Adequacy of Matrimonial Reliefs under the Personal Laws in India: A Human Rights Perspective

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By

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CERTIFICATE

This is to certify that the thesis titled **"Adequacy of Matrimonial Reliefs under the Personal Laws in India: A Human Rights Perspective"** submitted to Sikkim University in partial fulfilment of the degree of **Doctor of Philosophy in Law**, embodies the result of *bonafide* research work carried out by **Ishraz Ahmed** under my guidance and supervision. No part of the thesis has been submitted for any other Degree, Diploma or Fellowship. All the assistance and help received during the course of investigation have been acknowledged by her.

We recommend this thesis to be placed before the examiners for evaluation.

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DECLARATION

I, **Ishraz Ahmed**, hereby declare that the subject matter of this thesis titled **"Adequacy of Matrimonial Reliefs under the Personal Laws in India: A Human Rights Perspective"** isthe research work done by me, that the contents of the thesis did not form the basis of award of any previous degree to me, or to the best of my knowledge, to anybody else. The thesis has not been submitted by me for any research degree in any other university/institute. This has been submitted in partial fulfilment of the requirement of the Degree of Doctor of Philosophy in Law, School of Social Sciences, Sikkim University.

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"Teaching is a noble profession that shapes

the character, calibre and future of an individual. If people remember me as a good

teacher that will be the biggest honour to me."

-Dr. A.P.J. Abdul Kalam

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List of Abbreviations

Ind	India
Art	Article
p.	Page
Sec	Section
Para.	Paragraph
Ed.	Edition
Pvt.	Private
Ltd.	Limited
Vol.	Volume
URL	Uniform Resource Locator
Res.	Resolution
B.C.	Before Christ
A.D.	After Death
UN	United Nations
UNGA	United Nations General Assembly
ECOSOC	United Nations Economic and Social Council
CHR	Commission on Human Rights
CSW	Commission on the Status of Women
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	First Optional Protocol to the International Covenant on Civil and Political Rights

ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
DEDAW	Declaration on the Elimination of Discrimination Against Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
VCLT	Vienna Convention on Law of Treaties
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CAT	Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
OPCAT	Optional Protocol to the Convention Against Torture
ECPHRFF	European Convention for the Protection of Human Rights and the Fundamental Freedoms
ESC	European Social Charter
ADRDM	American Declaration of the Rights and Duties of Man
ACHR	American Convention on Human Rights
ACHRPR	African Charter on Human Rights and People's Rights
HRC	Human Rights Committee
AIWC	All-India Women's Conference
Constitution	Constitution of India
CrPC	Code of Criminal Procedure
IPC	Indian Penal Code

AIR	All India Reporter
SCC	Supreme Court Cases
KLT	Kerala Law Times
CrLJ	Criminal Law Journal
SCALE	Scale
ILR	Indian Law Reports
LR	Law Reports
PD	Public Defender
DMC	Divorce & Matrimonial Cases
MLR	Maharashtra Law Reporter
SCR	Supreme Court Reports
FB	Full Bench
DMC	Divorce and Matrimonial Cases
MIA	Moores Indian Appeals
RCR	Recent Criminal Reports
Govt.	Government
Rep	Reporter
SC	Supreme Court
HC	High Court
Ins.	Inserted
w.e.f.	With effect from
Del	Delhi
Ker	Kerala
Kar	Karnataka
Bom	Bombay

Cal	Calcutta
Chh	Chhattisgarh
Mad	Madras
All	Allahabad
AP	Andhra Pradesh
J&K	Jammu and Kashmir
HP	Himachal Pradesh
MP	Madhya Pradesh
P&H	Punjab and Haryana
Raj	Rajasthan
U.P.	Uttar Pradesh
Org	Organisation
Chap	Chapter
Int.	International
Inc.	Incorporated
Commr.	Commissioner

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Chapter One
Introduction

Comparative legal research is primarily done to compare legal provisions and bring about improvement in the system which requires it. One legal system benefit from the other because of comparative method of legal research. Henry Maine[1] and Gutteridge[2] were strong believers of this philosophy. Plato in his seventh book on The Republic has started it with a metaphor where he wants us to imagine a cave where men are chained and unable to move or even look behind them. All they could see was the light and the shadows of the people engaged in activities. If one of them were to ever escape into the real world and then come back to the cave with new ideas of truth and justice and question the shadows which the people in the caves believed to be true, the cave dwellers would not just severely punish him but might even punish him with death. This metaphor in the book has the sole purpose of pressing on the fact that we as human beings must be always ready to lookout of the cave and be open to new ideas. It says that wisdom in legal research comes from comparison. It further says that we should give realistic considerations to the legal problems rather than accepting things as they are.[3] Therefore, comparative legal research has its boon and bane but it cannot be denied that it is one of the most important forms of legal research.

In India, one of the best ways of conducting comparative legal research is by comparing the various personal laws and examining the advantages and disadvantages of it. Since personal laws are based on religion and India being a secular country which recognises all religions, there is not just religious plurality but also legal

[1] Maine, Village Communities in the East and West, 4, 7th Edition, 1895
[2] Gutteridge H.C., Comparative Law, Cambridge University Press, 2nd Edition, 1949
[3] Vol. 54, No. 7, Hessel E. Yntema, Comparative Legal Research: Some Remarks on "Looking out of the Cave", Michigan Law Review, The Michigan Law Review Association, May, 1956, p. 899, URL: https://www.jstor.org/stable/1285385

plurality in the form of laws which govern such persons. Therefore, conducting a comparative legal research in India is not just easy but also necessary so that the positives of one personal law can be imbibed in another and the negatives of one could be done away with by emulating another.

Personal laws in India are quite distinct in the sense that they are different from the laws that are applicable to everyone and are the laws of the land.[4] Personal laws are religion based and are applicable to the followers of the concerned religions. "A statute may apply only to persons of a particular religion, but the "personal law" as understood in India is not itself statute law. The zeal for codification never in fact took effect upon the law of the Hindus or Mahomedans."[5]

Family matters in India are governed by personal laws which are based on religion. All issues arising out of marriage, dower, divorce, maintenance, gift, guardianship is governed by the personal laws of the parties. There exist prominently four personal laws in India namely Hindu law, Muslim law, Christian law and Parsi law.

The personality of laws became more prominent at the time of the British. The British had come to India to carry on trade. However, they enacted laws to govern the matters and employees of the East India Company. This was permitted to them by the Mughals to reduce their difficulty of complying with personal laws.

The British association with the Indians started when the British acquired the diwani rights in 1765 which involved tax collection and also some judicial functions.[6] The

[4] Vol. 89, No. 4588, George C. Rankin, The Personal Law in British India, Journal of the Royal Society of Art, Royal Society for the Encouragement of Arts, Manufactures and Commerce, May 20th, 1941, p. 427, URL:https://www.jstor.org/stable/41359756

[5] Ibid.

[6] Vol. 26, No.4, The Evolution of Personal Laws in India and Sudan: Alokda M. Tier, Journal of the Indian Law Institute, October- December, 1984. Indian Law Institute, URL: https://www.jstor.org/ stable/ 43950945

Warren Hastings Regulation of 1772 reflected the British supervision in the Mughal courts and thereby, their involvement in the administration of justice. Section 23 of this Regulation stated the application of the laws to Hindus and Muslims respectively in inheritance, marriage, caste and other religious usages. However, for matters relating to inheritance, succession, contract, it was English law that remained the personal law for the non-Hindus and the non-Muslims.[7]

Warren Hastings made a committee to architect plans for collecting revenues and the 27th Article of the plan stated "In all suits regarding inheritance, marriage and caste and other religious usages and institutions, the laws of the Koran with respect to Mahomedans and those of the *Shaster* with respect to Gentoos shall be invariably adhered to. On all such occasions the *Molavies* and Brahmins shall respectively attend to expound the law and they shall sign the report and assist in passing the decree."[8]

Thus, this enabled the British to deepen their roots in the country and thereby rule the people even more prominently by making them follow their laws.

In 1781 the Bengal Chief Justice, Sir Elijah Impey added 'inheritance' to the list of personal laws and it was included in the re-enacted version of Lord Cornwallis Regulation of 1793 which came into force in Bombay in 1799, in Madras in 1802 and in Oudh in 1803. Contract was a part of the personal laws in the presidency towns only.

This practice was strengthened when the three courts at Calcutta, Bombay and Madras were established in 1862. This gave the British an opportunity to apply the personal laws to the parties and also the British laws to the British subjects.

[7] Ibid.
[8] Supra note 4

On the 10th of July, 1833, Lord MaCaulay in a speech had proposed to codify all the laws applicable in British India including the personal laws.[9] The Report of the Indian Law Commission, 31st October, 1840 had shown similar intentions. However, after being a part of India and understanding the sentiments and attachment that Indians have with their religion and all matters relating to it, the Second Law Commission Report of 13th December, 1855 stated "no portion either of the Mahomedan law or of the Hindu law ought to be enacted as such in any form by a British legislature."[10] The British had taken no time to realise the sensitivity of the matter and how Indian personal laws could not be fondled with. They had known that it was something completely undesirable and would act as a hurdle in the achievement of their primary goals.

In India, the Hindus were governed by the Dharmashastras and Vedas and the Brahmins were regarded as the caste closest to God. They performed all duties relating to the holy texts. The sources of Hindu law were the Shrutis and Smritis and it was divided into the two schools, namely, Mitakshara and Dayabhaga.

Muslim law is dated back to the conquest of Sind in AD 712 by Muhammad B. Qasim but was established in India by Sultan Qutbu'd-din Aybak in the thirteenth century.[11]

Muhammadan law being applied to Indian natives is found in the Charter of George II in 1753 where Muslims could have their cases adjudicated according to the Muslim law.[12] For putting this into practice it was decided in 1772 that Muftis also known as the Muslim priests were to attend courts of justice and play a role in deciding the matter and delivering the judgements.

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[9] Ibid.
[10] Second Law Commission Report, 13th December, 1855
[11] A.A.A. Fyzee, Ed. Tahir Mahmood, Cases in the Muhammadan Law of India, Pakistan and Bangladesh, 2nd Edition, p. xviii
[12] Ibid., p. xx

According to Asaf A. A. Fyzee the system of applying personal laws to the people was not a move of the British but was practiced from the Mughal era. The Mughal Muslim rulers did not want to impose their laws on the Hindus residing in their country and therefore every person had the right of being governed by their own religious laws. The system of Personal laws being applied to the parties was seen to be followed more rigidly during the British period. The British did not want to interfere or change this pattern. They played along and let people be governed by their own personal laws even if it meant allowing practices like sati and polygamy. The British were here for carrying on trade which later turned into taking the maximum benefit out of the resources available in India.

The courts were directed to apply all the customs applicable to the parties and the principles of justice, equity and good conscience.[13] India was a county with a plethora of cultures and traditions.

Marriage is a union of not just two people but of two souls, their families, their environment and everything that surrounds them. It is impossible to imagine marriage as a partnership of only two persons. It is rather much deep rooted including every member of both the sides of the family and their feelings towards each other. Marriage is an association and it includes a number of factors for it to work out.

Among all relationships, perhaps it is the only valid one where we have a right to choose the person unlike in blood relationships where the other person is God gifted! Although destiny is said to have a role to play in this whole process as we human beings are never ready to believe that things are happening without another supernatural force and therefore include destiny in this as well.

[13] Supra note 6

Marriage is a blessing in some cases where it is sailing in smooth waters. A happily married life is the ideal life a person can have but unfortunately not all are blessed. So, for those unlucky ones who do not find happiness and solace in marriage, there must be a sensible rescue from a melancholic and odious union.

1.1 STATEMENT OF PROBLEM

In the Indian society marriage is given immense importance. The life of a person is considered incomplete without marriage. Families are not complete without marriage and it is considered as one of the colossal parental duties to marry off their children. Marriage is a part of all personal laws and each of them treats it differently and carries out the rites and rituals accordingly.

Marriages often turn unbearable. In such situations the only rescue is some sort of relief.

The reliefs that do exist are called matrimonial reliefs. But they are not adequate. They seldom give relief and often increase the trouble between the parties. Often instead of providing solution to the problem, the matter is only highlighted and aggravated and the required respite eludes.

Regardless of which Personal law one is governed by, human beings are same, their suffering is same and their emotions are same.

There exist different matrimonial reliefs which are available to people according to their personal laws which are dependent on religion. There are different grounds for divorce which are easy in some and very difficult in the others.

There are inadequate reliefs where two or three grounds are required for a divorce to take place where as in some other personal laws divorce is easier. Divorce in Hindu

law and Muslim law is easier compared to that in Christian law and Parsi law where it is very rigid and difficult.

Section 2 (i) of the Dissolution of Muslim Marriages Act, 1939 deals with the ground available to a woman for the purpose of divorce which is if the whereabouts of the husband have not been known for a period of four years; similar ground is available under Hindu law in Section 13(1)(vii)[14] but the time period given is seven years, Parsi law recognises it in case where it is for a period of two years[15] and under the Christian law desertion is for a period of two years.[16]

Section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939 states that if the husband has neglected or has failed to provide for her maintenance for a period of two years is it a ground for divorce.

This ground is available only under Muslim law. Other personal laws do not have a provision for this although maintenance as a remedy is provided under every personal law and also under the Code of Criminal Procedure.

Section 2 (iii) of the Dissolution of Muslim Marriages Act, 1939 states that if the husband has been sentenced to imprisonment for a period of seven years or upwards it is a ground for divorce, the Hindu Marriage Act, 1955 does not speak of imprisonment of husband as a ground for divorce but says that if the husband is guilty of rape, sodomy or bestiality, it is a ground for divorce.[17] The Christian law talks

[14] The Hindu Marriage Act, 1955, Section 13(1)(vii)- "has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive"

[15] The Parsi Marriage and Divorce Act, 1936, Section 32 (g)- "that the defendant has deserted the plaintiff for at least two years;"

[16] The Divorce Act, 1869, Section 10(ix)- "has deserted the petitioner for at least two years immediately preceding the presentation of the petition."

[17] The Hindu Marriage Act, 1955, Section 13 (2) (ii)- "the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;"

about the conviction for rape, sodomy and bestiality. Under Parsi law this is a ground for divorce under Section 32(f) of the Act and the time period of imprisonment is same as that under Muslim law, which is seven years.

Section 2 (iv) of the Dissolution of Muslim Marriages Act, 1939 says that if the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years, it is a ground of divorce. However, other personal laws have not explicitly dealt with this as a ground for divorce.

Section 2 (v) states that if the husband was impotent at the time of the marriage and continues to be so, it may be a ground for divorce. This again has not been provided for under any of the other personal laws as a ground for divorce.

Section 2 (vi) of the Dissolution of Muslim Marriages Act, 1939 says that if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease, it is a ground for the wife to leave him. Hindu Marriage Act, 1955 deals with this ground for divorce under Section 13(1) (iii), (iv) and (v) of the Act. The Parsi Marriage and Divorce Act, 1936, deals with this ground for divorce under Section 32(b) and (e) of the Act.

However, the Divorce Act, 1869, governing the Christians, has no such ground for divorce.

Section 2 (vii) of the Dissolution of Muslim Marriage Act, 1939 says that the wife, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated is a ground for divorce.

Cruelty as a ground for divorce is recognised under all personal laws. However, under the Divorce Act, 1869 governing the Christians, cruelty is combined with adultery as a ground for divorce.

Conversion is also recognised under all personal laws as a ground for divorce but the Dissolution of Muslim Marriages Act, 1939 does not again explicitly mention it as a ground for divorce.

Judicial separation as a matrimonial relief finds place in the Hindu personal law in Section 10 of the Hindu Marriage Act, 1955,[18] under the Christian personal law it is contained in Section 22 of the Divorce Act, 1869 and under the Parsi personal law under Section 34 of the Parsi Marriage and Divorce Act. It is the period when the parties are separated by a court order and may get back to living together after three years or get a divorce according to whatever they want. But under Muslim Personal Law, this matrimonial relief is not provided.

Another matrimonial relief is restitution of conjugal rights. Section 9[19] of the Hindu Marriage Act, 1955, deals with this particular relief. Section 32 of the Divorce Act, 1869, deals with restitution of conjugal rights. Section 36 of the Parsi Marriage and Divorce Act, also deals with it. Muslim personal law also recognises it. It is a provision for enabling the parties to live together by a court order. All personal laws

[18] Hindu Marriage Act, 1955, Section 10- "Judicial separation- (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds might have been presented. (2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statement made in such petition, rescind the decree if it considers it just and reasonable to do so."

[19] Hindu Marriage Act, 1955, Section 9- "Restitution of conjugal rights.- When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly"

recognise as a matrimonial relief restitution of conjugal rights but whether it should be recognised as a proper matrimonial relief since it is violative not only of Article 14 and Article 21 of the Constitution of India but also is violative of human rights of the woman as was held by the Andhra Pradesh High Court in *T. Sareetha v. T. Venkatasubbaiah*.[20]

Maintenance is recognised by all the personal laws which shows the importance it has. But they differ in respect of period of maintenance and other details.

The Hindu Marriage Act, 1955 and the Muslim Women's (Protection of Rights on Divorce) Act, 1986 deal with the maintenance to be provided to the spouse as a matrimonial relief.

Section 36 of the Divorce Act, 1869, deals with alimony *pendete lite* and Section 37 deals with permanent alimony.

Section 39 of the Parsi Marriage and Divorce Act deals with alimony *pendent lite* and Section 40 is permanent alimony and maintenance.

Thus, the matrimonial reliefs under the personal laws in India are a welter of confusing, inadequate and unjust legal provisions.

1.2 LITERATURE REVIEW

Living the different personal laws is sometimes like living different realities and this is where the importance of reading writings of various authors comes in. Hence, the researcher has made an endeavour to do as many and as diversified literature review as possible on the subject matter.

[20] T. Sareetha v. T. Venkatasubbaiah, AIR 1983, AP356

Patrick Parkinson, Family Law and the Indissolubility of Parenthood, Cambridge University Press, 2011.

The book has a number of chapters of which the relevant ones are chapter two- the divorce revolution and the process of allocation, chapter eight- dispute resolution for the enduring family and chapter nine- adjudication for the enduring family.

Chapter two has the quote by Jesus Christ in the earliest chapters of the book of Genesis that after marriage, man and woman "become one flesh."[21] "So they are no longer two, but one," Jesus explained. "Therefore, what God has joined together, let no-one separate."

The book discusses the prohibition on divorce. It says that as stated by Mary Ann Glendon that over time divorce first became permitted and then gradually liberalized.

The emergence of no-fault divorce has been discussed. Its origin has been elaborately discussed. Its position in Stalin's government in Russia has been dealt with. The Russian Family Code of 1918 introduced mutual consent of both parties to the divorce. Article 18 of the Russian Family Code of 1926 allowed more freedom in divorce by enabling *ex parte* application to the Civil Registry. Nazi Germany's divorce on the basis of three years separation as a fault-based ground for divorce was added by Hitler in 1938. After the Second World War a number of countries reformed their family laws and provisions for divorce. For the purpose of this study divorce is one of the matrimonial reliefs and is dealt with exhaustively. Since this chapter includes the condition of a number of countries, it was good for a comparative study of these countries with India.

[21] Genesis 2:24 (New International Version)

Chapter eight has dealt with mediation as an alternative to litigation, the paradigm shift in family dispute resolution, new approaches to in-court counselling services and mediators, lawyers and the court system. Chapter nine is titled adjudication for the enduring family and deals with new approaches to adjudication. Countries like Denmark and Norway are described and the role of county Governor's offices has been dealt with. It also deals with reforming the adversarial system and adjudication in families with continuing high conflict.

Flavia Agnes, Law and Gender Inequality the Politics of Women's Rights in India, Oxford University Press, 1999.

The book is a work of the author as her M.Phil. dissertation at National Law School of India University. Known to be one of the leading figures on feminism, the author is known for her heart wrenching writings on women related issues.

This book is another masterpiece. Chapter one is Introduction- a need for rescrutiny. It is then divided into four parts. Part one deals with pre-colonial and colonial legal structures. Chapter two is Plurality of Hindu Law and Women's Rights under it. The chapter deals with the diverse sources of Hindu law, the concept of *stridhana*, women's rights under customary law, and "Hindu" an amorphous society.

Chapter three is Evolution of Islamic Law and Women's Spaces within it. It discusses the origin and development of Islamic law, introduction of Shariat law in India, rights of women under Islam and reform within Islam. Chapter four is titled Colonial rule and Subversion of rights. It deals with the jurisdiction of the company over natives, Anglicization of scriptures, subversion of women's rights, the status of women under the English law during the corresponding period. Chapter five is Politicization of women's rights. This chapter deals with the shift of the power that happened in 1857

from the company to the crown, the remoulding of the Indian family law within a western model, option of secular and civil statutes, sectarian reform within communalized communities and the debate within Constituent Assembly.

Part two of the book deals with post-independence developments. Chapter six is Hindu law reforms-stilted efforts at gender justice. It discusses the concerns governing the reforms, illusory inheritance rights, implications of formal equality, consequences of monogamy and the constitutional challenges. Chapter seven is erosion of secular principles. It discusses the scope of civil marriage law, efforts at introducing an adoption bill, the Shah Bano controversy and Muslim women's bill followed with the unpredictable turn of events. Chapter eight is communal undertones within recent judicial decisions. The chapter highlights the judgment of Justice Tilhari invalidating the triple talaq, Supreme Court Directive to implement a Uniform Civil Code and implications for identity politics.

Part three of the study deals with the developments in the personal laws of non-Muslim minorities. Chapter nine is titled legal significance of the Parsi community. The chapter deals with the Parsi laws of marriage and how it reformed during the eighties. Chapter ten is political reformulation of Christian personal laws. The chapter discusses Christianity in India and its origins. It also states the family laws governing Christian communities, the Law Commission Recommendations and community-based initiatives.

Part four of the book has chapter eleven and chapter twelve in it. Chapter eleven is model drafts and legal doctrines which deal with different drafts and recommendations and chapter twelve is strategies of reforms and as the title suggests,

it has practical strategies for reforming the personal laws and making it better. And perhaps, that is what the need of the hour for personal laws is.

Since the book covers a major portion of personal laws highlighting some key areas, the work is referred to at all stages of the research. Also, the researcher is a fan of the author and will be indebted to her for all her writings because of the knowledge they ooze out along with giving a new direction of looking at things.

Vol. 26, No.4, The Evolution of Personal Laws in India and Sudan: Alokda M. Tier, Journal of the Indian Law Institute, October- December, 1984. Indian Law Institute, url: https://www.jstor.org/stable/43950945.

The author has given a detailed analysis of the nature and purpose of personal laws. She has begun with a thorough and in-depth discussion of the history of India starting right from the Mughal rulers and the role played by the British era in strengthening the application of personal laws to the people respectively. The author has discussed all the Regulations and Charters which contributed to the development of personal laws in India. The author has then discussed the variation and scope of personal laws detailing the role played by courts in British India in adjudicating cases by applying the personal laws to them. Following it is the judicial extension of the subject matter and scope of personal laws. It speaks of the time before codification.

The article then goes on to discuss reduction in the number of personal laws and their subject matter. The factors behind the reduction are discussed of which the most important one is the decline due to judicial criticism against insufficient provisions of the personal laws. The special enactments for the Christians are also discussed. Operation of Parsi laws in matters of marriage, divorce and intestate succession is also dealt with stating further that it does not apply in intestate succession and religious

institution. It has then been said that in absence of legislation, justice, equity and good conscience is to applied and is a source of law. The Special Marriage Act, 1954 is also discussed, stating that it is an enabling Act and not a disabling one. The author has then moved on to discussing the subject matter and scope of personal laws in Sudan which may be relevant eventually in the research but is not of much importance at this stage of the study.

It is a 74-page long article which provides immense information about the history on personal laws in India and their application beginning mainly from the British era.

Vol. 33, No. 3, B.N. Sampath, Hindu Marriage aa a Samskara: A Resolvable Conundrum, Journal of the Indian Law Institute, Indian Law Institute, (July-September 1991), pp. 319-331, URL: https://www.jstor.org/stable/43951370

The author has begun by elaborating the nature of marriage. According to the author the nature of marriage is a samskara or sacrament. However, the author has further questioned whether the nature of marriage is relevant because the reliefs provided under the Hindu Marriage Act, 1955 are the same regardless of whether it is a contract or a sacrament. Then the author moves on to defining it as a status "arising between a man and a woman on the fulfilment of certain formalities, which may be religious or secular in character or partly the one and partly the other giving rise to rights, duties and obligations and which status can be terminated only in accordance with the provisions of the law."

A number of Hindu ancient sources are drawn upon and have been incorporated in order to understand the nature of marriage. Gradually the shift has been done and the author is of the view that according to the Hindu Marriage Act, 1955 it has almost acquired the shape of a contract rather than just a sacrament.

Since the article deals with marriage as a concept and its nature, elaborately, it was helpful to understand the matrimonial reliefs because without understanding matrimony, one could not understand the matrimonial reliefs.

Vol. 39, No. 2, Christa Rautenbach, Phenomenon of personal laws in India: some lessons for South Africa, The Comparative and International Law Journal of Southern Africa, (JULY 2006), Institute of Foreign and Comparative Law, URL: https://www.jstor.org/stable/23252637.

The author has discussed the histories of India and South Africa on the grounds that they are uniquely quite similar to each other. They were both colonies of the British which eventually received independence.

The uniqueness about India lies in the fact that there exist, simultaneously, two sets of laws. One that is applicable to all because it is the secular law and other that is applicable to only certain population because it applies only to them. It is beautiful how these two sets of laws can co-exist and not hamper the functioning of each other.

The author has discussed the Uniform Civil Code, Article 44 of the Constitution of India, along with discussing a number of relevant cases like *Sarla Mudgal v. Union of India*.[22] The importance of Uniform Civil Code, the fear of it and also the need for it is discussed in detail. The Uniform Civil Code has been used as a symbol of unity and integrity of India in this article and the author has advocated in favour of it. A number of relevant suggestions have been discussed by the author and are of great relevance.

[22] Sarla Mudgal v. Union of India, AIR 1995 SC 1531

Vol. 89, No. 4588, George C. Rankin, The Personal Law in British India, Journal of the Royal Society of Arts, (MAY 30th, 1941), Royal Society for the Encouragement of Arts, Manufactures and Commerce, URL: https://www.jstor.org/stable/41359756.

The piece of work is an extraction from 'INDIA AND BURMA SECTION, Wednesday, February 21st, 1941 SIR GEORGE BIRDWOOD MEMORIAL LECTURE the Right Hon. L. S. Amery, P.C., M.P., Secretary of State for India and Burma, in the Chair'- Sir George Rankin was on the bench and as a Chief Justice in Calcutta.

The customs and beliefs are considered to be indigenous and fundamental to the Indian society. The personal law in India has been said to be different as different laws are applicable to different people. Hindu and Mohammedan laws are considered the two most important ones among the personal laws. The article says "we know that a Muslim can by will dispose of not more than a third of his estate, that he can divorce his wife at his own hand by giving her talak, that speaking generally women will not be excluded from inheriting from him, but that his property will descend according to the rule of the "double share to the male." The Hindu joint family, again, is the unique product of the Hindu law, sons under the Benares school obtaining their interest in the joint family property at their birth, while under the Bengal school they succeed by inheritance from their father. Under both schools, daughters in the presence of sons are entitled, not to a share, but to rights of maintenance and marriage expenses if unmarried. In a number of matters-airily referred to sometimes as religious and family matters-no attempt is made to apply the same law to all the inhabitants, even to those who have no connection whatever with any other country". Thus, all this is easier

known because of the fact that there is personality of laws which thereby ensures certainty and the prediction of circumstances.

The quotes of the eminent lawyers who composed the Second Law Commission of India are given.

Other personal laws, like the Burmese Buddhist law has also been discussed. How as a judge he had to deal with the primitive people of Khasia and Jaintia hills in Assam while dealing with their matrimonial issues as they had been converted to Christianity has been addressed. How the zeal for codification has not taken effect among the Hindus and Muslims has also been dealt with in this article. How MaCaulay and the first Law Commission had proposed the codification of the personal laws but due to lack of willingness of the people, the intention had been abandoned.

The laws of the land have been discussed and how apart from presidency towns, there existed no such particular law of the land. The history of British India has been dealt with elaborately and this is an exhaustive piece of work which is referred to even in the later stages of the research.

Vol. 4, No. 1, M. P. Jain, Matrimonial Law in India, Journal of the Indian Law Institute, Indian Law Institute (Jan.-Mar., 1962), URL: https://www.jstor.org/stable/43949675.

The article begins by discussing the striking feature of matrimonial laws today as being extremely diverse. The author has discussed all the personal laws which govern marriages. The diversity has been justified with reasons of diversity in religious, cultural and social groups with differences in creeds, faith and belief. Also, the

Special Marriage Act, 1954 which is a secular legislation and governs all marriages has been discussed.

The article goes on to say “It may be of interest to remember that the policy of applying personal laws of marriage was initiated by Warren Hastings, the first British Governor-General of India, 1772 and it was assiduously pursued by the British throughout their rule in the country. The Indian Government has also been pursuing the same policy for the present, though the ultimate goal is to have a uniform law for all.” Thus, the author has given a backdrop and laid down the base for the discussion of personal laws, going back to its origin in the British regime to the efforts put in by the India government for wanting to establish a uniform civil code.

The matrimonial remedies provided under the Special Marriage Act, 1954, have been discussed in the article. It starts with divorce and the various ground enumerated for divorce, then moves on to discussing the provisions for it under the Hindu Marriage Act, 1955, gradually shifting to the provisions under the Mohammedan law and then to the Parsi Marriage Act, 1856. Judicial separation too has been discussed at length followed by the restitution of conjugal rights and then nullity and annulment, all in the same format.

The article is quite wholesome along with being extremely informative. It is referred to at the later stages of the study.

Granville Austin, Religion, Personal Law and Identity in India, Religion and Personal Law in Secular India A Call to Judgment, Edited by Gerald James Larson, Social Science Press, Delhi, 2001.

A book named Religion and Personal Law in Secular India which consists of a number of articles written by eminent scholars. One such relevant article in this study is the one written by Granville Austin on Religion, Personal Law and Identity in India.

The author has described religion and personal laws in India as closely intertwined with each other. Both religion and personal laws have also been independently dealt with. The article deals majorly with Article 44 and the reasons behind why it has never been successful in coming into force. The politics of the two religions has been described accurately and brings out the reality of the situation.

This article has mainly highlighted the fear of Muslims with respect to the Uniform Civil Code and that once it comes into existence the Muslims would lose their identity and their individuality.

The 1928 Nehru Report has been given importance as it is presumed to be a step towards unity due to the communal differences that existed at that time. The Constituent Assembly (1946-1949) has been dealt with and it is discussed how it was to deal with the minority rights and religion in the wake of partition and the communal riots that were happening at that time. The religious rights are all discussed in details. The article sums up the fear of Muslims regarding the Uniform Civil Code.

Vol. 45, Poonam Pradhan Saxena, Matrimonial Laws and Gender Justice, Journal of the Indian Law Institute, Indian Law Institute, Family Law Special Issue(July-December 2003), pp. 335-387, URL: https://www.jstor.org/stable/439518ft6s68.

The article starts by describing the importance of the institution of marriage and the link it has with a number of other issues like respectability of women, security both financial and personal, social acceptance and legality of a union. Marriage has been discussed from the parents' angle and their desperation for it after they feel that the child has reached or crossed the "marriageable age". Their joy in realising that their daughter found the perfect match and the expenditure often incurred in the wedding has all been beautifully elaborated by the author.

Gradually she moves on to the dawning of the harsh realities once the celebrations are over. These realities include moving away from her family to the husband's and that house becoming hers and shouldering responsibilities of the house which was his before. She then is known by her husband's surname which changes her identity, personality and sometimes even clothes.

Thus, the author has examined and described all the nitti gritties of marriage and the sacrifice majorly made by the woman in the relationship which often goes unnoticed.

The matrimonial legislations and gender justice have been discussed. This part helped in the study as it also states the need for marriage and also the difficulties and crises that arise which require respite. Multiplicity of matrimonial laws in India has been discussed which is the most relevant part for this study. All the various personal laws which have a role to play in marriage have been dealt with and discussed individually.

The Hindu law has been elaborately examined. The Christian law in Goa has been discussed with its history starting from the Portuguese Civil Code of 1867. Muslim law and Parsi law all have been discussed. Following this the author has dealt in detail with bigamy and converting to Muslim faith to commit polygamy. The various relevant case laws like *Sarla Mudgal v. Union of India*[23] and *Lily Thomas v. Union of India*[24] have been critiqued.

Part VI is the most important portion for the purpose of this study. It is matrimonial remedies and deals with restitution of conjugal rights, nullity of marriage, judicial separation and decree of divorce. Restitution of conjugal rights and divorce has been discussed in detail. A number of relevant case laws have also been discussed. The author has concluded on the note of the judicial tilt against women and how a number of judges are critical of a woman who wants to work outside.

Written with a feminist approach, the paper is quite exhaustive and extremely informative and is referred to in the later stages of the study.

Vol. 20, No. 3, Marriage, The International and Comparative Law Quarterly, (Jul., 1971), Cambridge University Press on behalf of the British Institute of International and Comparative Law, URL: https://www.jstor.org/stable/758353.

The article deals with polygamous marriages and states that for the purposes of family law and social security, the recognition of the status of polygamous marriage is an important one.

The Law Commission Report deals with it. "Polygamous marriage" is defined as "a marriage under a system of law which permits one of the parties to the marriage to

[23] Ibid.
[24] Lily Thomas v. Union of India, AIR 2000 SC 1650.

take another spouse at a later date even though the marriage still subsists." The situation of polygamous marriages in England and Wales has been discussed. The important case laws are discussed. The Report also deals with the various matrimonial reliefs and the case laws relating to it. Of the important reliefs like divorce, judicial separation, nullity and maintenance some recommendations have been made by the majority. These recommendations are for the union of marriage and not for polygamous marriages. Therefore, the problem of no matrimonial relief being available for polygamous marriages is another problem.

"Mr. Neil Lawson Q.C., one of the Commissioners, has stated in his Memorandum of Dissent, the recommendation that either party to a polygamous marriage should be able to petition for a decree of divorce or judicial separation "not only represents a departure from the basic principles of English law concerning the marriage relationship, in its many aspects, but its adoption would face the Courts with problems with which they are not designed or equipped to deal."- Law Commission, No. 42, Family Law: Report on Polygamous Marriages, H.C. 227 (H.M.S.O., February 1971).

In India the Foreign Marriages Act, 1969 provides for the marriage of Indians abroad. The provisions of this Act are discussed in the article. Special Marriage Act, 1954 has also been dealt with. The article provides an insight in the international aspect of the matter. It shows how matrimonial relief is not just a breakout but also perhaps a necessity.

Vol. 1, Summer Issue 2017, Shambhavi, Uniform Civil Code: The Necessity and the Absurdity, ILI Law Review, Indian Law Institute, New Delhi.

The article begins with the quote *"Raw haste, half-sister to delay"*-Lord Alfred Tennysonn. The author has discussed the human rights of women in the light of the

personal laws as the social institutions of marriage and family. The difficulty of India being a heterogeneous state and therefore the difficulty in handling the population has been discussed elaborately.

The Uniform Civil Code and the reasons for its imminent necessity have been discussed. The draft Constitution had added it in Article 35 and now it is a part of Article 44. The Uniform Civil Code and the constituent assembly debates have been discussed. It has been elaborated how the aim of the assembly debates was to provide for every group, section or community of people and they should not be obliged to give up their personal laws in case it has such a law.

The author has shown the importance given to personal laws which has been very true at all points of time in India. Personal laws have always formed a very important part of people's lives and giving up on it has never been an option for Indians. The views of K. M. Munshi, Dr. B.R. Ambedkar and Shri Aladi Krishnaswamy Ayyar have been discussed and was very relevant at the later stages of the study.

The author has discussed the intent of the judiciary along with a number of relevant case laws which were very helpful. The generalization of oppression of women, the threat of majoritarian dominance over minorities have been dealt with in this piece of writing and are of significance to the topic of research and are referred to later on as well.

Vol. 42, No. 2, Premchand Dommaraju, Divorce and Separation in India, Population and Development Review, (JUNE 2016), Population Council, URL: https://www.jstor.org/stable/44015635.

The author begins by saying that non-marriage and divorce are increasing in parts of Asia. In East Asia, exception being China, and in Southeast Asia the dissolution of marriage either by divorce or by separation has only been increasing. The author has discussed how marriage in India is endogamous and although, a few changes have occurred in the last few years but none of them have been able to bring about a radical change in how marriages actually take place in India.

The paper discusses nationally representative estimates of prevalence, trends and estimates of divorce and separation. Then it examines how marriage stability is affected by social and cultural changes. It also examines the factors that are responsible for divorce"-such as greater participation of women in the labour force, increasing incompatibility of gender roles with the status of women, changing demographic contexts, and individualization-are though, to a lesser degree, occurring in India as well."

The article highlights the elements of marriage and kinship, a pluralistic legal and social structure and family and other norms that have a role to play in marital stability.

Stability in marriage has been discussed at length in this article. A number of charts have been given to understand the data properly. Odds ratios have also been discussed.

It is a thirty-page informative article which has not just facts but also figures.

Vol. 15, Arundhati Katju, Because Jack Did Not Build This House Alone: The Right to the Matrimonial Home as a Property Right, Student Bar Review, Student Advocate Committee, (2003), URL: https://www.jstor.org/stable/44306636.

The article is almost as good and interesting as the title. The article starts with how if a matrimonial home is in the name of the husband, then the wife has neither ownership nor possession of it. All she can claim in times of crisis is maintenance. This again boils down to the same conclusion that the labour put by a housewife in building up a house has no economic value at the end.

The author goes on to explain that women would have had more economic right had it been recognised in terms of property rather than just emotionally and personally. The paper introduces the concept of a matrimonial home. It then goes on to explain the social and economic reasons why a woman needs a matrimonial home and why can this not be met by the general right to residence and shelter. It deals with the fact that personal rights are less secured than property rights. This is also an established fact as at the end of wedlock, a woman is left financially bankrupt if she has just laboured after the house. Had she laboured as much at a workplace she would have been at a much better position in life.

The paper then goes on to discuss that in order to deal with the deprivation of women in the matrimonial home, the court takes recourse to indirect ways to give her some right in the matrimonial home. The author has also examined the doctrine of constructive trust.

The author has discussed the concept of matrimonial home in Indian Law and society, provision for shelter-the right to maintenance and the dwelling house, the inadequacy

of “rights, control and access” to the matrimonial home, the socio-economic significance of the matrimonial home, conceptual debates-rethinking the purpose of property law and constructive trust as a personal rights solution.

Beautifully written by a student of National Law School of India University, the paper is indeed a scholarly work, swarming with new ideas and views. The article is examined and dealt with in detail at the later stage of the study.

Vol. 12, No. 2 Raj Kumari Agarwala, Restitution of Conjugal Rights Under Hindu Law: A Plea for The Abolition of The Remedy, Journal of the Indian Law Institute, Indian Law Institute, (APRIL-JUNE 1970), pp. 257-268, URL: https://www.jstor.org/stable/43950070.

As one of the matrimonial reliefs is restitution of conjugal rights, it was deemed important to research a little on it too. The article discusses the remedy primarily under the Hindu law. It draws back to centuries ago at the times of Manu and Yajnvalkya to how things changed almost overnight because of the Hindu Marriage Act, 1955. The author also states that it was one of the most controversial acts passed after independence. The author also describes how the traditional groups were against the passing of the Act. The Act is given credit for the provision of the restitution remedies like restitution of conjugal rights, judicial separation, nullity and annulment of marriage and divorce.

The author then goes on to discuss the remedy of restitution of conjugal rights. She says that the merit of this remedy is that it is the only positive one where as all the rest are negative. However, the author moves on to vehemently criticising it with the words “But the truth is that this positive character is merely theoretical and in actual practice it tends to become as negative as the other remedies. Human beings are not

machines, they are emotional entities. If it is true for a horse that it can be taken to water but cannot be made to drink it, it is truer in the case of humans. A court award ordering restitution cannot suddenly crease out the emotional (actual or imaginary) misgivings of a spouse." The remedy has been criticised to bits in this piece of work.

It is a scholarly article with a feminist approach. Indeed, a very helpful work which is referred to while doing a detailed study of the various matrimonial remedies.

Vol. 27, No. 41, Flavia Agnes, *Maintenance for Women Rhetoric of Equality*, Economic and Political Weekly, 1992.

As maintenance is one of the matrimonial reliefs and perhaps, the most important one because it comes into the picture even when the husband and wife are living together and even when they are not, it has been dealt with for the purpose of this study.

The writer of the article views the position of women with a feminist point of view and is of the opinion that maintenance is provided to women with the intention of keeping them dependent on men economically as economic dependence has no leeway and is perhaps, the worst form of dependence for any human being. According to the author the basis of granting maintenance to women is with the purpose of denying the granting of property rights as well as job opportunities to them. She states that for a woman marriage is a sense of security and hope that she would be maintained by the husband but how would she be maintained depends on the "will and whim of individual husbands". She further says that the role of a house wife is only glorified and if a marriage breaks down the woman does not earn anything from the several years of hard work, she has put in to take care of the children and the matrimonial home.

The author brings out the myth that easy divorce laws will influence women for a "life of freedom" which would then affect the society and for this purpose the divorce laws are enacted highlighting the economic security a marriage promises. The article brings out the harsh reality regarding how everything changes for a woman the minute she gets divorced. She has to leave her matrimonial home because it ceases to belong to her and she has no right to inherit her husband's property either. She is of the opinion that when a woman opts for divorce, she opts for a poverty struck life.

However, the author then discusses about the right to maintenance and writes that the purpose of the state for providing right to maintenance is to prevent vagrancy and prostitution rather than uphold the dignity of the woman because of the meagre amount of maintenance that is provided to her merely to keep her body and soul intact. She discusses a case[25] where the courts have upheld that the notion behind providing maintenance is to just let the woman maintain herself and not live a luxurious life as that would encourage divorce and discourage reconciliation. The author is of the view that the main problem arises when even these provisions are not taken seriously either by the courts or by the husbands or their lawyers and the orders of the courts are blatantly violated resulting in deprivation of maintenance to the woman. The writer has raised a number of questions regarding maintenance and the economic subordination that it gets along with it. She opines that the reality behind maintenance is that women maintain themselves and their children too because the amount provided is too less and more often than not the husbands do not pay the amount. She discusses the struggle of women and how they work even for low pay jobs just to make their ends meet. The author states that the hypothesis that when a

[25] M. Ponnambalam v. Saraswathi AIR 1957, Mad. 693.

woman heads a family it is a poorer one has been verified by sociological researches and stands established.

The author has also discussed a theory of legal feminism propounded by Martha Albertson Fineman[26] where she states that the idea of equal sharing of property is not appropriate because men and women are not equal and therefore, women should get a larger share "which is need-based rather than equality-based".

The Hindu Marriage Act, 1955 which grants men the right to claim maintenance has been criticised by the author. The idea of chastity and that only a chaste wife can claim maintenance not an unchaste one and how such tests cannot be put upon men in a patriarchal set up have been condemned. The author has discussed various other case laws condemning and criticising these case laws that according to her are absurdity at the name of equality. The Parsi, Christian and Muslim laws have also been discussed in gist and relevantly criticised in the context of maintenance. She has also provided suggestions such as while granting maintenance a number of other factors must be considered by the court like the age of the woman, whether she is literate or not, does she possess skills for particular work or does the condition of her health enable her to do industrious work?

Thus, the writer has brought out the ways through which a society tries to keep the woman entangled in a wed-lock by not creating divorce friendly laws and how in comparison to men they lag behind socio-economically where men are allowed to enrich themselves unjustly. It is a very informative article and the author's questions give scope for a plethora of new ideas and conceptions. The article is indeed a food for thought.

[26] Martha Albertson Fineman, *Illusion of Equality*, University of Chicago Press, 1991.

Vol. 38:3, Anjani Kant, *Right to Maintenance of Indian Women,* JILI, 1996.

The author of the article has dealt with different dependents who can claim maintenance under Section 125 of the Code of Criminal Procedure. The author has dealt with the concept of dower popularly known as *meher* in Muslim personal law and writes that it is given to the wife by the husband so that the wife can take care of her requirements. She has dealt with the issue of providing maintenance to women only till the *iddat* period under the Muslim law and the question of how would the divorced wife maintain herself further, comparing the Section 125 provisions and how it aims at bettering the situation of such wives by providing for maintenance till remarriage. She further states how due to political reasons the framing of the Uniform Civil Code never took place but the Muslim Women (Protection of Rights on Divorce) Act, 1986 came up instead. The writer has then discussed the maintenance of a minor child, a mother who may be maintained not just by her son but also by her daughter and if there are two or more children then it is at the discretion of the parent to acquire maintenance from one or more of those children. She has further discussed about the persons from whom maintenance may be claimed. The article says that the Hindu society is still male dominated and one where women need protection of their rights and the concept of equality in the Indian Constitution is a "notion until they struggle to make it a reality". The article discusses the conditions for granting maintenance along with the jurisdiction of such Judicial Magistrates to hear the maintenance proceedings. The procedure to be followed in maintenance cases is discussed in detail and the maintenance order has also been dealt with and that the amount of maintenance may be decided on case-to-case basis. The writer has then written about the enforcement of the order of maintenance in various circumstances and the alteration of allowance in cases of situational change of the party paying it or

receiving it and similarly cancellation of the maintenance in cases where the wife has remarried or received the sum paid on divorce under personal or customary law or voluntarily surrendered such right. The author concludes by saying that all personal laws accept the notion of maintaining a wife after dissolution of marriage provided the marriage was a legal one. Although the article is quite extensive and resourceful, there exists lack of clarity in the thoughts of the author at the beginning where she compares maintenance with dower. Apart from that the work is comprehensive.

The Law Commission Report on Right of the Hindu Wife to Maintenance, Report No. 252, January 2015 titled 'Right of the Hindu Wife to Maintenance: A relook at Section 18 of the Hindu Adoptions and Maintenance Act, 1956".

The Law Commission of India was asked for its opinion and thereby to submit a report regarding the right of a Hindu wife to claim maintenance from her father-in-law, not just for herself but also for her husband of unsound mind and children.[27] Since this aspect had not been covered by the said Act, the Law Commission was asked for its opinion in this regard.

Sufficient enquiry was conducted by the Commission regarding the Hindu Adoptions and Maintenance Act, 1956 and the Classical Hindu law that had been existent in this regard. Section 18 of the Act provides for the maintenance given to a wife who has a living husband and it is the liability of the husband to maintain the wife whereas Section 19 of the Act deals with maintenance of a widow by her father-in-law.

The Report stated that a clear interpretation of both the sections means that the wife of a living man who is of unsound mind does not fall within either of the categories and is therefore, not entitled to maintenance. The only remedies available to her are to

[27] Avtar Singh v. Jasbir Singh, RSA No. 29/1988, (O&M), 2008

either divorce the husband or file for a partition of the property because the joint family members would not be liable to maintain the wife or the children.

