,

²⁵⁶Asaf A.A. Fayzee, *Outlines of Mohammadan Law* 215 (Oxford University Press, New Delhi, 4th edn.)

²⁵⁷ See: *Radd Al-Muhtar*, 3,614, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

²⁵⁸ See: *Al-Sharkhasi, Al-Nabsut*, 5,227, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

father will provide. Same holds true for the maintenance of grandson. If father and grandfather are not there the next of kin will have this obligation²⁵⁹.

4.80 What is implied is that the maintenance of not only grandson but also of his children and grandchildren will be provided, if he does not have anyone in the parental line who is able to provide maintenance.

4.81 Thus, it is clear from the discussion herein above that it is the obligation of the father to maintain his children, till they attain the age of puberty and in the case of daughter, it is the obligation of the father to maintain her till she is married. He is bound to maintain them even if he is indigent and the children are in the custody of the mother. The flaw here is that the father is not bound to maintain his illegitimate child. These inconsistencies in the garb of personal laws add to the plight of such children who already suffer from societal stigma.

4.82 Section 125 of the Criminal Procedure Code, 1973, (which ensures that all such destitute children are maintained by their fathers except a married daughter) binds the father to pay for the maintenance of such children. In *Noor Sabha Khatoon v. Mohd Quasim*²⁶⁰ It was held by the Supreme Court that the children of Muslim parents are entitled to maintenance under Section 125 CrPC for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females till they get married. This exclusion of married women is addressed in the section of succession.

²⁵⁹ Al-Hawi Al-Kabir, 1,484, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

²⁶⁰AIR 1997 SC 3280.

CHRISTIAN LAW

4.83 As regards Christians, there is, like Parsis, no separate law relating to maintenance of children. However, the Indian Divorce Act, 1869 includes certain provisions relating to custody and maintenance of the children of those couples who seek judicial separation under that Act. These are contained in chapter XI. The court, hearing an application, for judicial separation, may make interim as well as final orders regarding the custody, education and maintenance of minor children. Similar powers are vested in the courts dealing with suits for dissolution of marriages or for nullity of marriages under the provisions of the Indian Divorce Act, 1869.²⁶¹

4.84 The Muslim law and the modern Hindu law (applicable also to Sikhs, Jains and Buddhists) both are quite comprehensive in regard to maintenance of children. The statutory laws applicable to Christians and Parsis deal only with maintenance of children of those parents who seek any of the matrimonial remedies. However, the provisions of the CrPC 1973, are applicable to all Indians alike. The religious as well as non-religious laws in this field suffer from some flaws as detailed in these pages above. It is desirable to bring piecemeal changes to personal laws to ensure that maintenance of children is ensured uniformly.

PARSI LAW

4.85 The provisions contained in the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, relating to the custody, maintenance and education of children, were first made under the Parsi Marriage and Divorce Act, 1936. Section 49 of that Act confers the same powers on Parsi matrimonial courts as are conferred in this respect on the courts by the law of civil marriages and by Hindu law. The language of

²⁶¹Ibid.

the provisions under the three laws is nearly identical. All of them provide safeguards for the interests of children likely to be affected, through provisions under matrimonial remedies, if granted, under the relevant law. There is however, no specific statute applicable to the Parsis.

CRIMINAL PROCEDURE CODE: MAINTENANCE PROVISION

4.86 Section 125 CrPC is a reincarnation of the section 488 of the old code, CrPC 1898 at the same time widening the ambit of the section by increasing the number of dependants that can claim maintenance. It was brought in as a welfare measure to protect the weaker sections like women and children. In CrPC 1973, relevant provisions are found in Chapter IX (Section 125-128). Section 125 of the CrPC includes wife, divorced as well as not divorced, minor children, legitimate or illegitimate, father and mother.

4.87 Section 125 provides, *inter alia*, that if any person "having sufficient means, neglects or refuses to maintain his child "unable to maintain itself", a magistrate of first class may "upon proof of such neglect or refusal, order such person to make a monthly allowance for" its maintenance. The provision applies equally to legitimate as well as illegitimate children" and also both to male and female children, whether married or unmarried. Section 125 to 128 prescribe a self contained speedy procedure for compelling a person to maintain his wife, children and parents. The right of a wife and children to be maintained by the husband and by the father is a statutory right created by the Act and it is not dependent upon the personal law.²⁶²

4.88 The word 'child' has not been defined in the CrPC. It means a person who has not attained full age i.e. 18 years as prescribed by the Indian Majority Act, 1875, and who is unable to enter into a contract

²⁶²KariyadanPokkar v.KayatBeeranKutti, (1895) 19 Mad 461.

or to enforce any claim under the law. Under clause(c) of sub section (1) a child need not be a minor, but he must be by reason of physical or mental abnormality unable to maintain himself.²⁶³

4.89 The basis of application for maintenance is the paternity of the Child²⁶⁴ however, the Supreme Court in *Sumitra Devi v. Bhaaikan Choudhary* ruled that in deciding the application whether the child is legitimate or illegitimate would not consideration. An illegitimate minor child is, therefore, entitled to maintenance.²⁶⁵

4.90 In *Ramesh Chandra Kausal v. Mrs Veena Kausal* ²⁶⁶ the Supreme Court on Section 125 observed that:

It is a measure of social justice and specially enacted to protect women and children and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39. There is no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social function to fulfil.

4.91 It is notable that there is no provision in the CrPC regarding a widowed daughter who is not a minor. If such a daughter cannot maintain herself, neither can her parents nor her in-laws be compelled by the criminal courts to maintain her under the provisions of the CrPC, and this seems to be a lacuna in the Code.

4.92 Section 125 CrPC, however, also deals with 'destitution' which is different from maintenance in the sense that one need not be destitute in order to seek or claim maintenance. The question of maintenance of divorced wives under various personal laws has been dealt with in the chapter on marriage. However, for maintenance of children and parents the section continues to be relevant.

²⁶³*Nanakchand v. Chandra Kishore*, AIR 1970 SC 446.

²⁶⁴*Abdul v. Ayesha*, AIR 1960 Kerala 101.

²⁶⁵ AIR 1985 SC 765.

²⁶⁶ AIR 1978 SC 1807.

4.93 It is worth noting that financially independent daughters, married daughters, are also be able to support and maintain their parents.²⁶⁷ In *Vasant vs. Govindrao Upasrao Naik*,²⁶⁸ Criminal Revision Application No. 172/2014, the Bombay High Court held that married daughters who have financial capacity are also obligated to maintain their own parents. The court stated that when woman can inherit an equal share in property as their brothers their obligation for maintaining their own family also exists.

It is true that Cl.(d) has used the expression “his father or mother” but, in our opinion, the use of the word ‘his’ does not exclude the parents claiming maintenance from their daughter. Section 2(y) Cr.P.C. provides that the words and expressions used herein and not defined but defined in the Indian Penal code have the meanings respectively assigned to them in that Code. S.8 of the Indian Penal Code lays down that the pronoun ‘his’ in Cl.(d) of S.125(1), Cr.P.C. also indicates a female.....In other words, the parents will be entitled to claim maintenance against their daughter provided, however, the other conditions as mentioned in the Section are fulfilled. Before ordering maintenance in favour of a father or a mother against their married daughter, the Court must be satisfied that the daughter has sufficient means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself.

Thus, maintenance of parents can be claimed from any child regardless of gender.

²⁶⁷ See *Dr. Mrs. Vijaya Arbat v. Kashirao Sawau* AIR 1987 SC 1100,

²⁶⁸ (2017) 1 HLR 169.

5. INHERITANCE AND SUCCESSION

5.1. The term 'inheritance' has been defined in Black's Law Dictionary as, "a. Property received from an ancestor under the laws of intestacy; b. Property that a person receives by bequest or devise."²⁶⁹ The dictionary, further, defines 'succession' as, "the acquisition of rights or property by inheritance under the laws of descent and distribution"²⁷⁰. Succession is mainly of two kinds-

1. Intestate succession - "a. The method used to distribute property owned by a person who dies without a valid will; b. Succession by the common law of descent." This type of succession is also termed hereditary succession, descent and distribution;
2. Testamentary succession - "Succession resulting from the designation of an heir in a testament executed in the legally required form".

5.2. A perusal of the above definitions indicates that, 'inheritance' is associated with the act of receiving property, while 'succession' is related to acquiring rights or title in the property received by way of 'inheritance'. 'Inheritance' may be termed as a means to an end, that end being 'succession'. Sir William Blackstone maintains the distinction between 'inheritance' and 'succession' by dealing with the latter in the contexts of corporation sole, corporation aggregate, property acquired upon marriage and property acquired by way of suit or judgment. He deals with inheritance in the context of freehold estates and later in that of coparcenary property.²⁷¹ However, these terms are so closely intertwined, that for all intents and purposes, they are used synonymously. While it is true, that succession can also

²⁶⁹ Black Law's Dictionary, 8th ed., 2004

²⁷⁰ Ibid.

²⁷¹ Wilfrid Prest (ed.), *William Blackstone: Commentaries on the Laws of England - Book II on the Right of Things* (Oxford University Press, Oxford, 1stedn., 2006).

be of 'power vis-à-vis office', in this chapter 'succession' will be dealt with in terms of 'property'.

5.3. Sir Henry Maine observes, "All laws of inheritance are made up of the debris of the various forms which family law has assumed."²⁷² The laws (statutes, customs, usages, precedents, *et al.*) pertaining to inheritance and succession followed in India are due a long impending overhaul. This chapter will deal with personal laws of Hindus, Muslims, Christians and Parsis apropos inheritance and succession and make certain suggestions after an examination of the drawbacks of each system.

HINDU LAW

5.4. Inheritance under Hindu Law can be classified into two categories – (a) traditional system, and (b) statutory.

5.5 Under the traditional system two prominent schools of Hindu law are essentially required to be analysed, namely, the *Dayabhaga* school (applicable in Bengal and Assam) and the *Mitakshara* school (applicable in rest of India). The most pronounced point of distinction between the two schools is that, traditionally, while *Dayabhaga* school based its law of succession on the principle of "spiritual benefit", entailing that those who could impart maximum spiritual benefit to the deceased would succeed, *Mitakshara* school based its law of succession on the "principle of propinquity", meaning that those nearer in blood relationship would succeed.

5.6 Under the traditional *Mitakshara* law of inheritance, the coparcenary²⁷³ could consist only of males, while *Dayabhaga* law permitted females to be a part of coparcenary as well. *Mitakshara* law created an interest in favour of sons (includes - grandson and great-

²⁷² See Smith :op cit p. 80

²⁷³ The concept is explained later in the paper.

grandson), in the coparcenary, as soon as they were conceived, and they could ask for partition during the lifetime of the father. Such property devolved by 'rule of survivorship' and not by rules of succession. The *Dayabhaga* law, on the other hand, created no such interest and the property would devolve only by succession upon the death of the father.

5.7 It is noteworthy that under the traditional *Mitakshara* law, testamentary disposition of property was not permitted. This power, however, has been granted by virtue of section 30 the Hindu Succession Act, 1956.

5.8 Having taken a brief look at the traditional Hindu law of succession, it would be appropriate to point out that the current statutory law (the Act 1956) has incorporated in itself and hence replaced, the traditional law. Under the scheme of the statutory law, the difference between the two schools stands moot, as it presents a uniform law system of inheritance applicable to all Hindus irrespective of any school or sub-school to which they belong.

5.9 The move to codify Hindu Law had met with stiff opposition from conservatives who felt that codification would dilute the age old law enumerated in the *Smritis*. Initially the idea was to bring forth a Hindu Code that abolished the concept of coparcenary and joint family system. Many members were not willing to accord equal property rights to women. Recognising this opposition from fellow Parliamentarians, Mr. Biswas, the then Law Minister remarked that:

“We male members of this house are in a huge majority. I do not wish that the tyranny of the majority may be imposed on the minority, the female members of this house.”²⁷⁴

²⁷⁴ The Constituent Assembly of India, (Legislative) Debates Vol.VI 1949 Part II in 174th Law Commission Report, para 2.6.

5.10 However, due to this opposition, both these concepts were retained by the Parliament. Consequently, section 6 of the Act 1956 allowed the gender discriminatory concept of Mitakshara coparcenary, denying women equal property rights.

5.11 In a move towards removing gender disparity, daughters, irrespective of their marital status were made the primary heir in father's property in preference to the male collaterals. However, a daughter could claim this right only with regard to his separate property and not the coparcenary property. With the 2005 amendment in the Act 1956, daughters were given the status of coparceners, there remains, however, scope of improvement in the Act 1956.

Abolition of Coparcenary

5.12 The concept of coparcenary is unique to Hindu law. Hindu coparcenary is a much narrower institution than the joint family.²⁷⁵ Coparcenary rights can only be claimed over ancestral property. A Hindu male had absolute right over one's separate property but his right over ancestral property was subject to the claims of the coparceners. Coparcenary cannot be created by parties and is purely a creature of law.²⁷⁶ Under the *Mitakshara* School of law, three generation of males from the last holder of the property constitute *Mitakshara* coparcenary. Coparceners are related to each other either by blood or adoption. Mayne defines coparceners as three generation next to the owner, in unbroken male descent, i.e., propositus, his sons, grandsons and great grandsons, all of them constitute a single coparcenary.²⁷⁷

²⁷⁵ For further discussion see Satyajeet Desai, *Mulla Hindu Law*(22ndedn.,Lexis Nexis, Gurgaon, Rep. 2017) 340; see also See *Yenumula v.Ramandora* (1870) 6 MHCR 94; *Tirumal Rao v.Rangadani* (1912) 23 MLJ 79.

²⁷⁶*Ibid*

²⁷⁷ See Mayne, *Treatise on Hindu Law & Usage*, 707 (Bharat Law House, New Delhi, 17thedn.).

5.13 One of the most important incidents of coparcenary is that coparceners acquire a right in the ancestral property by birth and doctrine of survivorship. Doctrine of survivorship means that on the death of a coparcener, the property does not pass to other coparceners by succession. Instead the probable share of other coparceners increases with every death in the coparcenary and decreases with every birth. The share of the coparceners is, thus, probable and can only be converted into fixed share by claiming partition.

5.14 In *Rohit Chauhan v. Surinder Singh & Ors.*,²⁷⁸ the apex Court observed that the property consisting of ancestral property is called a 'coparcenary property' and a coparcener is the one who shares equally with other descendants in inheritance in the estate of common ancestor. The interest of the coparceners remains in flux, it increases with the death of a coparcener and reduces with the birth in the family. **The Court further opined that until the time an ancestral property remains in the hand of a single person, it would be treated as the separate property of that person, and any alienation of the property cannot be called into question. However, as soon as an issue is born, the property will acquire the nature of an ancestral property, entitling the issue born as the coparcener.**²⁷⁹

5.15 The essence of coparcenary, under *Mitakshara* Law is 'the unity of ownership',²⁸⁰ while under *Dayabhaga* Law, it is 'unity of possession'.²⁸¹ **In the Hindu jurisprudence, coparcenary is attributed to the interpretation of 'daya' by Vignaneshwara, according to whom it is only that property which becomes the**

²⁷⁸ AIR 2013 SC 3525.

²⁷⁹ Ibid.

²⁸⁰ *Vellikannu v. R. Singaperumal & Anr.*, AIR 2005 SC 2587.

²⁸¹ *Commissioner of Income Tax v. Prafulla Kumar Panja & Ors.*, [1993] 200 ITR 706 (Cal).

property of another person, solely by reason of relation to the owner.

5.16 Membership of a coparcenary is dynamic and not static, as fresh links are being continually added to the chain of descendants by births and earlier links are being constantly detached or removed by death.²⁸²

5.17 Coparcenary is related to the idea of 'joint tenancy'. In the case of joint tenancy, the joint owners own the property in coparcenary, where their shares cannot be ascertained before the partition of property. Each joint owner owns or has a right to the extent of his share. Joint tenants have unity of title, unity of commencement of title, unity of interest, so as in law to have equal share in the joint estate, unity of possession, as well of every part as of the whole, and right of survivorship.²⁸³

5.18 In *Uttam v. Saubhag Singh & Ors.*,²⁸⁴ the plaintiff, grandson of the deceased - *J*, claimed the suit property to be ancestral and that he was a coparcener in the same. The parties to the suit agreed to be governed by proviso of section 6 of the Hindu Succession Act 1956, as *J* had left a widow and three sons. The question that came before the Supreme Court for consideration was whether it would be the share of *J* that would be divided, keeping the joint family property intact or after the application of section 8 joint family property ceases to exist. The character of joint family property if remained intact, would further decide appellant's right to sue for the partition.

²⁸² See *Yenumula v. Ramandora* (1870) 6 MHCR 94; *Tirumal Rao v. Rangadani* (1912) 23 MLJ 79.

²⁸³ See *Commissioner of Wealth-Tax v. Kantilal Manilal*, (1973) 90 ITR 289 Guj.

²⁸⁴ AIR 2016 SC 1169.

5.19 The Supreme Court referred to *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*,²⁸⁵ where in the presence of a widow and daughter was held as class I heirs, the Court held that the proviso to section 6 would come into play and section 6 would be excluded. The Court, also held that in order to ascertain the share of heirs in the property it was necessary to ascertain the share of the deceased in the coparcenary property. What was, therefore, required was to assume that a partition in the property, between the deceased and his coparceners, had taken place immediately before his death. This assumption once made was irrevocable.

5.20 The Supreme Court, in the case of *Uttam*²⁸⁶ observed that when section 8 comes into picture the property would devolve by *intestacy and not by survivorship*. The Court added that on a conjoint reading of sections 4, 8 and 19 of the Act 1956, it is found that once section 8 is pressed into service and the property devolves by the principles of intestacy, the joint family property loses its character as such and those who succeed, hold it as tenants-in-common, not as joint-tenants. The Court, concluded that the case would attract the proviso to section 6 in the presence of a Class I female heir and a notional partition must be assumed to have taken effect in 1973, i.e., when *J* died. The appellant would have been entitled to a share had he been born in 1973, however, he was born in 1977, so such a share could not be allotted to him. The Court held that the ancestral property, upon the death of *J* in 1973, devolved by succession under section 8 of the Act 1956, thereby losing its character of a joint family property, held by his widow and other coparceners as tenants-in-common, not as joint-tenants. Thus, a suit for partition by the appellant was held to be not maintainable.

²⁸⁵ (1978) 3 SCC 383. See also *Shyama Devi v. Manju Shukla* (1994) 6 SCC 342.

²⁸⁶ AIR 2016 SC 1169.

5.21 Although, the system of coparcenary had been an essential feature of the system of Hindu Succession, there have been views of doing away with the concept since the time of codification of Hindu Laws. In the light of the above discussion it can be deduced that the concept of coparcenary is losing its character. In fact, the broader concept of Hindu Joint Family itself had been a point of discord. The B.N. Rau Committee, i.e., the Hindu Law Committee (1941), entrusted with the task of codifying Hindu law was of the opinion that the system of Hindu Joint Family be abolished. The Report submitted by the Committee in 1947,²⁸⁷ did contain an opinion of Hon. Srinivasa Sastri to the effect:

...There is some point in the joint family system being disrupted. But the joint family is already crumbling; many in roads have been made into it; the modern spirit does not favour its continuance any longer. The choice is between the maintenance of big estates and recognition of the independence of individual members of joint family. The latter in my opinion, is a more important aim as it affords greater scope for individual initiative and prosperity.²⁸⁸

5.22 Based on the recommendations of the Committee, Kerala abolished the Joint Family System in 1975 by enacting the Kerala Hindu Joint Family (Abolition) Act, 1975.

5.23 The Law Commission of India in its 174th Report 'Property Rights of Women: Proposed Reforms under the Hindu Law' (2000), had also opined in the favour of the abolition of coparcenary. However, the report further explained that unless daughters are not made coparceners, the system cannot be abolished because that would reduce only the male descendants as tenants-in-common in the absence of joint tenancy. Now that daughters have been made a member of the coparcenary by the Hindu Succession (Amendment) Act 2005, it has brought with itself a new set of concoctions.

²⁸⁷Report of the Hindu Law Committee (1947)

²⁸⁸*Id* at 15.

5.24 This new system of coparcenary where daughters are also coparceners though necessary in light of granting equal rights to a female issue, is replete with inherent lacunae. Making daughters coparceners has decreased the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit stands reduced. In States where the wife takes a share on partition, as in Maharashtra, the widow's potential share is now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share has fallen below the daughter's. Moreover, a thorough reading and interpretation of the phrase "daughter of a coparcener" in section 6 of the amended Act, reveals an undue advantage to the daughter's daughter.

5.25 To solve these anomalies, and inconsistencies now that daughters have been made coparceners like sons, the recommendation of the Law Commission in its 174th Report (2000) may be taken forward.

5.26 Therefore, it is suggested that the coparcenary be abolished at the Central level and the right in a property by birth be extinguished,²⁸⁹ by opting for 'tenancy-in-common',²⁹⁰ instead of 'joint tenancy'.

Abolition of Hindu Undivided Family (HUF)

5.27 An offshoot of the coparcenary aspect of the personal law of Hindus can be seen in the realm of taxation laws. The concept of HUF

²⁸⁹ Also suggested by the Hindu Law Committee in its Report (1947), at 13.

²⁹⁰ In *Valiyaveettil Konnappan v. Mangot Velia Kunniyil Manikkam*, AIR 1968 Ker 229, the court emphasised the distinction between the rights arising from joint tenancy and tenancy in common. It was observed that in case of tenants-in-common there is only unity of possession, not of title or interest.

finds its roots in the Hindu joint family system. According to the colonial interpretation, “*HUF was a joint family that was held together by strong ties of kinship and entailed a variety of joint property relations among the members*”.²⁹¹ Hence, a legal status was given to the HUF as a trading entity. In the debate on the Super Tax Bill 1917, it was proposed that HUF be recognized as a distinct category for taxation, in order to overcome the problem of the dual characteristics of being a family and a business entity. This interpretation led to the recognition of the HUF as a separate tax entity which was subsequently incorporated into the Income Tax Act 1922.

5.28 In present times, HUF is neither congruent with corporate governance, nor is it conducive for the tax regime. In 1936, the Income Tax Enquiry Report had warned of substantive revenue loss if HUF is granted special exemptions. Preferential tax treatment to the HUF has been commented upon by various other committees too in the post- independence era. The Taxation Enquiry Commission (1953-54) noted that there were certain anomalies in the tax treatment of the Hindu undivided family but came to the conclusion that it would be inexpedient to make any far reaching changes in this regard, particularly for the reason that the Hindu Code Bill was then pending before Parliament.²⁹² Then, in the ‘Final Report on Rationalisation and Simplification of the Tax Structure’, S. Bhoothalingam had stated that there has always been some scope to use the institution of the HUF as a means of lowering the tax liability of individuals and that “in economic terms it would be justifiable to restrict or diminish the tax benefits which can thus be acquired in a perfectly legal way.”²⁹³

²⁹¹Chirashree Das Gupta and Mohit Gupta, “The Hindu Undivided Family in Independent India’s Corporate Governance and Tax Regime”*South Asia Multi-Discplry Acad. Jnl available at:*

<http://journals.openedition.org/samaj/4300> (last visited on 22-01-2018).

²⁹²Government of India, Report of the Taxation Inquiry Commission 118 (Ministry of Finance, Dept. of Economic Affairs, 1953-54).

²⁹³*Id.* at 43

5.29 Thereby, the special status given to the entity of HUF, was only for the purpose of taxation. Now, this status if being used for the evasion of tax only. Reflecting the same concern Ramanujam, a former Chief Commissioner of Income Tax, had averred that

the government carries out any amount of amendment to the Hindu law without looking into the revenue loss caused by the recognition of the HUF as a separate taxable entity. HUF may be a boon to the taxpaying Hindu. But it is definitely a bane to government revenues.²⁹⁴

5.30 As soon as coparcenary is abolished the institution of HUF would inevitably collapse. In *Commissioner of Income Tax & Ors. v. N. Ramanatha Reddiar (HUF) & Ors.*,²⁹⁵ it was to be decided that, whether after the commencement of Kerala Hindu Joint Family System Abolition Act, 1975, Income Tax Department had right to make assessments on the HUF status of the assessed respondent. The Court held that once the entity of Joint Family is being abolished by a competent legislature, the Income Tax Department had no right to look into the status of a 'non-existing' entity.

5.31 In Direct Taxes Enquiry Committee Report 1971, i.e., Wanchoo Committee clearly stated that the institution of HUF has been used for tax avoidance.²⁹⁶ Thus, the institution of HUF was a so-called 'gift' by the British when they could not comprehend the complex socio-economic structure of the Indian families. **However, today, when it has been seventy-two years since independence, it is high time that it is understood that justifying this institution on the ground of deep-rooted sentiments at the cost of the country's revenues may not be judicious.**

²⁹⁴ T.C.A. Ramanujam, "HUF: Bane or Boon" available at: <https://www.thehindubusinessline.com/todays-paper/tp-opinion/HUF-Bane-or-Boon/article20217532.ece> (last visited on 22-03-2018).

²⁹⁵ (1997) 10 SCC 478.

²⁹⁶ Government of India, Final Report of Direct Taxes Inquiry Committee 73-75 (Ministry of Finance, 1971).

Rights of females related to agricultural land.

5.32 The 2005 amendment to the Act, 1956, by omitting sub-section (2) of section 4, has brought agricultural land within the purview of section 6 of the Act. Therefore, daughters too are now coparceners in agricultural land along with other coparcenary property.

5.33 Prior to 2005 amendment, heritable tenancy rights to agricultural land devolved under respective State laws. For example, in Uttar Pradesh, U.P. Zamindari Abolition and Land Reforms Act, 1950 (UPZALR Act), governed these rights under sections 171 to 174 of the Act. UPZALR Act governs rights related to land irrespective of whether the tenure-holder is a Hindu, Muslim, Christian or follower of any other religion.²⁹⁷

5.34 As per section 171 of the UPZLAR Act, when a *bhumidar*,²⁹⁸ or *asami*,²⁹⁹ being a male, dies, his interest in his land-holding devolves upon his heirs specified in sub-section (2). It is worthwhile to note that his widow, unmarried daughter and male lineal descendant receive equal shares (section 171 (2)(a) read with sub-section (1)(i)). Even a married daughter is included in the inheritance under clause (c) of section 171(2).

5.35 Section 172(1) of the UPZALR Act, entails that a female's interest inherited from a male shall remain a limited one. However, this is not to be confused with the orthodox Hindu Law. Her estate is a limited one in the sense that upon her death or remarriage, the interest does not devolve upon her heirs but shall devolve upon the

²⁹⁷ R.R. Maurya, *Uttar Pradesh Land Laws* 223 (Central Law Publications, 21st edition, 2015).

²⁹⁸ Highest type of tenure-holder. The interest held by a *bhumidar* is permanent, heritable and transferable.

²⁹⁹ *Asami* at the bottom in the cadre of tenure-holders. Their interest is neither permanent nor transferable, but only heritable.

heirs of the last male tenure-holder from whom the female had succeeded. Except this, the Act does not restrict a female to deal with her property. She is not the holder of a life-estate as considered under English Law or under orthodox Hindu Law.³⁰⁰

5.36 Where a tenure-holder is a female and has not inherited the land from a male, then upon her death the land-holding shall devolve in accordance with the provisions of section 174 and not under section 172(1) of the UPZALR Act. Therefore, where a female makes a purchase of some land holding herself or acquires the land by gift or even by adverse possession, upon her death the property shall devolve upon her heirs and not the heirs of the last male owner.³⁰¹

5.37 It may be noted that Muslim Personal Law (Shariat) Application Act, 1937, by virtue of section 2, excludes the agricultural land, from the purview of Muslim Personal Law (Shariat).

5.38 In *Tukaram Genba Jadhav &Ors. v. Laxman Genba Jadhav &Anr.*,³⁰² the Bombay High Court relying on the judgment of the Supreme Court in *Accountants and Secretarial Services Pvt. Ltd. v. Union of India*³⁰³, observed that the section 4(2) of the Act 1956 entailed that, except for fragmentation of agricultural holdings or fixation of ceilings or devolution of tenancy rights, in respect of agricultural holdings, Act 1956 applied to agricultural lands as well. If, however, there was a local law dealing with the specific provision carved out in section 4(2) then that local law will prevail unaffected by the provisions of the Act 1956.

³⁰⁰ R.R. Maurya, *Uttar Pradesh Land Laws 223* (Central Law Publications, 21st edition, 2015).

³⁰¹ *Smt. Phool Kunwar v. Dy. Director, Consolidation*, 1991 R.D. 82.

³⁰² (1994) 96 Bom LR 227.

³⁰³ AIR 1988 SC 1708.

5.39 On a careful reading of the referred Supreme Court judgment, the view of the Bombay High Court appears erroneous. It is submitted that para 5 of the judgment of the Supreme Court clearly states that the more harmonious interpretation would be that any subject matter that involves transfer or alienation of any property, **other than agricultural land** or devolution of any property, **other than agricultural land**, would fall under the Concurrent List and not the State List. This clearly entails that the Apex Court acknowledged that agricultural land would be an exception and would fall under the State List, not the Concurrent List (emphasis added). This dichotomy has since been resolved by the omission of section 4(2) of the Act 1956. Now, devolution of rights to agricultural lands is undoubtedly included under section 8 of the Act 1956.

Need for relocation and reconciliation of heirs

5.40 In 2008 the 204th Report of the Law Commission, 'Proposal to amend the Hindu Succession Act as Amended by Act of 39 of 2005', made certain observations regarding the locations of heirs among different classes as provided in the Schedule to the Act, 1956. The Report brought to attention five major issues that inadvertently arose after the 2005 amendment to the Act 1956. They are as follows:

1. Certain class II heirs that had been promoted to class I post the amendment in 2005, are not deleted from class II. This resulted in duplication of certain heirs which featured in both class I and class II. As per 2005 amendment in the aforesaid Act following relations *viz*:
 - Son of a predeceased daughter of a predeceased daughter (i.e. daughter's daughter's son);
 - Daughter of a predeceased daughter of a predeceased daughter (i.e. daughter's daughter's daughter).
 - Daughter of a predeceased son of a predeceased daughter (i.e. daughter's son's daughter);
 - Daughter of a predeceased daughter of a predeceased son (i.e. son's daughter's daughter)have been elevated to Class I but they are not deleted from Class II.

2. Two of the male descendants in the daughter's line are not listed as Class I heirs while their female counterparts are so listed. This omission creates 'reverse discrimination' against the male descendants.
3. 'Father' should be relocated from class II to class I as this relation is certainly closer than some of the existing relations provided in class I which even extend to the third degree. This would also be in line with objective sought to be achieved by The Senior Citizens (Maintenance, Protection and Welfare) Act, 2007. The father and mother as class I heirs may take between them one share. Section 10 is required to be amended accordingly.
4. 'Father's widow' as provided under class II should be clarified to indicate step-mother and not real/biological mother, who finds a place in class I.
5. Rewording of class I heirs in simpler terms. The revised list will read as follows:
 - Son, daughter, widow, mother and father.
 - Where any son or daughter pre-deceased the intestate, then children of such pre-deceased son or daughter, as the case may be, and widow of a pre-deceased son, if any.
 - And so on in succession among the heirs of the descending branch of successors pre-deceasing the intestate.

Thus, Section 10 may be amended accordingly.

Steps towards gender equality

5.41 In the past there have been several legislative exercises to make the traditional Hindu law of succession, more equitable in nature. Hindu Women's Right to Property Act, 1937, putting the widow of a coparcener in his place upon his death, thereby entitling her to claim her share in the coparcenary and also ask for partition if she so wanted. The most significant change at the Central level was ushered in by the Hindu Succession (Amendment) Act, 2005, by entitling the daughter of coparcener to become, by birth, a coparcener in her own right just as a son would have.³⁰⁴ Section 6 of the Act 1956 deals with devolution of interest of a Hindu in coparcenary property

³⁰⁴ Section 6(1) (a) & (b).

and recognises the rule of devolution by survivorship among the members of the coparcenary.

5.42 In *Prakash & Ors. v. Phulavati & Ors.*,³⁰⁵ the question arose whether the right of a daughter to be a coparcener would be applicable to living daughters of living coparceners as on 9th September 2005, i.e., date of enforcement of the Amendment Act, 2005, irrespective of when such daughters were born or would the amendment in section 6 of the Act 1956 be applicable to a daughter born after the said date? The Supreme Court held that this right is available to daughters living on the date of the amendment irrespective of the fact when they were born.

5.43 In *Danamma @ Suman Surpur & Anr. v. Amar & Ors.*,³⁰⁶ a suit for partition was instituted in 2002. During the pendency of the suit section 6 of the Act, 1956 was amended in 2005. The trial court decreed the suit in 2007. The question which arose for consideration of the Supreme Court, was whether the appellant daughters, since born before the enactment of 1956 Act, could not be treated as the coparceners? The alternate question was whether, after passing of the Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener “by birth” in their “own right in the same manner as the son” and are therefore entitled to equal share as that of a son? The Court held that the controversy regarding the first question was settled with the “authoritative pronouncement” in *Prakash & Ors. v. Phulavati & Ors.*,³⁰⁷ adding that the rights of the appellants got crystallised in the year 2005 itself and thus the shares in the partition suit shall devolve upon the appellants as well. Regarding the second question, the Court confirmed that the amended section 6 statutorily recognises the rights of daughters as coparceners since birth. The Court added, that it is the factum of birth that creates the

³⁰⁵ AIR 2016 SC 769.

³⁰⁶ AIR 2018 SC 721

³⁰⁷ AIR 2016 SC 769.

coparcenary. Therefore, the sons and daughters of a coparcener become coparceners by virtue of birth.

5.44 The Statement of Objects and Reasons of the Hindu Succession (Amendment) Act, 2005, clearly stated that the retention of the *Mitakshara* coparcenary property without including the females in it entailed that the females could not inherit the ancestral property in the same manner as their male counterparts did. It was also said that the law, excluding the daughter from participating in the coparcenary ownership is not only gender-discriminatory but also led to oppression and violation of her fundamental right of equality guaranteed under the Constitution.

5.45 To render social justice to women, States such as Andhra Pradesh,³⁰⁸ Tamil Nadu,³⁰⁹ Karnataka,³¹⁰ and Maharashtra,³¹¹ made necessary changes, in their respective laws, giving equal right to daughters in Hindu (*Mitakshara*) law (coparcenary property), long before the Central law did.

5.46 The Central law, taking a sign from the progressive approach of these States towards gender justice, enacted the 2005 amendment to the Act, 1956. Therefore, it is evident that when it came to rights of daughters in the coparcenary property or gender justice in the law of inheritance applicable to Hindus, in general, the torch bearers were State laws whilst the Central law merely followed the suit.

5.47 It might also be worthwhile to note that *stridhana* being an absolute property of a woman with the right of disposal at her pleasure, cannot be a part of coparcenary property. Her husband or

³⁰⁸ Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

³⁰⁹ Hindu Succession (Tamil Nadu Amendment) Act, 1989.

³¹⁰ Hindu Succession (Karnataka Amendment) Act, 1990.

³¹¹ Hindu Succession (Maharashtra Amendment) Act, 1994.

any other member of his family has no right, title or control over the property held as *stridhana*.³¹²

5.48 In the spirit of gender equality, sections 23 and 24 of the Act 1956 too have been repealed by the Centre by virtue of 2005 amendment. This removed the disability of a female heir which barred her from claiming partition of a dwelling house until the male heirs chose to divide their shares. The amendment also entitled, the widows of pre-deceased sons or brothers who had remarried when the succession opened.

5.49 That being said, there is still inherent discrimination the Act 1956, which needs to be addressed. The following section deals with the loophole in the statute.

Addressing the issue of 'self-acquired property' of a Hindu female

5.50 Under the current scheme, if a Hindu female dies intestate, her property will first devolve upon her husband, sons and daughters (including children of predeceased son or daughter). In the absence of these heirs, the next in line are the heirs of the husband, in their absence her mother and father and in their absence, the heirs of her father. Exceptions to this are that if the property is acquired by her through her natal family, then it shall devolve first upon the heirs of her father and then on the heirs of the husband, while if the property is inherited by her through her husband or father-in-law, will devolve upon the heirs of her husband.

5.51 In case of self-acquired property of a Hindu female or property received by way of will, gift, settlement, etc. The scheme of succession provides that the property would first devolve upon

³¹² See: *Pratibha Rani v. Suraj Kumar* AIR 1985 SC 628; *Balkrishna Ramchandara Kadam v. Sangeeta Balkrishna Kadam* AIR 1997 SC 3562; and *Rashmi Kumar v. Mahesh Kumar Bhada* (1997) 2 SCC 397.

husband and children of the female intestate. In their absence, it devolves upon the heirs of the husband. In case heirs of husbands are also not present, it devolves upon the mother and father of the deceased. In their absence it devolves upon the heirs of the father and lastly upon the heirs of the mother.

5.52 Thus, the heirs of husband, including his Class II heirs, agnates and cognates have a prior claim over the property of female intestate compared to her own parents and siblings. This is in stark contrast to the scheme of succession provided for male intestate, wherein the mother of male intestate is a Class I heir and father and siblings have been made Class II heir. The parents of a man's wife are nowhere in the scheme of succession.

5.53 The constitutionality of section 15 was challenged before the Bombay High Court in *Sonabai Yeshwant Jadhav v. BalaGovinda Yadav*.³¹³ However, the court upheld section 15 on the ground of reasonable classification. It opined that:

The Constitution does not posit totally unguided non-classified quality. Equal protection under the laws is not an abstract proposition. Laws are intended to solve specific problems and achieve definite objective and hence, absolute equality or total uniformity is impossible of achievement. The governing principles of Art. 14 operate upon the filed that amongst the equal the law should be equal and be so administered. Discrimination if forbidden between the classes and persons who are substantially similarly circumstance. If the person of groups are rationally classified and such classified bears the testimony of long standing position of the personal law. then surely law can reach them differently and such different treatment would not result in discrimination.

5.54 This separate scheme of succession is an output of patriarchal society, where a woman is considered to have severed all

³¹³AIR 1983 Bom 156.

ties with her natal family on her marriage. While on one hand by making daughters coparceners, this notion has been challenged by the 2005 Amendment Act, a provision that echoes the same logic has been retained.

5.55 The marital status of a man does not affect the manner in which his property devolves; however, the marital status of women is the determining factor for ascertaining the mode of succession for her property. It is a high time that we examine this discriminatory scheme of succession of property in an age where gender equality is a cherished ideal.³¹⁴ The unjustness of this scheme became apparent in *Omprakash v. Radhacharan*³¹⁵. In this case, a woman became a widow within three months of her marriage, after which she was driven out of her matrimonial home. She went to her parent's home, received education and got employment. On her death she had various bank accounts and provident funds in her name. Her mother, filed for a succession certificate. However, the courts denied her claim as according to section 15 of the Act 1956, husband and heirs of husband have a prior claim over a married female intestate's property. Since it was the self acquired property of the deceased, section 15(1) was applicable and therefore the mother was not eligible to inherit the property of the deceased. The court while deciding this case acknowledges that this was a hard case as the deceased had never visited her in laws house and neither had they supported her after throwing her out of their house. Had it been a male in place of female, his mother being a Class I heir would have been eligible to inherit the property.

³¹⁴ See Poonam Pradhan Saxena, "Reinforcing Patriarchal Dictates Through Judicial Mechanism: Need to Reform Law of Succession to Hindu Female Intestates" (2009) JILI 221.

³¹⁵ 2009 (7) SCALE 51

5.56 A similar situation arose before the Delhi High Court in *Ganny Kaur v. State of NCT of Delhi*³¹⁶. In this case the question before the court was whether compensation granted by the State for the 1984 riot victims should be given to persons in accordance with the HAS 1956 or whether State could award compensation equitably to the next of kin without considering the scheme of the 1956 Act? In this case, compensation was awarded for the death a woman, her husband and their two children.

5.57 The court in this case held that the compensation being an ex gratia payment could not be considered property held by the deceased. Therefore, the mother of the woman and the father of the husband were given equitable compensation as they both stood in the same position.

5.58 It is argued that the logic behind classifying the property on the basis of its origin is to let the property remain in the family to which it originally belonged. However, a close analysis of section 15 shows that this is not the case. While property inherited by a female from her father devolves (in the absence of children or grand children) upon the heirs of her father, the property inherited from her mother also devolves on the heirs of father. Had the logic been to let the property remain within the originating family, property inherited from mother would have devolved on her mother's blood relatives and not relatives through marriage. The entire scheme of succession under section 15 discriminates against women and reinforces the secondary status of woman in a patriarchal society. While granting coparcenary status to females may have been hailed as a progressive step, it does not do much for the property rights of Hindu women.

5.59 The problem with 2005 Amendment Act is that it strives to bring gender neutral provisions within a gender discriminatory

³¹⁶ AIR 2007 Del 273.

framework. This has created a lot of ambiguity and contradictions in practical scenarios.