The Report then views the institution of the Joint Hindu Family and Hindu Coparcenary and analyses the concept of right to property and who acquires such right in both the institutions. Though, joint family members, mother, wife and daughter in law are not coparceners and therefore, do not enjoy the rights as coparceners of the property of the joint family but only enjoy the right to residence and maintenance. Only a daughter can be a coparcener according to the 2005 Amendment of the Hindu Succession Act, 1956.

The Report then analyses the classical Hindu Law of maintenance according to which no female member of the family can be left un-provided for and it was the duty of every Hindu to maintain all females of the family. The classical view gives rise to provision for maintenance on the ground of the relationship they share or on the basis of acquiring property. Under these two circumstances a person becomes liable to maintain another.

The Report further states the views of the family law scholars like Paras Diwan and Peeyushi Diwan according to whom the basis of maintenance is the family ties, love and relations and the role of the *karta* to maintain the family members is evaluated.

The Commission has looked into a number of other case laws in which the courts have granted the right to maintenance to a wife from the relatives of her husband.[28]

Mulla's Book on Hindu Law is examined and it is stated that when a person with disability is outside the ambit of inheritance then it becomes the duty of the family members to maintain him, his wife and children out of the property he would have

[28] Ramabai v. Trimbak Ganesh Desai, (1872), 9 Bom. HC283

inherited had his disability not come in the way of his inheritance. However, after the enactment of Section 28 of the Hindu Succession Act, 1956 no person is disqualified from inheritance on any such grounds anymore. Thus, classical Hindu Law provides for the maintenance of a woman by her father-in-law if her husband is unable to maintain her.

The Commission concluded in the Report that a Hindu woman should be provided with maintenance from her husband's relatives and for this purpose sub-section 4 was inserted under Section 18 that states that "where the husband is unable to provide for his wife, on account of physical disability, mental disorder, disappearance, renunciation of the world by entering any religious order or other similar reasons, the Hindu wife is entitled to claim maintenance during her lifetime, from members of the joint Hindu family of the husband, except where the husband has received his share in the joint family property".[29]

Thus, the court played an active role in not just delivering the judgment for the case that came before it but also for taking the initiative for removing the lacuna that existed in the Act.

The Report throws some light on the quality of judicial approach in terms of human rights in matters relating to maintenance. It shows the initiative taken by courts not just for the purpose of addressing the cases before it but going the extra mile to fix the errors by asking for the opinion of the Law Commission and thereby, resulting in the amendment of the Act. The Report has dealt with some relevant case laws which are looked into for the purpose of research.

[29] Hindu Adoptions and Maintenance Act, 1956

Vol. 26, No. 3, Harinder Boparai, Reappraisal of Bars to Divorce: A Comparative Study, Journal of the Indian Law Institute, Indian Law Institute, (JULY-SEPTEMBER 1984), URL: https://www.jstor.org/stable/43953868.

The article begins by stating that divorce is given only when the petitioner fulfils the prescribed conditions for divorce. The relief may also be refused if there appears a legal bar to any of the grounds for which the divorce is sought. The article then discusses the nature of the bar and whether it is of absolute nature or discretionary.

The article then discusses the principle followed by the Ecclesiastical Courts in matters of matrimonial relief like that of the petitioner coming to the court with clean hands and with urgent sense of injury. It also discusses the bars prescribed in the English Divorce and Matrimonial Causes Act, 1857 and the reforms made by the Divorce Reform Act, 1969. It also deals with the English Matrimonial Causes Act, 1965 which used to be applied in Nigeria before the Nigerian Matrimonial Causes Act, 1970 was enacted. The bars prescribed by the Nigerian Matrimonial Causes Act, 1970 have also been elaborated. The Canadian Divorce Act, 1968 has also been dealt with. After that the author gradually moves to India and has elaborately discussed the bars prescribed by the Hindu Marriage Act, 1955.

The minimum time after which a petition may be presented has been dealt with in the article. The various divorce laws have been compared in this segment of the article. Collusion as a bar to divorce has been discussed. Then it is followed by connivance and then condonation. Resumption of cohabitation, prejudicial effect upon children's maintenance, hardship to spouse, petitioner's own wrong or disability, unnecessary or improper delay, force, fraud and undue influence and other legal grounds have been examined.

The article is wholesome in the comparative study and has all the divorce laws of different countries discussed quite elaborately. It was a great source of information specially while analysing and comparing things from the international perspective.

Vol. 29, No. 3, Kusum, Concept of Matrimonial Home, Journal of the Indian Law Institute, Indian Law Institute, (July-September 1987), URL: https://www.jstor.org/stable/43952275.

The author has begun the article by explaining that an issue which has gained importance in the recent years in the context of matrimonial reliefs is the matrimonial home. It is often a matter of dispute because both the parties have the matrimonial home as their only place of shelter. It has been discussed how the recalcitrant spouse does not want to vacate the house so that there is scope for harassing the other spouse. The state of constant misery in a marriage and how this situation is on the increase has been discussed. The wife's aspect and how she has more than one reason to cling on to her matrimonial home has been discussed.

The questions can a wife turn out the husband or can the husband turn out the wife legally from the matrimonial home have been discussed with illustrative case laws.

The decisions given by the Supreme Court and High Courts on this issue have been discussed.

"If he goes to stay in the house of his wife, legally speaking, he has no right as such to stay and can be turned out from the house at any time by its legal owner, namely, the wife." [30]

[30] Revti Devi. v. Kishan Lal, 1970, Ren C.J. 417 (Del.)

Thus, the court was of the opinion that the wife's house is not the matrimonial home over which the husband can claim a right of occupation.

The author goes on to discuss that now that more women are into government jobs, they are entitled to government accommodation and can also afford buying private property for themselves. This further, results in getting an eviction order against the husband in case of strained relations. It has been suggested in the article that the concept of matrimonial home needs to be clarified and that after divorce their common assets should be divided between them.

This article gives the study a new dimension altogether. It is important for a researcher to look at things from different perspectives specially something as serious as matrimonial relief. Therefore, this article is referred to in future for a more in-depth study and analysis.

1.3 HYPOTHESIS

There do not exist sufficient number of matrimonial reliefs under the personal laws in India and ones that do exist are inadequate and far below the international human rights standards.

1.4 RESEARCH QUESTIONS

1. What importance do personal laws have in India?
2. What is matrimonial relief? What are the existent matrimonial reliefs in India under the various personal laws?
3. Are the matrimonial reliefs adequate?
4. Do the reliefs have a human rights approach and do they meet the International Human Rights standards?

5. Do the provisions of the Constitution of India support matrimonial reliefs under personal laws?
6. What has been the role of the Judiciary in protection and promotion of matrimonial reliefs in India?

1.5 OBJECTIVES OF THE STUDY

The study analyses the personal laws existing in India in the light of the national legislations and other international conventions which may be relevant. The research is conducted to understand the social and philosophical need of matrimonial reliefs and in the process, analysing and scrutinising the existing laws in the field. After adequate research the study establishes the reliefs that do exist under various personal laws are not all in consonance with human rights standards.

The study will aim at making some suggestions for reform in the field of matrimonial reliefs. The reforms suggested will be after analysing all the existing matrimonial reliefs and understanding not just the laws that exist but also the loopholes in them and whether the maladies exist in statutes or their application.

1.6 SCOPE OF THE STUDY

The scope of this study is limited to critically analysing the Indian Personal Laws relating to matrimonial reliefs and the legislations, relating to them with an international human rights perspective.

The study includes in its ambit the Hindu Personal law, Muslim personal law, Christian personal law and Parsi personal law.

1.7 RESEARCH METHODOLOGY

The research methodology followed by the researcher for this research is doctrinal method of research. Primary data is analysed like international conventions and national legislations, judicial decisions and the data from secondary sources is from books, journals, articles and online databases like SCC Online, Jstor, etc.

Historical method of research is also employed to understand the origin and development of the matrimonial reliefs under the various personal laws in India.

The researcher has also examined all the secondary sources of data through analytical method of research and used the comparative method of research to evaluate the provisions of matrimonial reliefs and understand whether they conform to the human rights standards.

1.8 CHAPTERISATION

Chapter One: Introduction.

This is the present chapter which introduces the topic, states the problem and frames the hypothesis and research questions. The chapter also states the objectives and scope of the study. It contains the review of literature. It states the research methodology adhered to and the chapterization.

Chapter Two: Matrimonial Relief under the Personal Laws: A Historical Perspective.

This chapter deals with the historical development of different personal laws in India and also examine the evolution of various matrimonial reliefs.

Chapter Three: International Human Rights Standards and Matrimonial Relief under the Personal Laws.

In this chapter the matrimonial reliefs under the personal laws in India are examined in the light of the International Human Rights standards as contained in various International Human Rights instruments and also an assessment is made of how far and to what extent they meet the International Human Rights standards.

Chapter Four: Matrimonial Relief and Personal Laws under the Constitution of India.

This chapter examines the personal laws and the matrimonial reliefs in the light of the provisions of the Constitution of India. This chapter examines the various legislative provisions relating to matrimonial reliefs under the different personal laws.

Chapter Five: Role of the Judiciary in Matrimonial Relief under the Personal Laws in India.

In this chapter the role played and the contribution made by the judiciary in the field of matrimonial reliefs under the personal laws is discussed and examined.

Chapter Six: Suggestions and Conclusion.

This chapter concludes the study with suggestions for the improvement of the matrimonial reliefs under the personal laws in the light of the provisions of the Constitution of India and International Human Rights standard.

Chapter Two

Matrimonial Reliefs under the Personal Laws: A Historical Perspective

2.1 INTRODUCTION

The early Orientalists of British India held the view that India had no history in the sense of historical writings. This was the opinion of many Orientalists although they differed in the details of their expositions.[1] Thus, R.C. Majumdar begins with this opinion in his multivolume monumental work published just after independence.[2] But the perception faded away due to the change of colonial paradigm as India was being seen through the eyes of its rulers and the history being created on account of their interaction with India and its people, culture and laws. The view came to be taken more lightly as an opinion of some Orientalists. This development has created a conducive environment for fresh studies leading to the opposite direction that India did have history and a civilisation in the glorious past that only need to be studied and researched. However, it may be worthwhile to examine in what way and to what extent this view was correct.

An Orientalist Wilson held the view in a weak sense that India did not have a history as in ancient India there was weak sense of history and history writing, India had a history that could be recovered.[3] Hegel goes further and maintains that historical consciousness and writing of history both are essential for creation of history. History

[1] Vol. 54, No. 1, Thomas R. Trautmann, Does India have History? Does History have India?, Comparative Studies in Society and History, Jan 2012, Cambridge University Press, https://www.jstor.org/stable/41428712

[2] Vol.1, R.C. Majumdar, History and Culture of the Indian People, London: George Allen & Unwin, 1951

[3] H.H. Wilson, An Introduction to Universal History, for the Use of Schools, Calcutta: Calcutta School Book Society. 5th E. 1854 [1st ed. 1831]

is based on historical consciousness because history is an expression of self-consciousness as an actor creating and producing something new which is recorded. Thus, writing history is history consciousness. Hegel unambiguously states that India has no history.[4] But to understand Indian history one must have an elementary knowledge of Indian literature of profound spiritual reality of this country and the knowledge of great ancient books of law. Hegel is definitely thinking of the laws of Manu as translated by Jones.[5] History has subjective and objective aspect. It is not the same thing happened being given two different names, on the contrary, the two meanings are connected at a deeper level for the creation of history the deeds and events taking place and their writing are the same thing. Hegel was a great philosopher of history.[6] When the European expansion of history was at its zenith and therefore, he had an influence on the historians of Europe including those who were Orientalists. Historical thinking percolated down and went much beyond human history. Hegel's theorization of history was shockingly restrictive and narrow. It is ironical as well as strange that a great philosopher and promoter of history circumscribed true history so narrowly that left out vast unchartered territories covered by the history consciousness of Europe and European historians.[7] However Hegel's opinion has been discarded without any serious examination as it was produced by colonial interest, cultural cleavage and inadequate and half understanding of Indian language, literature and heritage. It is seen as a mere ideological projection rather than a factual account of Indian history.[8]

[4] G.W.F. Hegel, Introduction: Reason in History, 1975. In Lectures on the Philosophy of World History. H. B Nisbet, trans. Cambridge: Cambridge University
[5] Supra note 1
[6] G.W.F.Hegel, Philosophy of History, Dover Publications Ins., 2004
[7] Supra note 1
[8] Ibid.

"While our Constitution has adopted a democratic form of governance it has at the same time adopted values based on constitutional liberalism. Central to those values is the position of the individual. The fundamental freedoms which Part III of the Constitution confers are central to the constitutional purpose of overseeing a transformation of society based on dignity, liberty and equality. Hence morality for the purposes of Articles 25 and 26 of the Constitution must mean that which is governed by fundamental constitutional principles."[9]

India is a country which has diversity. It includes people belonging to different religions and having different faiths and beliefs. Talal Asad is of the view that secularism is a normative framework accepted by a modern state or one striving to be a modern state which postulates that there exists a differentiable quantity, called religion, which can impact society without merging in it.[10] In the post-colonial period the relation between secularism, modernity and liberty has not only been complicated but at times appears to be paradoxical. The modern state demands loyalty from the people casting religion to the oblivion of the past and yet using religion as an instrumentality for achieving its end when it suits it. The state practising secularism professes to liberate people from religion is found itself practising religion. In the process of prioritising loyalty for its citizens the state is found constructing an entity called religion that it apparently purports to distance from.[11] Thus, the relation of post-colonial state with religion has neither been clear nor consistent. It has been more of an ambivalence than total acceptance or complete rejection. Perhaps, more attention needs to be paid to the manner in which modern states' power to regulate

[9] Dr. D. Y. Chandrachud, J. in Indian Young Lawyers Assn. (Sabrimala Temple-5 J. v. State of Kerala), (2019), 11 SSC 1, Para 214

[10] Talal Asad, Formations of the Secular: Christianity, Islam, Modernity, Stanford University Press, (2003), p.181-201

[11] Vol. 8, Nos. 1-2, Talal Asad, French Secularism and the "Islamic Veil Affair,' Hedgehog Review, (2006), p. 93-106

religion instead of minimising or neutralising the role or predominance of religion in the system. A secular state is not one which completely withdraws itself from religions or religious affairs but rather one which authoritatively regulates religions and religious affairs. This has been demonstrated by the personal law reforms in Hungary in 1890s, in Great Britain 1970s and the Hindu Code of the 1950s in India.[12]

There are two major communities in India which are the Hindus and the Muslims. There exist minor communities as well like the Christians, Parsis and others. All these communities in India are governed by the laws of the land in civil and criminal matters. However, when it comes to personal affairs which primarily mean family matters, they are governed by their laws. The law which governs them today has been derived from a number of sources. The country portrays from where has it been originated and each personal law has its' own history and reasons of growth. India's old and ancient customs and traditions remain ingrained and are reflected in its personal laws.[13]

2.2 THE HISTORY OF PERSONAL LAWS

In certain matters which are family matters or which may be considered as personal matters our legal system has adopted a system and a scheme where in people are governed by their own family laws in matters of marriage, dower, divorce, guardianship, waqf, charitable endowments, maintenance, co-parcenary, intestate and testamentary succession, inheritance while in all other matters the general law of the land applies.

[12] Vol. 52, No. 3, Nandini Chatterjee, English Law, Brahmo Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India, Comparative Studies in Society and History, Cambridge University Press, https://www.jstor.org/stable/40864788

[13] K.B.Agarwal, Family Law in India, Kluwer Law International, 2010, p. 38

Personal law system was adopted where different communities have their own personal laws depending on their religious beliefs in respect of certain laws family matters. These systems regulate their family affairs.[14]

Hindus have their own laws in family matters like inheritance, guardianship, maintenance. Muslims have been governed by their own personal laws in marriage, dower, divorce,

The personal laws have collectively been a major part of the Indian culture. They have been in existence whether consciously or unconsciously and have always governed personal and family matters of the mankind.

According to Syed Ameer Ali in India, law is mainly personal and there is no *lex loci* in this country.[15] When the British government began its ascendancy in India, it did promise to the people of India by way of an Act of Parliament, the full enjoyment of their laws and customs. One of the objects of the Act as stated in the Preamble was "that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges." The tendency of the court in the case of *Musleah v. Musleah*[16] and other cases was to restrict the operation of the personal laws to the Hindus and Muslims.[17] Justice Bittleston was dealing with the question whether the Queen's laws were applicable to the Hindus and the Muhammedans in the case of *H. H. Azimunnisa Begum v. Clement Dale*[18] where he expressed "In Mortan's Col. Rep., 358, there is an evidence that the statute (which is in *pari materia)* 13 Eliz., cap. V, appears to be considered as extending in India; and in a case

[14] Volume 30, Issue 3, Farrah Ahmed, Remedying Personal Law Systems, International Journal of Law, Policy and the Family, December 2016, https://doi.org/10.1093/lawfam/ebw008
[15] Vol.1, Syed Ameer Ali, Mahommedan Law, 4th Ed., 1985, p.1
[16] Fulton's Rep., p. 420
[17] Supra note 15, p. 2
[18] 1868, 6 Mad. H.C.R., 455

arising entirely between British subjects other than Hindus or Muhammedans, I am disposed to think that with the reasoning in *Freeman v. Fairlie* (1 Moo., I.A., p. 305) and the *Mayor of Lyons v. The E.I.C.*, id., p. 175, the Statute 27 Eliz. ought also to be considered...."

Before independence India was divided into two main fractions. One was the Indian states ruled by the Princely rulers and the other was the states ruled by the Crown through the Governor-General of India with some aid from the local representatives of the people. States with the British rule had different set of laws compared to the princely states. Therefore, one of the major conflict of laws was that of the laws of the British Indian states and the princely states.[19]

Many post-colonial scholars maintain that to a great extent Indians are governed by their religions and their social and political life cannot be segregated from it. Secularism was introduced by the British as a way of modernising the Indian society. Thus, enacting civil marriage law in India in 1872 was an important milestone in the modernization of Indian law. However, there is a counter argument that Britain itself might not have been modern enough to modernize India through Personal law reforms where the primary subject or beneficiaries of reform would be women.[20] Till the close of the 19th century British personal laws were backward looking and dominated by the Catholic Church. Rights of women under their personal laws were few and scarce and gender equality was a far cry.[21] Modernization of personal laws was perhaps, the result of interaction between the Indian personal laws and the British personal laws

[19] Vol 4, No. 1, Paras Diwan, The International and Comparative Law Quarterly, Cambridge University Press on behalf of the British Institute of International and Comparative Law, Jan 1955, https://www.jstor.org/stable/755758

[20] Supra note 12

[21] J.S.Mill & Harriot Taylor, The Subjection of Women, London: Longmas, Greens, Reader and Dyer, APA 6th Ed., 1869

where the contribution of the oriental, enlightened reformers were no less than their British counterpart.

India has been a multi-cultural, multi-lingual and multi-religious society. Vast number of people have been living according to their own customs, usages, social mores and established practices. In India, different communities have been living according to their own religion based personal laws such as Hindu law, Muslim law, Christian law and Parsi law. These personal laws were applied even before the advent of the British rule and when the British established their rule in this country, they adopted a policy of non-interference in the scripture based personal laws as they had come here primarily for promoting trade and commerce.[22]

However, from the very advent of British rule the British officers were clear about the difference a public set of laws that would be used to administrate the market place and a private set of laws which would be applied to the family matters realm.[23] British understanding of scriptures as sources of law in India and religious practices determined how British officials found Indian traditions and practices and recorded them under different segments of Hindu law and Muslim law which was to crystallise and take more definite shapes in years to come. The desire of the British to acquire knowledge of the scriptural laws and apply them as they were found retarded the organic growth of these laws through a process of liberal interpretation and adaptation.[24] The British had not wanted to interfere with the personal laws of the people as their policy right from the onset of their rule in this country was that of non-

[22] Vol. 39, No.2, Christa Rautenbach, Phenomenon of personal laws in India: some lessons for South Africa, The Comparative and International Law Journal of Southern Africa, Institute of Foreign and Comparative Law, July 2006, URL: https://www.jstor.org/stable/23252637

[23] Vol. 45, No.1, Eleanor Newbigin, Personal Law and Citizenship in India's Transition to Independence, Modern Asian Studies, Cambridge University Press, 2011, p. 10, URL: https://www.jstor. org/stable/25835665

[24] Ibid.

interference with the Indian personal laws. They had not come here for reforming the Indian society. They had come here for trade and commerce. This approach was abundantly clear right from the time of Warren Hastings. Till the 1850s they had not made any amendment in the religious laws which governed each community. However, the Caste Disabilities Removal Act, 1850 and the Widow Remarriage Act, 1856 were enacted by the British on the demand of Indian reformers like Raja Ram Mohan Roy and Ishwar Chandra Vidyasagar. However, though Hindus and Muslims had their own respective set of personal laws, the condition of the Christians and Parsis suffered. These communities had no proper established system of personal laws, neither codified nor uncodified. They were by default governed by the English law in the presidency towns but in *mofussils* there were no general laws applied to them. The courts used to apply the law of the country or the customs practised by them. For this context the presidency towns meant the courts at Calcutta, Madras and Bombay and *mofussils* implied all the courts beyond the three presidency courts.[25]

The failure of Indians in the Revolution of 1957 left the British government feeling more confident about themselves and having an upper hand on the Indians. It gave them the credence they had perhaps wanted all along to make changes in the laws in the country and especially those relating to family matters. In Britain the democratic capitalist marriage arrived on 1st July, 1837, this was the date on which the Marriage Act of 1836 came into force.[26] Before this Act came into force, all marriages were to be celebrated in an Anglican church, in day light with all the ceremonies being performed by the Anglican priest in order to be valid except the marriages which got special licenses like Archbishop's license, those of the Jews and Quakers, royal

[25] Supra note 13
[26] Michael H. Fischer, The Travels of Dean Mahomet: An Eighteenth-Century Journey through India, ed. (Berkeley, 1997), p. 209.

marriages and marriages abroad.[27] This was a demand made by the Nonconformists, Roman Catholics and non-Christians who were not a part of the church and yet the practice applied to them. One Din Muhammad a Bengali Muslim who was an army man travelled to Britain in the nineteenth century and established a medico-cosmetic business married an Irish Protestant woman named Jane Daly in 1786 in an Anglican church. His biographer believed that he had become a Christian as when his son was born, he was baptised according to the rites of the Anglican church.[28] However, there was no evidence that he had converted to Christianity or had changed his religion and he married a second time in 1806 which indicated that he had not taken Christian doctrines and norms seriously. The poignant question which arises here is whether he had converted to Christianity in order to marry in an Anglican church? The answer is that he had not converted to Christianity. But there was no other provision enabling Jane to contract the marriage with him legally in British ruled Ireland. This was the position since Lord Hardwicke's Act of 1753 (26 Geo. II c.23) which prohibited all marriages not duly solemnised and registered in an Anglican church. Din Mohammad would not have qualified for any of the exceptions permitted under the law. This was the position in the mid eighteenth century in Britain. The Act of 1753 did not separate the church from the state but instead strengthened the church more than its capacity. The canon law continued to be the marriage law and the ecclesiastical courts continued to administer the canon law.[29] The Anglican church continued to serve as an agency of the state although it did some relief work in the governance of the parish. With the 1753 Act the relation became even closer between the church and the

[27] Supra note 12
[28] Supra note 26
[29] Supra note 12

state which served the objective of the state of securing compliance from the people with the help of the church which was hither to difficult.[30]

The 1837 Act of England was the first civil law on marriage. The new Act aimed at freeing the people from the authority of a church in personal matters. The major theme for changing the course of civil marriages was secularism. Usually, our religious beliefs are our private matters and so are the important events in life like birth, death and marriage and one often wants to keep the private beliefs and matters away from the public affairs. Hence, this precisely was the reason for separating the two. It is important that we know and understand the laws governing personal relations in Britain because a number of our laws have been taken from them and made by them. In order to go beyond just juxtaposition, it is important we see the background and where is it coming from.

If the British was a part of the state accommodation of religious variety rather than discarding it, adoption of the laws in India in 1851 was characterised by heightened awareness of the importance of religious divergences. As it happened in England, the demand of the Nonconformists to contract lawful marriages without complying with Anglican matrimonial rites eventually led to the passing of the first civil marriage law in India in 1872. The sources of Hindu personal law and Muslim personal law are in their respective religions, religious scriptures and religious practices as well as the interpretation and commentaries of the jurists in the respective fields.[31] As Hindu and

[30] Ibid.

[31] Vol.18, No.4, D. K. Srivastava, Personal Laws and Religious Freedom, Journal of the Indian Law Institute, Indian Law Institute, October-December 1976, p.551, URL: https://www.jstor.org/stable/43950450

Muslim marriages laws were already in existence the new law was made applicable only to Christians. This laid the foundation of Christian law in India.[32]

As English statutes did not apply in India *ipso jure*, Act 14 and 15 of 1851 titled "An Act for Marriages in India" were passed by the British parliament and effectuated by Indian Act V of 1852 which provided for lawful marriage before the Registrar of marriages without religious rites. Unlike English law it did not cover large majority of church marriages.[33] From the beginning it was official British policy not to interfere with religious matters in India. As a corollary to this they adopted and continued to apply Hindu law to Hindus and Muslim law to Muslims in matters which were essentially family matters. This restricted the limit to which English laws could be applied to India producing very different results even where the formal laws were similar in Britain and India such as the (British) Marriage Act of 1836, and the Act for Marriages in India, 1851. From the eighteenth century the gamut of native laws reduced until in the mid nineteenth century it only entailed the acceptance of Hindu and Muslim laws of personal relations ate relations, including laws regulating marriage and divorce, inheritance and succession, guardianship of minors, caste disputes, and religious endowments. Indian personal laws included more than a bouquet of laws that came to be recognised as family laws under the Western legal system which remained a species of private law dealing with inter-personal matters which were not essentially matters not affecting the state or the its market. The substantive personal laws varied with the religions of the persons as their sources were rooted in their respective scriptures. Thus, Hindus would be governed by Hindu law in matters of marriage, divorce or any other family matter just as Muslims would be governed by Muslim law in those matters. Thus, they were quite different from the

[32] Supra note 12
[33] Ibid.

general law of British India which had universal application. Thus, the application of personal laws was a matter of religious affiliation of the parties and therefore, the ascertainment of their religious identity became an integral part of administration of the law. People like Parsis or Indian Christians who did not fit in the recognised categories faced a jurisdictional crisis under the law in family matters for whom the legal system had to make provisions in times to come. The origin of this policy is generally attributed to Warren Hasting's Plan of 1772 which was designed to establish and edifice for the administration of Bengal which permitted the East India Company to assume its functions as the Mughal diwan and this is regarded often as the laying of foundation of the personal law system in India.[34] "Clause XXIII of this plan, which ostensibly aimed to restore an ancient "Mogul constitution," declared, "That in all suits regarding inheritance, marriage and caste and other religious usages and institutions, the laws of the Koran with respect to Mahomedans and those *Shaster* with respect to Gentoos shall be invariably adhered to." The British consulted Maulvis for Muslim law and Pandits for Hindu law as experts in the subjects to assist them in courts in the administration of the law.[35] The British wished to govern Indian society by their own laws and local customs.[36] When a legal system is in its infancy or weak it is only prudent on its part to do so. The state doesn't have to exert much when local customs, conventions and practices govern the society as they in a way have a self-enforcing mechanism- people themselves enforce them. This suited the British well at least in the formative years of their rule in India.

[34] Ibid.

[35] Vol.4, No.1 J.D.M. Derrett, The Administration of Hindu Law by the British, Comparative Studies in Society and History (1961): 10-52, p. 26

[36] Vol.28, No.4, Chandra Mallampalli, Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness, Law and History Review, American Society for Legal History, Nov 2010, p.1044, https://www.jstor.org/stable/25800904

So, from the advent of the British rule in India they had decided as a matter of policy to be tolerant towards Indian religions and the religion based personal laws but yet the legal system that the British wanted to build would be a unified state centric legal system. The British wanted to administer Indian law as a part of their own law although in family and personal matters they did not want to interfere with the indigenous customs, practices, caste relating disputes and family matters. But the administration of justice they had taken upon themselves as a state would do. So, the state started administering not only the civil law but also the religious laws of the Indians. Personal law was state law right from the inception and therefore its administration was a state action although the state did not recognise autonomy of the people in religious matters or their right of self-governance in these matters through their own bodies or agencies. Administration of multiple personal laws for different religious groups and communities gave birth in India to what we may call the personal law system under which each religious community is governed by its own personal laws primarily based on its own religious scriptures. Although the personal laws apply only in respect of certain matters which were essentially personal or family matters. In all other civil matters as well criminal the general law would apply. Neither Hindu law nor Muslim law was codified and therefore these laws needed to be ascertained and authoritatively stated and this was done by the elitist by the Hindus as well as Muslims. There was little resistance for the state when it was assuming the role *pater patriae* for the administration of law in general and personal in particular although the personal laws were close to the heart of the people.

They mainly made laws for the communities that were lacking it and on matters which was gravely required. Parsi Marriage and Divorce Act, 1865 was enacted to govern the marriages and divorces of the Parsi community. This Act is now repealed.

Christian Marriage Act, 1872, and Indian Divorce Act, 1869 were enacted to govern and regulate the matters of marriage and divorce between the Christians. The Special Marriage Act, 1872 and Indian Divorce Act, 1869 were enacted for the people who wanted to marry beyond their religions. The Special Marriage Act, 1872 was Act III of that year which was considered a relic of the past in the history of Modern Personal Law. It was titled as "An Act to Provide a Form of Marriage in Certain Cases". This Act was passed as first civil marriage law in India.[37] It is interesting to note that the opponents of this law criticised it for being revolutionary in character but it left its proponents equally dissatisfied and critical. Its principal and ardent supporter Keshub Chandra Sen who was an Indian religious leader became a party to the violation of the Act just within seven years of its coming into force. The process of formulation of the law began when Keshub Chandra Sen filed a petition in 1868 on behalf of Brahmo Samaj to the Government of India for a law to provide for and regulate Brahmo marriages. Brahmo Samaj was a society established in 1828 by Raja Rammohan Roy, a great social reformer who was the father of modern India who was shunned by his own people on account of his enlightenment and revolutionary ideas. He was far ahead of his people and time. Today he is considered as a modern constitutional liberal. The Brahmo Samaj was made up of upper caste Hindus in Bengal who were committed to religious reforms in matters of religious worship, social mores and odious customs. The Samaj advocated non-idolatrous worship and non-religious marriage rituals. They also wanted inter-caste marriages in liberal and unorthodox tradition. They also advocated widow remarriage form 1860s. Keshub Chandra Sen questioned the validity of such marriages and therefore presented a petition for enacting a proper law for regulating such marriages. Mody's work on the background

[37] Vol.36, No.1, Perveez Mody, Love and the Law: Love-Marriage in Delhi, Modern Asian Studies, (2002), p.223-56

of the Special Marriage Act maintains that submission of petition by Keshub Chandra Sen was an attempt to get recognition for the Brahmo Samaj as a distinct community with legitimate rites of marriage which was ignored by the British.[38] British ultimately created a civil marriage law which could be used by all those who did not accept their own religious rituals for contracting marriage and who would not lose their property or civil rights by contracting such a marriage. The civil marriage law was enacted for the purpose of protecting such dissentient communities or groups who were putting forth demand for the law. The law also protected marriages of individual choice in contradistinction with social marriages or family arranged marriages. Indian religious communities vehemently opposed such a notion of civil marriage due to which a self-excommunication clause was added in the civil marriage Act which stated that 'couples marrying under this law had to declare that they did not profess the "Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jaina religion."'[39] Apart from the threat of ostracization, draconian administrative provisions were added such as the requirement of place of residence in the district of marriage was to be two weeks in 1872 which was extended to thirty days in 1954. The law apparently came down heavily on the eloping couple whose family could pursue them wherever they would go.[40]

With some additions and alterations this law was enacted once again as Special Marriage Act, 1954 which is currently the law on the subject. However, the provisions relating to ex-communication have not found place in the present civil marriage law of 1954 as it was enacted after the commencement of our Constitution which is based

[38] Ibid.
[39] Ibid.
[40] Ibid.

on the western liberal principles permitting individuals freedom of choice and conscience.[41]

The civil marriage law of 1852 fulfilled its objective in a comprehensive way when the Indian Succession Act was enacted in 1865 which provided that it would apply to Christians (and its testamentary sections to Parsis) by giving exceptions to Hindus, Muslims and Parsis. This Act was based on British inheritance laws which gave importance to the nuclear family where property would devolve on the widow and children rather than agnatic males although posthumously. The Indian Succession Act, 1865 was passed to complete the vision of the Indian Civil Code just like the Indian Marriage Act, 1852.[42]

Nonetheless, these Acts dealing with marriage, divorce and succession were not applicable to the Hindus and Muslims because their laws were considered to be of beatific genesis.[43] However, on request from the Hindus and Muslims a few Acts were enacted for them as well. The Dissolution of Muslim Marriages Act, 1939 was enacted by the British to regulate matters of divorce under Muslim law. Similarly, the Hindu Wills Act, 1870, the Hindu Transfers and Bequests Act, 1914 and 1921, the Hindu Dispositions of Property Act, 1916 were enacted by the British. The Hindu Wills Act, 1870 was used to regulate the transfer of property, testamentary and inter vivos.[44]

The legislature was of the opinion that where there are no enactments on a particular matter, the Courts should function on the basis of principles of justice, equity and good conscience.

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[41] Ibid.
[42] Supra note 12
[43] Supra note 13
[44] Ibid.

After independence, the states in India became either a part of India or Pakistan. Although India became a federation, its form was very different from that of the United States of America, the idea was to have a unified federation and same laws to govern all so that the conflict of laws was not supposed to be a question to arise.[45] Perhaps, one of the major reasons of having a unified federation must have been that the framers of the Constitution had witnessed similar problems being faced in non-independent India between the British ruled states and the Princely states and did not want the same problems cropping up in the independent India they had struggled and achieved and thus removing the very root of inter-state conflicts and confusions. But as reflected by Dr. Paras Diwan in his article, he directed the attention towards a conflict of laws which might arise in India due to the existence of the variety of Personal laws. The precise reason why even after so many years of independence no such conflict has arisen is because they all have their own domain of functioning and function within that domain. The only scope where they come in connection is when inter-religious marriages take place and these marriages in India are governed by a civil law which is equally applicable to all. Thus, this was a step which enabled the doing away with of the risk of conflict of laws in India.

After independence the new government aimed at not playing with the insecurities of the minorities and making relevant provisions in the Indian Constitution for them.[46] All the personal laws were retained. India has two system of law. In the first category are those laws which have general application throughout the territory of India. For example, the Special Marriage Act, 1954 has general application and members of any community or every community are under its purview. This law does not apply

[45] Supra note 19

[46] Vol.7, No.1, Amalendu Misra, Hindu Nationalism and Muslim Minority Rights, International Journal on Minority and Group Rights, Published by Brill, 2000, p.3, URL: https://www.jstor.org/stable/ 24675146

against the will of the people. It applies to those parties who opt for it and who either contract or register their marriage under the Act and once they do it, they are governed by the provisions of the Act in the matter of marriage, dissolution of marriage and succession and their own personal laws do not apply to them. The second category of laws such as the Hindu Marriage Act, 1955 or Hindu Succession Act, 1956 apply only to Hindus just as the Dissolution of Muslim Marriages Act, 1939 applies only to Muslims. These laws are personal laws in the strict sense since they apply only to specific religious communities.[47]

A distinction is also made between Public law and Private law- Public law deals with relation between the state and the rights and duties of its people. For example, Constitutional law and Administrative law. Whereas Private law deals with rights and duties of private individuals *inter se*.[48] Personal laws deal with rights and obligations of private individuals in their relation to one another and therefore it is termed Private law. But the term 'Private law' is much wider than Personal law as it also includes many other laws regulating the rights and duties of private individuals in their relation to one another such as law of contract, torts, partnership, sale of goods etc.[49]

Changes in the personal laws were not on the basis of only western societies but were also formed on the basis of the pre-colonial period in India. For the reformists who wanted to take the good from the western models faced a problem because of the

[47] Supra note 22
[48] Ibid.
[49] Ibid.

section of society who were not ready to imbibe the modern culture and carry on with their orthodox practices.[50]

2.3 HINDU LAW

Not only the Orientalists of British India but also the earlier Orientalists as well accepted that ancient India had a history and started working and looking for it. In the ancient texts the *itihasa purana* contains the stories of the past- a class which embraces three broad categories of work. These include the two great epics Mahabharata and Ramayana apart from the texts called Puranas which etymologically denotes "antiquities" or ancients. The epics narrate great wars and about the kings who fought them. There are said to be eighteen Puranas and then there are Upapuranas which are lesser texts and then there are Stalapuranas which are local texts. They speak about the kings of the past although the discourse is in the form of a prophesy of an ancient sage. Purana has five important aspects (*lakshanas*) namely the creation, the successive world ages, the genealogies of gods and sages, the epoch of the Manu or first humans and the genealogies of kings.[51] The early Orientalists of British India were attracted by the two great epics and the puranas to which they devoted their resources at their disposal as they considered them a wealth of material for their study and research. Prior to the arrival of Jones in India the British had commenced the composition of an epitome of Puranic history from a pandit in Bengal named Radhakanta Sharma, the *Puranarthaprakasha* in Sanskrit which was translated

[50] "Visions of indigenous modernity in the non-West were not based solely on the models of change provided by Western societies. They also drew from pre-colonial cultures, reformed to meet standards of modernity; as a result, the predominant visions of modern family life varied in the former colonies. The modernists who wished to transplant Western models or to promote more locally based social reform faced challenges from groups that claimed to represent deeply rooted traditions. These traditionalists valued different kinds of family relations, and varied in influence." Vol. 69, No. 3, Narendra Subramanian, Making Family and Nation: Hindu Marriage Law in Early Postcolonial India, The Journal of Asian Studies, Association for Asian Studies, URL: https://www.jstor.org/ stable/40929192

[51] Supra note 1

into English after its translation into Persian as a result of which it suffered tremendously in the process. H. H. Wilson, a great Orientalist embarked upon his search for the ancient history of India with zeal and tenacity which made him a forerunner in the field. He was assisted by a team of Indian scholars who undertook a comprehensive study of the Puranas and prepared section by section *corpus juris* of the entire Puranas.[52] However, the work was not published and it is kept in the British library. This served as the foundation of Wilson's understanding of the Puranas and Wilson selected from this the Vishnu Purana for translation and publication. The project gave birth to a work which was meant for the students of Hindu College or other colleges of which he was in charge in the capacity of Secretary to the Committee of Public Instruction. The work was subsequently published in England and was used by the students there.[53]

Hindu legal system has been stressed upon by Mayne as the "proud possessor oldest pedigree of any known system of jurisprudence". Till now it manages to regulate the lived of over 800 million people, be it from the mountains in Kashmir to the hills of Kanyakumari or the desserts in the extreme west of India to the eastern states near the Bay of Bengal.[54] Among the known systems of law, the Hindu system of law is known to be of the oldest origin. The Vedic period is 4000 to 1000 B.C., Hindu law is about 6000 years older.[55] It has seen numerous phases, sometimes developing and evolving immensely and sometimes becoming rigid and orthodox and has also remained static and stagnant at some times.[56]

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[52] Ibid.
[53] H.H. Wilson, An Introduction to Universal History, for the Use of Schools, Calcutta: Calcutta School Book Society, 5th Ed.,1854
[54] Supra note 13, p. 39
[55] Paras Diwan, Modern Hindu Law, Allahabad Law Agency, 21st Ed., 2012, p.26
[56] Ibid.

Law is required to be ever growing and ever changing with the needs of the society and it cannot afford to become stagnant as that would result in law being unable to fulfil the grievances of the people which are its primary and perhaps only duty. In this respect Hindu law has shown great potential. Its development has been immense and it has vigorously catered to the needs of the society. To understand Hindu law's origin, one must understand the sources from which it has originated. It is divided into two main sets namely the ancient sources of Hindu law and the modern sources of Hindu law. The ancient sources include the *srutis, smritis,* digest and commentaries and customs. The modern sources are legislation, precedent and equity, justice and good conscience. These sources are discussed in detail below:

2.3.1 Ancient Sources

***Srutis*:** The word "*Sruti*" means "what was heard". Hindu law is believed to be a divine law and is a revealed law for that purpose. It is believed that some sages had acquired spirituality and could communicate to God. Thus, there was a point when this communication revealed the sacred laws. These are contained in the *Srutis* or *Vedas*. *Srutis* include the four *Vedas* which are namely the *Rig Veda*, the *Yajur Veda*, the *Sama Veda* and the *Atharva Veda*. These *Vedas* had their respective *Brahmanas*. These *Brahmanas* are the annexure which were added later on to these *Vedas*. The *Vedas* deal with various ceremonies, rituals and sacrifices. *Vedas* are given extreme importance and are the fundamental source of Hindu law because they are believed to be the voice of God. In this aspect it is believed that entire Hindu law has originated from the *Vedas*. They depict way of life of the ancestors. 4000 to 1000 B.C. is expected as the time of the *Vedas*. It is at this time when it is believed that Vedic Aryans had moved into the rich and fertile lands of the Punjab and Doab and had settled there. They lived the life of farmers and agriculture was the main profession.

The Aryans were believed to be vigorous, healthy and uncomplicated people. They were interested in making the most of what the rich land had to offer them.[57] Two sets of rules were existent at that time, the rules of customary law and the law of divine wisdom. Rules of customary law were meant to deal with rights and duties, wrong and right though more with duties than with rights. *Dharma* which meant the obligations of a person, *varna* which meant being a member of a class and *ashram* which was a stage of life were the aspects of this period. The law of divine wisdom was known to govern everything on earth. The immortality of the soul was the belief and the body were known to be perishable. The deeds of one birth were what would regulate what the person would be born as in the next birth. The concept of *karma* was there and thus deeds were important. *Yajna* was a way of attaining salvation. And *karma* was the way of attaining salvation by doing all the good deeds.[58]

The *Upanishad* philosophy and *Yoga* system were not in existence at this point of time. After the *Vedas,* it took a while to reach the *Smriti* period. Till then the development happened mainly through customs but because of lack of materials available of that period our knowledge is limited.

Smritis: *Smritis* and digest and commentaries consist major portion of references made to the earlier existing laws and customs and included not just the *Vedas* but also the *Sutras* and *Gathas*. *Gathas* existed for many centuries and this has been illustrated in the *Sutras* of Gautama and Vasistha and also in the *Manu Smiriti*. At that period there was a plethora of *Sutras* but because they are not available the knowledge about them is barely available. However, because of their mention in the *Smritis* it is apparent that they were composed in large numbers. The *Brahman as* were composed

[57] Ibid., p. 27
[58] Ibid., p. 27, 28

in this transition period from the *Vedas* to the *Smritis*. This was the period where the caste system became rigid and importance was given to learning of the *Vedas* by the male children belonging to the tree higher classes. *Vedas* could be taught only by the Brahmin class. Since Brahmins all across India were teaching the *Vedas*, they have various interpretations of it which led to the development of numerous *shakas* or branches of the *Vedas*. They also laid down their own rituals and legal rules. Means of communication were known to be slow during this period.[59]

The era of the *Smritis* is called the golden period for Hindus. The word "*smriti*" means "what was remembered". These are found on the memory of the sages who were known to be the store house of the sacred revelation of the Hindu religion. *Smriti* period is further divided into the early *smritis* and the later *smritis*. The early *smritis* are called *Dharmasutras* and the later *smritis* are called *Dharmashastras*. After the Vedic period, there arose a societal need of supplementing the Vedas with something more. The transition arose from the *Samhita Charanas* to the Sutra *Charanas*. Some of the Sutras made during this period were also written. There existed a trilogy of Sutras which included *Shrauta* dealing with sacrifices, *Grihya* which dealt with ceremonies relating to domestic fire and *Samayacharika* which were the law and customs dealing with duties of men in their various relations. The *Samacharika* is also known as *Dharmasutra*.[60]

Dharmasutra: Its period was approximately between 300 to 200 B. C. *Dharmasutras* were written mostly in prose and a few were written in prose and poems both. Most of them have their author's name and some even have the name of the *shakas* or the school to which the author belonged. The main *Dharmasutras* are- Gautama,

[59] Ibid., p. 28
[60] Ibid., p.29

Baudhyana, Aapastamba, Harita, Vasistha and Vishnu. Also, maybe there might have been more *Dharmasutras* of which we are not aware. The *Dharmasutras* deal with the duty of men in their various personal relations. They are a mixture of the *Vedas*, the decisions of people familiar with the law and also the customs followed by Aryans during the Vedic period. They are presumed to be the manuals which were written by the teachers of the Vedic schools for the children studying there. These were held to be authoritative texts at that time and later on became a source of Hindu law.[61]

Dharmashastras- Dharmashastras are also known as later *smritis*. They are in more rhythmic verses as compared to the early *smritis*. They have dealt with matters in a synchronised and systematic way. They are divided into three parts namely *Achara, Vyavahara* and *Prayashcitta*. *Achara* deals with the rules governing the religious observances. *Vyavahara* deals with the civil law and *Prayashchitta* deals with repenting. The earlier *smritis* have laid more emphasis on the first third whereas the later *smritis* have dealt with the civil laws at length. Both substantive and procedural laws have been dealt with. The Yajnavalkya Smriti illustrates the names of twenty sage who are Manu, Atri, Vishnu, Yajnavalkya, Usanas, Angaris, Yama, Apastamba, Samvarta, Katyayan, Brihaspati, Vyasa, Sankh, Likhita, Daksha, Gautama, Satatapa and Vasistha. According to Mitakshara the counting is illustrative and not exhaustive. Kane is of the opinion that not all Smritis are of the equal and same authority. Many are too old and barely cited by scholars.[62] The Manu Smriti is considered as the most important one among all the Smritis. But the irony is that the person who has compiled this great work has not been identified. Also, Manu who is the mentioned from the beginning has been given various names like Vridha (old), Brihat (great) and

[61] Vol. 25, XI, Buhler, Introduction to the Laws of Manu, Sacred Books of the East Series, Motilal Banarsidass, (1988)
[62] Kane, History of Dharmashastra, Vol. I, 12

Adi Manava (first patriarch). Chances are that the Manu who is known to be the ancestor of mankind could have been a mythical character. Nevertheless, he has been given immense importance and this is portrayed from the words which are used there, which says "Whatever Manu says is medicine". Manu has not just been recognised by the Hindus but also by the Buddhist writers of Java, Siam and Burma.[63] 200 B.C. is the approximate date of the *Manu Smriti*. Although Manu preached a number of important things like the importance of law and that law is the king of kings and how the king in subordinate to law but with divine rights. However, his patriarchal thinking led him into being extremely harsh to women and *sudras*. He believed in the domination of Brahmans and therefore had extremely right and backward thinking. A number of commentaries have been written on the *Manu Smriti*, the important ones being the Kulukka's *Manvarthamuktavali*, Medhatithi's *Manubhashya* and Govindraja's *Manutika*.[64]

The Yajnavalkya Smriti comes after the Manu Smriti, approximately at the beginning of the Christian era. Although based on Manu Smriti, it is way more synthesized, concise and logical. Yajnavalkya was from the Sukla Yajurveda and draws connection from the Brihadaranyak Upanishad. This Smriti is divided into three parts with proper arrangements and avoidance of repetition. The rules of procedural law have been dealt with in detail. His work is way more liberal that Manu's. He does not believe in the divine rights of the kind and does not support that ideology. He was like Manu when it came to customs. He attaches a lot of importance to customs. He favoured the *danda* and was of the opinion that people could not get punished for what they

[63] Supra note 55, p. 31
[64] Ibid., p.32

deserved punishment.[65] Interestingly so, he reminds one of John Austin who continuously insisted on the importance of sanction.

The third and the last is the *Narada Smriti*. It dates back to 200 A.D. Narada is presumed to have belonged to Nepal. This is considered as the first code devoid of moral and religious aspects. It deals only with *Vyavahara* and not with *Achara* and *Prayashchitta*. It is based on the *Smritis* of Manu and Yajnavalkya though on a number of matters it differs from them. The detailing with which it deals with the procedural laws is remarkable, although substantive law has not been dealt with that much of details. The work is divided into two parts, the first part deals with judicial procedure and judicial assembly and the second part deals with eighteen titles of law. It is extremely systematic and organised in dealing with rules of law. *Narada Smriti* was composed at the time when Harshavardhan was the ruler of Aryaverta. Since the Maurya Empire the necessity was felt to have a ruler who had law-making powers. Narada has dealt with it and has given it formulation. He not just dealt with the king's law-making power but also gave more importance to it than to the divine laws and customs. He said "Be whatever, the King is to be obeyed".[66] Along with this, he also recognised the importance of custom and said that "custom decides everything and overrules the sacred law". He was the first sage to be vocal about custom overriding sacred and divine laws. He is considered progressive as compared to the other sages because he supported the rights of women to inherit and own property and was of the opinion that a woman could leave her husband if the necessity arose. He was not that rigid towards *sudras* also.[67] There are a few other *Smritis* like the Parasara, Brihaspati and Katyayana but are not available in its entirety. Some others are there about which

[65] Ibid., p.33
[66] *Narada Smriti*, XVIII, 24
[67] Supra note 55, p.35

we have found out from Digest and Commentaries. The important ones among these are Vyasa, Samvarta and Devala.[68]

Digest and Commentaries: Digest and commentaries came up as a means of evolving the law. It existed for a period of one thousand years, from 700 B.C to 700 A.D. it was required because the Smritis were not clear on all points and in all situations. The last commentary is by Nanda Pandit who was the last of the commentators on *Vishnu-dharmasutra* called the Vijayanti, written in the 17th century. The commentaries known as *tika* were written on the various *Smritis* and from 12th century onwards the trend started of writing *nibandhas*. It was believed that if the *smritis* were understood they could have been connected and synchronised with each other because each part used to compliment the other.[69]

The important commentaries on Manu Smriti are by Madhatithi, Govingraja, Kullukabhatta. The important commentaries on Yajnavalkya Smriti are Visvarupa, Vijnaneshwara, Aparaka, Mitra-Mishra. These commentaries have further been supplemented by the local work of the authorities like the South Indian authorities, the West Indian authorities, the Mithila authorities, Benares authorities and Bengal authorities.[70] There have been works on adoption which are the *Dattaka Mimansa* and *Dattaka Chandrika*. *Dattaka Mimansa* is the well-known of Nandapandita among all his other works. Who can adopt, when can it be made, who can give it in adoption, who can be adopted, the ceremonies which are necessary to perform adoption, the motives behind adopting and the consequences of that adoption.[71] In *Collector of*

[68] Ibid., p.35
[69] Ibid., p.38
[70] Ibid., p.39
[71] Ibid., p.43

Madras v. Mootoo Ramalinga[72] the Privy Council had said that "Again of the *Dattaka Mimansa* of Nandapandita and the Dattaka Chandrika of Devannabhatta, two treatise on the particular subject of adoption, Sir William Macnaughten says that they are respected all over India; but that when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern jurists while the former is held to be the authority in the province of Mithila and Benares". Nandapandita had a number of followers from various parts of India and in this way, he has composed many works.[73] Although not much is known about his personal life his professional life shows the plethora of work done by him and this has been observed by Kane. He has placed his work from the period of 1595-1630.[74]

Nirnaya Sindhu was composed by Kamalakar Bhatta in approximately 1610-1640 A.D. is known to be an authentic enunciation on principles of ceremonial and religious laws throughout India. It deals with the concepts of *sraddha* and in that way deals with succession. Kamalakar Bhatta has authored 22 works and the well-known among them are *Nirnaya Sindhu, Sutra Kamalakara* and *Vivadatandava*.[75] The *Nirnaya Sindhu* is known to be the most scholarly work among the three.[76]

Dharmasindhu composed by Kasinath in 1790 A.D. is a work on ceremonial subject matter. It is given authority to primarily by the Benares school. The *Vyavastha Chandrika* is a digest on Mitakshara and the *Vyavastha Dayabhaga* is a digest on Dayabhaga are the two well-known erudite works Vidya Bhushan Sharma Charan Sarkar who had chaired Tagore Law Lectures in the University of Calcutta.[77]

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[72] 12 MIA 397 at 437
[73] Supra note 55, p.43
[74] Kane, 430
[75] Supra note 55, p. 43
[76] Supra note 62
[77] Supra note 55, p.44

During the British rule, the rules that got their force from digest and commentaries were reformed through legislation.[78]

Custom: Custom is one of the most ancient concepts of Jurisprudence. A custom is an established practice of a society which has prevailed over a long period of time and which is followed by the people openly without coercion. However, all customs are not valid. In our own legal system like other traditional legal systems custom has an important role to play. Many of our laws operate subject to any custom or usage to the contrary. It has forever been not just a mode of law reforms but is also a part of people's lives.

Mayne has defined 'custom' as "A belief in the propriety of the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative or proper to do so. When from either cause or both causes, a uniform or persistent usage has moulded the life and regulated the dealing of a particular class or community, it becomes a custom."[79] The term 'custom' is used in various senses to mean different things like local custom, usage which is also known as conventional custom, general custom and custom of the courts which is also known as precedent.[80] However, the custom of the courts have not been a part of custom as an ancient source of Hindu law and will therefore, no be dealt with here. Customs grow slowly and over a prolonged period. It gradually develops once it has been done continuously and the people are habituated to doing it. Several such customs are

[78] Supra note 13, p. 39
[79] Hindu Law and Usage, p. 63-64
[80] Dias, Jurisprudence, LexisNexis, 5th Ed.,2013, p. 187

followed by the society, but all do not become law or a source of law. The situations in which it becomes a law are various and may differ from one society to another.[81]

Customs in our legal system have role in all our personal laws. In most of the personal laws, custom is considered as an important source of law. Particularly in Hindu law, customs have played a major role, so much that they are acknowledge as a source of law. The *Vedas* and *Smritis* which are considered as the divine law were in actual practice nothing, but the customs followed by people. Once the *Smritikars* had written the law, the process of its development started through Digest and Commentaries. These writers incorporated the customs though not in its entirety. This also led to the translation of customary rules into principles of law. The meanings contained in the *Smritis* were dealt in detail by the Digest writers and commentators. This led to the including of customs in them. However, this incorporation has never been exactly as what the customs were. They were often modified to suit the needs and circumstances of the society. Also, the writers of Smritis and Digest and Commentaries have never openly claimed to have incorporated customs and therefore the scope of applying customs to resolve disputes was given to the King.[82]

Customs have a few requirements in order to be valid which are as follows: -

Ancient- Custom must be ancient. The word 'ancient' means that it must be antique. The whole idea of custom is that it must be older than human memory and no person following the custom should have a memory of as and when it started. Custom is mentioned in Section 3(a) of the Hindu Marriage Act, 1955 where its requirement is that it should be observed for a 'long time'. The term 'long time' is a dicey one and can have various connotations. In India it is required to be 100 years old or more in

[81] Ibid.
[82] Supra note 55, p. 45

order to fulfil the criteria of being ancient.[83] However, according to Derrett it may be 40 years old in order to qualify as ancient.[84] In a case[85] it was established by the Privy Council that the antiquity of the custom would be decided on case-to-case basis but what is necessary is to establish that the usage was in practice and with the consent of the people who were governed by it. An agreement cannot give birth to a custom. No new customs can be recognised either and no one can make law or custom as that is the duty and the privilege of the legislature.[86]

Continuous- Custom must be continuous in practice. Continuity is deemed to be as important as antiquity. If it is established that a custom is 400 years old but has not been followed continuously then it may be put aside. Whether the discontinuance is intentional or accidental is irrespective. However, customs can be repealed only by abandoning it.[87] There is no other way of repealing a custom which is its quality quite different from laws implemented by Parliament.

Certain- In order to be a valid custom, it is important that the custom must be certain. Vague practices which are uncertain cannot be labelled as custom. The onus of proving what the custom is and if it is applicable to the matter is on the person claiming it. It is important to prove the certainty of the custom and that it applies to the parties on the matter of dispute.[88]

Reasonable- An unreasonable custom is deemed to be void. Though, customs are not always a reflection of reasonableness but what qualifies for reasonableness or

[83] Ibid.
[84] Introduction to Modern Law, 15
[85] Mt. Subani v. Nawab, 1941, Lah 134
[86] Supra note 55, p. 46
[87] Ibid.
[88] Ibid.

unreasonableness is decided by the society. However, there are certain set of rules which are always considered unreasonable by all societies.[89]

Moral- Customs in order to be valid must be moral. Immoral customs are void.

Not opposed to public policy- In order to be a valid custom, it should not be opposed to public policy. Customs opposed to public policy are void.

Not opposed to law- Customs opposed to law made by the parliament are void and cannot be given effect.

Custom under Hindu law has been given immense importance. Though over a period of time this has changed. In the 1950s when Hindu law was thoroughly codified, a number of customs were done away with except for a few. There still are many customs which are practised and have been given much weight age, the laws enacted by the Parliament often leave leeway for customs and usages practised by the people thus portraying its immense importance.

2.3.2 Modern Sources

Legislation: Among the sources of law, legislation is by far the most important source of law. Its predominance among all modern legal systems has virtually relegated all other sources of law as relics of the past. Legislation is laying down of new legal rules by a legislative body recognised in the legal system as competent for the purpose.

Hindu Code which was brought in the 1950s is considered as one of the landmark achievements in post-independence law reforms. The Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act, 1956 and

[89] Ibid., p.47

the Hindu Minority and Guardianship Act, 1956 have reformed Hindu law overnight and made it an example for the other personal laws.

Precedent: We have imported the doctrine of precedent or *stare decisis is* from England as a common law doctrine. Article 141 of our Constitution reinforces the doctrine by stating that the law laid down by the Supreme Court shall be followed by all courts in India.

Under the doctrine of precedent, a court looks at the law through the eye of its predecessors. Precedent is laying down new legal rules by a court during the exercise of its judicial function. In the course of interpretation an application of the law the courts can and do lay down rules which will be followed by the courts in future and will apply to litigants coming before the courts with similar facts. A judicial decision thus operates *in personam* as well as *in rem*. The parties to a dispute before a court are bound by the decision of the court in respect of all the facts involved but the ratio decidendi of the case applies to the future litigants as well who come before the court with similar facts.

The important principles of Hindu law have developed from case laws. In these cases, references to the particular case law are sufficient. It is also a source of Hindu law in a way that through case laws the principles of Hindu law get modified and may sometimes be modified in such a way that that they become new principles and laws. Thus, precedents play a role in being a source of Hindu law.[90]

Justice, Equity and Good Conscience: Hindu law had anciently also had a version of the doctrine of equity, justice and good conscience. This principle has always been the very ingredient of Hindu law. Many scholars have emphasised on the importance

[90] Ibid., p. 51

of the reasoning power. Brihaspati once said that "No decision should be made merely exclusively according to the letter of the *Shastra* for, in a decision devoid of *Yukti* (reason of equity) failure of justice occurs."[91] Yajnavalkya observed that if there were conflicting rules of law in a matter than it must be decided on the basis of *nyaya* (natural equity and justice).[92]

Among the various family matters governed by Hindu law, marriage is one of the most important one. It has always been regarded as a sacrament not just for the life at present, but which once tied lasts for seven births and cannot ever be untied. According to Derrett, the reason behind this was to make husband and wife feel one in every way. It was not thought of a social act but was rather a spiritual one. According to the Holy Scriptures know as it was considered as an indissoluble union.[93] The modification of this thinking through the process of legislation over the years and introducing judicial separation and divorce in its ambit and giving it as an option to dissolve the marriage and giving women the liberty to free herself from tyrannical and selfish husbands marks a major shift in thought process from the ancient thinking of a union of several births. The introduction of respite is one of the most humane changes the system could have made. Polygamy and dowry were also a part of the malpractices at the time. *Shastric* law reform became a possibility only after independence in 1947.[94] *Nyaya* and *yukti* have always been given importance and have been used not just to supplement the law but to very often rectify and improvise it.

[91] Brihaspati, II, 12
[92] Supra note 55, p. 50
[93] Supra note 13, p. 39
[94] Ibid., p. 40

In the realm of joint family laws, traditional law was amended during the British period through the Hindu Gains and Learning Act, 1930 enacted through which the ambit of 'unobstructed heritage' was amended. For intestate succession Hindu law had no scope till 1928. Traditional Hindu law would disqualify heirs on the grounds of bodily and mental diseases and deformity. These laws were amended during the British era by the Hindu Inheritance (Removal of Disabilities) Act, 1928. The Hindu Women's Right to Property Act, 1937 improved the position of women and enhanced their capacity with respect to inheriting property. The Hindu Inheritance (Removal of Disabilities) Act, 1928 later on succeeded by the Indian Succession Act, 1956.[95]

Post-independence era is often referred to as the Indian Renaissance and Reform period. Early postcolonial Indian leaders retained a version of colonial family law in which distinct laws governed the personal lives of religious and other cultural groups in order to recognize cultural identity, the public relevance of religion, and the links that many people felt between group laws and group identities. Moreover, the executive changed Hindu law in the first postcolonial decade, left the laws of the religious minorities same, and indefinitely postponed the plan indicated in the constitution to introduce a uniform civil code (UCC). Hindu law governs about 78 percent of India's population. It applies to Hindus other than those who belong to tribes, and to the followers of other religions of South Asian origin, such as Sikhism, Buddhism, and Jainism.[96]

The British had enacted quite a few beneficial legislations like the Widow Remarriage Act, 1856 and Child Marriage Restraint Act, 1929.[97] A widow was not allowed to remarry after the death of her husband even if she had lost her husband in her

[95] Ibid., p.39
[96] Supra note 50
[97] Also known as the Sharda Act, 1929

childhood as child marriage was rampant in the society. Widows had to spend their life as destitute and vagrants and was looked down upon as social outcastes. Indian reformers led by Raja Rammohan Roy and Ishwar Chandra Vidyasagar worked and wrote against this evil and presented petition to the government for enacting a law permitting widow remarriage although they faced strict opposition and criticism from their own people. The Widow Remarriage Act was passed in 1856 which permitted remarriage of widows. Another serious evil which was prevalent in the Indian society and was practiced by all religious communities was child marriage and for the eradication of this social evil the Act of 1929 was passed. The Act made a child marriage where one of the parties was a minor punishable for the guardians and celebrants of the marriage although the marriage itself was legally valid as invalidating the marriage would have made the remedy worse than the disease. The Act has now been substituted by the Prohibition of Child Marriage Act, 2006 which makes a child marriage punishable and also gives the wife to repudiate her marriage on attaining majority if her marriage was contracted during her minority.

The British had appointed a Hindu Law Committee in 1941 to look into Hindu law and make recommendations and reforms but the report of the committee was rejected. Again, a similar committee was appointed in 1944 under the Chairmanship of B. N. Rau. It was known as the Rau Committee and in 1947 it submitted its report along with a draft of the codified version of Hindu law. The Bill had provisions of divorce in it but was strongly opposed by the orthodox section of the Hindus and therefore could not be enforced.[98] The law of inheritance was earlier not laid down in a detailed manner. Partitions did not happen often and where it did, it just resulted in new joint families. In a coparcenary, the death of a person resulted in his male issue succeeding

[98] Supra note 13, p. 41

him. It was unobstructed succession by son or grandson or great grandson. If none of these existed then the remoter kin of the *gotra* would succeed. However, the traditional Hindu law on matters of succession was different among the two main schools of Hindu law, namely the Mitakshara and Dayabhaga. For succession in Mitakshara it was propinquity and under Dayabhaga it was religious efficacy. In Mitakshara the joint property has a different course of succession and a property which is separate will have another course of succession but in Dayabhaga all properties whether divided or undivided or ancestral or self-acquired have the same manner of succession. In some parts of the country like Himachal Pradesh, Kerala and Tamil Nadu even the matrimonial system of inheritance was recognised. Changes in Hindu law of succession began when the Caste Disabilities Removal Act, 1850 was introduced by the British.[99] One of the remarkable features of this Act was that it was applied to all communities and sections of society. The Hindu Women's Right to Property Act, 1937 came into force precisely to give women the much-needed rights of inheritance.

The two major schools of Hindu law have their sub-schools as well. Mitakshara is further divided into the Benares, the Mithila, the Bombay and the Dravida.[100]

The British also left the country with people feeling more united and secular than perhaps ever before. These feelings of oneness made India which led to the enactment of the Hindu Marriage Validation Act, 1949, according to which marriage between people of different religions, castes and sects was valid. Some states enacted progressive laws like Bombay had enacted the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 and Madras had enacted the Madras Hindu Bigamy

[99] Supra note 13, p. 42
[100] John D. Mayne, Hindu Law and Usages, Chaps XII, XIII, Allahabad, India, Bharat Law House, 1950

Prevention and Divorce Act, 1949, and a similar law in 1952 in the State of Saurashtra and according to these Acts, Hindu marriage which was bigamous in nature was meant to be void.[101]

Hindu law saw major reforms from 1954 to 1956. Overnight Hindu law was put on a higher pedestal due to meaningful legislations enacted to govern the family matters. These were the Hindu Marriage Act, 1955, Hindu Succession Act, 1955, Hindu Adoption and Maintenance Act, 1956 and Hindu Minority and Guardianship Act, 1956.

The Hindu Marriage Act, 1955 completely transformed the nature of marriage under Hindu law. The Act drastically altered nature of Hindu marriage as a sacrament. It has made provision for divorce and dissolution of marriage by judicial decree. It has made marriage dissoluble by mutual consent *albeit* through judicial decree. Polygamy has been abolished and is even made punishable under the criminal law. It has provision for maintenance of either of the spouse by the other, irrespective of gender. It is only under the Hindu personal law under this Act that a husband is entitled to claim maintenance from his wife in appropriate circumstances putting both the spouses on the footing of complete equality.

The Hindu Adoption and Maintenance Act, 1956 completely changed the concept as well as the philosophy of adoption. Under the Act performance of religious ceremony *duttahoma* is neither a requirement nor is necessary for the validity of adoption. Adoption has been secularised. Moreover, the paramount consideration in adoption under the Act is the welfare of the child and not so much the spiritual benefits of the adoptive parents or the ancestors as was the case earlier. The Act has also codified the

[101] Supra note 13, p. 40

law relating to maintenance of wife, children and other relatives including maintenance of widowed daughter-in-law by the father-in-law which was altogether a novel provision inserted in the Act.

The Hindu Minority and Guardianship, 1956 raised the age of majority and changed the role of guardian to that of the protector of the ward and his interest, moral as well as material.

The Hindu Succession Act, 1955 improved the old Hindu law and made provisions for inheritance without dividing them on the basis of schools and sub-schools. It overrides some of the obsolete forms of succession. The Hindu Succession (Amendment) Act, 2005 has made one of the prodigious compliments to the Hindu Succession Act, 1955 by making a daughter a coparcener in the same way a son can become a coparcener.[102] This step has been a big leap in portraying equality which is often not followed in the name of religion and spirituality. The Hindu Succession Act also applies to Hindus who have chosen to marry under the Special Marriage Act, 1954.

One of the most important enactments passed by the Indian parliament for eradicating a long-standing atrocious practice was the Dowry Prohibition Act, 1961.[103] It outlaws giving and taking of dowry and makes the practice punishable under the Act. The Act with subsequent amendments in 1984 and 1985 contains stringent provisions for the prevention and punishment of the offence of dowry. It was a law which took a big leap forward when the Indian society perhaps not prepared for it and therefore, this law is respected more in breach than in obedience. The law has been rendered toothless and ineffective because the society is not prepared to accept it. Law is made

[102] Supra note 13, p. 44
[103] Supra note 13, p. 41

for regulating and moulding the society but also it can be moulded by the society to the extent of its complete annihilation. As observed by the great realist judge Oliver Wendel Holmes "the life of the law has not been logic: it has been experience."[104]

2.3.3 Matrimonial Reliefs

Marriage is an important institution of society and it gives rise to rights and obligations between the parties. It is also the foundation of a family which is although the smallest unit of a society and yet it is the most important one.

Although marriage is a permanent institution but human nature and human affairs are such that nothing can be permanent in this world. Therefore, there are provisions for matrimonial relief under Hindu law as there are provisions under every other law in every legal system

1. Restitution of Conjugal Rights- once a marriage is contracted between the parties they become entitled to each other's company, comfort and consortium.[105] So if one of them leaves the matrimonial home without proper justification or reasonable cause the other party may file a petition before the district court for the restitution of conjugal rights and the court on being satisfied that there is no reasonable ground or justification for such withdrawal from the matrimonial home may pass a decree for the restitution of conjugal right. If a question arises as to the cause about the reasonableness of the cause or justification for withdrawal from the company of the aggrieved party, the

[104] Oliver Wendell Holmes Jr., The Common Law, Dover Publication Inc., 1991

[105] Hindu Marriage Act, 1955, Section 9- "Restitution of conjugal rights. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Explanation- Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

burden of proof will be on the person who asserts it that is the person who has withdrawn from the matrimonial home.

In a landmark case[106] the Andhra Pradesh High Court struck down the provision for restitution of conjugal rights contained in Section 9 of the Hindu Marriage Act on the ground that the provision was violative *inter alia* of Articles 14 and 21 of the Constitution and also the basic human rights and therefore was ultra vires. However, in a subsequent case[107] the Supreme Court held that the Section 9 of the Act dealing with restitution of conjugal rights was valid and constitutional if seen in proper perspective as it envisages a social purpose of preserving the family. The parties once again get an opportunity to come together and prevent breaking of the family without any serious harm being caused to any of them.

2. Judicial Separation- another important matrimonial relief is judicial separation where parties are given some pooling period.[108] Either party to a marriage can petition the court for passing a decree of judicial separation on any of the grounds mentioned in sub-section (1) of Section 13. However, the wife can also petition on any of the grounds on which a petition for divorce would have been presented. Where such a decree is passed by the court it shall no longer be obligatory on the part of the petitioner to co-habit with the respondent. But such a decree for judicial separation can be rescinded by the court if the court

[106] T. Sareetha v. T. Venkatasubbaiah, A.I.R 1983 A.P. 356

[107] Saroj Rani v. Sudarshan Kumar, 1984 AIR 1562, 1985 SCR (1) 303

[108] Hindu Marriage Act, 1955, Section 10-"Judicial Separation.(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree of judicial separation on any of the grounds specified in sub-section (1) of section 13 and in the case of a wife on any of the grounds on which a petition for divorce might have been presented.(2) Where a decree for judicial separation has been passed, it should no longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree, if he considers it just and reasonable to do so."

is satisfied that it is necessary to do so on the petition of either party to the marriage.

3. Nullity of marriage- any marriage after the Act has come into force shall be null and void on a petition by either party to the marriage against the other party to be declared by a decree of nullity if it contravenes ay one of the conditions let down in clauses (i), (iv) and (v) of Section 5.
4. Any marriage contracted after the marriage came into force shall be voidable and therefore may be nullified by the court by passing a decree of nullity on any of the specified in Section 12 of the Act.
5. Divorce- any marriage contracted before or after the commencement of the Act may be dissolved by a decree of divorce on presentation of a petition by either party to the marriage on any of the grounds specified in Section 13.[109]

[109] Hindu Marriage Act, 1955, Section 13- "Divorce.(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party- (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or(ii) has ceased to be a Hindu by conversion to another religion; or(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. Explanation-In this clause- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any disorder or disability of mind and includes schizophrenia; (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not included sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment(iv) has been suffering from a virulent and incurable form of leprosy or (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive. Explanation- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent of or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly."

6. Divorce by mutual consent[110]- Both the parties to the marriage may present a petition to the district court on the ground that they have been living separately for a period of one year or more and that they have mutually decided that their marriage should be dissolved. However, no petition for divorce can be filed within one year of solemnization of marriage.[111]
7. Maintenance pendente lite-in any proceeding under this Act if the court receiving an application from either the husband or the wife finds that the petitioner does not have an independent means of income or is unable to maintain himself or herself order payment of the expenses incurred in the court and also such sum as may appear to be reasonable to the court for the

[110] Hindu Marriage Act, 1955,Section 13B- "Divorce by mutual consent.(1) Subject to the provisions of this Act, a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (Act no.68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (2) on the motion of both the parties made no earlier than six months after the date of presentation of the petition referred to in sub-section (1) not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such enquiry as it thinks fit, that a marriage has been solemnized and that the averments of the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

[111] Hindu Marriage Act, 1955, Section 14- "No petition for divorce to be presented within one year of marriage. (1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of a marriage by a decree of divorce unless at the date of presentation of the petition one year has elapsed since the date of the marriage: Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed. (2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of marriage, the Court shall have regard to the interests to any children of the marriage and the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year."

maintenance of the party. Under this provision [112] what is awarded is for a temporary period to tide over the difficulties arising due to court proceedings and also maintenance expenses.

8. Permanent alimony and maintenance- in any proceeding under this Act at the time of passing any order or decree or anytime thereafter if the husband or the wife makes such an application the court may pass an order or decree granting the petitioner such lump sum to be paid or such sum to be paid on a periodic or monthly basis as it deems fit taking into account the petitioner's own income and property and the income and property of the respondent.[113] Such maintenance once awarded may be altered or varied subsequently on presentation of a petition for such revision or variation if the court is convinced about the need of such variation or alteration. An interesting feature of provisions for maintenance under this Act is that they are equally available to both husband and wife. But more interesting feature of this provision is that

[112] Hindu Marriage Act, 1955, Section 24, - "Maintenance pendent lite and expenses of proceedings. Where in any proceedings under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings , it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceedings, such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable; Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be."

[113] Hindu Marriage Act, 1955, Section 25, - "Permanent alimony and maintenance. (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. (2) If the Court is satisfied that there is, a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem fit. (3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem fit."

rarely petition for maintenance is presented by the husband against the wife for his maintenance.

A Hindu wife is also entitled to maintenance during her lifetime under the provisions of Hindu Adoptions and Maintenance Act, 1956.[114]

In addition to this provision a wife or a divorced wife is also entitled to maintenance under Sections 125 to 128 of the Code of Criminal Procedure, 1973.

2.4 MUSLIM LAW

From a historical point of view, the growth of Islamic law system has been an interesting one. Its' beginning was small but in a short span of time it had developed rapidly into one of the important juridical systems in a civilised world.[115] Islamic Jurisprudence is founded primarily on the Koran and the traditions of the Prophet but a large amount of it has been supplied at Baghdad, in Bokhara, in Syria, in Andalusia and Persia. There is a resemblance between Islam and Rabbinical law. Similar are the conceptions of the Saracenic jurists who have contributed to the development and ascendancy of Moslem and draw analogy from the Roman Civil Law on cognate matters. The Byzantine notions have influenced the legal conceptions of Arabian

[114] Hindu Adoptions and Maintenance Act, 1956, Section 18- "Maintenance of wife (1) Subject to the provisions of this section, a Hindu wife whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime. (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying her living separately. (3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

[115] Supra note 15, p.4-5

jurists and the two are quite inter-twined.[116] A divide in the juridical conceptions led to the formation of two major sects of Islamic law namely the Shias and the Sunnis. It initiated because of dynastic questions which grew into separation of thoughts on doctrinal and legal grounds. The question which led to this divide was of the "spiritual headship of the Mussalman Commonwealth". The Shias were in opposition to the authority of the people to elect a spiritual head while the Sunnis were in agreement to this. This question arose on the death of the Prophet when it became an issue to have a successor elected to the leadership of Islam. The Shia minority rested their theology and law exclusively on the interpretation of the Quran and Hadith. The Sunnis who were in majority had based their theology and law on the interpretation and narration of the texts by the Prophet's companions and their disciples. There have been and still exist four different schools of theology and law among Sunni Muslims. They are (i) the Hanafi school, (ii) the Maliki school, (iii) the Shafei school and (iv) the Hanbali school. There were also some other Sunni schools which came to an end with the passing of time. The most important three of them are; (i) the Awzai school, (ii) the Zahiri school and (iii) the Tabari school.

Shias are divided mainly in three Schools. They are (i) the Ithna Ashari Jafari School, (ii) the Zaidi Shia school and (iii) The Ismailiya school. All these schools exist in different parts of India.

The Hashimites were the kinsmen of Prophet Mohammad and were of the opinion that after him his son-in-law Ali was the successor to his office. The other fragment which was the Koreishites was not in conformity to this and pressed on conducting elections. Abu Bakr was elected as the first Caliph by the Koreshites.[117] This marked

[116] Ibid., p. 5
[117] Ibid., Pg. 6.

a great divide in the history of Islam which has continued till date. The Shias and the Sunnis developed their own systems of Islamic laws respectively. These differ from each other on different points of law and status of similar matters is different in these sects. Abu Bakr was then succeeded by Abu Omar. After his decease Ali was offered the Caliphate on the condition that he would govern in accordance with the precedents of the two Caliphs. Ali declined the offer on the condition that in cases where there was no positive law or decision of the Prophet, he would rely on his judgement instead of the precedents of the Caliphs. This declaration intensified the differences between the Shias and the Sunnis and almost brought them to a point from where there was no going back. The next Caliph was Abu Osman as he had consented to the conditions of the electoral body. His willingness to follow the precedents of the two Caliphs marked a distinctive beginning. Both Abu Bakr and Abu Omar had deferred to Ali's interpretation and explanation of the law. Abu Osman tried to set a different example and governed by his secretary and kinsman Merwan, who later became a Caliph himself. However, Abu Osman was killed soon by Egyptian soldiers led by Mohammad, the son of Abu Bakr. After his death Ali was elected as the next Caliph. His succession led to two revolts and then an arbitration which was agreed to by Ali in order to prevent further bloodshed. Abu Musa al-Ashaary was appointed as the arbitrator on behalf of the House of Mohammad and Amr ibn-ul-Aas on behalf of the other party, Muawiyah. It was decided that both the Caliphs would be chiefs would be set aside and a new Caliph would be elected but while pronouncing the judgment Amr ibn-ul-Aas did not stick to what was decided and said that Muawiyah would become the next Caliph. This appalled all those who had seen the arbitration as something to prevent further bloodshed. It ended in an undying hatred towards each other. After

this incident Ali was shortly assassinated in a mosque while praying. His assassination helped Muawiyah to consolidate his power in Syria and Hijaz.[118]

The followers of Ali were known as Banu-Hashim and under Muawiyah, the followers of the House of Mohammed had started being called "Shiahs" or "adherents" and the followers of Muawiyah had started being called Amawis.[119] Later when the Abbasides got the dominion, the party advocating the principle of election was not of the opinion of hereditary succession. The adopted the name of *Ahl-us-Sunnat wa'l Jama'at* (People of the traditions and assembly). The Fatimides adopted green which was regarded as the Prophet's colour and the *Banu Ommeyya* assumed white as their colour. Till this point the differences between the two groups was mainly political and dynastic. Their doctrinal and legal differences arose from this point for attaining the kind of and proportions they have now.

2.4.1 Sources of Muslim Law

There exist four major sources of Muslim Law which are as follows:

Koran: Mohammadan law is founded mainly on the Koran or Quran. The rules and principles which now regulate the lives of the people are found in the Koran. It certainly contains the seeds cardinal principles which govern inter-personal human relations such as religious, civil and criminal laws. The moral and legal principles which were led down not at once as a complete Code of Law but were rather revealed over a period of time as the requirements *and* needs of the society arose during the lifetime of the Prophet.[120]

[118] Ibid., Pg. 7.
[119] From Ommey'a an ancestor of Muawiyah; in other words, the Ommeyades., Supra note 115, p. 8
[120] Supra note 15, p.8

***Sunnat*:** *Sunnat* is a source of Muslim law. It is also known as *hadis*. These are the traditions which used to be practised by the Prophet and have been handed down by him. The *Hadis* constitutes of all the words, counsels and oral laws of the Prophet which is known as *Kawl*, his actions, works and daily practices which is called *Fyl* and his silences which is *Takrir* which means implied approval by him for any act committed by his disciples.[121]

***Ijma*:** *Ijma* is the agreement on the decisions of the Caliphs and the general body of *ulema* or *Ijma'a-ul-Ummat*. *'Ijma'* means general acceptance. The apostolic laws which were the *ijma* included the explanations, glosses and decisions of the leading disciples of the Prophet, their successors and the principal jurist on theological, civil and criminal matters.[122]

***Qiyas*:** *Qiyas* is the analogical reasoning on which Sunni jurisprudence is based. Indian multiculturalism is portrayed through the existence of more than one community. The postcolonial state did not change Muslim law as conservative Muslims, who had significant influence in their community, considered these laws as important bases of Muslim identity.[123] *Qiyas* also plays a major role in being a point of difference between the different schools of Sunni law.

At the time of the British all questions relating to disposition of property between the Mahommedans were to be governed by the Mahommedan law.[124] In the case of *Zohorooddeen Sirdar v. Baharoollah Sirdar*[125] the judges were of the opinion that Mahommedan law would be followed on questions of inheritance, marriage and caste that the court will decide only these matters in conformity with Mahommedan law

[121] Ibid., p.9
[122] Ibid., p. 10
[123] Supra note 50
[124] Supra note 15, p. 2
[125] 1864, Gap Number W. R., 187

and that the matter in issue was not one of any of the above hence was to be decided by the rules of equity and good conscience.[126] In the case of *H. H. Azimunnisa Begum v. Clement Dale*[127] where the question was of a gift made by a Mahommedan to a Mahommedan, it was held by the court that any question arising on its validity was to be decided by Mahommedan law. The Bombay High Court too was of the opinion that Mahommedan law will be applied in the construction of deeds dealing with property matters if it was executed by Mahommedans irrespective of the language in which it was disposed.[128] The system followed at the time was probably a very just one considering that when a conflict was between two parties of which one was a Mahommedan and one was not, then the dispute would be decided according to the law of the defendant.[129] In the case of *Moonshee Buzloor Ruheem v. Shumsoon-nissa Begum*[130] the Privy Council had made the following observations:-

"Their Lordships most emphatically dissent from the conclusion. It is, in their opinion, opposed to the whole policy of law in British India, and particularly to the enactment already referred to (Reg. IV of 1793, Sec. 15) which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahommedan laws with respect to Mahommedans, and Hindu laws with respect to Hindus are to be considered as the general rules by which judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahommedan community than to learn by a judicial decision that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations."

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[126] Supra note 115, p. 2
[127] 1868, 6 Mad. H.C.R., 455
[128] Gangabai v. Thavar Mulla, 1863, Bom.H.C. R., 71
[129] Supra note 115, p.4
[130] 1867, 11 Moo. I.A. 551

"These conditions motivated initiatives to authorise the monogamous nuclear family and to provide women new rights, but also restricted the scope of these reforms."[131]

However, people were willing to retain their own sectarian laws and wanted to minimise the changes made to these laws and they gave priority to the state sponsored changes made in their economic and social life rather than their personal laws.

In India, Muslims are found belonging to both the major schools of Muslim law- Sunni and Shia. Ninety percent of the Muslims in India belong to the Sunni school and ninety percent of the Sunni Muslims in India are Hanafis. Shias thus constitute only ten percent of the Muslim population. Ninety percent of the Shia population in India belong to the Ithna Ashari school who are found mainly in Lucknow and Hyderabad. The Boras and Khojas of Bombay and western India belong to the Ismaili school of Shia. Shafis of Sunni school are also found in western India. Malikis and Hanbali Sunnis are not found in India.

However, the schools and sub-schools differ only in the details of religious rites and practices and inter-marriage between these schools and sub-schools is valid. For this purpose, the expositions of all schools and sub-schools are considered equally authentic.[132]

Muslim law in India has not been codified although personal law of the Hanafi school was compiled by a body of jurists during the rule of Aurangazeb. It is called the *Fatwa-a-Alamgiri* and was prepared in Persian. Another important text which is relied upon by the courts in India is the *Hidaya* which was prepared in the 12th century in Persian by Burhanuddin Al Marghinani. It was translated into English by Charles

[131] Supra note 50

[132] Vol. 16, No. 2, Tahir Mahmood, Law and Social Development in India and Afghanistan: A Comparative Perspective, Journal of the Indian Law Institute, April-June, 1974, p.233

Hamilton. These works are followed in the interpretation and application of Muslim law along with other texts.[133] Muslim law was applied to Muslims as Hindu law was applied to Hindus under various regulations passed during the British rule. However, in 1937 the Muslim Personal Law (Shariat) Application Act was passed to authorise the courts to apply Muslim personal law to Muslims in matters of marriage, dower, divorce, gifts, guardianship, waqf and intestate succession.[134] In matters of wills, legacies and adoptions Muslims would be governed by their customary law, if any unless and until he makes a declaration before the competent authority expressing his desire to be governed by Muslim personal law to the exclusion of his custom. Thenceforth he and his minor children would be governed by Muslim law.[135]

An important piece of legislation which was passed in Muslim law was the Dissolution of Muslim Marriages Act, 1929. Although, judicial divorce was recognised by all schools of Muslim law under the doctrine of *fask*, the grounds on which a wife could petition for the dissolution of her marriage widely differed; the most conservative school was the Hanafi school and the most liberal school was the Maliki school. The said Act in Section 2 enumerates the grounds on the existence of

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[133] Ibid.

[134] Muslim Personal Law (Shariat) Application Act, 1927, 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, ila, 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] Muslim Personal Law (Shariat) Application Act, 1927, Section 3-" Power to make a declaration.- (1) Any person who satisfies the prescribed authority- (a) that he is a Muslim, and (b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, (9 of 1872) and (c) that he is a resident of [1] the territories to which this Act extends, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [2] the provisions of this section, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified. (2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same."

anyone or more of them a wife is entitled to have her marriage dissolved by the court. The Act is applicable to all Muslim wives regardless of their school and therefore, the traditional Muslim law on the subject is only of academic interest after coming into force of this Act. This law was enacted on the demand of some luminaries of *Jamat-e-Ulama Hind* which is considered as one of the most progressive legislations. Another important piece of legislation which was passed is the Special Marriage Act, 1954. Anyone including a Muslim under the provisions of the Act is entitled to contract his or her marriage or can register already subsisting marriage under the Act. This Act is applicable to everyone regardless of his religion or personal law. Once a marriage is contracted or registered under this Act the marriage or its dissolution will be governed by the Special Marriage Act and in matters of succession the person will be governed by the Indian Succession Act, 1925 and not by his personal law. However, this is an enabling Act and applies to a person only as a matter of choice.[136] However, if a person contracts or registers a marriage under this Act he does not cease to belong to his religion but only in some limited matters he is governed by this Act.

Under Muslim law women were given full legal capacity to acquire, hold and dispose of property. Neither the husband after her marriage nor any other relative have any right or interest in her property as she has full ownership of her property. She may have acquired the property through purchase, gift or inheritance. Under Muslim law of inheritance according to all schools a female is entitled to inherit as a wife, as a mother, as a grandmother, as a daughter, as a granddaughter and as a full or half-sister.[137] Her property right is recognised under the Dissolution of Muslim Marriages

[136] Supra note 132
[137] N. J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, p. 35

Act, 1939, Section 2(8)(d)[138] which says that she is entitled to have her marriage dissolved if the husband disposes off her property or attempts to dispose it off without her consent or prevents her from exercising her rights over her property. Such an act on the part of the husband amounts to cruelty to the wife and therefore, entitles her to a decree of dissolution.

However, more often than not women are neither given their due share in the inheritance nor are they able to exercise their rights over their property. The reasons may be illiteracy, poverty or lack of consciousness in this regard or the callousness on the part of the society rendering imperative their empowerment through different modes and means. The plight of women in general and Muslim women in particular is in a sorry state not so much on account of lack or inadequacy of legal provisions conferring rights on them but rather because of their powerlessness to exercise and enforce their rights. If they are incapable of exercising their rights or enforcing them, they are only to lose them as the Romans *vigilanti bus non dormianti bus jura sub venient*- law is for those who are vigilant and not for those who slumber and sleep over their rights. When women are not conscious of their rights men are callous about them or choose to be callous as it suits them.

Charity is one of the greatest virtues in Islam and on this is based the institution of waqf. Waqf means the permanent dedication of an immovable property which is regarded by Muslim law as religious, pious or charitable. The institution of waqf as a charitable endowment has played a great role in the socio-economic life of Muslims as it has come to own huge property in almost all parts of the country. Waqf can be either public or private. A private or a *waqf-alal-awlad* is a family waqf created by the

[138] Dissolution of Muslim Marriages Act, 1939, Section 2(8)(d)- "disposes off her property or prevents her exercising her legal rights over it".

waqif or the founder of the waqf for his children generation after generation.[139] This institution of waqf was struck down by the Privy Council in a case in the close of the nineteenth century.[140] In this case, under the terms of the waqf the waqif had made provisions for maintenance of his family and children generation after generation and when the family was extinct the benefit would go to orphans and widows. The Privy Council held that the waqf was made for the purpose of family aggrandisement and the benefit to the poor orphans and widows was illusory as it was quite likely that before the family was extinct the property could disappear. It was an application of western thinking to an oriental institution as under Muslim law benefitting or helping one's poor family members or children generation after generation is itself a charity and therefore, it was sufficient to support the waqf for its validity.[141] Subsequently the Waqf Validating Act was passed in 1913 to restore the validity of such family waqfs and the Waqf Validating Act, 1930 was passed to give retrospective effect to the Waqf Validating Act, 1913. Apart from the State Waqf Acts, the Waqf Act, 1954 was passed for the management of waqfs in the country.[142] This Act was replaced by the Waqf Act, 1995 which is currently in force. There are public waqfs and private waqfs which own large number of properties and if these properties are managed well and their income is properly utilised huge welfare schemes can be managed with their funds and socio-economic condition of people can drastically change. The properties are not only mismanaged but also mired in litigation. Neither accounts are kept properly nor are they regularly audited. The managers or the *mutawallis* are accountable to none. Thus, the institution of waqf has failed to serve the purpose for which it was designed.

[139] Aqil Ahmed, Mohammedan Law, Central Law Agency, 17th Ed., 1997, p.213
[140] Abul Fata Mohammed v. Russomoy Dhur Chowdhury, I.A. 27 (1894)
[141] Supra note 132, p.237
[142] Supra note 139, p.200-201

2.4.2 Marriage

Marriage is an institution ordained for the perpetuation of society and for the promotion of normal human life. It legalises co-habitation and procreation of children. It is the smallest social unit in a system and yet perhaps the most important one among all social groups and institutions.[143]

Under Muslim law a marriage can be contracted by a man and a woman who have attained marriageable age by complying with the formalities let down for the purpose. There should be offer in clear terms and acceptance in the same way and at the same time and the parties should not be within prohibited degrees of relationship by consanguinity, affinity or fosterage. Under Sunni law presence of two witnesses is necessary although under Shia law it is not a requirement. If there is no permanent or absolute impediment between the parties a marriage contracted is valid. However, if there are partial or temporary impediments and a marriage is contracted it is *fasid* or invalid. A marriage in Muslim law is a civil contract although it has religious or social dimensions.[144]

2.4.3 Matrimonial Reliefs

Although marriage is contracted for life, it may not be for lifetime. Taking human nature as it is every legal system therefore makes provision for matrimonial relief. There is a *hadis* from the Prophet of Islam where he said that of all permissible things on earth, divorce is most detestable in the eyes of Allah. Muslim law makes elaborate provisions for matrimonial relief.

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[143] Tahir Mahmood, The Muslim Law of India, Law Book Company, 2nd Ed. 1982, p.45
[144] Abdul Qadir v. Salima, 1886, ILR 8 All 149

Three principal modes of divorce are recognised by Muslim law-unilateral repudiation of the wife by the husband or *talaq*, divorce by mutual consent and dissolution of marriage by judicial decree.

1. Divorce by *Talaq*- where a Muslim husband has power to terminate his marriage unilaterally at his discretion. No intervention by the court is required. *Talaq* is an extra-judicial proceeding variedly effected by the husband pronouncing the appropriate words. *Talaq* may be of the following kinds: -

(i) *Talaq-al-ahsan*- where the husband pronounces *talaq* during the wife's *tuhr* period and the wife goes into her *iddat* which may last for three months or till the delivery of the child whichever is later and on the expiry of this *iddat* period the marital ties come to an end.[145]

(ii) *Talaq-al-hasan*- in which the husband pronounces *talaq* once during the *tuhr* period of the wife and then after one month pronounces it for the second time and then again after one month pronounces it for the third time and then the wife goes in her *iddat*.[146]

(iii) *Talaq-al-biddat, talaq-al-bain* or triple *talaq* where the husband pronounces *talaq* three times in the same breath or pronounces *talaq* with finality and the marriage is dissolved and then the wife goes into her *iddat*.[147]

The power to repudiate the marriage when certain conditions are fulfilled or certain circumstances come to exist, can be given to the wife and this is known as delegated *talaq*or *talaq-e-tafweez*.[148]

[145] Supra note 139, p.104.
[146] Ibid., p.104.
[147] Ibid., p.105.
[148] Ibid., p.106.

2. Divorce by mutual consent- divorce by mutual consent can be either *khula* or *mubarat*. In *khula* form of divorce by mutual consent the aversion is on the part of the wife and therefore, the proposal comes from her and she may remit whole or part of her dower in consideration of acceptance of her proposal. Although, such remission of dower is neither necessary for its validity nor is it necessarily implied. In *mubarat* form both the parties mutually agree to dissolve their marriage, in both the forms of divorce by mutual consent as soon as the divorce becomes final it becomes effective and irrevocable as it is contractual in nature.[149]
3. Divorce by judicial decree- under traditional Muslim law there was doctrine of *fask* under which a Muslim wife was entitled to petition the *qazi* for the dissolution of her marriage in certain circumstances. The Maliki law the largest number of grounds on which a Muslim wife was entitled to petition for the dissolution of her marriage whilst Hanafi law was the most conservative and recognised limited grounds on which she could file such a petition. In 1930s some Muslim legal luminaries got a bill introduced which was passed as the Dissolution of Muslim Marriages Act, 1939. The Act contains more or less the grounds on which under Maliki law a wife was entitled to petition the court for the dissolution of her marriage. Under this Act a Muslim wife belonging to any school of Muslim law is entitled to get her marriage dissolved.

[149] Ibid., p. 108

Section 2 of the Act[150] states that a Muslim wife can petition the court for the dissolution of her marriage on anyone or more of the grounds stated in the Section.[151] A decree passed under this Section operates as an irrevocable form of divorce and therefore, during the *iddat* period of the wife the marriage is no more subsisting.