5.60 The 207th Report of the Law Commission 'A proposal to amend section 15 of the Hindu Succession Act 1956 in case a female dies intestate leaving her self-acquired property with no heirs' (2008), suggested addition of clause (c) to section 15(2) of the Act, 1956, in order to remedy this issue. The proposed amendment read as follows:

(c) if a female Hindu leaves any self-acquired property, in the absence of husband and any son or daughter of the deceased (including the children of any pre-deceased son or daughter), the said property would devolve not upon heirs as mentioned in sub Section (1) in the chronology, but the heirs in category (b)+(c) would inherit simultaneously. If she has no heirs in category (c), then heirs in category (b) + (d) would inherit simultaneously.

5.61 **This Commission suggests further modifications in this regard.** In case a Hindu widow dies issueless, her self-acquired property should devolve upon heirs in category (b) limited to the mother-in-law and father-in-law of the deceased female, simultaneously with heirs in category (c). If she has heirs either in (b) or (c) alone, then such heirs would inherit the property completely. If she has no heirs either in category (b) or (c), then, such property should be inherited by heirs in categories (d) + (e) simultaneously.

5.62 Gender gap in effective ownership is one of the most important reason for gender inequity.³¹⁷ Equal right of Hindu women over property will remain a distant dream till the legislature overhauls the succession scheme under the Act 1956. There is no rationale behind providing separate succession scheme for men and women. The 2005 amendment Act while claiming to be progressive with respect to coparcenary right, grossly overlooked the fact that the

³¹⁷ Meera Velayudhan, "Women's Rights and Entitlement to Land in SouthAsia: Changing Forms of Engagements" at 4 in Kalpana Kannabiran, *Women and Law: Critical Feminist Perspectives* (Sage Law, Delhi, 2014).

primary scheme of succession under the Act, 1956 is in itself discriminatory.

Testamentary succession

5.63 Testamentary succession among Hindus has been dealt with under section 30 of the Act, 1956. The section reads as follows:

Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

5.64 It can be seen from the above that 'any Hindu' is free to dispose of any property, be it self-acquired or even his undivided interest in a coparcenary. This further entails that a widow(s) or unmarried daughter(s)/other dependants (as listed under section 21 of Hindu Adoption and Maintenance Act, 1956) (HAMA) who have no means to sustain themselves may be deprived of their share, by will, and the entire property may be assigned of to a son or anyone that the testator may choose. This *prima facie* creates an inequitable situation and a spouse/other dependant with no means of sustenance might be left with naught for survival in such scenarios.

5.65 While a widow may claim maintenance from a dependent who has inherited by way of a will, from the testator, under section 22 of HAMA, there is certainly no 'charge' created on the estate of the deceased husband (unless it has been created in the manner so provided under section 27 of HAMA).³¹⁸ In the absence of any decree or instrument providing for a charge, the widow would have no recourse against a 'transferee for consideration and without notice of

³¹⁸ See *Sadhu Singh v. Gurdwara Sahib Narike&Ors.*, AIR 2006 SC 3282.

the right' (section 39 of the Transfer of Property Act, 1882), who has no obligation to maintain her under HAMA or under CrPC, 1973.

5.66 It is hereby suggested that some portion (to be fixed by law) of the property (including self-acquired property) of a Hindu, which he or she is capable of disposing under section 30 of HSA, 1956, be reserved for widow(s)/unmarried daughter(s)/other dependants (as listed under section 21 of HAMA), to ensure that such situation does not arise.

5.67 While it may be averred that a person should have an absolute right to dispose of their self-acquired property, it is submitted that in the interest of social and economic justice as well as equity, law may affix some portion which may not be disposed of by will. This stands supported by the law laid down by the Apex Court to the effect that right to property is a constitutional right under Article 300-A, not a fundamental right under Part III of the Constitution and may very well be regulated by the State.³¹⁹

MUSLIM LAW

5.68 Muslim law of inheritance and succession can be traced to rules of succession found in the Holy Quran or in the traditions, pre-Islamic customs which received approval of the Prophet. The Mohammedan law of succession is based on Pre-Islamic customary law of succession and on the patriarchal form of family.³²⁰

5.69 There are some notable differences in two main sects of Islam. Both Shia and Sunni systems of inheritance took authoritative

³¹⁹ See *Rajiv Sarin v. State of Uttarakhand*, (2011) 8 SCC 708; *Laxman Lal v. State of Rajasthan*, (2013) 3 SCC 764; *KT Plantation (P) Ltd. v. State of Karnataka* (2011) 9 SCC 1.

³²⁰ Mulla, *Commentary on Mohammedan Law* 784, 785 (Dwivedi Law Agency, Allahabad, 2006).

sources which were almost identical but the dichotomy arose due a fundamental difference in approach to the nature of reforms effected by the Prophet. The essence of this difference was that Sunnis accepted the pre-Islamic system of agnate succession or tribal heirs as still relevant and operative, except in so far as it has been modified in certain very radical aspects, while the Shias discarded the agnate system of inheritance completely and set out to erect a totally new system on the basis of Quranic provisions.³²¹

5.70 The Quranic law and the Islamic law of inheritance (the *'ilm al-fara'id* or “science of the shares”) are best understood in the backdrop of the tribal customary law of pre-Islamic Arabia, that is, the customary inheritance practices of the nomadic Arabs living in the Hijaz prior to the rise of Islam. This tribal society was patrilineal in its structure; individual tribes were formed of adult males who traced their descent from a common ancestor through exclusive male links. The tribe was bound by unwritten rules that had evolved as a manifestation of its spirit and character. These rules served to consolidate the tribe's military strength and to preserve its patrimony by limiting inheritance rights to the male agnate relatives (*asaba*) of the deceased, arranged in a hierarchical order, with sons and their descendants being first in order of priority.³²²

5.71 The system of agnate succession as it existed in pre-Islamic Arabia, was that a man's heirs were limited to males who were related to him through the male line. Descendants were given priority to ascendants, ascendants to collateral and descendants of father to descendants of a more remote ancestor. Within each of these classes, the nearer in degree was preferred to the remote and where the two claimants were equal both in, order and degree, one related to both parents was preferred to one related only through the father.³²³

³²¹ Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976).

³²² Noel J. Coulson, *A History of Islamic Law* 9-10, 15-16 (Edinburgh, 1964).

³²³ *Id.* at 148.

5.72 To reform the tribal structure of inheritance a set of reforms were introduced. Under these, nine quota-sharers were specifically mentioned in the Quran, six of whom were women- mothers, daughters, wives and sisters of full, consanguine and uterine blood, and to these son's daughter and 'true' grandmother were added, on the principle of analogy, by Sunni jurists. The other quota-sharers were males, three of whom were named in the Quran – husbands, uterine brothers (not agnates) and fathers (who would be entitled as quota-sharers only when ousted by a son or son's son from inheriting as the nearest agnate). Here too, Sunni jurists added the paternal grandfather on the principle of analogy.³²⁴ The first essential is to give any entitled quota-sharer his or her prescribed share, which varies, and then to allot the remainder to the nearest agnate. If there is no agnate, however remote, then any quota-sharers will first take their prescribed shares and then divide the residue between them proportionately, by the doctrine of *radd* or 'return'.³²⁵

5.73 However, the Quranic reforms were short-lived. Just after Prophet Muhammad, Muslim jurists fused together the pre-Islamic tribal customary law and the Quranic inheritance. The latter imposes compulsory rules for the division of a minimum of two-thirds of every estate; bequests may not normally exceed one-third of the estate and may not be made in favour of any person who stands to inherit a share. Since the bulk of the estate was often preserved for the closest surviving male agnate, Coulson³²⁶ concluded that the tribal component within the Islamic law of inheritance had prevailed over the Quranic, nuclear family component. In his view, the Islamic law of inheritance gives superior rights to the male agnate relatives. Thus,

³²⁴ *Ibid.*

³²⁵ *Id* at 149.

³²⁶ Coulson, *cited in* David S. Powers, "The Islamic Inheritance System: A Socio-Historical approach" 8 *Arab L.Q.* 13 (1993).

the agnatic, extended family had reasserted its dominance over the nuclear family.³²⁷

5.74 Shias, on the other hand, divided all relatives into three classes: first, a class composed of descendants (irrespective of whether they were agnates or not), together with father and mother; second, a class made up of brothers and sisters and their descendants, together with grandparents and great grandparents; finally, a class which comprises uncles and aunts and great uncles and aunts and their descendants, on both, paternal and maternal side. Any claimant from the first class will exclude all others and so on. However, husband and wife will in all cases be entitled to their respective share.³²⁸

5.75 At this juncture and before proceeding further, it is necessary to state that the presumption of Hindu Law regarding joint family, joint family property or joint family funds has got to be completely kept out of mind while deliberating on Muslim Law of inheritance and succession.³²⁹ These concepts are absent in Muslim Law.³³⁰ The heirs are only tenants-in-common whose shares are well defined under the law.³³¹ The concept of right by birth in the property is absent in the Muslim Law. While the person is alive, nobody can claim right in the property merely because he is heir-apparent or heir-presumptive. Inheritance opens upon the death of a person.³³²

5.76 Muslim law does not make any distinction between movable and immovable property, concept of self-acquired and ancestral property also does not exist.³³³

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ *Shaikh Safir Mohd. v. Basir Mohd.*, AIR 1961 Ori 92. See also Mulla, at 792.

³³⁰ *Sukrullah v. Zahura Bibi*, AIR 1932 All 512. See also Mulla, at 792.

³³¹ *Mohammed Subhan v. (Dr.) Misbahuddin Ahmad*, AIR 1971 Raj 274. See also, Mulla, at 793.

³³² Mulla at 798.

³³³ Mulla, at 790, 791.

5.77 The doctrine of partial partition does not apply to Muslims as they hold the land as tenants-in-common and not as co-sharers or join-tenants.³³⁴ The division is done by metes and bounds, where specific share of heirs is already determined by the law.³³⁵ The residue, after the payment of the funeral and other expenses such as debts etc., devolves on the heirs of the deceased. The heirs succeed to the estate as tenants-in-common in specific shares.

Sunni law of inheritance

5.78 Under Sunni Law, broadly there are two classes of successors that are entitled to inherit – (a) Relations by blood and marriage, (b) Unrelated successors. Relations by blood and marriage are further sub-divided into Class I - Quranic heirs (twelve relations who have their prescribed shares), Class II - Agnatic heirs (also referred to as residuaries. All male agnates and four females who are sharers but are converted into residuaries in some cases) and Class III - Uterine heirs (distant kindred, all other blood relations).

5.79 Thereafter there are four subsidiary classes which succeed only by way of exception in the very unlikely event of absence of all from the first three classes.

5.80 The Quran deals exhaustively with the law of inheritance. The very first class consists of certain close relations of the deceased to whom a specific share is allotted. The shares are fixed and class I heirs take precedence over other two classes. However, the rule must not be conceived as creating a preferential class of heirs which takes the bulk of the property. On the contrary, on perusal of usual cases, it is found that from the whole of the property, a slice is taken out as per the dictates of the Quran and the residue (mostly being the bulk of the

³³⁴ *Mst. Haliman v. Mohd. Manir*, AIR 1971 Pat 385. See also, Mulla, at 800.

³³⁵ *Mohd. Abdullah v. Mohd. Rahiman*, AIR 1934 Mad 234. See also, Mulla, at 802.

property) goes to the heirs/residuaries. The Quranic heirs consist mainly of females barring a few exceptions. Bulk of the property, in most of the cases, is sought to be kept intact for the second class, who are mostly all males.³³⁶

5.81 The Quranic heirs consist of (a) heirs by affinity – wife, husband, and (b) heirs by blood relations – father, true grandfather, mother, true grandmother, daughter, son’s daughter, full sister, consanguine sister, uterine brother, uterine sister.³³⁷ If a woman dies leaving children or agnatic descendants, the husband is entitled to $\frac{1}{4}$ of the net estate, but if there are no children, he gets $\frac{1}{2}$ of the net estate. The wife inherits $\frac{1}{8}$ if there are children and $\frac{1}{4}$ if there are none. In case of plurality of wives, the $\frac{1}{8}$ or $\frac{1}{4}$ share is equally divided between them.³³⁸ There are primary Quranic heirs who can never be excluded completely from inheriting. They are the parents of the deceased, the spouses, and the children. Daughter receives $\frac{1}{2}$ (in case there is one daughter) and $\frac{2}{3}$ in case two or more daughters inherit collectively. If the daughter(s) co-exist with a son, she is made an agnatic heir.³³⁹ When a parent is survived by one or more sons, the children, including the daughters, act as agnatic/residuary heirs, giving the sons twice the share of inheritance than that of their sisters.

5.82 The Agnatic heirs are divided into three groups. The first group comprises of male agnatic heirs who trace their relation to the deceased by a male line (*‘aṣab binafsihī*). They are also called ‘residuary heirs in their own right’. They are divided into four subgroups. The first consists of the sons (and in their absence their male issue, irrespective of degrees removed). In the absence of this

³³⁶ Asaf A.A. Fyzee, *Outlines of Mohammedan Law* 398-399 (Oxford University Press, New Delhi, 4th edn., 1974).

³³⁷ Fyzee. *Id* at 403.

³³⁸ Fyzee. *Id* at 405.

³³⁹ Fyzee, *Id.* chart opp 404.

subgroup, the ascendants, that is, the father and the father's ascendants, irrespective of degrees removed, will inherit the residue; third, brothers (and in the absence of brothers, the brother's male issue); and fourth, paternal uncles (and their issue). Within the respective subgroups, the heir closest in degree takes priority.³⁴⁰ The second group of residuary heirs are the so-called agnatic co-sharers, also termed 'residuary heirs in right of another' (*'aṣab bi-ghayrihi*). These are female Quranic heirs who are converted into the group of residuary heirs by a male agnate related to the deceased in the same degree as themselves. Finally, there is a group of the female agnatic heirs, also known as 'residuary heirs with another' (*'aṣab ma'a ghayrihi*). They consist of the consanguine or germane sisters of the deceased and as a general principle they belong to the category of Quranic heirs.³⁴¹

5.83 In the absence of Quranic heirs and agnatic heirs, the inheritance passes to the distant relatives. Distant kindred are either female relatives or relatives tracing their relationship to the deceased through a female line.³⁴² It is believed that in terms of probability they never get a share of inheritance. They are divided into four sub-groups with each group excluding the one below in the hierarchy.

Shia law of inheritance

5.84 Unlike Sunni Law, the Shia law divides heirs on two grounds – (a) heirs by consanguinity (*Nasab*), i.e., heirs by blood relationship, and (b) heirs by special cause (*Sahbab*), i.e., heirs by marriage (husband and wife).³⁴³

³⁴⁰ Nadjma Yassari, "Intestate Succession in Islamic Countries" in Kenneth Reid, Marius de Waal, *et al.* (eds.) *Comparative Succession Law: Volume II: Intestate Succession* (Oxford University Press, 2015).

³⁴¹ *Ibid.* See also, Fyzee at 419.

³⁴² Yassari, *ibid.*

³⁴³ Mulla, at 843.

5.85 Heirs by consanguinity are further divided into three classes and each class is sub-divided into two sections:³⁴⁴

Class I – (i) Parents

(ii) Children and other lineal descendants, how lowsoever.

Class II – (i) Grandparents (true or false) how highsoever.

(ii) Siblings and their descendants how lowsoever.

Class III – (i) Paternal, and,

(ii) maternal uncles and aunts of the deceased, and of his parents and grandparents how highsoever, and their descendants how lowsoever.

5.86 Heirs by special cause are divided into two kinds – (a) heirs by marriage (*Zoujiyat*) (b) heirs by special relationship (*Wala*). The latter is not recognised in India.³⁴⁵

Evaluation of the two systems

5.87 It is abundantly clear that the Sunni system of inheritance and the Shia system of inheritance differ widely. It is so even when the starting point of both the systems is the immutable text of the Quran. The Shia system gives priority to the immediate family of the deceased setting aside the concept of Agnatic heirs which in itself was a remnant of the tribal history of pre-Islamic Arabia. Under the Shia system, no relative is solely excluded on the basis of gender alone, i.e., males and females inherit together even if males generally receive twice the share of females. Fyzee mentions that when someone questioned this disparity in the shares of males and females, Imam Ja'far al-Sadiq said,

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

A female is excused from the performance of many duties imposed by law upon a male, such as service in the holy wars, maintenance or support of relations and payment of expiatory fines, and for this reason her share of inheritance has been justly limited to half the portion of a male.³⁴⁶

5.88 It is also averred that a Muslim woman has to be maintained financially by her husband during her marital life, irrespective of whether she is rich or poor. Additionally, the obligation to maintain an unmarried or divorced female has to be discharged by her male relative, irrespective of the fact whether he is financially sound to do so or not.³⁴⁷

5.89 To summarise, following the principles of Sunnah, Sunni law gives entitlement to the male agnatic heirs, on the other hand Shia law follows principle of proximity. Sunni and Shia interpreted Quranic law from different perspectives.³⁴⁸ For Sunnis, Quranic rules are there to substantiate the traditional tribal rules of inheritances, but for Shias it constituted the fundamental principles of succession.³⁴⁹ The net result is that there are different outcomes with regard to inheritance when it comes to the one nearer to the deceased. Therefore, it has been observed that this has led to the phenomena of “religious conversions of convenience”.³⁵⁰ People in some countries such as Iraq and Lebanon have converted to Shia sect in order to fall under its scheme of inheritance, specially parents having only daughters in order to preserve their daughters’ right of inheritance against remote agnatic heirs.³⁵¹

³⁴⁶ See Fyzee, at 448.

³⁴⁷ Mohd. Altaf Hussain Ahangar, “Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal” 28 *Arab L.Q.* 134 (2014).

³⁴⁸ Richard Kimber, “The Qur'anic Law of Inheritance” 5 *Islamic L. & Soc'y* 291 (1998).

³⁴⁹ Noel J. Coulson, *Succession in the Muslim family*, 130-133 (Cambridge 1971) cited in Kimber, *Id* at 293.

³⁵⁰ Yassari, citing Lucy Carrol, “Application of the Islamic Law of Succession: Was the Propositus a Sunni or a Shi'i,?” 2 *Islamic L. & Soc'y* 24 (1995).

³⁵¹ *Ibid.*

5.90 Some of the elements of these systems can be retained, but a conversation needs to be initiated on creation of an optional statutory law which can be opted into much like how the Muslim Personal Law Shariat Application Act, 1937 was enacted as an optional legislation before it was extended to different states in the 1950s and 1960s. The codified law discussed below must also borrow from some of the laws that have been reformed in other Islamic countries.

International Islamic Inheritance Reforms

5.91 Owing to the central position of the Quran while deducing the law related to inheritance, Islamic law of inheritance has largely remained unchanged.³⁵² Beginning as early as 1943, Egypt enacted its law of inheritance. Several other countries, including Syria, Tunisia, Morocco, Iraq and Pakistan followed the suit within the next twenty years. Although several changes were made to the law of inheritance in Muslim countries, none of the changes sought to reform the Quranic prescriptions of inheritance shares or the classes of heirs created through consensus. Those laws that did challenge such prescriptions were either later amended or altogether repealed. For example, Iraq's Law of Personal Status, 1959 changed how the property of the deceased would be divided. The new law was largely of German origin which was previously in force in the Ottoman Empire.³⁵³ It allowed Iraqi citizens the right to execute a will if they wished to dispose of their property according to the traditional Islamic law of inheritance. In absence of a will, the government would divide the land according to a system that openly defied the Islamic law of inheritance. This change in the Islamic law of inheritance lasted for

³⁵² Yasir Billoo, "Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States" 84 *U. Det. Mercy L. Rev.* 647 (2007) citing Martha Mundy, 3 "The Family, Inheritance and Islam: A Re-examination of the Sociology of Fara'id Law" in Aziz Al Azmeh (ed.), *Islamic Law: Social and Historical Contexts* (1988).

³⁵³ See Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976)

about four years. In 1963, Abd al-Karim Qasem, the erstwhile Iraqi dictator, was overthrown and one of the first things to go with him was the change in the inheritance law. This is also a good example of change not taken within the parameters of Islamic law. Such change will not gain the authenticity the law requires for it to be effective.³⁵⁴

Codification of succession law of Muslims³⁵⁵ -

5.92 It is desirable that in order to eliminate the obfuscation and to demystify the currently esoteric inheritance law followed among Muslims, a complete code, i.e., Muslim Code of Inheritance and Succession, applicable to both the sects – the Sunnis and the Shias, along all the schools falling under either, may be formulated. This would entail abolition of the Muslim Personal Law (Shariat) Application Act, 1937³⁵⁶.

Succession be based on proximity to the deceased rather than preference to male agnates heirs –

5.93 Succession should be based on the proximity to the deceased. It is hard to see the relevance of the pre-Islamic Arabian tribal system of inheritance in today's time where nuclear families are replacing extended families. It is irrefutable that preference to remote male agnatic heirs against the nearer and dearer relatives of the deceased is anachronistic. It may be observed that this lacuna is already being circumvented by many Muslim families by making transfers of property *inter vivos* by way of gifts to the closer relatives. The rules of inheritance apply to property owned by the deceased only at the time of death or at the time he enters his final sickness. Until then, the proprietor is free to dispose of the property as he wishes. Thus, a

³⁵⁴ Billoo, at 651.

³⁵⁵ It is to be noted that inheritance under Muslim Law is under challenge in Delhi High Court in *Sahara Kalyan Samiti & Anr v. Union of India* WP(C)1892/2017

³⁵⁶ Section 2 of the Act is under challenged before the Supreme Court in *Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri v. Union of India*, W.P (C) No. 235/2018

proprietor who wants to exercise a greater degree of autonomy over his property gifts away a chunk of property to the ones he wishes to. This effectively decreases the quantum of property left to be divided among the heirs upon his death. This has its own drawbacks. One, the transfer is complete by way of gift, it is irrevocable. In case of a revenue generating property or a dwelling house on which owner wanted to exercise a greater degree of control, his hands get tied. Further, if the formalities of the transfer are not observed properly, the gift property reverts to inheritable property which is to be divided among heirs. Thus, the heirs have an interest in demonstrating that the transfer made by way of gift was not done properly. This creates rifts in the families.

5.94 Taking these factors into consideration, and the fact that both Shia and Sunni systems of inheritance owe their origin to a common source, i.e., the Quran, **it is suggested that a classification system of heirs may be adopted based on proximity of the relationship of the heirs with the deceased.** Class I heirs may include the spouse(s) relict, parents of the deceased, son(s) and/or daughter(s) of the deceased. Further, the Class I heirs of pre-deceased son(s) and/or daughter(s) shall take between them one share. In case there are more than one widows of the deceased, then both or all of them would take one share between themselves. Class II heirs may include the full-blood sibling(s) of the deceased, descendants of the siblings of the deceased how lowsoever, grandparents of the deceased. Class III heirs may include all other relatives. Class I heirs of the intestate may inherit the property completely, each taking one share (*per capita* distribution) to the exclusion of Class II and Class III heirs. In the absence of Class I heirs, Class II heirs may inherit the property to the exclusion of Class III heirs, with the division of shares to be done *per stripes*. In the absence of the first two classes of heirs, Class III heirs may inherit the property, with the division of shares to be done *per stripes*.

5.95 In the absence of a Code, as suggested above, the following suggestions may be adopted:

Preference to Spouse Relict –

5.96 In Tunisia the reformers, in 1959, in order to protect the interests of the nuclear family, added an addendum to Article 143 of the Law of Personal Status, 1956. They introduced the doctrine of 'radd' or return and extended it to the spouse relict on an equal footing with other quota-sharers. They also provided that a daughter or a son's daughter will exclude any collateral. In Egypt³⁵⁷ and Syria³⁵⁸, the law gave the spouse relict priority over an acknowledged kinsman.³⁵⁹

Bequest to closer heirs –

5.97 In favour of the nuclear family a reform was introduced in Egypt,³⁶⁰ Sudan³⁶¹ and Iraq, giving the testator the right to make a complete bequest to one of his heirs (of course, within the bequeathable 1/3 parameter). This was always a part of the Shia doctrine, however, the Sunni schools either completely excluded a bequest to an heir in all circumstances³⁶² or required consent of other heirs³⁶³ before allowing it. This made it possible for a man to bequeath 1/3 of his estate to his wife, daughter or other member of his nuclear family, in addition to the prescribed share, which alone could have been inadequate.

³⁵⁷ Article 30, Law of Inheritance, 1943.

³⁵⁸ Article 288, Law of Inheritance, 1953.

³⁵⁹ See Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976) at 152.

³⁶⁰ Article 37 of the Law of Testamentary Dispositions of 1946.

³⁶¹ Judicial Circular No. 53 of 1945.

³⁶² Maliki system.

³⁶³ Hanafi system.

Orphaned Grandchildren – right of representation –

5.98 The basic principle that ‘the nearer in degree excludes the more remote’ caused a problem when orphaned grandchildren who may have been completely dependant upon their grandparents stood excluded. The right of representation (children stepping into the shoes of the deceased parent) remedies this situation. Syria and Morocco allowed the grandson of the deceased to inherit what his father would have received or one-third of the estate, whichever is less. A similar provision for the granddaughter was still lacking. Egypt and Tunisia responded to the problem by allowing either the grandson or the grand daughter to receive up to one-third of the estate. The right of representation was adopted in Pakistan as a part of Muslim Family Laws Ordinance, 1961. There, the law created a representational scheme of all grandchildren inheriting per stirpes the inheritance their parents would have received.³⁶⁴ The Indonesian Supreme Court in 1994 nudged the inheritance laws of country in a more gender-neutral direction by holding that a male or a female child of the deceased could exclude collaterals. The court interpreted “*walad*” in Quran’s verse 4:176 to mean both male and female children³⁶⁵. This interpretation can buttress future gender-neutral reforms in Indonesia as well as other countries. **Thus, it is suggested that taking from the Indonesian example, gender-neutrality be observed while classifying the heirs.**

Rights of a Childless Widow

5.99 The right of a Shia childless widow, to inherit land, also needs to be addressed and remedied. A childless widow, under the Shia law, does not take her share from the immovable property of her husband. However, she is entitled to her proper share in the value of the

³⁶⁴ Billoo, *citing* N J. Coulson, *Succession in the Muslim Family*, 145 (1971). *See also*, Anderson, at 153-154.

³⁶⁵ Decision of the Supreme Court No. 86.K/AG/1994, July 27, 1995

household effects, trees, buildings and moveable property, including debts due to the deceased.³⁶⁶ This rule, which resulted in particular hardship for women in rural area as regards the transfer of agricultural land. Only when the estate included land with buildings and/or trees could the widow claim the equivalent of her respective Quranic share of the value of the buildings and/or trees, but she could neither claim the land itself nor its value. In 2009, Iran amended this rule allowing the widow, a right to the value of immovable property, according to her share.

5.100 In view of the above, **it is recommended that a widow(s), childless or not, would be a Class I heir, according to the Code suggested earlier and would therefore inherit the property of the deceased as a Class I heir, taking one share.**

CHRISTIAN LAW

5.101 The Law of Succession that applies to Indian Christians has seen vicissitudes of its own. To briefly trace the history of law of intestate succession applicable to Indian Christians, it is imperative to segregate it into three distinct periods, *viz*, (i) pre-1865, (ii) between 1865 and 1925 and (iii) post-1925.³⁶⁷

5.102 **Pre-1865:** It was the famous case of *Abraham v. Abraham*,³⁶⁸ that established the law of succession for Christians in India. The Privy Council, in this case, observed,

When a Hindu becomes a convert to Christianity, the Hindu is no doubt released from the trammels of Hindu Law. However, in regard to matters in which Christianity has no concern, it does not of necessity (sic) involve any change of right or relation such as rights to

³⁶⁶ Fyzee, at 446.

³⁶⁷ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁶⁸ 9 M.I.A. 105

or interest in and powers over property. It is open to the convert to renounce the old Hindu Law along with the old Hindu religion which he has renounced or retain the old Hindu Law though he has renounced the old Hindu religion.

5.103 This case established that those Christians who were converted but are still following Hindu customs and manners would be governed by ancient Hindu Law of Succession. However, if a convert has completely westernised, it is for him to prove that he has adopted the western way of living, customs and laws.³⁶⁹

5.104 **1865-1925:** The Indian Succession Act was passed in (the Act 1865). The Act, as interpreted by the Courts, introduced a change in approach which had been historically followed. In *Dagree v. Pacotti San Jao*,³⁷⁰ the question arose whether those converted into Christianity would be governed by the ancient Hindu law, irrespective of the fact that the converts follow the Hindu customs. The Bombay High Court, held that unless it is proved that the deceased was a Hindu, Mohammedan or Buddhist, the Act of 1865 would apply, and not the Hindu law.³⁷¹ The same view was reiterated by the Privy Council in 1921 in the case of *Kamawati v. Digbijai Singh*.³⁷² Thus, even if a Christian convert followed Hindu usages and customs, the 1865 Act would apply. Executing a will, was the only option to devolve the property according to the Hindu Law.

5.105 **Post 1925:** In 1925, the Indian Succession Act (the Act 1925), was passed, consolidating the laws of succession. By virtue of section 29 of the Act, Hindus were exempted from the rules of succession and additionally, Muslims, Buddhists, Jains, Sikhs as well as 'others' were also exempted. The words 'any other law for the time

³⁶⁹ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁷⁰ ILR 19 Bom. 783.

³⁷¹ See also, *Ponnusami Nandan v. Dorasami Ayyan*, ILR 2 Mad. 209; *Administrator General of Madras v. Anandanchari & Ors.*, ILR 9 Mad. 466; *Tellis v. Saldhana*, ILR 10 Mad. 69.

³⁷² (1922) 24 BOMLR 626

being in force' can be interpreted in light of Article 13 of the Constitution which includes rules, regulations, notifications, customs or usage having force of law. Thus, section 29 affirmed the stand of Privy Council in the case of *Abraham*³⁷³. In the case of Coorg Christians, Khasias and Jyentengs in Khasia and Jaintia Hills in Assam, Mundas and Oraons in the Provinces of Bihar and Orissa, it was taken cognisance that they follow the ancient customary law of succession.³⁷⁴ The applicability of the Act 1925 comes into picture only when the Christians are not governed by any other customary or statutory laws. For instance, Christians in Goa, Daman and Diu are governed by Portuguese Civil Code, 1867 while those in Pondicherry are governed by customary Hindu law, the Act 1925, and the French Civil Code, 1804.³⁷⁵

5.106 State of Kerala and the *Mary Roy* case: Kerala posed a unique challenge in implementation of the Act 1925. It was formed by the enactment of State Reorganisation Act, 1956 which merged Travancore, Cochin and certain parts of Malabar. Separate laws, viz, Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921 were applicable in Travancore and Cochin. After independence in 1947, Travancore and Cochin continued to be Princely States. It was after the signature of their rulers on Instrument of Accession in 1949, that they became part of Union as Part B States.³⁷⁶ Thereafter, Part B States (Laws) Act, 1951 was enacted for the purpose of providing for the extension of certain enactments mentioned in the Schedule including Act 1925 to Part B States and also for repealing the corresponding Acts and Ordinances then in force in the Part B States. After merger, specific provisions

³⁷³ 9 MIA 105

³⁷⁴ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁷⁵ Archana Mishra, "Breaking Silence - Christian Women's Inheritance Rights under Indian Succession Act, 1925" 4 (2015) available at: <https://www.researchgate.net/publication/291349382> (last visited on 27-02-2018).

³⁷⁶ Sebastian Champappillyae, "Christian Law of Succession and *Mary Roy's* Case" (1994) 4 SCC (Jour) 9.

were made to save the “existing laws” and the “law in force” by virtue of section 119 of the States Reorganisation Act, 1956 which resulted in three different legislations applicable to Christians in Kerala. The State Legislative Assembly of Kerala introduced, “Christian Succession Acts (Repeal) Bill, 1958 to repeal the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921. The Statement of Objects and Reasons of the Bill of 1958 read:

[I]t is considered necessary to have a uniform law to govern the intestate succession among Christians for the whole of the State and for that purpose to repeal the Travancore Christian Succession Act and the Cochin Christian Succession Act. The Bill is intended for this purpose.

5.107 The objective of the Bill was to apply Act 1925 to all Christians in Kerala. The Bill, though lapsed, highlighted the need to bring one law of succession in the State.³⁷⁷ In *Mary Roy v. State of Kerala*,³⁷⁸ the validity of sections 24, 28 and 29 of the Travancore Christian Succession Act, 1916 was challenged. It was contended that the sections are in violation of Article 14 of the Constitution. Another issue for determination was, whether after the coming into force of the Part B States (Laws) Act 1951, the Travancore Act continued to govern intestate succession of the Indian Christian Community in the territories originally forming part of the erstwhile state of Travancore or was it governed by the Act 1925. The Supreme Court held that by virtue of section 3 of Part B States (Laws) Act, 1951, the Act 1925 extended to Part B State of Travancore-Cochin. It was further observed that, since the provisions of the Travancore Christian Succession Act, 1916 were not expressly saved by the Part B State (Laws) Act, 1951, thereby they were superseded by the Act 1925. The Act 1925 became applicable to the intestate succession of property of Indian Christian of the State of Travancore. However, the court declined to examine the provisions which affected the property rights

³⁷⁷ Mishra, at 5.

³⁷⁸ AIR 1986 SC 1011.

of women belonging to that State.³⁷⁹ The court took the view from April 1, 1951 the Travancore Act stood repealed and from the same date the Act 1925, be given effect.

5.108 Following the decision of the Supreme Court in *Mary Roy* the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by the Part B States (Laws) Act, 1951.³⁸⁰

INDIAN SUCCESSION ACT, 1925

5.109 Today the Indian Succession Act, 1925 (the Act 1925) is the principal legislative measure in India dealing with the substantive law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindus and Muslims. It is also the principal legislative measure dealing with machinery of succession in regard to the testamentary and intestate succession in respect of such persons.³⁸¹ General provisions under the Act 1925 relating to intestate succession are based on the law of England, the notable features of which are: (1) there is no discrimination based on sex among the heirs, (2) there is no discrimination between persons related by full blood and those related by half blood, and (3) relations by adoption are not recognised.³⁸² Both movable and immovable property could be inherited under the Act 1925 by kindred. Kindred under the Act contemplates only relation by blood through lawful wedlock, therefore the terms 'wife', 'husband' or 'lineal descendants' refer to legitimate relationships. It lays uniform rule for devolution of property for both male and female dying

³⁷⁹ Archana Mishra, "Vicissitudes of Women's Inheritance Right – England, Canada, and India at the dawn of 21st century" 58 *JILI* 493 (2016).

³⁸⁰ *V.M. Mathew v. Eliswa*, 1988(1) KLT 310; *Joseph v. Mary*, 1988(2) KLT 27.

³⁸¹ 247th Report of the Law Commission of India on "Sections 41 to 48 of the Indian Succession Act, 1925 – Proposed Reforms" (Sept. 2014).

³⁸² Report of the Committee on the Status of Women in India, Ministry of Education & Social Welfare Department of Social Welfare, Government of India, "Towards Equality" (Dec. 1974) at 494.

intestate. The shares inherited by the heirs, including female heirs, are absolute and freely alienable.

5.110 Part-V of the Act 1925, contains the provisions relating to the intestate succession. It deals with the intestate succession. Chapter I (Sections 29 & 30) of this part of the Act is preliminary while Chapter II (Sections 31 to 49) deals with 'Rules in cases of Intestates other than Parsis' and Chapter III (Sections 50-56) contains special rules for Parsi intestates.

5.111 **It is suggested that on the lines of the suggestions made pertaining to succession under Muslim Law, Part-V of the Act 1925 be appropriately amended to incorporate a three-class system of succession for Christians.** The three-class system is being suggested because it is based on ensuring that the proximal relationships of the deceased intestate are the ones who inherit the property, and only in their absence, the property devolves upon distant kindred. Moreover, this system is gender-neutral, does not differentiate between natural or adopted issue, and remedies some of the existing lacunae in the current scheme of the Act 1925, which turn out to be unfair for the widow and mother of the deceased intestate (as will be discussed in following paragraphs). In light of above, the recommended classes and their respective shares are as follows:

5.112 Class I heirs may include the spouse relict, parents of the deceased, son(s) and/or daughter(s) (natural or adopted) of the deceased. Further, the Class I heirs of pre-deceased son(s) and/or daughter(s) shall take between them one share. Class II heirs may include the full-blood sibling(s) of the deceased, lineal descendants of the siblings of the deceased, grandparents of the deceased. Class III heirs may include all other relatives. Class I heirs of the intestate may inherit the property completely, each taking one share (per capita

distribution) to the exclusion of Class II and Class III heirs. In the absence of Class I heirs, Class II heirs may inherit the property to the exclusion of Class III heirs, with the division of shares to be done per stripes. In the absence of the first two classes of heirs, Class III heirs may inherit the property, with the division of shares to be done per stripes.

5.113 In case the above suggestion is not accepted, the following issues in the Act 1925, are required to be addressed.

5.114 **Section 33:** In nutshell, this section states that the widow of the intestate would receive $1/3^{\text{rd}}$ of the property in the presence of lineal descendants of the deceased with $2/3^{\text{rd}}$ going to the lineal descendants. In case there are no lineal descendants but there are kindred, the widow will receive $1/2$ of the property, with the remaining $1/2$ going to the kindred. Finally, if there are neither lineal descendants, nor kindred, whole of the property of the deceased will go to his widow.

5.115 With regard to the first situation, it is required to be noted that in presence of lineal descendants, the share of the widow is fixed at $1/3^{\text{rd}}$. Now, even if there is just one lineal descendant, he or she gets $2/3^{\text{rd}}$ share while the widow still gets $1/3^{\text{rd}}$. This division is inherently fallacious and unfair and needs to be remedied. Even in the UK, where the intestate leaves issue, the law has been amended to provide the surviving spouse or a civil partner, personal chattels absolutely, statutory legacy,³⁸³ and then the residuary estate is divided in equal halves between the surviving spouse/civil partner and the issue of the intestate.³⁸⁴

³⁸³ 'Statutory legacy' is a concept borrowed from English Law wherein a widow is entitled to receive a fixed net sum from the deceased's estate, leaving other close surviving members.

³⁸⁴ Section 46(1)(A), (B) and (C), Administration of Estates Act, 1925.

5.116 It is suggested that the section may be so amended that the property be divided in such a manner that the widow and lineal descendants get equal shares.³⁸⁵

5.117 With regard to the second situation involving kindreds, the Law Commission of India in its 110th Report 'Indian Succession Act 1925', in 1985 highlighted the change made in the law in England, wherein, in the absence of lineal descendants, parents, brother or sister of the whole blood or issue of such brother or sister, the husband intestate's whole property passes on to the widow.³⁸⁶ The Commission had recommended that the same should be adopted in India, and section 33 should be amended accordingly. This Commission reiterates this recommendation.

5.118 **Section 33A:** The section provides for 'statutory legacy' for Christian spouses who are to inherit property in the absence of lineal descendants.

5.119 Firstly, the current understanding of this section is that it does not apply to Indian Christians and that clause (b) of section 33A(5) is an independent clause which is not to be read with clause (a).³⁸⁷ Such an interpretation has the effect of making this section inapplicable to the majority of the Christians in India, i.e., Indian Christians and makes it applicable only to a miniscule minority like Europeans and Anglo-Indians.³⁸⁸ It is well established that in order to interpret a provision, intention of the legislature must be taken into account. The Preamble to the amended section speaks of providing more liberally for the surviving spouse in the absence of lineal

³⁸⁵ See also B. Sivaramayya, "The Indian Succession Act, 1925" in K.D. Gangrade (ed.), II *Social Legislation in India* 89 (Concept Publishing Company Pvt. Ltd., New Delhi, rep. 2011) cited in Mishra – Vicissitudes, at 496.

³⁸⁶ Section 46, Intestates' Estates Act, 1952.

³⁸⁷ *Arulayi v. Antonimuthu*, AIR 1945 Mad 47.

³⁸⁸ B.B. Mitra, *The Indian Succession Act*, Sukumar Ray (ed.) 93-95 (Eastern Law House, New Delhi, 15th edn., 2013).

descendants, in case of total intestacy. This object can only be achieved if clause (b) of section 33A (5) is read together with clause (a).³⁸⁹ This way the benefit can be extended to the Indian Christian community as there appears to be no logic as to why they should be deprived of this benefit.

5.120 **It is suggested that the section be redrafted to remove the ambiguity and be made explicit and unambiguous and applicable to the surviving spouse belonging to the entire Indian Christian community, in case of total intestacy and in the absence of lineal descendants.**

5.121 Secondly, monetary amount of statutory legacy is a mere sum of five thousand rupees with an interest of four per cent per annum until payment, if the net value of the property of the deceased intestate exceeds the said sum. The Law Commission in its 110th Report (1985) suggested raising the amount to thirty-five thousand rupees and the rate of interest to nine per cent per annum.³⁹⁰ However, there have been no amendments made in the section till date.