During the *iddat* period after the dissolution of her marriage the wife is entitled to maintenance. The *iddat* period may last for three months or till the delivery of the child, whichever is later.

[150] Dissolution of Muslim Marriages Act, 1939,Section 2.- "Grounds for decree for dissolution of marriage.- A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: (i)that the whereabouts of the husband have not been known for a period of four years; (ii)that the husband has neglected or has failed to provide for her maintenance for a period of two years; (iii)that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iv)that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (v)that the husband was impotent at the time of the marriage and continues to be so; (vi)that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease; (vii)that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated; (viii)that the husband treats her with cruelty, that is to say, (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (b) associates with women of evil repute or leads an infamous life, or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or prevents her exercising her legal rights over it, or (e) obstructs her in the observance of her religious profession or practice, or (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran; (ix)on any other ground which is recognised as valid for the dissolution of marriages under Muslim law: Provided that (a)no decree shall be passed on ground (iii) until the sentence has become final; (b)a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfied the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and (c)before passing a decree on ground (v) the Court shall, on application by the husband, made an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

[151] Supra note 139, p.114

However, she is also entitled to maintenance as a matrimonial relief under the provisions of Muslim Women's (Protection of Rights on Divorce) Act, 1986.[152] Maintenance is also available to a Muslim wife under Section 125 of Code of

[152] Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 4.- "Order for payment of maintenance.(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order: Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her: Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.", and Section 5-"Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974. If on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly. Explanation– For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

Criminal Procedure, 1973.[153] As early as in 1976 Kerala High Court had awarded maintenance to a Muslim wife under the Code.[154] Later in 1979 also the Supreme Court awarded maintenance to a Muslim wife.[155] In this case Krishna Iyer J. wrote the judgment on behalf of the court and held that the purpose of Muslim personal law on the subject is same as the purpose of the provisions of the Code that is to prevent the destitution and vagrancy if women. To the extent to which a woman is if a woman gets full protection under one law, she does not need the protection of the other but to the extent to which a wife is not protected under one law, she is entitled to the protection of the other. Again in 1980 the Supreme Court reiterated its stand in *Bai*

[153] Code of Criminal Procedure, 1973, Section 125, -"Order of Maintenance for wife, children and parents(1) If any person having sufficient means neglects or refuses to maintain-(a) his wife, unable to maintain herself, or (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority; (b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation. - If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

[154] Kunnhi Moyin v. Pathuamma, 1976, KLT, 87

[155] Bai Tahira v. Ali Hussain Fissali Chothia, 1979, 2 SCC 316

Tahira case.[156] But later in what is popularly known as *Shah Bano case*[157] great hue and cry was raised against the judgment because of certain remarks made by the court although a maintenance was awarded to a Muslim wife and what was done by the court in this case was nothing new. The law was already let down and settled by the court in the earlier cases. The judgment of the court in this case was followed by so much acrimonious debate that the Muslim Women (Protection of Right on Divorce) Act was passed in 1986. The primary objective of which was to absolve the husband from the liability to maintain his divorced wife after the period of *iddat* and to shift the liability to her children, parents or her other relatives and ultimately to the Waqf Board. However, the Supreme Court in 2001 held that a divorced Muslim wife is entitled to maintenance under the Code of Criminal Procedure[158] and the earlier law was restored.

4. Dower means any property or a sum of money paid or promised or partly paid or partly promised as a mark of respect to the wife.[159] *Meher* or dower is a legal incident of valid marriage under Muslim law. It is fixed before or at the time of marriage but if it is not fixed still, it is payable as a proper dower. If it is payable immediately after marriage it is called prompt dower but if it is payable at a later date or at the time of dissolution of the marriage it is called deferred dower and thus is an important matrimonial relief. On divorce all dower whether prompt or deferred which has remined unpaid becomes payable.
5. Restitution of conjugal rights- one of the legal incidents of a valid marriage is that each spouse is entitled to the company and consortium of the other.

[156] Fazlum Bi v. K. Khader Vali, AIR 1980, SC, 1730
[157] Mohd. Ahmed Khan v. Shah Bano Begum, 1985 2 SCC 556
[158] Danial Latifi v. Union of India, 2001, 7 SCC 740
[159] Asaf A. A. Fyzee, Outlines of Muhammadan Law, Oxford India Paperbacks, 5th Ed. 2009, p.105

> Neither party is entitled to leave the matrimonial home and deprive the other of the company and comfort. If any one of them leaves the matrimonial home without proper cause or justification the other party is entitled to bring a suit for the restitution of conjugal rights. The court will pass such an order against the party who has left the matrimonial home without reasonable cause or justification.

There are fairly large number of matrimonial remedies which have come to exist on the basis of Quranic texts, *hadiths*, *ijma*, *qiyas* and their juristic interpretations as well as commentaries of the scholars. The question is about their adequacy and how they can be made more effective in modern times and circumstances.

2.5 CHRISTIAN LAW

2.5.1 History of Christian Law

The history of Christianity began from the Saxon times where there was an intimate connection between the Church and the State. The Courts had jurisdiction in not just civil and criminal matters but also in ecclesiastical matters. In all matters the superiority of the Church was always maintained. The clergy had a major role to play in legislative matters, administration of justice and in the general governance of the state. In 1066 A.D. King Harold was defeated at the Battle of Hastings by William the Conqueror with the assistance of the Pope. They abolished the practice of dealing with everything in the same court and the Bishop and the Archdeacon had their own courts.[160] Marriage laws were made the canon law in England.[161] The laws administered in the Church Courts were administered on the basis of Holy Scriptures

[160] Sir William Blackstone Knt., Commentaries on the Laws of England, Book III, 15th Ed, 1809, London, p.62.
[161] Vol. II, Pollock & Maitland, The History of English Law, 1968, Cambridge, p.367-367

in the "vulgate" version made by St. Jerome in the fourth century, the other regulations made by local and general Councils, decrees of Popes were treated as legislations and had the force of law.[162] There were collections and compilations from the sixteenth century which was called the *Corpus Juris Canonici* or the Body of Canon Law which was the law formed on the basis of the law which was administered by the Church Courts.[163] However, after a period of time differences began to come up between the Church and the State when King Henry II wanted to abolish the privileges of the clergy in 1164 A.D. this was followed by King Henry VIII forbidding appeals to the Pope in the Statute of Appeals. Following this was the Act of the Submission of the Clergy. Eventually, when the Pope did not annul the marriage of the King, he ended up proclaiming himself the "Supreme Head in Earth of the Church of England" in 1534. The Church Courts got their royalty only after King Henry VIII and retained their independence of Common Law Court. Instead of the Canon law being repudiated, a new one was built.[164] The Statutes became superior to the Church and the Church Courts were superior to the statute law. Although, law of the land started getting above the Church but the Church did not lose its authority altogether. Only in matters of conflict, the law of the land would prevail otherwise the law of the Church did retain basic authority.[165]

However, the Courts would apply the canon law for deciding the validity and other matters relating to marriage. This was highlighted in the judgment of Lord Penzance in a case[166] where he said that "Marriage as it is understood in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others."

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[162] Sebastian Champappilly, Christian Law of Divorce, Sothern Law Publishers, 2007, p. 10
[163] Max Radin, Anglo American Church History, 1936, Minnesota, p. 101-102
[164] Supra note 162, p. 11
[165] Ibid., p 12
[166] Hyde v. Hyde and Woodmansee, L.R., 1866, 1 P.D., p. 130-133

This was later accepted as the 'definition of Christian Marriage'. Later, the enactment of Judicature Act, 1873 led to the vesting of jurisdiction in the High Court of Justice for all matrimonial causes. The Acts which followed like the Supreme Court of Judicature (Consolidation) Act, 1925 did not bring about any major changes in the substantive law of the land. The statutory law of England from 1857 to 1925 did not specify any grounds for declaring a marriage null and void. It all depended of the laws of the Church.[167] However, all of these factors are necessary to understand the development of Christian law in India.

The British raj had massive impact on the Indian system. English law was applied in India in a number of ways and to a number of people. It was especially applied to Christians because unlike Hindus and Muslims they did not have their own set of divine laws. Initially the British applied their laws which was the English Statute 14 and 15 Victoria, Chapter 40. After this the Statute 58, Geo III Chapter 84 were applied. This was followed by the application of Indian Act VIII of 1852, Act XXV of 1864 and Act V of 1865.[168] These laws were all applied for the Christian marriages. Eventually this led to the question of application of laws to Christian divorces. The British were of the opinion that a law for divorce was also required. Matrimonial Causes Act, 1857 of the British was applied to Christians with slight modifications. This led to the enactment of the Indian Divorce Act, 1869 by the Governor General in Council which was applied throughout India barring a few exceptions like Princely states, Portuguese and French settlements.[169] Also, although the name was the Indian Divorce Act, but it applied only to Christians. It has later on been amended and is now only called Divorce Act. The reason of the enactment of this Act was also to confer

[167] Supra note 162, p. 12-13.
[168] Ibid., p.9.
[169] Ibid.

the power of jurisdiction upon the Supreme Court and the High Courts for dealing with issues of matrimony. The Preamble of the Act paints a picture that the Act was enacted to supplement some other law as well which was existing at that time. The Matrimonial Causes Act of 1857 is inter-twined with the Indian Divorce Act and the understanding of the English laws is also important in order to understand the history of the Christian personal laws. The Draft Bill of the Indian Divorce Act was framed by Mr. Whitely Stokes. It was given to the several High Courts and the opinions of the judges of the Calcutta and Bombay High Courts was put forward before the Council of the Governor-General. The Bill was introduced by Sir Henry Maine on 24th December, 1862. The Bill was pending for seven years and finally on 26th February, 1869 got the assent from the Governor-General. The primary objective of this Act was to give the High Court's original jurisdiction in matters relating matrimonial matters.

Before the year 1872, the law for the solemnisation of Christian marriages was scattered in two Acts of British parliament and three Acts of Indian legislatures. It was thus considered desirable to consolidate and amend the law culminating in the passing of the Indian Christian Marriage Act, 1872. The object of this enactment was to codify the existing law into a compact enactment as well as modify and systematise the law wherever required.

The Act applies to the whole of India except those territories which prior to 1st November 1956 comprised in: (i) the state of Manipur (ii) the state of Jammu and Kashmir and (iii) the erstwhile state of Travancore-Cochin.

2.5.2 Marriage

Requirements of a valid Christian marriage- Sections 4 to 9 deal with persons who can solemnise their marriages under the Act.[170] Section 4 states that every marriage where one of the parties is a Christian or where both parties are Christians shall be solemnised according to the provisions of Section 5 of the Act. Any marriage which is not contracted in accordance with the provisions of the Act are rendered void.

Thus, apparently Section 4 applies where one of the parties is a Christian and the other is not and the marriage is solemnised under the Indian Christian Marriage Act. But if a Christian marries a non-Christian under the Special Marriage Act, the marriage cannot be considered to be void because of its non-compliance with Sections 4 and 5 of the Christian Marriage Act.[171] Compliance with Sections 5 and 6 of the Act is obligatory for the validity of a marriage under the Act. Solemnisation of a Christian marriage can only be in accordance with the provisions of the Act and not in any other manner even if there was a custom to that effect. Time and place for solemnisation for Christian marriage, Sections 10 and 11 of the Act enshrine provisions relating to time and place of Christian marriage.

Before the dawn of Christianity, Roman law did not require specific formalities for marriage or divorce which were considered personal matters. But after the advent of Christianity marriage was recognised as a sacrament and the Roman church came to be recognised as the supreme ecclesiastical authority in all matrimonial matters. The Canon law maintained complete indissolubility of marriage as husband and wife were made one flesh by an act of the Almighty. Marriage came to be regarded as a holy institution which could only be dissolved by death.

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[170] Indian Christian Marriage Act, 1872, Sections 4-9
[171] A.A.Balasundaram v. Vijaya Kumari, 1991, Cr.L.J.2254

It was not until the period of reformation that the concept of marriage began to change as a union of one man and one woman for life. The reformation divided the Christian world into Catholics and Protestants. The Protestants started considering marriage as a civil contract which was not completely indissoluble and over which the civil courts could exercise jurisdiction but the Catholics continued indissolubility of marriage and allowed the church to have exclusive jurisdiction over marriage.

In India, Christian marriages are governed by the Indian Christian Marriage Act, 1872 and the Divorce Act, 1869 regulates divorce amongst Christians. Till quite recent past these two enactments were inconsistent with other statutes applicable to other communities in India for example the Hindu Marriage Act, 1955 or Special Marriage Act, 1954 or the Parsi Marriage and Divorce Act, 1936.

2.5.3 Matrimonial Reliefs

1. Dissolution of marriage is dealt with in Sections 10 to 17. Sections 10 and 11 deal with dissolution of marriage by a Christian husband or wife. Section 10 deals with the right of a Christian wife to obtain a decree of dissolution of marriage. Section 10A envisages divorce by mutual consent. Sections 10 to 15 deal with powers of the court. Sections 16 and 17 deal with decree nisi and confirmation of decree. Only a court decree passed under the Divorce Act can dissolve a Christian Marriage in India. The ecclesiastical bodies or tribunals have no jurisdiction to grant divorce or pass a decree of dissolution of a Christian marriage.

   The amendment of 2001 has brought about a radical change in the grounds available to a Christian couple for dissolving their marriage. Now, either party to the marriage can file a petition before the district court for dissolution of the

marriage on any one or more of the ten grounds stated in Section 10 of the Act.[172]

2. Judicial Separation- Sections 22 to 23 deal with judicial separation. Section 22 states that after passing of the Divorce Act the court cannot pass a decree of divorce *a mensa et toro* (i.e., separation in bread and board). Nonetheless the court can pass on any of the following grounds:
   (i) Adultery
   (ii) Cruelty
   (iii) Desertion for two years or more

Such a petition can be filed by the husband or wife and a decree on such a petition would have the effect of a divorce *a mensa et toro*. Under Section 23 a petition for judicial separation can be filed by either spouse in the district court. If a district court passes a decree for judicial separation, it does not require any confirmation by the high court.[173] It must be noted here that a decree for judicial separation does not dissolve the marriage in the eyes of the law and the parties continue to remain as

[172] Divorce Act, 1869, Section 10-"Grounds for dissolution of marriage-(1)Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) act, 2001, may, on a petition presented to the District Court either by the husband or wife, be dissolved on the ground that since the solemnization of marriage, the respondent- (i) has committed adultery; or (ii) has ceased to be a Christian by conversion to another religion; or (iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or (iv) has for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or (v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or (vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or (vii) has willfully refused to consummate the marriage and the marriage has not therefore been consummated; or (viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or (ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or (x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. (2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

[173] Benzmin v. Rundbhai, A.I.R 1989, M.P.25

husband and wife. They can legally live separately from each other but cannot remarry. Before a divorce takes place, judicial separation is the last opportunity for the parties to come together. It allows the parties to rethink about the continuation of their relationship.

3. Restitution of Conjugal Rights- the primary purpose of marriage is legalising and legitimising cohabitation between husband and wife, all matrimonial laws in India make provisions for restitution of conjugal rights. Cohabitation means living together as husband and wife. It implies that each party has a right to the society, companionship and affection.

Thus, Section 32 of the Act provides for restitution of conjugal rights.[174] Where either party to the marriage may apply to the court for restitution of conjugal rights if the other spouse has left the matrimonial home without a just cause or lawful justification depriving the petitioner of conjugal rights. If the court is satisfied about the truth of the matter in the petitioner's statement it may pass a decree for restitution of conjugal rights. It is provided that whatever constitutes a ground for judicial separation or nullity of marriage would be sufficient defence to such a petition.

4. Alimony- alimony means the allowance provided to a woman by a court when she is not living with her husband. The purpose of such payment is to make provision for the maintenance of the wife. There are two kinds of alimony. Alimony pendente lite or during the matrimonial litigation where the court directs the husband to pay to the wife when the suit is pending before the

[174] Divorce Act, 1869, Section 32-"Petition for restitution of conjugal rights- When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife, or husband may apply, by petition to the District Court for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."

court. This kind of alimony is in the nature of interim relief payable to the wife only till the matter is disposed of. The second type of alimony is permanent alimony which is provided by the court finally disposed by it. In respect of nullity of marriage, dissolution of marriage or restitution of conjugal rights.

5. Alimony *pendente lite*- alimony *pendente lite* or alimony pending the suit is an allowance which the husband is ordered to pay to the wife so long as the matrimonial proceedings are before the court. Receipt of such an allowance for the wife on the discretion of the court. However, such discretion is not to be exercised unfettered but only in accordance with established principles.

The wife entitled to make a petition for payment of such alimony during the pendency of the suit whether the petition is filed by her or her husband. Such a petition is served on the husband and the court may pass an order for payment of expenses and alimony pendente lite after hearing both the husband and the wife. The purpose of the provision is to make provision for maintenance of the wife until the matrimonial petition is finally disposed of by the court. The court takes into consideration all relevant facts and circumstances including the income of both the parties while examining an application or alimony pendente lite. The court will be justified in refusing to award alimony pendente lite when the husband has no income or property of his own. So, in a case where the husband was on six months leave without pay from India and was not having any other income nor did he have any other property the court refused to order payment of alimony pendente lite.[175] The Allahabad high court has held that where the wife goes and lives with her father, this by itself does not disentitle her to alimony pendente lite from the husband.[176] The wife's own income is taken into account by the court while considering the award of alimony

[175] Fletcher v. Fletcher, 31, LJP 82
[176] Ganga Devi v. C.B.Joshi, A.I.R. 1980, All 130

pendente lite. But the fact that she has jewellery does not disentitle her to a claim of alimony.[177]

6. Permanent alimony- when the court passes final decree for dissolution of marriage or judicial separation, it can order the husband to pay the wife an amount of money for any period not exceeding the wife's lifetime if the court considers it just and reasonable. While passing such an order, the court shall consider the wife's property, the husband's ability and the conduct of both the parties.

The matrimonial relief under the Indian Christian law are primarily derived from and based on English law. Although they enjoy the advantage of being enshrined in statutes and statutory provisions, they suffer from the disadvantage of neglect and apathy. The provisions relating to these reliefs have never been regularly amended and updated in keeping with the development of the society and aspirations of the people.

2.6 PARSI LAW

2.6.1 History of Parsi Law

The Parsi community did not have any codified law till 1865. They were governed by their customs. When the British period started in India, the British laws were applied to Parsis because of lack of codified law. Personal laws were only applied to Hindus and Muslims by the Act of 1781 because of their divine origin and in *J.S. Jebb v. C. Lefevers and Caroline*[178] the Calcutta High Court had held that there were only three systems existing in India namely the English, Hindu and Muslim and therefore all

[177] Kuria Kose v. Kuria Kose, A.I.R. 1958, Mad. 340
[178] Ind. Dec. (o.s.) F, 68(1818)

persons not falling under the heads of Hindu law and Muslim law were to be governed by English law only. In the case of *Naoraji Beramji v. Rogers*[179] it was expressly declared by the Court of Bombay that the English laws would be applied to Parsis.[180]

However, the Parsis were dissatisfied with this forceful application of English laws on them. In 1835 the Parsis spoke up against a fly in the ointment which they were facing because of lack of codified laws. The Third Law Commission pointed out that their claim to have a separate law had not been fulfilled. At last, in 1864, a Parsi Law Commission was appointed. This Commission proposed that a law was to be enacted for the entire Parsi community and no discrimination should be made between people of the Presidency and those living in the *mofussils*. This discrimination often led to more problems and complexities and was to be avoided.[181] This led to the enactment of the Parsi Marriage and Divorce Law, 1865. This was their first ever codified law and was primarily based on the principles of the English Matrimonial Causes Act, 1857. One of the pros of this Act was that it made marriages monogamous but its con was that it only recognised adultery as a ground of divorce. Further, the Parsi Central Association appointed a subcommittee to amend these provisions. The Report of the subcommittee was further circulated among the community so that the people would be in a position to see and propose necessary changes to the laws that would govern them. The Central Association, Panchayats, Trustees and well-known jurists of the Parsi community looked into the matter and gave their opinions and suggestions. Depending upon their suggestions the 1865 Act was replaced by the present day Parsi

[179] 4 Bom. H.C.R., 12
[180] Supra note 13, Pg. 46
[181] Ibid., Pg. 47.

Marriage and Divorce Act, 1936. Subsequently the Parsi Marriage and Divorce (Amendment) Act, 1988 was made.[182]

For laws of succession for Parsis, used to be the English common law expect in cases of marriage and bigamy before 1837 but a determined initiative by the Parsis led to the enactment of the Parsi Intestate Succession Act, 1865. One of the remarkable features of the Act was that widows and daughters who were earlier entitled only to maintenance after the death of the deceased could now also get a share in the property. However, with the enforcement of the Indian Succession Act, 1925, the Parsi Intestate Succession Act, 1865 has been now made Chapter III of the Indian Succession Act, 1925. Following this there were major amendments made in the Parsi intestate and succession law in the years 1939 and 1942.

2.6.2 Marriage

The Parsi Marriage and Divorce Act was passed in 1936 to amend the law governing marriage and divorce among Parsis. Since the society had undergone a sea change after the passing of the Parsi Marriage and Divorce Act. Under Sections 3 and 4 of the Parsi Marriage and Divorce Act, a Parsi marriage is valid only if the following conditions are fulfilled:

1. That the parties to the marriage are not related within prohibited degrees on the grounds of consanguinity or affinity as laid down in the Schedule to the Act.
2. The marriage must be solemnised in accordance with the Parsi ceremony called *ashirvad* by a Parsi priest in the presence of two Parsi witnesses.

[182] Ibid.

3. The bridegroom should have completed the age of twenty-one years and the bride the age of eighteen years. The requirement of minimum age of twenty-one for boy and eighteen for girl was brought about by the Amendment Act of 1988.
4. A Parsi cannot contract a marriage in the lifetime of his or her spouse without obtaining a divorce through the due process of law.
5. Solemnisation of marriage contracted under the Act must be certified by the officiating priest in the prescribed form given in Schedule II to the Act.[183]

2.6.3 Matrimonial Reliefs

The Parsi Marriage and Divorce Act enshrines the following matrimonial remedies;

1. Suit for nullity- a Parsi marriage can be declared to be null and void under the Act if consummation of the marriage is not possible. Any one of the spouses can petition the court for declaring the marriage null and void on this ground.[184]

[183] Parsi Marriage and Divorce Act, 1936, Section 5- "Punishment of bigamy- Every Parsi who during the lifetime of his or her wife or husband, whether a Parsi or not, contracts a marriage without having been lawfully divorced from such wife or husband, or without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code (45 of 1860) for the offence of marrying again during the lifetime of a husband or wife."

[184] Parsi Marriage and Divorce Act, 1936, Section 30- "Suits for nullity- In any case in which consummation of the marriage is from natural causes impossible, such marriage may, at the instance of either party thereto, be declared to be null and void."

2. Suit for dissolution- if a spouse has been missing for a period of seven years and has not been heard of by those who would have heard of him/her had he/she been alive, the aggrieved spouse may petition the court for the dissolution of the marriage.[185]
3. Grounds for divorce- any married person may petition for divorce on any one or more of the grounds contained in Section 32.[186]

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[185] Parsi Marriage and Divorce Act, 1936, Section 31- "Suits for dissolution- If a husband or wife shall have been continually absent from his or her wife or husband for the space of seven years, and shall not have been heard of as being alive within that time by those persons who would have naturally heard of him or her, had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved."

[186] Parsi Marriage and Divorce Act, 1936, Section 32- "Grounds for divorce-Any married person may sue for divorce on any one or more of the following grounds, namely:- (a) that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it; (b) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit: Provided that divorce shall not be granted on this ground, unless the plaintiff: (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage; [(bb) that the defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant. Explanation.-In this clause,(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;(b) the expression "psychopathic disorder" means a persistent disorder of disability of mind (whether or not including sub normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment;](c) that the defendant was at the time of marriage pregnant by some person other than the plaintiff: Provided that divorce shall not be granted on this ground unless: (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact; (d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact; [(dd) that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant: Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;] (e) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution; (f) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860): Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period; (g) that the defendant has deserted the plaintiff for at least 2[two years]; (h) that an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for [one year] or more since such decree or order; (j) that the defendant has ceased to be a Parsi [by conversion to another religion]: Provided

4. Non-resumption of cohabitation on restitution of conjugal rights- either party to the marriage may petition for divorce if there has been no resumption of cohabitation for a period of one year after a decree for restitution of conjugal rights was passed by the court.[187]
5. Divorce by mutual consent- both the parties to the marriage may petition the court for dissolution of their marriage if they have been living separately for a period of one year or more and they have not been able to live together and therefore have mutually decided to dissolve the marriage.[188]
6. Judicial Separation- Section 34 of the Act provides the remedy of judicial separation.[189]

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that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact."

[187] Parsi Marriage and Divorce Act, 1936, Section 32A- "Non-resumption of cohabitation or restitution of conjugal rights within one year in pursuance of a decree to be ground for divorce.- (1) Either party to a marriage, whether solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988 (5 of 1988), may sue for divorce also on the ground,- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. (2) No decree for divorce shall be granted under sub-section (1) if the plaintiff has failed or neglected to comply with an order for maintenance passed against him under section 40 of this Act or section 488 of the Code of Criminal Procedure, 1898 (5of 1898) or section 125 of the Code of Criminal Procedure, 1973 (2 of 1974)." Ins. by Act 5 of 1988, s. 9 (w.e.f. 15-4-1988).

[188] Parsi Marriage and Divorce Act, 1936, Section 32B-" Divorce by mutual consent.—(1) Subject to the provisions of this Act, a suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988 (5 of 1988), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved: Provided that no suit under this sub-section shall be filed unless at the date of the filing of the suit one year has lapsed since the date of the marriage. (2) The Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act and the averments in the plaint are true and that the consent of either party to the suit was not obtained by force or fraud, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.]" Ins. by Act 5 of 1988, s. 9 (w.e.f. 15-4-1988).

[189] Parsi Marriage and Divorce Act, 1936, Section 34- "Suits for judicial separation- Any married person may sue for judicial separation on any of the ground for which such person could have filed a suit for divorce."

7. Restitution of conjugal rights- where husband has been deserted by the wife or the wife has been deserted by the husband without a lawful cause the aggrieved party may file a suit for restitution of conjugal rights.[190]
8. Alimony *pendente lite*- where in any suit or proceeding the court finds that a party to such a proceeding has no income to bear the expenses or maintain himself or herself it may order the defendant to pay maintenance and expenses being incurred.[191]
9. Permanent alimony and maintenance- the court either at the time of passing a decree or anytime thereafter may order the defendant to pay to the plaintiff a sum of money for his or her maintenance and support during the lifetime of such a person and while doing so will take into account the income and property of the plaintiff as well as of the defendant.[192]

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[190] Parsi Marriage and Divorce Act, 1936, Section 36-" Suit for restitution of conjugal rights- Where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly."

[191] Parsi Marriage and Divorce Act, 1936, Section 39-" Alimony pendente lite.- Where in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff, the expenses of the suit, and such weekly or monthly sum, during the suit, as, having regard to the plaintiff's own income and the income of the defendant, it may seem to the Court to be reasonable: 2 [Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]"1. Subs. by Act 5 of 1988, s. 13, for sections 39 and 40 (w.e.f. 15-4-1988), 2. Ins. by Act 49 of 2001, s. 4 (w.e.f. 24-9-2001).

[192] Parsi Marriage and Divorce Act, 1936, Section 40- "Permanent alimony and maintenance.- (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant. (2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just. (3) The Court if it is satisfied that the party in whose favour an order has been made

The matrimonial reliefs under the Parsi law, as has been the case under other personal laws have been in a process of evolution albeit through statutory amendments. Important matrimonial reliefs were added in Parsi Marriage and Divorce Act, 1936 through its amendment of 1988. The matrimonial reliefs under the Act need to be systematized, rationalised and updated to meet the standards of human rights and the needs and aspirations of the modern society.

2.7 CONCLUSION

Personal law systems raise serious worries regarding the religious freedoms and the discrimination which is faced by people because of them varying the religion they follow. This personal law systems' plurality must be in a position to benefit from one another and the good should be imbibed from one to another and the bad should be shredded.

Defending personal laws from feminist's perspective and to give up on anti-conversion campaign as an attack on religious freedom is not possible. Legal uniformity or legal pluralism is what triggers this dilemma.[193] Often, the concept of legal uniformity allures us into wanting a system where we have the same laws applicable to all human beings that form a part of that particular system which also insists on the fact that there exist no discriminations as the very root of discrimination would be removed by a legal system being formed on the basis of uniform set of laws and principles. Cultural diversity can also be interpreted as religious plurality, legal pluralism and the presence of more than one patriarchy. Thus, another question which

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under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.]"

[193] Vol. 27, No.5/6, Kumkum Sagari, Gender Lines: Personal Laws, Uniform Laws, Conversion, Social Scientist, May-June 1999, URL: https://www.jstor.org/stable/3518142

arises in the context of uniformity of laws is whether uniformity also means gender justice or is the differences and oppression of women which is a part of the personal laws continue to be a part of the legal uniformity as well. However, on the other hand moving further into this dilemma is that legal pluralism is like the utopia perhaps every primordialism wants to have. Nothing sounds more enchanting than a society which can survive even with a colossal diversity of people who form a part of it. Human beings who can survive peacefully with others who are not like themselves and accept each other with their differences and embrace it is almost a virtue. Thus, though legal uniformity makes things easier for people, legal pluralism makes it more mystical and it is on us to choose between the two. Every personal law has its history and beauty and whether we want to retain it in its form or create something which is applicable to us is what we need to decide from this dilemma of the legal uniformity and legal pluralism. The feminist perspective to legal plurality is different. It is the relation of laws both uniform as well as personal to social plurality and the nature of the patriarchies that exist and whether or if at all they are to be opposed through legal pluralism or legal uniformity. Rights universal and inalienable on nature for women is what is sought. It cannot be denied that the state's approach to women has always been "patriarchal, undemocratic and class differentiated". From paying lesser to the women for the same work to not recognising the work done by her at the domestic front to the extent of invisiblising it, making and enforcing property laws that go against the right of the women, creating gender inequalities, making sure women are economically dependent on men and curbing other various freedoms and putting restrictions through its welfare state practices. The state has always connived with the local and community patriarchal set up to work against women and their interests. The feminists blame the state for supporting patriarchy through theory and practice and by

using religious grounds as a means to do so. It is also seen as the state having the power and authority to allow people to opt for laws other than their personal laws like the provisions of the Code of Criminal Procedure but has yet always tried and maintained religious boundaries and differences in order to allow the existence of a divide.[194] The question of women has not been community or state centric. Every community has its qualms particularly against women and that is a condition that feminists have stressed upon. The sufferings of women are not associated with any particular religion. All personal laws have certain shortcomings that in some way or the other affect the interests of women adversely.

However, one cannot fail to mention that the Section 125 of the Criminal Procedure Code which has been made applicable to everyone is a great example of gender just law made beyond the scope of the personal law to curb and correct a flawed provision of the personal law and therefore, if this way we continue overcoming the short comings in the personal laws, it will become beneficial and just both in the course of time.

"Democratic government is a hallmark of a Constitution which is wedded to democracy for it is through democratic form of governance that the aspirations of those who elect their representatives are met".

[194] Ibid.

Chapter Three

International Human Rights Standards and Matrimonial Relief under the Personal Laws

3.1 INTRODUCTION

Human rights are the rights which are inherent in human beings. These rights are inherent in human beings because they are human. According to Oxford Advanced Learner's Dictionary it is "one of the basic rights that everyone has to be treated fairly and not in a cruel way specially by their government"[1] So, human rights are basic rights and therefore, they are inviolable. According to the Oxford Dictionary of Law, human rights are "rights and freedoms to which every human being is entitled. Protection against breaches of these rights committed by a state (including the state of which the victim is a national) may in some cases be enforced in international law"[2] Thus, human rights are those rights and freedoms to which every human being is entitled regardless of his place in society. According to Black's Law Dictionary human rights are "the freedoms, immunities and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live".[3] Therefore, human rights are possessed and enjoyed by human beings because they are members of the human family. Human beings are entitled to these rights regardless of their race, religion, caste, sex, place of birth, property or nationality. A human being is entitled to these rights because he is born as a human being. Thus, human rights are inalienable, inviolable and interdependent.

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[1] Oxford Advanced Learner's Dictionary of Current English, Oxford University Press, 7th Ed., 2005, p.760
[2] Oxford Dictionary of Law, Oxford University Press, 5th Ed. 2002, p. 237
[3] Black's Law Dictionary, 9th Ed., 2009, p. 809

These human rights constitute minimum standards of human behaviour and are contained in numerous international treaties and covenants on human rights law and humanitarian law. They all are collectively referred to as international human rights standards. The human rights constitute basic human values and are therefore, possessed by and reflected in international legal order and municipal legal systems.

Human rights are the rights of individuals. However, human communities, human peoples and human families are also possessed of human rights and recent advancement in human rights law have made this clear. Group rights are a difficult and controversial idea but there is no doubt that some human communities are entitled to rights, whether conceived as the aggregate of members' individual rights or the rights of the group as a whole.[4]

International law and municipal law are known to be two different sets of laws prevalent globally. There exist two main theories which govern the relationship between international law and municipal law. These theories are called monistic theory and dualist theory. The monistic theory has originated with the belief that there exists one type of laws and both international law and domestic law form the part of the same system of law.

The monists are of the view that there exists a unitary legal system as a whole and do not believe in division which the dualists create. The writer who accepts the monist approach can be classified into two groups: those who uphold strong ethical position with deep concern for human rights like Lauterpacht and those hold a monist position on formalistic legal grounds such as Kelson. The monists uniformly adopt a unitary view of law as a whole and oppose the strict division maintained by the positivists.

[4] Gordon Brown, The Universal Declaration of Human Rights in the 21st Century, Open Book Publishers, p. 45, URL: https://www.jstor.org/stable/j.ctt1bpmb7v.10

The main concern of the naturalists who are the monists believe that the function of the law is the welfare of the people and they are the advocate of the supremacy of the international law as they believe that it is the best way of attaining the welfare of the people.[5]

Lauterpacht represents the naturalist position in England and his works finds the primary function of all laws meant for the well-being of people and is indicative of the supremacy of international law as best way of attaining this. This approach is characterised by sovereignty and independence of state and reposes faith in the ability of rules of international law to inject into it a sense of moral purpose and justice based upon respect for welfare of individuals and human rights.[6]

Kelson expounds his monistic theory in a different way by using Kant's philosophy as his basis. Law is envisaged as a normative pattern of behaviour which ought to be followed for fear of sanction which are employed against an illegal act when it occurs as the same definition applies to both internal sphere and the international sphere, a logical affinity is found.

According to Hans Kelson,[7] law is a pyramidical system of norms wherein all norms derive their validity from the higher norms. The highest within the system which Kelson called the grundnorm is a postulate of the legal system which does not derive its validity from any norm within the system being itself the highest norm of the system. The grundnorm of a legal system may be one or more than one. Source of its validity cannot be found in any legal norm of the system. The source of such validity maybe a matter of historical evolution or social or political phenomenon. In Kelson's

[5] Malcolm N. Shaw, International Law, Cambridge University Press, 6th Ed. 2008, Reprint 2013, p. 131
[6] See generally Lauterpacht, International Law, Cambridge University Press, 1970, See also Lauterpacht, International Law and Human Rights, London, 1950
[7] See generally, Hans Kelson, Pure Theory of Law, Oxford University Press, Lars Vinx, 2007.

theory of law the entire legal system of the world can be construed as a single legal system and hence, Kelson was an ardent proponent of monistic theory of international law.

On the other hand, the dualist theory of law where the positivists maintained that international law is created by state through consent. State practice is based on custom and treaty which determines the norms of international law although there are no formalistic structure or moral code or theoretical formulation. Thus, when positivists like Strupp and Tripel[8] regard the relationship of international law with municipal law they do it on the ground that states are sovereign and consider the two existing orders very different. This theory is called as dualism and it emphasises that the rules of the two systems of international law and municipal law are separate and independent and cannot affect or override each other.

The two systems are fundamentally different in nature and content as, in one, the subject matter is inter-state relation and in the other, it is intra-state relation. When a domestic enactment allows the rules of international law this is so because a rule of municipal law permits such obligation and only indicates that the authority of the state is supreme within its own municipal jurisdiction. It is not that in this case the international law is applying within municipal jurisdiction on its own force. The spheres of their operations as well as jurisdictions are different and independent.

Comparative international law provides new light to the similarities and differences in how international law is understood and approached at the domestic level. Comparative international human rights law applies this approach to similarities and

[8] H Triepel, Volkerrecht und Landesrecht, Berlin, 1988.

differences to understand international human rights law in how it is interpreted at the domestic level by courts.[9]

Human rights have been asserted in many documents throughout the history of human rights struggles, including the Magna Carta (1215), the English Bill of Rights (1689), the United States Declaration of Independence (1776), The Constitution of the United States of America (1787), the French Declaration of the Rights of Man and the Citizen (1789) and the Bill of Rights of the US Constitution (1791). However, the enforcements of some of these documents have excluded certain groups like women, people of colour or certain religious minorities. Hence, the different groups often excluded from these declarations of human rights struggled for their rights, which were ultimately incorporated by worldwide efforts in the twentieth century to cultivate and promote human rights internationally. The origins of international women's human rights can be traced to the establishment of the League of Nations in the aftermath of World War I in 1919, which aimed to 'promote international cooperation and to achieve international peace and security.' The League of Nations further aimed to ensure the self-determination of peoples and prevent the occurrence of another world war by binding its members to international law and the treaty obligations. It promoted human rights in terms of just and human treatment in labour, fair treatment of natives in colonial territories and it prohibited trafficking of women and children. The issue of women's status was on the agenda of the League in 1935 and was set to be investigated into by a Committee of Experts in 1937. Nonetheless, these initiatives of the League could not receive political backing on account of the

[9] Vol. 109, No.3, Christopher McCrudden, Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW, The American Journal of International Law, Cambridge University Press, July 2015, p.534, URL: https://www.jstor.org/stable/10.5305/amerjintelaw.109.3.0534

ensuing Second World War. The League of Nations could not receive support from its members, which eventually led to the failure of the League in the matter.[10]

After the failure of the League of Nations, the major international powers met in San Francisco and established the Charter of the United Nations on 24th October 1945. The Charter aimed to maintain international peace and was recognized as the dawn of a new era for protection of human rights in the world creating new agencies and instrumentalities which would bear fruits in the years to come. Although, the philosophy of natural rights had existed long before the birth of the League of Nations and the United Nations,[11] the nomenclature of human rights for the philosophy was introduced, galvanised and legitimised for the first time by the United Nations and its various agencies which started working in the field. The UN Charter was the first international multilateral treaty to directly mention discrimination based on gender, specifying the equal rights of men and women and the fundamental rights of individuals and the dignity and value of human beings in the preamble. Furthermore, one of the main purposes of the United Nations as mentioned in Article 1, paragraph 3 is to promote and encourage respect for human rights and for fundamental freedoms for all without the distinction of sex, race, language, or religion.[12]

States individually or collectively cannot create human rights by making law for the purpose. They can only recognise if such rights are already in existence. They can accord protection and enforce these rights which are already there. Therefore, the role of the state is only declaratory. Under the fundamental principle of international law:

[10] Marziyeh Bakhshizadeh, Changing Gender Norms in Islam Between Reason and Revelation, Verlag Barbara Budrich; Budrich UniPress, p. 79
[11] See generally Thomas Hobbes, Leviathan, Penguin, 4th Ed., 2002; John Locke, The Two Treatise of Civil Government, Gale Ecco, 2018; Jean Jacques Rousseau, The Social Contract, Penguin, 2004.
[12] Supra note 10, p. 80

pacta sunt servanda which is enshrined in Article 26[13] of the Vienna Convention on the Law of Treaties, a state is bound to honour its obligations under a treaty voluntarily entered into. It is also obliged not to invoke its internal law as an excuse for non-compliance with its treaty obligation. In an interdependent world, the relationship between international law and national legal system has become important. State practice differs on how international law in general and international human rights law in particular, is internalised by states who are ultimately the primary enforcers of human rights norms.[14]

Universal Declaration of Human Rights, 1948, proclaiming the common standard for achievement but is now accepted as declaratory of customary international law.[15] Article 21(3) provides that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[16] Thus, although it is an international declaration, it lays the foundation for a civilised state and its government today. Its relevance and significance are as much to an individual state as it is to the international order. Once a state comes into existence it becomes a member of the international community. All the International Conventions are a living example of how a sovereign state willingly binds itself for acting in conformity to a set of international standards which have been set by the international community.

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[13] Vienna Convention on Law of Treaties, 1969, Article 26 - ""P*acta sunt servanda"* Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[14] Thio Li-Ann, The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & The Transformative Potential of Cedaw, Singapore Journal of International & Comparative Law, (1997),p. 281-282URL:https://heinonline.org/HOL/Page?handle=hein.journals/singa1&collection=journals&id=284&startid=284&endid=356

[15] Vol. 84, No. 4, W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, The American Journal of International Law, Cambridge University Press, Oct., 1990, p. 867, URL: https://www.jstor.org/stable/2202838

[16] Universal Declaration of Human Rights, 1948, GA Res. 217A (III), UN Doc. A/810, p. 71

In our legal system, under different personal laws, matrimonial relief of different kinds are provided. In this chapter an attempt has been made to examine what the international standards of human rights are in this sense and to what extent the matrimonial reliefs meet these international human rights standards

3.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

The two world wars and the holocaust had not only brought unfathomable suffering and misery to the mankind but also reduced human beings to a sub-human species compelling human civilization to reaffirm faith in the worth and dignity of human beings and this manifested in the form of Universal Declaration of Human Rights, 1948 accepted by the General Assembly of the United Nations on the 10th of December. The atrocities of the war and the brutalities perpetrated by the Nazis and Fascist regimes compelled the world to adopt a solemn proclamation wherein justice, equality, liberty and human dignity would constitute a new creed to be professed, practiced and preached in the form of human rights. These rights would be the new standards for all states and their laws to their people as well as for the states inter-se in their international relations. The rights declared in course of time percolated down to different constitutions adopted by the colonies after their self-determination and independence among them India being one. The human rights also manifested in these countries. They continue to serve as the minimum standards of these countries although, the need for these standards was there for all branches of law but it was felt much more imperative in the field of personal laws in India.

The Universal Declaration of Human Rights was formulated in 1948 with the intention to avoid a third world war. The Preamble itself explains that one of the many reasons for the Declaration is to avoid further wars. Many of the provisions of

Universal Declaration of Human Rights backed by the affirmation of the General Assembly through different resolutions on the matters, many of the provisions of the Declaration, it is maintained have acquired over a period of time the status of customary international law because of state practice and opinion juris.

Article 5[17] of the Universal Declaration of Human Rights, 1948 deals with prohibition against torture or cruel, inhuman and degrading treatment.

Torture, cruelty or inhuman treatment has a dehumanising effect on a human being. It lowers him not only in the esteem of the society but even in his own esteem he sinks. As a human being he suffers irreparable loss not only physically but also mentally and morally. The scar left on his psyche remains for a long time or maybe for the rest of his life. This basic human right is recognised in not just this international instrument but also in the other international instruments.

Article 8[18] of the Declaration recognises the right to an effective remedy by the courts in cases of violations of fundamental rights guaranteed by the Constitution or the respective law. Every person is entitled to expeditious, effective and affordable remedy from ordinary courts of the land for violation of his fundamental rights granted to him by the law or by the Constitution. There should be no special court for a person or class of persons for trial or for providing legal remedies. Setting up separate tribunal for the trial of a person or particular class of persons is a violation of

[17] Universal Declaration of Human Rights, 1948, Article 5- "No one shall be subjected to torture or go cruel, inhuman or degrading treatment or punishment."

[18] Universal Declaration of Human Rights,1948, Article 8- "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law."

the provisions of this Article. This is one of the cardinal principles of the doctrine of rule of law as propounded by A.V. Dicey.[19]

Article 16[20] of the Declaration deals with the right of men and women to get married without any limitation as to race, nationality or religion and have a family. The Article also says that they are entitled to equal rights as to marriage, during the subsistence of their marriage and also at its dissolution. The Articles goes onto dealing with the free consent aspect of parties while getting married in its second clause and in its third clause it says that the family is a unit of society and is entitled to protection by society and state.

Irrespective of their race, religion, nationality or caste, all men and women who have attained age of majority have the right to marry and to raise family. Family is the most basic social unit and yet it is the most important microcosm not only for human happiness but for the fulfilment of human life. A human being needs a family at all stages of human life whether it is childhood or adulthood or old age. A human being is a social being and his social instincts and aspirations start fulfilling from the family of his birth and continue till his death. Without a family normal happy life for a human being is almost impossible. In his family he finds strength, support, sustenance and even aspiration. A family is as precious to a human being as his own life and sometime seven more. Thus, right to marry and raise a family is among the most basic human rights rooted in human nature and human instincts. A denial of this right or its

[19] See generally, A.V. Dicey, Introduction to the Study of the Law of the Constitution, Liberty Fund; Illustrated edition, 30 October 1982.

[20] Universal Declaration of Human Rights,1948, 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 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 state".

violation amounts to cruelty, torture or degrading treatment to him. It is suppression of fulfilment of his life.

Men and women are entitled to equal rights to marriage during wedlock as well as during the dissolution of marriage. Just as parties have equal right to marry, they enjoy equal right during the marriage. The equality in marriage continues till the time of final dissolution. The relief of dissolution should be available to both the parties on the same grounds and to the same extent. No party shall be put on a disadvantage on the ground of gender.

Marriage shall be entered into only with the free and full consent of the parties and cannot be vitiated by fraud or duress.

Family is a basic unit of society which is rooted in human nature and therefore, is entitled to protection not only by the society but also by the state through all its instrumentalities and mechanism. Only a man with a happy family can be expected to be a responsible and sensible citizen. It is in the interest of the state to protect and promote normal, happy family life of its people so that there is peace and harmony in the society and the state can move on the path of progress and prosperity. Without peace and harmony progress is not possible. This is why maintaining law and order comes not only in the basic function of the state, but it is a part of its sovereign function. Even a minimal state has to perform this function.[21]

Although the Constitution of India does not deal with the right to marry and have family but the humongous Article 21[22] of the Indian Constitution includes this right in

[21] See generally, Ronald Dworkin, Taking Rights Seriously, Bloomsbury Publishing India Private Limited; Reprint edition, 1 January 2013

[22] The Constitution of India, Article 21- "No person shall be deprived of his life or personal liberty except according to procedure established by law."

its gamut. The clause two of the Article is explicitly seen in Article 14[23] of the Constitution of India. As for clause three, it is not present anywhere explicitly in Indian laws but the very fact that it is a welfare state, and that the government is bound to take care of the people as well and do the needful for protection of its people.

Article 25[24] of the Declaration deals with the right to adequate standard of living for himself and his family. This Article is quite wide and includes food, clothing, housing, medical care and social services which may be necessary and covers the times of unemployment, sickness, disability, widowhood, old age or other lack of livelihood situations which are not within the control of a person.

Everyone has a right to a standard of living sufficient for his well-being and health for himself as well as his family. It includes right to food, clothing, shelter, medical amenities as well as essential social services. It entitles him to state assistance in circumstances beyond his control such as right to security in case of unemployment, ailment, disability, widowhood, old age, etc. During motherhood a woman is entitled to special care and protection. It is a medical condition of a woman due to biological facts where her vulnerability is increased imposing corresponding duty on the family, society as well as the state to render the required help and assistance. Only a healthy woman can give birth to a healthy child. Neglecting motherhood is not only neglecting the woman but also the child. Under the provisions of the Article, a child is also entitled to special care and protection. Childhood is a formative phase of full-

[23] The Constitution of India, Article 14- "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[24] Universal Declaration of Human Rights,1948, Article 25- "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widow hood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children whether born in act of wedlock, shall enjoy the same social protection."

fledged human life. It is the foundation of the entire human life which is going to remain in the world for a long span of time. Only a healthy child can be a healthy citizen and make a healthy state. Children are the future of the state. No state can or should afford to neglect its future.

This provision may not be present in verbatim in the Constitution of India, but it definitely is present in Article 21 of the Constitution in spirit. Clause 2 of Article 25 is regarding the special care for motherhood and childhood. The provisions regarding these are in Part IV of the Indian Constitution and is also available in various laws and legislations.

3.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

The International Covenants are considered as treatise between the states that are parties to them and that is the main point of difference between these covenants and the Universal Declaration of Human Rights. The Declaration is a solemn statement and is applicable to everyone irrespective of whether the state is a party to it or not.

The International Covenant on Civil and Political Rights, 1966 was adopted by the General Assembly Resolution 2200A (XXI) on 16th December 1966 in New York, USA and came into force on 23rd March 1976. The Covenant deals with the civil and political rights of the members of the human community. The Covenant envisages commitment of nations to a large number of basic civil and political rights including liberty and security of the person; equality of all persons before courts and tribunals; the right to freedom of thought, conscience and religion; equality before the law; and

the right of peaceful assembly and freedom of association.[25] States that are parties to the Covenant are obliged to furnish information regarding the measures that they have taken for implementing the rights guaranteed although, there is no mechanism for monitoring the enforcement of these rights by the states.

This Covenant has two optional protocols to it.

The First Optional Protocol to the International Covenant on Civil and Political Rights is an international treaty establishing an individual complaint mechanism for the International Covenant on Civil and Political Rights (ICCPR). It was adopted by the UN General Assembly on 16th December 1966 and entered into force on 23rd March 1976.

The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2) was adopted by the United Nations General Assembly (Resolution 44/128) on 15th December 1989. It commits states parties to the abolition of the death penalty.

Article 3[26] of the Covenant mentions that the men and women have equal rights when it comes to enjoyment of their civil and political rights.

In a wedlock, one of the main pillars is that men and women are not just equal but are treated with equality, both having equal say in the day to day matters for the wedlock to exist and become a success. Even if it were to break, it is important that the

[25] Vol. 51, No. 4, Oona A. Hathaway, Why Do Countries Commit to Human Rights Treaties? The Journal of Conflict Resolution, Aug 2007, Sage Publications, Inc., p.591, URL: https://www.jstor.org/ stable/27638567

[26] International Covenant on Civil and Political Rights, 1966, Article 3- "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

equality of both parties is maintained, and both get an equal say in matters which will affect them and their coming generations.

Article 17[27] of the Covenant deals with the protection of people's privacy and family life and the protection of law against unlawful or arbitrary interference. This provision is envisaged in Article 21 of the Constitution of India as well.

Article 23[28] of this Covenant is similar to Article 16 of the Universal Declaration of Human Rights. It deals with the rights to marry and have a family and the duty of the State to protect the family as an institution.

3.4 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) on 16th December 1966 and came into force on 3rd January 1976.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was adopted by the United Nations General Assembly (Resolution A/RES/63/117) on 10th December 2008. It establishes mechanisms for bringing violations of economic, social and cultural rights before the UN Committee on Economic, Social and Cultural Rights, specifically, an individual complaints mechanism, an inter-state complaint mechanism and an inquiry procedure.

[27] International Covenant on Civil and Political Rights, 1966, Article 17- "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

[28] International Covenant on Civil and Political Rights, 1966, Article 23- "1. The family is the natural and -women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

Article 3[29] of the Covenant deals with equality of rights of men and women in all spheres of life. This provision is similar to Article 3 of the International Covenant on Civil and Political Rights, 1966.

In a wedlock it is important that both men and women have equal rights in all matters that govern the relationship in order to have an everlasting and healthy relationship.

Article 10[30] deals with the most important unit of society, family. It says that the family must be protected, and marriages must be entered into with free consent, says about the protection to mothers before and after childbirth. It also deals with the protection of children from economic exploitation and the setting of age limits of children for various paid employments.

[29] International Covenant on Economic, Social and Cultural Rights, 1966, Article 3- "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

[30] International Covenant on Economic, Social and Cultural Rights, 1966, Article 10- "The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

Article 11[31] of the Covenant envisages the right of adequate standard of living of every human being which includes adequate food, clothing, housing and the improvement of other living conditions. It recognises freedom from hunger and all the steps that may be adhered to in order to achieve it.

3.5 CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979

The Convention on Elimination of All Forms of Discrimination Against Women was adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18th December 1979 and came into force on 3rd September 1981. The Convention is also called CEDAW and is referred to as CEDAW in discussing its provisions. The umbilical cord of CEDAW is attached to the First World Conference on Women, 1975 held in Mexico City. Five years later, the Convention on Elimination of All Forms of Discrimination Against Women was adopted. It focused on establishing the human rights standards for women and girls worldwide and by becoming the Bill of Rights for Women, it provides a roadmap to the States in how to enforce those rights. It is an international treaty and perhaps, the only international treaty which provides a mechanism for feedback and assessment to the member states of human rights' status of women in their country in the Concluding Observations and

[31] International Covenant on Economic, Social and Cultural Rights, 1966, Article 11- "1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

Recommendations section. The Convention deals at length with the women's rights in all aspects of life. It also provides the scope to member nations to address their lack of legislation or implementation when it comes to women.[32]

In order to draw the attention of the world to the issues and concerns of women, the UN declared 1975 to be the International Women's Year. The First World Conference on Women held in Mexico was important because the World Plan of Action for the implementation of the objectives of the International Women's Year was adopted by the delegates. Conferences to promote the advancement of women continued over the next few decades in Copenhagen, 1980, Nairobi, 1985 and Beijing, 1995. This resulted in the UN declaring the following ten years as the 'Decade for Women' focusing on equality, development and peace. The Decade for Women and the World Women's conferences led to gender sensitization cutting across cultural, ethnic and religious barriers and gave publicity to gender issues bringing them to the public domain and triggered institutionalization of the UN's gender policies in various ways. The most important result of the Decade for Women was the process of moving from the non-binding Declaration on the Elimination of Discrimination Against Women (DEDAW) to adopting a legally binding Convention on the Elimination of Discrimination Against Women (CEDAW). It was adopted on 18th December, 1979 after a long drawn arduous and contentious negotiation, with thirty votes in favour, none against, and ten abstentions. During the Conference at Copenhagen in 1980, sixty-four states signed CEDAW and two states even submitted their instruments of ratification. Ratification or accession by many states does not, however, mean the "ban of discrimination against women on the grounds of sex and marital status or with the demand for equality, equal treatment and equal status of women and men." Some

[32] Bandana Rana and Victoria Perrie, CEDAW: A Tool for Addressing Violence against Women, Sustainable Development Policy Institute (2019), URL: http://www.jstor.com/stable/resrep24393.12

states have applied the right of reservations (Article 28, para. 1 and 2)[33] and have not accepted all articles of CEDAW, justifying the incompatibility of those articles to their political, legal and religious arrangements.[34]

The Convention is a special one not just because of its status as a human rights treaty but also because it aims at eliminating discrimination against women by overcoming the conventional approaches in our daily lives and by surpassing our typical stereotypes. The Convention aims to resolve the processes of discrimination and gender related inequality across the globe. The treaty status of the Convention enables it to compel the state parties to eliminate all forms of discrimination against women whether they are intended or unintended through enabling laws, making policies, practising customs in their territories.[35]

CEDAW has a Preamble and 30 Articles. Beginning with the Preamble and pervading through the document, CEDAW commits member states to enact laws that conform to women's rights. It also emphasizes that discrimination against women in whatever form is equivalent to a fundamental human rights violation.[36] The preamble iterates that inspite of the existing international human rights instruments, widespread discrimination continues to exist. And thus, there is a need to go beyond the existing frameworks for women's human rights protection. It requires states to undertake specific measures to achieve equality of men and women. It also lays emphasis on the

[33] Convention on Elimination of all Forms of Discrimination Against Women, 1979, Article 28 "1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession. 2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted. 3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received."

[34] Supra note 10, p. 83-84

[35] Supra note 32

[36] Vol.26, No.1/2, Miriam Zacharia Matinda, Implementation of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), Willamette Journal of International Law and Dispute Resolution, Willamette University College of Law, 2019, p.102, URL:https://www.jstor.org/stable/10.2307/26915365

contribution of women to the society in general and family in particular which requires evolving traditional gender roles for men and women in both society and in the family. Concerning the upbringing of children, women's capacity to bear children must not lead to discrimination because "the upbringing of children requires a sharing of responsibility between men and women and society as a whole".[37]

Each Article of the Convention deals with the problem of discrimination against and violence to women or girls whether they are direct or indirect. Although the provisions of the Convention do not explicitly condemn violence against women, indirectly or by necessary implication they rule out such violence.[38] The articles of CEDAW are categorized into six parts. Part one is from Articles 1 to 6 which addresses the general purposes of the Convention and state parties' obligations.

Article 1[39] of the Convention defines "discrimination against women". The definition is very wide and includes all forms of distinction, exclusion or restriction which shall affect the enjoyment or exercise of rights of women in a derogatory manner. It is not restricted to sex-based discrimination and prohibits discrimination against women regardless of their marital status which prevents them from enjoying their human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other fields. The following five articles contain the states' obligations to empower women and promote cultural change to reach equality between men and women.[40]

[37] Supra note 10, p. 85
[38] Supra note 32, p. 113
[39] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 1- "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
[40] Supra note 10, p. 85

In India, although there exists several provisions and legislations that deal with equality of women and benefit them in one way or the other but there is no such provision which explicitly defines what exactly does discrimination against women mean. Therefore, it is important that when the courts face a problem on the question whether there has been discrimination against a woman or not, they can always refer to this Article which makes it easier for them.

Article 2[41] of the Convention elaborates the duties on the part of the state parties to the Convention for the purpose of enabling equality and protection to women at their national level. The provisions work as a check on the state parties and enable them to do their duties towards the women in their country. It identifies areas of discrimination against women.

Article 4[42] of this Convention envisages that the state parties to the Convention may take special measures for enabling the equality of men and women and further goes on to say that the measures taken for the protection of maternity shall not be

[41] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 2- "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women."

[42] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 4- "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

considered discriminatory in any way. The Article refers to temporary special measures that should be taken by states for positive discrimination for women.

Article 5[43] of the Convention is a provision which was perhaps, ahead of its times. One of its most striking and modern features being that it spoke of elimination of the superiority of either of the sexes or stereotyping the roles of men and women. Stereotyping roles of men and women is the problem we face even today and society judges jobs, hobbies, profession and so many other things on the basis of stereotypes. The Article further goes on to discuss family education and says that a proper understanding of maternity is the understanding and recognition of the fact that men and women both are equally responsible for the upbringing and development of children. It has also been stated clearly and firmly that the interest of the children is the primary consideration in all cases. This being said, the end of a wedlock and all things that follow from it have a tendency to affect the children the most. If the courts keep this provision in mind and decide cases maybe it will make the process if not easier, definitely less harsh for the children dealing with the consequences. Article 5 provides for states action for changing social and cultural patterns based on prejudice, custom, tradition, culture stereotypes, sex-role stereotypes and the alleged inferiority or superiority of either of the sexes and also recognizes common responsibilities of men and women in the family for the upbringing and development of children.[44]

[43] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 5- "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

[44] Supra note 10, p. 85-86

Hindu law has enacted recent laws which deal with the inheritance of the child and the legitimacy of the children in cases of void marriage also. All these provisions have been enacted definitely keeping in mind the interest of the children.

Article 9[45] of CEDAW deals with the equality of women in matters relating to nationality and that neither marrying someone not of her nationality nor the change of nationality of the husband during marriage shall not automatically change her nationality or force her husband's nationality upon her or render her in a state of statelessness. The Article also states that women shall have equal rights with men when it comes to the matter of the nationality of their children. This Article is one of the important provisions which aims at equality of the women and in treating her like a person of enough prudence who can have a say in matters which are as important as human existence.

Article 10 (h)[46] of the Convention deals with educating the people about the health of the families to ensure their well-being and also informing and advising on family planning.

Sadly, in India we have no such particular law or provision which aims at educating people on family matters be it family planning or family health and maybe perhaps we could make a certain legislation keeping in mind this provision of CEDAW.

[45] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 9- "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

[46] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 10(h)- "Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

Article 11(2)[47] of the Convention deals with the duty of the state parties to prevent discrimination against women on the grounds of either marriage or maternity in matters relating to their right to work, they should not be penalised on grounds of pregnancy or maternity leave or for their marital status. Isn't it melancholic how such things need to be explicitly stated in matters of women whereas when men are concerned these things do not even come to a person's mind? A man cannot be thought of being discriminated against on grounds of getting married or having a baby. A leading case on this is *Air India v. Nargesh Mirza*[48] where a flight attendant was discriminated against for reasons of reaching the age of 35 years. Air India made a regulation which said that an air hostess would retire from her job at the age of 35 years or on marrying within four years of getting into service or on getting pregnant, whichever is earlier. The Supreme Court held that these regulations were unreasonable and arbitrary and against the public policy and were upheld as invalid.

The Article also goes on to include maternity leave with pay or social benefits without loss of employment, seniority or social benefits, developing child-care facilities and to protect women during pregnancy from the type of work harmful for them. The state parties who are signatories to the Convention are expected to legislate on these matters and a take a look at them periodically in order to amend and upgrade them.

[47] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 11(2)- "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them."

[48] Air India v. Nargesh Mirza, AIR 1981 SC 1829

Article 13[49] of CEDAW deals with the equality of women in matters of economic and social life. The state parties are expected to do the needful and eliminate such discrimination. It says that women must have the right to family benefits, right to bank loans, mortgages and other forms of financial credit, right to participate in recreational activities, sports and other aspects of cultural life.

There are actions which are expected out of the state in order to eliminate discrimination but as a society, it is important that we start these practices at the level of the family and society first. Law cannot do much if the people are not ready or positive towards such change of actions. After a period of time such law will only be left redundant.

Article 16[50] of the Convention extensively deals with the need to eliminate the discrimination against men and women. It enjoins all state parties to eliminate all forms of discrimination against women in matters of matrimony and family rights. The vision of the CEDAW is manifest in legislative enactments, protective

[49] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 13- "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of financial credit; (c) The right to participate in recreational activities, sports and all aspects of cultural life".

[50] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 16- "1.States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

discrimination for women such as women friendly maternity standards and the modification of social and cultural patterns of conduct. Other steps taken in this regard include eliminating trafficking in women, while simultaneously enhancing women's participation in political and public life, as well as women's opportunity to represent the government at the international level.[51]

In all such matters the state parties are obliged to establish, maintain and promote equality between men and women. All have equal right to enter into contract of marriage with their own free consent and freedom of choice. They are entitled to have the same rights and obligations not only during the subsistence of marriage but also during divorce. They are entitled to have same marital status and their rights over their children are same although the interest of the children is of paramount consideration and will be the ultimate determinant. They have the same right to decide about all matters relating to the well-being, education, and health care of their children. Their rights in respect of guardianship, custody or adoption are same giving primacy to the interest of the children. They have the same personal status and have the same right to choose any profession or occupation. They are entitled to equal rights in matters of acquisition, management, enjoyment and alienation of property. Thus, there is not only complete equality in ownership of property but also in all other proprietary and personal matters in the matrimonial home. Child marriage and betrothal are prohibited, and the state is mandated to lay down the minimum age of marriage and make provision for compulsory registration of marriage.

Research in this area shows that the social structure is patriarchal in nature and that women and their aspirations are shaped by the general social outlook involving assumptions about the women of the family being subject to the authority of the man

[51] Supra note 36, p.103

to the extent that women themselves have internalized that outlook. A further challenge is in applying the international human rights standards in municipal courts in the light of the national constitution and the domestic laws by the judges and lawyers. Training judges to increase awareness of gender issues has not been organized regularly, appropriate training would be of great help to judges.[52]

However, in India discrimination against women exists in all matters of marriage and family rights. Their consent for marriage is not always obtained. Under some personal laws their consent is not even a legal requirement. A marriage contracted with a girl below the age of eighteen years is not a void marriage. Within a family equality between men and women remains an ideal but not a reality. From dissolution of marriage women suffer much more than men in many ways. Legally, socially and economically not only because of the laws that exist but also because of customs, mores and ethos of the society. Traditions, culture as well as the meta narratives all go against them. As parents, women do not enjoy the same rights as men over their children in matters of guardianship, custody or adoption. The laws discriminate against them as does the society. Women do not enjoy the same right as men in the family in the choice of profession or occupation. They are barred from certain professions or occupations. They suffer from certain disabilities only on account of their womanhood.[53] Women face professional hazards much more than men.

In matters of acquisition, management, administration or ownership of property they are always kept out. Their rights are neither recognised nor enforced. They are precluded from exercising rights over their property. The personal laws are

[52] Vol.25, No.1, Maysa Bydoon, Reservations on the "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)" Based on Islam and its Practical Application in Jordan: Legal Perspectives, Arab Law Quarterly, Brill, 2011, URL: https://www.jstor.org/stable/23025223
[53] Supra note 48

discriminatory and do not give them equal right of inheritance but even where they are given right of inheritance by the law the society frowns upon it and therefore more often than not, they do not get their shares in inheritance.

Although, forbidden under the Convention, child marriage is rampant. It not only hampers her physical and intellectual growth but also seals her future. The existing law against child marriage is not adequate. It permits a child marriage but only imposes inadequate punishment on certain persons. Because the social opinion is against the law, the law is made toothless and it cannot achieve its purpose. People have been violating the law with impunity amidst feasts and celebrations.

Contrary to what has been mandated by the Convention, there is no law for compulsory registration of all marriages in India. The need for necessity of registration of all marriages was not only recognised but was also recommended by the Supreme Court in Seema v. Ashwini Kumar.[54] If a marriage is not registered it is not properly recorded and if it is not properly recorded the wife cannot get the protection of marriage including right of maintenance. Lack of evidence on marriage makes the wife's position precarious not only for herself but also for her children. A marriage which is not registered is a perfectly valid marriage. The punishment for non-registration of marriage is only a meagre fine which no one should mind paying but yet no one has to ever pay.

[54] Seema v. Ashwini Kumar, 2006, 2 SCC 578

Article 17[55] of the CEDAW states that in order to assess the implementation of the Convention, a Committee on the Elimination of Discrimination against Women shall be established. The Committee shall consist of eighteen members at the time of coming into force of the Convention and after its ratification or accession by at least thirty-five state parties, twenty-three experts of high moral standing and competence in the relevant fields. The experts are to be elected from amongst their nationals but shall serve in their personal capacity. While electing the members of the Committee equitable geographical representation of different legal systems should be given. Members of the Committee are elected by secret ballot from a list of persons submitted by the state parties. Each state may nominate one person.

[55] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 17- "1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems. 2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. 3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties. 4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting. 5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee. 6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee. 7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee. 8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities. 9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention."

The CEDAW Committee is one which has been constituted absolutely for a reason and with no intentions of any skulduggery. The Committee is mandated with the responsibility of examining and monitoring complaints received from individuals of different countries. The Committee consists of experts in the field from countries who have ratified the Convention. The Committee comprises of 23 members. Although, the members of the Committee are nominated by the state parties, they are independent experts in the field and do not represent the views of their nominating states. Each state nominates its member and the nominated members of the state parties cast their vote through secret ballots to elect the Committee. All 23 members of the Committee are experts in the fields governed by the Convention who possess high moral standard known for their integrity as well as competence.[56]

The first election was to be held six months after coming into force of the Convention. The Secretary General of the United Nations had to address a letter to the state inviting their nominations at least three months prior to the election. The state parties thereafter had to submit nominations within two months. The Secretary General thereafter prepares a list of nominated candidates in alphabetical order. Members of the Committee are elected in a meeting of the state parties convened at the UN headquarters by the Secretary General. Two thirds of the state parties shall constitute a quorum. The members of the Committee are elected for a term of four years.

[56] Supra note 32, p. 113

Article 18[57] of the Convention obliges signatory states to submit a report to the Secretary General specifying the legislative, administrative and judicial measures adopted by them in fulfilment of their responsibility under the Convention. They are also to state the policies adopted by them in furtherance of the goal and fulfilment of the vision of the Convention. The States have to do this within one year from the date of their membership of the Convention and thereafter once in every four years or at the request of the Committee. The States are however, entitled to indicate problems and hurdles faced by them in fulfilling their obligation under the Convention.

On the basis of the report received by the Committee it can put in motion a process of dialogue in the areas of concern. The States then have to respond to the concerns raised by the Committee and also are obliged to specify measures taken by them for compliance. On measures taken by the State as well as their compliance with the provisions of the Convention, Civil Society Organisations are encouraged to submit their report. Thus, the Civil Society Organisations have an important role to play in the implementation of the provisions of the Convention. They bring to light before the international forum facts and data which may not be available to the forum. Members of the Committee examine the reports and point out the gaps or lacuna in them and recommend appropriate remedial measures. Prior to the constructive dialogue the Committee normally gives a hearing to the Civil Society Organisations to get a clear and comprehensive picture of the measures taken by the State Parties and the areas of non-compliance or violation of the provisions of the Convention. The organisations

[57] The Convention on Elimination of All Form of Discrimination Against Women, 1978, Article 18- "1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect: (a) Within one year after the entry into force for the State concerned; (b) Thereafter at least every four years and further whenever the Committee so requests. 2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention."

being from the concerned state are in a good position to give authentic information with proper data. Civil Society Organisations may provide even that information which the state party may not have provided to the Committee or might have even supressed. States have to appear before the Committee for one day. Important issues of concern are deliberated, difficulties and problems faced by them are discussed and constructive suggestions are given for the way forward. During this dialogue, experts ask specific questions which are called interventions to the delegates of the State Parties who then have to respond to the questions. If the delegate of a State Party is unable to answer the questions raised, a period of 48 hours is given to submit its reply in writing. During this process delegates of the States are questioned on discrimination to and violence against women or inadequacy of measures taken by the state or violation of the provisions of the Convention by the State. Existing problems are identified and discussed, and appropriate suggestions are given.[58]

The reporting process is a mechanism put in place for the purpose of monitoring the implementation of the Convention and a process through which the state parties can be held accountable for the non-compliance therewith. The reporting process has primarily three following purposes:

(a) Identifying the areas of direct and indirect violations of the provisions of the Convention.
(b) Affording a forum for holding governments accountable for non-fulfilment of their obligations under the Convention and providing a road map for compliance.
(c) Provide an opportunity to non-governmental organisations to monitor the activities of their government vis-à-vis the provisions of the Convention.

[58] Supra note 32, p. 114

The constructive dialogue and concluding observations constitute a mechanism for operational sing the 16 CEDAW Articles on important aspects of women including those concerning constitutional and legislative framework, national agencies for the advancement of women, stereotypes and harmful practices, violence against women and girls, including domestic violence, trafficking of women for commercial purposes, involvement of women in decision making process, nationality, education and training, employment, health, economic and social life, rural women, the situation of disadvantaged groups of women such as older women, women with disabilities, women in detention, indigenous women, women belonging to ethnic minorities, refugee and migrant women, lesbian, bisexual, and transgender women and intersex persons, equality before the law, marriage and family relations, and women, peace and security.[59]

3.5.1 Use of CEDAW in Domestic Jurisdictions

References to CEDAW is often perfunctory and in conjunction with other international instruments. CEDAW is not very frequently singled out for special mention and rarely subjected to substantive interpretation. There are important differences between jurisdictions in procedural areas for example, in how CEDAW is accepted into the national legislative and judicial systems for the purpose of interpretation and use and in the legal status of CEDAW at the national level these differences appear to have not much effect on the substantive interpretation of CEDAW even though there are significant instances of cases in which national courts adopt substantively different interpretations of CEDAW. This happens not only with respect to the conclusion that the courts arrive at but also at their conceptual level. Although this is noteworthy, but its implications should not be overemphasized. It

[59] Ibid., p. 115

happens because the same issue may arise in different jurisdictions. The lack of disagreement may indicate that the comparative case law available on any substantive issue is scarce. Courts normally do not refer to the interpretations of CEDAW by other foreign domestic courts and not much discussion takes place in the interpretation of CEDAW by national courts even where cases from foreign courts are cited.[60]

Implementation of the CEDAW is an obligation of the national government. The United Nations and its agencies do not have the authority to implement CEDAW for a sovereign state. States have to express their ability in fulfilling their obligation under the Convention and have to be willing to take responsibility for implementation of its provisions by enacting appropriate legislation. Although, countries are making rapid strides in guaranteeing rights to women, South Asian countries are lagging far behind in guaranteeing and enforcing rights to women in general and upholding international human rights standards in particular, especially in the field of marriage, dissolution of marriage and matrimonial relief. Their laws are arbitrary, discriminatory and unjust as they create and perpetuate inequality and injustice between men and women. After the dialogue and additional responses if any, submitted by the State, the Committee submits its final opinion containing a statement on the extent of compliance by the State and suggestions and recommendations to the State for its way forward. This Convention addresses the problem of discrimination against women with a holistic and collective approach and this responsibility has been assigned to the state as well as the non-state institutions in a state and also to private persons.[61]

[60] Supra note 9, p. 535
[61] Supra note 32

The interpretation of international law shows considerable diversity in domestic jurisdictions when domestic courts act as agents of international legal order. To a great extent, domestic courts determine their own approaches to the international legal order through their own interpretations to serve or advance their own objectives or targets. Thus, the use of CEDAW by domestic legal system is shaped to a great extent by itself. Therefore, there are and bound to be alternative models of judicial interpretation and acceptance of the CEDAW.[62]

3.5.2 International law and Municipal Courts

Domestic courts are domestic players who have to fulfil the needs and advance the interests of their own society. Thus, international legal order may appear to be a universe in which domestic legal systems are working systematically and coherently but that is far from reality. Domestic courts use international law as a matter of their own strategy to serve their own interest, but they do not consider themselves as trustees of international law.[63] They do not see themselves as advancing the interests of the international order. Nor do they appear to see themselves as agents of a domestic community seeking to shape international legal approaches to suit the preferences of their own state. Citation of international law by the Supreme Court of India has been primarily in pursuit of domestic goals. The Supreme Court has used CEDAW to advance its national interest and serve the needs of its own society.[64]

The interpretation of international law by the domestic courts, to a great extent varies from one legal system to another and from one region to another depending on the

[62] Supra note 9, p.536
[63] Vol. 102, Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, American Journal of International Law, Cambridge University Press, 2008, p. 241
[64] Anthea Roberts et. al. (Ed), Comparative International Law, Oxford University Press, Illustrated edition, 2018

local needs and circumstances of the society and aspiration of the people. Even at the international level the substantive interpretation of the international law has not been consistent always and for all nations. Their interpretations have been fragmented and even incoherent. The reception of international law by the domestic courts are shaped and coloured by the local traditions, culture, customs and mores which is bound to vary to an extent from country to country and region to region.[65] So, when a domestic court receives international law, it may vary in colour and shade depending on its own needs and aspirations. Some seek to develop a more neutral language of engagement between the domestic and the international, one in which a more syncretic approach is taken, when a different norm emerges out of the contact between the exported norm and the indigenous norm. Based on this, it might be predicted that an equivalent type of fragmentation is occurring at the national level as is said to have taken place at the international level, and that we could expect a significant degree of divergence in the substantive interpretation of the Convention at the national level.[66] However, this is not the case with CEDAW. Although, there are instances of appeals to CEDAW norms have been marginalised and ignored, but there are hardly examples of outright rejection or subversion in the substantive interpretation of the CEDAW norms at the judicial level. Courts cite CEDAW usually when they want to substantiate their own views or arguments but when they want to disagree with a particular reading of CEDAW, they just marginalize and ignore it, rather than reinterpret, subvert, or hybridize. The Lesotho High Court, for example, in upholding customary law rights relating to male succession to chieftainship, relied on the fact that, in acceding to CEDAW, the government had entered reservations, as it was permitted to do under CEDAW, which specifically excluded matters concerning customary practices

[65] Supra note 9, p. 537
[66] Ibid., p. 538

relating to succession to the throne and to chieftainship. The Court referred to CEDAW and the Government's reservation as a reason why it should not interfere with the Executive and the Legislature in this matter. The international instruments remain important but, in these cases, to defend the status quo rather than change it.[67]

The domestic jurisdictions sometimes need an international human rights law source to help address domestic issues. For the purpose of handling certain complex or difficult issues deeply embedded in orthodox tradition or culture, the courts need the source of international human rights law and CEDAW contains the standards and principles for this. Norms from an international source may be useful in some contexts and less useful in others. Whether the source of the norm being international is appealing to a domestic audience depends significantly on the local context. Different national histories suggest different functions for international human rights law, sometimes leading to different patterns of use and interpretation.[68]

3.5.3 CEDAW as an International Normative Pattern

CEDAW is neither treated as domestic law nor is it treated as international law simpliciter. CEDAW is useful in addressing domestic goals as considered appropriate by the domestic courts. There appears to be a strong desire for domestic courts to emphasize that CEDAW contains norms that are international and not just transnational or comparative and also are static in their meaning rather than subject to changing meanings with a significant role for domestic interpretation in shaping that meaning. This appears to be because of an important function that CEDAW plays at the domestic level. Promoting an external, static, and top-down comprehension of international law means that it can be drawn on in ways and for purposes that a

[67] Ibid., p.539
[68] Ibid., p. 547

flexible and bottom-up understanding of international law, one in which the domestic court accepts that it has considerable latitude in the meaning of the international legal provision, would be less likely to support. CEDAW appears to be useful to domestic courts specially if the court can present it as clear, external and authoritative. CEDAW's regulatory authority depends on the cultural legitimacy of the international process of regulating and related socio-political movements for the attainment of social justice.[69] CEDAW can be considered as a global legality to the extent it can be absorbed in the local traditions, cultures and ethos. Its legality can percolate down to the grassroots level of a domestic legal system through the medium of the local courts. The domestic court performs an active role in translating CEDAW and claims for itself a minor role while upholding and applying the CEDAW norms. As a result of this there is no evidence of the adoption of discourse-based approaches to the interpretation of CEDAW in which open-ended international human rights standards provide the opportunity for contested views to be debated on and argued about and where the human rights norms are seen as reinvented and resolutions are at best temporary and provisional. That approach would not fulfil the role that domestic courts appear to need CEDAW to play. As far as courts are concerned, the international norm may not cause the judges to act in a particular way, but it gives them a way of justifying what they want to do in something beyond their subjective views. To do this effectively, the judge has a purpose in not making international norm very flexible. Politicians also refer to the international norms or practices of foreign courts to substantiate their own views and arguments which may result in absorption of the international norms into the domestic legal system. When the Indian Supreme Court took up an intensive campaign against gender discrimination, it

[69] Ibid., p. 540

appeared to be important to it to stress that "the cry for equality and equal status . . . is not restrictive to any particular country but world over with variation in degree only."[70]

3.5.4 CEDAW as Law

There is an important difference between CEDAW being the basis of a legal claim in domestic courts and CEDAW being accorded indirect weight in the interpretative context. In the latter case it is accorded indirect effect, the court will be more likely to be convinced of the appropriateness of the content of the norm that CEDAW incorporates or from the degree of international consensus for the need for change in particular areas that CEDAW represents than by CEDAW's legal status because CEDAW is not legally binding in that context. This can be seen most clearly in those cases in which the court draws on CEDAW as the basis for the legislature to address a particular social problem identified by the court. An instance of this in the Indian context is the case of Vishakha.[71] The indirect effect of CEDAW on domestic courts may be viewed as assertion of their moral authority and social philosophy rather than legal authority of CEDAW. CEDAW is not just a set of norms but it is a set of international legal norms. Because it is a set of international legal norms it has persuasive legal value in the domestic courts of law. If it were not law, it would not have persuasive value for the courts nor would there be justification for the courts to pay attention to it. So, CEDAW is valuable in the domestic perspective because it is accepted as law as well as because it is international even though CEDAW may not be binding law in the jurisdiction concerned.[72]

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[70] Gita Hariharan v. Reserve Bank of India, AIR 1999, 2 SCC 228
[71] Vishakha v. State of Rajasthan, AIR 1997, SC 3011
[72] Supra note 9, p. 543-544

3.5.5 CEDAW as Human Rights Convention

CEDAW is not just cited as a set of international legal norms but as a set of international human rights law norms. Courts accept CEDAW in this way because of its normative human rights character in law enabling presentation of women's rights claim as human rights claim. Courts may be persuaded by this approach. The meta narrative of dignity is often used by the judges as underlying principle of CEDAW because this enables the court to connect the women's rights enshrined in CEDAW with other human rights instruments. Human rights appear to have a normative weight that other international norms may not have because of their foundation in meta principles like dignity. This interpretation of human rights is important for the understanding of CEDAW at the domestic level. CEDAW is thus referenced as evidence of changing times, and CEDAW is called on to add weight to a progressive interpretation of domestic legal rights.[73]

Instead of courts adapting CEDAW to local traditions and culture they appear to be working to adapt local tradition and culture to CEDAW as it contains the international human rights standards. By its very character CEDAW is different from other human rights treaties. We cannot presume that what holds true for CEDAW will hold true for domestic judicial approaches to other human rights conventions. We should be cautious enough not to assume that what is true of one human rights treaty will also be true of other human rights treaties, let alone other norms of international law.[74]

3.6 CEDAW OPTIONAL PROTOCOL, 2000

In order to promote non-discrimination against women and equal rights for women on 22nd December 2000 the CEDAW Committee added an instrument called the Optional

[73] Ibid., p.548
[74] Ibid., p. 549

Protocol. The Optional Protocol is an appendage added to CEDAW. It is the first international complaints procedure which is in the nature of a treaty. So, the state parties had to ratify the Protocol separately and independently of the Convention. It was a revolutionary development in the comity of nations. The recognised and accepted complaint procedure confers jurisdiction on the CEDAW Committee to take up complaints of non-compliance or violation of CEDAW. The Committee accepts complaints from women individually or collectively in groups when they have exhausted all remedies provided within their legal system.[75]

The Committee examines the Complaint and seeks the response of the state thereon. Thereafter, the complainant is entitled to submit his reply to the response of the state. Thereafter, the Committee examines the entire matter. The Committee has the authority and jurisdiction to make recommendations to the state concerned in order to prevent any serious harm or irreparable loss likely to be caused to the victim. During the investigation of the complaint there may be dialogue with the Committee or visit by the Committee of the state concerned. The Committee may give its decision providing redressal to the victim. The proceedings before the Committee are of quasi-judicial nature and may take up to two years. But if there is a possibility of irreparable loss caused to the victim, the Committee may provide interim relief.[76]

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[75] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2000, Article 4- "1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. 2. The Committee shall declare a communication inadmissible where:(*a*) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;(*b*) It is incompatible with the provisions of the Convention;(*c*) It is manifestly ill-founded or not sufficiently substantiated;(*d*) It is an abuse of the right to submit a communication;(*e*) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date."

[76] Supra note 32, p. 120

It placed CEDAW on equal footing with human rights treaties that have complaints procedures, such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. The Optional Protocol disseminates knowledge and awareness about rights of women and also envisages a detailed procedure for their enforcement.[77]

Through the instrumentality of the additional Protocol, violence against women can be addressed. A large number of cases brought to the Committee under CEDAW have been on violence against women. Redressal provided to the victim may be in the form of financial assistance or other reliefs. This Protocol has been ratified by 109 countries, and signed by 13, with 75 countries having taken no action (ratification dashboard). Nepal, Sri Lanka, Bangladesh, and Maldives have ratified the Optional Protocol; leaving India, Pakistan, Bhutan, and Afghanistan as the South Asian countries that have not ratified.[78]

The function of CEDAW is to uphold the rights of women throughout the world. It prohibits violence, discrimination and injustice against women. It envisages international standards of behaviour which must be maintained between men and women in human society. It envisages a normative system of behaviour between men and women for every human society but legally CEDAW being in the nature of a treaty is binding only on those countries which have ratified the Convention but many of the provisions of CEDAW may be considered as minimum standards of human behaviour recognised and accepted by civilised nations and therefore, a part of

[77] Supra note 10, p. 85
[78] Supra note 32, p. 120

international human rights standards which must be upheld and maintained by all civilised nations whether they are signatories to the Convention or not.

It appears that the patterns of references to CEDAW in municipal courts could produce to a great extent a combination of the four elements involved in comparative international human rights law which are international law, concerning human rights, that it is law and that it is being applied domestically.[79]

The aim of the rights mentioned in CEDAW is that countries may improve those rights for their citizens.[80]

The contribution of CEDAW and the mechanism of its enforcement of human rights of women has been immense and they include expansion of modern human rights standards, mainstreaming gender discourse and centre staging women's rights in the modern legal systems, inducing and activating human rights implementation efforts in the municipal legal systems and creating and fostering rights-based approach for the UN agencies working in the field.[81]

3.7 STATUS OF WOMEN AND THE UN

The Economic and Social Council (ECOSOC) is one of the six main organs of the United Nations established by the UN Charter in 1946. Its primary function is conducting research and taking measures to promote human rights and basic freedoms. ECOSOC is the main forum and primary authority "for coordination, policy review, policy dialogue and recommendation on economic, social and

[79] Supra note 9, p. 550

[80] Vol. 57, No. 2, Wade M. Cole, Government Respect for Gendered Rights: The Effect of the Convention on the Elimination of Discrimination against Women on Women's Rights Outcomes, International Studies Quarterly, June 2013, Wiley on behalf of The International Studies Association, p. 234, URL: https://www.jstor.org/stable/24016136

[81] Anne F. Bayefsky, et al., The CEDAW Convention: Its Contribution Today, American Society of International Law, April 2000, Published by: Cambridge University Press on behalf of the American Society of International Law, p. 197, URL: https://www.jstor.org/stable/25659389

environmental issues, as well as for implementation of the internationally agreed development goals."[82]

A number of subsidiary agencies and committees were established by ECOSOC, including the Commission on Human Rights (CHR). This was created to develop for the purpose of setting human rights standards and their codification. ECOSOC also established a Commission as a subsidiary agency of the Commission of Human Rights for the purpose of studying and examining the status of women. In 1946 it had its first meeting. The sub-committee arranged its tasks which included the creation of a worldwide survey of laws on women and organizing a women's conference. As the sub-committee did not receive proper support from the Commission on Human Rights, they protested to the Commission and they demanded a separate and independent commission under the auspices of ECOSOC. Thus, the Commission on the Status of Women (CSW) was established in 1947. Its functions included preparing recommendations and reports for the Economic and Social Council with a view to advancing women's rights in the fields of politics, business, social life and education and to give priority to the problems of women's rights in order to reiterate the principle that men and women have equal rights, to prepare proposals for this purpose and to issue appropriate recommendations.[83] The Commission played an important role in retaining the phrase 'equal rights of men and women' from the preamble of the UN Charter in the Universal Declaration of Human Rights, 1948. The Commission also sponsored several conferences from 1949 to 1959 including the Convention on the Political Rights of Women, 1952, the Convention on the Nationality of Married Women, 1957 and the Convention on Consent to Marriage, Minimum Age for

[82] The United Nations' central platform for reflection, debate, and innovative thinking on sustainable development, The Economic and Social Council (ECOSOC). Available at: http://www.un .org/en/ecosoc/about/index.shtml (21 June 2015)

[83] ECOSOC Resolution 48(IV) of March 29, 1947, cited in Gaudart 2007, 13

Marriage and Registration of Marriages, 1962. Throughout the 1960s, the Commission on the Status of Women gave more importance to family planning and its impact on the status of women. A report prepared for ECOSOC about this impact concluded that family planning provides many benefits to women as individuals, especially regarding their health, education or employment and their roles in family life and public life. Furthermore, concerning the status of women, especially their education, employment and position in the family and community, it has a distinct and decisive impact on the family size and on the success of family planning programs.[84]

In the post-World War II period, international consensus on the status of women has been steadily building. When the countries of the world met in Vienna in June 1993 to discuss human rights, they produced the Vienna Declaration and Programme of Action[85]which devoted one section to women's rights appealing to states to galvanise their efforts for promotion of women's rights.[86]

"The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic and social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."[87]

[84] Supra note 10, p. 82
[85] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF 157/23, 12 July 1993 at 12, para 36 affirming the importance of national institutions in human rights protection.
[86] Supra note 14, p. 284
[87] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF 157/23, 12 July 1993 at 12, para 36 affirming the importance of national institutions in human rights protection, Part I, para 18.

Some believe that women's rights activists and their concerns are marginalised on the broader canvas of human rights movement. In the perspective of human rights regime, it seems that women's rights have been relegated to political periphery lacking adequate resources and are institutionary separate from the epicentre of human rights activities.[88]

"Women's rights are not usually handled in the Commission on Human Rights but rather in the separate - and definitely not equal - Commission on the Status of Women. Moreover, CEDAW does not meet in Geneva or New York, like the other human rights bodies, but in Vienna. And whereas twenty-two of the twenty-three members of CEDAW in 1988 were women, only one of eighteen members of the Committee on the Elimination of Racial Discrimination, and two of eighteen in each of the committees supervising the International Human Rights Covenants were females. Women's rights seem to be of little interest to men in international organisations and other human rights would seem to be "too important" to be handled by women."[89]

3.8 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 on 10th December 1984 which came into force on 26th June 1987, in accordance with article 27(1). It is one of the most vital Conventions at the international level and keeps a check on the other international instruments that envisage the fundamental human rights provided by nations.

[88] Supra note 86, p. 286
[89] Jack Donnelly, International Human Rights, Westview Press, (1993), p. 76

The Convention has an Optional Protocol which is known as the Optional Protocol to the Convention Against Torture (OPCAT). This Protocol supplements the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. It was adopted by the General Assembly in New York on 18th December 2002 and came into force on 22nd June 2006.

Article 1 of the Convention[90] defines the term 'torture' for the purpose of this Convention. The definition has been made extremely wide by including both physical as well as mental elements.

Torture is prohibited under numerous international treaties as well as under human rights and humanitarian law. It has also been recognised as a principle of international law by all civilised nations and therefore, as *jus cogens* it is binding on all civilised members of international community. As a peremptory norm of general international law, it is binding even on the members of international community who are not signatories or who have not ratified the treaties or conventions on specific human rights law or humanitarian law. The principle has been advocated from the time of the Universal Declaration of Human Rights, 1948.[91] In this Article the words "treatment

[90] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1-"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

[91] Universal Declaration of Human Rights, 1948, Article 5- "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

or punishment" include not only acts of extreme cruelty but also those behaviour or treatments which are either degrading or inconsistent with human dignity.[92]

This principle is also reflected in Article 7[93] of the International Covenant on Civil and Political Rights, 1966. Under international humanitarian law, the four Geneva Conventions of 1949 for the protection of wounded, sick and shipwrecked members of land and sea forces, prisoners of war and civilians in time of armed conflict also prohibit torture-whether physical or mental. These provisions apply both to international and internal armed conflict.[94]

Unfortunately, India has not ratified this Convention and is not a party to it, one of the reasons why capital punishment is still prevalent in India. Countries that have ratified this Convention have abolished capital punishment. However, a striking feature of the Indian personal laws is that torture is recognised as a ground of judicial separation and divorce both and in all the personal laws equally.

The other Articles of this Convention deals with how parties to the Convention may deal with prisoners of other countries in matters of extradition and criminal proceedings. It says that all acts of torture are considered as offences under this Convention and hence under the respective criminal law of the state parties. The convention always throws light upon the examination of information, establishment of jurisdiction, the assistance by state parties in criminal proceedings mentioned in

[92] Vol. 63, No. 4, Talal Asad, On Torture, or Cruel, Inhuman, and Degrading Treatment, Social Research, The Johns Hopkins University Press WINTER 1996, p.1081, URL:https://www.jstor.org/stable/40971325

[93] International Covenant on Civil and Political Rights, 1966, Article 7- "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[94] Vol. 67, No. 3, Mohd. Yousuf Bhat, Menace of Torture: Prohibition in International Law, The Indian Journal of Political Science, July-Sept., 2006, Indian Political Science Association, p.555, URL: https://www.jstor.org/stable/41856242

Article 4[95] of the Convention and discusses the rights of the victim of torture. The Convention also makes provisions for establishing a Committee against torture which shall carry out the functions provided under the Convention.

3.9 MATRIMONIAL RELIEFS

Human beings are entitled to rights as citizens, employees, employers and consumers but the most important and fundamental rights to which they are entitled are those which are inherent in them because they are human beings. These rights are called human rights which relate to their life, liberty and dignity which make a person a full and proper human being, and which may be regarded as sine qua non of human life on the earth.

In large number of cases of violation of the basic rights of life, liberty, equality and dignity, the victims are women. Women's rights are often violated not only in the political field but also in day-to-day life, in the family, in households and in the public domain. The violation of women's human rights includes violence against them in the form of bride burning, child abuse, child marriage, domestic violence, female foeticide, eve teasing, female infanticide and sexual harassment at the workplace. In a patriarchal society, women often suffer in silence, often deprived of personal liberty and bound by rules made by the allegedly superior males. This cuts across different cultures, religions and social backgrounds and violence against women in the family

[95] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 4- **"**1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

occurs in developed and developing countries alike. The denial of reproductive rights including free choice regarding childbearing is also a human rights violation.[96]

The first spate of the recent women's movement in India can be traced to the pre-independence period. Women participated in the freedom movement as volunteers and leaders. Women's education and social and religious reforms were responsible for participation of women in the movement. Women set up the Prayag Mahila Samiti in 1909. Ketki Bhatt opposed the Simon Commission and participated in the salt satyagraha. Organisations like the Women's Indian Association, 1917, the National Council of Indian Women, 1926 and the All India Women's Conference 1927 expressed the voices of women highlighting their problems and plights on national platforms for Indians although they were considered elitist. During the freedom struggle in 1917 for the first time women's right to vote was made a demand. Mahatma Gandhi changed the character of the women's movement from an elite setup to a mass movement and linked public and private life. That is, he visualised a political role for women along with their private one.[97]

The second phase of the women's movement in India began after independence, from the 1960s until the mid-1980s. On the economic and social rights of women there were grassroots movements. The third phase started in the late-1980s, linking women's issues to the environment with a focus on alternative strategies of development. The Indian Constitution guarantees equality to all men and women.