5.122 The present Commission **suggests that the sum as well as the rate of interest be appropriately increased, taking into consideration the fall in the value of rupee since 1926, increased cost of living etc.**

5.123 **Sections 42, 43, 44, 45 and 46:** Sections 41-49 apply in the absence of lineal descendants. These section 42 states that if the intestate's father is living he shall succeed the property. On a simple reading this section appears manifestly unjust and gender biased. As suggested by the Law Commission in its 247th Report 'Indian

³⁸⁹ *Ibid.*

³⁹⁰ 110th Report (1985), at 56.

Succession Act' (2014), it should be reworded and 'father' should be replaced with 'parents' to include the mother within the section's ambit. In UK, the Administration of Estates Act, 1925 gives equal status to both father and mother and they have equal shares.

5.124 Additionally, the surviving parent inherits the property absolutely.³⁹¹ It is suggested that the same approach should be here and section 43 should be amended appropriately to state that if one parent of the intestate survives the other, the surviving parent should inherit the property absolutely. Likewise, section 44 should be reworded to read "Where both of the parents of the intestate are dead...". A similar amendment would be required to be carried out in section 45 to provide for the scenario where both of the parents of the intestate are dead, instead of merely the father.³⁹² If these amendments are carried out, then the current section 46 becomes redundant and may be deleted.

5.125 **Section 47:** It was suggested by the Law Commission of India in its 110th Report (1985) as well as the 247th Report (2014) that section 47 be reworded to clearly indicate that it would be operative only if at least one brother or sister survives the death of the intestate. This can be done by adding "but has left a brother or sister" after the existing words "nor mother". The present Commission reiterates this recommendation.³⁹³ Additionally, it is suggested that the words "father" and "mother" be replaced with a more gender-neutral word, i.e., "parents".

5.126 **Section 48:** The section in its current form provides for distribution *per capita*. This would entail that the death of one issue of a deceased brother or sister would extinguish the right of inheritance of his or her (issue's) descendants as his or her share would become part of the corpus that would be equally divided among other

³⁹¹ Section 46(1)(iii) and (iv).

³⁹² See 247th Report (2014), at 16.

³⁹³ See 110th Report (1985), at 62 and *Id* at 13, 18.

surviving members who are nearer in degree. Thus, the property in *per capita* distribution would not devolve upon the descendants of the deceased issue. This method of distribution is contrary to the method followed in section 47. Section 47 follows distribution *per stripes* thereby entitling the descendants of the deceased issue to equal division of the share of their deceased parent, among themselves. The Commission in its 110th Report (1985) as well as the 247th Report (2014) recommended to add an explanation clause after the section, which would read as follows:

Explanation: Where such relatives are children of or sisters of the intestate, they shall take stripes.³⁹⁴

Consequently, illustration (iv) of section 48 would change accordingly.³⁹⁵

5.127 **Testamentary disposition of property:** Section 59 governs the testamentary disposition. On lines of recommendation made regarding testamentary disposition in the case of Hindus and borrowing from the Muslim law, it is suggested the section be appropriately amended so that in the case of Christians too, some portion of the property (to be fixed by law) can be kept outside the power of disposition by will of the testator. This restricted portion may be used for the welfare and maintenance of the testator's widow, unmarried daughter, minor son or elderly dependant parents. In the event the maintenance may be claimed by these dependants through section 125 of the CrPC, it might be more judicious to allow them to claim it as a matter of right, after fulfilling some basic procedural requirements (determined by law), without making them to wait in long queue of the justice delivery system. Additionally, this would ease the burden of the overburdened courts.

³⁹⁴ See 110th Report (1985), *id.* at 63 and 247th Report (2014), *id.* at 19, 20.

³⁹⁵ *Ibid.*

PARSI LAW

5.128 Prior to 1837, the English Common Law, subject to certain exceptions related to marriage and bigamy, applied to the Parsi community in India. Thus, the law of primogeniture³⁹⁶ in the male line that prevailed in England, governed the intestate succession among Parsis in India. Thereafter, Parsee Chattels Real Act 1837 (Act 9 of 1937) declared that on and from 1st June 1837, all immovable properties within the jurisdiction of any court established by His Majesty's Charter, shall, as far as the transmission of such property on the death and intestacy of any Parsi or by virtue of the last will of any such Parsi, be taken to have been in the nature of chattels real,³⁹⁷ and not of free-hold. After Act of 1837 the Parsis were free from the operation of the law of primogeniture, they were, in cases of intestacy, governed by English Statute of Distributions.³⁹⁸

5.129 In 1859, the Managing Committee of the Parsi Law Association framed a "Draft Code of Inheritance, Succession and other matters" with an objective to have a law in accordance with their customs and traditions. A Commission was appointed by the Government of Bombay, in 1861, to look into the matter. The Commission's recommendations resulted into the introduction of two Bills-The Parsi Marriage and Divorce Bill and The Succession and Inheritance (Parsis) Bill- in Legislative Council of India in 1862. The Parsee Intestate Succession Act was passed in 1865, replacing the Parsee Chattels Real Act, 1837. Later, when Indian Succession Act was passed in 1925, the provisions of the 1865 Act were incorporated verbatim. Thereafter, the 1865 Act was repealed.³⁹⁹

³⁹⁶ A rule of inheritance where the oldest male child inherits the estate to the exclusion of younger siblings.

³⁹⁷ A real property interest that is less than a free-hold such as a leasehold. (Black's Law Dictionary, 8th edition, 2004).

³⁹⁸ B.B. Mitra, *The Indian Succession Act*, Sukumar Ray (ed.) 93-95 (Eastern Law House, New Delhi, 15th edn., 2013).122 at 108-109.

³⁹⁹ *Ibid.*

Intestate Succession Among Parsis In India

5.130 Sections 50-56 of the Indian Succession Act, 1925 (the Act 1925), deal with intestate succession among Parsis in India. These provisions were amended in 1939 and thereafter in 1991 to remedy the problem of gender discrimination.

5.131 It may be noted that the Law Commission of India in its 110th Report (1985) recommended that the impugned provisions should be amended taking into consideration the Constitutional and fundamental rights relating to gender equality. The erstwhile provisions were patently discriminatory giving sons double the share of daughters, where the intestate was a male.⁴⁰⁰ Even among relatives mentioned in Part I and II of Schedule II of the Act 1925, the males took double the share than that of females. Now this situation stand remedied, and sons and daughters, receive equal shares upon death of the intestate.

5.132 Section 50 lays down general principles that are applicable to intestate succession among Parsis. In clause (a) it is provided that there is no distinction between those who were born in the lifetime of the intestate and those who were subsequently born alive. This is based on the dictum that a child *en ventre* is a child *in esse*. Clause (b) lays down that the share of a lineal descendant of the intestate would not be taken into account in division of assets, if he or she predeceased the intestate without leaving a widow/widower, or, his or her own lineal descendant, or, the latter's widow/widower. Clause (c) debars a widow/widower of any relative of the intestate from inheritance, if he or she remarries during the lifetime of the intestate. This particular clause echoes the sentiments of the Parsi community and was given effect in 1939 as it was decided in the case of *Tehangir*

⁴⁰⁰ See 110th Report (1985), at 64-66.

v. *Pirojbai*,⁴⁰¹ under Parsi Intestate Succession Act, 1865, that the widower (son-in-law) will receive his deceased wife's share even though he had remarried, in the absence of a provision to the contrary.

5.133 Section 51 deals with the division of the intestate's property among the spouse relict, children and parents. It lays down that the spouse relict and each child would receive the property in equal shares. In the absence of the spouse relict, the children would inherit the property in equal shares. If the parent(s) of the deceased intestate are alive then each parent(s) would be entitled to inherit a share equal to half the share of each child.⁴⁰²

5.134 **Section 52 has been omitted from the current scheme.** Under the original section 52, where a Parsi died intestate leaving children but no widow, each son received a share four times the share of each daughter.

5.135 Section 53 of the Act deals with the division of share of a predeceased child of the intestate where the latter has left lineal descendants. Clause (a) lays down that where the predeceased child was a son, his widow and children take shares in a manner as if he had died immediately after the intestate's death. However, a proviso to this clause states that if the predeceased son leaves behind a widow, or, the widow of the lineal descendant of the predeceased son but no lineal descendant (i.e., the lineal descendant of the predeceased son is himself deceased but has left behind his widow), the widow will get her distributive share while the residue will be treated as belonging to the intestate without taking into account the share of the predeceased son. The widow's share is not contingent upon the existence of the child of predeceased son. This proviso gave effect to the decision in

⁴⁰¹ 11 Bom. 1 C 4, 69, 73

⁴⁰² See *Perviz Sarosh Batliwalla v. Mrs. Viloo Plumber*, AIR 2000 Bom 189.

Mancherji v. Mithibai,⁴⁰³ wherein it was held that a childless widow of a predeceased son was entitled to a moiety in the share which her husband would have got had he been alive at the time of the intestate's death. Clause (b) lays down that if the predeceased child of the intestate was a daughter, then her share will be equally divided among her children. This would entail that the husband of the predeceased daughter of the intestate does not inherit from his wife's share.

5.136 Clause (c) states that if the child of a predeceased child has also passed away during the lifetime of the intestate, his or her share would be divided the same way as provided in clauses (a) or (b), as the case may be. Clause (d) lays down that where a remoter lineal descendant has predeceased the intestate, the provision of clause (c) will apply *mutatis mutandis*.

5.137 Section 54 deals with the scenario where the intestate leaves no lineal descendant but leaves a spouse relict or a spouse relict of any lineal descendant. Assuming W1 to be the spouse relict of the intestate and W2 to be the spouse relict of the lineal descendant of the intestate, clauses (a) to (e) can be summarised as follows:

- (a) Only W1 and no W2: W1 will take half the property,
- (b) Both W1 and W2: both receive one-third property. If there are more than one W2 then one-third property will be equally divided among them;
- (c) No W1 but one W2: W2 will get one-third property. If there are more than one W2, two-thirds property will be divided among W2s in equal shares;
- (d) The residue that remains after (a) or (b) or (c), shall be distributed, in order, among relatives of the intestate mentioned in Part I of Schedule II. The distribution shall be in such a manner that males and females who are in the same degree of propinquity shall receive equal shares;

⁴⁰³ (1877) ILR 1 Bom 506.

- (e) In case there are no relatives to receive the residue as mentioned in the above clause, the whole residue shall revert to relatives mentioned in clauses (a) to (c).

5.138 The old section 55 was replaced in 1991 with a new one to ensure equality of genders by making the share of females in the same degree of propinquity equal to that of the males. Section 55 applies when a Parsi intestate dies leaving behind neither lineal descendants, spouse relict nor spouse relict of any lineal descendant. In such a case the property devolves upon the relatives mentioned in Part II of Schedule II, in order of their mention.

5.139 It may be noted that the first six entries of Part II overlap with the six entries of Part I. However, Part I is applicable only when section 54 is attracted, i.e., for distribution of residue left after the W1 or W2 or both, as the case may be, have already received their shares. On the other hand, Part II applies when section 55 is attracted, i.e., there is no W1 or W2 or any lineal descendant of the intestate in existence. Thus, it will be the common first six entries that will be entitled to receive the intestate's property (in order of their mention) in case the intestate dies leaving behind neither W1, W2 nor any lineal descendant, and only then entries seven onwards will come to inherit (again, in order of their mention).

5.140 Section 56 is a residuary section and lays down that in case there is no relative of the deceased Parsi intestate, that would attract any of the previous sections of Chapter III, then the intestate's property shall be divided among relatives who are in nearest degree of kindred to him. In *Hirjibai v. Barjori*,⁴⁰⁴ the court held that the words 'relative' and 'kindred' have been used synonymously, in the legislative scheme.

⁴⁰⁴ ILR 22 Bom 909.

5.141 This discussion sums up the law of intestate succession among the Parsi community in India. It may be noted that, after 1991 amendment, the sections are well-balanced and lay down that the shares of males and females in the same degree of propinquity would be equal. However, one issue that needs to be addressed is that the definition of 'Parsi' has not been provided in the Act, 1925. The term has been defined in the Parsi Marriage and Divorce Act, 1936, to mean a Parsi Zoroastrian. The children of a Parsi father even with a non-Parsi mother would be Parsis if they are admitted into and profess the Zoroastrian religion. The same does not apply to the children born to a Parsi mother and a non-Parsi father. Such children would not be Parsis. Even the Parsi mother ceases to be a part of the Parsi community if she marries outside the community. Consequently, the children are not entitled to inherit the property of a deceased Parsi intestate. This situation needs to be remedied. As previously suggested in the chapter dealing with marriage and divorce, in the present paper, the Parsi woman should be allowed to retain her identity and status of a Parsi even if she marries outside the community. Consequently, it is suggested that, the children born of such marriage should be allowed to inherit if they choose to profess Zoroastrian religion and not to adopt their father's religion.

5.142 **Testamentary disposition of property:** Section 59 governs the testamentary disposition in case of Parsis too. On lines of recommendation made regarding testamentary disposition in the case of Hindus and Christians, borrowing from the Muslim law, it is suggested that the section be appropriately amended so that some portion of the property (to be fixed by law) can be kept outside the power of disposition by will of the testator. This restricted portion be earmarked for the welfare and maintenance of the testator's widow, unmarried daughter, minor son or elderly dependant parents.

Inheritance rights of illegitimate children

5.143 The 110th Report (1985) of the Law Commission had proposed that the definition of 'child', should be provided under the Act 1925 and include:

- (a) An adopted child, in the case of any one whose personal law permits adoption.
- (b) An illegitimate child.

5.144 The Commission was of the opinion that excluding adopted and illegitimate children from the definition of 'child' and disentitling them from inheritance goes against modern socio-legal ethos and the disentitles an innocent child. While the status of adopted children as regards inheritance has been dealt with under the chapter pertaining to 'Adoption and Maintenance', in the present paper, in this part the inheritance rights of illegitimate children are discussed.

5.145 The Hindu Marriage Act, 1955, (HMA, 1955) under the amended section 16 (w-e-f 27-05-1976) recognises, children born of marriages which are null and void under section 11 or voidable under section 12, as legitimate. However, section 16(3) states that such children will not have rights in or to the property of any person, other than the parents, which they would have been incapable of possessing but for the passing of the Act.

5.146 The Supreme Court in *Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors.*,⁴⁰⁵ observed that as per section 16(3) the deemed legitimate children will have property right only in the self-acquired property of the parents. This view was followed in several other cases, until the Supreme Court interpreted the section differently in *Revanasidappa & Ors. v. Mallikarjuna & Ors.*,⁴⁰⁶ wherein the Court held that if a child is deemed to be legitimate, his/her right cannot be

⁴⁰⁵ (2003) 1 SCC 730. See also, *Neelamma & Ors. v. Sarojamma & Ors.* (2006) 9 SCC 612; *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685.

⁴⁰⁶ (2011) 11 SCC 1.

restricted to inherit only self-acquired property of the parents, but he/she is also entitled to ancestral property. The court observed that:

The relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights, which are given to other children born in valid marriage. This is the crux of Section 16(3).

5.147 It further opined that the legislature used the term 'property' without specifying it to be ancestral or self-acquired. Considering the fact that a restrictive interpretation of the word property under section 16(3) would be counter-productive to the benevolent intent of the amending Act, the Court held that it should include ancestral property within its ambit. Though the Court dissented from its judgment in *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*,⁴⁰⁷ it deemed it appropriate to refer the matter to a larger bench. It may be noted that though the Court was of the view that illegitimate children will be entitled to all the rights which are afforded to children born in a valid marriage, such a view cannot be said to apply to children born of live-in relationships, for certain reasons discussed in the following paragraphs.

5.148 Section 16 of the HMA, 1955, comes into play only to legitimise children born of void and voidable marriages. It may be noted that children born in live-in relationships which are in the nature of marriage, i.e., long-term cohabitation of partners, are deemed to be legitimate,⁴⁰⁸ and would thus, attract the legal fiction of section 16(3). On the other hand, children born of live-in relationships of a transient nature, i.e., of a short duration, which would not entail the presumption of marriage under section 114 of the Indian Evidence Act, 1872, would be outside the purview of section 16 as such a relationship cannot be categorised as either a void or voidable

⁴⁰⁷ AIR 2010 SC 2685.

⁴⁰⁸ See *S.P.S. Balasubramanyam v. Suruttayan*, AIR 1992 SC 756.

marriage and in the absence of a law on this point would continue to be bastardised. So, it appears, that either ways the legal fiction created by section 16 of the HMA, 1955, would not apply to children born in live-in relationships.

5.149 Therefore, it is recommended that the Parliament should enact a law to address the issue of legitimisation of children born of live-in relationships that fail to reach the threshold of a deemed marriage. Further, such children should be entitled to inherit the self-acquired property of their parents.

5.150 In Mohammedan Law, where the paternity of a child is under doubt, the acknowledgment of the father confers legitimacy on the child (*iqrar*). In this system, legitimacy and legitimisation have to be distinguished.⁴⁰⁹ While legitimacy is a status that results from certain facts, legitimisation is a proceeding which creates a status which did not exist before.⁴¹⁰ Where a person has been proved to be illegitimate, no statement made by another man that he is his child can confer legitimacy on the person, however, in the absence of such proof, the statement or acknowledgment is enough substantive evidence that the person so acknowledged is a legitimate child of the man.⁴¹¹

5.151 If a woman gives birth to an illegitimate child, not only would the child be excluded from inheritance but also the woman would be punishable for *zina* (illicit intercourse).⁴¹² An illegitimate child, under Hanafi law, cannot inherit from father, but they may inherit from mother. In *Bafatun v. Bilaiti Kanum*,⁴¹³ the Court that where a woman under Hanafi law died leaving behind a husband and an illegitimate

⁴⁰⁹ Fyze, at 189.

⁴¹⁰ *Ibid.*

⁴¹¹ *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 234.

⁴¹² Fyze, at 191.

⁴¹³ (1903) 30 Cal. 683.

son of her sister, the husband could take half the property and the other half went to the illegitimate son.

5.152 Under Shia law, there is a distinction between *walad al-zina* (child of fornication) which is a *nullus filius* and inherits from neither the father nor mother, and *walad al-mala'ina* (child of imprecation or a child disowned), who inherits from the mother.⁴¹⁴

5.153 It may be noted that since live-in relationships are not recognised in Islam and an illegitimate child is already entitled to inherit from his or her mother and can claim maintenance under section 125 of the CrPC.

5.154 Under Christian law the word 'child' does not include an illegitimate child.⁴¹⁵ Thus, it is clear that illegitimate children, under the Christian law have no right of inheritance. However, it may be noted that as per section 21 of the Indian Divorce Act, 1869, children begotten of an annulled marriage; where the second marriage has been annulled on the ground that a former husband or wife was living but the subsequent marriage was contracted *bona fide* with the belief that the former spouse was deceased; or where the marriage was annulled on the ground of insanity; will be considered as legitimate and shall be entitled to succeed the estate of the parent who at the time of the marriage was competent to contract. Reading this with section 19 of the aforementioned Act, it appears that children begotten of a marriage that was annulled due to impotency or due to the marriage being contracted within the prohibited degrees, would not get the benefit of being considered as legitimate and thus would not be entitled to inheritance.

5.155 This distinction appears inexplicable and unfounded. It should be addressed by the Legislature forthwith. Section 21 of the Indian Divorce Act, 1869, should be appropriately amended to confer

⁴¹⁴ Fyzee, at 463.

⁴¹⁵ *In the Goods of Sarah Ezra*, AIR 1931 Cal. 560, 562. See also, *Smith v. Massey* (1906) ILR30 Bom. 500.

legitimacy on children begotten of all annulled marriages. All such children should be entitled to succeed the estate of their parents.

5.156 The judgment of Kerala High Court, in *Antony v. Siyath*,⁴¹⁶ merits discussion in this context. The Court held therein that all illegitimate children are a result of cohabitation of a man and a woman as husband and wife. The Court further said that if such children are not conferred legitimacy then the benevolent object of section 16 of HMA, 1955 as well as section 21 of Indian Divorce Act, 1869, would not be fulfilled. Moreover, the Court reasoned, that if such children can claim maintenance under section 125 of CrPC, there is no ostensible rationale behind denying them the right to inherit the estate of their parents.

5.157 While this interpretation of the existing law on the point is certainly progressive and laudable, the fact remains that it would be applicable only in the State of Kerala. Moreover, equating all illegitimate children with legitimate children may tantamount to undermining the institution of marriage. Thus, a need is felt for a Central legislation to confer legitimacy on illegitimate children, under certain circumstances, irrespective of their religion and entitling them to inherit the property of their parents.

5.158 As regards Parsis, it has been observed that when on the death of a Parsi intestate, the Recorder's Court, in 1811, admitted an illegitimate son on evidence of customs and usage, the decision to do this was considered to be erroneous and was reversed by a subsequent Recorder. It was held that, among Parsis, an illegitimate son is entitled to life maintenance only.⁴¹⁷ This dispute was, apropos

⁴¹⁶ (2008) 4 KLT 1002. See also, *Rameshwari Devi v. State of Bihar* (2000) 2 SCC 431; *Badri Prasad v. Dy. Director of Consolidation* (1978) 3 SCC 527; *Vidyadhari v. Sukhrana Bai* (2008) 2 SCC 238.

⁴¹⁷ Report into the usages recognised as law by the Parsee Community of India, and into the necessity of special legislation in connection with them, October 13, 1862, para 4 in J.D. 1863 cited in Jesse S. Palsetia, *The Parsis of India: Preservation of*

Parsi inheritance law, one of the earliest matters to come up before the British Courts in Bombay. Subsequently, the Parsee *Panchayet* introduced reforms in 1818 to outlaw bigamy and illegitimacy.⁴¹⁸ The illegitimate children may seek recourse of section 125 CrPC to get maintenance, however, under the Indian Succession Act, 1925, there appears to be no provision to afford them any inheritance rights. The requisites for a valid Parsi marriage are listed under section 3 of The Parsi Marriage and Divorce Act, 1936. Subsection 2 of section 3 categorically states that, notwithstanding the fact a marriage is invalid due to non-fulfilment of conditions provided under this section, the children begotten from such a marriage would be legitimate. This entails that such children should have the right to inherit the property as provided in the Act of 1925.

5.159 In view of the aforesaid discussion, it is suggested that illegitimate children, for the purpose of intestate succession under the Act 1925, should be given a right to inherit the self-acquired property of their parents. To put this in effect, as recommended by the Law Commission in its 110th Report 'Indian Succession Act 1925' in 1985, a viable definition of 'child' should be included in the Act 1925. The definition should include 'illegitimate child'.

5.160 It may be noted that, as witnessed earlier in this Chapter, while the Courts are trying to afford inheritance rights to children born out of wedlock as much as possible by interpreting the law liberally, the lack of a secular Central law in this regard is conspicuous by its absence.

Identity in Bombay City 199 (Koninklijke Brill NV, Leiden, The Netherlands, 2001) available at: <https://bit.ly/2HfDAG4> (last visited on 06-04-2018).

⁴¹⁸ Manokjee Cursetjee, *The Parsee Panchayet* 27, 28 (Bombay, 1860) cited in Jesse S. Palsetia, *ibid*.

RIGHT TO LIFE
WITH HUMAN DIGNITY:
CONSTITUTIONAL
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Right to Life with Human Dignity: Constitutional Jurisprudence

2. 1. Introduction

Indian Constitution is one of the unique Constitutions of the world which takes care of each and every section of the society. The framers of Constitution were aware of the importance of human dignity and worthiness and therefore they incorporated the word human dignity in the preamble of the Constitution of India. The most important feature of the Constitution is the fundamental rights. The framers of Constitution borrowed it from USA and added a separate chapter in Part III of the Constitution. The Constitution provided various rights i.e. right to equality, right to freedom, right against exploitation, right to freedom of religion, right to cultural and education, right to constitutional remedy, which talks about most sacred, inalienable, natural and inherent rights. Fundamental rights are guaranteed by the Constitution to all people without any discrimination. The provision of fundamental rights preserve and protects the human dignity. The Judiciary has also emphasized dignity as a fundamental right in number of cases. Recently, in *Naz Foundation v. Government of NCT and others*¹, Court observed that, “the Constitutional protection of human dignity requires us to acknowledge the value and worth of all individuals as members of our society”. All citizens of India will live and enjoy peaceful, dignified life without any disturbances.

¹. *Naz Foundation v. Government of NCT and others w.p. (c)7455, 2001*

The constitution of India is the supreme law of the land and there is nothing beyond the Constitution. According to the Kelson's pure law theory the Constitution of India is the grand norm means, it is at the top and there is nothing beyond that. The Constitution of India takes care of every section of the society to protect their rights of individuals and at the same time it restricts the state not to violate the rights of person guaranteed by the Constitution.

The Constitution of India guarantees equal protection to all and forbids the state from depriving anybody's life and personal liberty without procedure established by law². Social justice which is the base of the Indian Constitution has its overtones in the criminal justice system too. The preamble of Indian Constitution itself make it clear that there is equality among all the citizens of India and that is the reason all persons are equal before the law including law makers and followers of the same law. The Constitution of India also guarantees equal justice to all the people of India apart from their caste and religion.

Justice *MishraRagnath* rightly pointed out in *ParamandaKatara v. Union of India*³ 'preservation of life is of most importance, because if one's life is lost, the *status qunte ante* cannot be restored as resurrection is beyond the capacity of man'. Right to life is inalienable basic right of man. It is most important, human, fundamental, inalienable, transcendental rights⁴. Naturally and logically this right requires the highest protection. It denotes the significance of human existence for this reason it is widely called the highest fundamental rights. Everyone has the right to life, liberty and security of person⁵. Article 21 is the important

². Articles.14 and 21 of the Constitution of India

³. *AIR 1989 SC 2039*

⁴. Indian Bar Review, Vol. XIX, 1992, P. 100.

⁵. *Article 3 of Universal Declaration of human Rights 1948*

provision of the Indian Constitution and occupies a unique place as a fundamental right and enforceable against state. Since *Maneka Gandhi's case*⁶ the Supreme Court interpreted article 21 of Constitution has ushered a new era of expansion of the horizons of right to life. Traditionally right to life was called as natural right of the people. Right to life is one of the important fundamental rights of the citizen of India and aliens of India. It is protected by the Constitution of India.

Every human life is precious and beautiful. One must pay respect to one's human dignity. Therefore, it is universally recognised and the foundation of moral vision for the society. After Second World War International community concentrated on Human dignity as a core element for protection of human beings. The conceptual dimensions of human dignity were established in 1948 as the foundational concept of the UDHR. The preamble of UDHR says, 'where as recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Human dignity mentioned at the outset of the *Article 1 of the Universal Declaration of Human Rights 1948*, which is the most important document in the world. *The Universal Declaration of Human Rights provides* the preliminary work out for protecting and development of right to life with human dignity in the various constitutional laws of various countries in the world. Every person has inalienable right to live with dignified life without discrimination. They are entitled to claim equal respect from the state as well as from other persons. It is one of primary duties of each state to protect fundamental rights to the human dignity and implement welfare schemes in order to improve the dignified life of the citizens.

⁶. AIR 1978 S.C. 597

Indian constitution ensures many rights to the citizens as well as aliens. It is not only a legal document, but also a social document. The preamble of Indian Constitution ensures social, economic and political justice in a way the Constitution which makes it exceptional Constitution in the world. Now, the question is what right to life is something which is more than an animal. Article 21 of Constitution of India deals with only right to life and liberty includes that no person shall be deprived life and liberty except according to procedure established by law. Article 21 is concern with right to life and liberty in literal sense, but due to liberal interpretation of same Article the court has expanded its scope.

Under right to life many more rights are there. It included because of Supreme Court interpretation. It reveals that, the interpretation made by the Supreme Court for widening the scope and ambit of Article 21 has resulted a jurisprudence of human right. It is not out place to mention that this jurisprudence is now part and parcel of human dignity. All This happened because of liberal attitude and approach of Supreme Court. The court has interpreted in such way a that, the right to life includes a dignified life in the case of *OligaTellis v. Bombay MuncipalCoroporation and others*⁷ and *Corlie Mullin v. Adminstrator and Union Territory of Delhi*⁸. It includes many more things about dignified life. So in a way scope of right to life which has been expanded and given widen connotation to it within its amplitudes the courts has covered many more rights. Hence, right to life includes anything which is essential to live life with dignity.

The right to life is not only correlated with human dignity but also it directs our attention to the very essential subject of honour killing,

⁷. AIR 1986 SC 180

⁸. AIR 1981 SC 746

family members for sake of social status or 'so called his family honour' kill the members of family the Constitutional guarantee of right to life which is ensured through this paramount status book like Indian Constitution is important. Now if we take into consideration the very basis of honour killing why and how it happens, then the question comes about the constitutional guarantee which has been ensured through the different pronouncement of the courts.

India is seen in as one of the powerful emerging countries in the world. 21st century recently our Prime Minister *Mr. Modi* proudly said that, dignity of women is our collective responsibility and there should not be any compromise in any way. We must pay respect and honour equally to encourage their dignity. Researcher feels that, even in the global period the Indian women struggle for the right to life with human dignity even today. Women have been victims of various forms of cultural and customary exploitation from years together. Young girl or women are facing a number of problems in every sphere of life. They are still suffering with the evil customary practices like honour killing; female foeticide etc. and deprived of their life. This is nothing but exactly against the nature and the constitutional provisions such as the right to live with dignity. Indian Womanhood is tied up by many a rusted chains of religious customs and traditions still today.

It is seen that, even after sixty nine years of the Independence of India, women have not got proper freedom and she is unable to enjoy the fruits of right to dignified life within her house and outside the house. They are always living under the influence of customary, religious norms, which is considered as supreme power of the honour to the family or community. Whoever tries to violate the norms of the caste, community or religion society people (*panachayat*) will punish to particular person

as, in that way of boycott or directed to play with the human dignity or harassment, torture and sometime withdraw the life of the person i.e. honour killing. The real situation of women and young girls is very crucial for living with dignity.

Though the country has made a lot of progress the role of women in the society is yet not changed. Still women became the victims of the patriarchal system. In our country number of rules and plans are working on only paper but practically the Government is seems to be weaker for implementation of rules and regulations in this regard. There is no specific stringent law to protect the dignified life of women from the customary evil and barbaric practices such as Sexual abuses, Infanticide, Feticide, Rape, Sexual- harassment, Murder, honour killing etc.

2. 2. Meaning of Human Dignity

Human dignity is connected with the individual life and it's having Constitutional jurisprudential value as fundamental rights. Dignity refers to presentation of honour and personal merits of individual. The idea of human dignity is associated with the protection against the exploitation, and violation of inalienable rights. The term human dignity is commonly used for protecting the status and honour of the person, without that person cannot live in the earth. Every one having their own status and respect and they are living for that only. Human dignity attaches with their own behaviour and role of the person in the society. The world human "dignity" has been derived from a Latin "*dignitas*" which means worth, merit, quality or state worthy of esteem and respect or high status, reputation.⁹ The term dignity means simply 'worthiness' or 'excellence'. It is any quality of a person entitling them to be regarded, respected and

⁹. English dictionary i.e., your dictionary

honoured by others¹⁰. Human Dignity also treated as honour and status of the individual. It has always conveyed something deserving of respect, honour, excellence worthiness and nobility of the individuals. Human dignity is closely connected with the honour of the person or group the contemporary society.

Constitution used the term '*dignity*' in its preamble; the preamble reads as 'assuring the dignity of the individual and the unity and integrity of the nation. Dignity is attached to the identity of a human being as a person, when a human being does not enjoy the right to persons, dignity does not exist at all. In simpler terms, it can be said that dignity can be ensured when every member of the society has a feeling that he or she is a respectable member and no one can humiliate, harass, exploit and insult him or her on the basis of caste, creed, sex and status etc.'¹¹

At present there is no precise definition of human dignity. The term human dignity protected the civil, political, religious and social rights of individual. "Human dignity means a state of worthy of honour, respect, equal status and it is inherent connected mentally with human life irrespective of caste, creed, sex, colour, status, of the person". Human dignity is attached with the family, caste, community and society. Every society having its own norms with pride of dignity, they maintain their dignity, respect and status as per customary practices. Being a human it should treat equal in dignity irrespective of gender.

Human dignity is the foundational concept of the worldwide human rights system of Government. The importance of human dignity is laid in *The UN Charter, Universal Declaration of Human Rights* and other

¹⁰ . Ravi Rajan,' Interrogating the Conceptualization of Human Dignity: A Human Rights Perspective' Social Action Journal, Vol. 65, No. 03, July-Sept. 2015, ISSN No. 0037-7627, P. 26

¹¹ . Dr. N.K.Chakrabarti, Dr. ShachiChakrabarti,"Gender Justice"vol.II, first Edition 2006, pub, R. Cambray and Co. Private Ltd, Kolkata, P. 339

several international covenants as also in the Constitution of India, which mentions 'dignity of the individual' as a most important value in its Preamble.

2. 3. Concept of Right to Life with Human Dignity

The right to life is the important and most valuable fundamental right of the citizen and aliens of India. Everyone has the right to life, liberty and security of person. The concept of life is not possible to define in specific way or in a single word. It is true that life can be defined scientifically, theoretically or even philosophically. It is also said that law has its inherent jurisdiction over all these aspects of life. According to the Oxford Dictionary '*Life*' is a condition that distinguishes animals and plants from inorganic matter, including the capacity for response, growth, reproduction, functional activity, and continual change preceding death.

Every society has different norms to protect the human life and dignity of individual. The right to life denotes the significance of human existence for this reason. It is widely called the highest fundamental rights¹². Our Indian Constitution ensures in part III fundamental rights which are designed to protect and preserve the basic rights of individuals from the violation of right to life with human dignity. The concept of right to life and liberty as enriched in Article 21 of the Constitution of India, being a guaranteed number of fundamental rights to the citizen and non-citizen of India. The main intention of Constitution framer is to promote individual welfare as well as social welfare. Right to life is the most precious fundamental rights amongst all human rights. Undoubtedly its scope and applicability and with the advent of their modern strides in jurisprudence with revolutionary pronouncement by the various court so

¹². Indian Journal of International Law Vol. 51, No. 03 , July/ Sept. 2011, P. 408

has assumed wider connotations and amplifications. Under this noble concept every citizen has guaranteed the right to life and liberty. Article 21 imposes an obligation on the state to safeguard the right to life of every person and preservation of human life is thus of paramount importance.

The concept of dignity under the Indian Constitution is significant any form of violence against women is violation of the fundamental right to live with human dignified life. State has primary duty to protect the right to live with human dignity as fundamental rights of each citizen.

Constitution has not given any specific provision about human dignity. Article 21 of Constitution of India the right to life it has wider meaning which includes the right to life with human dignity. It is fundamental right without which we cannot live as human being and includes all those aspects of life which go to make a man's life meaningful worth of life. Life is not simply life physical act of breathing, it does not mean merely animal existence it has a much wider meaning which includes right to live with human dignity.

Chief justice of India, *J. S. Verma* absolutely expressed views about right to life with human dignity, as “the right to life is a recognised as a fundamental right under Article 21 of the Constitution of India. It is a basic human right inherent in human existence with is not gift of any law. The law merely recognised an inherent right and is not its source. Human rights are those rights has derived from the natural law which have evolved out of natural rights , rights inherent to people by virtue of their being human and being a moral and rational nature and having a common capacity of reason. This comprises a core base of basic guarantees, including the right to life, freedom form torture or inhuman or degrading

treatment or punishment, freedom from slavery, servitude and forced labour, the right to free movement and the right to food and shelter”.

This Article gives a constitutional importance of rights to the every citizen. Justice *Krishna Iyer* has stated that, Article 21 is characterised as protective of life and liberty and corresponds to the *Magna Carta case*¹³. The *Magna Carta* became the first document proclaims that the crown had legal rights and the law could bind the monarch, it grants legal rights to the all men. In India the judiciary has first and nicely interpreted in *A. K. Gopalan v. state of Madras*¹⁴ right to life as it is nothing but fundamental freedoms which is guaranteed under Article 19 of the Constitution of India. It means that the right to life is not merely a fundamental right it also basic right to an individual i.e. no one should withdraw the life without following process of law.

The important landmark decision which leads to the widening the concept of Article 21 of Indian Constitution was in the case of *Maneka Gandhi v. Union of India*¹⁵ of the world personal liberty, it covers variety of many more fundamental rights¹⁶ i.e., right to speedy trial , Right to bail, right to against torture, right to live with human dignity etc., and has made it obligatory on part of the state to fulfil on many accepts, the term Life and personal liberty was elaborated in expensive meaning to move beyond mere animal existence. It means that life is not confine to the certain limit. Therefore no one can deprive the life without just and fair process of law. This case gave a new dimension to the Article 21 and apex court held that right to live is not merely confined to physical

¹³. *Magna Carta of 1215*

¹⁴. *AIR 1950 SC 27*

¹⁵. *AIR 1978SC 597*

¹⁶. *Article 19 of the Constitution of India*

existence but it includes within its ambit the right to live with human dignity.

The importance of right to life has been given by *Justice Krishna Iyer*. Right to life does not mean that mere existence of life but it must be a dignified quality life. In case of *Kharah Singh v. State of Uttar Pradesh*¹⁷ apex court held that the expression 'Life' was not limited to bodily restraint or confinement to prison only but something more than mere animal existence. Under the Article 21 of Constitution is a right of a person to be free from any restriction or encroachment where directly or indirectly imposed on individual.

According to *Justice Krishna Iyer* depriving a person of his right is nothing but a murder. If state or anybody violate or deprived rights of any person of his constitutional rights, it also commits murder. He also observed that life is not vegetable existence. The Supreme Court quoted with approval *Field, J.* observation in case *Munn v. Illinois*¹⁸ by the term 'Life' something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of the arm or leg or putting out of an eye or the destruction of any other organ of the body through which the soul communicate with the outer world. The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyments is prohibited by the provision in question if its efficacy be not frittered away by judicial decision

Justice Bhagwati elaborated the extensive interpret the term 'Life' in the concept of right to life with human dignity in case of *Francis*

¹⁷.AIR 1963 SC 1295

¹⁸. *Munn v. Illinois*, 153(1877)94 U.S. 113

*Coralie v. Union Territory of Delhi*¹⁹, “that right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading and expressing oneself in diverse forms freely moving about and mixing and commingling with fellow human beings” It means that life of a person is beyond the animal existence. Everyone should be treated with equally²⁰ no one should discriminate basing on sex, caste, religion, colour or any other reason being human race we should behave and pay dignified respect to others.

Supreme Court explained the meaning of the word ‘Life’ in the case *Board of Trustees v. Dilip*²¹ that, life means does not merely connote animal existence or a continued drudgery through life. The expression life has a much wider meaning. Hence the apex court Article 21 of Indian constitution has been interpreted, that every citizen is entitled to a life of dignity²². The concept of right to life with human dignity Supreme Court has elaborated in the case of *Bandhu Mukti Morcha v. Union of India*²³, as Article 21 of Indian Constitution assured that the right to live with human dignity and free from any exploitation. State has obligatory duty to protect from the violation of fundamental rights especially to the weaker section of the society.

Researcher finds that the ambit of right to life under Article 21 of Constitution is inclusion of social, political and cultural life of the person. This fundamental right assured to all citizens under the constitution includes the right to life with human dignity. Right to life is a phrase that describes the belief that a human being has an essential right to live with

¹⁹. SCC 608 (1981)

²⁰. Article 14 of Indian Constitution

²¹. AIR 1983 SC 109

²². S. Rathi v. Union of India, AIR 1998

²³. (1989)4 SSC, 62

human dignified life, particularly which a human being has the right not to be killed in the name of protecting honour of the family or caste, community by another human being i.e. honour killing.

2.4. Development of Right to Life with Human Dignity

Researcher is of the view that, a very fascinating development in the Indian Constitutional jurisprudence is the extended dimension given to Article 21 by the Indian judiciary in the modern era. The Supreme Court has asserted that in order to treat a right as a fundamental right. It is not necessary that it should be expressly stated in the Constitution as a fundamental right. Development of right to life with human dignity not only observed in Indian Constitutional jurisprudence but also observed in the international level.

Right to life strives towards human well-being from the British *Magna Carta* case in the year 1215 and provides that “No free man shall be taken or imprisoned or deceased or outlawed or banished or any ways destroyed, nor will the king pass upon him or commit him to prison unless by the judgment of his peers or the law of the land”.

In the year of 1948 Universal Declaration of Human Rights provides the Article 3 saying “*Everyone has the right to life, liberty and security of person*” as well as in Article 9 provides that, “*No one shall be subjected to arbitrary arrest, detention or exile*”.

In 1950, European Convention on Human Rights also provides Article 2 saying that “*Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*”.

All these have considered a human being as a physical entity and attempted to safeguard him from the excesses by rulers or State by itself or violators of law. However, it is only In India that has envisaged the human being in totality and strived for his complete wellbeing, all round development, prosperity and freedom from suffering and attempted to protect the life from any kind of external aggression.

Our Constitution makers perceived the human being beyond a mere physical entity and incorporated Article 21 in Indian Constitution as-

“No person shall be deprived of his life and personal liberty except according to procedure established by law”.

In order toProtection and promotion of Indian citizens, the right to life and personal liberty, has been guaranteed by a Constitutional provision, which has received a widest possible interpretation under the canopy of Article 21 of the Indian Constitution. Right to life and personal liberty is basic for the development of individual’s personality. This right implies a reasonable standard of comfort and decency. Supreme Court of India has incorporating many more new rights. Because of these human rights jurisprudence has been developed in India. It has paved the way to common people to have a dignified life.

The Supreme Court did liberal and dynamic interpretation of Article 21 of the Constitution, the apex court evolved number of new fundamental rights available as part and parcel of right to life enriched in Article 21. Apex court interpreted the ambit of right to life very narrowly for almost three decades spanning between 1950 and 1977, wherein, in the landmark judgment of Supreme Court in *A. K. Gopalan v. State of Madras*²⁴ it was held that, the right to life under Article 21 was mutually

²⁴ .AIR 1950 SC 27

exclusive of the fundamental freedoms guaranteed under Article 19 of the Constitution. This means that Article 19 was not applying to a law affecting personal liberty to which Article 21 would apply. It was further held in the *A. K. Gopalan Case* that a law affecting right to life and personal liberty could not be declared unconstitutional on grounds of its failure to guarantee natural justice or due procedure. Therefore, a law prescribing an unfair and arbitrary procedure could deprive a citizen of his right to life and personal liberty as long as such law was enacted by a valid legislature.

In *Gopalan* case interpretation of Article 21 of the Constitution was that a procedure established by law can deprive a person of his right to life. Earlier understanding of Article 21 was a narrow and procedural one. It did not matter whether the law just and fair. It is observed that, the expression personal liberty means only liberty relating to or concerning the person or body of the individual. Justice *Mukherjea* observed that, personal liberty is the anti-thesis of physical restraint or coercion. According to definition of Dicey 'personal liberty means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification'.

In 1963 apex court observed in *Kharak Singh v. State of U.P.*²⁵ the personal liberty was not only limited to bodily restraint or confinement to prisons only, but was used as a compendious term including within itself all the verities of rights which go to make up the personal liberty of a man other than those dealt within Article 19.

In the year 1978 the Supreme Court observed in *Maneka Gandhi v. Union of India*²⁶ brought about a transformation in judicial attitude

²⁵. AIR 1978 SC 1295

²⁶. AIR 1978 SC 597

attitude towards right to life and personal liberty guaranteed under the Constitution of India. Apex court not only overruled *Gopalan*'s case but widened the scope of the personal liberty Justice *Bhagwati* observed 'The expression personal liberty in Article 21 is widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have to the status of distinct fundamental rights and given additional protection under Article 19'. The term 'Life' and 'Personal Liberty' were given an expansive meaning to move beyond mere animal existence. The case also read in several fundamental rights into and as part of right to life under Article 21 even though these rights were not expressly mentioned in the Constitution of India.

In 1981 Supreme Court gave expansion of the right to life was carried forward in subsequent cases. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*²⁷ the court held that, 'the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter etc'. Apex court in *Oliga Tellis v. Bombay Municipal Corporation*²⁸ wherein held that, the inhibition against deprivation of life extends to those limits and faculties by which life is enjoyed.

The Supreme Court emphasized on point that, the right to life under Article 21 must be guarantee to Indian citizen and aliens something beyond just the life of an animal to include the needs of a human being. In case of *P. Rathinam v. Union of India*²⁹, that the term Life has been defined as 'the right to live with human dignity and the same does not connote continued drudgery, it takes within its fold some of the graces of

²⁷. AIR 1981 SC 746

²⁸. AIR 1986 SC 180

²⁹. (1994) 3 SCC 394

civilization which makes life worth living and that the widened concept of life would mean the tradition, culture and heritage of the concerned’.

One of the most crucial development and expansion of the right to life under Article 21 of the Constitution is the provision for inclusion of the social life of the person. Thus the fundamental right to life guaranteed to all persons under the Constitution includes the right to live with human dignity.

2.5. Interpretation of Right to Life

Indian judiciary has been shown a liberal attitude towards interpretation of the Article 21 of the Constitution in different innovative process. Therefore, Supreme Court evolved number of new fundamental rights available as a part and parcel of right to life enshrined in Article 21. The expression “life or personal liberty” under Article 21 is interpreted by the Court to mean and include life with human dignity³⁰. Article 21 is couched in negative phraseology. But by its creative interpretation of Article 21 in various cases, the Supreme Court has come to impose positive obligation upon the state to take steps for ensuring to the individual a better enjoyment of his life and dignity³¹. In *Smt. Gain Kaur v. The State of Punjab*,³² The Supreme Court of India has not only reiterated that right to life includes right to dignity but also it has held that this expression means the existence of such a right up to the end of natural life.

Dignity of human beings is construed as respect of human beings, not depends on any particular additional status. Right to dignity incorporation, has become inseparable part of right to life. Incorporation

³⁰ . *Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1081) 1 SCC 608, See Bandua Mukti Morcha v. Union of India, (1984) 3 SCC 161*

³¹ . M.P. Jain, ‘Indian Constitutional Law, sixth edition, 2012, Publ., Lexis Nexis Butterworths Wadhwa, Nagpur, P.1225

³² .(1996) SCC (2) 648

of dignity within the meaning and ambit of right to life assures self-respect and recognition of individual in all transactions, in all relations, at all levels and everywhere. Dignity is one of the civil rights but it is now to be construed as defendant on the enjoyment of several economic, social and cultural rights. For instance, dignity protects self-respect of the individual. This in turn is dependent on food, water, shelter, health and clothing that are again dependent on right to work, just conditions of work, equal pay for equal work, etc. Therefore, right to dignity and its realization is to be considered from different perspectives.

Dignity means many things to many people. In common usage, dignity and dignified life is used to mean respect by others, self-respect, having access to food, health, clothing and shelter, ability to earn, being independent, honour, protect the honour of the family, prestige and status of the individual .

It is found that, recently in India young men and women are killed for marrying outside their case or refusing arranged marriage or having extra marital relation or sometimes marrying within the same *Gotra* or having premarital sex under the name of customary practice, considering it as an act of dishonour of the family, their caste or community. This act can be considered as an act carried in pursuance of right to dignity but it can be considered as a crime. In order to protect the dignity of family or religion or caste or community honour killing cases increases, such killing under the name of dishonour is against the right to life and it is clearly violation of human rights.

2.6 Expanding Horizons of Article 21

Article 21 of the Constitution of India is the heart and soul of our Constitution. Its scope is being widened in an ever expanding horizon, by various judicial pronouncements.

A Constitutional provision is treated as *sui generis*, calling for principles of interpretation of its own suitable to its character. Constitution is an organic instrument, must be interpreted broadly, liberally and purposively so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation. Accordingly, the judiciary has read into Article 21 the different facets of civilised meaningful human life.

It is observed that, through its innovative process the Indian judiciary has been expanded the scope of Article 21 of Indian Constitution. The Supreme Court did this by liberal and dynamic interpretation of the Article 21 of the Constitution. Likewise the Supreme Court evolved number of new fundamental rights available as a part and parcel of right to life.

Right to life is the most precious fundamental right amongst all human rights. The Indian Constitution, in part III, guarantees certain fundamental freedoms to the citizens, or the negative obligations of the state not to encroach upon such rights. The right to life and personal liberty is one of such important rights. The Constitution – makers took three long periods to decide the nature and scope of the right to life. *Dr BabasheabAmbedkar* Prepared a long list of fundamental rights. He observed that their necessity was recognised in all the old and new Constitution. He pointed out that the rights incorporated in his draft were

borrowed from the Constitution of various countries particularly those were more or less analogous to those existing in India.

In the very first year of Indian Constitution, the issue of personal liberty came up before the Supreme Court in case of *A. K. Gopalan v. State of Madras*³³. In this case Supreme Court has examined the scope of Article 21 of Indian Constitution on different occasions to find out the limits within which the guarantee of personal liberty is available to the Indian citizens. The apex court has observed in the *Gopalan case*³⁴ that the expression of personal liberty means only liberty relating to or concerning the person or body of the individual. According to the view of the Chief justice *Kania* personal liberty means liberty of the physical body of the individuals. Again He gave wider interpreting the term personal liberty includes not only the freedom from the bodily restrain but also those rights which go to make human personality i.e., human dignity.

Right to life guaranteed by Article 21 of the Constitution of India is not merely a fundamental right. It is a basic human right without which person can't enjoy the real life. This Article is the heart and soul of our nation. The object of fundamental right is to prevent encroachment upon personal life and liberty except according to procedure of law. It is clearly indicate that right to life has been provided against the state.

Supreme Court given a major land mark decision in *Maneka Gandhi case*³⁵ which an expanded meaning to read the ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. Article 21 Constitution of India has been liberally interpreted so as right to life means something more than mere

³³. *AIR 1950 S.C. 27*

³⁴. *Ibid.*

³⁵. *Ibid.*

survival and mere existence or animal existence. It therefore includes all those aspects of life which go to make a man's life meaningful, complete and worth living. In the case of *Unnikrishana v. state of Andhra Pradesh*³⁶ S. C. court stated that, Art. 21 of Constitution of India is the heart of fundamental right.

According to Justice *Krishna Iyer* the spirit of man is at the root of Article 21 Constitution of India. Article 21 scopes are being widened in an ever expanding horizon, by various judicial pronouncements. Right to life has been interpreted in a very dynamic fashion by the Supreme Court to include a number of rights not specifically mentioned in the Indian Constitution. Right to life is the most precious human right from all other rights.

Justice *Bhagwati* observed in *Francis Coralie Case*³⁷ "we think that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as, adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and coming along with fellow human beings"

In addition to above, Supreme Court interpreted in case of *P. Rathinam v. Union of India*³⁸ 'life' means the right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine grace of civilization which makes life worth living and that the expanded meaning of life would mean the tradition, culture and heritage of the person concerned.

³⁶ . AIR 1993 SC 2178

³⁷ . AIR 1978 SC 597

³⁸ . (1994)3 SCC 394

Justice Mukharjee rightly pointed out in *Ramsaran v. Union of India*³⁹ a life in its expanded horizons today includes all that give meaning to human life including his tradition, culture and heritage and protection of that heritage it in its full measure would certainly come within the encompass of an expanded concept of Article 21 constitution of India. Now days it is like a protective umbrella of rights.

In *Board of Trustees, port of Bombay v. Dilip Kumar* apex court held that the right to live with dignity includes right to one's reputation, as the loss of one's reputation would disable one from enjoying right to live with dignity. Some examples of such right are- Right to dignity, Right to live hood, Right to shelter, Right to privacy, Right to a speedy trial, Right to health, Right to free legal aid and Right to pollution free water etc.

Researcher observed that from the above cases cited and conclude that, the judiciary has done a remarkable and quite impressive work in expanding the scope of the right to life and there by promoting and protecting the human rights of the people. Though it was criticised as over activism the judiciary with its innovative methods and devised new strategies boldly over stepped into legislative functions for the purpose of providing access to justice for the people, who were denied the basic rights and to whom freedom and liberty had no meaning.

We can say that in the quest of socio-economic justice it has been acting as the guardian of the basic rights of Indian citizens and aliens. In acting so it has emerged, from the adjudicatory role, as a forum for rising, redressing and providing solutions to the problems of have note, oppressed, women girl children victims, as well as victims of customary evil practices such as honour killing. With this it is proved that, today the

³⁹. AIR 1989 SC 549

judiciary has been acting as courts of justice instead of mere courts of law.

2.6.1.Right to livelihood

The word life in Article 21 of Constitution of India includes the right to livelihood. In case of *Olga Tellis v. Bombay Municipal Corporation* also popularly known as *Pavement Dwellers Case*⁴⁰ in this case the Chief Minister of Maharashtra had made announcement that all pavement dwellers in the city of Bombay will be evicted forcibly and deported to their respective places outside the city. The announcement was made on the apparent justification that it was a very inhuman existence during the monsoon season. There was no way these people could live comfortably. When the pavement and slum dwellers approached the Supreme Court, the Court held that, Article 21 of Constitution gives the right to life and gave wide meaning as, “It does not mean merely that life cannot be extinguished or taken away as, for e.g., by imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to live hood is not treated as a part of the constitutional right to life, the easiest ways of depriving a person of his right to life would be depriving him of his means of live hood”.

Furthermore the Court of law held that, Article 39 (a) and 41 of the Indian Constitution provides that the state to secure to the citizens and adequate means of live hood and right to work, it would be sheer pedantry to exclude the right to live hood from the content of the right to life. If any person who is deprived his right to live hood without procedure

⁴⁰. AIR 1986 SC 180

which is established by the law it would be considered as infringement of fundamental right which is conferred by Constitution of India.

2. 6.2.Right to shelter

Right to shelter is a fundamental right under 21 of Constitution of India. In case of *Chameli Singh v. State of U. P*⁴¹ Supreme Court held that, shelter for human being is not mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally and spiritually. Right to shelter therefore includes adequate living space, safe and decent structure, clean and decent surrounding, sufficient light, pure air and water, sanitation and other civil amenities like roads so as easy to access to daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head, but it includes the right to the entire infrastructure necessary to enable to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live, should be deemed to have been guaranteed as a fundamental right.

In view of importance of the right to shelter the mandate of constitution and obligation under the Universal Declaration of Human Right, The court held that it is the duty of state to provide housing facilities to Dalit's and tribes, to enable them to come into the mainstream of national life.

Similar view was reiterated in *P.G. Gupta v. State of Gujarat* and *Prabhakar Nair v. State of T.N.* the court held that shelter is a fundamental right.

⁴¹. AIR 1996 SC 1051

2.6.3.Right to dignity

Constitution of India has not enumerated right of dignity expressly in part III of the Constitution of India, but The Supreme Court has recognised right to dignity as emanating from Article 14, 19 and 21 . In number of cases the Supreme Court has held that even prisoners are not denuded of all fundamental rights. They retain certain fundamental rights including right to be treated with humanity and with respect for the inherent dignity of human person⁴².

The right to human dignity explain in the Article 10 of the International Covenant on Civil and Political Rights as ‘All person deprived of their liberty shall be treated with humanity and with respect for inherent of the human person’ The preamble of the Covenant mentions that, recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family is the foundation of freedom, justice and peace in the world and recognises that these rights derived from the inherent dignity of the human beings.

Justice *Krishna Iyer* observed that, in *Jolly George Varghese v. The Bank of Cochin*⁴³ ‘The value of human dignity and the worth of human person enshrined in Article 21, read with Article 14 and 19 obligates the state not to incarcerate except under law which is fair, just and reasonable in its procedural essence..’ it is well settled that, right to life enshrined in Article 21 of the Constitution of India takes within its sweep right to life which is worth living, it includes the all essential required for living things.

⁴².*Sobhraj v. Superintendent of jail, New Delhi, (1978) 4 SCC 494;* *Sunil Batra v. Delhi Administration, AIR 1978 SC 1675,*

⁴³. *AIR 1980 SC 470*

Right to dignity is one of the most recognised Human rights because without a right to live with human dignity other rights cannot be made enforceable. Recognizing this fact, the preamble to the charter of *the United Nation and Universal Declaration of Human Rights, 1948*, Article 1 reads “All human beings are born free and equal in dignity and rights” and article 2 includes, “Everyone is entitled to all the rights and freedom without distinction of any kind, such as race, colour, sex, language, religion, property, birth or other status” emphasized on maintain dignity of human being.

The right to life incorporates the right to dignity. It is more than mere existence; it is a right to be treated as a human being with dignity. Without dignity, human life is substantially diminished. In the Constitutional Court of South Africa, *O'Regan Judge* explained in case *The State v. Makwanyane*⁴⁴ that, the right to life is in one sense, antecedent to all rights. ‘Without life in the sense of existence, it would not be possible to exercise rights or to be the nearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life; the right to live as a human being, to be a part of a broader community, to share in the experience of humanity this concept of human life is at the centre of our Constitutional value.

The apex court has used Article 21 of Constitution of India in a very creative and innovative manner to improve the living status and quality of human life. The Supreme Court has recognised in the case of *KeshvanandBharti v. State of Kerala*⁴⁵; it as a basic value of the

⁴⁴. *The State v. Makwanyane (1995)1 LRC 269*

⁴⁵. *AIR 1973 SC 1461*

Constitution of India It has been made clear that the preamble contain the fundamental aspects of the Indian republic and it may be invoked to determine and find out certain true scope of various fundamental rights. Court has based its several judgments and interpreted the rights with the help of term dignity of the person used in the preamble. The underlying Importance given towards the value of human dignity has been exhibited by the Supreme Court in various cases.

Article 21 has been defined its widest amplitude including right to dignity. It is a fountain head of the right to human dignity. Right to dignity explain by the Supreme Court that the right to life does not mean only animal existence but to live with human dignity. Right to life extends to even to live in a dignified way unto natural death including the dignified procedure of death. The Supreme Court has given guideline in the case of *Nilabati Behera v. State of Orissa*⁴⁶ that the state has ensured that the right to life is not violate by any public authority and public institution. Further Supreme Court has held that it is to be the primary duty of the state to ensure the protection of human dignity through proper statutes and by creation of suitable and adequate mechanisms⁴⁷.

Researcher finds that, there are several long standing customary and traditional social evil practices prevailing in the Indian society. These evil practices sometimes violate the dignity of individual and deprived the life of individual e.g. Honour killing, slavery, beggar, exploitation of weaker section⁴⁸,untouchability⁴⁹,such social evil practices must be abolished.

⁴⁶. AIR 1993 SC 1960

⁴⁷. *Vishakha v. State of Rajasthan*, AIR 1997 SC 311

⁴⁸. Article 23 and 24 Constitution of India

⁴⁹. Article 17 Constitution of India

Supreme Court in case of *Munshi Singh Gautam v. State of M.P.*⁵⁰, explaining the luminary provision in the Constitution regarding the scope of personal liberty under Art 21 held that, “The sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes the right to live with human dignity. There is an inbuilt guarantee against torture or assault by the state or its functionaries.

Since *Maneka Gandhi Case*⁵¹ the Supreme Court gave a new dimension to the Article 21 which is most important guidelines to the progress the welfare of the citizens. And court held that right to life is not confine to physical existence but it includes within its ambit the right to live with human dignity. Supreme Court observed the same view in case *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*⁵² Right to life enriched that in Article 21 cannot be restricted to mere animal existence it means something much more than just physical survival. Further Court held that, right to life is limited only protection of limb or faculty or does it goes further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it. E.g. the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings,

Similarly observation of Supreme Court in Case of *Consumer Education and Research Centre and others v. Union of India*⁵³ court held that right to life with human dignity includes within its fold some of finer

⁵⁰. AIR 2005 SC 402

⁵¹. Ibid

⁵²AIR 1981 SC 746

⁵³. AIR 1995 SC 922

accepts of human civilization which make life worth's living. The expanding meaning of life would mean the tradition and cultural heritage of the persons concerned. Supreme Court further laid down that right to life includes protection of health and strength of workers. This is minimum requirement of person to live with human dignity and happiness. Denial there of deprives the workmen facet of right to life, would amount violate Article 21 of Constitution of India. Apex court given importance to the right to human dignity, development and personality, social protection, and right to rest and leisure are fundamental human rights to workman. Which is assured in preamble , Article 38 “provides that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political- shall inform all the institution of national life”⁵⁴ and Article 39 of Constitution of India and Human Rights Charter.

Following the *Maneka Gandhi Case*⁵⁵ and *Francis Coralie Mullin case*⁵⁶ Justice Bhagwati explain on same footing in the case of *Peoples Union for Democratic Rights v. Union of India*⁵⁷ court held that Non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was denial to them of their right to live with basic human dignity and violate of Article 21 of the Constitution, further Justice Bhagwati said, that the majority held that the rights and benefits conferred on the workmen employed by a contractor under various labour laws are “clearly intended to ensure basic human dignity to workmen and if the workmen and deprived of any of these rights and benefits, that would clearly be a violation of Article 21. Again he held that the non-

⁵⁴. Article 38 Constitution of India

⁵⁵. Ibid

⁵⁶. Ibid

⁵⁷. AIR 1982SC 1473

implementation by the private contractors and non-enforcement by the state Authorities of the provisions of various labour laws violate the fundamental rights of workers to live with human dignity. This type of decision was brought a legal revolution; it has clothed millions of workers in factories, and mines, with human dignity⁵⁸. Every person has fundamental rights to have drinking water, shelter, medical aid and safety in respective occupations covered by various welfare legislations.

Supreme Court held in number of cases right to life includes right to human dignity. If we can observe in the case of *Chandra Raja Kumari v. Police Commissioner Hyderabad*⁵⁹ right to live includes right to live with human dignity or decency and therefore, holding of beauty contest is repugnant to dignity or decency of women and offends Article 21 of the Constitution.

Supreme Court has shown broad view about right to life includes right to live with human dignity in case of *Bandhu Mukti Morcha v. Union of India*⁶⁰ court stated that Article 21 is the heart of the fundamental rights and court gave expanded meaning of right to life is nothing but right to live with human dignity, free from exploitation. It includes protection of health and strength of workers, men and women and of the tender age of the children against abuse, opportunities and facilities for children to develop in a healthy manner and in condition of freedom and dignity.

Researcher identified that the Supreme Court has used the Article 21 of Constitution of India in very innovative manner and strongly recommended to the rights of the people of Indian country and a grand

⁵⁸. Dr. J. N. Pandey, "Constitutional Law of India" 44th edition 2007, Pub Central Law Agency, Allahabad, p. 231

⁵⁹. *AIR 1998 AP 302*

⁶⁰. *(1989)4 SSC, 62*

step was taken by the court in expanding the scope of article 21, when it argued that, right to life includes living with dignity of human being.

2. 6.4. Right to privacy

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can interfere anything concerning the above matters without the consent whether truthful or otherwise and whether laudatory or critical. If he does, he would be violating the fundamental rights which are ensuring by Article 21 of Constitution of India. Supreme Court has expressly in case of *R. Rajagopal v. State of T.N*⁶¹ that right to privacy or the right to be alone is guaranteed by Article 21 of Constitution of India.

In case of *State of Maharashtra v. Madulkar Narain*⁶² Supreme Court has been held that, Right to privacy is available even to a woman of easy virtue and no one can invade her privacy. In another case *Sujit Singh Thind v. Kanwaljit Kaur*⁶³ allowing medical examination of a woman for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of Constitution of India.

Similarly number of cases recognised as a part of right to life enshrined in Article 21 of the Constitution. In *Vishaka v. State of Rajasthan*⁶⁴, apex court held that, sexual harassment of women at work place was found to be against human dignity and violation of Article 21 of the Constitution. In *Bodhisattwa Gautam v. Subhra Chakraborty*⁶⁵, the court held that rape is a crime against the basic human right and violation

⁶¹. *R. Rajagopal v. State of T.N* (1994) 6 SCC 632

⁶². AIR 1991 SC 207

⁶³. AIR 2003 P&H See also *Sharda v. Dharmapal*, 2003 AIR SCW 1950

⁶⁴. AIR 1997 SC 3011

⁶⁵. AIR 1996 SC 922

of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim.

2.6.5. Right to Reputation

It is observed that, Supreme Court has shown broad view about right to life includes right to reputation. In *State of Bihar v. Lal Krishna Advani*⁶⁶ apex court observed that right to reputation is a facet of the right to life a citizen under Article 21. It takes within its sweep right to reputation. Right to breathe, Personal liberty⁶⁷ right to privacy⁶⁸. It has been reiterated that since right to reputation is a person's valuable asset and is a facet of his right under Article 21.

In addition to above many more rights have been derived from Article 21 Of Indian Constitution, against delayed execution, right against custodial violence, right against public hanging, hand cuffing are some important them and various issues like child welfare, corruption, poverty and starvation for weaker sections, religious freedom, freedom of speech, expression, welfare of women etc., also have been very widely discussed and brought with in the ambit of fundamental rights guaranteed by the Indian Constitution.

2.7. Right to Life with Human Dignity and Directive Principle of State Policy

Directive Principles of State Policy contained in scheduled IV of Constitution of India. The idea and novel features in the Constitution has been borrowed from the Ireland and copied from the Spanish Constitution. The makers of Constitution incorporated a few provisions in

⁶⁶ . AIR 2003 SC 3357

⁶⁷ . Pawan Kumar v. State of Haryana (2003), 11 SCC 241;, AIR 2003 SC 2987

⁶⁸ . shardav. Dharmapal, AIR 2003 SC 3450

the constitution with view Union and Governments must keep in mind while they formulate policy to pass a law. The idea of welfare State envisaged by our Constitution can only be achieved if the states endeavour to implement them with a high sense of moral duty. They lay down certain social, economic and political principles suitable to peculiar conditions prevailing in India⁶⁹. They impose certain obligation on the state to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy. These principles gave directions to the legislatures and the executive in India as regards the manner in which they should exercise their power⁷⁰. State has mainly concerned with the maintenance of law and order and the protection of life, liberty and property of the citizen of India.

Directive Principles of State Policy are not enforceable in a court of law, in spite of that, they are fundamental in governance of the nation. Directive Principles of State Policy are differing from the fundamental rights, which were enforceable in court of law. In case of *Confederation of Ex-servicemen and others v. Union of India*⁷¹ bench of C. K. Thakker observed that, apart from fundamental rights guaranteed by Constitution of India it is duty of state to implement the Directive Principles of State Policy which is provided in the scheduled IV of the Constitution of India.

Justice *Bhagwathi* expressed his view in *Francis Mullen v. Administrator; Union of Territory of Delhi*⁷² that, it is the fundamental

⁶⁹. DR. J. N. Pandey 'Constitutional Law of India' 44th edition, 2007, Pub, Central Law Agency, Allahabad, P 385

⁷⁰. Prof. M. P. Jain 'Indian Constitution Law' Sixth edition Reprint 2012, Pub, Lexis Nexis Butterworths Wadhwa, Nagpur P. 1485

⁷¹. *Confederation of Ex-servicemen and others v. Union of India SC 210, 1999*

⁷². Ibid

right of every citizen of the India assured that, right to life⁷³ means to live with human dignity i.e. free from exploitation and torture.

Right to life with human dignity enriched in Article 21 of Indian Constitution derives its life breath from the Directive Principles of State Policy particularly Articles provided that, Article 39 Clause (e) that the health and strength of workers, men and women and tender age of children are not abused and that citizens are not forced by economic unsuited to their age or strength; and

Article 39 clause (f) that childhood and youth are protected against exploitation and against moral and material abandonment and

Article 41 provides that The state shall, within limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want and

Article 42 provided that the state shall make provision for securing just and humane conditions of work and for maternity relief.

Therefore it must be included health and strength of workers, men and women and tender age of children are not abuse, opportunities and facilities for children to develop in healthy manner and freedom of dignity. These are minimum requirements for existing for live with human dignity. No one has right to deprive the natural rights which we called as inalienable rights i.e. by birth rights deprived without procedure of law. No States or any persons take any actions which will deprive a person of enjoyment of these basic essentials. Hence the Directive Principles of State Policy provided Article 39 clause (e) and (f), Article

⁷³. *Article 21 of Constitution of India*

41 and 42 are not enforceable by court of law. Denial of right to live with human dignity which enshrined in Article 21 Constitution of India, it will be treated as violating the basic human rights. Victims are entitled for remedy under Article 226 and Article 32 of Constitution of India.

It is the primary duty of state to provide protection of every citizen, along with that to preserve the human dignity through various facilities and conditions. Justice *S. Rajendra Babu* and *S. N. Phukan* has rightly observed in case of *S. S. Ahuwalaiya v. Union of India and others*⁷⁴ that, Article 21 of the Constitution stated that, the state to create a climate where members of the society belonging to different faith, caste and creed live together and therefore, the state has a duty to protect their life, liberty, and worth of an individual which should not be endangered. If any circumstance the state is not to do so then it cannot escape the liability.

Therefore in order to preserving human dignity the parliament has enacted number of Act i.e. *Minimum Wages Act, 1948, Equal remuneration Act, 1978, Rule employment Guarantee Act, 2005, Child Labour Act, 1986, Maternity Benefit Act, 1961* and other laws have progressively increase the concept of human dignity.

State playing the role of Paternity and maternity of the citizens, it is Constitutional obligation to look that; there is no infringement of fundamental rights of the citizens, especially for the weaker sections of the society. It is bound to the ensure observance of the various social welfare of the citizens. Both Central Government and State Government has to ensure all basic needs and facilities of life, Sanitation, Education, Drinking water, Food and other whichever required for development enhancement of human dignity.

⁷⁴. *S. S. Ahuwalaiya v. Union of India and others* 1997(232)

It is observed that, a plethora of rights have been held to be emanating from Article 21 of Indian Constitution, because of the judicial activism shown by the Indian judiciary.

In *BhagwanDass v. State of (NTC) of Delhi*, Supreme Court held mandated death sentence for honour killing i.e. killing of young men and women who married outside their caste or religion or community or in their same *gotra* or same village or thereby, dishonouring the parents or their case. The killing to the family or society members to a man or woman for marrying against parent's wishes, having extra-marital or pre-marital affairs, marrying outside one's caste or within the same *gotra* etc., in order to protect the social status and honour of the family.

Recently Supreme Court strongly condemned the practice of honour killing and intrusion of informal *panacahayat* taking law into their own hands and including in offensive activities which causes danger to the life of the person⁷⁵.

2.8. Constitutional Remedy on right To Life with Human Dignity

In the Constituent Assembly Debates *Dr. BabasheabAmbedkar* once said that, "If I was asked to name any particular Article in this Constitution as the most important- an Article without which this Constitution would be a nullity- I could not refer to any other Article except this one It is very soul of the Constitution and the very heart of it,"

Constitution provides number of fundamental rights which are most important for the progress and development of the human life. The most

⁷⁵. *ArumugamServai v. State of Tamil Nadu (2011)*

unique feature of Indian Constitution provides Article 32. Right to remedy is a fundamental right guaranteed to citizens of India under scheduled III is guaranteed. Right to constitutional remedy was created as one of the main fundamental right because the Constitution protects the rights of the citizens.

Article 32(1) provides that, “Guarantees the right to move the Supreme Court by appropriate proceeding for the enforcement of the fundamental right conferred by part III of the Constitution”.

It is crystal clear that, the Supreme Court has power to enforce fundamental rights in widest sense. It is important features that whenever there is violation of right to live with dignified life or any person or state denial and deprived such rights, aggrieved person can move the Court for appropriate remedy.

Article 32(2) confers power of Supreme Court to issue appropriate directions or orders or writ including writ in nature of *Habeas Corpus*, *Mandamus*, *Prohibition*, *Quo-warranto* and *Certiorari* for the enforcement any of the rights conferred by part III of the Constitution. Because, Court has enforceable fundamental rights particularly right to life includes right to live with human dignity.

Simply providing the Article 21 of Constitution of India i.e. right to life is meaningless unless there is effective machinery for enforcement of the right. Right to life including right to live with human dignity⁷⁶. If there is no remedy there is no fundamental right at all. Constitutional provisions made for the protection and preservation of right to life with human dignity.

⁷⁶. AIR SC 746

Constitution of India provides Constitutional remedies in case of violation of fundamental rights of the citizen or Any State or person denial and deprived the minimum conditions of dignified life of another person; aggrieved person can approach Supreme Court for enforcement of his rights. In addition to that, when there is infringement or violation of fundamental rights or rights guaranteed by law aggravated person get opportunity to file petition in a high court under article 226 of the Constitution of India.

2.9. Human Dignity and Social Justice

The preamble to our Constitution assures the Dignity of the individual and unity and integrity of the nation .The balance between liberty and dignity of the individual on the one hand and the security of nation on the other is a delicate one. Life means does not signify mere existence or continued drudgery through life. Its wider meaning includes the right to live hood desirable standard of life⁷⁷. Supreme Court stated in *OligaTellis v. Bombay Municipal Corporation*⁷⁸, that no person can live without the means of living or live hood. The right to live hood is a part of the constitutional right to life. The right to life with human dignity encompasses its fold, some of finer facets of human civilization which make life worth living.

The aim of the protection enriched in Article 21 of constitution is not only to ensure the human dignity of the person concerned, but to ultimately contribute for the achievement of social justice⁷⁹. In *Consumer Education and Research Centre v. Union of India*⁸⁰ the Supreme Court

⁷⁷. AIR 1995 SC 922

⁷⁸. AIR 1986 SC 180

⁷⁹. V. Parabrahmasastri "Right to Life and Personal Liberty (commentary and case-materials)", Pub. Asia Law House, Hyderabad, 1st edition, 2005, reprint 2010, P.2

⁸⁰. AIR 1995 SC 922

observed that, the preamble and Art. 38 of the constitution of India, the supreme law, envision social justice as its arch to ensure life to be meaningful and liveable with human dignity. Law is the ultimate aim of every civilized society as a key system in a given era, to meet the needs urge and commitment. The constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are corner stones of social democracy.

2.10. Dignity of Women in India

The notion of women dignity is connected with the gender equality and gender justice. During the National Struggle for Independence *Gandhi* gave a call for emancipation of women. *Gandhi* struggled hard for women's rights and their empowerment as he was of the view of that woman are competent like men. The preamble of Constitution of India promises to secure to all its citizens justice- social, economic and political.

Article 51(A) (e) clearly stated that, 'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounces practices derogatory to the dignity of women' Hence the apex court has held that the women should be treated with full dignity and any act, conducts and gesture of doing a work should not be derogatory to the dignity of women. It is the obligatory duty of state to protect and preserve the women dignity. Hence Constitution of India declared that, to renounce the practices derogatory to the dignity of women. Preamble of the constitution to promises the fraternity assuring the dignity of person.

In order to protect the women dignity the Constitution of India provides equality before the law⁸¹and strictly prohibited any type of discrimination grounds, 'State shall not discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth'⁸²

2.11 Women Dignity in Social Setup

2.11.1 Ancient Period

Status of women in a society should ideally start from the social framework. Social structure, cultural norms and value system are important determinates of women's roles and their position in society. A great leader *Pandit Jawaharlal Nehru* had rightly said; 'The status of women indicates the character of a country'. Emphasis of women dignity we can observe in the multi-cultural, multi-religious and social activities, which is most distinguished in the world. Since ancient period the concept of Indian women as in different parts of the country majority of devotees are worshiped Shakti Goddesses as *Lakshmi, Sara Swati, Parvati, Durga, Kali, JaiSantoshiMaa etc.*, and treated respectfully. We can observe the famous epic Mahabharata says that there is no guru like the mother. Indeed the women have a real first *Guru* of the house which she only teaches right and wrongs path for their children's.

2.11.2 Vedic Period

In earlier Vedic period a woman held a supreme and honoured position in the society, as well as in the household as mentioned in *Rig veda* and other scriptures. Men and women were treated equally and enjoyed freedom in all sphere of house affairs. Without a wife the home

⁸¹. Article 14 of Constitution of India 'The state shall not deny to any person equality before the law or the equal protection of the laws within the territory to India

⁸². Article 15 of Constitution of India

was not considered a home. She was the very centre of the domestic world and was its empress. It means she was enjoyed a superior to that of a man in the matter of performance of religious ceremonies. In the post Vedic period the position of women gradually stated declining. The wife status in the matrimonial home was less satisfactory. Moreover, *Manusmrithi* stated that husband is the lord and master of his wife; he must be adorned and obeyed even if devoid of all virtues.⁸³ *Manu* also suggested the ways and means to keep wife under subjugation. *Manu*, men have adopted those ways and cruelly exploited women through the ages. This kind of treatment of a wife is a natural consequence of *Manu's* theory that Marriage establishes the supremacy of the husband over the wife.⁸⁴ It seems that seeds of domestic violence were sown by *Manu* and *Dharmashastra*. Moreover, our society has adopted patriarchal system i.e., male dominated society women control under men, in the childhood age under her father, after the marriage she has custody under the husband and in the old age she has under custody of her son.

2.11.3 Medieval Period

During Medieval period the invasion of the country by the Muslims brought about deterioration in the position of women. Women were oppressed in feudal social order and patriarchal families. She had no place in the formal religious organisation and legal affairs of the community.⁸⁵ In British period the status of women in the society had reached the maximum degree of deterioration because of the evil socio-religious and sinner customary practices, which had crept in to the society⁸⁶.

⁸³. *Manusumrithi*, IX 26

⁸⁴. Dr. R. Revathi "Law Relating to Domestic Violence" New edition 2004, Pub Asia Law House, Hyderabad

⁸⁵. Dr. N.K.Charkrabarti and Dr. (Mrs.) ShachiChakrabarty, "Gender Justice" First edition 2006, Pub R. Cambray and Co. Private Ltd, Kolkata

⁸⁶. Ibid

2.11.4 Post Independent Period

After the Independence, efforts have been made to promote the welfare of women. The Constitution Provides several provision about protection of life and dignity of women. The Constitution guarantee that women in India should not be treated as inferior to the men, all are equally before the law irrespective of religion, race, caste, sex or place of birth.⁸⁷

In deed Indian women have much better position than other developing countries. Since the last few years' number of women developed carrier in the social workers, reformers as an leaders, like *Indira Gandhi, Mother Terisa, Vijay Lakshmi Panditetc.*, really we fell very proud because their greats achievements in the society. Recently number of changes took place in our society, women allowed to enhancing her carrier in the society. Women occupy a unique position in the society, she will be future creator of the family and entire future of the family depends upon her. Women perform different role as sister, wife and mother etc. It is duty of every person to protect her life and provide such circumstance as she enjoys dignified life. But, there is diversity of cultural, tradition, customs and norms, caste, religion as well as patriarchal system that influences gender discrimination in the society. She will be faces every minute problems and struggle for dignified life not only within the house, but outside the house. There are several factors dehumanisation of women's dignity at every sphere of her life.

According to International Research Centre for women identified that, 'entire India, social norms and practices are mostly governed by patriarchal ideologies'⁸⁸. Dignity of women always had been an object of

⁸⁷. Article 14, 15, and 16 of the Indian constitution

⁸⁸. www.Redressonline.com/2013/01/daughters-of-india-violated-and-abused/ assessed on 19/05/2015

gross and severe violence at the hands of male dominated society. Women always depend upon the men at every sphere of her life, since womb to tomb.

2.12. Human Dignity with Reference to Honour Killing

Honour killing is not a new word to Indian society. It is a murder generally committed against women or girl for actual or perceived immoral behaviour that is deemed to have breached the honour code of a household or community. It is a customary practices generally committed by the family members for dishonouring code of family, community. Recently Supreme Court has strongly condemned these customary ill practices. Honour killing means acts of violence, usually murder, committed by male family members against female members, most of the timewho are held to have brought dishonour upon the family. A woman can be targeted by (individuals within) her family for a variety of reasons, including: refusing to enter in to an arranged marriage, being the victim of a sexual assault, seeking a divorce even from an abusive husband or (allegedly) committing adultery. The mere perception that a woman has behaved in a way that “dishonour” her family is sufficient to trigger an attack on her life.

Every human life is precious and beautiful. It must be essential to protect and preserve life of human beings. The right to life denotes the significance of human existence for this reason it is widely called the highest fundamental rights⁸⁹.Our Indian Constitution provides fundamental rights in part IIIwhich are designed to protect and preserve the basic rights of individuals from the violation of right to life with human dignity. Right to life is the most precious fundamental rights

⁸⁹. *Indian Journal of International Law Vol. 51, No. 03 , July/ Sept. 2011, P. 408*

amongst all human rights. The concept of right to life and liberty as enshrined in Article 21 of the Constitution of India, has guaranteed number of fundamental rights to the citizen and non-citizens. The main intention of Constitution framer is to promote individual welfare as well as social welfare.

Right to life includes human dignity⁹⁰, which is universally protected by law. Honour killing crimes deprive the right to life which is valuable, inalienable right. Honour killing practice is nothing but, violation right to life, liberty and freedom of the person⁹¹. Right to life is fundamental right which guaranteed by the Constitution of India. It has been recognised by judicially, and constitutionally. In case of honour killing In order to preserve Honour of the family, the family member used to commit murder of the person; it means that deprived the life of person.

Honour killing violate the guarantee of right to life in national and international level. Right to life is the highest right any act which causes harm or deprived the life of someone's it would be amount to violation of fundamental right. Human life is protected by national and international instruments. Right to life is universally accepted that inherent dignity and inalienable right, no one has right to withdraw the life of human being under the heading of any customary practice. *The Universal Declaration of Human Rights, 1948* clearly stated that, *everyone has a right to life liberty and security of the persons*⁹².

In Article 21 of European Convention for Protection of Human Rights and Fundamental Freedoms, 1950 provides that '*every one's right to life shall be protected by law*' and *every person has right to liberty and*

⁹⁰. Ibid.