[96] Vol. 22, No. 1, Bharti Chhibber, Women's Rights Are Human Rights, World Affairs: The Journal of International Issues, Kapur Surya Foundation, Spring (January-March), 2018, p. 122-123, URL: https://www.jstor.org/stable/10.2307/48520052
[97] Ibid., p. 124-125

According to Article 15,[98] discrimination cannot be made among citizens on grounds of religion, race, caste or sex. Article 51A(e)[99] states that it is the duty of every citizen to renounce practices derogatory to the dignity of women. The Indian parliament enacted the Protection of Human Rights Act in 1993 that defines human rights.[100] Even more than seven decades after independence, women in India largely remain under privileged suffering inequality, injustice and exploitation despite lofty vision and guaranteed rights of the Constitution. The right to equality before the law is not fully enforceable because of various personal laws in force that deny equality to

[98] Constitution of India, Article 15- "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.(2)No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- (2)(a)access to shops, public restaurants, hotels and places of public entertainment; or(2)(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.(3)Nothing in this article shall prevent the State from making any special provision for women and children.(4)Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[First Amendment Act; 18-06-1951](5): Nothing in this article or in sub-clause(g) of clause(l) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause(l) of Article 30.[93th Amendment act,2005](6): Nothing in this article or sub-clause(g) of clause(l) of article 19 or clause(2) of article 29 shall prevent the State from making, [103rd Amendment act 2019](6)(a): any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and (6)(b): any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten percent. of the total seats in each category. Explanation- For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."

[99] Constitution of India, Article 51A(e)- "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;"

[100] Protection of Human Rights, 1993, Section 2(d) - ""human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;"

women. Static women's roles defined by cultural and religious mores are not easy to reform.[101]

"The women's movement in India is one of the many burgeoning efforts at the reassertion of citizens' claims to participate as equals in the political and development process ... Violence however is perpetrated through the given institutions of state, community, the family and society at large. It draws sustenance from prevailing ideologies which seek to propagate the status quo... in the name of age old customs and traditions, religious and caste identities".[102] Women are underrepresented in legislature, defence, bureaucracy, judiciary and police force resulting in their marginalisation and voicelessness. Perhaps, greater participation by women would make the world more cooperative and peaceful and less belligerent and tense.[103]

Despite the prohibition of forced labour and the trafficking of human beings by the Constitution of India,[104] the practices continue unabated. In the Directive Principles of State Policy, Article 39(d)[105] mandates that there shall be equal rights of livelihood for women and equal pay for equal work, but women are paid far less for the same work and most urban and industrial jobs are hardly available to them. For this purpose, an enabling Act was passed. This was the Equal Remuneration Act, 1976. Yet even in the metropolitan cities of our country there is a bias against women in matters of employment. A survey by the Associated Chambers of Commerce and Industry of

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[101] Supra note 96, p.125

[102] Vol. 30, No. 29, Indu Agnihotri and Veena Majumdar, Changing Terms of Political Discourse: Women's Movement in India 1970s–1990s, Economic and Political Weekly, 1995, p. 1869

[103] Vol.77, No.5, Francis Fukuyama, Women and the Evolution of World Politics, Foreign Affairs, 1998, p. 24

[104] Constitution of India, Article 23- "Prohibition of traffic in human beings and forced labour(1) Traffic in human beings and the beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

[105] Constitution of India, Article 39(d)- "that there is equal pay for equal work for both men and women;"

India revealed that only 3.3 per cent of women are promoted to top positions. While under the Maternity Benefit Act, 1961 women workers in certain industrial establishments receive maternity leave with wages, most women in rural areas and in the informal urban sector are denied this benefit. According to an estimate by the National Commission on Self-Employed Women, 94 per cent of the female work force operates within these highly exploited sectors.[106] A large proportion of women workers are denied social security to which they are legally entitled under existing labour laws.[107]

In the latter half of 1970s, a new movement of women started wherein women themselves took up their cause in order to fight for their rights and in this movement gender issues were on their main agenda. The women who participated in the movement were educated and came from upper and middle class. Before this, women's movements were either sponsored by political parties or organisations affiliated to them. A report of the committee on the status of women in 1974 brought to light the fact that the condition of women in India had declined from 1911.[108] The report also highlighted the matter of a Uniform Civil Code in the context of gender equity and justice.[109]

Society did not consider serious even worst crimes committed against women. A heinous crime like bride burning was made light of by the society as a suicide and the pressure and torture for dowry which she would undergo were ignored. It was only in early 1980s that the law started taking serious cognizance of such criminal acts. A

[106] Vol.27, No.3, Richard Anker, Gender and Jobs: Sex Segregation of Occupations in the World, International Labour Organisation, Geneva, 1998 and Guy Standing, Global Feminisation through Flexible Labour: A Theme Revisited, World Development, 1999, p, 583
[107] Supra note 96, p. 125
[108] Towards Equality: Report of the Committee on the Status of Women, Department of Social Welfare, Ministry of Education and Social Welfare, Government of India, New Delhi, 1974
[109] Supra note 96, p.128

widespread mass movement under the auspices of the Dahej Virodhi Chetna Manch forced the government to take action and the parliament enacted the Criminal Law (Second Amendment) Act, 1983. This made cruelty to a wife a non-bailable offence and redefined cruelty to include mental and physical harassment. Section 113[110] of the Evidence Act was amended and the burden of proof shifted from the complainant. Moreover, any death of a woman within the first seven years of her marriage was required to be investigated. Nonetheless, a comprehensive reform of the laws of inheritance and property rights of women through legislations was turned down by the government. The National Commission for Women has recommended a more stringent law dealing with dowry, as cases have been reported even 22 years after marriage- the seven-year limit clause thus needs to be revised.[111]

The most important area where human rights of women are violated is the field of family law and family relations. Till recently all family matters were in the private domain and therefore, were not the concern of the law. In this private domain the victim of atrocities would invariably be the woman. The matter would be considered personal or private even if it was beating up the wife. An important contribution of the feminists is bringing the women's issues from private to public domain.

3.10 Hindu law

3.10.1 Marriage: The bedrock of a family is marriage. Serious injustice and inequality are found in matrimony and matrimonial relief. A marriage is not invalid

[110] The Indian Evidence Act, 1872, Section 113A-" Presumption as to abetment of suicide by a married woman.-When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

[111] Supra note 96, p. 128-129

for lack of consent of the wife when her guardians or relatives give consent. Even after marriage there are serious inequality and incongruity in matters of matrimonial relief available to both the spouses.

Section 5[112] of the Hindu Marriage Act, 1955 envisages the conditions required for a Hindu marriage. One of the major discrepancies we see in the institution of marriage under the Hindu law is that there is no mention of the term 'consent'. The girl's consent holds no value, and her father is supposed to do her *'kanyadaan'* which is highly objectifying and derogatory to the dignity of any human being.

Further, we see that in Section 5(iii) of the Act the marriageable age of the bridegroom is 21 years whereas that of the bride is 18 years. This results in girls getting lesser time for studying and building a career. Thus, the idea of equality which is prevalent in all the international human rights standards seems to have been falling short of here. Men and women have not been kept on an equal footing.

3.10.2 Divorce: When marriages do not work out and like we know the age old saying "a divorced daughter is better than a dead daughter", we must preserve yet not exploit the institution of divorce.

[112] Hindu Marriage Act, 1955, Section 5-"Conditions for a Hindu marriage- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage;(ii) at the time of the marriage, neither party (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity (iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

Section 13[113] of the Hindu Marriage Act, 1955 deals with divorce. The section provides a good number of grounds for divorce. The grounds are quite exhaustive and do abide by the human rights standards primarily because they have been provided equally to men and women.

Section 13B[114] of the Act provides for divorce by mutual consent. One of the best ways of divorce is that by mutual consent in which both parties are on the same page and want riddance from each other.

[113] Hindu Marriage Act, 1955, Section 13- "Divorce- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party- (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or(ii) has ceased to be a Hindu by conversion to another religion; or(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. Explanation-In this clause- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any disorder or disability of mind and includes schizophrenia; (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not included sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment(iv) has been suffering from a virulent and incurable form of leprosy or (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive. Explanation- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent of or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly."

[114] Hindu Marriage Act, 1955, Section 13B-"Divorce by mutual consent.- (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (2) On the motion of both the parties made no earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

3.10.3 Maintenance: Section 24[115] of the Hindu Marriage Act, 1955 deals with maintenance *pendente lite* and expenses of the proceedings and Section 25 of the Act deals with permanent alimony and maintenance.[116] One of the striking features of this provision is that when the court gives a decision about providing maintenance then it looks at the income of the parties before seeing their genders and the husband can also claim maintenance from the wife if the wife is in a better financial position. This has been quite a progressive provision, the right to equality, which is a cardinal principle of all the international instruments seems to have been met.

Further, the right to maintenance of the wife is also provided under the Hindu Adoptions and Maintenance Act, 1956.[117] According to the international standards of

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[115] Hindu Marriage Act, 1955, Section 24- "Maintenance pendente lite and expenses of proceedings- Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

[116] Hindu Marriage Act, 1955, Section 25-"Permanent alimony and maintenance- (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant [the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just]."

[117] Hindu Adoptions and Maintenance Act, 1956, Section 18- **"**Maintenance of wife. - (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time. (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying living separately. (3) A Hindu wife shall not be entitled to

human rights and particularly if we refer to the Convention on Elimination of all Forms of Discrimination Against Women, 1979, feminists and other human rights activists would have criticised this provision for its very being. First of all, the provision enumerates a number of grounds under which a wife is entitled to be maintained by her husband even if she is living separately. Now, these grounds have been thought of and enacted in the year 1956 and we know that with the technological development we have ended up creating a number of technological Frankensteins who have further created technological monsters and the world has moved ahead way more than what it was in 1956. Hence, the reasons and grounds given under this section are extremely orthodoxical and behind their times. Second of all, and the major criticism is that sub-section (3) states that the wife shall be entitled to separate residence and maintenance only if she is chaste. Now, the chastity or unchastity of a woman is too difficult a question and to have any court of law question the character of a woman for the purpose of awarding her maintenance is against the international human rights standards in this era of globalisation. Also, because of deep rooted patriarchy and power being given only to the males in the society, this question of a chaste wife comes up and although, the Hindu Marriage Act provides maintenance to both spouses, one has never heard of the judges questioning the chastity of the husband in order to claim maintenance.

3.11 Muslim law

3.11.1 Marriage: Marriage under Muslim law is that of a contract. One of the remarkable features is that both parties need to give consent in the form of pronouncing *"qubool hai"* during the *nikah* ceremony. The concept of acquiring

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separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion"

consent of both parties alike, without any discrimination based on their genders is a provision which shows the existence of a certain kind of equality. However, this remarkable feature is again ruined by the prevalence of polygamy for men and monogamy for women. It brings back the concept of inequality. When we compare these provisions to the declarations, covenants and conventions we realise that many of the provisions of the Muslim personal laws are far from meeting the international human rights standards.

3.11.2 Divorce: Divorce as an institution is perhaps, as old as marriage. Divorce under Muslim law is known to be one of the things least liked yet allowed by the Prophet. Section 2[118] of the Dissolution of Muslim Marriages Act, 1939 enumerates a large number of grounds for divorce available only to the wife. Again, when we consider the year when the Act was enacted, we cannot dispute that it does need some current day amendments and inclusion of more grounds could be possible specially

[118] Dissolution of Muslim Marriages Act, 1939, Section 2.-"Grounds for decree for dissolution of marriage.- A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: (i) that the whereabouts of the husband have not been known for a period of four years; (ii)that the husband has neglected or has failed to provide for her maintenance for a period of two years; (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (v) that the husband was impotent at the time of the marriage and continues to be so; (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease; (vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated; (viii)that the husband treats her with cruelty, that is to say, (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (b) associates with women of evil repute or leads an infamous life, or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or prevents her exercising her legal rights over it, or (e) obstructs her in the observance of her religious profession or practice, or (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran; (ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law: Provided that (a) no decree shall be passed on ground (iii) until the sentence has become final; (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfied the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and (c) before passing a decree on ground (v) the Court shall, on application by the husband, made an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

taking into consideration the amount the world has developed. However, if seen from a humanitarian point of view, one might criticise this for providing grounds for divorce only to the wife and not to the husband. But again, one cannot overlook the fact that triple talaq was a practice prevalent under the Muslim law by the husbands and only recently has been banned along with putting an imprisonment clause of 3 years and fine.[119] Thus, as wrong as it may sound, it can be justified that not giving the men the power to divorce under the Act is not so much of a wrong done.

3.11.3 Maintenance: A Muslim husband is bound to maintain his wife and failure to do so can also give the wife a reason to file for divorce.[120] However, most Muslim law cases on maintenance are decided according to Section 125[121] of the Code of Criminal Procedure, 1973. The Code is the secular law which deals with the woman's right to claim maintenance. Thus, when we see it from the point of view of a woman, the provision does conform to human rights standards but then when we look at the provision more closely, we come to realise that the wife is not bound to maintain the husband regardless of how much she earns or how much property she owns. Thus, the discrimination and not giving women the duty to maintain the husband shows lack of

[119] The Muslim Women (Protection of Rights on Marriage) Act, 2019

[120] Dissolution of Muslim Marriages Act, 1939, Section 2(ii)- "that the husband has neglected or has failed to provide for her maintenance for a period of two years."

[121] Code of Criminal Procedure, 1973, Section 25- "Order for maintenance of wives, children and parents.- "(1) If any person having sufficient means neglects or refuses to maintain–(a) his wife, unable to maintain herself, or(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct; Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means." However, the words "not exceeding five hundred rupees in the whole" omitted by Act 50 of 2001, Section 2 (1)(a) (w.e.f. 24.9.2001). The magistrate may on the application of the wife direct the husband to pay such monthly allowance as the magistrate may think reasonable having regard to the income of such person. Ins. by Act 50 of 2001, Section 2(1) (b) (w.e.f. 24.9.2001)

equality and that it does not meet the criteria of treating both the genders equally as prescribed by the international instruments. Similarly, the maintenance provision under the Code has the same drawback.

3.12 Christian law

3.12.1 Marriage: The Indian Christian Marriage Act, 1872 does not have any section which deals with the grounds or requirements of a valid marriage. However, an alarming section is the section 19[122] of the Act. The section is worded in a way that makes it explicitly acceptable to have child marriages with the consent of the parent or guardian.

In the 21st century, a provision like this under any personal law terribly fails the purpose of the law itself and renders it not capable of meeting the international human rights standards.

[122] The Indian Christian Marriage Act, 1872, Section 19- "Consent of father or guardian or mother: - The father, if living, of any minor, or if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorised to give such consent be resident in India. Comments Where the marriage of a girl above 18 years but below 21 and belonging to Roman Catholic Church is solemnised by a Minister belonging to the Church, the marriage does not become null and void on the ground that the consent of the girl's parents is not taken."

3.12.2 Divorce: Section 10[123] of the Divorce Act deals with the grounds of divorce. The amendment in 2001 has improved the provision and given it a more humane approach to look at the matter of divorce. Since there exist decent number of clauses, it can be agreed upon that they do meet the international human rights standards. Section 10A[124] envisages dissolution by mutual consent.

3.12.3 Maintenance: Section 36[125] of the Divorce Act, 1869 deals with alimony *pendente lite* which entitles the wife to claim the expenses of the proceedings and the

[123] Divorce Act, 1869, Section 10-"Grounds for dissolution of marriage-(1)Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or wife, be dissolved on the ground that since the solemnization of marriage, the respondent- (i) has committed adultery; or (ii) has ceased to be a Christian by conversion to another religion; or (iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or (iv) has for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or (v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or (vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or (vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or (viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or (ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or (x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. (2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

[124] Divorce Act, 1869, 10A- "Dissolution of marriage by mutual consent. (1) Subject to the provisions of this Act and the rules made there under, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.(2) On the motion of both the parties made no earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.]"

[125] Divorce Act, 1869, Section 36- "Alimony pendente lite. - In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection [the wife may present a petition for expenses of the proceedings and alimony pending the suit]. Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband [for payment to the wife of the expenses of the proceedings and alimony pending the suit] as it may deem just: [Provided further that the petition for the expenses of the proceedings and alimony pending the suit, shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.]"

alimony which is pending the suit. Section 37[126] of the Act is the power of the court to order permanent alimony. This section entitles only the wife to claim maintenance from the husband and not the husband and empowers the court to order the making of monthly or weekly payments to the wife. If viewed from the international human rights standards point of view, one can find it objectionable that the idea of equality is not there since either party cannot claim from the other and gender discrimination does seem to exist.

3.13 Parsi law

3.13.1 Marriage: Section 3[127] of the Parsi Marriage and Divorce Act deals with a valid Parsi marriage. Among other requirements, one of the requirements is that the girl should have completed the age of eighteen years and the boy should have completed the age of twenty-one. This again is a provision similar to the Hindu Marriage Act, 1955 and does not meet the international standards when it comes to treating men and women with equality.

[126] Divorce Act, 1869, Section 37- "Power to order permanent alimony. [Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall], to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties. Power to order monthly or weekly payments. In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit."

[127] The Parsi Marriage and Divorce Act, 1936, Section 3- "Requisites to validity of Parsi marriages. - [(1)] No marriage shall be valid if- (a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or(b) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest; or[(c) in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age];(2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section (1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.]"

3.13.2 Divorce: Section 32[128] of the Act deals with the grounds of divorce. There exist a vast number of grounds for filing a petition of divorce. The grounds are quite a few and do meet the international human rights standards but when we look at the year in which these were enacted, in this case 1936, we cannot help but assume that a fresh look and perhaps, framing a few new grounds would do it some good.

[128] The Parsi Marriage and Divorce Act, 1936, Section 32- "Grounds for divorce. -Any married person may sue for divorce on any one or more of the following grounds, namely: - (a) that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it;(b) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit: Provided that divorce shall not be granted on this ground, unless the plaintiff: (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage; [(bb) that the defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant. Explanation. - In this clause- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;(b) the expression "psychopathic disorder" means a persistent disorder of disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment;](c) that the defendant was at the time of marriage pregnant by some person other than the plaintiff: Provided that divorce shall not be granted on this ground unless: (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact;(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact; [(dd) that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant: Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;] (e) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution;(f) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860): Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period; (g) that the defendant has deserted the plaintiff for at least 2[two years]; (h) that an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for [one year] or more since such decree or order;(j) that the defendant has ceased to be a Parsi [by conversion to another religion]: Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact."

Section 32B[129] of the Act deals with divorce by mutual consent. As discussed before, it is one of the best forms of divorce where both parties decided the divorce consensually meaning that both the parties have got an equal say and therefore, equality exists.

3.13.3 Maintenance: Section 39[130] of the Act deals with alimony *pendente lite* and Section 40[131] with permanent alimony and maintenance. Like the provision for maintenance under the Hindu Marriage Act, 1955, there exist the provision of maintenance being claimed by either the husband or the wife. Thus, the true spirit of equality being kept alive. Another, outstanding feature of the Act is that it not just

[129] The Parsi Marriage and Divorce Act, 1936, Section 32B- "Divorce by mutual consent. -(1) Subject to the provisions of this Act, a suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved: Provided that no suit under this sub-section shall be filed unless at the date of the filing of the suit one year has lapsed since the date of the marriage. (2) The Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act and the averments in the plaint are true and that the consent of either party to the suit was not obtained by force or fraud, pass a decree declaring the marriage to be dissolved with effect from the date of the decree]."

[130] The Parsi Marriage and Divorce Act, 1936, Section 39- "Alimony *pendente lite*.—Where in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff, the expenses of the suit, and such weekly or monthly sum, during suit, as, having regard to the plaintiff's own income and the income of the defendant, it may seem to the Court to be reasonable. [38] [Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]"

[131] The Parsi Marriage and Divorce Act, 1936, Section 40 -" Permanent alimony and maintenance.- (1) Any Court exercising jurisdiction under this Act may, at the time passing decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant. (2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify, or rescind any such order in such manner as the Court may deem just.(3) The Court if it is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just]."

speaks about the chastity of the wife but also of the husband. It lays down circumstances under which the husband loses his chastity and thereby, the right to claim maintenance from the wife. This provision is perhaps, by are the most forward moving and way ahead of its times provision in all the personal laws prevalent in India on this date.

3.14 CONCLUSION

The Convention on Elimination of all forms of Discrimination Against Women, 1979 and its interpretation by the CEDAW Committee in the form of its conclusion on the reports of State Parties and its recommendations and suggestions on the articles of the Convention goes a long way in enhancing our understanding of human rights in general and rights of women in particular. Human rights protection does not only mean refraining from causing positive harm or only negative obligation on the part of the state but also positive obligations on the state for the realisation of enjoyment of equality and justice. Obligation of the state extends to restraining private actors such as husbands, employers or institutions from violating the rights of women. International human rights protection requires relief from facially neutral law and policies which have adverse effects and discriminatory results.[132] The Convention enshrines civil, political, social, economic and cultural rights and has thus, done away with watertight compartmentalisation of these rights resulting in mutual inconsistencies and even contradictions. It has gone a long way in developing a wholistic approach in gender discourse in general and gender equality in particular. This has not only facilitated but has also given a fillip to the efforts of implementation of human rights of women in domestic jurisdictions. Women have received a powerful advocacy tool in various countries of the world through CEDAW whether it

[132] Supra note 81, p. 198

is in the context of drafting national constitutions, judicial decision-making, drafting national laws, and formulating government policy. Municipal courts have used CEDAW and other international human rights instruments to enhance and promote the human rights of women at the national level.

Equal rights for women not just in law or texts but in practice are very important for a democratic society. If we want women to contribute and make a difference in the country's future, they must be given equal opportunities for the same. There exists a colossal legal system to protect the rights of Indian women including the Hindu Marriage Act, the Hindu Succession Act, the Dowry Prohibition Act and the list goes on, what is lacking is amending and updating them on a regular basis and their proper implementation. However, we cannot expect laws to miraculously change social structures but instead set a code of conduct. Law and societal reforms must always go hand in hand. Although the laws may not remove or reduce structural inequalities, but they can help in bringing about social change. Literacy, health and other necessities are the basic rights that must be provided to women to ensure their improvement of their position in the social strata by also changing their economic status. This would go a long way in giving them political power as well. There is a need for more awareness through education and to work upon the culture of non-violence and non-bias. The social attitudes and beliefs including those of the judges and police officers must be gender sensitised. Inculcating values in men and boys to regard women as equal partners in life and society will also go a long way in increasing their respect for women's human rights and play a vital role in the nation's progress and development.[133]

[133] Supra note 96, p.135

Chapter Four:

Matrimonial Reliefs and Personal Laws under the Constitution of India

4.1 INTRODUCTION

4.2 CONSTITUTION OF INDIA AND ITS VISION

Constitution of a country is its supreme law. It is the highest law of the land from which all other laws derive their validity. According to the Oxford Advanced Learner's Dictionary, constitution is "the system of laws and basic principles that a state, a country or an organisation is governed by".[1] The constitution of a country is its basic law. Constitution according to the Oxford Dictionary of Law is "the rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state".[2] According to Black's Law Dictionary, the constitution is "the fundamental and organic law of a nation or state that establishes the institutions or apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual rights and liberties".[3] Thus, the constitution of a country is its fundamental law on which the organs of the state is based and their powers, functions and interrelations defined. It defines the scope of governmental powers and guarantees individual civil rights.

The Constitution of India was adopted on 26th November 1949 and it came into force on 26th January 1950. It declares India a "SOVEREIGN SOCIALIST SECULAR

[1] Oxford Advanced Learner's Dictionary of Current English, Oxford University Press, 7th Ed., 2005, p.326
[2] Oxford Dictionary of Law, Oxford University Press, 5th Ed. 2002, p. 108
[3] Black's Law Dictionary, 9th Ed., 2009, p. 353

DEMOCRATIC REPUBLIC" and secure to all its citizens "JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];"[4] the Preamble contains the basic philosophy and vision of the constitution. It serves as a key to open the minds of the makers of the constitution. It can be used to ascertain the correct meaning of a provision in the operative part of the constitution when there is ambiguity, obscurity or uncertainty. Although, the provisions in the preamble are not justiciable, the preamble is a part of the constitution and enables us and helps us to understand it.[5]

Preamble to the constitution enshrines its vision. The vision is concretised in the constitution through its elaborate provisions in the operative parts. The preamble was adopted by the constituent assembly after the approval of the draft constitution.[6] It was done in order to ensure that the preamble to the constitution is inconformity with the philosophy and objectives of the constitution contained in the detailed provisions.[7]

All organs of the state as well as other agencies and institutions owe their origin to the constitution and derive their powers from its provisions. They have only those powers that are conferred on them by the constitution. This is true about the parliament as much as it is true about the state legislatures. All organs of the government as well as other institutions and agencies must function within its limits and their actions are

[4] Preamble to Constitution of India
[5] Keshavnanda Bharti v. State of Kerela, AIR 1973 SC 1461
[6] B. Shiva Rao, Framing of India's Constitution- A Study, Indian Institute of Public Administration, 1968, p. 130-132
[7] Mahendra Pal Singh, V.N. Shukla's Constitution of India, Eastern Book Company, 13th Ed., 2017, p. A-21

subject to judicial review. The parliament has been given power to amend the constitution, but such power must be exercised within the limits of the constitution.[8]

Almost every constitution has a preamble. Although, its length, content and form are different but every preamble normally sets out the goals and ideals which the makers of the constitution want to achieve through the constitution. Hence, it is regarded as "a key to open the mind of the makers of the constitution which may show the general purposes for which they made several provisions in the constitution".[9] Thus, the preamble is a necessary aid in the interpretation of the provisions of the constitution. In this way the preamble of our constitution is on a different pedestal from the preamble of an act. The preamble of an act is not enacted by the legislature. So, it cannot be used while interpreting the act for removing any obscurity or ambiguity in the enacted provisions of the act. But unlike the preamble of an act or the preamble of any other constitution, the preamble of our constitution was enacted and adopted by the constituent assembly following the same process as in the case of the rest of the constitution. If we see the history of the preamble it was introduced in the constituent assembly in the form of Objectives Resolution as the first substantive issue to be deliberated and decided as guide for its subsequent discussion and decision in the making of the constitution. In order to ensure its consistency with the rest of the constitution it was finalised as the last item in the constitution making process. So, the preamble forms part of the constitution. But this history of the preamble was not brought to the notice of the Supreme Court in *re Berubari Union case*[10] where it observed that the preamble is not a part of the constitution. Later, in *Keshavnanda*

[8] Ibid.
[9] Re Berubari Union, AIR 1960 SC 845
[10] Ibid.

Bharati v. State of Kerala[11] when the constitution history was brought to the notice of the court, it held that the preamble is a part of the constitution and its observation in re *Berubari Union case* was not correct.[12]

Accepting the preamble as a part of the constitution makes the preamble a valuable aid in the interpretation in the provisions of the constitution. Therefore, a reference is often made to the preamble while interpreting the provisions of the constitution. The framers of constitution of India wanted into a "sovereign, socialist, secular, democratic, republic".

It may be pertinent to note that precedence was given to the concept of justice over liberty, equality and fraternity, and to social and economic as compared to political justice, was deliberate. The sequence of placement of the words indicates that the concept of social and economic justice was perhaps considered the most fundamental norm of the Constitution of India. Hence, it could be said that the constitution makers envisioned a concept of social justice which involved the establishment on social order based on equality and justice. Many people in the Constituent Assembly believed that social changes were to be brought about through the process of political democracy and individual liberty but others maintained that mere political democracy only would not suffice but economic democracy was required to effect the desired social change.[13]

4.3 CONSTITUTIONAL PROVISIONS ON PERSONAL LAWS

4.3.1. Preamble

The preamble inter alia assures to individual citizens liberty of thought expression,

[11] Supra note 5
[12] Supra note 7, p. 1-2
[13] Vol. I, B.R. Ambedkar, Constituent Assembly Debates, p. 99-100

belief, faith and worship**.** Liberty is sphere of activities permitted by the law. Within this sphere the law leaves him free to do as he pleases. Thus, preamble confers on individuals, liberty or freedom to be governed by his scripture-based laws. in certain matters which are essentially either personal or family matters. Thus, in family matters such as marriage, dissolution of marriage, guardianship, *waqfs* and religious and charitable endowments, intestate and testamentary succession. People are allowed to be governed by their own personal laws which are primarily based on their religious scriptures. The matters in respect of which these laws are applicable are essentially personal in nature and thus the expression 'personal law' is used. Similarly, the expression 'family law' is also used as the matters in respect of which this law is applicable are essentially family matters. But none of the expressions seems to be accurate- the term 'personal law' is not appropriate because all matters governed by this branch of law are not necessarily matters of personal status of the parties. For instance, there is nothing personal in matters of *waqfs* or religious or charitable endowments or in testamentary succession. Similarly, the expression 'family law' is also not accurate as all matters governed by this law are not family matters. *Waqfs*, religious and charitable endowments or gifts and testamentary succession cannot be considered family matters.

Preamble also assures dignity of the individual and upholds unity and integrity of the nation. India is a multi-cultural and multi-religious society. It is a land of diverse traditions, cultures, customs, belief, faith and worship. Although, it is a nation governed by one constitution. It has unity in diversity. The nature of pluralistic society in India necessitates its governance by the personal laws rooted in different religions, traditions, customs and cultures. It fulfils the constitutional vision of a liberal democracy.

4.3.2 Article 13

Under Article 13[14] of the Constitution of India all laws in force within the territory of India before the commencement of the Constitution were to continue to remain in force unless and until they were inconsistent with the provisions of part III of the Constitution. In this article the term 'law' has been used in its generic and comprehensive sense to include any ordinance, order, byelaw, rule, regulation, notification, custom or usage having the force of law within the territory of India. The expression "laws in force" includes laws made by a legislature or other competent body within the territory of India before the commencement of the Constitution but not previously repealed. So, all personal laws whether statutory or customary or incorporated in judicial precedents were to continue after the commencement of the Constitution. The definition of law is enumerative. It mentions some of the forms in which it finds expression. The definition enumerates the following as included in the definition law:

(a) Statutory law- It includes supreme legislation made by the legislature or subordinate legislation made by subordinate authorities having necessary power. Such subordinate or delegated legislation may be rules, orders, regulations, notifications and bye-laws. The list is not exhaustive. Subordinate

[14] Constitution of India, Article 13- " Laws inconsistent with or in derogation of the fundamental rights(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality."

or delegated legislation become invalid when the Act under which it was made has been held to be unconstitutional.

(b) Custom- The term 'law' includes any custom or usage which has the course of law. In a case[15] Das J, said, "Even if there was a custom which has been recognised by law…that custom must yield to a fundamental right." However, personal laws such as Hindu law and Muslim law are not included within the expression.[16] The court has also held that "religious beliefs, customs and practices based on religious faith and scriptures cannot be treated to be void."[17]

Custom was an important source of law in early times, as legal system evolves it is superseded by statute law and it is considered as a relic of the past. Nonetheless, custom has not completely lost its law creating power. In our legal system a reasonable and definite custom is binding on the courts like an act of legislature. The binding custom which are repugnant to the fundamental rights shall become inoperative after the commencement of the constitution. The custom of pre-emption on ground of vicinity in certain urban areas has been struck down as it imposes unreasonable restriction on the fundamental right to freedom of property which has now been repealed.[18]

[15] Gazula Dasaratha Rama Rao v. State of A.P., AIR 1961 SC 564
[16] State v. NarasuAppaMalli, AIR 1952 Bom 84
[17] Riju Prasad Sarma v. State of Assam, (2015) 9 SCC 461, 497
[18] Sant Ram v. Labh Singh, 1965 AIR 166

4.3.3 Article 372

Article 372[19] of the Constitution of India mandates continuance in force of existing laws. All laws in force immediately before the commencement of the constitution shall continue to remain in force until repealed, altered or amended by the competent authority but it shall be subject to other provisions of the constitution and this means that if an existing law is contrary to any provision of the constitution, the law shall not be valid.

The expression "law in force" is elucidated in explanation I to the article. It means laws enacted by a competent body before the commencement of the constitution. For all purposes it has the same meaning as the term 'existing law' defined in Article

[19] Constitution of India, Article 372-"Continuance in force of existing laws and their adaptation(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law(3) Nothing in clause (2) shall be deemed(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause Explanation I The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas Explanation II Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect Explanation III Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force Explanation IV An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period."

366[20] as including any law, ordinance, regulation, rule, order or bye-law made or passed before the Constitution commenced. The expression includes statutory law as well as custom or usage having the force of law. Personal laws exist in the form of statutory provisions or in the form of custom or usage or judicial precedents prior to the commencement of the Constitution for a long period of time and have continued to be in operation after the commencement of the Constitution. The roots of personal laws and the authority for their application existed in statutory provisions, religious texts, customs, usages and even in the principles of justice, equity and good conscience.

If personal laws were in fact in force immediately before commencement of the Constitution, then it is difficult to understand why it would not come within the expression "all the laws in force". In Article 372(1) of the Constitution or within the similar phraseology "all laws in force" in Article 13(1) unless one finds that due to some peculiar and particular definition or any such explanation or some other limitation or something in the particular context, the expression "all laws in force" has a narrow meaning excluding from its purview the personal laws of the Hindus and the Muslims as part of their religious profession and practice. But due to some obscure reason the expression "law in force" and "laws in force" have been defined in similar terms in explanation I to Article 372 and in Article 13(3)(b) but the definitions as well as the definition of law in Article 13(3)(a) are exclusive but not exhaustive because

[20] Constitution of India, Article 366(10)- "Definition In this Constitution, unless the context otherwise requires, the following expressions have l, the meanings hereby respectively assigned to them, that is to say" (10)- "existing law means any law, Ordinance, order, bye law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye law, rule or regulation;"

even a statutory enactment it being expressly included in the definition of law in 13(3)(a).[21]

In Articles 372 or 13 of the Constitution there is no indication that the Hindu personal laws and Muslim personal laws are excluded from the provisions of these articles. If the personal laws of the Hindus and Muslims were "laws in force" within the meaning of Article 372(1) they would have continued as provided in that clause only 'subject to other provisions of this Constitution' including Part III and especially if they were 'laws in force' within the meaning of Article 13(1), they were subject to all provisions contained in Part III. It may be interesting to know why Chagla, C.J. and Gajendragadkar, J. in *Narasu Appa Malli*[22] held Hindu personal laws and Muslim personal laws not to be "laws in force" within the meaning of Article 372(1) and Article 13(1) and by the Supreme Court in *Krishna Singh v. Mathura Ahir*[23] held that Part III of the Constitution did not touch upon personal laws. The Supreme Court in the decision last cited has only declared the law without specifying reasons and the decision of Bombay High Court in *Narasu Appa Malli* appears to be the only decision dealing with the reasons quite elaborately. In *Narasu Appa Malli*an important question had arisen. The Bombay Prohibition of Hindu Bigamous Marriages Act, 1946 made all bigamous marriages contracted by the Hindus null and void and punishable as criminal offence. A question was raised about the validity of the Bombay Act on various grounds in the same proceedings before the High Court. One of the grounds was that the provisions of the Hindu law and Mohammedan law which allowed polygamy for the males but provided monogamy for females violated the provisions of equality and non-discrimination on the ground of sex enshrined in

[21] A.M. Bhattacharjee, Hindu Law and the Constitution, Eastern Law House, 2nd Ed., 1994, p.53
[22] Supra note 16
[23] AIR 1980 SC 707

Articles 14[24] and 15[25] of the Constitution and were therefore, null and void. Hence, both Hindus and Muslims become equally liable under Section 494[26] of the Indian Penal Code for contracting bigamous marriage but the Bombay Act singled out the Hindus only and the offence of bigamy under the Act which was more serious under Section 494 of the Indian Penal Code as it was cognizable and non-compoundable. The question which had arisen for determination before the High Court was whether the personal laws applicable to Hindus and Muslims are laws in force within the meaning of Article 13(1) within the Constitution in order to satisfy the requirements of Articles 14, 15 and other provisions of Part III. Both Chagla, C.J. and Gajendragadkar, J. decided this question in the negative.[27] The grounds on which the two learned judges rested their decision and held that the expression "laws in force" in Article 372 and Article 13 did not include the personal laws.

1. The language of Articles 372(1) and (2) that the expression 'laws in force' used in this article does not include personal laws. Article 372(2) entitles the President to adapt and modify the law in force by way of repeal or amendment

[24] Constitution of India, Article 14- "Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

[25] Constitution of India, Article 15- "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public (3) Nothing in this article shall prevent the State from making any special provision for women and children (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

[26] Indian Penal Code, 1860, Section 494- "Marrying again during lifetime of husband or wife- Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

[27] Supra note 21, p. 54-55

and certainly it cannot be argued that it was meant to authorise the President to make alteration or adaptation in the personal law of the community.

It is one thing to guess how much or to what extend the founding fathers of the Constitution might have intended any specific power to be exercised and a very different thing to determine the ambit ad extend of the power. If the personal laws could be amended so many times prior to the Constitution, it is hard to understand why it cannot be amended or adapted under Article 372(2).[28]

2. Article 44 of the Constitution implicitly recognises the existence of different personal laws applicable to Hindus and the Muslims and permits their continuance but at the same time empowers the legislatures to modify or improve them in exercise of their power under Entry no. 5 of the concurrent list until the state succeeds in its endeavour to establish a uniform civil code for all the citizens as directed by Article 44.

   Article 44 of the Constitution contains one of the Directive Principles of State Policy requiring the state to endeavour to secure a uniform civil code for the citizens of India. Construing the provision as a recognition by implication of the existence of different codes applicable to different communities or classes of citizens appears to be without sufficient reasons or grounds.[29]

3. If the provisions of Hindu personal law which are inconsistent with fundamental rights become void by reason of inconsistency with the Constitution, it was unnecessary to specially provide in Article 17[30] and

[28] Ibid., p.57
[29] Ibid., p. 61
[30] Constitution of India, Article 17, "Abolition of Untouchability- Untouchability is abolished and its practice in any form is forbidden the enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law"

Article 25(2)(b)[31] for certain aspects of Hindu law which infringed Articles 14[32] and 15[33] and this shows that only in certain respects has the Constitution dealt with personal law. Therefore, the arrangement of the Constitution seems to leave personal law unaffected except where specific provisions is made for it.

If the expression 'law in force' in Article 13(1) included personal laws then reading Article 13(1) with Article 15 would render void all the provisions of personal laws which discriminates between persons on ground of religion, race, sex, etc. and in that event there would have been no need for once again providing separately and explicitly in Article 17 for the abolition of untouchability or in Article 25(2)(b) for throwing open Hindu Public Religious Institutions to all classes and sections of Hindus.[34]

4. Entry no. 5 of the concurrent list specifically provides that personal law is a subject of legislation which indicates that the Constitution has treated personal law as a distinct legal concept and hence, if personal law was intended to be

[31] Constitution of India, Article 25(2)(b)- "(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly"

[32] Constitution of India, Article 14, "Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

[33] Constitution of India, Article 15-"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to(a) access to shops, public restaurants, hotels and palaces of public entertainment; or(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public(3) Nothing in this article shall prevent the State from making any special provision for women and children(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

[34] Supra note 21, p. 62

included within the expression 'law in force' in Article 13 it would have been explicitly mentioned in the definition of law in Article 13(3)(a).

Entry no. 5 of the Constitution undoubtedly provides for the matters covered by personal laws as subjects in respect of which parliament as well as the state legislatures can enact laws. But from this alone a conclusion cannot be drawn that the framers of the Constitution have specifically included personal law in definition of law in Article 13(3)(a).[35]

5. Though customs and usages having the force of law and in force in India immediately before the commencement of the Constitution are void to the extent of their inconsistency with the fundamental rights, the personal laws would not be void as it seems impossible to hold either Hindu law or Muslim law is based on customs or usage having the force of law.

   It is not correct to say that Hindu law or Muslim law is not based on custom or usage having the force of law. Customs and usages have since long been recognised among the sources of law both under Hindu law and Muslim law.[36]

4.3.4 Article 25

Article 25[37] of the Constitution of India guarantees to all persons, freedom of conscience and the right to freely profess, practice and propagate religion. The article

[35] Ibid., p. 67
[36] Ibid.
[37] Constitution of India, Article 25- "Freedom of conscience and free profession, practice and propagation of religion-(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina

protects matters of religious doctrines and belief as well as acts done in pursuance of religion including rituals, ceremonies and modes of worship. The provision contains the principle of religious tolerance that has always characterised the Indian civilization from the earliest time.[38]

The Constitution does not define the term 'religion' anywhere but the Supreme Court has given a comprehensive definition in the following words:[39]

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observations might extend even to matters of food and dress."

A religion may not lay down a moral code for its followers but it may prescribe rituals, ceremonies and observances as well as modes of worship which are considered a part of religion and these matters may be concerning his family life or personal status in some matters such as marriage, dissolution of marriage, guardianship, religions and charitable endowments or testamentary or intestate succession. Thus, in respect of these matters, all persons in India are governed by

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or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

[38] Supra note 7, p. 262

[39] Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954, SC 282

their personal laws based on or rooted in their religious beliefs, customs, traditions, mores and social ethos. All these are considered a part of religion. Thus, on this it may be said, stands the personal law system in India. The article guarantees to every person whether he is a citizen or not the freedom of conscience and the right to freely profess and practice any religion. Of course, the right is in every case subject to public order, health and morality and other provisions in Part III.

It may be noted that right to convert to some other religion or not to practice or profess any religion is included in the freedom to practice or profess any religion as guaranteed under Article 25. The Supreme Court has held that a conversion is valid as long as it has not been induced by force or fraud. This means that conversion by the process of persuasion is part of a fundamental right in India. Right to preach one's religion or say good things about one's religion is also included in Article 25 as his right to propagate his religion is also guaranteed but no one has a right to speak ill or denigrate religion of others. An Explanation to Article 25 says that the wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. This implies that no law can be passed to prevent Sikhs from wearing and carrying kirpans. One of the important exceptions to the freedom of conscience guaranteed by Article 25 is contained in clause 2(b) of that article. It gives protection to laws passed for "social welfare and reform" or also for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. An Explanation to this provision clarifies that a law throwing open religious institutions of a public character to all classes and sections would be available, not only to Hindus but also to Sikhs, Jains and Buddhists. The exception to Article 25, concerning laws providing for social welfare and reform, is a significant provision which lays down a limit to the principle that the State will not interfere in religious affairs. The Hindu

Code, consisting of laws passed in the 1950's in relation to Hindu marriages, Hindu succession, Hindu minorities and guardianship, and Hindu adoption and maintenance, were facilitated by the above provision in Article 25 (2)(b) of the Constitution. It appears that by use of the powers of social welfare and reform mentioned in this provision, laws giving better rights to Muslim women in respect of marriage, divorce, inheritance, etc. are also passed, although, not to the extent to which such laws have been passed in several Muslim countries. It is to be hoped that enlightened Muslim opinion will be persuaded to support such laws, since they are already enacted in other Muslim countries. It appears that a reform movement is now slowly emerging amongst Indian Muslims and it is obviously in the interest of Muslims themselves that the movement should grow and gather strength.[40]

4.4 PERSONAL LAW SYSTEM IN INDIA

"The words contained in the text of the Constitution have to be attributed a purposive interpretation which advances fundamental constitutional values."[41]

Although, 42nd Amendment to the Constitution of India declares India to be a "sovereign, socialist, secular democratic republic," passed in 1976, India has been a secular state right from its inception. India has not imported secularism from the West. It was only in the eighteenth and nineteenth century that state was separated from the Church and laws of the state became independent and supreme in their application to the people. Prior to this the Writ of the Pope ran large and supremacy of the Church was acknowledged by the kings and people alike.

[40] V.M. Tarkunde, Secularism and the Indian Constitution, India International Centre Quarterly, Spring 1995, India International Centre, p.149-150, http://www.jstor.com/stable/23003717
[41] Dr. D. Y. Chandrachud, J. in Govt. v. Union of India, (2018), 8 SCC 501, para 436.

Secularism as a creed was established in India as early as during the reign of Ashoka the great in the third century B.C. who gave people freedom of conscience and treated all religions at par. There was no discrimination or persecution on the ground of one's religion. After Ashoka the great the credo of secularism was practised by Akbar the great in the sixteenth century.

In the western countries, secularism means separation of church from the state and equal treatment to all regardless of their religion.[42] However, Indian secularism is much deeper in meaning and much more universal in reach. It not only treats all religions alike but declares *basudhayeva kutumb kamb*- the universe is a family. On plurality of religion Swami Ramakrishna Paramhansh said *"jotto mat, totto path"* in the nineteenth century. If secularism is among the cherished human values of civilised nations, it was given by India to the West. When our Constitution was adopted, secularism did not mean that the state was anti-religious but rather that the state was irreligious: the state was not interested in any particular religion. In a sense the state was indifferent towards religions. Thus, we find that at the early stages after independence the government functionaries at the higher level did not participate in religious programmes or activities of any religious community. However, the meaning of the term changed with passage of time and it acquired more positive contents in course of time. Secularism came to mean that the state through its functionaries would take interest or even participate in religious activities or programmes of all religions.

Traditionally, the personal laws in India have been divergent as well as deep-rooted. The plurality in the realm of personal laws has been strengthened by the regional customs, usages and traditions prevailing among all religious groups. So, a Uniform

[42] Vol.38, No.4, Hyeon-Jae Seo, Equal but Not Separate: India's Secular Dilemma, Harvard International Review, published by Harvard International Review, Fall 2017, p.43, URL: https://www.jstor.org/stable/10.2307/26528705

Civil Code seemed a difficult idea and a scheme to be pursued for ease of governance of personal laws and also as a symbol of national unity during the Constitution drafting process.[43]

The Constitution of India expressly accepts the concept of minorities. It makes provisions for the minorities delineating not only their educational and cultural rights but also for the establishment of institutions for the conservation and protection of the rights. Accommodation of groups in the system and recognition and protection of their rights is a sine qua non for a modern vibrant democracy. But differentiation of distinction has always remained an important feature of Indian society as we find in the caste system.[44] Although at a theoretical level casteism is regarded as a feature of Hindu society, at a more practical level it is recognised as well as practiced among the Muslims as well. No Syed or Sheikh wants to give his daughter in marriage to someone from the caste of *subjifarosh*, *dhunkar* or *julha.* Professions are graded in society and when they are recognised by the people as hierarchical, we may accept them as caste system as an important feature of caste system is lack of mobility or restriction on mobility from one stratum to another on the other hand, in class system there is mobility for the people to move from one stratum to another on receiving education or wealth, post, position or by excelling in a certain profession.

All personal laws are beset with problems that have been pointed out by writers, especially those belonging to feminist groups. The problems exist not only with the contents of the personal laws but also with their basic postulates. Personal laws are not only based on wrong principles but also wrong logic as they deny to women

[43] Vol.59, No.2, Akhilendra Pratap Singh, Utility of Uniform Civil Code, Journal of the Indian Law Institute, April - June 2017, Indian Law Institute, p.185, URL: https://www.jstor.org/stable/10.2307/26826599

[44] Supra note 42

within communities the rights that communities claim for themselves- the right to self-determination, independence and equal sharing of resources. Personal laws discriminate against women as they are based on religion which sanctions inequality and resists democratic and egalitarian relation between men and women both within the family and outside. This is evident from the fact that reforms either in Hindu law or Muslim law have been carried out against orthodox opposition. Reforms and codification of personal law have reduced the customary variations and diversions within communities. Personal laws are applicable to all members of a community simply because of their birth in that community. So, these laws do not permit any choice to individuals who may be atheists or believers who do not wish to submit to unjust and discriminatory laws which violate their basic rights. The feminists are committed to the right to chosen political affiliation that is not based on biological difference. Their commitment is to a struggle against patriarchal repression. They think about infringement of democratic principles as the group or community rights are allowed to infringe the individual rights of women.[45]

The question of questioning personal laws is a serious one as it involves the questioning of religious texts which is outright rejected in every community because of the orthodoxy of a majority of members of that community. This is the reason behind there being such less progresses under the personal laws namely the Hindu, Muslim, Christian and Parsi. Although, there have been amendments over the years but these personal laws have failed in abolishing the patriarchal privileges and there has been limited success in matters which concern women in particular. When proposals are made in regard to the reforms, the orthodoxy of the communities, results in opposition and then it results in these reforms either being watered down or often

[45] Vol. 31, No. 20, Reversing the Option: Civil Codes and Personal Laws, Economic and Political Weekly, May 18, 1996, p.1181, URL: https://www.jstor.org/stable/4404139

not enabling for women. Also, these efforts for reforms of personal law within a community are a deep-seated part of a broader political process and the major debate in this matter is on the equal rights for women.[46]

It can be rightly said that all personal laws have implanted in them a sense of unjustness and a biasness against women. Although, Hindu law was the one which is believed to have come up with major reforms in the 1950s, it could be said that it was misleading to believe that Hindu law made any reforms because it merely codified the law rather than actually reforming it or making it women-friendly. On the eve of the first general election, held in 1951 in the Congress party, laws sought to re-examine and reform marriage and inheritance were dropped from consideration in parliament in response to pressure from the orthodox and puritan groups. B.R. Ambedkar who had originally drafted the Hindu code bill, resigned as law minister in protest. Then, Prime Minister Nehru piloted the four legislations for codification of Hindu law in 1950-1956 which were the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act. What these laws attained was the codification of the huge and incoherent practices of all communities that were neither Muslim, Parsi, nor Christian, bringing them to harmony with what had been assumed to be "Hindu" practices, but they were, as a matter fact, North Indian, upper-caste practices. But those practices which were not reconcilable with these norms were explicitly dismissed during the debates in parliament as being "un-Indian." So, the laws of the 1950s were not exactly advancement in the rights of women. Rather, codification ended the variation of

[46] Ibid.

Hindu laws practiced in different regions, in the process destroying existing and often more liberal customary provisions.[47]

In Muslim Personal Law, there are provisions which are more beneficial to women than Hindu Personal Law. The Muslim marriage-as-contract protects women better in matters of divorce than the Hindu marriage as sacrament, the Muslim law of inheritance protects women's rights better than Hindu law and the *mehr* is the wife's exclusive personal property. Also, Muslim men who contract more than one marriage are legally obliged to fulfil their duties and responsibilities towards all of them as they have the status of wives, but if Hindu men enter into polygamous relationships, they have no liability towards the second or third wives as it is illegal under the Hindu Marriage Act, 1955.[48]

The feminists are opposed to unqualified claims of minority religious communities of their traditional and unreformed personal laws for the sake of cultural identity. They do not accept the notion of cultural identity for the purpose of stalling reform in the realm of personal law. It is pertinent to note here the origin of personal law system in India- the British colonial government, in consultation with self-styled community leaders, simplified vastly heterogeneous family and property arrangements within the ambit of four major religions: Hindu, Muslim, Christian and Parsi. So, the personal laws today of each of these religions that are being defended in the name of tradition and religious freedom are, thus, colonial constructions of the late nineteenth and early twentieth centuries. Feminists reject the notion of a religious community exerting rights over women through their personal laws because the gender discriminatory

[47] Vol.40, No.2, Nivedita Menon, A Uniform Civil Code in India: The State of the Debate in 2014, Feminist Studies, Special Issue: Food and Ecology (2014) p.482, URL: https://www.jstor.org/stable/10.15767/feministstudies.40.2.480

[48] Ibid.

provisions of the personal laws are based on the same logic of exclusions that characterize the coming-into-being of the Indian nation itself.[49]

It is about time that we shift our focus to focus on a just nation where every individual has equal rights as guaranteed by our Constitution. These rights must be inalienable, non-negotiable and non-waiver able. It is time we aim at going beyond the whims and fancies of personal laws and do not let the patriarchal, double standard, unjust structure of these laws exploit women.

4.5 CONSTITUTIONAL VALIDITY OF PERSONAL LAWS

The interface between provisions of equality and non-discrimination contained in the constitution and the religious or customary gender-based discriminatory personal laws should be discussed. The interface between diverse personal laws and the need for a Uniform Civil Code as enshrined in Article 44 of the Constitution will be briefly discussed.

Issues such as restitution of conjugal rights, monogamy, discriminatory grounds of divorce, right of inheritance, right of maintenance upon divorce and discriminatory personal laws have come for scrutiny before the courts time and again. In most of the cases the challenges have been in the context of statutory provisions made by the legislature. The courts had to adjudicate the validity of certain provisions enacted by the legislature in the light of the mandate of the constitution for equality, non-discrimination and freedoms. It may be mentioned here that the decisions are at times incoherent and contradictory. There is also a danger that through these rulings the judiciary may encroach upon the domain of the legislature leading to perceived controversial judicial law making. The rulings were warranted by the social concern

[49] Ibid.

and political exigency as understood by an individual judge. So, the legal development has been cautious and on case-to-case basis rather than on any broad framework of standards or rights.

One of the earliest constitutional challenges to the existence of personal laws in the post-colonial period after the commencement of the Constitution was the case of *Narasu Appa Malli.*[50] The petitioner was defending the power of a Hindu male to contract polygamous marriage. The petitioner contended that the obligation of monogamy imposed upon him by the Bombay Prohibition of Bigamous Marriages Act, 1946 was violative of the provisions of equality under Article 14 and non-discrimination under Article 15 of the Constitution on the ground that Muslim men could contract polygamous marriages. The Bombay High Court upheld the validity of this social legislation for the protection of women and also held that the personal laws are not 'laws in force' under Article 13 of the Constitution since they are based on religious precepts and customary practices and the principles contained in Part III of the Constitution cannot be applied to the personal laws. Later in *Srinivasa Aiyar case*[51] the petitioner pleaded that the right to practice polygamy is based on Hindu religious practice and a prohibition on polygamy is in derogation of his right to practice his religion. The Madras High Court opined that even if one assumes that the expression 'law in force' includes personal laws, the Act does not violate Article 15 which mandates non-discrimination on the basis of sex.[52]

After almost half a century, the Supreme Court clarified the matter in *C. Masilamani Mudaliar*[53] and held as follows:

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[50] Supra note 16
[51] Srinivasa Aiyar v. Saraswati Ammal, AIR 1952 Mad 193
[52] Vol 1, Flavia Agnes, Family Laws and Constitutional Claims, Oxford University Press, 2011, p. 145
[53] C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoli, (1996) 8 SCC 525

"The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights."

Thus, the Supreme Court overruled, *albeit*, implicitly the earlier two judgments which had held that personal laws are not in force. The effect of the observation of the Supreme Court dealing with the right of a Hindu woman to execute a will in respect of the property acquired or possessed by her under Section 14 of the Hindu Succession Act, 1956 is that the right of women to eliminate all kinds of gender-based discriminations specially in property matters is an implicit right and it forms part of Articles 14, 15 and 21 of the Constitution of India which the judgment referred to as the "the trinity of justice- equality, liberty and dignity of person". So, it can be said that after this judgment personal laws can be considered as 'laws in force' under Article 13 and can be struck down if they infringe the fundamental rights.

In another case[54] where the husband could get divorce on the ground of adultery but the wife had also to prove cruelty or desertion, the Madras High Court adopted completely anti-women approach and held that discrimination is based on a sensible and reasonable classification taking into account the ability of men and women and the results of the acts and it is not arbitrary. Later, in *Ammini E.J.*[55] the constitutional validity of Section 10 of the Indian Divorce Act, was challenged on the ground that it was violative of Article 14, 15 and 21 of the Constitution. The Kerala High Court accepting the contention struck down then impugned provisions and introduced the notion of right to life with dignity within the Article 21 and held that the effect of the

[54] Dwarakabai v. Prof. Mainam Mathews, AIR 1953 Mad 792
[55] Ammini E.J. v. Union of India, AIR 1995 Ker 252 FB. Also reported as Mary Sonia Zachariah v. Union of India, II (1995) DMC 27 FB

provision contained in Section 10 is compelling the wife who has been cruelly treated or deserted to continue to live as a wife of a man she hates. Such a life will be a sub-human life devoid of dignity and personal liberty. It will be humiliating as well as oppressive and she will not have the freedom to remarry and lead a normal life. Such a life can certainly be treated as a life imposed by the tyranny of law. On helpless, deserted or cruelly treated Christian wife against her will and will be a life without dignity and liberty guaranteed by the Constitution. Hence, the provisions which require the Christian wife to prove adultery along with desertion and cruelty are in violation of Article 21 of the Constitution.[56]

4.5.1 Constitutional Provision for Uniform Civil Code

Article 44 of the Constitution obliges the state to endeavour for the uniform civil code for all people.[57] Under this article the state is to take steps for formulating a uniform civil code which will apply throughout India. There were two objections put forth in the constituent assembly against the uniform civil code applicable throughout the country. Firstly, it would violate the fundamental right, the freedom of religion guaranteed under article 25 as a fundamental right and secondly, such a provision would be tyrannical to the minority.

The first objection is not valid because the directive contained in Article 44 does not violate the freedom of religion guaranteed in Article 25. Clause (2) of that article clearly saves secular activities associated with religious practices from the guaranteed freedom of religion enshrined in clause (1) of Article 25.[58]

[56] Ammini E.J. v. Union of India, AIR 1995 Ker 252 FB
[57] Constitution of India, Article 44- "Uniform civil code for the citizens- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."
[58] John Vallamattom v. Union of India, (2003), 6 SCC 611

As far as the second objection is concerned, the speech of Sri K. M Munshi, a member of the drafting committee in constituent assembly may be referred to. He argued that nowhere in advanced Muslim countries the personal law of each minority has been considered so sacrosanct that as to prevent the enactment of a civil code. He gave the example of Turkey or Egypt. No minority in these countries is allowed to have such rights.[59] He pointed out that when the Shariat Act was passed, the Khojas and Kutchi Memons were very much dissatisfied because they were following Hindu customs since they became Muslims. They were unwilling to conform to the shariat and yet by a legislation of the central legislature certain Muslim members who wanted shariat law should be enforced upon the whole community could make their will effective. If you want to consolidate a community, you have to take into account the benefits which may come to the whole community and not to the customs of a part of it. It is incorrect to say that such an act is tyranny of the majority. He drew the attention of the countries in Europe which have a civil code, everyone who goes there from any part of the world and every minority has to submit to the civil code. The minority does not consider it a tyranny. The point was whether to consolidate or unify our personal law in a way that life of the whole country as may in course of time be unified and secular. Religion should be separated from law and from what may be called social relation or rights of parties in respect of inheritance and succession. These things have little to do with religion. [60]

Not having a civil code creates and perpetuates many problems. For example, the law of Mayukha applying in some parts of India but there is Mitakshara in other parts. The law of Dayabhaga is applied in Bengal. So, among the Hindus also different schools of law are applied in different states. It is not just a question of minority but it affects

[59] Supra note 7, p. 383
[60] Ibid.

the majority as well. There are many Hindus who do not like a uniform civil code. They believe that their personal laws of inheritance and succession are a part of their religion. If that is maintained then equality to women cannot be achieved but a fundamental right to that effect has already been guaranteed for them. In an article which states that there should be no gender-based discrimination but Hindu law and Muslim law contain discrimination against women and if this is a part of religion or religious practice, no law can be passed to elevate the position of women. So, therefore there is no reason why there should not be a civil code throughout the territory of India.[61]

The constitutional validity of various personal laws brings us to the debate around the uniform civil code. The debate is centred between two guarantees of the Constitution. Namely, equality and non-discrimination contained in Articles 14 and 15 and religious freedom and cultural pluralism contained in Articles 25 to 28.[62]

The Constitution of India appears to have incoherence in the matter of family law. On the one hand, Article 44 directs the State the power to make laws in the field of family law is contained in the Concurrent List- Entry 5, list 3 of the VII Schedule. This means that power is granted to both central and state legislatures. As the Constitution provides for the federal structure clearly defining the legislative powers excluding the state by enacting a set of rigid and uniform family laws would lead to the dominance of the centre over the states violating the principle of federalism. It will cause a serious blow to the relationship with the north-eastern states which are further protected through special constitutional guarantees of protection of customary laws and practices of certain tribes. The pre-independence movement of women, the All-

[61] Ibid, p. 384
[62] Supra note 52, p. 148

India Women's Conference (AIWC) had as one of its demand's uniform family law for all. The women's rights issues were raised within larger political debates of the Indian National Congress. Among the issues of priority was the unequal treatment of men and women within personal laws. Initially demand for reform was made for upliftment for women at a later stage the scope was widened to equal rights. There was a demand for a comprehensive code for regulating marriage, divorce and inheritance. As a first move the AIWC took up a comprehensive study of family laws of different communities with a view to recommend reforms within them. The National Planning Committee in 1940 focussing on economic issues of women's rights resolve that, women should be equal to men in a plan-based society. For this purpose, they recommended a uniform civil code.[63]

At the initial stage the uniform civil code was to be an optional code which could gradually replace the various personal laws. In the 1950s the members of the AIWC amply demonstrated their political maturity in the parliamentary debates on the Hindu Code Bill. Representatives of the Hindu fundamentalist parties termed the proposed code as anti-Hindu and anti-Indian and raised the demand for a uniform civil code for delaying the matter. But AIWC members directed the proposal for a uniform civil code and went ahead with Hindu law reforms. This was an important political move as a support for demand of a uniform civil code at that time would have meant an alliance with the anti-women reactionary process and would have been great set back to the rights of Hindu women.[64]

In the Constituent Assembly Debates the focus shifted on gender equality to national integration. The demand for uniform civil code was perceived as a measure for

[63] Ibid., p 149
[64] Ibid.

divisive colonial politics. It was realised that integration of communities should be achieved through uniformity of personal laws. M.R. Masani Hansa Mehta and Amrit Kaur favoured enactment of uniform civil code within a framework of time. In the Constituent Assembly there was little discussion on the significance of uniform civil code for women. Women's rights seem to have been overshadowed by the political concern of building a modern nation. It was tacitly accepted that a modern state would transform the social order and would ensure gender justice.[65]

At this political juncture of India's independence, the overwhelming concern of the founding fathers was the formation of the new state and its smooth governance. The possibility and desirability of uniform civil code was discussed primarily in the context of the authority of the state to govern family life and family relationships of its people and the rights of minorities to cultural identity.[66]

Religion must be restricted to remain within its domain, the rest of life must be regulated and modified in a manner that we evolve as a strong nation.

As a response to the Supreme Court judgment in the *Shah Bano case*[67] some attempts were made to formulate a uniform civil code. The main purpose of the draft was to bring in some uniformity in the diverse family laws in order to enhance state authority over civil marriages concerning minority communities. Though there was a claim of gender equality some of the suggestions in the proposed draft were at variance with this claim. They adopted a notion of formal equality which sometimes proves to be

[65] Ibid., p. 150
[66] Ibid.
[67] Mohd. Ahmed Khan v. Shah Bano, AIR 1985 SC 945

averse to women's rights. The approach towards equality has to be substantive and not just a formal notion of equality.[68]

The report of the Committee on the Status of Women in 1974 changed its attention to gender justice and made the demand of uniform civil code and continued to work for building a modern and secular nation.

In the later decades the issue was further complicated by comments from the judiciary. It is a matter of debate if uniform civil code will promote integration and communal harmony but the comments have enabled communal process to appropriate the demand and turn it into a political discourse.[69]

4.6 MATRIMONIAL RELIEFS UNDER THE PERSONAL LAWS AND THE CONSTITUTION

The personal laws whether codified or not provide for matrimonial relief in appropriate cases. These reliefs or remedies include restitution of conjugal rights, maintenance, judicial separation, nullity of marriage and divorce. The first three were established under the matrimonial law even before the introduction of the right to divorce. These concepts were brought into the Indian legal system through a judge made law. After codification they became well recognised rights under the personal laws.[70]

4.6.1 Divorce

Marriage came to be recognised as an institution for promotion of normal human life and family based on the free consent of men and women who were not infallible.

[68] Supra note 52, p. 172
[69] Ibid., p. 150
[70] Vol. II, Flavia Agnes, Marriage, Divorce and Matrimonial Litigation, Oxford University Press, 3rd Edition, 2018, p.8

Taking into account infallibility of man and human nature as it is, dissolution of marriage had to be recognised when the marriage becomes odious or burdensome. Thus, every legal system today makes provision for dissolution of marriage in the same way as it provides for marriage.[71]

The term 'divorce' is derived from the French word *'diverter'* and the Latin term *'divortium'* which means to divert. The French Civil Code of 1800 also called the Code Napoleon was the first among the modern codes and statutes to recognise marriage as a civil contract. Marriages thus, ceased to be controlled by the Church and became dissoluble civil contracts. Subsequently, in 1857, the Matrimonial Causes Act made similar provision for matrimonial remedies in England. In 1865 the Parsi Marriage and Divorce Act and in 1869 the Indian Divorce Act also made provision for judicial divorce. In Hindu law divorce was introduced by the Hindu Marriage Act, 1955. The Act contains elaborate provisions for divorce. The Muslim law recognised divorce from its inception.[72] (The details have been discussed in Chapter two.)

Theories of Divorce

1. Fault Theory of Divorce

   While transforming marriages from status to contracts the main concern was to enable the parties to dissolve their marriage through a judicial decree so that thereafter the spouses will be entitled to contract marriage. Once the sacred tie of marriage was severed, the marital bondage ended. This was an important step for both Hindus and Christians.[73]

[71] Ibid., p.5
[72] Ibid., p.5
[73] Ibid., p.29

Today, there are several ways in which a marriage can be dissolved, but the fault theory was the first step in this direction.

Divorce became obtainable on the ground of fault of the other party. The right to dissolve the marriage was first introduced into matrimonial law on the ground of the guilt of the other party. The guilt or fault on the part of a spouse was considered a misconduct amounting to a violation of terms and conditions of the marriage contract and therefore, the other spouse had the right to dissolve the marriage. It was believed that the objective of the right to dissolve the marriage and free the spouse who was to penalise the party who had committed a matrimonial offence by depriving the party of the conjugal rights of the other. So, a marriage could not be dissolved on the ground of mutual incompatibility of temperament.[74]

2. Consent Theory of Divorce (Doctrine of No-Fault Divorce)

   The no-fault theory of divorce is founded on the principle that marriages very often do not work out, not because of the fault or guilt of one of the spouses but because the spouses are temperamentally incompatible. They are not able to live together as husband and wife, inspite of their best efforts as they are temperamentally incompatible. Before the introduction of the no-fault theory the only way out for such a couple was to fabricate a fault ground where one of the spouses alleges matrimonial faulty or guilt or offence against the other and the other does not oppose it or contest. This is known as a collusive decree and is unambiguously prohibited under various matrimonial statutes. The couple would be forced to collude to obtain their release from the matrimonial bondage because they would have no other option. To address the problem

[74] Ibid.

faced by such couples, the notion of consent divorce came to be included in matrimonial laws. The objective was to help the spouses to adopt honest rather than fraudulent or collusive methods for achieving their desired ends. The consent theory is a sharp contrast with the sacramental notion of marriage and brings marriage to the level of contractual partnership based on free will. If spouses are free to enter into a matrimonial contract, they are equally free to withdraw from it.[75]

3. Breakdown Theory of Divorce

In the process of evolution of the law relating to matrimonial relief, after the fault theory came the consent theory of divorce and reaching the breakdown theory was a logical forward step. With the passage of time courts started pondering over whether it is prudent and convenient to grant a divorce when even one of the parties has understood and accepted that the marriage has irretrievably broken down and it would not be possible to continue with the relationship.[76]

The reason behind granting divorce on account of irretrievable breakdown of marriage is that what cannot be mended must be ended. The irretrievable breakdown theory of marriage must replace the fault or guilt theory of divorce. It will save the parties from playing the blame game and futile mudslinging. In fault or guilt theory the spouses have to compete in portraying each other as black as possible where the worst one is likely to succeed. A marriage could be broken down on account of fault of either party or both parties or on account of fault of neither party. It often happens that, relations of husband and wife deteriorates and they stop living together and may become strangers

[75] Ibid., p. 49
[76] Ibid., p.58-59

or even hostile to each other. In such circumstances, it becomes mutually beneficial that the relationship is dissolved and marital ties severed by a decree of divorce on the ground of irretrievable breakdown of marriage without fixing any responsibility on either party in the interest of both the parties and also the society. It is only a *de jure* recognition to a situation which exists *de facto* so that they can replan their life and resettle once again having gone through an ordeal. Unfortunately, this ground has not received legislative recognition in the family laws of our country. However, the Supreme Court has been granting relief of this nature to the parties under its plenary power under Article 142[77] of the Constitution of India. Under this provision the Supreme Court has power to do complete justice in a case and to attain this objective it may go beyond the letters of the law.[78]

It may be argued that the court, as the protector of justice and guarantor of rights should be considered as the best judge of the situation where there is an irretrievable breakdown of marriage empowered to grant divorce without being bound by the technicalities of law. When a marriage has broken down irretrievably, no public interest is served in keeping the parties together by an artificial bond. In limited span of human life, misery, melancholy and suffering cannot be allowed to continue indefinitely. Law cannot give

[77] Constitution of India, Article 142- "Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc- (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

[78] Vol. 48, No. 3, Jaya V.S., Irretrievable Breakdown of Marriage as an Additional Ground for Divorce, Journal of the Indian Law Institute, Indian Law Institute, July-September 2006, p.443, URL: https://www.jstor.org/stable/43952052

happiness but it can certainly prevent suffering. It would, therefore, be better, if irretrievable breakdown of marriage is included as a separate ground for divorce under section 13 of the Hindu Marriage Act, 1955 as recommended by the Law Commission[79] and in the other personal laws as well.

4.6.2 Restitution of Conjugal Rights

The restitution of conjugal rights owes its origin to the Roman Catholic tradition in medieval Europe where the Roman Catholic Church had the power to physically restore to the husband, wives who had escaped from their custody.[80] Subsequently, it was accepted by English law. But neither Hindu law nor Muslim law had recognized this concept. The English lawyers imported it to India and brought it before the courts in the Presidency as well as *mofussil* towns. There are two important cases which were decided in the newly established judicial system in India where this remedy was contested and awarded- In *Moonshee Bazloor Raheem v. Shamsoonissa Begum*[81] the Privy Council in 1876 applied the principle to Mohammedan law and held that a Muslim husband may institute a suit in the civil court of India for declaration of his right to the possession of his wife and for a sentence that she returns to cohabitation.

In *Dadaji Bhikaji v. Rukhmabai*[82] Pinhey J. who had earlier heard the case in 1885 had refused to grant the husband remedy on the following two grounds- firstly, the remedy could only be applied to situations where the spouses had cohabited. It would be inhuman, cruel and repugnant to human conscience to compel a young lady to go to a man whom she dislikes. Secondly, that the remedy was brought from English law and it had no foundation in Hindu law but within six months in appeal a Division

[79] Ibid., p.444
[80] Supra note 70, p.22
[81] (1867) 11 MIA 551
[82] (1885) 10 Bom 301

Bench of the Bombay High Court comprising Sargent C.J. and Sir Baley J. set it aside and awarded the husband a decree of restitution of conjugal rights. In this case, although, the court of first instance had drawn the attention to the vexed question of relationship between morality and law and in founding the case within a broader humanitarian framework the appellate court preferred the easier path of accepting the tradition of male dominance casting the issue of justice and women's rights to the oblivion. The verdict made the case inseparable from women's cause.

The main purpose of the decree of restitution of conjugal rights is restoration of cohabitation. It is an opportunity accorded by the law to the spouses to put their marriage on the rail by coming and living together once again when their marriage is on trial. In the words of Smt. Jayashree:

"Marriage is the most vital problem in the life of individuals which affects not only the spouses but also the children of this wedlock. It is, therefore, the duty of the state to protect the rights of those individuals who enter into this union and also enforce the obligations of this union."[83]

Over a period of time, it has been made an instrumentality used by the husband for the harassment of the wife and also affording the judges an occasion to remind the wife of her traditional duties. Although, theoretically, the relief is available to both the spouses equally, but this formal equality seems to be without substance as the bulk of the litigation on this remedy is instituted and carried out by the husband on account of his economic superiority and social status and security. Restitution of conjugal rights remedy means that if either party to the marriage withdraws from the society of the other, without a reasonable excuse, the court will order, on a petition filed by the

[83] Jayshree, Bhakt Darshan, Lok Sabha Debates (1955), p.7318

aggrieved party, the guilty party to come back and give conjugal company to the aggrieved. A “reasonable excuse" is to be interpreted by the judiciary. The present economic condition and education of women and the changed circumstances have made many women to take up jobs. This career orientation of women has often led to an inter-spousal conflict relating to the place of residence and also the control of the salary of the women. An accepted practice is that a working woman is expected to continue with her job only with the permission of the husband and if he finds her job coming in the way of her household duties and withdraws his permission, she has to accept domestic responsibilities and quit her job although she may be even holding a superior job. The situation becomes more difficult if her place of work is away from the husband's residence. In majority of cases, the courts have imposed a legal duty on such a wife to give up her job, join the husband and give him conjugal company at his residence.[84]

Under all the personal laws, the "withdrawal" by one spouse should be without reasonable excuse, and if a woman withdraws from his society because she is serving at a different place, this consideration of employment is not "reasonable excuse" according to a majority of judgments. A few cases will highlight the plight of working women, and the obvious gender bias reflected in their observations. In *Surinder Kaur v. Gurdeep Singh,*[85] the wife got a job of a teacher after the marriage but was asked by the husband to resign and stay with him. After she refused to join him at his matrimonial home, he brought a restitution petition against her alleging that he was denied his marital rights as his wife was not willing to resign her job. Granting the petition in favour of the husband, the court observed-

[84] Vol. 45, No.3/4 Poonam Pradhan Saxena, Matrimonial Laws and Gender Justice, Journal of the Indian Law Institute, Indian Law Institute, July-December, 2003, p.368 URL: https://www.jstor.org/stable/43951868

[85] AIR 1973 P&H 135

"According to Hindu law, marriage is a holy union. The relationship between husband and wife imposes upon them certain marital duties and gives each of them certain legal marital rights. The marriage imposes a duty on the husband to protect his wife, to give her a home.... It enjoins on the wife the duty of attendance, obedience and to the veneration for the husband and to live with him wherever he may choose to reside. Therefore, by entering into marriage with him, the appellant had placed herself under obligation to reside with him at Chandigarh."

In *P. V. Prasada Sarma v. P. Seshalakshmi*,[86] the willingness of the wife to stay with the husband during vacations was not accepted as amounting to performing her marital obligations. It was held that the wife cannot insist on continuing with her job at a distant place from her husband and it amounted to withdrawing from his society without sufficient cause.

In *Deepa Suyal v. P.C. Suyal*,[87] due to financial insecurity the wife took up a job. The court refused to accept that she was forced to take up the job. She wanted to satisfy the demand for her dowry from the husband's side from the salary which she would earn from the job. The court rejected her contention and passed a decree for restitution of conjugal rights in favour of the husband and held-

"If the husband or wife refuses to discharge their matrimonial obligations, they have to lead strong evidences in support of their refusal to discharge their obligations."

Financial insecurity is the main reason for the subordination of the wife rendering her vulnerable in many circumstances.

[86] AIR 1975 AP 239
[87] AIR 1993 All 244

In *T. Sareetha v. Venkata Subbaiah*,[88] the constitutional validity of this remedy was challenged on the ground that it is against the integrity of a person and invades his/her privacy rights. It was contended that there were more serious implications for a woman than a man. Conception and delivery of a child involves the most private use of the body. The creation takes place inside her body and the child that would be born will be of her flesh and blood. A matter which so intimately concerns her body and which is so vital for her life is violated by a decree of restitution of conjugal rights excludes her. The court held this remedy as barbarous, savage and unconstitutional. It violated the rights of privacy and human dignity guaranteed by the Article 21[89] of the Constitution. Article 21 prevents the state from treating the human life as that of any other animal. It observed:

"A decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's rights to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being.... The woman loses control over her most intimate decisions and the right to privacy guaranteed by article 21 is flagrantly violated by this decree."

The court also held that it also violates Article 14 of the Constitution as more often than not the suit for the remedy is brought by the husband and rarely, the wife. Normally only the wife is adversely affected when a decree for restitution of conjugal rights is passed. Thus, the use of this remedy in reality becomes partial, one sided and available only to the husband as it guarantees formal equality to both the parties but it

[88] AIR 1983 AP 356

[89] Constitution of India, Article 21- "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."

is devoid of substantive equality between the parties. The mandate of equal protection of laws is absent. So, the court held that it violates Article 14 of the Constitution.[90]

But in *Harvinder Kaur*,[91] Avadh Bihari Rohatgi, J., dissented from the decision in *T. Sareetha's case* although agreeing that the court cannot enforce sexual intercourse but maintained that it can enforce cohabitation. As regards its constitutional validity, it said-

"One general observation must be made. The introduction of Constitutional law in the home is most inappropriate. It is like introducing bull in a China shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 should have any place. In a sensitive sphere, which is at once, most intimate and delicate, the introduction of the cold principles of Constitutional law will have the effect of weakening the marriage bond. The house of everyone is to him, his castle and fortress. The spouses can claim a sort of sacred protection behind the door. The introduction of Constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relation and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind."

The court differentiated between the public and the private spheres and held that the equality provisions of the Constitution have no applicability in the private sphere because firstly, it will be detrimental to the institution of marriage and secondly, it will strike at the very substance of intimate domestic relation and would lead to

[90] Supra note 84, p.374
[91] Harvinder Kaur v. Harminder Singh, AIR 1984 Del 66

unnecessary litigation, which should be avoided under all circumstances. For the protection of the institution of marriage and in order to avoid litigation, it is desirable that a woman should be treated as subordinate to man.[92]

4.6.3 Judicial Separation

The relief of judicial separation was widely used when the requirements for divorce were stringent. Proof of adultery was needed for divorce but judicial separation could be obtained on grounds of cruelty and desertion. Thus, when women were subjected to cruelty the right to judicial separation was an important remedy of having separate residence, maintenance and custody of children.[93]

Subsequently, it developed as an interim measure for couples who were facing matrimonial turmoil but were not ready for complete severance of matrimonial ties as they still saw rays of hope in their matrimony. During judicial separation they continue to be husband and wife and not entitled to remarry. During this period, therefore, they continue to have mutual rights and obligations if not active, at least in dormant form. Thus, if one of them dies, the survivor has a right of inheritance during this period. Issues relating to alimony and custody of children may be contested during this period of judicial separation.[94]

When Hindu women did not have right to statutory divorce in 1946, the Hindu Married Women's Separate Residence and Maintenance Act came to their help. The Act recognised the right of Hindu wives to live separately and obtained maintenance for themselves under certain circumstances such as cruelty, desertion, bigamy, apostasy, venereal diseases and so on. Subsequently, the same relief was included in

[92] Supra note 84, p.375
[93] Supra note 70, p.27
[94] Ibid.

the Hindu Marriage Act, 1955 in the form of judicial separation.[95] Under the Hindu Marriage Act both the husband and the wife are entitled to approach the courts for a decree of judicial separation on any one of the fault grounds enumerated in Section 13(1). The parties are also entitled to approach the court for judicial separation if the other party is guilty of non-compliance with a decree of restitution of conjugal rights. All other Indian matrimonial laws except Muslim law have provision for judicial separation. Although, the provisions relating to judicial separation are not identical in all of them.

Section 34[96] of the Parsi Marriage and Divorce Act, 1936 and Section 23[97] of the Special Marriage Act provide for the remedy of judicial separation. Sections 22[98] and

[95] Hindu Marriage Act, 1955, Section 10- "Judicial separation- [(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.](2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so."

[96] The Parsi Marriage and Divorce Act, 1936, Section 34- "Suits for judicial separation- Any married person may sue for judicial separation on any of the ground for which such person could have filed a suit for divorce."

[97] The Special Marriage Act, 1954, Section 23- "23. Judicial separation- (1) A petition for judicial separation may be presented to the district court either by the husband or the wife,- (a) on any of the grounds specified 1[in sub-section (1)] 2[and sub-section (1-A)] of section 27 on which a petition for divorce might have been presented; or (b) on the ground of failure to comply with a decree for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.(2) Where the court grants a decree for judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so."

[98] The Indian Divorce Act, 1869Section 22-"Bar to decree for divorce a mensa et toro; but judicial separation obtainable by husband or wife.- No decree shall hereafter be made for a divorce a mensa et toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned."

23[99] of the Indian Divorce Act, 1869 contains provisions for a decree of judicial separation on the ground of adultery, cruelty and desertion of more than two years. The court may pass a decree for judicial separation in those cases where the petitioner has not been able to establish a ground of divorce or has opted for judicial separation in place of divorce. Although, this is not mandatory, but the parties can reconcile and resume cohabitation after obtaining a decree for judicial separation. If the parties have not resumed cohabitation even after one year of a decree of judicial separation, either party is entitled to a decree of divorce merely on the ground that they have not been able to resume cohabitation. And there is no need to prove any other ground. So, this effectively becomes a ground of irretrievable breakdown of marriage.[100] If the parties are old and married for many years the court may pass a decree of judicial separation instead of divorce.

Judicial separation is considered lesser of the two evils. Ordinarily judicial separation leads to reconciliation but if the parties can withstand the test of separation for this period and cannot come to terms with each other the end is divorce. The intention of this relief is to give the parties an opportunity to set aside their differences and if possible, come together to give their marriage one more chance.[101]

The provisions for judicial separation in different personal laws is positive and beneficial for the institution of marriage and also does not involve hardship or injustice to any of the parties to the marriage. It has been used by the courts for the

[99] The Indian Divorce Act, 1869, Section 23-Application for separation made by petition-Application for judicial separation on any one of the grounds aforesaid, may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly."

[100] Hindu Marriage Act, 1955, Section 13(1-A) and Special Marriage Act, 1954, Section 27(2)

[101] Y.P.Bhagat and Kumar Keshav, Laws on Marriage, Divorce and Maintenance in India, Vinod Publications, 2018, p.114

benefit of the society in general and in the interest of parties in particular without infringement of any provisions of the Constitution.

4.6.4 Nullity of Marriage

Marriage confers the status of husband and wife upon a man and a woman and provides legitimacy to their cohabitation and relation. As a result of this relationship certain rights and obligations between the parties as legal incidents are created but the creation of these rights and obligations presupposes the capacity of the parties to contract a lawful marriage. The concept of nullity is linked to the capacity of an individual to contract a valid marriage. In case the person does not possess the capacity for marriage, the marriage is either void or voidable.[102]

A void marriage in law is one which is deemed to have never taken place. Its very existence is negated and therefore, the term used for such a marriage is *void ab initio*. No court decree is required for invalidating such a marriage as the marriage does not exist. It is a semblance of marriage *de facto* without *de jure* substance.[103]

A voidable marriage on the other hand is one which is considered valid until a decree annulling it has been passed by a court of competent jurisdiction. Invalidation of the marriage is at the behest of one of the parties. Here the marriage is deemed to be valid and parties have mutual rights and obligations until it is declared invalid.[104]

4.6.5 Right of Maintenance

According to Oxford Advanced Learner's Dictionary maintenance is "money that somebody must pay regularly to their former wife, husband or partner, especially

[102] Supra note 70, p. 9
[103] Ibid., p.11
[104] Ibid., p.12

when they have had children together".[105] Here, the obligation to pay a sum of money arises from one's past conduct or relationship. According to the Oxford Dictionary of Law, maintenance means "the provision of food, clothing, and other basic necessities of life".[106] According to the Black's Law Dictionary maintenance means "financial support given by one person to another, usually paid as a result of a legal separation or divorce. Maintenance may end after a specified time or upon the death, cohabitation or remarriage of the receiving party."[107] So, maintenance is a sum of money given by way of support to another person towards whom he has a legal obligation. The support includes the basic amenities of life.

Maintenance means provision for food, clothing and shelter. Maintenance is a state of supporting a person financially with a sum of money so that a decent living may be possible. It means providing all basic amenities of life required for a decent living for a person towards whom he has a legal obligation. All personal laws have provisions for maintenance of the wife. Although, they are not identical and vary in details.[108]

4.6.6 Dower

Dower under Muslim law is any property or sum of money which is given to the wife as a mark of respect on marriage. It may be payable immediately after marriage which is called prompt dower or it may be payable on dissolution of marriage which is known as deferred dower. However, on dissolution of marriage either by divorce or death of either party the entire unpaid dower becomes payable whether prompt or deferred. Dower is always fixed before or at the time of marriage. However, even if it is not fixed it is payable and it is known as proper dower. Dower is a personal

[105] Supra note 1, p. 928
[106] Supra note 2, p. 300
[107] Supra note 3, p. 239
[108] See generally, Ishraz Ahmed, Women's Right to Maintenance in India in Human Rights Discourse, University Book House Pvt. Ltd., 2019

property of the wife over which the husband or other relatives have no control or share.

4.7 CONCLUSION

4.7.1 The Special Marriage Act, 1954

In the post-independence period, the most important step to secularise family laws was the passing of the Special Marriage Act, 1954. The then law minister C.C. Biswas in 1952 described it as an attempt to lay down a uniform territorial law for the whole of India. The Act makes provisions for a civil marriage between two Indians regardless of their religion. As a marriage under this Act is a civil contract conversion or apostasy is not a ground for divorce. A marriage under the Act is contracted in the presence of a marriage officer appointed by the state. No religious ceremony or ritual is required for contracting a marriage under the Act. The marriage officer issues a certificate to the parties which constitutes sufficient proof of a valid marriage for all future purposes. Once the parties choose this secular form of marriage, they are governed by the Indian Succession Act, 1925 which is more gender-just and egalitarian and they are not governed by their respective personal laws. This was a step in the right direction towards the gradual unification of the family laws.[109]

Conservative Muslim, Hindu and Christian opinion was opposed to the Act but their demand was not conceded. Prime Minister Jawaharlal Nehru pointed out that the Constitutional guarantee of freedom to practice religion also includes not to practice a religion. He clarified that it was only an enabling Act and no one was compulsorily bound by it. Everyone was at liberty to opt for its provisions. The Act brought forth a prospect of having a comprehensive code of marriage and divorce which could

[109] Supra note 52, p.153

include necessary safeguards for women without leading to a controversy on freedom of religion. The proposition that the Act is only an enabling measure applying only to consenting parties had already been accepted both legally and socially. But sufficient awareness of the Act has not been created and there seems to exist a tendency to undermine the provisions of the Act.[110]

The Act largely reflects dominant Hindu upper caste practices which prohibit marriages between first cousins and close family relatives. Such prohibitions are not found in customary practices of many lower caste as well as among Parsis, Muslims and Jews. Among several South Indian communities, marriages between uncles and nieces are valid and marriages between first cousins are a norm among many communities.[111]

In 1963, in order to expand the ambit of the Act an amendment was made to the Act which subordinated the Act to any custom or usage to the contrary.[112] The amendment was criticised as a retrograde step by sovereign members of the parliament during the parliamentary debate. Hitherto, provisions of personal law were made subordinate to the Special Marriage Act. This amendment reversed the position and subordinated the Act to provisions of personal law. It was stated that the reason for the amendment was recognition of the practices of South Indian communities which allowed marriages between uncles and nieces as well as between first cousins. The purpose was to reconcile the Act with the provisions of the Hindu Marriage Act, 1955 which permitted customary practices. Its relevance to minority communities and prevalent

[110] Ibid.
[111] Ibid.
[112] The Special Marriage (Amendment) Act, 1963 added the following proviso to Section 4 (d): "Provided that where a custom governing atleast one of the parties permits of a marriage between them, such marriage may be solemnized notwithstanding that they are within the prohibited degrees of relationship."

practices among them was not a concern which the law makers addressed at the time. The amendment pushed the Act away from a progressive path.[113]

The Special Marriage Act, 1954 has worked reasonably successfully as a progressive legislation for nearly seven decades. The scope of its operation has been limited. It applies only in matters of marriage and divorce and in succession matters the Indian Succession Act, 1925 applies. A more comprehensive law should be enacted in the line of the Special Marriage Act, 1954 to cover other matters falling within the purview of the personal laws. This may go a long way in streamlining the personal laws as well as in ensuring equality and justice to women.

4.7.2 Uniform Civil Code

The debate on whether India should have a uniform civil code or not began before its independence in 1947. At the time when the sub-committee on Fundamental Rights proposed to enact a Uniform Civil Code in India. Thus, Article 44 was enacted which provides for a Uniform Civil Code for India.[114] Although there was opposition from some Muslim members of the Constituent Assembly Article 44 was enacted in the Constitution. Article 44 is one of the Directive Principles of State Policy contained in Part IV of the Constitution. Article 37[115] states that the Directive Principles of State Policy shall not be justiciable or enforceable, but they shall guide the state in its governance and formulation of policies. They have persuasive value for the state and

[113] Supra note 52, p.154

[114] The Constitution of India, Article 44- "Uniform civil code for the citizens- The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."

[115] Constitution of India, Article 37- "Application of the principles contained in this Part- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"

the state is expected to follow them to the extent it considers expedient.[116] The Directive Principles detail not only the basic purpose and the objectives of the Constitution but also enshrine its vision as contained in the Preamble. Although directive principles are not justiciable, they are guiding principles to the state for good governance. So, in case of a conflict between the directive principles and fundamental rights the latter should prevail. If a law enacted to give effect to the directive principles is violative of fundamental rights it must be struck down.[117] However, it does not mean that directive principles are without significance in the Constitution. They contain the basic values of the Constitution and therefore can be employed as tools of interpretation specially when a particular provision is obscure or ambiguous. In such a situation an interpretation which is consistent with the basic values of the Constitution as contained in Part IV should be accepted rather than the one which goes against.[118] Though directive principles are unenforceable, the courts should always endeavour in the process of interpretation to reconcile the directive principles with the fundamental rights and adopt a mechanism of harmonious construction.[119]

Efforts to reform religion-based laws tantamount to reforming the ideology of people. The matter is made more difficult and complicated as a very large segment of Indian population lacks education and enlightenment which are necessary for developing a non-religious outlook and scientific temper so people continue to identify themselves as religious groups and communities and refine the manifestations of all this in identity politics so rampant and widely practiced.[120] Religion based identities are not harmful to the society per se, the manner in which they affect their perception of other

[116] Vol. 39, No. 2, Christa Rautenbach, Phenomenon of personal laws in India: some lessons for South Africa, The Comparative and International Law Journal of Southern Africa, Institute of Foreign and Comparative Law, July 2006, p.250 URL:https://www.jstor.org/stable/23252637
[117] State of Madras v Champakam Dorairajan, AIR 1951 SC 226, 500, 647.
[118] Supra note 116, p.251
[119] State of Tamil Nadu v. L Abu Kavur Bai, AIR 1984 SC 326.
[120] Supra note 42, p.45

people and their activities creates problem sometimes. Secularism is important in Indian society as often personal identities are rooted in religion. Not only India's progress and prosperity as a pluralistic society is dependent on it but also its peace and harmony. Any society where a segment of people feels neglected or discriminated against can neither progress nor be contented. As secularism has been held to be a part of the basic structure[121] government must be held accountable for its implementation. Solution to the problem cannot be easy in a labyrinth of culture, religion and politics when they are closely inter-twined and have become a prism.[122]

Women's movement on Uniform Civil Code have taken different twists and turns. This demand galvanised by larger sections of the women's movement until the late 1980s. However, there grew rethinking on the measure in the early 1990s. In the later part of the 1990s, different positions on this had developed, from outright rejection of the Uniform Civil Code to reform in each personal law from within. By the end of the 1990s, a consensus in the women's movement had emerged that the campaign for gender-just laws should be conducted at three levels:

1. Espouse all attempts to reform personal laws.

2. Support for legislation in areas not covered by either secular or personal laws, thus avoiding a direct confrontation with communities and communal politics, for example laws on domestic violence and matrimonial home.

3. Establishing a proper, comprehensive, gender-just mechanism of rights covering not only areas covered by personal laws but also include the public domain of work

[121] S.R.Bommai v. Union of India, AIR 1994 SC 1918
[122] Supra note 42, p. 45

for instance laws encompassing day care, equal wages for equal work, maternity benefits, etc., which should be available to all citizens.[123]

Although, religious groups and institutions were given the right to manage their own affairs, it did not help in any way the women in securing their rights and social space. This was because the religious groups used their respective personal laws for regulating their affairs holding onto their orthodoxy and this hardly benefitted the women in any way. So, the only alternative was the amendment or codification of the personal laws wherever possible and to the extent possible. But, the scope of reform was limited and primarily confined to the Hindu personal laws. The issue of gender justice took centre stage and was used for justifying Uniform Civil Code after a series of decisions of the Supreme Court stressed its need. The demand for its implementation, generally, comes from the right-wing Hindu socio-political groups and women's rights groups. But there are diverging views about the intention of these groups for their demand for a Uniform Civil Code.[124]

The problems that arise with the framing of the Uniform Civil Code is the lack of clarity on the matter. Article 44 of the Constitution just mentions the idea of the Code but does not give any insight on its details. Should it include just the provisions governing marriages, divorce, inheritance, guardianship, etc. or should it also include the discriminatory Hindu Undivided Family tax provisions. The laws and customary practices in the country vary so much within the same religious groups that rites and rituals differ from place to place- practices of the south are different from that of the north and those of the west are different from those of the east and north-east. These differences will result in unacceptance of a uniform code. Another issue which may

[123] Supra note 47, p.483
[124] Supra note 43, p.182

crop up in this process is that the personal laws of some of the communities like Nagas, Mizos, etc. is entitled to constitutional as well as political protections. So, implementing a Code will also mean making a number of constitutional amendments for this purpose. Also, without a proper uniform code, there exist grey areas between the various personal laws and the judgments passed by the courts. Often, they are contrary to each other and that again becomes a source of problem for the parties in question. To solve this the people who are of the view that in the difficulties evident in the enactment of the Uniform Civil Code the relevant course would be for the communities to undertake and come up with a thorough internal initiative in which the relevant aspects of their personal laws which seem to be in conflict with the constitutional provisions and very often do not pass the test of equity, justice and good conscience, a doctrine of Roman law followed in India, should be discarded as practices. This would be apt as every community would be in a place to uphold its distinctiveness along with making the necessary changes in its governing system.[125]

The Uniform Civil Code must be framed in a manner as to incorporate the best of not just both worlds but all worlds. Before a draft framework is made, a thorough study of all the personal laws must be made. From understanding the various provisions not in the sense of juxtapositions but their historical relevance and the reason why they exist, it is important to understand that all this is done with regard to all the personal laws so that the best from them can be taken and incorporated and put into a uniform civil code for that nation. The code should be comprehensive and must cover areas of marriage, divorce, inheritance, adoption, guardianship, rights of residence, rights of matrimonial property, rights against domestic violence, rights to work and be entitled to equal pay and rights to maternity benefits, etc. It is vital that whenever the Code

[125] Vol. 30, No. 45, Imtiaz Ahmad, Personal Laws: Promoting Reform from Within, Economic and Political Weekly, Nov. 11, 1995, p. 2851, URL: https://www.jstor.org/stable/4403418

comes into effect it must be a comprehensive and exhaustive one and if there are gaps in the provisions then those may be bridged by making further relevant laws.