⁹¹. Article 21 of Indian Constitution of India "Noperson shall be deprived of his life, liberty or personal liberty except according to a procedure established by law"

⁹². Article 2 of the Universal Declaration of Human Rights, 1948

*security of person save in accordance with the procedure established by law*⁹³. It seems that even family members are not having right to deprived life under the name of custom i.e. honour killing or sati practice. In International Convention on Civil and Political Rights 1996 also provides that, ‘*every human being has an inherent right to life. This right shall be protected by the law and no one shall be arbitrarily deprived of such right*’⁹⁴. Researcher has found that, right to life with human dignity is signifies that basic rights which cannot be deprived by state or any person in the name of preserving honour of the family, that is fundamental rights which is provided to the all human beings.

Life of human being is most precious things no one can withdraws or taken away for protecting the honour of the family. Justice Field, observed that life means ‘something more is meant than mere existence. The inhibition against its deprivation extends to all those limbs and faculties by which the life is enjoyed’⁹⁵. In honour killing practice the family boy or the girl who does act against the desire of family member that act considered as dishonour the family, and members deprived the freedom, and exploited them by using anything with their life, sometime taken away life of both.

In *Francis Carolie v. Union Territory of Delhi*⁹⁶, justice Bhagwati also stated that, ‘life means right to life means right to live with human dignity and all that which goes along with it namely the bare necessities such as adequate food, clothing and shelter and facilities for reading and writing and expressing oneself in diverse forms, freely moving about

⁹³. Article 5 of European Convention for Protection of Human Rights and Fundamental Freedoms, 1950

⁹⁴. Article 6 of the International Convention on Civil and Political Rights 1996

⁹⁵. *Munn v. Illinois*, 1877 94 U. S. 113

⁹⁶. AIR 1981 SC 746, 753 (1981) SC

mixing and comingle with the fellow human beings further pointing out that inhibition would extend to all faculties by which life enjoyed'

Recently Supreme Court strongly condemned the practice of honour killing and intrusion of informal *panacahayat* taking law into their own hands and including in offensive activities which causes danger to the life of the person⁹⁷. Honour killing practice is purely violation fundamental rights of the person. It is an offence under the penal Code⁹⁸. Innocent young youths are being murdered in the name of customary practices.

Article 21 of Constitution of India include within its ambit Right to marry and choose the life partner of one's own choice. There are several incidents of honour killing taking place in our society for protecting, the dignity or honour of their own clan, community and family on ground of inter-caste marriage, marriage took place in same *gotra*. Honour killing practice is clearly violating basic inalienable fundamental rights of the person. Right to life guaranteed at the national and international level gets violated by customary practice. The law protect the right to life and dignity of person, but question is can an own family member i.e. mother or father or brother or sister or uncle etc.Protect life of individual in case of dishonour the family.

Right to life is includes a right to marry, in famous case of *Lata Singh v. State of Uttar Pradesh*⁹⁹the Supreme Court has observed that, 'India is free and democratic country and once person becomes major he or she can marry whosoever he /she like'. Not only in national legislation

⁹⁷. *ArumugamServai v. State of Tamil Nadu* (2011)

⁹⁸. U/S. 299, 302 Of the Indian Penal Code 1860

⁹⁹. *Lata Singh v. State of Uttar Pradesh* 2006, SC2522

there is prohibit from interfering in the life of another person, but also several international legislations provides to prohibits and preserve the right to marry out of choice. Right to life is applicable to universally all human beings irrespective of caste, community, religion and sex. National and international legislations provisions protect the life of human being, these provisions act as protective umbrellas against any violation of fundamental rights.

THE IDEA OF HUMAN RIGHTS IN ANCIENT INDIAN SOCIETY

THE IDEA OF HUMAN RIGHTS IN ANCIENT INDIAN SOCIETY

Swati Singh Parmar

Assistant Professor, Amity Law School, Amity University, Noida, Uttar Pradesh, India

Abstract

The idea that every individual, by the virtue of being a human, is entitled to a set of basic rights that are inalienable is fairly new, although this idea has its roots in various ancient cultures of the world. It was only after the two World Wars that the idea of human rights was centrestaged in the international arena. Human Rights were only then explicitly mentioned in a formal document, that we know as the Universal Declaration of Human Rights. The historical evolution of the human rights is complex as the idea of Human rights already existed either in oral or written form. Many concepts of religious or philosophical origin, when analysed carefully, would seem to be based on the ideals on which the Human Rights are based. Its evolution is the result of philosophical, spiritual, cultural and legal developments throughout the world history. The value of human dignity and belief in justice is found in almost all the religious texts or practices of the world. The inviolability of these fundamentals is stressed in the religious traditions of Hinduism, Buddhism, Judaism and others. The underpinnings of the modern day international human rights jurisprudence is actually influenced by the moral foundations that were laid by the practices of various religions across the world.

Keywords: Cyrus Cylinder, Natural Law, Human dignity, Dharma, Justice, Human rights

Introduction

The revolutions around the world- British, American, French, Chinese and Russian were developed around the concept of natural law and natural rights that later on came to be known as Human Rights. The struggle against discrimination, inequalities and injustice has been at the core of all the human civilizations. The early demands made by the people were for basic civil liberties like right to life, liberty and pursuit of happiness, and later demands for rights of higher order like the social, cultural and economic or the collective rights came to be realised.

The evolution of the Human Rights is closely linked to the developments that took place in the relationship of an individual and the society. The changes from the absolutist state to that of the liberal or the state of laissez-faire and then to the welfare or socialist state has aided in the evolution of the idea of the Human Rights. As the societies evolved, the masses demanded for physical safety and inviolability of the person and property. Eventually, the concept of 'welfare state' paved way for the demand of rights such as rights against the arbitrary action of the state. The ideals of human rights and fundamental freedoms, thus, started being used as a safeguard against the lawlessness as well as arbitrariness of the governments. Of late, human rights have been used as a parameter of measurement of how a State treats its people. Although international documents on human rights such as Universal Declaration on Human Rights are not legally binding, but their authority is unparalleled. And this is one of the reasons as to why the members of the international community unanimously are critical of the states that fail to protect their subjects from human rights abuses.

Although the Cyrus Cylinder is regarded as the earliest source of human rights in the academia, especially by the western thinkers, but many other thinkers regard Rig Ved, one of the four

canonical sacred texts of Hinduism, as the earliest document that mentions the idea of human rights. Many Pan-Indian authors and others as well regard a strong possibility in the roots of the today's Human Rights in the oldest texts of Hinduism, the most significant one being, the Rig Ved.

Human Rights in Ancient Indian Society

The earliest traces of the idea of Human Rights date back to more than 4,000 years. Rig Ved is considered as one of the oldest sources of Human Rights in the world. In the words of Lukman Harees,

“The earliest attempts of literate societies to write about the rights and responsibilities date back to more than 4,000 years to the Babylonian Code of Hammurabi. This Code, the Old and New Testaments of the Bible, the Analects of Confucius, the Quran and the Hindu Vedas are the five oldest written sources which address questions of people's duties, rights, and responsibilities [1].”

i) Human Dignity in Hindu Tradition

Human dignity is an integral part of Right to life, not only under the International covenants and conventions of Human Rights, but also at municipal levels. The Right to life under Article 21 of the Constitution of India includes, by way of wide interpretation, right to live with 'human dignity' as well. Human dignity finds an important place in various religious texts. In his book, Lukman Harees further mentions,

“Religion has always played a central role in the protection of the human rights and especially in the promotion of human dignity [2].”

This is easily done by the religion as it draws a moral code in which every human is treated as a child of God, thereby imposing a moral obligation on every human to respect others. Often, individuals who may not be so law-abiding, follow their religions firmly. Many times, religion as a firm moral code deters more individuals from a wrongdoing than law can do.

Hinduism by laying stress on universal brotherhood, rejection of hatred and emphasis on the spiritual and eternal aspect of all human, promotes and furthers the conception of human dignity.

ii) Idea of Human Rights in Rigveda

There are various theories on the origin and evolution of Human Rights. Positive law approach explains the origin and development of human rights from law while natural law approach explains it as being embedded in basic human nature. Similarly, the explanation for human rights finds place in almost all the religious and cultural traditions of the world [3]. There are religious theories that maintain that human rights developed within a moral context. Such moral ground as the foundational stone of human rights is found in the various ancient Hindu texts, one being, the Rig Ved.

‘Amritasya Putrah Vayam’
(Translation- ‘We all are begotten of the immortal’)
- Svetasvatara Upanishad

The idea of according a spiritual as well as divine value to a human being is peculiar of Hinduism. Hinduism does not regard human as mere material beings but an element of spirituality and

divinity is attributed to all the human beings. Man is treated as the 'son of the immortal', where immortal is used for the almighty. On this aspect, all human beings are kept on the footing. A basic sense of non-discrimination, which is the cross-cutting principle in all the today's international conventions on human rights, was pre-eminent in the ancient Hindu texts.

Rig Ved is considered as one of the oldest texts in any Indo-European language ^[4]. Evidences of philology and linguistics reveal that it most likely dates back between c. 1500 and 1200 BC ^[5]. References to different kinds of human rights that we find in various international instruments on Human Rights can easily be found in the texts of Rig Ved.

It is believed that every human body consist an aatma or the soul that travels from one life to the other. That way, a man of lower financial or social status may embody a soul which in earlier life embodied in a woman of affluent class. That is to say that the aatma had been connoted under Indian legal philosophy, an indiscriminatory stature. Nevertheless, it cannot be denied that there evolved social structure based on division of labour in the ancient Indian society that later transformed into a discriminatory caste system, the shackles of which exist even today. Although the ancient texts do not mention such discrimination; it essentially was the manifestation of the people and their misinterpretation of the ancient texts. Furthermore, aatma has another dimension that establishes a close connection to the idea of human rights-invisibility. Aatma is regarded as invisible, probably so that the human agencies become incapable of giving it a status based on any of the discriminatory consideration. This non-discrimination is a cross cutting principle in all the treaties, covenants and conventions on Human Rights.

RigVeda mentions about a primal man- purush- who destroyed himself to create the human society and from his body parts, four different varnas were created. When his body was offered at the primordial sacrifice, the four varnas came from his mouth (This class was accorded the status of a priest), arms (a warrior), thighs (a peasant) and feet (a shudra or servant). This marked the starting of varna system in the ancient India. But this varna system was devised for the need of division of labour in an evolving society. Later, human agencies misconstrued it, according to their own selfish needs, to be transformed into an inflexible and illogical caste system that prevailed for centuries. Even the Arya Samaj believes that the ancient vedic texts originally were casteless and non-discriminatory. They have maintained "a notion of dharma based on universal, rather than caste-specific, obligations to social values [6]."

'Aatma' that all the human beings embody is regarded as the integral part of the divine whole- 'parmaatma'- which is constituent of 'param' (penultimate) and 'aatma' (soul).

*"Ajyesthaaso Akanisthaasa Yete
Sam Bhraataro Vaavrudhuh Soubhagaya"*
-Rig Ved, Mandala-5, Sukta-60, Mantra-5

'No one is superior or inferior; all are brothers; all should strive for the interest of all and progress collectively.'

The caste-system that strongly held the social institutions of life in India would discourage one to believe that an element of 'equality' was inherent in Rig Ved. Mitra also affirms that Despite the immense powers that a king, Raja, had over his subjects in his empire, the Hindu texts recognised the fundamental sense of 'equality' by ruling that no one is superior or inferior, thereby bringing everybody at the same platform. This can also be inferred from the fact that

although the king of the land was awarded a powerful and significant stature, but his subjects could easily reach them and discuss their problems with the Raja in his 'darbar'. Even a common man could reach the highest authority of the state. For instance, a financially marginalised man, Sudaama, reaches out to meet his childhood friend, Krishna, who was now a Raja. There are many other such instances in history where a common man can meet the King without much difficulty.

Rig Ved talks about three rights that are civil in nature i.e. Tan (body), Skridhi (dwelling place) and Jibhasi (life), thereby relating to the right to physical liberty, right to shelter and right to life as we know them today.

Arthvar Ved also provides for Human Rights such as right to food and water.

*Samani Prapaa Saha Vonnabhagah
Samane Yoktre Saha vo Yunajmi
Aaraah Nabhimivaabhitah*

(Translation- "All have equal Rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together in harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and hub".

-Atharva Veda – Samjnana Sukta)

iii) Right to Happiness

The pursuit of happiness that was one of the fundamental rights sought for in the British Bill of Rights finds a special status in Hinduism. The right to happiness is considered to be the highest fundamental right. The holy prayer in Hinduism which is believed to be inspired from the Brihadāranyaka Upanishad is as follows:

*"Sarvepi Sukhinah Santu
Sarve Santu Niramayah
Sarve Bhadrani Pashyantu
Ma Kaschid Dukhabhag Bhavet"*

(Translation- Let all be happy
Let all be free from diseases
Let all see auspicious things
Let nobody suffer from grief)

Even the fundamental document of international acclaim on Human Rights, the Universal Declaration of Human Rights, is silent on right to happiness. Although, the right to live along with pursuit of happiness has been laid stress in the American Declaration of Independence.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness^[7]."

Further, a prayer finds mention in Taittareya Upanishad in the chapter- Sikshavalli which emphasises on happiness of entire mankind.

*Om Sahanavavatu
Saha Nau Bhunaktu*

*Sahaviryam Karavavahai
Tejaswi Navadhitamastu
Ma Vidmishamahai
Om shantih shantih shantih*

Right to happiness is also emphasised in the Kautilya's Arthashastra-

*"Prajasukhe Sukham Rajnah Prajanam cha Hite Hitam
Naatmapriyam Hitam Rajnah Prajanaam tu Priyam Hitam"*

(Translation- "In the happiness of the subjects lies the happiness of the King; in their welfare his welfare. The King shall not consider what pleases himself as good; whatever pleases his subjects is only good for him")

iv) The Concept of 'Dharma'

'Dharma' or 'Dhamma' is the key concept that has been accorded multiple meanings and that has no single word translation in any of the western languages ^[8]. It is a fundamental concept that is treated as a cosmic law and order that relates to the orders and customs that make life and a universe possible ^[9] and connotes duties, rights, laws, conduct, virtues and "right way of living ^[10]". The concept can be differently interpreted, for instance, in religious context, it can be used as to perform one's religious duties. It can also be taken as the performance of duties by all irrespective of their social, economic or cultural status ^[11]. It is on account of this dharma that the weak is protected against the strong. A fundamental sense of law, order and morality is maintained by dharma.

As per the ancient Hindu philosophy, the ideals of happiness, justice and social harmony can only be achieved through dharma.

A remarkable feature Hinduism is that it lays emphasis on duties in contrast to the rights. Hinduism does not see any right as absolute. It does not support the idea of rights being alienated to the concept of duties. Karma is considered as one's highest duty in Hindu tradition.

In Hinduism, it is often maintained that there is no word for 'rights' ^[12]. The closest word in Hindu tradition to the word 'rights' is *adhikar* which is used by Manu to describe a just claim or a right. In the words of Kana Mitra ^[13], "Dharma implies justice and propriety as does the word 'right' of the U.N. Declaration, although the connotation of a 'just claim' is not explicitly present."

Raimundo Panikkar ^[14] argues that the Hindu notion of dharma requires:

- That human rights are not only the rights of individuals or even humans,
- That human rights involve duties and relate us to the whole cosmos, and
- That human rights are not absolute but are relative to each culture.

Ancient Hindu philosophy lays as much stress on rights as on duties, and sometimes, even more. Even in the international instruments on Human Rights in the contemporary era, we do not find a mention of the duties along with the rights. Hindu philosophy believes that an individual can have an entitlement to a right only when he has fulfilled his duty or Karma.

Conclusion

Western thinkers are often attributed for their thoughts and theories to the making for the international Human rights jurisprudence. This view largely does not take into account the contribution of the non-western philosophies. And this in turn, poses a question on 'universality' of human rights that is emphasised time and again as the basic feature of the Human Rights. While studying Hinduism, one would find a strong foundational theory for the idea of Human Rights.

It is often maintained that there is an antagonistic relationship between the Hinduism and the ideas of Human rights, given the hierarchical system of caste that clinched the Indian society for ages. This perception about the status of human rights in ancient Hindu tradition seems to be biased and erroneous. What most thinkers ignore is the fact that a hierarchical caste system was essentially and purely a misinterpretation of the few classes of the Hindu society. There is definitely a room for the relation between the classical Hindu thoughts and the concept of Human rights. The concept of dharma or dhamma is a remarkable feature of Hinduism which is of unparalleled significance value. It is relatable to the idea of law, justice, duties and rights. Many other shlokas of ancient Hindu texts deliberate the concepts of equality, non-discrimination and right to happiness which are some basic human rights contained in almost all the international instruments on Human Rights. The ancient Hindu texts not only provide for traces of the ideas on the human rights but they do also lay special emphasis on the duties. This can definitely help in developing and enriching the International Human Rights jurisprudence, as in most of the international instruments on the subject, even today we do not find mention of fundamental duties, but only of the fundamental rights.

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FAMILY COURTS IN INDIA: AN ANALYSIS

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Family Courts in India: An Analysis

India has one of the oldest legal systems and practices in the world. It's law and jurisprudence stretches back to many centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. India is a land of diversified culture, local customs and various conventions which are not in opposition to the statute or ethics. People of different religions as well as traditions are regulated by all the different sets of personal laws in order to relate to family affairs. India is a vast country with the second largest population in the world, so naturally the numbers of married persons are also high. With the high number of married persons, marital disputes also increase due to various reasons and the majority come to the court for redressal. Family courts have a very crucial role to play in reducing the load of disputes on an overburdened judicial system, providing relief to litigants, who are forced to suffer prolonged delays in getting justice. Thus, this chapter deals with the origin and development of family courts in India and discusses how the family law is applicable in the process and functions of the family court. It also provides an overall view of the Indian family court systems.

3.1 History of Family Courts in India

The quality of family determines not only the health and happiness of the parties but also of the society at large. Unfortunately, today permanence and

inviolability of marriage has been eroded and breakdown of family relationship is common. Marital litigation is a traumatic experience in the lives of partners and their children. Apart from emotional problems, it creates many legal, social and practical complications. It is unfortunate that the only way available to parties to obtain relief from an unhappy and tolerable relationship is by subjecting themselves and their spouses to the hazards of ordinary court procedures. The breakdown of the family relationship of the parties, divorce laws are being liberalised everywhere. From 1955 when the Hindu Marriage Act was passed till date several amendments have been made to liberalise the grounds for divorce, coupled with that the courts have also construed and applied the provisions as to provide maximum relief with least hardship to any of the parties. The same is true with regard to other personal law statutes governing Christians, Parsis, and Muslims as well.

The process of settlement of matrimonial disputes, which includes divorce, separation, maintenance, settlement of matrimonial property and child custody, are very complex, expensive and time consuming. It is adversarial in nature involving a lot of mud-slinging. The pain and suffering of the parties already in agony are compounded, and by the time any relief comes from the court, the parties are physically, financially and emotionally wrecked and past their age of resettling in life.

Though the law could not alter the facts of life, it need not unnecessary exaggerate the hardships inevitably involved. Thus, in order to ensure that hardship is not unnecessarily exaggerated, we need to seriously reform the procedures. Just

as in medicine the agony of patient suffering from even the most dreadful and painful diseases can be mitigated by drugs, gentle nursing, love, care and sensitive handling of the parties in an informal manner can make the painful and embarrassing process less traumatic.¹

The movement to establish a family court in India was initiated by the late Durgabhai Deshmukh, the noted social worker from Maharashtra. After a tour of China in 1953, where she had occasion to study the working of family courts, Deshmukh discussed the subject with certain judges² and legal experts and then made a proposal to set up family courts in India to Prime Minister Jawaharlal Nehru.³ From the beginning the objective of establishing these courts was to provide speedy disposal of cases involving problems faced by women who were traumatised by marriage that had turned bitter. The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner with an approach ensuring the maximum welfare of society and dignity of women.

The Law Commission, in its fifty fourth report on the Code of Civil Procedure strongly recommended the need for special handling of matters pertaining to divorce. Consequent to these recommendations, the Code of Civil Procedure of 1908 was amended, and Order 32-A⁴ was incorporated in the Civil Procedure Code in 1976. This Order seeks to highlight the need for adopting a

¹ *Family Court Report on Working of Family Courts and Model Family Courts*, National Commission for Women, New Delhi. 2002, p. ii.

² Justice Chagla and Justice Gagendragadkar.

³ Archi Agnihotri & Medha Srivastava, 'Family Courts in India: an Overview', Legal Service India, <http://www.legalserviceindia.com/article/1356-Family-Courts-in-India.html>, Accessed on 19-08-2013.

⁴ Order 32A-CPC

different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement. However, not much use has been made by the court in adopting the conciliation procedure and the court continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails.

The immediate reason for setting up of family women organisations, welfare organisations and individuals for the establishment of special courts was for producing a forum for speedy settlement of family disputes.⁵Emphasis was laid on a non-adversarial method of resolving family disputes and promoting conciliation and securing a speedy settlement of disputes relating to marriage and family affairs.

The regular courts had been filled to the brim with civil disputes and could not be expected to provide expeditious relief to these harassed victims with their heavy workloads, the judges could not even be expected to display the sensitivity required in dealing with broken marriages, there are cases dealing with a broad spectrum of issues such as family matters and property which continue for generations. Such cases continue for an atrocious period of time, ranging from 7 to 30 years. In such a scenario, the channeling of cases to different courts set up especially for this purpose not only ensures their speedy disposal, but also ensures that the cases are dealt by experts specially set up for this purpose more

⁵ *Family Court: Report on Working of Family Courts and Model Family Courts*, National Commission for Women, New Delhi, 2002, p.1.

effectively.⁶ The saying that “justice delayed is justice denied” then becomes relevant to take into consideration.

The handling of custody matters is another problem which requires a human touch. In order to explore the possibility of a reconciliation, concerted efforts aimed at resolving the disputes may be through counselling were needed before sanctioning the breakup of the marriage.⁷ So a multi- disciplinary approach was felt necessary. The idea underlying the movement of family court is that ordinary courts with their conservative atmosphere cannot appropriately deal with family disputes in the proper spirit. This realisation led to the creation of family courts in India.

The Law Commission in its 59th report issued in 1974 had stressed that in dealing with disputes concerning the family, the court ought to adopt an approach radically distinguished from the existing ordinary civil proceedings, and that these courts should make reasonable efforts for settlement before the commencement of the trial.⁸ The code of civil procedure was amended to provide, for special procedure to be adopted in suits or proceedings relating to matters concerning the family. Gender-sensitised personnel, including judges, social workers and trained staff should hear and resolve all the family related issues through elimination of rigid rules of procedure.

⁶ Archi Agnihotri & Medha Srivastava, ‘*Family Courts in India: An Overview*’, Legal Service India, <http://www.legalserviceindia.com/article/1356-Family-Courts-in-India.html>, Accessed on 19-08-2013.

⁷ *Family Court: Report on Working of Family Courts and Model Family Courts*, National Commission for Women, New Delhi, 2002, p.8.

⁸ *Ibid*, p.1.

In any case a great deal of time of the civil courts was being consumed in family disputes which could be handled at much less cost of time and money by family courts. It was felt that those courts would, right from the beginning, adopt a radical approach to family disputes by attending counselling even before the commencement of the proceedings. Thus, the idea of segregating such cases and establishing a new institution of family courts within the judicial system found in favour with the authorities. However, the court continues to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. Hence a great need was felt in the public interest to establish family courts for speedy settlement of disputes. In 1975 the committee on the status of women recommended that all matters concerning the family should be dealt with separately.

This was followed by an All India Family Court conference held in 1982 wherein suggestions emerged that two issues need to be addressed.

- a. Divorce on the basis of mutual consent
- b. Divorce on the basis of irretrievable breakdown of marriage.

It was felt at that time that family courts should address specified problems like matrimonial home, custody of and provision for children, speedy disposal of cases, informality of procedure, etc. It was especially thought that lawyers should be prohibited from arguing matters in the family courts unless specific permission is taken from the court. In the year 1984, when the Bill was introduced in the parliament for being passed as an Act, statement of objects and reasons accompanying that Bill referred to the futility of the special procedure (order

XXXII-A) required to be adopted by ordinary courts in dealing with family matters and the need for the establishment of family courts. The statement of objects and reasons are:

- a) Provide for establishment of Family Courts by the State Governments,
- b) Make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million,
- c) Enable the State Governments to set up such courts in areas other than those specified in (b) above,
- d) Exclusively provide within the jurisdiction of the Family Courts the matters relating to:
 - i. Matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of a marriage or as to the matrimonial status of any person,
 - ii. The property of the spouses or either of them,
 - iii. Declaration as to the legitimacy of any person,
 - iv. Guardianship of a person or the custody of any minor,
 - v. Proceedings under Chapter IX of the Code of Criminal Procedure. (relating to order for maintenance of wife, children or parents)
 - vi. Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure need not apply.

- e) Provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the services of medical and welfare experts,
- f) Provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by a legal practitioner. However, the Court may, in the interest of justice, seek assistance of a legal expert as *amicus curiae*,
- g) Simplify the rules of evidence and procedures so as to enable a Family Court to deal effectually with a dispute,
- h) Provide for only one right of appeal which shall lie to the High Court.

Thus, the Family Court Act encouraged and empowered various state governments to set up Family Courts in all cities with a population of over one million people. The Department of Justice is the nodal department concerned with the administration of the Act.

Though the women in India demanded establishment of family courts in 1975, the government of India took ten years to pass the necessary legislation. Finally, the Family Court Act was passed in 1984 and was welcomed by all.

The Act was part of the trend of legal reforms concerning women, because of the pressure from various institutions lobbying for the welfare of women all over the country. The Act provides for a commencement provision which enables the central government to bring the Act into force in a state by a notification in the official gazette.

The backlog of cases of family matters pending with the various courts was gradually transferred to the newly established family courts thus reducing the existing load of civil courts. Thus the Act encouraged and empowered various state governments to set up family courts in all cities.⁹ In India, Rajasthan¹⁰ is the pioneering state with regard to the establishment and functioning of the family courts. It was established in Jaipur city far beyond court campus keeping in view the need of informal environment which is very much essential for the determination of disputes arising out of conflicts and tension among the family members. Sunder Lal Mehta was appointed by the Rajasthan High Court, the first judge in the Family Court. He was a devoted judge with the highest regards to the institution of marriage.¹¹ In Tamil Nadu, the family court was started in Chennai in 1988. Though the family court was enacted in 1984, in Kerala it was established only on 6th June 1992.

3.2 Establishment of Family Courts

Section 3 of the Family Courts Act, 1984, deals the establishment of family courts. The following statements of the Act provide the brief details of the establishment of family courts.

1. For the purpose of exercising the jurisdiction and powers conferred on a family court by this Act, the State Government, after consultation with the High Courts, and by notification.

⁹ Section 3, *The Family Courts Act*, 1984

¹⁰ The date of commencement of the first Family Court in India is January 1, 1986. It was established in Jaipur city in Rajasthan.

¹¹ P. K Bandyopadhyay, 'The Functioning of Family Courts: A Lesson from Rajasthan', In Vinay Chandra Mishra, (Ed.), *Indian Bar Review*, Vol XX(ii), Bar council of India Trust, New Delhi 1993, p.111.

- a. Shall, as soon as may be after the commencement of this Act, establish in any area in the state comprising city or town where the population exceeds one million, a family court.
 - b. May establish family courts for such other areas in the state as it may deem necessary.
2. The state government shall, after consultation with the High Court, specify, by notification, the total limits of the area to which the jurisdiction of the family court shall extend and may, at any time, increase, reduce or alter such limits.

The main objective of the family courts is to settle matrimonial disputes speedily by adopting simplified procedure. To achieve the objectives, the state government is put under obligation to establish family courts in the areas mainly in cities and towns, where the population exceeds one million. However respective state governments may also establish family courts in the areas where it is necessary. Subsection (2) of the Family Court Act says that the state governments are to consult their respective High Courts and specify the local limits of the area to which the Family Courts were to be established. Therefore the territorial jurisdiction of the Family Court is limited to that of a District Court or as the State Government may fix by notification in consultation with the High Court.

3.3 Constitutional Validity

The Act was questioned in various High Courts on the ground that the establishment of the family courts on the basis of population is discriminating

and violative of Article 14 of the Constitution of India.¹² India consists of villages rather than cities and their population rarely exceed a million. The rural masses around and the percentage of illiteracy and poverty are much more there. Matrimonial degradation and atrocities, or even breakups are just tolerated by the poor tortured women without redress.

The Division Bench of High Court of Bombay after giving exhausts reasoning held that establishment of Family Courts on population basis is not violative of Article 14 of the Constitution of India.¹³

In case of *Lata Pimple v. Union of India*¹⁴ the state government was under an obligation to establish family courts in the first instance in the metropolitan cities having a population of one million and above. This is a rational and intelligible difference made to secure aims and objects of the Act. The metropolitan cities having a population of one million and above is a place for various matrimonial disputes, It was further held that:

“It was noticed that the petitions under the Hindu Marriage Act could not be disposed of within a reasonable time and some matters remained pending for years together. It is with this object in mind the family courts have been established in the metropolitan cities where population exceeds one million. It is clear that what is decipherable and intelligible distinction in each class has been carved out having reasonable nexus with the aims and objects of the Act and in order to achieve these aims and objects in the first instance, family courts were

¹² K. Pandu Ranga Rao, *Commentary on the Family Courts Act, 1984*, Gogia Law Publications, Hyderabad, 2010, p. 15.

¹³ *Lata Pimple v. Union of India and others*, AIR 1993 Bom 255.

¹⁴ AIR 1993 Bom 255.

established on the basis of population. The Section cannot be challenged as being discriminatory and violative of Article 14 of constitution.”¹⁵

3.4 Present Position of Family Courts in India

In India, with the enactment of the Family Courts Act of 1984, there are 410 family courts in 2014 which have been set up throughout the country so far.

The breakup is presented in Table 3.1

Table: 3.1
NUMBER OF FAMILY COURTS IN INDIA
(AS ON 31.10.2014)

SI No.	Name of the State	Number of Family Courts functioning in the State
1	Andhra Pradesh / Telangana	27
2	Arunachal Pradesh	-
3	Assam	03
4	Bihar	33
5	Chhattisgarh	20
6	Delhi	15
7	Goa	-
8	Gujarat	17
9	Haryana	06
10	Himachal Pradesh	-
11	Jammu & Kashmir	-
12	Jharkhand	21
13	Karnataka	24
14	Kerala	28
15	Madhya Pradesh	31
16	Maharashtra	25
17	Manipur	04
18	Meghalaya	-
19	Mizoram	04
20	Nagaland	02
21	Odisha	17

¹⁵ AIR 1993 Bom. 255.

22	Punjab	-
23	Puducherry	01
24	Rajasthan	28
25	Sikkim	02
26	Tamil Nadu	14
27	Tripura	03
28	Uttar Pradesh	75
29	Uttarakhand	08
30	West Bengal	02
Total:		410

Source: Note by Department of Justice, State of Implementation of the Family Courts, Govt. of India

3.5 Functioning of Family Courts

3.5.1 Appointment of Judges

The aim of the Family Courts Act was preservation of the family. In the family court the role of a judge has been crucial for just, speedy and conciliated settlement of family disputes. The Act provided that only persons committed to the need to protect and preserve the institution of marriage should be appointed as judges. So selection of judges with appropriate qualification experience and commitment is very important in view of the discretionary powers vested with the judges of the family courts. The appointment of a judge is the main criteria for the establishment of family courts. The state government in consultation with the respective High Court may appoint one or more persons as judges of the family court, depending upon the necessity.

In *Shankar Kanojia and another v. Maya Bai*,¹⁶ the Division Bench of Madhya Pradesh High Court held that the Family Court cannot be said to have

¹⁶ AIR 1990 MP 246

been effectively established unless the judges of the courts have been appointed in accordance with the provisions of Section 4 of the Act. As per the notification of the Kerala High Court, the family court, judge is the first preceding officer of the court.¹⁷

Section 4 of the Family Courts Act contains provisions for the appointment and functions of judges, their qualifications, designation, age limit, the powers of the central government to frame rules regarding selection of judges, service conditions etc.

The process of appointment of presiding officers in family court, their background, tenure and training is crucial for the success of family Courts. Most appointments to family courts are made through the transfer of the district and sessions judges. There are several concerns that have been raised about this process. The ideology as well as procedures of regular civil and criminal courts are substantially different from those of a family court. Well set in an adversarial pattern of dispute resolution, judges have to adapt to the needs of high-strung and emotional litigants in family disputes. This transition is not easy. Some legal scholars argue that experienced senior level district judges should be appointed as family court judges as they would have a good grasp over family law and the rules of evidence and would also have the confidence to depart from set pattern and experiments with newer forms of dispute resolution.¹⁸ Another suggestion is that judges of all courts should be transferred to family courts at some point of their

¹⁷ *Ali Haji v. Alima, II* (1997) DMC 343.

¹⁸ Flavia Agnus, *Family Law: Marriage, Divorce and Matrimonial Litigation*, vol. II, Oxford University Press, New Delhi, p. 290

career. This would contribute to their overall development and provide them a good exposure to the ground level realities of women's lives.¹⁹

The duties of a family court judge to require a great deal of mental involvement, not just the knowledge of law and legal proceedings to change procedural rules. A tenure of a minimum of five years would be beneficial to the judge as well as to the court. It would give sufficient time to make concrete contributions towards bringing ineffective changes.

3.5.1.1 Qualification for appointment as Judge

The primary requisite for appointment of a judge of a family court is that he/she should have a qualification for being appointed as a district judge.

He/she should have at least seven years of service as a judicial officer in India or be a member of a tribunal or any post under the union or the state government may frame rules regarding other qualification for a judge in consultation with the chief justice of India. In pursuance of this provision, the central government notified rules regarding other qualifications for appointment of judges of the family court. Subsection 3(b) of Section 4 lays down that the person for appointment of judge must possess such "other qualifications" as the central government with the concurrence of the Chief Justice of India. The qualifications are (i) A post graduate in law with specialisation in personal Laws, or A post graduate degree in social sciences such as masters of social welfare, sociology, psychology/ philosophy with the degree in Law; and (ii) At least seven years of experience in the field work/research or of teaching in a government department

¹⁹ Ibid

or in a college/university or comparable academic institute with special reference to the problems of women and children, or Seven years of experience in the examinations and/or application of central or state laws relating to the marriage, divorce, maintenance, guardianship and other family disputes.²⁰

The rules laid down regarding 'other qualifications', includes legal/judicial/field work/research or teaching experience of not less than seven years has been required for appointment of judges. Furthermore the rationale of the family courts, the qualifications prescribed for appointment of judges are no longer restricted to legal/law qualification but also cover qualifications in social sciences.

3.5.1.2 Preferences for Appointment of Judges

In selecting persons for appointment as judges in the family court, every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; preference shall be given to women. Therefore, a person having an ideal family background, much worldly wisdom and practical approach to the problems are required for this purpose. Therefore, while selecting a person as a judge of a family court, his/her family background, professional expertise and service track record are

²⁰ Rule 2, *The Family Courts (other qualification for appointment of judges) Rules* 1998 passed by the Central Government in exercise of power conferred under section 22 (1), Family Courts Act, 1984.

very important. So the selection of judges for the family courts is very important and it will be beneficial to family court.

A person can exercise discretionary powers appropriately only when he has the needed maturity which comes from experience and personal qualities and a sense of commitment. Family disputes arise between spouses mostly due to lack of understanding, financial constrains, suspicious characters, cruel natures, egoistic temperaments, and such other factors. If a mediator or a family court judge tactfully and convincingly deals with the problems, the parties may reconcile and forget the dispute by adjusting themselves. Therefore a wise mediator is required for solving matrimonial problem.²¹This endeavour is required to be made by the judge of the family court. Thus the judge of a family court has to endeavor, first for conciliation between the parties²² so as to achieve the objectives of establishment of family courts.

The Family Court Act also intends that the family court should preferably have a woman judge because women are expected to understand the family problems well and can resolve the difference in a better way than a male judge. So in selecting judges for the appointment, preference shall be given to women.

²¹ K. Panduranga Rao, *Commentary of The Family Courts Act*, 1984, Gogia Law publications, Hyderabad, 2010, p. 21

²² *Raj Kishore Mishra v. Meena Mishra*, AIR 1995 All.

3.5.1.3 Age Limits

The Act prescribes sixty two years as the upper age limit for a judge of a family court. Subsection (5) of the Act says that no person shall be appointed as or hold the office of a judge of family court after he/she has attained the age of sixty-two years.²³ Therefore, if a working judge is appointed, he will hold the office of a judge of a family court till the attainment of the age of sixty two years and retirement is effected under the provisions of the Family Courts Act and Rules.

3.5.1.4 Powers of Judges

Family Court Judges are placed at the same level as district judge. Subsection (2) of Section 4 deals with the designation and powers of judges of the family court. The judges of the family courts are appointed by the state government in consultation with the High Court of the state. If more than one judge is appointed for a family court, one of them is designated as principal judge and the others as additional principal judge. Each of them can exercise all or any of the powers conferred on the family court by virtue of the Act. The principal judge being the head of the family court, will allot the day to day business of the court to the additional principal judge or other judges. Thus the principal judge has supervisory and administrative authority over the other judges. In the absence of the principal judge or in the event of any vacancy, the additional principal judge will be discharging his/her functions by assuming the powers of the principal judge.

²³ Family Court Act 1984, section 4 (5)

Family court judges are armed with additional powers to mould and adopt procedures in the interest of justice, a power which the judges of criminal and civil courts do not have. In addition, there are two points of departure from the practices adopted in regular courts: (i) judges, as a rule, do not have the help of lawyers as in regular courts; and (ii) they are to be aided by non-legal support systems, such as of conciliators and experts from other fields, who may not have adequate knowledge of the law.²⁴ The approach of the counsellors may at times be in variance with a judges' training and orientation in adjudication. A judge has to negotiate these hurdles while arriving at an amicable resolution of the dispute in a speedy and gender just manner. This is a challenge to most judges in the family courts. Many resolve the conflict by adopting a less legalistic and technical and more humanist approach to dispute resolution, but there are instances where family court judges seem to forget the purpose behind the additional powers granted to them and their call of duty.

In *Veena Devi v. Ashok Kumar Mandal*,²⁵ while claiming maintenance under Section 125, Cr. P.C, the woman could not state whether the ritual of *saptapadi* had been performed during the wedding ceremony. Due to this, the presiding judge of the family court disbelieved her evidence regarding the fact of her marriage. In the appeal, the Patna High Court commented adversely on the role of the family court in determining this issue and held:

²⁴ Flavia Agnus, *Family Law: Marriage, Divorce and Matrimonial Litigation*, vol. II, Oxford University Press, New Delhi, p. 292.

²⁵ 2000 Cri. Lj 332 Pat.

‘The principal judge, Family Court, Dhanbad, while exercising jurisdiction under Section 125 Cr. P.C was not required to decide the question of marriage like a matrimonial court. The object of such proceeding is only to prevent vagrancy and make a provision for destitute woman or child. The evidence adduced to prove the marriage should not have been viewed with such precision as the learned principal judge has done. If there was any evidence on record to bring out sufficient facts and circumstances to support the case of the petitioner in respect of her marriage, there was no justification for the learned Principal Judge of the family court to take a contrary view by adopting an altogether technical approach to the matter’.

This is an important ruling which emphasizes the two different roles a family court judge has to perform-a civil judge or district judge while deciding matrimonial petitions and suits for maintenance under the Hindu Marriage Act and a magistrate’s court while adjudicating issues of maintenance under Section 125 Cr. P.C which is summary proceedings. In these proceedings which are of a summary nature, the court does not have the authority to determine the validity of marriage like a civil or matrimonial court. A family court judge is called upon to keep these different roles in mind so that the interest of justice is not hampered in the process.

The higher judiciary has also repeatedly stressed upon the fact that matrimonial litigation causes extreme emotional trauma and has called upon family court judges and counsellors to be sensitive to the needs of litigants. It has been pointed out that the very purpose of establishing family courts was to have a

different atmosphere during the settlement of family disputes and family court judges have to take this into account and be lenient with respect to procedural technicalities. The overarching aim should be to create an atmosphere which is most conducive to an amicable resolution of the dispute, while protecting the rights of the weaker parties.

There is a concern beneath the wide discretionary powers bestowed upon the presiding officers in the family court. Since the Act is silent on this issue, individual judges have to grope their way around in the dark and find their own balance relying on constitutional mandate. While this is the norm, today there is also a realisation that the discretionary powers are generally used in accordance with the judges own socialisation, value system, exposure, and level of gender sensitisation. It is in this context that the selection of judges, their training, and sensitisation play an important role, lest the powers be used against women. A guiding principle for judges while using the discretionary power would be Article 15 (3) of the Constitution, which validates special provisions for the benefit of women and children. Principles of neutrality and equality can be sidestepped within this legal premise of constitutional justice. Family court judges need special orientation to evolve this framework.

3.5.2 Jurisdiction of Family Courts

Section 7 (1) & (2) explanation of the Family Courts Act of 1984 describes the kind of disputes over which the family court has jurisdiction. It is “Subject to the other provisions of this Act, a family court shall:

1. (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and
2. be deemed, for the purpose of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil courts in the area to which the jurisdiction of family court extends.

The suits and proceedings referred to in this Subsection are suits and proceedings of the following nature, namely:-

- (a) suits or proceedings between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) a suit or proceeding between the parties to a marriage with respect of the property of the parties or of either of them;
- (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship,
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceedings for maintenance;

- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
2. Subject to the other provisions of the Act, the family court shall also have and exercise-
- (a) the jurisdiction exercisable by a magistrate of the First Class under Chapter IX (relating to the order for maintenance of wife, children and parents) of the code of criminal procedure, 1973 (2 of 1974); and
 - (b) such other jurisdiction as may be conferred on it by any other enactment.

3.5.2.1 Territorial jurisdiction

The territorial jurisdiction of the family court is limited to that of a district court as the state government may by notification stipulate in consultation with the High Court.²⁶ The state government can also reduce or increase its territorial limits from time to time, depending on local factors and circumstances. The High Court and state government may confer the jurisdiction only to a limited area.²⁷

3.5.2.2 Subject Matter Jurisdiction

Section 7 (1) of the Act confers on family courts the jurisdiction and powers exercisable by district and subordinate civil courts in respect of civil suits and proceedings enumerated in the explanatory clause. All matrimonial disputes enumerated in the explanation and dispute relating to maintenance under Section 125, Cr. P.C is to be adjudicated in a particular district. This Act is aimed at

²⁶ Section 3(2), The Family Court Act, 1984

²⁷ Flavia Agnus, *Family Law: Marriage, Divorce, and Matrimonial Litigation*, vol. II, Oxford University Press, New Delhi, p. 275.

providing speedy and effective settlement of all types of matrimonial disputes under one roof, to all sections of people irrespective of caste, creed and religion.²⁸

The family court exercising jurisdiction in respect of suits or proceedings between parties to the marriage are for the decree of nullity of marriage, restitution of conjugal rights, dissolution of marriage, judicial separation, validity of marriage, declaration of matrimonial status of a person, disputes regarding property of either of the parties or joint property, injunction arising out of matrimonial relations, legitimacy of any person, maintenance, guardianship, custody and access to any minor.

In *Gettam Isrial v. M Siromani*,²⁹ it was held that, if the husband and wife think fit to live with some other woman and man respectively, without obtaining a divorce from the court as contemplated by law, their marriage would not get dissolved automatically and as such a suit for declaration of matrimonial status is maintained in the family court.

Explanation (a) to Section 7 of the Act, does not make any distinction regarding caste or religion. Hence, any such dispute arising between the parties to the marriage, whatever the caste or creed, can be brought before the family court for getting their right declared.³⁰

In *R. Durga Prasad v. Union of India*,³¹ the issue before the Andhra Pradesh High Court was whether the family court has jurisdiction to entertain a

²⁸ K. Pandu Ranga Rao *Commentary of the Family Courts Act, 1984* Gogia Law Agency, Hyderabad, 2010, p. 30.

²⁹ AIR 2002 A.P. 279

³⁰ *Reddy Anand Rao v. Thota Vani Sujatha*, AIR 2003, Noc. 258 (AP)

³¹ II(1998) DMC 45; 1998(2) ALD 25.

dispute where the fact of marriage itself is contested. In this case, a petition filed by a woman in a family court at Vishakapatnam stating so many facts and pleading invalidity of the marriage on the ground that the marriage was not according to her free will and consent, but by force and fraud and that the marriage was null and void. The husband challenged the jurisdiction of the family court to adjudicate a dispute concerning the validity of marriage. Rejecting their contention, the Andhra Pradesh High Court held that:

“It has to be born in mind that while interpreting a statute, the specific provisions are to be read and understood and have to be interpreted in consistence with the language and intention of the legal provisions, are clear and unambiguous, then there is no need to take the aid of the preamble or statement of objects and reasons. Further, in the interpretation of statutes caption given to the Act is of little significance as it is always the express legal provisions which operate and the adjudication has to be made only baring upon the said express provisions of the statute unguided by the nature of the caption of the Act, or the statement of objects and reasons or even the preamble there to”.

Here the reference was to the preamble of the Act, which uses the phrase ‘dispute relating to the marriage and family affairs’ and the explanation (a) in Section 7(1), which uses the phrase ‘a suit or proceedings between the parties to a marriage.’

It cannot be construed that the dispute with regard to the very existence of marriage cannot be a subject to adjudication by a Family Court under the Family

Courts Act, 1984. The words “Settlement of dispute relating to marriage” takes in not only the matters of an admitted marriage, but also a dispute with regard to the very existence of the marriage or otherwise of a marriage is also a dispute relating to marriage.

The family court is deemed to be a civil court for the purpose of exercising jurisdiction under Subsection (1) of Section 7 as a district court or a subordinate civil court as the case may be to which its jurisdiction extends.³² The provisions of the Civil Procedure Code are made applicable to the family court while dealing with the suits and proceedings under Subsection (1) and while adjudicating the proceedings under chapter IX of the Cr. P. C. before it, the provisions of the Cr. P. C. and Criminal Rules of Practice are applied. Thus, the family court has civil as well as criminal jurisdiction while entertaining the matters envisaged in Subsection (1) and Subsection (2) of this Section

In *Satyabhama v. Ramachandran*,³³ it was held that while exercising jurisdiction under Section 7 (2) (a) of the Act and disposing of applications filed under chapter IX of the code of criminal procedure, the family court acts as a criminal court and not as a civil court and when revision filed against the order passed by the family court is to be numbered as revision petition (Family Court) and to be disposed of. Where the marriage was solemnised under the Hindu Marriage Act and registered under the Hindu Marriage Act and, it would not affect the jurisdiction of the court for entertaining divorce petition.

³² *Shyni v. George*, AIR 1997 Ker 231.

³³ 1 (1998) DMC 298.

In *Anitha Abraham v. Jacob Oommen*,³⁴ where the petition is filed for appointment of a guardian for the property of the minor, the civil court has jurisdiction since family court has no jurisdiction to entertain an application to appoint a person as guardian of property of the minor.

The term 'family' used in the Act does not include disputes between siblings. A partition suit filed by two sisters against their brother was rejected by a family court in Hyderabad. On appeal, it was argued that since the plaintiffs are women and since the Act was enacted for the benefit of women, the suit is maintainable before the family court. It was also argued that the word 'family' is not defined under the Act and hence the meaning used in common parlance must be adopted. It was held that since the Act is beneficent in nature, every dispute arising in the family, not necessarily only between the husband and wife, must be entertained and the interpretation has to be liberal in this respect. But the Andhra Pradesh High Court rejected this contention and held that family court has no jurisdiction to entertain disputes between brothers, sisters and parents regarding property. The court commented that the object and scope of the Family Court Act are confined to disputes arising out of matrimonial relationship. It is not for the court to expand its jurisdiction by imparting anything which is not stated in the Act.

The *Manasi Anirudha Pusalkar v. Anirudha Ramachandra Pusalkar*,³⁵ it was held that as the dispute between major daughters and their father would come within the scope of a dispute arising out of matrimonial relationship. A suit for maintenance filed by the major daughters under Section 20 of the Hindu

³⁴ 2004 (2) Marri L J 743.

³⁵ 11 (2002) DMC 477.

Adoption and Maintenance Act was rejected by the family court in Pune on the ground that it was not a dispute between parties to a marriage. But the Bombay High Court held that the same is maintainable under the Family Courts Act. The Division bench commented that, as noted in the preamble of the Act, the family court is a court for resolving dispute relating to family affairs and for matters connected therewith. Hence a suit for proceedings for maintenance by daughters against their father will certainly fall within the purview of clause (1) of the explanation to Section 7 of the Family Court Act.

Family courts do not have jurisdiction to appoint guardians to property of a minor. This jurisdiction is specifically excluded in the case of *Susila Naik v. Judge of Family Court*.³⁶ Where the family court had appointed the mother as the guardian of the minor and the grandmother as the guardian of the minor's property, the Orissa High Court set aside the order. Explanation (g) contained in sub-Section (1) of Section 7 of the Act is regarding suit and proceedings in relation to guardianship of the person or the custody of or access to any minor. Therefore, dispute falling within the purview of Guardians and Ward Act, 1890 and the Hindu Minority and Guardianship Act, 1956 also are entertained only by the family court where there is a family court. It is to be noted that the jurisdiction of the Civil Court in respect of disputes relating to appointment of guardian for minor's property is excluded from the jurisdiction of the family court. Therefore, the family courts do not have jurisdiction if the question

³⁶ 11 (1997) DMC 235 Ori.

involved related to the appointment of a guardian in respect of property of a minor whether under personal law or statutory or testamentary guardian.³⁷

In *Narayana v. Pushparajani*,³⁸ the Kerala High Court in the matter of appointment of guardian to a destitute minor and permission to remove the child from the territorial jurisdiction of civil court held, that it relates to custody of or access to a minor by a guardian, which comes under clause (g) of explanation to Section 7 (1) of the Family Court Act as such the petition is required to be presented before the family court.

3.5.2.3 Jurisdiction related to Property Disputes

The clause (c) of explanation to Section 7 of the Family Court Act 1984, specifically deals with property disputes. It contains provision for settlement of disputes in respect of property of the parties to a marriage. These disputes normally arise where the decree of divorce is passed. The disputes should be related to “property of the parties” or of either of them. For the family court to exercise its jurisdiction, two conditions must be satisfied. Firstly the said dispute between the parties to the marriage only; and secondly, the dispute should be in respect of the property of the parties of either of them. Both these conditions must be satisfied before the family court can take cognizance of a suit or proceedings under the Act, in respect of property matters.³⁹ Therefore, it is clear that the family court has no jurisdiction to entertain and try a suit or proceedings claiming a property by persons other than the parties to the marriage. Further the property

³⁷ *Ranjit Chohra v. Savitha Chobra*, 1991 (2) C.L.J. All. 483.

³⁸ AIR 1991 Ker. 10.

³⁹ Justice P.S. Narayana, *Law Relating to Family Courts*, Universal Law Publishing Co, New Delhi, 2013, p. 38.

in dispute should belong exclusively to the parties or either of them. So family court has nothing to do with the general partition of property between the members of a joint family.

If a person other than the parties to the marriage has an interest in the said dispute, the family court has no jurisdiction to adjudicate the dispute. The parties to the marriage cannot claim right in a property, in which third parties also have interests before the family court. So the family courts have no jurisdiction to adjudicate disputes between persons other than the parties to the marriage and the property which does not exclusively belong to the parties to the marriage or either of them. Therefore the suit filed by the wife against her husband for partition and separate possession of her share in respect of ancestral and the joint family property is not maintainable in the family court, admittedly apart from them others who are not parties to the marriage also have an interest in the said property.⁴⁰ Similarly suit filed by daughters against their father for partition is also not maintainable as they are not parties to a marriage.

The jurisdiction of family court has been expanded to all issues concerning property between the spouses, even beyond the scope of matrimonial status, contest over the right of residence in the matrimonial home, protective orders and injunctions restraining entry of a spouse, economic settlement, sale of matrimonial home and other property and distribution of proceeds between the spouses and children, division of property upon divorce, return of valuables and properties given at the time of marriage, etc. are issues which arise during a

⁴⁰ *Genu v. Jalabai*, 2009(1) HLR 521

matrimonial dispute.⁴¹ Family courts have the jurisdiction to entertain these disputes either in the course of the matrimonial litigation or as separate proceedings.

In *Shyni v. George*,⁴² a suit was filed by the wife against her husband for recovery of cash and valuables given at the time of marriage to the husband and father-in-law. The complaint was rejected by the family court at Ernakulam on the ground that it does not have jurisdiction to entertain an issue against the father-in-law since he is not a 'party to the marriage' as stipulated by explanation (c) to Section 7 (1) of the Family Courts Act. The court directed the wife to amend her suit and delete the claim against the father-in-law or in the alternative, the court would proceed on the basis that the claim was only against the husband. In an appeal against this order filed by the wife, the Kerala High Court held that the dispute is related to marriage and family affairs between the spouses and hence falls clearly within the purview of the family court. The court explained that a suit for partition in which a party to a marriage claims a share in the property of her husband, which he holds along with the various other members of the joint family would be totally different from a case where a wife files for recovery of her exclusive property against her husband and someone else who is holding the property on her behalf like the father-in-law in this case.

⁴¹ Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation*, Vol. II, Oxford University Press, New Delhi, 2011 p. 277.

⁴² AIR 1997 ker 231.

A later decision of the Kerala High Court in *Devaki Antharjanam v. Narayanan Namboodiri*⁴³ confirmed this position and held that if a property belongs not only to the parties to the marriage, but to others as well, a suit for partition of such property cannot be brought within the purview of family courts. However, in respect of property disputes as provided under clause (c) to the explanation, the mere existence of matrimonial relationship or plea to the side effect would not render the suit maintainable. In addition to the matrimonial relationship the dispute shared be related to the “property of the parties or of either of them”. If the property in dispute does not exclusively belong to the parties to the marriage or either of them, then, notwithstanding the matrimonial relationship in the plaint, or even the existence of the matrimonial relationship being admitted, the suit is not maintainable.

Another issue has been regarding the claim of divorced Muslim women in respect of the matrimonial home and disputes over such property. In *A. Mannan Khan v. Judge of Family Court*,⁴⁴ the wife had instituted proceedings in the family court regarding her right and title to the matrimonial home. The husband challenged it on the basis that after divorce, she ceased to be a wife and hence the family court cannot entertain the said suit. On appeal, the Andhra Pradesh High Court held that the expression ‘the parties to a marriage’ would include divorced spouses and not just parties whose marriage is subsisting. Further, mere severance of the relationship between the husband and wife could not be said that

⁴³ AIR 2007 Ker 38.

⁴⁴ AIR 2001 AP 163.

they were not parties to the marriage and the suit by ex-wife before a family court for absolute ownership over matrimonial house maintainable.

In *K.A. Abdul Jaleel v. T.A Shahida*⁴⁵ the Supreme Court confirmed the above view and held that the family court has jurisdiction to adjudicate over property disputes between divorced couples. In a suit filed before the family court at Ernakulam, the wife contented that since her money and valuables were used for the purchase of properties, the husband had agreed to transfer the properties to her name through an agreement. But when the relationship between the parties became strained, the husband pronounced *talaq* and dissolved the marriage. Thereafter he refused to transfer the properties on the ground that the agreement was signed by him under threat and coercion. When the wife approached the family court for deciding the issue, the husband contented that as per explanation to Section 7 (1) of the Family Courts Act, the court only has jurisdiction to settle the property dispute between the ‘parties to a marriage’, which would mean parties to a subsisting marriage. The family court rejected this contention and held that it has jurisdiction to entertain issues related to property between a divorced Muslim couple. The dismissal of his appeal by the High Court, the husband approached the Supreme Court. While dismissing the appeal, the Supreme Court held that the family court had the power to decide property matters between spouses even when the marriage is not subsisting. The Apex Court commented: “It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning is described with explanation

⁴⁵ AIR 2003 SC 2525; 2003(4) Bom. Cr. 498.

(c) to S. 7 (1) of the Act would frustrate the object wherever the Family Courts were set up.”

In another rating, *Manita Khurana v. Indra Khurana*⁴⁶ the Delhi High Court has held that a dispute between the mother-in-law and daughter-in-law in respect of the property exclusively owned by the mother-in-law is not maintainable in the family court, despite the claim that the same constitutes the matrimonial residence under the Domestic Violence Act. Hence proceedings filed by the mother-in-law were held to be not transferable to the family court.

3.5.2.4 Jurisdiction of High Court

As per Section 7 (1) (a) and (b) of the Family Court Act, the jurisdiction of the ‘district courts’ was transferred to the family court. But the legislation did not clearly exclude the original matrimonial jurisdiction exercised by the High Court. This, defective drafting of the Family Court Act led to great confusion and ambiguity during the initial phase and became a matter of contradictory judicial interpretations. The first decision on this issue was delivered by a single judge of the Bombay High Court, in *Kamal v. M. Allaudin v. Raja Shaikh*⁴⁷ which held as follows: “Even assuming that the High Court may not be described as the district court, it can certainly be held that it was exercising the same powers and the same jurisdiction as the District Court if one were to exist in the city of Bombay prior to the establishment of the city civil court”. In that sense, the High Court was entertaining suits between Muslim, Parsi and Jews and even Hindus when the

⁴⁶ Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation*, Vol. II, Oxford University Press, New Delhi, 2011, p.283.

⁴⁷ AIR 1990 Bom 299.

dispute did not fall within the confines of the Hindu Marriage Act and was doing so to the same extent as the district court would have done. Taking away that jurisdiction and vesting it in the Family court by enacting the Family Courts Act, the Legislature cannot be said to have taken any step which comes in conflict with its inherent jurisdiction under the letters patent which is meant to be exercised in the absence of any other law (Para 64), undoubtedly, this court is the superior Court and its jurisdiction cannot be lightly tinkered. New dimensions of public interests and social reform are emerging, taking us in the direction of fulfilment of the obligations arising under Chapter IV of the Constitution of India (the reference was to the mandate of social reform reflected in Part IV- Directive Principles of State Policy). This court cannot be over-sensitive and feel touchy over loss of its jurisdiction to entertain certain kinds of suits which cannot in any manner come in conflict with its position as the superior court and a Court of Appeal (Para 65). This view was in conformity with the spirit behind the enactment of the Family Courts Act, i.e., to make matrimonial litigation less formal and more speedy irrespective of persons religious affiliations.

But in *Kanak Vinod Mehta v. Vinod Dulerai Mehta*,⁴⁸ it was held that the established rule that a “statute should not be construed as taking away the jurisdiction of the court in the absence of clear and unambiguous language to that effect”. This principle enshrined in the judgement of Indian and English Courts. The principle applies with even greater vigour when the statute purports to take away the jurisdiction of a superior court such as a High Court.

⁴⁸ AIR 1991 Bom 337: 1 (1992) DMC 403.

Later full bench of the Madras High Court gave a judgment holding that the High Court on the original side is vested with the jurisdiction to deal with matters under the Indian Divorce Act and Section 7 and 8 of the Family Court Act do not oust this jurisdiction of the High Court. The Bombay High Court also gives a ruling that the jurisdiction of the High Court on its original side is not ousted by any of the provisions of the Family Courts Act and the High Court shall continue to exercise the jurisdiction vested in it under the letters patent and other laws, notwithstanding the provisions of Section 7 and 8 of the Family Court Act, 1984.⁴⁹

In *Kanak Vinod Metha's* case, a question came before the Division Bench of Bombay High Court whether by an establishment of family court, can the jurisdiction of the High Court cease by virtue of clause (a) of Section 8 of the Family Court Act. The court held that the original jurisdiction of High Court does not cease. The Family Court does not take away the jurisdiction of the High Court in respect of all types of suits mentioned in the explanation to Section 7 (1) of the Act.

The special Bench of High Court of Madras, in *Dr. Mary Sheila v. Dr. Vincent Thamburaj*,⁵⁰ affirmed that the family court as well as the High Court on its original side will have concurrent jurisdiction in respect of matters falling under Section 7 (1) of the Family Courts Act. In this case, the family court had awarded an ex parte decree on a petition filed by the wife for declaring her marriage null and void. The husband challenged the decree on the ground that the family court did not have the jurisdiction to entertain matters under the Indian

⁴⁹ *Harindrar Kaur V. Narendra Singh*, 11 (1992) DMC 623.

⁵⁰ AIR 1991 Mad. 180.

Divorce Act as the jurisdiction lies to the High Court. The special Bench held that it cannot be disputed that the family court in Madras was established under Section 3 of the Family Courts Act. Consequently, the jurisdiction to adjudicate over matters listed under the explanation to Section 7 (1) of the Act has been transferred to family courts. The ruling reaffirmed the concurrent jurisdiction of High Courts and family courts over issues concerning Christian marriages. Hence the *ex parte* decree awarded by the family court was held to be valid and binding.

In *Munnalal v. State of UP and another*, the Bombay High Court took the view that family court has no jurisdiction to entertain the matters which are exclusively coming under the jurisdiction of the High Courts. Any High Court has the jurisdiction to transfer cases from one family courts of another under Section 22, 23 and 24 of the civil procedure code.⁵¹

3.5.2.5 Exclusion of Jurisdiction and Pending Proceedings

Section 8 of the Family Courts Act excludes the jurisdiction of civil courts in matrimonial matters and of criminal courts in respect of maintenance under Section 125 of the Cr. P.C. After the establishment of family courts in a district, the jurisdiction of District Judges and subordinate judges in matrimonial cases ceases. Where family courts are established, all cases falling under Section 7 of the Act have to be filed only in the Family court and the suit and proceedings already pending before the civil courts automatically stands transferred to the family court for settlement. After such transfer being effected, the provisions of

⁵¹ AIR All 189 (DB).

the Family Courts Act shall apply and the cases are decided as per procedure of the family courts.

In *Marya Thresa Martin v. E. Martin*,⁵² the Kerala High Court held that when a family court is set up, the district court has no jurisdiction to entertain matrimonial disputes. In another case it was held that once the family court is set up, in respect of matter enumerated in explanation to Section 7 (1), the family court will exercise exclusive jurisdiction.⁵³ In *M.D.Pansur Ali v. Hafia Begum*,⁵⁴ the Gauhati High Court held that after the establishment of the family court, no magistrate within the jurisdiction of the family court is competent to exercise any jurisdiction under chapter IX of the Cr.P.C.

The Kerala High Court made the observation that the district court can also execute the order passed by the Family Court provided no family court is established in that area, but when a family court has already been established in the area, the district court has no jurisdiction to execute the order of the Family Court.⁵⁵ In *Sailaja v. Koteswara Rao* held that, the exclusion contemplated under Section 8 is only limited to the district where a Family court is already constituted under the Family Courts Act, in which the case, the jurisdiction of the civil courts in such district in respect of the matters which are mentioned in the explanation to Section 7 of the Act get ousted. But in places where family court is not constituted, then the said exclusion contemplated under Section 8 is not applicable to the civil

⁵² AIR 1994 Ker 264.

⁵³ *Sanjaykumar Sharma v. Vidya Sharma*, AIR 2003 Ori 89.

⁵⁴ *Maria Teresa martein v. E. Martein*, AIR 1994 Ker. 264.

⁵⁵ AIR 2003 AP. 178.

courts, which are functioning in such places. In such cases, the local civil courts will continue to exercise the jurisdiction in respect of all matrimonial matters.

3.5.3 Conciliation and Counselling in Family Court

The institution of marriage and the family continues to experience pressure of the changing socio-economic forces in society. The spread of urbanization, the joint family system began to disintegrate, giving place to a unitary system. With this the family life changed new pressures began to manifest in relationship in the family. In the case of family disputes counselling play a major part to bring the two parties together or to accept the decisions of the court, interim or final, offering justice to the parties concerned. Social workers with their training can play a vital role in the process of counselling in family courts.

The term conciliation means to bring about a rapprochement or settlement between parties. It is a process in which a third party assists the parties to resolve their disputes by agreement.⁵⁶ It is a compromise settlement with the assistance of a conciliator. It is considered a higher level task and requires competence and ability of high order, including the capacity to practice the situation correctly and then convince the parties for a settlement.

In this process the counsellor needs the ability of persuasion, and empathetic understanding. It is an alternative method of dispute resolution and an attempt at preserving the institution of marriage. Under the Family Courts Act, counsellors are expected to carry out the conciliation process. The counsellors,

⁵⁶ Ashwine Kumar Bansal, *Arbitration and ADR*, Universal Law Publishing Co, Delhi, 2007, p. 19.

guided by the principles of objectivity, fairness and justice should assist the parties in an independent and impartial manner to arrive at an amicable settlement, considering the rights and obligation of the parties. The counsellors are supposed to make proposals for a settlement of disputes, based on the preference made by the parties. They offer a range of choice for resolving the disputes. The conciliator is supposed to act in an independent and impartial manner while facilitating an amicable settlement between the parties, he/she is to observe objectivity, fairness and justice and has to give due consideration to the right and the obligation of both parties.⁵⁷ So conciliation is the best mechanism to resolve family disputes.

Litigation does not always lead to a satisfactory result. It is expensive in terms of time and money.⁵⁸ Its adverse nature does not change the mind-set of the parties and it ends up in bitterness. Conciliation and mediation are not only cost and time effective, they preserve the relationship between the parties by encouraging communication and collaboration.⁵⁹ Maintenance of peace and harmony is the paramount consideration in resolving family disputes. The Indian family is strong, stable, close, resilient and enduring. Conciliation can help to preserve this character of the Indian family and reform and complement the formal dispute resolution mechanism.⁶⁰

⁵⁷ Section 67, *The Arbitration and Conciliation Act*, 1996.

⁵⁸ The formal dispute resolution process is procedure oriented and therefore it consumes a lot of time and money.

⁵⁹ Vini Singh, "Compulsory Mediation for Family Disputes?", *The Indian Arbitrator*, Vol 2, issue 9, Sept. 2010, <http://arbitrationindia.com/html/publiocations.htm>, Accessed on 15-05-2013.

⁶⁰ Ibid.

Conciliation and counselling are the special and unique features of the Family Courts Acts, 1984. The Family Court Act prescribes conciliation with the dominant purpose of ‘preserving the institution of marriage’ and ‘promoting the welfare of children’. The statement of objects and reasons to the Act reads: “That family courts be set up for the settlement of family disputes where emphasis should be laid on conciliation and achieving socially desirable results”. In the appointment of judges the Act specifies that “every endeavour shall be made to ensure that persons committed to the need to perfect and preserve the institution of marriage and to promote the welfare of children are selected.”⁶¹

Conciliation is a more personalised process than adjudication. It is not impersonal distanced like the formal judicial process.⁶² As such it is important that both of the parties to the dispute feel comfortable in the presence of the conciliation officer. However, in the formalised conciliation process there is no scope for such considerations. The family court judge’s role is very important one, though he is the judge by his official position like any other civil judges, duty is to cast on him to protect and preserve the interest of marriage and promote the welfare of the children of the parties to the dispute by the process of conciliation and counselling in association with medical and social welfare agencies and other experts.⁶³ Judges plays the dual role of conciliator and judges as contemplated in the Family Courts Act, when a judge who is in position of power and following the guidelines of the Act, has been chosen as a person

⁶¹ Section 4(4)(a), The Family Court Act, 1984.

⁶² D. Nagasaila, “Family Courts: A Critique”, *Economic and Political weekly*, August 15, 1992, p. 1735.

⁶³ K. Panduranga Rao, *Commentary on the Family Courts Acts*, 1984, reprint edition, Gogia Law Publications, Hyderabad, 2010, p. 56.

committed to the cause of preserving the institution of marriage, there can be a strong temptation to settle as many cases as possible. This could often result in compromising the interest of the parties.⁶⁴

The preamble to the Act specifically refers to promotion of conciliation. This is further supported by Section 9 (1) which says that “in every suit or proceedings, endeavour shall be made by the family court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings and for this purpose a family court may, subject to any rules made by the High Court, follow such procedure as it may deem fit,⁶⁵ and appears that there is a reasonable possibility of settlement between the parties for such period as it think fit, is necessary for taking the required measures for bringing about the settlement. These provisions clearly imply conciliation.

Section 6 (1) merely state that “the State Government shall, in consultation with the High Court determine the number and categories of counsellors, officers and other employees required to assist a family Court in the discharge of its functions and provide the family court with such counsellors, officers and other employees as it may think fit”. Thus, appointment of counsellors is indirectly indicated in the Act. The Act does not provide for the appointment of conciliators as such, unless it is assumed that counselling

⁶⁴ D. Nagasaila, “Family Courts: A Critique”, *Economic and Political weekly*, Aug. 15, 1992, p. 1736.

⁶⁵ Section 9(1) *The Family Courts Act*, 1984.

subsumes conciliation and that the task of conciliation will be performed by the counsellors. By the same token, it could also be assumed that where as counselling, as is generally understood would be performed by the counsellors, conciliation work will be performed by the judges themselves.⁶⁶ The Act is ambiguous on this important point. It is ironical that the Act while declaring that one of its objectives to promote conciliation in matrimonial and family disputes it does not even envisage a role to conciliators,⁶⁷ even if it is assumed that the term counsellors, officers and other employees used in the Act will include conciliators. The Act fails to draw a sharp distinction between the role of counsellors and conciliators.⁶⁸

The Family Court Act does not provide for institutionalised conciliations either in the public sector or in the private sector. In Japan, conciliation connected to the court is known as public sector conciliation. It includes a conciliation committee consist of a judge and two counsellors, one of whom is a woman. A private sector conciliation is on the other hand is not connected with the court and is purely voluntary and unconnected with the process of the court. In people's Republic of China, conciliation units consisting of three or five neighbours visit the couples having marital problems and try to put in an effort to settle them. These units are voluntary in character and have no judicial power. They represent the concern of the community for the well-being of the family. Family courts in

⁶⁶ Jamwal, N Have, Family courts lived up to expectations. Mains stream, Vol. XLVII, No. 12, March 7, 2009.

⁶⁷ B. Sivaramayya, "Family Courts: An Appraisal", in Ratha Varma (Ed) *Family Courts in India: An Appraisal of strength and Limitation*, Inter India publications, Delhi, 1997.p.33.

⁶⁸ Ibid.

India do not contemplate institutionalised conciliation either connected with the court or disassociated with the court.

A criticism voiced against conciliation is that it offers too little, too late, because the process starts after the marriage has virtually broken down. To avoid this, there should be some mechanism by which the couples are encouraged to approach NGO's immediately on problems developing in their relationship before it became too late.

Conciliation, speedy settlement, non-adversarial approach, multidisciplinary strategy to deal with family disputes, informal and simple rules of procedure, gender justice are supported to be the cornerstones of the philosophy of the Family Court Act.⁶⁹ The whole structure of family courts rests the twin pillars of counselling and conciliation. The counsellors are required to not only provide counselling but to bring about reconciliation and mutual settlement whenever feasible.⁷⁰

Section 23(2) Hindu Marriage Act, 1955 which contains similar provisions provided that before proceedings to grant any relief under this Act, it shall be the duty of the court in the first instances, in every case where it is possible to do consistency with the nature and circumstances of the case, making every endeavour to bring about a reconciliation between the parties.

Similarly, Section 89 of the Civil Procedure Code (Amendment) Act, 1999 directs the courts to identify cases where an amicable settlement possible, formulate the terms of such settlement and inform the observations to the parties

⁶⁹ Jamwal, N, "Have family courts lived up to expectations", *mainstream*, vol XLVII No.12, March 7, 2009.

⁷⁰ Ibid.

in disputes. Where the court comes to the conclusion that mediation is the appropriate mode of settlement, it may itself act as a mediator and “shall effect a compromise between the parties. So conciliation is a very effective method of family dispute resolution. It empowers the parties to deceive an agreement which meets their specific needs.⁷¹

A similar stipulation regarding settlement can also be found in Order 32A, Rule 3 of the Civil Procedure Code. The concern of the legislature while enacting the Family Courts Act has been to bring about reconciliation or in the alternative, an amicable settlement. The purpose of the enactment appears to be to avoid contested litigation and to bring about a speedy resolution of the dispute. This provision also recognised the fact that the presiding officer may not have the time and expertise to get into counselling sessions which require time, skill, and patience.

Counsellors have been awarded a high position within the Act. The position of a counsellor within the court premises was a new concept and both judges and lawyers had to reconcile with it. In most states, counselling has remained external to the judicial forum; the mandatory provision of counselling is followed in a cursory manner and their role is confined to the task of ascertaining whether it is possible to reconcile the dispute and save the marriage. As the state governments, in consultation with their respective High Courts, were to provide counsellors to assist the judges in the discharge of the functions. There is wide disparity in the procedures adopted for appointment of counsellors, their

⁷¹ Section 73, *The Arbitration and Conciliation Act*, 1996.

qualifications and remunerations, the role and position awarded to them and the counselling techniques adopted by individual counsellors.

The Andhra Pradesh government initially did not provide for the appointment of counsellors, and judges were burdened with the task of counselling, which is time consuming and cumbersome. Since 2005, counselling has been introduced in family courts under the State Legal Service Authority and the parties are referred to counsellors. Help of NGOs who offer counselling service is also sought, when required. Under the rules framed by the Tamil Nadu government, counsellors are appointed only for a period of three months and have a very limited role.⁷² Thus, when stretch for a period of time which is longer than this, the aggrieved person has to adjust with new counsellors and their story has to be refilled several times.⁷³ But recently, trained personnel are appointed as counsellors and they are assigned tasks such as ascertaining the issues of children in custody and negotiating divorce settlements. In April 2006, the Madras High Court started a counselling centre along with a psychology centre and a children's complex in the family court.⁷⁴

In Karnataka, there is no bar against appointing lawyers as counsellors. So instead of a diminished role within the family court structure, the lawyer's role has been enhanced. Though the counsellors are appointed from a list forwarded to the High Court by the presiding officer annually, this task is carried out by the clerical staff and it is very easy for any lawyer to get himself/herself appointed as

⁷² *The Family Court (Tamil Nadu Rules) 1987*, Section 5 (2).

⁷³ Archi Agnihotri and Medha Srivastava, "Family Courts in India: An overview", Legal service India, www.legalserviceindia.com/article/1356, Accessed on 03-02-2014.

⁷⁴ *The Family Court (Karnataka Rules), 1987*, Section 8.

a counsellor. The information gathered by the counsellors in the course of attempts for reconciliation shall be treated as confidential. The counsellor shall not disclose to others or be compelled to disclose such information. There are no mechanisms for monitoring the work of the conciliators, either at the High Court level or at the governmental level.

West Bengal adopts another pattern regarding the appointment and tenure of counsellors. Section 23 to 27 of the rules framed by the Calcutta High Court in 1990 deal with the counselling process. It stipulates that counsellors will be appointed by the High Court in consultation with one or more professionally activated experts in family and child welfare. Preferably working with a recognised institution of social sciences or social work,⁷⁵ and persons having a master's degree in social work with two years in family counselling will be eligible for appointment as counsellors.

As compared to other states, the counselling process is far more integrated in Maharashtra. This is due to an experiment conducted in the city civil court in 1980. Faced with a huge backlog and stalemates in matrimonial disputes, the judge who was assigned matrimonial matters introduced a process of optional counselling, and invited various NGOs in the city to participate in this experiment. The Departmental Head of Family and Child Welfare of the Tata Institute of Social Work were invited to coordinate this venture.⁷⁶ The success of this experiment has led to these councils being awarded a high status when the

⁷⁵ Ibid., Section 27.

⁷⁶ Flavia Agnus, *Family Law: Marriage, Divorce and Matrimonial Litigation*, vol.II, oxford University press, New Delhi, 2011, p. 301.

Maharashtra Government framed rules under the Family Courts Act in 1988. This experiment, served as the basis of formulating further rules to make counselling an integral part of the family courts in the State. Due to the earlier experiment, as well as the elaborate rules framed under the Act, counsellors are awarded a respectable position as officers of the court in Maharashtra. The selection interviews are conducted by judges of the High Court and they hold a permanent post of Class I gazetted officers.⁷⁷ But even this model has its own drawbacks. The permanency of tenure brings about its own set of problems. This seems to be the only non transferable position within the family court, but on the positive side, the office of marriage counsellors has been a serious effort on the part of the state government to bring in non-commercial support to litigants in family courts. The counsellors have been able to effectively carry out various important functions which arise in the course of matrimonial litigation. Converting a contested divorce petition into a petition for divorce by mutual consent, negotiating financial settlements at the time of divorce, acting as court commissioners to conduct on the spot surveys and inventories, home visits and school visits to study the environment of the child while ascertaining custody issues, negotiating a consensus regarding access to non-custodial parent, etc., have been important functions which the marriage counsellors have been able to carry out in Maharashtra.⁷⁸ They have also been instrumental in setting up child access rooms within the court, where supervised access to the non-custodial

⁷⁷ Flavia Agnus, *Family Law: Marriage, Divorce and Matrimonial Litigation*, vol.II, oxford University press, New Delhi, 2011, p. 301.

⁷⁸ Ibid, p. 302.

parents are possible. Issue of emotional crises during matrimonial litigation have also been an important concern for the counsellors.

Since they are appointed on a permanent basis and are full time employees, judges can refer the matter to them at any stage for further negotiations and settlements and to carry out supervisory functions

The role of the counsellors is not limited to counselling but extends to reconciliation and mutual settlement wherever deemed feasible. A good number of cases can be resolved by way of proper counselling. In about three fourth of the cases, the quarrel starts with very simple issues. The initial fault may either relate to the husband or the wife. Such disputes and differences can be worked out with proper and competent counselling.⁷⁹

Notwithstanding the important role of counsellors, it has been observed that some of the family courts do not even have any counsellors, and in good number of Courts, the counsellors keep on changing frequently. Each time the woman meets a new counsellor, she has to explain her problems all over again, with no continuity in discussion. Many of the counsellors are just part time and are not properly trained. Proper selection and training of the counsellors is of crucial importance for efficient and competent delivery of justice. As is expected, it is the counsellors who take up the cases at the first stage, proactive role of the judge has helped in resolving the dispute. The present rules or practices, however,

⁷⁹ Namita Singh Jamwal, "Have Family Court lived up to Expectations"? *Mainstream*, vol XL VII, No. 12, March 7, 2009.

do not permit the judge to personally counsel the parties when the case has come up for trial.⁸⁰

Since the emphasis under the Act is on counselling, it is reasonable to assume that almost all cases in the first instance will be referred for counselling. As such, the work load in relation to counselling is expected to be substantial which cannot be handled properly by a few counsellors. As a matter of fact, counselling proceeds through two stages, the first stage is inquisitorial in nature, and the second is advisory. The first step in any counselling would be to develop a broad understanding of the case. The counsellor needs to go into the history and the circumstances of the case. The counsellor needs to identify the main and subsidiary causes of conflict, and develop a full understanding of the personalities of the parties, etc. The counsellor would then proceed to the second stage advising the client. In other words he/she would suggest as to what course of action would be in their interest. Therefore, every family court should have a full-fledged counselling centre consisting of professionally qualified counsellors.

All cases should be routed through this centre, in case the government feels that this would involve too much expense, then alternately, some NGOs may be identified for the purpose and they could be strengthened through appropriate funding. The family court should maintain liaison with these NGOs and keep effective channels of communication. This would be a positive step forward towards the institutionalisation of counselling.

⁸⁰ Namita Singh Jamwal, "Have Family Court lived up to Expectations"? *Mainstream*, vol XL VII, No. 12, March 7, 2009.

Compulsory conciliation under Section 12 of the Industrial Dispute Act, 1947 has played a very vital role in establishing and maintaining industrial harmony by preserving relationship.⁸¹ The success of compulsory conciliation is very important for resolving family disputes. It not only reduces the backlog of cases, but will also provide substantial justice to the parties, particularly in the Indian context where the family structure is such that members of the family are too interdependent.

3.5.4 Procedure of Family Court

The concept of family essentially implies that the traditional adversarial procedures are not suited for the amicable settlement of family disputes. This means that different rules of procedures are to be devised. Thus, the rules of procedure should be worded simply and should indicate the whole range of procedures from the commencement of an action to its conclusion, including means to enforce judgments and orders; procedure should be so flexible as to cover diverse problems of familial conflict are covered; the standard forms to meet all situation should be drafted; pleadings should stay away from the traditional adversary approach, pre-trial process should be laid down, designed to provide dignified means for parties to reconcile their differences and to reach amicable settlement without the need of trial, free advice should be made available as to right of parties as well as their responsibilities and obligation and where children are involved, steps for immediate protection of their interest and rights should be

⁸¹ Vini singh, "Compulsory Mediation for Family Disputes?" *The Indian Arbitrator*, vol. 2, issue 9, September 2010, [http://www. Arbitration india.com/htm.Publications.htm](http://www.Arbitrationindia.com/htm.Publications.htm), Accessed on 12-9-2014.

taken, and issues should be determined without any prejudicial delay.⁸² The language, the conduct, documents and legal representation should be simple without any technicalities.⁸³

The preamble of the Family Court Act of 1984 itself indicates the obligation on the Family Court to make every endeavour to assist the parties in arriving at a speedy settlement of disputes relating to marriage and family affairs. Section 9 of the Act envisages the method adopted for settlement of disputes. Section 9 of this Act states that a duty is cast on the family court to make endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings. If the family court feels that there is a reasonable possibility of a settlement between the parties, the proceedings have to be adjourned for a reasonable period to enable the parties to effect such settlement.⁸⁴

The role of judges is very important in the settlement disputes in family courts. Though he is the judge by his official position like any other civil judge, duty is also cast on him to protect and preserve the institution of marriage and promote the welfare of the children of the parties to the dispute by the process of conciliation and counselling in association with medical and social welfare agencies and other experts. Therefore the proceeding of the family courts is informal at initial stage. The judge of the family court has to assist and persuade the parties in arriving at an amicable settlement as a person interested in the

⁸² Paras Diwan, *Family Law*, 8th ed, Allahabad Law Agency, Delhi, 2008, p.281.

⁸³ *Ibid.*, p.282.

⁸⁴ *The Family Court Act*, 1989, Section 9 (2).

welfare of the parties. The Kerala High Court emphasised the same principle that Section 9 (1) is similar to Section 23 (2) of the Hindu Marriage Act, 1955.⁸⁵

In a family court appeal, the Karnataka High Court observed that both Sections 9 (1) of the Family Courts Act and Section 23 (2) of the Hindu Marriage Act refer to the duty of the court to bring about reconciliation between the couple. Failure of the court in complying with such duty renders the proceedings illegal.⁸⁶

The family Court is not expected to act in a biased manner in resolving family disputes. Section 9 of the Act imposes a duty on a family court to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings.⁸⁷ Since one of the main objectives of the family court system is to encourage and enable parties to go into a process of conciliation, failing which, the family court judge should be able to pass consent orders if parties are able to come to some settlement, without any formality of formal hearing or trial.⁸⁸

According to Section 9 (3) of the family court Act, the family court is conferred with power to adjourn the proceedings at any stage, for any length of time if it appears to the Family Court that there is a reasonable possibility of a settlement between the parties. The pre-trial documentation of the pleadings

⁸⁵ *Dr. Sini v. Suresh Jyothi*, AIR 1996, Ker. 160.

⁸⁶ *H.S. Uma v. G.K. SumanthArya*, 1994 (2) C.L.J.411.

⁸⁷ *Sarala Sharma v. State of Rajasthan*, AIR 2002 Raj 30.

⁸⁸ Paras Diwan, *Modern Hindu Law*, 22nd ed, Allahabad Law Agency, Faridabad, 2013 p. 233.

should be such that issues between the parties are clearly defined, this will help in avoiding frivolous litigation, encourage pre-trial debate and settlement.⁸⁹

3.5.4.1 General Procedure

The procedure prescribed under Section 10 of the Family Court Act deals with general procedure and powers of the family court. The State High Courts, Central and State Governments are conferred with powers to frame rules for proper functioning of the family courts to achieve the objectives of the Act.

For the purpose of dealing the matters, the family court act as civil courts⁹⁰ and can apply the procedure laid down in the Civil Procedure Code and any other related law in addition to the rules framed by the High Courts, Central and State Governments. So also the provisions of Cr.P.C are made applicable to the family court in regard to matters relating to maintenance of wife, children and parents.⁹¹ For this purpose the family court will exercise jurisdiction of the first class magistrate.

The family court can also lay down its own procedure to facilitate proper and speedy settlement of disputes.⁹² Thus the following types of procedure are made applicable to the family courts for the settlement of disputes. Civil Procedure Code, Cr.P.C and Procedural rules framed by the High Court, central government and respective state governments.

⁸⁹ Paras Diwan, *Modern Hindu Law*, 22nd ed, Allahabad Law Agency, Faridabad, 2013 p. 233.

⁹⁰ Section 7(1), The Family Court Act, 1984.

⁹¹ Section 7 (2) (a) of The Family Court Act, 1984 (Chapter IX of the code of criminal procedure, 1973 (2 of 1974).

⁹² Section 10 (3).

Therefore the family courts are expected to adhere to simple and practicable procedure either in combination of or any of the procedures laid down in the Act.

The working procedures of the family courts are such that rules of evidence need not be followed rigidly. It means that the documents submitted as part of a dispute need not be prepared in the framework or format, provided in the other Acts. To achieve the objectives of the enactment, the family court need not stick to the rigid rules of proof through documentary evidence, examination of witness, admissibility, relevancy of evidence, etc. and can lay down its own simple procedure through administrative orders.⁹³

The disputes can be briefly stated and can be substantiated during the course of discussions. The statements of the parties concerned need not be recorded in writing in advance. It is sufficient to record them in brief. Formal evidence can be briefly recorded through an affidavit. These procedures are at variance with the practices generally followed in other courts. The decisions arrived through conciliation or on the basis of interim orders issued by the family court are not subject to appeal or revision.

The High Court is empowered to make rules regarding the case of working hours, venue of sitting and procedure for attempting settlement.⁹⁴ In respect of additional qualifications for appointment as a Judge of the family court, the central government is given the power to frame rules with the

⁹³ K. Pandu Ranga Rao, *Commentary on Family Courts Act*, 1984. Gogia Law Agency, Hyderabad, 2010, p. 62.

⁹⁴ The Family Courts Act, 1984 Section 21.

concurrence of the Chief Justice of India.⁹⁵ The state government is empowered to frame rules after consulting the High Court regarding the matter of the service conditions of family court Judges and the terms and conditions of the association of counsellors and officers, payment of fees to experts whose assistance is sought by the court.

Appeals against the decisions of the family court can be made on merit to the High Court; appeals so made are heard by a bench of at least two High Court Judges.

Procedure in the family court is not like that in ordinary civil court. In the proceedings of the family court, the court should be a little lenient, accommodating and allowing the parties to cross examine so that an effective adjudication could be made by dissolving the dispute.⁹⁶ Thus simplified procedure is prescribed in the Act to make the settlement easier and less complicated for the parties with the assistance of counsellors, welfare organisations and other persons who are connected with the Family Courts.

In Mannu's case⁹⁷ the Allahabad High Court examined the provisions of the statute in different angles and made the observation regarding the procedure in the family court:

Family Court is a court which decides the disputes in exercise of the state's judicial power conferred on it by statutes in the judicial manner and declare the rights of the parties. Parties before the family court are entitled to be

⁹⁵ The Family Courts Act, 1984 Section 22.

⁹⁶ *Shiyakami v. Shanmuga Sundram*, 11 (2007) BMC 78.

⁹⁷ AIR 1989 All. 189 (D13).

heard in support of their case and they are also entitled to adduce evidence in order to prove their claim. They can cross examine each other and adduce evidence. The family court is obliged under law to settle and decide the dispute on the basis of the evidence produced by the parties. The family court has all the attributes of a civil court and it satisfies all the ingredients of a court. It has been declared by Section 7 of the Act to be a district court or subordinate civil court to which provisions of the code of civil procedure and code of criminal procedure has been applied by Section 10 of the Act.

The provisions encoded in the civil procedure code are based on principles of natural justice and fair play, hence all the provisions of civil procedure are made applicable to the proceedings before the family courts within the meaning of Section 10 of the Family Court Act.⁹⁸ Limitation Act is also applicable to the proceeding under the Family Court Act.⁹⁹

If on the basis of the oral hearing and discussion, it is felt that the two parties to the disputes require the assistance of relatives and friends in order to arrive at a conciliation settlement, such relatives and friends are also called in the conciliation room or are issued notice for the next sitting in case they are not available that day. The same process of discussion for conciliation is repeated in the presence of such friends and relatives and an attempt is made for the two parties to agree to live as husband and wife in harmonious condition. In case, such conditions and circumstances are found useful and can protect the dignity of both parties, they are encouraged to come together with the help of the Judge,

⁹⁸ *Boby Devi v. Kiranpal Singh*, 2003 ALHC 1407.

⁹⁹ *Deepamala Sarma v. Mahesh Sarma*, 1 (1992) DMC 374.

friends and relatives, whenever such a situation of mutually agreeable decision has been arrived at, the statements of the two parties are formally recorded and a decision is made. In the absence of conciliated statement, the parties are directed to proceed with the case for legal sanction in accordance with the rules or procedures. The process of reconciliation may be continued even during this period.

It has been found that when the judicial process is about to complete or end, or has just ended and before an order is passed, the two parties have already agreed for conciliation. Their statements are recorded and an order on the basis of their mutual decision and conciliation is being passed.

In the event of failure of all attempts at conciliation, the judicial proceedings are set in motion. The civil suits are decided on the basis of written statements by the parties. However, such a practice is not resorted to under Section 125 of the Cr.P.C. The two parties recorded their evidence based on their cross examination, available petition, replies to the petitions and the orally articulated points. Sometimes the parties themselves bring questions to be asked from the other side. At the end of the process of evidence, the two parties are given an opportunity to present their arguments either in writing or orally. It has been noticed that a large number of parties present their arguments in writing. In case it is found that the two parties are not able to come together during the process of conciliation appears remote or that providing an opportunity to the couple for living together may create more problems in their lives and jeopardise

the lives of children, the two parties are advised to seek divorce on the basis of mutual consent.

In any case, in arriving at the settlement or in finding the truth about facts made out or mentioned by the parties the family court has full freedom to lay down its own procedures irrespective of the provisions of Cr.P.C. Even the rules of admissibility and relevancy under the Indian Evidence Act can be disregarded by the family court if, in its opinion, it is necessary to receive as evidence any report, statement or information. Evidence of a formal character can be given by affidavit and it may be read as evidence before a family court, but if the parties so desire the court shall summon and examine such persons as to the fact contained in the affidavit.¹⁰⁰ The recording of the oral evidence of a witness is also simplified by requiring only a memorandum of the substance of the witness's deposition duly signed rather than a verbatim recording. At the option of either party, the family court is obliged to hold its proceedings 'in camera', the court also on its own can decide to hold the proceeding in camera.

The judgment of a family Court contains a concise statement of the case, the point of determination, the decision and the reason for the same. The Act stipulates that a party is not entitled to be represented by a lawyer without the permission of the court. However invariably the court grants this permission and usually it is a lawyer who represent the parties. The most unique aspect regarding the proceedings before the family court are that they are first referred to conciliation and only when the conciliation proceedings fail to resolve the issues

¹⁰⁰ Section 16.

successfully, the matter is taken up for trial by the court. The counsellors are professionals who are appointed by the court. Once a final order is passed, the aggrieved party has an option of filing an appeal before the High Court. Such appeal is to be heard by a bench consisting of two judges.¹⁰¹

3.5.4.2 In Camera Proceedings

In camera means proceedings which are conducted in the chambers of the proceedings officer and not held in the open court hall (behind closed doors). The trial by in camera means the trial is restricted only to the parties of the proceedings and none else except the judge. The proceedings in camera are to be maintained in strict confidence.

According to Section 11 of the Family Court Act, 1984, “In very suit or proceedings to which this Act applies, the proceedings may be held in camera if the family court so desires and shall be so held if either party so desires.”

The provisions of in camera proceedings are normally incorporated in the marriage laws¹⁰² to maintain decorum of procedure. When all parties to the dispute desire to hold the proceedings in Camera, the court has to hold the trial in camera. The court also, if it so desires can hold the proceedings in camera. Since the matrimonial matters are confidential in nature, the parties normally desire for such trial. Though the trial in camera is at the discretion of the court, it has to oblige the parties. One should not confuse confidentiality of the proceedings with

¹⁰¹ Archi Agnihotri and Medha Srivastava, “Family Courts in India: An overview”, www.legalserviceindia.com/articles/1356-family-court-inindia-html, Accessed on 15-9-2014.

¹⁰² Corresponding provisions are found in other marriage laws the, Indian Divorce Act 1869, Section.53; Hindu Marriage Act 1955, Sec 22; Special marriage Act, 1954, Sec. 33; Parsi Marriage Act, 1936, Section 43, Foreign Marriage Act, 1969, Sec 18.

secrecy.¹⁰³ In any democratic system, the public is entitled to know the way justice is administered. No court should operate in secrecy. Constructive criticism, research and proposals for reforms can only come from the knowledge of the ways and procedures by which the courts operate.¹⁰⁴

The proceedings ‘in camera’ are to be maintained in strict confidence. Therefore, it is not open for reporting it in the newspapers or in the media. In camera proceedings can be taken up in the chambers of the judge or in exclusion of the spectators from the courtroom.

In the case of *Munnalal v. State of Uttar Pradesh*.¹⁰⁵ Justice R.A Sharma made an observation regarding in camera proceedings as given below:-

“With the growth of population, the litigation has gone up tremendously and some dispute are such that in order to protect the honour and position of the parties to the litigation proceedings should not be exposed to the public. Matters relating to the family are of prestige as such, provisions have been made to hold the proceedings in camera. When the proceedings are held in camera, a possibility of the settlement is greater.”

In *Sridhar v. Sukanyas*,¹⁰⁶ in view of Section 22 of the Hindu Marriage Act, 1955 it was held that the proceedings are to be in camera and respondents were restricted from publishing or telecasting the matrimonial proceedings of the

¹⁰³ Paras Diwan, *Modern Hindu Law*, 22nded, Allahabad Law Agency, Faridabad, 2013, p. 234.

¹⁰⁴ Ibid.

¹⁰⁵ AIR 1991 All 189; 1991 CrLj 1838

¹⁰⁶ 2005 (1) HLR 739.

petitioner. It is the part of the concept of the family court that confidentiality of the court record should be maintained.

The legislature is intended to promote reconciliation between the parties of the marriage. Therefore, the proceedings before the family court may be held in camera.¹⁰⁷ If the parties so desire or the court so thinks proper, the proceedings should be in camera.

Public confidence in the family court system is essential for the proper functioning, without public confidence, the judgments of the family courts run the risk of being seen as neither fair nor just, and also the authority of the court may be diminished. But confidentiality is also essential. Without proper protection for those involved in cases which go to family courts, parties to the proceedings and all those involved would not have the benefit of privacy. Over sensitive issues, at times when they are often highly vulnerable, privacy is vital, not only for the proper resolution of cases, but also is a protection to those involved in them rightly feel they deserve. So the challenge for the family court is to maintain a balance of confidence and confidentiality, through which transparency and privacy can be protected. So the family court system is open to scrutiny while it respects the privacy of those who find themselves involved in the proceedings.

3.5.5 Right to Legal Representation

The Family Courts Act of 1984 dispense with the service of the lawyer. The Act makes it clear that “notwithstanding anything contained in any law, no

¹⁰⁷ SC Tripathi & Vibha Arora, *Law Relating to Women and Children*, 2nd ed, Central Law Publications, Alahabad, 2006, p. 328.

party to a suit or proceedings before a family court shall be entitled, as of right to be represented by a legal practitioner; It provided that if the family court considered it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*".¹⁰⁸

This Section puts restriction on the parties to engage lawyers to represent their cases in the family court. It is quite clear that the lawmakers intended to keep the proceedings in the family court simple, informal and non- technical to achieve the main objectives of the enactment. In that perspective, it is mainly aimed at simplification of procedure. The Family Court Act restricts the role of lawyers and enhance the use of counsellors in the dispute resolution to encourage mutually amicable settlement. This is particular as well as contrary to other courts, which commonly employ the English legal method of practice called adversarial system of adjudication, the judge plays the role of a neutral arbiter and decides based on the merits of the case presented to him by the lawyers of the opposing parties. The Family Court Act limits the role of lawyer as legal expert or *amicus curiae*, whom the court may consult for opinion. The Act does away with lawyers with the hope to prevent excessive litigation cost, corruption, manipulation and subservice tactics, extended and bitter court battle and refusal to settle or compromise, and so on. The Act has taken away the right of the parties to engage legal practitioner. However, there is no bar on the parties to make application to permit them to engage legal practitioner. In such case the court can permit the parties to engage legal

¹⁰⁸ *The Family Courts Act, 1984, Section 13.*

practitioner by exercising its discretion.¹⁰⁹ If the family court considers it necessary in the interest of justice, it may seek the assistance of legal experts as *Amicus curiae*.¹¹⁰ In a writ petition the High Court of Rajasthan interpreted the term “*amicus curiae*” and made distinction between *amicus curiae* and advocate appearing for individual party. *Amicus curiae* is one who gives information to the court on some matters of law in respect of which the court is doubtful.¹¹¹ A fair reading of Section 13 of the Family Court Act, 1984 indicates that there is no total prohibition of being represented by a legal practitioner. The proviso clearly provides that litigants who desire to be represented by a lawyer, they can seek assistance of legal experts as *amicus curiae*.

The underlying idea of enactment of the Family Court Act is that the problems or ground, for matrimonial breakdown or dispute being essentially a personal nature, that it was better to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from trained counsellors with legal background. Therefore the appearance of lawyers in Family Courts is against the spirit of the Act. If the lawyers represent the cases of parties the functioning of family courts cannot be termed different from other civil courts and it amounts to defeat the very purpose for which the Family Courts were established. In some quarters there is a strong opinion to the exclusion of lawyer’s service from the family court. It is submitted that in undefended cases and in cases where parties are in a mood to settle issues amicably, the service of a

¹⁰⁹ K. Pandu Ranga Rao, *Commentary on The Family Courts Act, 1984*, (reprint edition) Gogia Law publications, Hyderabad, 200, p.69.

¹¹⁰ *Lata pimple v. Union of India*, AIR 1993 Bom 255.

¹¹¹ *Sarala Sharma v. State of Rajasthan*, 1 (2002) DMC 409 (DB).

qualified lawyer will hardly be needed. But in complicated or hotly contested cases dispensation of lawyer's service will undermine the rights of the parties and may harm them.

In the case of *Sadhana Patra v. Subrat Pradhan*,¹¹² it was held that though Section 13 of the Act, put bar to engage advocates by parties in a family court, as a matter of right, the rule 27 of Orissa Family Court Rules of 1990 permits a party to take legal advice at any stage of the proceedings whether at the time of conciliation or before the court. If Sec 13 of the Act and Rule 27 of the rules are read together, it will be clear that though the party to the proceedings before a family court as a matter of right cannot be represented by a legal practitioner, he/she shall be entitled to take legal advice even before the court. However, while applying to the court for permission to engage a legal practitioner, the party seeking such relief may assign reasons as to why the assistance of legal practitioner is required and only if the court is satisfied that for the reasons stated in the petition, the legal assistance is required. It may allow a party to take legal advice while the matter is pending before the court. There cannot be any doubt that an *amicus curiae* appointed by the judge of the family court, under Sec 13 of the Act, is only a friend of the court and is required to assist the court in matters to fact and law as and when required by the court and cannot act as a lawyer or advocate engaged by a party to defend the case.¹¹³

¹¹² AIR 2006 Ori 105: 11 (2006) DMC 316.

¹¹³ K. Pandu Ranga Rao, *Commentary on the Family Court Act, 1984*, Gogia Law publications, Hyderabad, 2010, p. 71.

It is the discretion of the family court Judge to permit or not to permit representation by the lawyer¹¹⁴ and the parties before family court may make a written request or an oral prayer for permission to engage a counsel observed in *Venkataraman v. Vijaya Saratha*.¹¹⁵

In case of *Leela Mahadeo Joshi v. Mahadeo Sitaram Joshi*,¹¹⁶ as far as issues such as custody of children, visiting rights, maintenance, alimony appointment of guardian to a marriage, etc. are concerned that the parties may not be in a position to protect their own interest or that they may not be in a position to visualise future problems or requirements and would, therefore, either give up their rights or not be in a position to agitate or safeguard them. The inevitable consequence would be either under hardship or future litigation, both of which deserve to be avoided. The court therefore inclined to agree with the grievance made before it is that the family court ought to give due credence to the desire of litigations where legal representation is concerned.

In *Kailashi Bhansali v. Surender Kumar*¹¹⁷ it was held that under Sections 13 of the Act, “a court is empowered to seek the assistance of a legal expert as *amicus curiae*, if it considers, it necessary in the interest of justice.” However the need has to be felt by the court and not by the parties; otherwise, there would be no difference between an ordinary litigation and proceedings in the family court. Though representation by a legal counsel is not allowed as a matter of right under

¹¹⁴ *Prabhat Narain Tickoo v. Mamatma Tockoo* 1998(2) HCR 652.

¹¹⁵ 1996(2) HLR 450.

¹¹⁶ AIR 1991 Bom 105; (1991) 3 Bom CR 130.

¹¹⁷ AIR 2000 Raj 390.

the Family Court Act, there is no bar to the filing of the petition by an agent.¹¹⁸ However, the court should allow an advocate only in exceptional circumstances.¹¹⁹ In *Jayraj Singh v. Bripaul Kaur*¹²⁰ it was held that the court has power to direct parties to remain present in person. Matrimonial disputes require consideration from the human angle. The court has to take a more affirmative and productive approach. The Bombay High Court observed as follows:

“It would, therefore, be a healthy practice for the family court at the scrutiny stage itself to ascertain as to whether the parties desire to be represented by their lawyer and if such desire is expressed on any subsequent stage of the proceedings, then the permission be granted, if the court is satisfied that the litigant requires such assistance and would be handicapped if the case is not permitted”.

In a family court appeal before the Bombay High Court the question came for consideration whether the family court should consider the need for representation by a lawyer and whether the family court can permit a party to be represented by a legal practitioner and refuse permission to the other party. The learned judge of the Division Bench felt that it is expedient to lay down certain broad norms which the family court should follow in certain situations because matrimonial proceedings often times involved certain embarrassing details which would make it extremely difficult for the litigants to handle their case personally.

¹¹⁸ K.B Agarwal, *Family Law in India*, Kluwer Law international, Netherlands, 2010, p. 66.

¹¹⁹ *Sarta Sharma v. State of Rajasthan*, AIR 2002 Raj 30.

¹²⁰ AIR 2007 SC 2083.

Ms. Komal S. Padukone v. The principal Judge and others,¹²¹ held that the family court should adopt a practical and human approach and indicate certain modalities for conducting the proceedings in the family court and held that it is the fundamental principle of justice that where one of the parties to the case is permitted to be represented by a counsel, the other party should also be permitted to be represented by a counsel. The rejection of application of one of the parties only while permitting to the other party for engaging a counsel is an improper exercise of jurisdiction opposed to the principle of justice.

Practice directions of the High Court of Delhi states that of the Family Courts Act, 1984 does not absolutely bar the appearance of the advocates before the family courts. Family courts therefore, in the absence of convincing and cogent reasons should not turn down the permission of the litigants of legal assistance when they desire it.¹²²

Section 30 of the Advocates Act, 1961 describes the right to Advocates to practice. “Subject to the provisions of this Act, every advocate whose name is entered in the state roll shall be entitled as of right to practice throughout the territories to which this Act extends:

- (i) In all courts, including the Supreme Court
- (ii) Before any tribunal or person legally authorized to take evidence and
- (iii) Before any other authority or person before whom such advocate is by or under any law for the time being in force to entitled to practice.

¹²¹ II (1999) DMC 301, ILR 1999 KAR 2811, 1999 (5) KarLJ 667.

¹²² Practice Directions No. 19, Rules/ DHC dated 90-02-2010 High Court of Delhi, New Delhi.

In *R. Durga Prasad v. Union of India*,¹²³ the judgment of the Justice B.S. Reddy and T. R. Rao of Andhra Pradesh High Court decided that the main provisions of Section 13 of the Family Courts Act, permit the parties to engage legal representation, but beyond the stage of impossibility of reconciliation exercised under Section 9 of the Act, the court shall be entitled to appoint *amicus curiae* to assist the said court in addition to the legal practitioners appointed by the parties.

The Supreme Court in *Lingappa Pochanna Appelwar v. State of Maharashtra*,¹²⁴ held that since Section 30 of the Advocates Act has not brought into force, therefore, the right of the Advocate is to be governed under Section 14 (1) (a) (b) (c) of the Bar Council Act, 1926.

In *T. C. Mathai & another v. District and Session Judge*,¹²⁵ the Supreme Court held that Section 30 of the Advocates Act confers a right of every advocate whose name is entered in the roll of the advocates maintained by the State Bar Council to practice in all the courts in India including the Supreme Court.

Justice P. R. Ramachandra Menon of Kerala High Court in *C.P. Saji v. Union of India*¹²⁶ has held that the litigant is open to any lawyer of his choice to appoint him before the family court.

The central government in its Gazette of India dated 09.06.2011 has given effect to Section 30 of the Advocates Act, 1961 from 15-06-2011 and in view of

¹²³ 1988 (2) ALD 25.

¹²⁴ AIR 1985 SC 389.

¹²⁵ AIR 1999 SC 1385.

¹²⁶ AIR 2012 Ker. 23.

the above judgements of the Supreme Court and High Courts, it is very much clear that the litigant can pursue the family court engaging his/her lawyer of choice and such lawyer is entitled to present the matter before the family court as a matter of right.¹²⁷ However, the lawyers being the officer of the court must keep in mind to cooperate and settle the matters if it is so possible.

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

The Act and rules excluded representation by the lawyers in the family courts and the system did not create any alternative and simplified rules merely stating that the proceedings are conciliating and not adversarial. The absence of lawyers, litigants are left to the mercy of court clerk and peon to help them to follow the complicated rules. Women are not even aware of the consequences of the suggestions made by court officials. So a mediator is necessary to give awareness to the litigants. The exploitation of innocent women would be prevented by allowing the legal practitioners in the family courts. They can assist the clients as they are familiar with rules and procedures. The provision of appointment of a legal practitioner as *amicus curiae*, were felt necessary by the court, already existed in the Family Court Act, and in practice, the family court, the litigants seeks assistance of lawyers. So the family court should provide

¹²⁷ PrasannaVarma, "Appearance of Advocates before Family Court", hindtoday.com/Blogs/ViewBlogsv2.aspx, Accessed on 08-01-2015.

necessary assistance to the litigants and also simplify the rules and procedures and create necessary infrastructure to give necessary service to the litigants.

3.5.6 Support or Auxiliary Service

The prime objective of support service is to help parties at reconciliation and conciliation, and to lessen an adversarial atmosphere. No family court system can proceed without well-organized support services. The Family Court Act visualises some support service. Section 5 of the Act stipulates for the association with the court proceedings of institutions or organisations engaged in the social welfare of persons professionally engaged in promoting the welfare of the family of persons working in the field of social welfare or any other expert in family law matters.¹²⁸ Section 6 of the Act also stipulates for the appointment of counsellors, officers and other employees necessary for the functioning of the family court system. The family court Act Section 12 also secures the service of a medical expert or such other persons who specialize in promoting the welfare of the family and to assist in the discharge of its functions.¹²⁹

These provisions are made to provide the court the purpose of understanding the social aspects of family disputes. All of them should have proper understanding of the factors influencing family disputes reflecting the pressure exerted by the socio – economic forces in society.¹³⁰ The court will not be in a position to ensure justice to both the parties under dispute, especially the weaker

¹²⁸ K.B. Agarwal, *Family Law in India*, Kluwer Law international, Netherlands, 2010, p.67.

¹²⁹ Ibid.

¹³⁰ Meharchand Nanavathy, “Family Disputes and Role of social workers and Lawyers in Family court” in RatnaVarma, Ed, *Family Courts in India: An Appraisal of Strength and Limitation*, Inter India Publication, New Delhi, 1997, p.100.

partner. So, auxiliary services are an essential adjunct of the family courts. The auxiliary service should have the following four component services: (a) family counselling and conciliation (b) investigative services (c) legal aid services and (d) enforcement service.¹³¹

The family counselling, reconciliation and conciliation service should be a three tier service. (a) Premarital counselling (b) reconciliation and conciliation counselling and (c) post adjudicatory counselling. The pre-marital counselling should not be part of the family court system, but a community service easily accessible to persons in need of it. The reconciliation, conciliation and counselling service should be available to the parties before they had gone to the court as well as when they are in the court. Its main role is to promote reconciliation whenever possible, where reconciliation is not possible or undesirable to secure an amicable settlement of all their issues which need solution when a marriage has broken down.¹³²

Its other role is to get the issues clarified and problems defined and to attempt conciliation of as many issues as possible, regardless of whether the marriage survives or disintegrates. In its third role it provides post adjudicatory counselling service which helps parties to sort out post- divorce dispute and problems, since the family court system discards the adversary procedure, an investigation service is an essential adjunct of the family court system. The service is meant to investigate the facts and submit its reports which help the

¹³¹ Paras Diwan, Peeyushi Diwan, *Family Law*, (2nded) Allahabad Law Agency, Allahabad, 1994, p. 250.

¹³² Ibid.

court in arriving at the decision in the main petition as well as collateral matters, such as custody, education, support of children, alimony, maintenance of the spouse and settlement of property.

The association of welfare agencies and persons under Section 5 of the Family Court Act is left to the discretion of the state government for its effective functioning. This Section enables the family court to associate itself with institutions and organisations and persons professionally engaged in promoting family welfare for its effective functioning. For this purpose rules have been framed by the state government in consultation with the High Court concerned. The rules of the states in this regard provide for preparing a panel of medical and other professional experts, institution, voluntary organisations, agencies and persons in order to enable the parties to obtain their assistance. However, sufficient care has to be taken by the court in selecting organisations, institution's, experts and other persons engaged in social welfare and professional expertise.

In *Romila Jaidev Shroff v. Jaidev Rajnikath Sharoff*,¹³³ it was held that if one turns to Section 5, subject to the rules framed there under, the family court is free to take assistance of and allow the association of institution or organisations engaged in social welfare or the persons professionally engaged in social welfare or the person professionally engaged in promoting the welfare of the family and so on.

The Kerala High Court while deciding a matrimonial dispute observed that one of the important aims of setting of the family court is to bring about a

¹³³ AIR 2000 Bom 316; II (2000) DMC 600.

reconciliation between the spouses if possible and to permit them to separate with dignity, only if all attempts of conciliation fails. The court also viewed that there cannot be any doubt that a special machinery has been constituted by the Family Court Act for counselling and for bringing about conciliation between the litigant spouses. Therefore, associations of social welfare agencies and professional expertise is of prime importance for effective resolution of matrimonial disputes by conciliation through the family courts.¹³⁴

If somehow, this discretion is not exercised or association of such agencies is not possible, then the effective functioning of the family court is not possible, and there can be no single neutral mediator, although one such functioning could sign the papers and documents. Psychological approach, collaboration, teamwork, social networking, home visit and follow - ups, family network therapy, joint and multiple interviews and conference are the hallmark of preservation of marriage and family. Such tasks could be attended only by qualified and experienced professionals, with assistance provided by para - legal professionals. And if their assistance is not sought as an integral part of the entire process, the court will not be able to achieve the purpose for which they have been established.¹³⁵ India has taken the necessary step in the direction of establishing family courts but much is to be done before the family court system can be brought in to effective functioning.

¹³⁴ *Shyni v. George and others*, II (19097) DMC 676.

¹³⁵ Namitha Sing Jamwal, *Marital Discord: Mode of Settlement, Special Reference to Family Court in India*, Doctoral Dissertation, Jamiya Milia Islamic University, 2009, p.161.

In *Ashok Shamjibhai Dharode v. Neeta Ashok Dharode*,¹³⁶ it is held that a provision is made under the rules framed under Family Courts Act to seek assistance from the marriage counsellor. The counsellors are trained persons and if deemed necessary, the presiding officer can seek assistance of the counsellors. The counsellor is entitled to interview relations, friends and acquaintances.

Most of the state governments have notified rules regarding the terms and conditions of the association of counsellors and the service conditions of the officers and other employees of the family court. Procedure of selections of counsellors and the structure of the staff and its cadre strength is also found in them. All the persons, including counsellors employees and experts are expected to discharge their functions in a team spirit.¹³⁷ Each one is expected to be interested in service to the society and coordinate with the other members of the team to achieve the aim and objective of the statute.

3.6 Gender Justice in Family Courts

India is the most democratic country in giving due protection and justice to all its citizens irrespective of any prejudices, creed, colour, gender or religion. But the day to day life of women is most directly governed by the existing structure of the family patterns of which they vary according to the religion, class and region. The dominant position given to men in the family structure leads to

¹³⁶ AIR 2001 Bom 142.

¹³⁷ K. Pandu Ranga Rao, *Commentary on the Family Courts Act, 1984*, Gogia Law Agency, Hyderabad, 2010, p.24.

discrimination against women in the family. The inequality of women within the family extends to the social, economic and legal positions in the society.¹³⁸

There are various provisions in the constitutions of India that are specified for gender equality. The preamble to the Indian constitution resolves to secure justice, liberty, equality and dignity of all. The constitution provides equal treatment before the law for every person¹³⁹ and prohibits discrimination based on religion, race, caste, sex or place of birth.¹⁴⁰ Thus the idea of equality is strongly emphasised in the Indian constitution.

The essence of social change is the progressive outlook and the share of equal right among the men and women. In India in spite of the constitutional provisions that men and women are equal, the reality is that the women have been generally oppressed. It is an undisputed fact that marriage and the family are two areas where women are the most oppressed, powerless and are denied the basic marriage right of self-protection.¹⁴¹

The Family Court Act is a social legislation, supposedly for woman which deals with preservation of marriage and conciliation, even though the most heinous acts of violence, such as dowry death, wife beating, rape etc. take place within the institution of marriage.¹⁴² A broken home hurts a woman more in India, where the economic independence of women is a far cry, where, the

¹³⁸ Jyotsna Chatterjee., "Justice to women: – Role of Family Courts" In RatnaVarma (ed), *Family Courts in India: An Appraisal of Strength and Limitation*, Inter India – Publications, New Delhi, 1997, p. 67.

¹³⁹ The Constitution of India, Article 14.

¹⁴⁰ Ibid, Article 15.

¹⁴¹ D. Nagasaila, "Family Courts: A Critique", *Economic and political weekly*, August 15, 1992, p. 1736.

¹⁴² D.Nagasaila, "The Family Court: A step backward", *The Hindu*, March 24, 1991.

holding of resources like education, wealth etc. by them are meagre. Consequently, in most cases a total view based on balancing of the two aspects, divorce and preservation of marriage are needed.

The principle of ‘gender justice’, which was the primary motivation for the demand for special courts for family matters, was not clearly spelt out in the enactment. Instead the Act emphasised ‘preservation of the family’ as its primary aim. An impression that the preservation of the family is synonymous with protection of women’s rights seems to have been conveyed to all official functionaries. But the legislative history of matrimonial law is contrary to this premise. It is a historical and a well-established fact that the institution of marriage and family can be preserved only at the cost of women, by denying them property rights and the right of divorce.¹⁴³ It is in this context that several legislations were enacted to loosen the sacramental bond of marriage and to give women the right of divorce and the consequential right to property ownership.

The Family Courts Act was meant to make further progress in this direction by making this right of divorce a practical and feasible reality by ensuring that matrimonial proceedings were speedy, devoid of anti- women biases and economically more fair and just for women. So the concern at this stage was the protection of rights of women and children. The aim had to be gender justice. But unfortunately the Family Court Act did not provide for this, instead the preamble laid down that the commitment of the Act is towards

¹⁴³ Flavia Agnes, *Family Law: Marriage, Divorce and Matrimonial Litigation*, Vol. II, Oxford University Press, New Delhi, 2011, p. 272.

preserving the institution of marriage and family.¹⁴⁴In view of Indian social reality the Family Courts Act should have provided for gender justice as one of its aims as also the operating mechanism to achieve the objectives.

The Family Courts Act of 1984 was passed with a view to creating an appropriate forum for rendering justice to women. Though, in disputes relating to family matters, both men and women are adversely affected, in the process of disorganisation of the family and its reorganisations, it is women and children who are worst affected. In order to circumvent the disorganisation of the family, a conciliatory mechanism is set up under the Family Courts Act of 1984 to resolve and reconcile the difference and provide speedier inexpensive justice to women. As the traditional justice system has proved to be ineffective, the courts resort to mechanical and technical disposal of cases to reduce the pendency of cases. The family courts are not to be considered as mere machinery for disposing of cases, but as social institutions finding solutions for problems bearing in mind the welfare of the family and children. The Family Courts Act provided the various means to achieve the gender justice.¹⁴⁵

The courts are directed to adopt a policy of reconciliation and speedier settlement of cases. Even though the basic human wants are for food, clothing and shelter, yet for women, being vulnerable sex in the society, it is the housing alone which is of prime importance. Thus the process of reconciliation achieves

¹⁴⁴ Flavia Agnes, *Family Law: Marriage, Divorce and Matrimonial Litigation*, Vol II, Oxford University Press, New Delhi, 2011, p. 272.

¹⁴⁵ NLSU, 'Marriage Dispute and Gender Justice in Family Courts', in Poornima Advani, project incharge, *Course Curriculum on Gender sensitization of judicial personnel; A training manual including, methods, and matrimonial National Commission for women*, New Delhi, 2001, p. 1878.

this objective. Besides, it also prevents the possible occurrence of destitution and vagrancy among women and children as there is economic interdependence among family members.

The Act rightly appreciates that the women judges would be in a better position to empathise with women as they may be more sensitive to women's issues than men resulting in rendering justice to women. Hence, a suitable provision has been made in the Act to give preference to the appointment of women Judges.

The Act makes it mandatory to provide the essential infra-structural facilities such as the appointment of counsellors, psychologists, medical expert and other supplying staff to facilitate the early settlement of the case by the court. The court has also discretionary powers to identify social workers or social welfare organisations for helping the court to achieve the objective of reconciliation in family disputes.

The Act envisages the flexible rules regarding the place of sitting, conducting proceedings in camera and informal court atmosphere for enabling the women litigants to divulge the true facts of the cases.

The Act also takes into consideration oral evidence deposed and also access affidavits as evidence for expediting the adjudicatory process. The court has also discretionary power to record evidence summary.

The court adopts inquisitional procedure by eliminating adversarial procedure. This would help the women litigants particularly as it reduces the financial burden on her.

The most important aspect of the Family Court Act is “the emphasis on conciliation and settlement rather than on the adversarial proceedings.”¹⁴⁶ This could have two detrimental effects at the individual level, women will have to pursue their own cases and, at the border level, in the seeming ‘privatization of family law. The Family Courts have been arranged on the ground that a conciliatory approach provided in the Act equates men and women in disregard of social reality. It is quite likely that in the course of conciliation process women and men are treated equally. No particular attention is paid to the distressing situation in which women might be placed. This may amount to disregarding the social reality.

Counsellors play an important role in promoting negotiations and settlement. So counsellors should be trained with gender sensitivity as the neutral stands of counsellors usually ends up being anti-women, influenced by long standing patriarchal biases against women. The women's groups had demanded, clearly defined framework for gender justice in the practice of the family courts, especially with respect to the roles of counsellors in order to avoid bias in the process of fulfilling the statutory mandate of “speedy settlement’ and ‘protect and preserve’ the family.”¹⁴⁷ Gender sensitivity may help counsellors to take neutral positions, but consider the unequal power relationship between men and women in reconciliation and settlement processes.

One of the major criticisms of the women’s group about the Family Court Act and the family justice system as a whole is that the conceptual basis of

¹⁴⁶ D.Nagarsila, “The Family Court: A Step Backward”, *The Hindu*, March 24, 1991.

¹⁴⁷ “Family justice system”, Legal studies, *cbseacademic.in*, Accessed on 5-12-2014.

‘gender justice’, the prime objective of the women’s movement, is left out. Instead the Family Court Act focuses on preservation of the family through conciliation and in a speedy manner.

Gender sensitive framework for counselling, while the appointment, supervision, and remuneration of counsellors are important concerns, the quality of their counselling is another aspect that needs to be examined. In most courts counselling is only superficial and rights are determined by the judicial process or by interventions of presiding officers. But where the counsellors play a substantial role in bringing about negotiations and settlements, there is a need to evolve a pro- woman framework for marriage counselling or for mediated settlements. Since the power balance within the family and society are tilted against women, a neutral stand of the counsellor may serve to reflect and endorse internalized patriarchal biases against women.¹⁴⁸ So the apparently neutral position may in fact get translated into an anti-woman posture. Counsellors have to be careful to avoid this pitfall. There is a need for periodic training to evolve, gender- sensitive, women oriented counselling techniques. Within the mandate of ‘speedy settlement’, without a clearly defined framework of gender justice, the conciliatory approach adopted by the marriage counsellors may further jeopardise the rights of women and the counselling process itself can turn anti- women.

At times the mandate of ‘reconciliation’ gets transformed into pressurising women to reconcile and return to the matrimonial home, even at the cost of defeating her human dignity, physical safety, and meagre economic rights. When

¹⁴⁸ Flavia Agnes, *Family Law: Marriage, Divorce and Matrimonial Litigation*, Vol. II, Oxford University press, New Delhi, 2011, p. 33.

a woman, who was physically abused and thrown out of her matrimonial home, files for maintenance under Section 125 of the Cr. P.C, the common ploy adopted by lawyers defending husbands, is to file for restitution of conjugal rights. The offer of reconciliation forms part of the legal ploy of defeating the women's claim to maintenance.

At this point, the counsellors need to ensure that a woman's right to maintenance is not defeated by such superficial offers of reconciliation. Even if a woman opts to test the genuineness of the offer by returning to the matrimonial home, the application for maintenance needs to be kept pending. In the event that reconciliation does not work out, the woman would then be in a position to pursue her earlier application for maintenance and will not lose her rights because of the intervening period of reconciliation. But if she has been forced to withdraw the maintenance application at the instance of her husband, it will seriously jeopardise her rights.¹⁴⁹ Marriage counsellors need to be aware of these legal complexities during negotiations. In many cases, women are suffering immensely with the functioning of courts and for difficulties in getting legal relief.

The family court aims to sustain and retain the family institution with umpteen number of counselling sessions, conciliation, speedy settlement and removal of gender bias. But in reality, there is a gap which needs to be addressed

¹⁴⁹ Flavia Agnes, *Family Law: Marriage, Divorce and Matrimonial Litigation*, Vol. II, Oxford University Press, New Delhi, 2011, p. 303.

by developing various fair mechanism, systems and processes, including gender sensitive civil society organisations.¹⁵⁰

The Family Court Act's preoccupation with conciliation between parties and preservation of the institution of marriage goes against such substantive laws such as Hindu Marriage Act, Special Marriage Act, which deals with divorce, the provision for divorce by mutual consent, which enable the couple to make the breakdown of marriage less traumatic and easier. Yet the view is emphasised that the Family Court Act is merely a procedural law and does not in any way affect substantive law.

The conciliation approach is based on the notion that both parties are equal. It ignores the fact that women have no equal status in the existing social structure, and are therefore vulnerable and dependent on men for social and economic security.¹⁵¹ Though the preservation of marriage is laudable objective of the family court, it is quite likely that in the name of preservation of marriage, pressure is applied to the women by the stronger party who could be the husband, or the conciliator for a particular settlement which may not be to the liking of the woman.

The stronger party may be able to force a settlement on the weaker party. If this happens then woman may suffer by facing the unequal partner and the mediator who, though appearing neutral, may actually be the purveyor of the

¹⁵⁰ S.S Kavitha, "Aims versus implementation", www.thehindu.com/features/metropolis/aims-versus-implimentation/article/4241420, Accessed on 18-05-2013.

¹⁵¹ Jyotsna Chatterjee., "Justice to women: – Role of Family Courts" In RatnaVarma (Ed), *Family Courts in India: An Appraisal of Strength and Limitation*, Inter India – Publications, New Delhi, 1997, p.68.

dominant oppressive social values.¹⁵² Thus, the shift from the formal to informal proceedings and from legality to welfarism could confuse the issues and still may not yield socially desirable results. However, the provisions in the Section 4 (b) of the Act, that preference would be given to the appointment of women judges may go to the extent in ameliorating the situation. When an increasing number of woman judges start handling cases in the family court it is hoped that they would be in a position to balance the conflicting consideration of preservation of the family and redressal against male oppression.

Another cause of concern in the Family Court Act is the 'in camera' proceedings. This provided for privacy and is favoured by women, but in the long run it may go against women. When a certain amount of awareness has been created, and proceedings are held in the open court, it is not easy for the court to take an anti- women stand. There is scope for some kind of informal control being exercised by the public on the legal fraternity. According to the Family Court Act, this has become impossible as, to some extent, there is a privatisation of women issues. There is a shift from legality to welfarism. Fundamental problems faced by women also became hidden and muted in the name of conciliation.¹⁵³ The introduction of informal justice system in dealing with the family disputes will slowly relegate women to the private sphere, even in the legal system.

¹⁵² NLSU, 'Marriage Dispute and Gender Justice in Family Courts', in Poornima Advani, project incharge, *Course Curriculum on Gender Sensitization of Judicial Personnel; A training manual including, methods, and matrimonial National Commission for women*, New Delhi, 2001, p. 1878.

¹⁵³ Monica Chawla, *Gender justice: Women and Law in India*, Deep and Deep publications Pvt., New Delhi, p.2006.

3.7 Conclusion

There are different personal and special matrimonial laws in force covering matrimonial and allied matters. The family court has jurisdiction to settle the disputes under all these enactments. Thus the Family Court Act is only a procedural statute. Hence the Act does not override personal laws, but provides an alternative adjudication forum of dispute resolution. The right and obligations of the parties to the disputes are to be decided as per their personal or matrimonial laws.

THE INDIAN FAMILY SYSTEM

THE INDIAN FAMILY SYSTEM

2.1 Chapter Overview

Family is one of the main socialising institutions of the society. Since ancient times, the family has been the most important child care institute in India as children are expected to grow under the glory of family where a satisfactory rearing of child is ensured. According to Pope – “the family is more sacred than the State.” It was pointed out by Will and Ariel Durant that the family is nucleus of civilisation. The universal declaration of human rights prescribes the family as the natural and fundamental unit of society. Family is virtually a social organisation or a unit of men and women out of relationship.

The importance of family lies in bringing up the child to a full man in the family atmosphere. It has been a time honoured belief in our culture that the child is a gift of God that must be nurtured with care and affection within the family and society as a future dawn. As per Confucius-the strength of a Nation is derived from the integrity of its homes. It is the famous saying that a comfortable home is a great source of happiness. It ranks immediately after health and good conscience as aptly said by Byron. Without loving heart there is no meaning for home. The purpose of this chapter is to describe the theoretical framework of this research by defining family and giving insight into the Indian family system.

2.2 Family

Family, a basic unit of social structure, the exact definition of which can vary greatly from time to time and from culture to culture. How a society defines family as a primary group, and the functions it asks families to perform, are by no means constant. There has been much recent discussion of the nuclear family, which consists only of parents and children, but the nuclear family is by no means universal. In the United States, the percentage of households consisting of a nuclear family declined from 45% in 1960 to 23.5% in 2000.¹⁹ In preindustrial societies, the ties of kinship bind the individual both to the family of orientation, into which one is born, and to the family of procreation, which one founds at marriage and which often includes one's spouse's relatives. The nuclear family also may be extended through the acquisition of more than one spouse, or through the common residence of two or more married couples and their children or of several generations connected in the male or female line. This is called the extended family; it is widespread in many parts of the world, by no means exclusively in pastoral and agricultural economies. The primary functions of the family are reproductive, economic, social, and educational; it is through kin itself variously defined that the child first absorbs the culture of his group²⁰.

2.3 Indian Family System

In India the family is the most important institution that has survived through the ages. India, like most other less industrialised, traditional, eastern societies is a

¹⁹ en.wikipedia.org/wiki/American_family_structure

²⁰ The Columbia Encyclopedia, Sixth Edition Copyright© 2004, Columbia University Press

collectivist society that emphasizes family integrity, family loyalty, and family unity. C. Hui and H. Triandis²¹ defined collectivism, which is the opposite of individualism as, “a sense of harmony, interdependence and concern for others”. More specifically, collectivism is reflected in greater readiness to cooperate with family members and extended kin on decisions affecting most aspects of life, including career choice, mate selection, marriage and its continuity.

The Indian family has been a dominant institution in the life of the individual and in the life of the community.²² For the Hindu family, extended family and kinship ties are of utmost importance. In India, families adhere to a patriarchal ideology, follow the patrilineal rule of descent, are patrilocal, have familialistic value orientations, and endorse traditional gender role preferences. The Indian family is considered strong, stable, close, resilient, and enduring.²³ Historically, the traditional, ideal and desired family in India is the joint family. A joint family includes kinsmen, and generally includes three to four living generations, including uncles, aunts, nieces, nephews, and grandparents living together in the same household. It is a group composed of a number of family units living in separate rooms of the same house. These members eat the food cooked at one hearth, share a common income, common property, are related to one another through kinship ties, and worship the same idols. The family supports the old; takes care of widows, never-married adults, and the disabled; assists during periods of

²¹ Hui, C. and Triandis, H. (1985), ‘Measurement in Cross-Cultural Psychology: A Review and Comparison of Strategies’, *Journal of Cross-Cultural Psychology*, Vol. 16.

²² Mullatti, L. (1992), ‘Changing Profile of the Indian Family’, *The Changing Family in Asia*, UNESCO Principal Regional Office for Asia and the Pacific, RUSHSAP Series on Monographs and Occasional Papers 35, Bangkok.

²³ Shangle, S. (1995), ‘A View into the Family and Social Life in India’, *Family Perspective*, Vol. 29, pp 423–446.

unemployment; and provides security and a sense of support and togetherness.²⁴ The joint family has always been the preferred family type in the Indian culture, and most Indians at some point in their lives have participated in joint family living.²⁵

The beauty about the Indian culture lies in its age-long prevailing tradition of the joint family system. It's a system under which even extended members of a family like one's parents, children, the children's spouses and their offspring, etc. live together. The elder-most, usually the male member is the head in the joint Indian family system who makes all important decisions and rules, whereas other family members abide by it dutifully with full respect.

A major factor that keeps all members, big and small, united in love and peace in a joint family system in India is the importance attached to protocol. This feature is very unique to Indian families and very special. Manners like respecting elders, touching their feet as a sign of respect, speaking in a dignified manner, taking elders' advice prior taking important decisions, etc. is something that Indian parents take care to inculcate in their kids from very beginning. The head of the family responds by caring and treating each member of the family the same.

The intention behind the formation of any social unit will fail to serve its purpose if discipline is lacking and the same applies to the joint family system as well. Due to this reason, discipline is another factor given utmost importance in the joint family system in India. As a rule, it's the say of the family head that prevails upon others. In case of any

²⁴ Chekki, D.A. (1996), 'Family Values and Family Change', *Journal of Comparative Family Studies*, Vol. 27, No. 2, pp 409-411.

²⁵ Nandan, Y. and Eames, E. (1980), 'Typology and Analysis of the Asian-Indian Family', In Saran, P. and Eames, E. (Eds.), *The New Ethnics: Asian Indians in the United States*, Praeger, New York.

disagreement, the matter is diligently sorted out by taking suggestions from other adult members. One usually also has to follow fixed timings for returning home, eating, etc.

The reason why Indians are proving to emerge as a prosperous lot globally, many researches claim, is because of the significance they attach to the joint family system. All working cohesively to solve a problem faced by any one or more members of the joint family, is what works magic in keeping one tension-free, happy and contented even in today's highly competitive environment. An Indian may be a top corporate honcho or a great sportsperson or a movie actor and so on in a particular professional field, but all these accomplishments relegate to the backseat when at home.

With the advent of urbanisation and modernisation, younger generations are turning away from the joint family form. Some scholars specify that the modified extended family has replaced the traditional joint family, in that it does not demand geographical proximity or occupational involvement and does not have a hierarchal authority structure.²⁶ This new family form encourages frequent visits; financial assistance; aid and support in childcare and household chores; and involvement and participation in life-cycle events such as births, marriages, deaths, and festival celebrations. The familial and kinship bonds are thus maintained and sustained. Even in the more modern and nuclear families in contemporary India, many functional extensions of the traditional joint family have been retained, and the nuclear family is strongly embedded in the extended kinship matrix. In spite of the numerous changes and adaptations to a pseudo-Western culture and a move toward the nuclear family among the

²⁶ Ibid. 25, p 22

middle and upper classes, the modified extended family is preferred and continues to prevail in modern India.

India is an extremely pronatalistic society, and the desire to have a male child is greatly stressed and is considered by some to be a man's highest duty, a religious necessity, and a source of emotional and familial gratification.²⁷ Because male children are desired more than female children, they are treated with more respect and given special privileges. Male children are raised to be assertive, less tolerant, independent, self-reliant, demanding, and domineering.²⁸ Females, in contrast, are socialised from an early age to be self-sacrificing, docile, accommodating, nurturing, altruistic, adaptive, tolerant, and religious, and to value family above all.²⁹ In rural areas, low-income women have always worked outside the home. In urban areas, there has been a substantial increase in the number of middle- and upper-class women working to supplement their husbands' incomes. In a traditional Indian family, the wife is typically dependent, submissive, compliant, demure, nonassertive, and goes out of her way to please her husband. Women are entrusted with the responsibility of looking after the home and caring for the children and the elderly parents and relatives.

Child rearing practices in India tend to be permissive, and children are not encouraged to be independent and self-sufficient. The family is expected to provide an environment to maximise the development of a child's personality and, within the context

²⁷ Kakar, S. (1981), *The Inner World: Psychoanalytic Study of Childhood and Society in India*, Oxford University Press, Bombay

²⁸ Pothen, S. (1993), 'Divorce in Hindu Society', In Tepperman, L. and Wilson, S. (Eds.), *Next to Kin*, Prentice Hall, Englewood Cliffs, New Jersey.

²⁹ Kumar, P., and Rohatgi, K. (1987), 'Value Patterns as Related with High and Low Adjustment in Marriage', *Indian Journal of Current Psychological Research*, Vol. 2, pp 98–102.

of the Hindu beliefs and philosophy, positively influence the child's attitudes and behaviours.

Adolescence and young adulthood are particularly stressful and traumatic stages in the lives of Indian youths. In one way, they desire emancipation and liberation from family but residing in the matrix of the extended family makes it difficult for them to assert themselves and exhibit any independence in thought, action, or behaviour. Social changes are gradually occurring but arranged marriages are still the norm, and dating generally is not allowed. Furthermore, sex and sexuality issues are not openly discussed, sex education is not readily available, interrelationships with the opposite sex are discouraged, and premarital sex is frowned upon. In the traditional Indian family, communication between parents and children tends to be one-sided. Children are expected to listen, respect, and obey their parents. Generally, adolescents do not share their personal concerns with their parents because they believe their parents will not listen and will not understand their problems.³⁰

2.4 Problems of India's Changing Family

The family has been and continues to be one of the most important elements in the fabric of Indian society. The bond that ties the individual to his family, the range of the influence and authority that the family exercises make the family in India not merely an institutional structure of our society, but accord give it a deep value. The family has indeed contributed to the stability to Indian society and culture.³¹

³⁰ Medora, N. P., Larson, J. H., and Dave, P. B. (2000), 'East- Indian College Student's Perceptions of Family Strengths', *Journal of Comparative Family Studies*, Vol. 31, pp 408–424

³¹ www.egyankosh.ac.in/bitstream/123456789/36906/1/Unit-1.pdf

Today, the Indian family is subjected to the effects of changes that have been taking place in the economic, political, social and cultural spheres of the society. In the economic sphere, the patterns of production, distribution and consumption have changed greatly. The process of industrialisation and the consequent urbanisation and commercialisation have had drastic impacts on the family. Migration to urban areas, growth of slums, change from caste oriented and hereditary occupations to new patterns of employment offered by a technological revolution, the cut-throat competition for economic survival and many other economic changes have left their impact on the family.

Briefly speaking, these changes in the socio-economic-political-cultural milieu of our society have led to changes in the structures, functions, roles, relationships and values of the family. In the context of the changes in the economic system more and more members of the family are moving away from the larger family circle and living as individuals or members of a nuclear unit in urban areas. The patterns or loyalties, obligations and expectations have changed. The cases of the child and the aged in particular have become a problem for many due to structural changes in the family.³²

2.4.1 Disappearing Joint Family System

Since time immemorial the joint family has been one of the salient features of the Indian society. But the twentieth century brought enormous changes in the family system. Changes in the traditional family system have been so enormous that it is steadily on the wane from the urban scene. There is absolutely no chance of reversal of this trend. In

³² Bharat S. (Ed.) (1991), *Research on Families with Problems in India: Issues and Implications*. Vol. 1, Tata Institute of Social Sciences, Bombay.

villages the size of joint family has been substantially reduced or is found in its fragmented form. Some have split into several nuclear families, while others have taken the form of extended or stem families. Extended family is in fact a transitory phase between joint and nuclear family system. The available data suggest that the joint family is on its way out in rural areas too.³³

The joint family or extended family in rural areas is surviving in its skeleton or nominal form as a kinship group. The adults have migrated to cities either to pursue higher education or to secure more lucrative jobs or to eke out their living outside their traditional callings, ensuing from the availability of better opportunities elsewhere as well as the rising pressure of population on the limited land base. Many of the urban households are really offshoots of rural extended or joint families. A joint family in the native village is the fountainhead of nuclear families in towns. These days in most cases two brothers tend to form two independent households even within the same city owing to the rising spirit of individualism, regardless of similarity in occupation, even when the ancestral property is not formally partitioned at their native place.

The nuclear family, same as elsewhere, is now the characteristic feature of the Indian society. According to the Census of India data³⁴, of all the households nuclear family constituted 70 percent and single member or more than one member households without spouse comprised about 11 percent. The extended and joint family or households together claim merely 20 percent of all households. This is the overall picture about the

³³ Singh, J.P. (2004), 'The contemporary Indian family', In Adams, B.N and Trost, J. (Eds.), '*Handbook of World Families*', Sage Publications Inc., California.

³⁴ Census of India (2011), Available at <http://www.censusindia.net/>.

entire country, whereas in the case of urban areas the proportion of nuclear family is somewhat higher still.

An extended family, which includes a couple with married sons or daughters and their spouses as well as household head without spouse but with at least two married sons, daughters and their spouses, constitute a little less than one fifth of the total households. With further industrial development, rural to urban migration, nuclearisation of families and rise of divorce rate and the proportion of single member household is likely to increase steadily on the line of industrial West. This is believed to be so because the states, which have got a higher level of urbanization, tend to have a higher proportion of single member households. Similarly, about a couple of decades ago almost 20 percent households contained only one person in the USA.³⁵ More or less, a similar situation exists in other developed countries as well, and above all, not a single country has recorded decline in the proportion of single member household during the last three decades. In fact, the tendency is more towards increase in the proportion of single member households.

As the process of family formation and dissolution has become relatively faster now than before, households are progressively more headed by relatively younger people. Census data from 1971 onward have clearly borne out that at the national level over three-fifths of the households are headed by persons aged less than 50.³⁶ There is every reason to believe that proportion of households headed by younger persons is likely to constitute a larger proportion than this in urban areas where the proportion of extended family, not to speak of joint family, is much smaller than that of rural areas.

³⁵ Skolnick, A. and Skolnick, J.H. (1980), *Family in Transition*, Little, Brown and Company, Boston.

³⁶ Ibid. 33, p. 28

The emergence of financially independent, career-oriented men and women, who are confident of taking their own decisions and crave to have a sense of individual achievement, has greatly contributed to the disintegration of joint family. Disintegration of joint family has led to closer bonds between spouses, but the reverse is also true in certain cases. For many, nuclear family is a safer matrimonial home to a woman. In bygone days people generally lived in joint families, yet familial discord never escalated into extreme physical violence or death, as we so often come across such instances in our day-to-day life and also know through national dailies, both electronic and print media.

2.4.2 Changes in Authority Structure

Once the authority within the family was primarily in the hands of family elders. The general attitude of members of the family towards the traditional patriarch was mostly one of respect. Loyalty, submissiveness, respect and deference over the household were bestowed on him. These attributes also encompassed other relationships in the family, such as children to their parents, a wife to her husband, and younger brothers to their older brothers.³⁷ Within a household no one was supposed to flout the will of his elders. The father, or in his absence the eldest brother, was consulted on all important family matters like pursuing litigation in courts of law, building a house, buying and selling of property and arranging marriages, etc. The joint family did not allow the neglect or disregard of elders. The age-grade hierarchy was quite strong. Now the people of younger generation, particularly those with modern tertiary education, do not seem to show the same reverence which their fathers had for their parents or elders.

³⁷ Gupta, G.R. (1978), 'The joint family', In Das, M.S. and Bardis, P.D. (Eds.) *'The Family in Asia'*, George Allen & Unwin, London.

Among women, patriarch's wife was the paramount authority. In fact, women's position depended on the position of their husbands in the household. The wife of the household head or mother-in-law was in charge of the household. Her word was law or at least had the same force. Her decisions were made for the entire family and not for the welfare of the individuals in it. Young women in the family were expected to be dutiful and obedient. Self-assertion, even in bringing up their own children, was blasphemy. Widows and those spurned by their husbands were assured of the family roof, though mostly as voiceless members.

With a view to absolving themselves of responsibility now parents cleverly encourage their educated sons and daughters-in-law to take independent decision in a joint and extended family situation, leave aside urban areas, the similar situation has started to emerge in rural areas too. This is not unusual when sons and daughters tend to possess a higher level of education and a greater degree of exposure of the world outside the family than ever before. Now boys and girls, contrary to the old practice, are beginning to assert their wishes in mate selection. Parental decisions are no more supreme. Changes concerning erosion of authority of old guards, particularly in matters of mate selection, are on gradual decline in rural areas too.

Yet another interesting fact about the change in authority structure within the family is that about 10 percent of all the households are headed by women.³⁸ Most of the female household heads are usually independent and gainfully employed. In the absence of their husbands, either because of death, separation, transfer in job or business

³⁸ National Family Health Survey-1 (1992-93) (1994), *'India: Introductory Report'*, IIPS and ORC Macro, Mumbai.

engagement, women are themselves able to run the affairs of their family. Long distance migration of men for employment is also an important reason for the emergence of such households. The phenomenon of female-headed household assumes significance in the Indian society because in the past when the joint family system was so preponderant that the female-headed household was quite an uncommon phenomenon.

2.4.3 Changes in Marital Practices

The traditional system of values of the Indian society, especially that of Hindus, has been such that it stood for the practice of early as well as universal marriage for females. Child marriage or pre-puberty marriage all through has been an archetypal institution of India. The mean age at marriage was reported to be quite low in the 19th century and so also in earlier days. The mean age at marriage for females was about 13 years between 1901 and 1931 censuses³⁹ and it did not differ much between different communities. Of all the legal measures the Child Marriages Restraint Act 1929 (and its further amendments in 1949, 1955 and 1978) happened to be quite effective one. Rise in the age at marriage really became conspicuous during the post independence era, that is, during the period onward 1950. The act was further amended in 1978 wherein boys' marriage age was raised to 21 and girls' age to 18 years. On the whole, the state level census information for the last one hundred years has revealed a clear rise in the age at marriage for girls. During 1891-1991 the age at marriage increased by 4 to 7 years in different parts of the country. The Census of India, 2011⁴⁰ has estimated an age of 21.5 at marriage.

³⁹ Ibid. 34, p. 28

⁴⁰ Ibid.

A new law banning child marriage was passed in December 2006. The law provides certain positive initiatives for the intervention of courts to prevent child marriages through stay orders. Child marriages are solemnised during times of festivals such as Akshaya Tritiya, Akha Teej, Ram Navami, Basant Panchami and Karma Jayanti.⁴¹ According to UNICEF report⁴², 47 percent of India's women aged 20-24 were married before the legal age of 18, with 56 percent in rural areas.

Child marriages have been prevalent in many cultures throughout human history, but have gradually diminished since some countries started to urbanise and experience changes in the ways of life for the people of these countries. An increase in the advocacy of human rights, whether as women's rights or as children's rights, has caused the traditions of child marriage to decrease greatly as it was considered unfair and dangerous for the children. Today, child marriage is usually practised in countries where cultural practices and traditions of child marriage still have a strong influence. Although child marriages have been outlawed a long time ago, South Asia has currently the highest prevalence of child marriage of any region in the world.⁴³ India, as noted above, happens to be a forerunner in this regard.

Yet another important marital practice is consanguineous marriage which has been the notable feature of a large segment of the Indian society since long. Through the ages the system of cross-cousin and cross-uncle niece marriages has been the most favoured kind of marriage in South India. The most desirable mate for a man has been his

⁴¹ social.un.org/index/LinkClick.aspx?fileticket...tabid=215

⁴² UNICEF (2009), *The State of the World's Children*, Division of Communication, UNICEF, United Nations Plaza, New York.

⁴³ Ibid.

own sister's daughter or mother's brother's daughter.⁴⁴ In the face of rising dowry practices across the country consanguineous marriages have appreciably declined in South India in recent years. However, such marriages have remained tabooed among the vast majority of Hindus of North India. The Hindu Marriage and Divorce Act 1955 prohibits marriage among close relatives, called sapinda marriage. The sapinda relationship extends as far as the third generation in the line of mother and the fifth in the line of father. In North India only Muslims, certain scheduled castes and scheduled tribes tend to practice consanguineous marriages. Most of the tribal groups practice consanguinity of both types such as marriages with the father's sister's daughter, the mother's brother's daughter and the elder sister's daughter.⁴⁵

The Indian society has been a highly endogamous. Marriage within the same subcaste has been followed very strictly. The scheduled tribes are also endogamous, but most of the tribal communities practice clan exogamy.⁴⁶ Polygamy, more particularly polygyny, has been one of salient features of Indian family. It has been more popular among Muslims than Hindus. Here it is not suggested that the incidence of polygyny is more common than monogamy. The polygamous males often derived support from age-old scriptures and mythological stories. But mainly those who had no issue from the first wife practised such marriages. With the rise in the level of literacy the incidence of polygyny has receded even among the Muslims despite the fact that such marriages have got full cultural and legal sanction. While monogamy is the predominant form of

⁴⁴ Driver, E. D. and Driver, A.E. (1988), 'Social and demographic correlates of consanguineous marriages of south India', *Journal of Comparative Family Studies*, Vol. 19, pp 229-244.

⁴⁵ Singh, K. S. (1997), *The Scheduled Tribes* (People of India, Vol. III), Oxford University Press, New Delhi.

⁴⁶ Ibid.

marriage, there are a large number of tribes practicing sororal polygyny and non-sororal polygyny.⁴⁷

2.4.4 Dissolution of Marriage

The dissolution of marriage has been quite uncommon and rare in India for a long time. In case of any crisis or threat to stability of marriage, caste, community, kinsmen, tended to have played a dominant say. People had both respect for and fear of social values and public opinion. Authority of community, though implicit, has been supreme. The system of religious belief has provided enough sustenance to the institution of marriage and family. Individual choice has always been subservient to the communal sentiment or public opinion. Hindu marriage is taken as a life-long union for the couple, as it is a sacrament, rather than a contract between the couple to live in a social union so long as it is cordially feasible. Even in the event of frequent mental and physical torture, most Indian women persist in marriage, since remarriage of divorced or separated women is quite difficult. Morality relating to sex is so highly valued that every male wants to marry a virgin girl only. In the past Hindus demanded pre-nuptial chastity on the part of both, but now it is by and large limited to females. Virginitly is regarded as the girls' greatest virtue and a symbol of respectability. Under the circumstances remarriage of women is so difficult that annulment of marriage is a very hard choice or option.

Despite all these there has been a significant change in the views and attitudes towards sanctity of marriage in the recent past, especially in cities. Marriage is no longer held to be a 'divine match' or a 'sacred union'. Now it is more like a transfer of a female

⁴⁷ Ibid. 45, p. 34.

from one family to another, or from one kinship group to another. The marriage is no longer sanctified as it was believed in the past, and is viewed only as a bonding and nurturing life-long relationship and friendship. The rather flippant and superficial reasons given by many women and men to break a marriage may not portend well for the future. Indian marriages are still largely resilient and lasting, whereas in many developed countries they seem to break up for seemingly trivial reasons. Marriages are very vulnerable or fragile there. One in every four or five marriages breaks up despite more space and freedom in the West. The longevity of marriage in most developed countries ranges on an average from five to seven years. While in India divorce rates are among the lowest in the world. Only one out of 100 marriages ends up in divorce here. These days divorce rates in India's urban sphere are, however, slowly mounting.⁴⁸

Marriage counsellors, formerly pooh-poohed at, have today assumed a lot of importance in guiding couples through stormy seas and averting the imminent pain of divorce. Today in cities there is disenchantment with the system of arranged marriages in a large number of cases. The Indian family is faced with a new kind of social and psychological constraints. The women, however, tend to be more concerned about their marriage than men and in case of a problem they are expected to go for counselling. They are expected to take the lead to resolve conflicts and when they give up the effort, the marriage is generally over. In today's shifting values and changing times, there is less reliance on marriage as a definer of sex and living arrangements throughout life. Today in cities there is disenchantment with the system of arranged marriages. There is a greater incidence of extra-marital relationships, including open gay and lesbian relationships, a delay in the age at marriage, higher rates of marital disruption and more egalitarian

⁴⁸ Ibid. 41, p. 33.

genderrole attitudes among men and women. It is reported that in big metropolises a new system of 'live-in-arrangements' between pairs, particularly in upper stratum of society, is steadily emerging as a new kind of family life. Anyway, a relatively higher divorce rate in cities, inter alia, connote that marriage is an institution in trouble, or else expectations are so high that people are no longer willing to put up with the kinds of dissatisfactions and empty shell marriages that the previous generations tolerated. High rate of remarriages clearly means that people are sacrificing their marriages because of unsatisfactory relationships.

2.4.5 Domestic Tension and Violence

Violence within family settings is primarily a male activity. The prime targets are women and children. The women have been victims of humiliation and torture for as long as we have written records of the Indian society. Despite several legislative measures adopted in favour of women during the last 150 years, continuing spread of modern education and women's gradual economic independence, countless women have continued to be victims of discrimination and violence in the country.⁴⁹ Increasing family violence in modern times has compelled many social scientists to be apologists for the traditional joint family- as happy and harmonious, a high-voltage emotional setting, imbued with love, affection and tenderness. India's past has been so romanticised by certain scholars that they have regarded the joint family as the best form of family.

⁴⁹ Singh, J.P. (2002), 'Social and cultural aspects of gender inequality and discrimination in India', *Asian Profile*, Vol. 30, No. 2, pp 163-176.

There are data⁵⁰ showing that in India 40 percent of women have experienced violence by an intimate partner. These stark figures underline the fact that, although the home and community are places where women provide care for others, they are also places where millions of women experience coercion and abuse. A study of five districts of the State of Uttar Pradesh has revealed that 30 percent of currently married men acknowledge physically abusing their wives.⁵¹ About fifty percent of the women experiencing physical violence also reported physical abuse during pregnancy.

With the rise in the level of education and exposure to mass media, women tend to have greater awareness of the notion of gender equality, faith in the effectiveness of legal action to protect their rights, and confidence in such institutions as family courts and certain voluntary organizations working for women. Yet there is no sign of abatement in gender related violence. Cases of domestic violence, like wife-battering and forced incest with the women of the household, are so personal and delicate that they are seldom reported to the police or law courts. We are sure that the recent legislation of anti-domestic violence act of 2005 would certainly take care of the problem of gender-based violence of the Indian woman to a very large extent.

There is another side of the story of domestic violence as well which has remained uncovered, particularly by feminist writers. It is roughly estimated that every year more than 58000 educated women are making the life of their husbands hell by misusing anti-dowry law and domestic violence act and under these laws legal terrorism is continuing openly to extort money from the husbands and their families. More than 52000 married men are ending their life due to various type of harassment and domestic

⁵⁰ Ibid. 41, p. 33.

⁵¹ UNC, 1997, *Uttar Pradesh Male Reproductive Health Survey 1995-96* (The Evaluation Project), University of North Carolina at Chapel Hill, NC.

violence faced from their beloved wives in the form of verbal abuse, financial abuse, mental abuse, sexual abuse, relationship cheating, etc.⁵²

2.4.6 Problems of Children

Children constitute a little over 30 percent of the total population of the country according to the 2001 Census of India.⁵³ Evidence suggests that they are quite vulnerable and their exposure to violations of their protection rights remains widespread and multiple in nature. The manifestations of these violations are very varied, ranging from child labour and child trafficking to commercial sexual exploitation and many other forms of violence and abuse. With an estimated 12.6 million children engaged in hazardous occupations⁵⁴, for instance, India has the largest number of child labourers under the age of 14 in the world. Although poverty is often cited as the cause underlying child labour, other factors such as discrimination, social exclusion, as well as the lack of quality education or existing parents' attitudes and perceptions about child labour and the role and value of education need also to be considered.

While systematic data and information on child protection issues are still not always available, evidence suggests that children in need of special protection belong to communities suffering disadvantages and social exclusion such as scheduled castes and scheduled tribes, and the poor. The lack of available services as well as the gaps persisting in law enforcement and in rehabilitation schemes also constitute a major cause of concern. The children of poor families, especially those of artists, craftsmen, and other professions are trained by their parents and elders of the family in their vocations such as

⁵² Ibid. 41, p. 33

⁵³ Ibid. 34, p. 28

⁵⁴ Ibid.

weaving, tanning, sweeping dyeing, hairdressing, painting, carpentry and agriculture. A vast number of children grow up lending a helping hand to elders in their home-industries. The practice of intergenerational transfer of traditional callings more or less is still continuing. Such kids who lack formal schooling, but working and specializing in some craft or their traditional callings help them build a career.

Indeed, the poverty in India forces many parents to send their children to earn extra money. The employers who hire such children pay them paltry wages. One can see boys of poor families act as vegetable vendors throughout India. Children of construction workers help in bringing water, cleaning vessels or collecting twigs for fuel. Their parents are compelled to come to cities when monsoon fails and they cannot cultivate their lands.

Children are also subjected to gender based discrimination. Discrimination against women in fact starts the day she is born. Sometimes it also starts when she is in her mother's womb as a foetus. The practice of female foeticide, despite being illegal, is vigorously practised in urban India. The girl child's right to survival, health care and nutrition, education, social opportunities and protection has to be recognised and made a social and economic priority. Along with this the basic structural inequalities that cause poverty, malnutrition and the low status of women have to be addressed, if these rights are to be ensured. Within family parents are first to practice gender based discrimination and it is the first school of learning where girls are inculcated the values of their being inferior to their brothers.

Although India loves their children, still thousands of children roam the streets of major cities around the country and receive no education, proper food, clothing, or a bed to sleep in at night. Awareness presentations through multi-media, contributions, talking and sharing information among friends, education, self-help initiatives and good old fashion kindness are all that is needed to get these kids off the streets. Basically they need five things for their living: food, clothing, shelter, medical assistance and education.

Contrary to the above, there are children who belong to the well-off sections of society, but they are also not free from problems. They are facing a different kind of problem either due to lack of adequate care or attention from their working parents or due to heavy expectation from them by their parents in a fiercely competitive modern world full of uncertainties in life. In cases of working mothers, children are placed in an entirely different situation. The demands of city life are such that both wife and husband tend to remain outside their home for work even at the cost of interests of their children. Working couples are unable to give proper care and affection to their children. Obviously, latchkey children of working couples are strangers to the sense of security enjoyed by their own parents. The system of surrogate mothers or the Montessori and Kindergarten systems of schooling has proved to be a very poor substitute for family as an agent of socialization. With the diminished role of family as an agent of socialization juvenile delinquency is on the increase. In the past children enjoyed security of a kind unknown today. Growing up under the joint care of adults made them feel responsible for all the extended members of the family, besides their own parents. Now children are at greater strain than ever before because in general parents intend to accomplish those things in their life through their children what they themselves could not be able to achieve, no matter how difficult they are. Children are put under great stress and strain to

score high marks at schools to be able to meet the ever-increasing challenges of fiercely competitive world of education and employment. In addition to helping their children achieve higher goals of life, women, sometimes both the parents, have to work harder with a view to attaining economic independence and maintaining a higher standard of living of their family.

As stated above, there has been appreciable decline in fertility over the years. This has not been possible without recording drastic changes in the attitude of people towards the size of family and the value system of patriarchy and patriliney. Based on studies on fertility behaviour and contraceptive practices one can conclusively contend that perhaps no element of the Indian social system has experienced greater changes than the system of family during the post-independent period. This is clearly borne out by various empirical investigations. Despite considerable decline in fertility or lesser burden of children on the family, there is no improvement in the quality of care of children especially in rural areas.

There hardly exists any pre-school or community centre in villages. There also does not exist even a basic facility of play ground for children. The older children have to mind the younger children at home and sometimes they are also expected to lend helping hands to their parents in the household chores as and when required. The poor children learn the expected roles of life of their own with the passage of time, while the well-off peasantry send their children to private schools in towns and cities for better schooling.

2.5 Chapter Summary

In this chapter, an introductory theme, definition and meaning of family is presented. Indian family system and contemporary changes affecting the family structure in India in terms of disturbed family, changes in marital status, and problems of children are addressed in detail.

The basic unit of the Indian society is patrilineal family unit and wider kinship groupings. The most widely desired residential unit is the joint family, ideally consisting of three or four patrilineally related generations, all living under one roof. Due to the continuous and growing impact of urbanization and westernisation, nuclear family has now become the characteristic feature of the Indian society. The phenomenon of male-headed households has now been transforming into female-headed ones. Another noticeable change in the Indian family system is dissolution of marriages and the number of divorce cases is slowly mounting day by day. Increasing domestic violence has been reported in India, as a result of family fragmentation and loss of social support systems in marriage. The major influence that has been cast by the changes in all spheres of the society is on children leading to child labour, trafficking and other forms of abuse. Poverty is the main factor among all the reasons behind all such negative occurrences making their lives miserable. At the same time, children of well-to-do families are also experiencing several problems in terms of lack of attention from their busy parents and a great strain from high expectations to excel in the competitive world.

CONCEPTS OF CONCILIATION
AND
MEDIATION AND
THEIR DIFFERENCES

CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

by Justice M. Jagannadha Rao

One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different. (a) In the year 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of ‘mediation’ or ‘conciliation’. Sub-section (1) of sec. 30 permits the arbitral tribunal to

“use mediation, conciliation or other procedures”,
for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of ‘conciliation’ and ‘mediation’ as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals

with 'Conciliation' there is no definition of 'conciliation'. Nor is there any definition of 'conciliation' or 'mediation' in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

Conciliation

In order to understand what Parliament meant by 'Conciliation', we have necessarily to refer to the functions of a 'Conciliator' as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to 'Conciliation' by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of 'conciliation' under sec. 89 because, it says that once a reference is made to a 'conciliator', the 1996 Act would apply. Thus the meaning of 'conciliation' as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned

and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account “the circumstances of the case, the wishes the parties may express, including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows:

“Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to reformulate the terms after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

“Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After

receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.”

The above provisions in the 1996 Act, make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. This is indeed the UNCITRAL concept.

Mediation:

If the role of the ‘conciliator’ in India is pro-active and interventionist as stated above, the role of the ‘mediator’ must necessarily be restricted to that of a ‘facilitator’.

In their celebrated book ‘ADR Principles and Practice’ by Henry J. Brown and Arthur L. Mariot (1997, 2nd Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that ‘mediation’ is a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

In yet another leading book on ‘Dispute Resolution’ (Negotiation, Mediation and other processes’ by Stephen B. Goldberg, Frank E.A. Sander

and Nancy H. Rogers (1999, 3rd Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

“Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of ‘teeth’ in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

“In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. In stead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties’ own efforts to do so.”

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the Lord Chancellor's Department on Alternative Dispute Resolution (<http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm>) (Annexure A), where while defining 'Mediation' and 'Conciliation', it is stated that 'Mediation' is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term 'conciliation' is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the 'mediator' is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a 'conciliator'. We have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator'

in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”.

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a ‘mediator’ rather than a ‘conciliator’. Brown says (p 272) that the term ‘Conciliation’ which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term ‘mediation’. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use ‘conciliation’ to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, ‘Advisory, Conciliation and Arbitration Service’ (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to ‘employment’, the term ‘conciliation’ is used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of ‘conciliation’ formulated by the ILO (1983) is as follows:

“the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

However, according to the ACAS, ‘mediation’ in this context involves a process in which the neutral “mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see www.nadrac.gov.au) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms “conciliation” and “mediation” are used in diverse ways. (The ‘New’ Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words ‘conciliation’ and ‘counselling’ have disappeared in USA. In USA, the word ‘conciliation’ has disappeared and ‘mediation’ is used for the neutral who takes a pro-active role. For example:

“Whereas the terms ‘conciliation’ and ‘conselling’ have long since disappeared from the literature in reference to dispute resolution

services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with ‘mediation’ grafted on as a separate dispute resolution service in 1991.”

Conversely, policy papers in countries such as Japan still use the term ‘conciliation’ rather than ‘mediation’ for this pro-active process (see www.kantei.go.jp/foreign/judiciary/2001/0612 report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where ‘conciliation’ is treated as being at the less formal end of the spectrum while ‘mediation’ is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

“Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute....”

In an article from US entitled “Can you explain the difference between conciliation and mediation” (<http://www.colorado.edu/conflict/civil-rights/topics/1950.html>), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat ‘conciliation’ as less formal and ‘mediation’ as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a ‘conciliator’. The above article shows that in US the word ‘mediator’

reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, 'Conciliation' is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see <http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm>) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediation' is used and use the word 'conciliator' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.

CONCILIATION

CONCILIATION

What is conciliation?

Conciliation is an alternative out-of-court dispute resolution instrument.

Like mediation, conciliation is a voluntary, flexible, confidential, and interest based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party.

The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interests.

Like in mediation proceedings, the ultimate decision to agree on the settlement remains with the parties.

Main benefits

- **Conciliation ensures party autonomy.**
The parties can choose the timing, language, place, structure and content of the conciliation proceedings.
- **Conciliation ensures the expertise of the decision maker.**
The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and / or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.
- **Conciliation is time and cost efficient.**
Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.
- **Conciliation ensures confidentiality.**
The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.

You should develop your sixth sense as a Family Court Judge. Each case is unique, and each case deals with the family and each case kills the family. It is actually a dispute in the society and such family disputes causes lot of restlessness in the society and lot of troubles in the society.

Hon'ble Mr Justice Kurian Joseph
Judge, Supreme Court of India & Chairman
Supreme Court Committee for Sensitization of Family Court Matters
*(Excerpts from His Lordships's address to the Family Court Judges in
Chennai Regional Meet for Sensitization of Family Court Matters)*



Prepared by
Hon'ble Mr. Justice D.N. Patel
Judge, High Court of Jharkhand
&
Chairman
Supreme Committee for Sensitization of Family Court Matters