All personal laws provide for matrimonial relief but the remedies are diverse and yet inadequate. Some beneficial remedies are available under some personal laws but not under others. Neither there is uniformity nor consistency in the remedies under the personal laws. Their validity has often been tested in the light of the provisions relating to equality and anti-discrimination in the Constitution and the courts have expressed their dissatisfaction and anguish on some of them.

Article 44 has been mired in politics and polemics right from its inception and therefore has failed to achieve its objective but the Uniform Civil Code is the ultimate state of euphoria for the nation and some day it shall be implemented for the betterment of all communities equally and for the upliftment and equality of women.

Chapter Five

Role of the Judiciary in Matrimonial Reliefs under the Personal Laws in India

"In a country which follows the Rule of Law, independence of the judiciary is sacrosanct. There can be no Rule of Law, there can be no democracy unless there is a strong, fearless and independent judiciary. This independence and fearlessness is not only expected at the level of the Superior Courts but also from the District Judiciary."- Deepak Gupta, J. in *Krishna Prasad Verma v. State of Bihar, (2019) 10 SCC 640*, para. 1

5.1 INTRODUCTION

The courts in India apply norms that do not owe their origin or validity to a constitutional source in cases of religious personal laws. The ambit covered by religious personal laws in India seems to be within the category of constitutional pluralism than 'a constitution within a constitution'. The pluralism of religious personal laws owes their origin not to extra-territorial or geographical sources but are derived from other sources of law-making within the nation but from non-state entities.[1] The constitutional authority which has been endowed upon the courts for reviewing the laws and legislations made by the parliament has always been a question of huge dispute. It has always been pondered upon whether the court can review the laws and legislations made by the legislature which would also imply disregarding the basic structures of the Constitution like the separation of powers, rule

[1] P. Ishwara Bhat, Constitutionalism and Constitutional Pluralism, LexisNexis, 1st Edition, 2013, p.295

of law and the supremacy of the Constitution of India.[2] Although the courts have immense powers to strike down the laws made by the legislature, they try and maintain the non-interventionist approach and do as little interference with legislations as possible. This is the approach in order to keep the respect intact between two separate domains under the same Constitution. The common law principle which upholds judicial non-intervention in the internal matters of the legislature or legislative processes are to be dealt with before pointing fingers at the courts for its unwillingness to intervene. It is true that the Courts are considered as the guardian of the Constitution of India which endows upon them a duty to see to it that the other authorities under the Constitution exercise their powers within their constitutional limits, that these branches of the state function within the ambit of the power provided to them and do not cross the boundary and take over the powers of one and other. It is the responsibility of the courts to see to this and enforce this is practiced among the branches of the government.

"Two ends of paramount importance and fundamental to a free government are proposed to be attained by the establishment of a national judiciary. The first is a due execution of powers of the Government; and the second is a uniformity in the interpretation and operation of those powers and of the laws enacted in pursuance of them,"[3]

The power of interpreting the laws entails usually the function to assess whether they are in consonance to the Constitution or not. If not so, then to declare them void and inoperative. As the Constitution is the supreme law of the land, in a conflict between

[2] Vol. 48, No. 2, Okpaluba, Chuks. Can a Court Review the Internal Affairs and Processes of the Legislature? Contemporary Developments in South Africa, The Comparative and International Law Journal of Southern Africa, 2015, p. 183–218., URL: www.jstor.org/stable/24585877

[3] Vol. II, Joseph Story, Commentaries on the Constitution of the United States, 5th Edition. 1891, sec. 1576

the Constitution and the other laws, it becomes the duty of the courts to follow that only which is superior and this is their supreme obligation. The Constitution of India clearly states that "all laws in force in the territory of India immediately before the commencement of this Part, shall, to the extent of such inconsistency, be void."[4] Moreover, "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."[5] This provision relates to the rights of people conferred by Part III but all legislative and executive acts ultimately have bearing on the rights of people. So, subordination and subsuming of all law, rules, regulations, ordinances, executive and legislative acts by and under the Constitution confers on the Supreme Court a duty to interpret them and ensure that they are in conformity with the Constitution. Supremacy of the Constitution is guaranteed by separation and independence of the judiciary. Limitations on the legislature and executive can remain effective and operative only by vesting the power of judicial review in the judiciary so that they can declare null and void their actions to the extent to which they are repugnant to or in violation of the provisions of the Constitution. On close look of our Constitution, it may be seen that our Supreme Court and High Courts have been designed to meet the superior obligation of maintaining the authority of the Constitution.[6]

[4] Constitution of India, Article 13(1)- "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void"

[5] Constitution of India, Article 13(2)- "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

[6] Vol. 25, No. ¾, B.B. Jena, Our Supreme Court an Appellate Legislature, The Indian Journal of Political Science, July-September-December, 1964, Indian Political Science Association, p.250-251, URL: https://www.jstor.org/stable/41854037

The Constitution provides that there shall be a Supreme Court of India[7] with original, appellate and advisory jurisdictions. The Court is placed at the highest pedestal by the provision that "the law declared by the Supreme Court shall be binding on all Courts within the territory of India"[8] and all administrative as well as judicial bodies and authorities shall act under the supervision of the Supreme Court.[9] The Supreme Court has also been given power to pass any order, decree or judgment for doing complete justice in a case which comes before it.[10] The law declared by the Supreme Court includes its interpretations, elaborations and pronouncements on the laws. In this way the law laid down by the Supreme Court is followed by all courts and tribunals in India.[11] They are obliged to enforce the principles and decisions of the Supreme Court. The Supreme Court lays down the law in the form of ratio decidendi while adjudicating a dispute. *Ratio decidendi* is the reason for decision or the principle formulated and acted upon by the court. This part of the decision operates *in rem*. Not

[7] Constitution of India, Article 124(1)- "There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges."

[8] Constitution of India, Article 141- "Law declared by Supreme Court to be binding on all courts. The law declared by the Supreme Court shall be binding on all courts within the territory of India."

[9] Constitution of India, Article 144- "Civil and judicial authorities to act in aid of the Supreme Court All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

[10] Constitution of India, Article 142- " Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

[11] Constitution of India, Article 227- Power of superintendence over all courts by the High Court(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction (2) Without prejudice to the generality of the foregoing provisions, the High Court may (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

only that the parties are bound by it but all courts in India are bound to follow it as it constitutes a part of the law of the land. However, if something is said by the Supreme Court in passing or with reference to a hypothetical situation, it is called *obiter dictum* and this is different from *ratio decidendi* of the case. This is not binding on the subsequent courts because it is not properly argued upon by the parties as they are not interested in it as it is no part of their case. All provisions of law are not likely to be considered or applied and all aspects of the matter are not likely to be considered by the court in the light of the relevant laws. Therefore, the *obiter dictum* is not considered binding.

The Supreme Court is the final arbiter on the disputes involving any question whether of law or fact on which the existence or extent of a legal right depends[12] and cases involving a substantial question of law on the interpretation of the Constitution.[13] It has been mandated that the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal within the territory of India.[14] Apart from these powers, the Supreme Court is the custodian of the rights of the people and protects them from legislative and executive abridgement. The right to approach the Supreme Court for the enforcement of rights guaranteed by Part III is itself a guaranteed fundamental right[15] and the apex Court has power to issue directions or

[12] In respect of original jurisdiction vide Article 131

[13] In respect of appellate jurisdiction vide Article 132

[14] Constitution of India, Article 136- "Special leave to appeal by the Supreme Court (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India." The Military Tribunals are exempted from its jurisdiction. Vide Art. 136(2).

[15] Constitution of India, Article 32- "Remedies for enforcement of rights conferred by this Part (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed"

orders or writs for the enforcement of any of the rights conferred.[16] Except by way of amendment of the Constitution, these powers vested in the Supreme Court can never be taken away by the executive or the legislature in India. The oath taken by the Supreme Court judges is indicative of the fact that the Supreme Court is the guardian of the Constitution and custodian of the rights of the people.[17]

It has been accepted that when certain forms of liberty are not conducive to the progress and development of the society, the Supreme Court may regulate it for the benefit of people and advancement of the society. Social interest in individual liberty may well have to be subordinated to other greater social interests. It has been held that if it protects and promotes social interest then such a law will be considered desirable law although it may infringe the liberty for the rest of the members of the society.[18] Curtailment on liberty of action of the individuals should be seen not only subjectively as applied to few individuals who come within their operations but also objectively as securing the liberty of a far greater number of individuals.[19]

However, Article 141 of the Constitution which obliges all courts and tribunals in India to follow the law let down by the Supreme Court does not distinguish between *ratio decidendi* and *obiter dictum.* It only says that the law laid down by the Supreme Court shall be followed by all courts in India without distinguishing between the two. So, the law laid down by the Supreme Court should be followed by all courts and tribunals. Supreme Court being the highest fountain of justice in the country, even its *obiter dictum* should command high respect. Thus, the guidelines laid down by the

[16] Constitution of India, Article 32(2)- "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
[17] Supra note 5, p.251-252
[18] Mr. Justice Das, A. K. Gopalan case, SCR, 1950. p. 292-293
[19] Supra note 6, p.254

Supreme Court in *Vishakha v. State of Rajasthan*,[20] were in the nature of *obiter dicta* and yet they were followed by all organisations, institutions for preventing sexual harassment of women at workplace till ultimately the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was passed. Through such landmark decisions the Supreme Court has contributed immensely in the development of our law and some of these decisions relating to family matters and matrimonial reliefs will be briefly discussed in this chapter.

Marriages are solemnised with great hope and expectations that they would be lasting and happy. The parties at this time believe that the marriage would bring them comfort, companionship and all that they need for a blissful family life but human nature as it is, circumstances do emerge when things go wrong and parties are compelled to take recourse to save the relationship or to dissolve it. So, the law provides for a number of matrimonial reliefs in the nature of divorce, restitution of conjugal rights, judicial separation, right to maintenance and dower. When the relationship is not completely broken down and there is a hope of mending it but one of the spouses unreasonably withdraws from the society of the other, the aggrieved spouse can petition for restitution of conjugal rights. When the marriage is not workable at all and the aggrieved party wants to get out of it, the remedy available is divorce. But when the marriage is not completely broken and there still exists some hope of reconciliation a better relief of judicial separation is available. When the marriage has been contracted in utter disregard of the mandatory requirements of the Act the relief is getting the marriage declared legally void. The marriage is *void ab initio* or void from the time when the relationship of husband and wife sought to be started. So, there never has been a marriage. Although, it is not legally imperative to

[20] Vishakha v. State of Rajasthan, AIR 1997 SC 3011

obtain a decree of nullity in case of void marriage, there might be circumstances where it would be preferable to do so. The abovementioned reliefs are found almost under all personal laws and yet the nature and extent of the grounds on which they are available are not same.[21]

5.2 DIVORCE

Marriages are always solemnised with great hope and the parties believe that they can achieve everything and fulfil all their dreams in the happy family life which they are going to have thereafter. But sometimes marriages fall on the rock and do not work out and become so odious that getting out of them is the biggest relief. So, despite the problems in divorce for the parties as well as for the children, every modern legal system provides for divorce or dissolution of marriage.

In *N. G. Dastane v. S. Dastane*,[22] the question was whether a decree of judicial separation can be granted on the ground of cruelty when cruelty is established but the same is condoned and the respondent has not specifically pleaded condonation.

The parties got married in May 1956. They were highly educated and affluent. Two daughters were born in 1957 and 1959. Between May and October 1960 there were tension between them and they accused each other of cruelty and harassment. In February 1961 the wife left home when she was three months pregnant. In August 1961 the third daughter was born. The husband filed matrimonial suit on February 19, 1962. His prayer was:

[21] Kusum, Cases and Materials on Family Law, Universal Law Publishing Co., 4th Edition, 2017, p. 21
[22] AIR 1975 SC 1534

1. Annulment of the marriage under Section 12(1)(c) of the Hindu Marriage Act[23] on the ground that his consent for the marriage was fraudulently obtained; in the alternative
2. Divorce under Section 13(1)(iii)[24] on the ground that the respondent was incurably of unsound mind and in the alternative
3. Judicial separation under Section 10(1)[25] on the ground that the respondent had treated him with cruelty so as to cause a reasonable fear in his mind that it would be detrimental or injurious for him to live with her.

The allegation of the husband was that before their marriage the wife was treated at Yeravad Mental Hospital for schizophrenia but her father it and misled him that she was treated for sunstroke and cerebral malaria. The trial judge rejected this contention. The court also did not accept that the respondent was on unsound mind. However, it held that the wife was guilty of cruelty and on this ground, it passed a decree for judicial separation. The husband and the wife both went on appeal to the district judge. The husband's appeal was dismissed and the wife's appeal was allowed. A second appeal was filed by the husband in the Bombay High Court which was also dismissed. The High Court came to the conclusion that the abuse and insult by the wife must have been in retaliation to the abuses, insults and rebukes by the husband. On further appeal to the Supreme Court by the husband, the approach of the

[23] Hindu Marriage Act, 1955, Section 12(1)(c)- "that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was obtained by force [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent];"

[24] Hindu Marriage Act, 1955, Section 13(1)(iii)- "as been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent."

[25] Hindu Marriage Act, 1955, Section 10(1)- "[(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in subsection (2) thereof, as grounds on which a petition for divorce might have been presented.]"

High Court was found to be erroneous and the findings not acceptable. Nonetheless, since the matter was pending for thirteen long years, instead of remanding it to the High Court, the Supreme Court proceeded with the case itself. The concept of cruelty was discussed in great detail by the court. It agreed with the warning given by Lord Denning L.J. in *Kaslefsky v. Kaslefsky*:[26]

"If the doors of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we step into a state of affairs where the institution of marriage itself is imperilled."

In the present case Chandrachud J. felt that accepting that the wife's conduct does not amount to cruelty is, to close forever the door of cruelty so as to totally prevent any access to it. Among the acts construed as cruelty were:

1. She would indulge in every sort of harassment and would blurt out anything that came into her mind like, "I want to see the ruination of the whole Dastane dynasty", "You are not a man", "You are a monster in a human body", "burn the book written by your father and apply the ashes to your forehead" or "pickle them (daughters) and preserve them in jar" and so on.
2. Threats to pour kerosene on her body and set fire to herself and the house.
3. Lock the husband out when he was due to return from office.
4. Mercilessly beat children, put chillies in their eyes.

The court pointed out that the burden of proof certainly lies on the petitioner but it is not proof beyond reasonable doubt. The court held that although there was cruelty by the wife, it was condoned by the husband. After the condonation there was no serious

[26] 1950 (2) All ER 398 (403)

allegation against her which would reinforce her earlier cruelty. So, even when initially cruelty could be proved, its condonation by the husband would not entitle him to a decree. So, his appeal was dismissed. The parties were fighting a legal battle for more than ten years with all kinds of allegations and counter allegations against one another. The marriage was for all purposes over but on a technical ground of condonation the petitioner was denied a remedy. So, there was no legal dissolution of the marriage. So, they were neither legally separated nor together.

In *P.L. Sayal v. Sarla Rani*,[27] the question was whether mental cruelty under the Hindu Marriage Act requires intention or *mens rea* to entitle the petitioner to matrimonial relief. In 1948 the parties got married and had two children. The husband, who was the petitioner alleged that from mid-1949 the wife started ill-treating him in order to compel him to leave the house of his parents and goes and lives with her parents. This unpleasant situation culminated in the wife giving him poison on the advice of a *fakir* with apparent purported object of bringing peace and harmony in the family. However, after this incident his health started deteriorating. The husband construed this as cruelty and sought judicial separation under Section 10 of the Hindu Marriage Act. The wife opposed the petition. She contended that the plea of cruelty was baseless and the real intention of the husband was to get rid of her to marry another woman. She accepted that the husband certainly suffered health problems but denied that she had any malicious intention in giving him the poison. The point raised was whether the act of the wife constituted such cruelty as to cause a reasonable fear in the mind of the petitioner that it would be detrimental for him to live with her. The district court held that it would not be detrimental. Hence, the husband filed an appeal. It was apparent that the husband had suffered serious health

[27] AIR 1961 Punj 125

problems and the wife also accepted that she had committed an evil act on the instigation of others. If she knew about the harmful effects, she would not have done it. The court referred to various English cases to ascertain to what extent intention is important in such cases. The court admitted the husband's appeal and a decree of judicial separation was passed. The court made the following observation:

"The respondent's administration of the "love potion" may have emanated from the laudable object of bringing about domestic amity…but it had produced deleterious effect on the husband who is entitled to say now that it produced condition which he should not be called upon to endure. No doubt, man and wife take each other in marriage for better or worse, in sickness and in health but a spouse is not thereby entitled to put the life of the other in jeopardy, no matter what the real intention may be. The person whose life is put in jeopardy is entitled to seek protection of the court."[28]

Allowing the appeal of the husband the court passed a decree of judicial separation on the ground of cruelty by the wife.

It is not the *mens rea* but the impact of the respondent's behaviour on the petitioner which is material in determining whether cruelty is caused to the petitioner to entitle him or her to a matrimonial relief. If the conduct has caused harm and if the apprehension of recurrence of such conduct is reasonable, the petitioner is entitled to protection by way of decree.

In *Mahendra Nath Yadav v. Sheela Devi*,[29] the question was whether dissolution of marriage through panchayat under customary practice can be a ground for divorce under Section 13 of the Hindu Marriage Act. In 1990 the parties got married and the

[28] P.L. Sayal v. Sarla Rani, AIR 1961 Punj 125, para 8
[29] II (2011) DMC 487 (SC)

ceremony of *gauna* was performed in 1991. The wife was a teacher and the husband was in the Army. They got little opportunity to live together but soon differences cropped up between them. The wife obtained a maintenance order under Section 125 of the CrPC and also filed a criminal complaint against the husband and his family. A panchayat was convened in 1997 and as per the alleged custom a sum of Rs. 30000 was given to the wife's family and a document of divorce was signed. In order to give legal effect to the divorce under Section 13 of the Act on the grounds of cruelty and desertion, the wife filed a counter claim for restitution of conjugal rights under Section 9. The family court passed a decree of divorce to the husband and rejected the wife's petition for restitution on the ground that the marriage was already dissolved through the panchayat in 1997. The wife filed an appeal against this order and the Allahabad High Court reversed the order of the trial court holding that dissolution of marriage by a panchayat as per prevailing custom in that area cannot be accepted as a ground for divorce under Section 13 of the Hindu Marriage Act and also held that if the husband wanted the decree on the basis of customary practice of dissolution of marriage by panchayat, in 1997 there was no need for him to petition for dissolution of the marriage under Section 13 of the Act. Filing this application meant that both the parties were of the view that the divorce granted by the panchayat was legal. So, the husband's appeal against the order was dismissed. A divorce secured under customary practice cannot be a ground for seeking judicial divorce under Section 13 of the Act under grounds of desertion and cruelty. Dissolution of marriage through accepted or recognised custom is legal under Section 29(2) of the Hindu Marriage Act[30] and if the divorce has been obtained under legally recognised custom it is not necessary for the parties to approach a court for obtaining a divorce decree on the ground of recognised

[30] Hindu Marriage Act, 1955, Section 29(2)- "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

custom. But such divorce cannot form the basis for approaching the court to claim divorce on the ground of desertion and cruelty under Section 13 of the Hindu Marriage Act.

In *Ashok Hurra v. Rupa Bipin Zaveri*,[31] the issue was in cases of mutual consent whether a divorce decree by consent be passed even after consent by one of the parties has been withdrawn?

In this case the parties had been married in 1970. After fourteen years of their marriage, under Section 13B[32] of the Hindu Marriage Act, they filed a joint petition. After a period of eight years, the husband approached the court alone and sought divorce. Notice was sent to the wife and on application of both parties, was adjourned. The trial court made a number of unsuccessful attempts for reconciliation of the parties. The husband remarried and had a child within a year of filing the petition. Criminal cases were filed by the wife asking the court to declare the second marriage illegal and the child illegitimate. After nearly nineteen months of the filing of petition of divorce the wife withdrew her consent and sought dismissal and prayed for dismissal of the petition. The husband opposed and argued that she had no right to withdraw after eighteen months had elapsed. The trial judge nevertheless, held that as the wife had withdrawn her consent a decree of divorce could not be passed. Against this order the husband preferred an appeal before a single judge of Gujrat High Court.

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[31] AIR 1997 SC 1266

[32] Hindu Marriage Act, 1955, Section 13B- "Divorce by mutual consent. – (1) Subject to the provisions of this Act, a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (Act no.68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (2) on the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such enquiry as it thinks fit, that a marriage has been solemnized and that the averments of the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

Having gone through the facts and circumstances and the law the court concluded that as the wife had not withdrawn the petition within the period of eighteen months and also as the marriage had irretrievably broken down, the divorce should be granted. The decree dissolving the marriage was made to take effect from the date of filing of the petition. Under Section 13B(2) a decree of dissolution of marriage under this section shall be passed with effect from the date of the decree. Thus, an order passed on March 3, 1996 was given the retrospective effect from 21 August, 1984 that is to say from the date of filing of the application. The wife filed letters patent appeal against this order before the division bench of Gujrat High Court. The appeal was admitted and the order of the single judge was set aside.

The court also referred to the clean hands maxim that is the party who comes to the court must come with clean hands which the husband certainly did not in this case. So, the division bench refused to grant divorce. Against this order the husband went on appeal to the Supreme Court. A two-judge bench of the court took up the matter under Article 142 of the Constitution where under the court may pass any decree, order as may be required for doing complete justice. The court admitted that the husband by entering into a bigamous marriage during the pendency of the divorce proceedings had committed a wrong.

In exercise of its jurisdiction under Article 142[33] of the Constitution the court passed an order for divorce contingent on the husband paying a sum of Rs.1000000 and

[33] Constitution of India, Article 142- "(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

Rs.50000 as litigation expenses to the wife. The court took into account totality of circumstances and came to the conclusion that the marriage was dead both emotionally and factually and there was no chance of revival. The court was convinced that this was a case where it ought to exercise its jurisdiction under Article 124[34] of the Constitution and granted divorce by a mutual consent in order to do complete justice in the cases.

5.3 RESTITUTION OF CONJUGAL RIGHTS

Right to consortium is an important component of the matrimonial bond which maybe said to be one of the legal incidents of marriage. A valid marriage gives rise to mutual rights and obligations between the parties and right to the company and comfort of the spouse is among them. So, when one spouse leaves the other without any reasonable cause the aggrieved party may seek assistance of the court for the restoration of cohabitation. The rationale behind the relief is to restore the conjugal relationship which has got estranged. The remedy is in the nature of an effort by the court for reconciliation and resumption of cohabitation between the spouses. The remedy has been recognised and provided for under all personal laws whether statutory or non-statutory.

Section 9 of the Hindu Marriage Act; Sections 32-33 of the Divorce Act; Section 36 of the Parsi Marriage and Divorce Act and Section 22 of the Special Marriage Act deal with this remedy. Muslim law also has provision for restitution of conjugal

[34] Constitution of India, Article 124- "(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven2 other Judges. (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal 3[on the recommendation of the National Judicial Appointments Commission referred to in article 124A] and shall hold office until he attains the age of sixty-five years:"

rights. As discussed by Mulla[35] and Fyzee,[36] if a wife ceases to cohabit with her husband without reasonable cause the husband may sue the wife for restitution of conjugal rights. Similarly, the wife has the right to demand fulfilment of marital duties by the husband through the relief of restitution of conjugal rights. So, this is a well-recognised and well-established relief under all personal laws.

The concept was introduced by English lawyers who were practising both in presidency and *mofussil* towns. Two important cases which were decided at the earliest stage and the anglicised judicial system in India where the remedy was contested and allowed were *Moonshee Buzloor Raheem v. Shamsoonissa Begum*[37] and *Dadaji Bhikaji v. Rukhmabai.*[38] In the first case the Privy Council applied the principle to Mohammedan law and held:

"On authority as well as principle, there is no doubt that a Musalman husband may institute a suit in the Civil Court of India for a declaration of his right to the possession of his wife and for a sentence that she return to cohabitation."

In the second case Pinhey J. who had earlier heard the case in 1885 had refused to grant the husband remedy on the following two grounds- firstly, the remedy could only be applied to situations where the spouses had cohabited. It would be inhuman, cruel and repugnant to human conscience to compel a young lady to go to a man whom she dislikes. Secondly, that the remedy was brought from English law and it had no foundation in Hindu law but within six months in appeal a Division Bench of the Bombay High Court comprising Sargent C.J. and Sir Baley J. set it aside and awarded the husband a decree of restitution of conjugal rights. In this case, although,

[35] Mulla, Principles of Mohammedan Law, 1972, para 28
[36] Fyzee, Outlines of Mohammedan Law, Oxford University Press, 1974, p. 121
[37] (1867) II MIA 551
[38] (1886) 10 Bom 301

the court of first instance had drawn the attention to the vexed question of relationship between morality and law and in founding the case within a broader humanitarian framework the appellate court preferred the easier path of accepting the tradition of male dominance casting the issue of justice and women's rights to the oblivion. The verdict made the case inseparable from women's cause.

Although at the initial stage the remedy was availed of only by the husband later it was used by deserted wives to restore their marriages. Now the remedy is available under all personal laws through matrimonial statutes. It has also been introduced to Muslim law through case law.

The most significant requirement for availing the remedy of restitution of conjugal rights is to prove the withdrawal of one spouse from the society of the other. As already stated, certain rights and obligations arise as legal incidents of marriage. Withdrawal from society means the refusal of one spouse to continue cohabitation with the other. There have been contentious disputes as to what constitutes withdrawal from one's society. The withdrawal from society may take place even when the parties are living under the same roof. When the husband himself is responsible for ousting the wife from the matrimonial home, it cannot be considered that the wife has withdrawn from the society of the husband.[39]

In *T. Sareetha v. T. Venkata Subbaiah*[40] the question was whether Section 9 of the Hindu Marriage Act providing for restitution of conjugal rights violates Articles 14, 19, 21 of the Constitution?

The husband had filed a petition for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act against his wife Sareetha. Sareetha was a film star. She

[39] Vol. II, Flavia Agnes, Family Laws and Constitutional Claims, Oxford University Press, 2011, p.23
[40] AIR 1993 AP 356

opposed the petition on the ground of jurisdiction of the Cuddapah Court. The trial court held that Cuddapah Court had jurisdiction to try to adjudicate the petition and against this the wife went to the High Court in revision. Chowdhury J., of the High Court upheld the order of the lower court on the issue of jurisdiction. The High Court examined the issue of constitutional validity of Section 9 of the Hindu Marriage Act. The judge held the provision of restitution of conjugal rights uncivilised, barbarous and an engine of oppression and held Section 9 violative of Articles 14, 19 and 21 of the Constitution.

The decree holder gets a right not only to the company of the other but also to have marital intercourse. This would result in transferring the choice of whether or not to have marital intercourse to the state and not to the individual concerned. As a natural corollary it also means the surrender of the choice.

Since restitution decree is capable of being enforced, the court was of the opinion that it is coercive enough judicial process likely to be used against the person's consent and free will. In the words of Chowdhury J., "nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act". Holding the decree of restitution of conjugal rights contrary to Article 21 of the Constitution guaranteeing right to life and personal liberty, the court held that right to privacy is a part of Article 21 and certainly includes human body's inviolability and integrity.[41] A decree for the restitution of conjugal rights is grossest form of violation of an individual's right to privacy. According to the court, Section 9 also violated Article 14 of the Constitution. It agreed that although in form Section 9 does not offend classification test since it makes no discrimination between husband and wife making the remedy available

[41] Supra note 21, p. 202

equally to both. But "bare equality of treatment regardless of equality of realities is neither justice nor homage to the constitutional principle". In the reality of society, the remedy is almost exclusively used by the husband and the reasons for this are obvious and numerous. The enforcement of a restitution decree against a wife may change her entire life pattern whereas the husband's position more or less remains the same. So, treating the husband and wife who are in reality unequal as equals Section 9 of the Act is violative of the rule of equal protection of laws. The court observed that the only advantage of a restitution decree was that it provides a ground for divorce at a later stage but the price for this was very high in terms of human dignity.[42]

The court held that Section 9 of the Hindu Marriage Act was savage, barbarous and is uncivilised and is violative of the constitutional provisions and hence, null and void.

However, the judgment was over ruled by the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha*[43] and is therefore, no more good law.

In *Harvinder Kaur v. Harmander Singh Choudhry*,[44] the issue was once again whether Section 9 of the Hindu Marriage Act providing for restitution of conjugal rights is violative of constitutional provisions relating to equality and privacy. The husband filed a petition for the restitution of conjugal rights against his wife on the ground that without any reasonable cause or excuse she had withdrawn from his company. The trial court passed a decree in his favour. Against the order, the aggrieved wife filed an appeal before the High Court challenging the constitutional validity of Section 9 by relying, among other authorities, on *T. Sareetha v. T. Venkata Subbaiah*[45] however, the same was dismissed. Avadh Behari J., denounced

[42] Ibid.
[43] AIR 1984 SC 1562
[44] AIR 1984 Del 66
[45] AIR 1983 AP 356

introduction of constitutional law in family matters as "introducing a bull in a China shop". The meaning, idea and purpose of cohabitation and consortium were discussed and the rationale behind a decree of restitution were elaborated in detail. It was held that restitution aims at cohabitation and consortium. A disproportionate emphasis on sex almost bordering on obsession as according to Delhi High Court coloured the views of the judge in T. Sareetha. The court held that the essence of marriage is cohabitation. So, the court held that Section 9 is in some way an extension of Section 23(2) and (3) which aims at stabilising a marriage and encourage reconciliation. A restitution decree in the words of the court acts as an index of connubial felicity. If the decree is disobeyed it is an indicium that the parties have reached a stage of no return. Also, in this parties get a ground for divorce after completion of one year.

The court held that Section 9 of the Hindu Marriage Act was constitutional and introducing constitutional law in family life serves no purpose. "In the privacy of home and married life neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of constitutional law has the effect of weakening the marriage bond...in the home the consideration that really obtains is the mutual love and affection which counts for so little in these old courts. Constitutional law principles find no place in domestic code".[46]

In *Dalbir Singh v. Simar Kaur*,[47] the husband instituted a suit for restitution of conjugal rights on the ground that the wife had withdrawn from his society without just cause. The wife contested the petition stating that the husband had filed this petition to ward off maintenance proceedings against him. She pleaded that she was

[46] Supra note 21, p. 203-204
[47] II (2002) DMC 371 P&H

forced to leave the matrimonial home by the husband who used to physically assault her. She also pleaded that the children from the former marriage of the husband were adults and they tormented her to an extent that she apprehended that it would not be safe for her to return to the matrimonial home. The trial court found that the wife's fears were genuine. Hence, the petition filed by the husband for restitution of conjugal rights was dismissed. On appeal, the High Court agreed with the trial court's finding that the wife's apprehension of being unsafe in the matrimonial home was well founded and that in this situation a decree for restitution of conjugal rights could not be passed in favour of the husband.

In *Mohinder Singh v. Preet Kaur*[48] the question was whether the husband's blindness after marriage was a reasonable ground for a wife for withdrawal of society so to defeat his petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. The facts of the case were that the parties were married for six months. The husband in a violent incident with his brother lost his eyesight and became totally blind. The wife went back to her parents and never came back. The husband filed a petition for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act but his petition was rejected. Hence, the appeal. The court held that the wife had a reasonable ground for withdrawal from the society of the husband. The court observed that the conjugal relations are meant for happiness and not for disaster and misery. No situation can afford happiness when she is forced to live as a wife of a blind and unprotected man.

Although, cruelty was neither alleged nor pleaded but according to the court it would amount to cruelty to the wife to expect her to live with a husband who has become totally handicapped visually just after six months of marriage.

[48] AIR 1981 JK 25

In *Itwari v. Asghari*[49] the question was whether a Muslim husband contracting another marriage can seek restitution of conjugal rights against the first wife and whether the plea of second marriage is a good defence available to the first wife. A Muslim husband had brought a suit for restitution of conjugal rights against his wife who refused to cohabit with him after his second marriage and accused him of cruelty. The parties were married in 1950. After sometime the relations soured and the wife deserted him and returned to her parents. The husband took no steps to bring her back but rather married another woman. The first wife filed an application under Section 488 of the CrPC, 1898 for maintenance. Thereafter, the husband filed a suit for restitution of conjugal rights. The wife contended that the husband turned her out of the house and had relationship with a woman whom he married later and also took her ornaments. So, he caused her immense physical and mental pain and he had also not paid her dower. The trial court held that the wife had not established cruelty. According to the trial court the second marriage by itself does not give rise to a presumption of cruelty. The husband's explanation that he had not taken his second wife to live in her house with Asghari found favour with the trial court. The court felt that if she was really aggrieved by the second marriage of her husband, she should have petitioned for dissolution of the marriage. Accordingly, the husband's suit for restitution was decreed. On wife's appeal the district judge reversed the finding of the trial court. According to him the husband's petition for restitution was only a counterblast to wife's petition for maintenance. Earlier, he had never tried to bring her back. His petition for restitution of conjugal rights was only a ploy to defeat wife's application.

[49] AIR 1960 All 684

In *Vijaykumar Bhate v. Neela Bhate*[50] the wife instituted a suit for divorce on ground of cruelty. The husband in his written statement made unfounded allegations of sexual immorality against his wife which were ordered to be dropped by way of an amendment. The wife was awarded a decree of divorce on the ground of mental cruelty. Thereafter the husband filed a petition for restitution of conjugal rights which was dismissed by the court. After dismissal of appeal by the Bombay High Court, the husband approached the Supreme Court. The Supreme Court held that the unfounded allegations of sexual immorality made by the husband in his written statement caused upon her and cannot be said to have been removed by amendments which were ordered. Allegations and counter allegations exchanged are indicative of strong hatred between the parties. Once the decree of divorce is passed, the relief of restitution of conjugal rights is sought merely in desperation and not serve any serious purpose and therefore, it must fail.

In *Kuldeep Kumar Dogra v. Monika Sharma*[51] the question was whether a husband who subjects his wife to physical and mental cruelty can approach the court for restitution of conjugal rights. The husband approached the court with a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. He alleged that his wife had withdrawn from his society and left the matrimonial home without a reasonable cause and that she refused to cohabit with him wilfully and was not performing her duties as a wife. The wife resisted the allegation on many grounds. She pleaded that he deliberately and intentionally had created a situation which was where living together was not possible. She alleged physical violence and mental harassment and therefore, her withdrawal was for a reasonable cause. She was a very religious woman who performed *pujas* in a temple and was respected by the people

[50] AIR 2003 SC 2462
[51] AIR 2010 HP 58

and she was known as "*sandhoori mata".* He found the popularity of the wife difficult to tolerate and tried to prevent her from going to the temple by burning the wooden bridge connecting the road to the temple. He also got the telephone and electricity connection of her room disconnected. The additional district judge dismissed the husband's petition who then preferred an appeal. The court after analysing the facts and circumstances of the case referred to different cases on the subject. The court came to the conclusion that there was reasonable cause for the wife to withdraw from the husband's company. It observed "A conjugal reading of the evidence of the parties leaves no room for doubt that it would not be possible for the wife…to live with the husband. She has been subjected to beatings and threats by him and she reasonably apprehends that it is not safe for her to live with the appellant."[52] So the husband's appeal was dismissed. A husband and wife are normally expected to live together but if the circumstances change and the situation becomes extremely harsh, there is no rule to compel the wife to live with her husband. The relief of restitution of conjugal rights is available to the petitioner only when the other spouse is guilty of withdrawal from the society without any reasonable cause. If the withdrawing spouse has sufficient and cogent reasons to leave the matrimonial home the relief will not be available.

In *Puspa Kumari v. Parichhit Pandey*,[53] on the ground of cruelty and demand for dowry, the wife had filed criminal cases against the husband and in-laws. In response the husband instituted a suit for restitution of conjugal rights. The trial court decreed his suit. Setting aside the decree passed by the trial court, the High Court held in a modern society it is very difficult to force any person to live according to the wishes of the other and hence, Section 9 of the Hindu Marriage Act providing for restitution

[52] Kuldeep Kumar Dogra v. Monika Sharma, AIR 2010 HP 58, p. 61
[53] 2005 MLR 551

of conjugal rights is losing its relevance because even if the prayer for restitution of conjugal rights is allowed, the decree cannot be enforced against the wife who does not want to cohabit with the husband. The cases under Section 498(A)[54] of the IPC and the Dowry Prohibition Act instituted by the wife against the husband and in-laws are pending. In such a situation allowing the prayer for restitution of conjugal rights filed by the husband would amount to annihilating the cases filed by the wife. Since, these facts have come on record, petition for restitution of conjugal rights cannot be allowed because there will always be a possibility of the wife being put in trouble in some form or the other.

In the case of *Santana Banerjee v. Susanta Kumar Banerjee,*[55] the question was whether a wife's apprehension of future torture in matrimonial home can constitute a reasonable cause for her withdrawal of society from the husband? The husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act against his wife who had deserted the matrimonial home along with their infant daughter just two years after their marriage. The husband had an old mother, an old disabled father and a handicapped brother. The wife wanted the husband to separate from them which was not possible for him to do and therefore, she left the matrimonial home. She also alleged physical and mental harassment, torture and dowry demand. Inspite of husband's efforts to bring her back she did not return. And hence, his petition for restitution of conjugal rights. He was ready to take her back despite the fact that on the basis of the criminal complaint he had to face humiliation of imprisonment for a day. The wife agreed to return on the condition that the husband went to her father's place to bring her back. The husband accepted that as

[54] Indian Penal Code, 1860, Section498(A)- "A woman's husband or her husband's relative is subject to crueltys- Anyone who abuses a woman who is a relative of a husband can be sentenced to three years in prison and also be liable to a fine."
[55] AIR 2012 Cal 16

well. Even after that the wife refused to return and alleged apprehension of torture if she returned. The trial court allowed the husband's petition against which the wife filed the appeal. The court observed "The apprehension of wife of further torture on her return to her matrimonial home, resulting in her death is found to be a myth as she herself deposed that she would return to her matrimonial home if husband went to her father's place to bring her back."[56] The reasons for withdrawing from the consortium must be genuine and weighty to defend a suit for restitution filed by the aggrieved party. If there is no compelling reason for the spouse to leave the matrimonial home other than some apprehension of future harassment or torture, the court would decree restitution. How useful or effective it would be for resumption of their cohabitation is a different question but the endeavour of the court is to retain the matrimonial bond.

In *C.R. Chenthilkumar v. K. Sutha,*[57] the court held that there is no specific rule to express the intention for resumption of cohabitation, there must be a petition for restitution of conjugal rights. The decree of restitution of conjugal rights is only a paper as it is not subject to specific enforcement but it helps secure other reliefs such as maintenance, custody of children and so on if the wife is not willing to go for divorce and wants to retain her marital tie or is expecting a patch up with her husband. When putting in motion the legal process on this ground, one should be careful enough that the decree serves in a roundabout way entry towards divorce on the ground of irretrievable breakdown of marriage.

In *Ram Niwas Singh Rathore v. Sumitra Singh Rathore,*[58] the Madhya Pradesh High Court upheld the decree of restitution of conjugal rights passed by the trial court in favour of the wife on the ground that the husband denied her right to lead marital life

[56] Santana Banerjee v. Susanta Kumar Banerjee, AIR 2012 Cal 16, p.19
[57] II (2008) DMC 278 Mad
[58] I (2004) DMC 442 MP

without any reasonable excuse. The court held the husband guilty of matrimonial misconduct for making baseless and reckless allegations against the wife that she was leading an unchaste life and has an illegitimate daughter. He illtreated her and threw her out of the matrimonial house. Therefore, it was held that he was not entitled to a decree of divorce on the ground of desertion. His contention was that the wife is living separately since 1991 and had not lived with him even after passing a decree of restitution of conjugal rights. The court held that the husband cannot take advantage of his own wrong.

In *Saroj Rani v. Sudarshan Kumar Chhadha*,[59] the wife instituted a suit for restitution of conjugal rights against her husband. In March 1973 the husband appeared before the court and submitted that he had no objection if the wife's petition is granted. In April 1979 the husband filed a petition for divorce under Section 13(1A) on the ground that one year had passed after the decree was passed and cohabitation had not taken place between the parties. The wife alleged that in pursuance of the decree when she went to the husband's she was turned out within two days. She also contended that she had approached the lower court for the enforcement of the decree. The husband's petition for divorce was dismissed by the trial court. But on appeal the husband was granted a decree of divorce. The wife filed an appeal before the Supreme Court seeking to set aside the decree of the High Court on the ground that the husband cannot be allowed to take advantage of his own wrong. On behalf of the wife, it was argued that Indian wives should not be made to suffer at the hands of cunning and dishonest husbands. But the Supreme Court held that noncompliance of the decree of restitution of conjugal rights does not amount to taking advantage of his or her wrong as mentioned in Section 23(1) of the Hindu Marriage Act. The court held that the

[59] AIR 1984 SC 1562

marriage had broken down irretrievably and therefore, the parties could not live together as husband and wife and in such circumstances, it is better to end the marriage. If the conduct of the husband is to be treated as a wrong then legislative action was required to that effect.

In *Santosh Kumar Pandey v. Ananya Pandey*,[60] the question was whether a petition for restitution of conjugal rights was maintainable under Section 9 of the Hindu Marriage Act when the marriage is denied by one of the parties. The husband filed a petition for restitution of conjugal rights under the Hindu Marriage Act on the ground that the wife had withdrawn from his consortium without any reasonable cause. This was opposed by the wife on the ground that she was never married to him and hence, there was no question of restitution of conjugal rights. The family court dismissed the husband's petition and hence the appeal. The High Court, dismissing the appeal held that the existence of relationship of husband and wife is the *sine qua non* for maintaining an application under Section 9 of the Hindu Marriage Act. So, when the very existence of marriage between the parties is in question, a petition for restitution is not maintainable. A declaration as to the validity of marriage must be obtained first.

Legal incidents of marriage arise only if there is a valid marriage. So, there can be no matrimonial rights and obligations if there has been no valid marriage.

5.4 JUDICIAL SEPARATION

The Court has the power to issue a decree for judicial separation where the petitioner has been unable to establish a ground of divorce or has opted for judicial separation and not divorce. Even after obtaining a decree for judicial separation, the parties can reconcile and resume cohabitation. Although, this is neither mandatory nor does it

[60] AIR 2013 Chh 95

happen very often in fact. If the parties have not started living together even after one year of a decree of judicial separation, either party is entitled to a decree of divorce merely on the ground that they have not been able to resume cohabitation. There is no need to prove any other ground. It effectively becomes a ground of irretrievable break down of marriage.

In *Angrez Kaur v. Baldev Singh*,[61] the issue was whether a long period of separation could ripe into a right to seek divorce. The facts of the case were that the husband filed a petition for restitution of conjugal rights under Section 9[62] of the Hindu Marriage Act on the ground that the wife had without any reasonable cause left him. The court found that the wife had reasonable ground to live separately from him and therefore he lost the case. After fifteen years of actual separation and twenty-nine years of marriage, the husband petitioned for divorce on the ground that they were living separately since long and both the parties submitted that they could not cohabit. The district court granted the decree but on appeal the High Court found that the husband was at fault and so could not be given divorce. The husband's prayer was not granted as no one should be allowed to take advantage of their own wrong. The case once again brings to light the pathetic state of affairs where parties are neither living together nor are they free to restart their lives. The petition at the appellate stage could have been converted into a petition for divorce by mutual consent as both the parties admitted that they were living separately for long and there were no prospects of reconciliation.

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[61] AIR 1980 P&H 171

[62] The Hindu Marriage Act, 1955, Section 9- "Restitution of conjugal rights- When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. [Explanation. Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]"

In *M. Aruna Kumari v. A.V. Janardhan Rao*,[63] the issue was whether decree of judicial separation was granted with consent of both the parties, would constitute a ground for divorce under Section 13(1A) (i) of the Act[64] that is whether non-cohabitation after separation decree would constitute a ground for divorce.

The facts were that the wife had filed a petition for judicial separation and the husband was contesting but in order to put an end to the tension in his written statement the husband indicated that he had no objection if the decree was granted to the wife. After putting in efforts for reconciliation the court passed the decree on 23.12.1995 on 28.12.1996 that is after the lapse of one year the husband the husband wanted divorce under Section 13(A)(i). the wife contested the case and contended that she was never wanted separation and that she obtained the decree in the hope that there might be a behavioural change in the husband. The family court rejected the husband's petition on the ground that the decree of judicial separation was passed uncontested and was as good as consent or collusive decree and therefore, he could not be allowed to take advantage of his own wrong. The Andhra Pradesh High Court on appeal examined the entire evidence and relied on *Saroj Rani v. Sudharshan Kumar Chadha*,[65] held that in matrimonial matters a consent decree per se cannot be treated as collusive. So, the wife's special leave petition challenged the same. She contended that the evidence before the court was not properly considered by the high court and so its finding should not be binding and the matter be remitted to the high court for reconsideration. She further pleaded that there was sufficient evidence to

[63] 2003 (5) SCALE 290

[64] The Hindu Marriage Act, Section 13(A) (i)- "Alternate relief in divorce proceedings- In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section(1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.]"

[65] AIR 1984 SC 1562

indicate that the husband had been paying her visits even after the decree of separation and even stayed with her. However, on the basis of evidence and facts the court found that there was no reason to interfere with the order of the high court in exercise of its power under Article 136[66] of the Constitution.

The wife's appeal against grant of divorce was rejected. The high court rejected wife's appeal against grant of divorce. But when it was pointed out to the court that their daughter had attained marriageable age and that the father was not taking any interest or responsibility the court directed that he should make some provision for marriage. He was asked to pay Rs. 50000/- and his office was directed to deduct Rs. 5000/- per month from his salary every month for ten months and send the amount to her. The wife's plea in this case was not justified. No one can misuse the court's time and resources on trivial or superfluous plea that she had sought the court decree of judicial separation only believing that the husband would change and but that as a matter of fact she never wanted a separation. After obtaining the decree she cannot defeat the husband's claim to rely on the decree to seek a divorce on ground available to him under the law.[67] It may be mentioned here that *ex parte* decree of separation or restitution is as good as contested decree in invoking the ground under Section 13(1A).[68]

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[66] Constitution of India, Article 136- "Special leave to appeal by the Supreme Court(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

[67] Supra note 21, p.158

[68] The Hindu Marriage Act, Section 13(1A)- "Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [22] [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no

In *Hirachand Srinivas Managaonkar v. Sunanda*,[69] the issue was whether a petitioner has a vested right to get a remedy under section 13(1A) of the Hindu Marriage Act only by demonstrating that the ground for such relief exists. The facts of the case were that the wife had obtained a decree for judicial separation on the ground of husband's adultery. The husband was ordered to pay maintenance to the wife and minor daughters. There was non-compliance with the order on the part of the husband and he also continued to live adultery. He petitioned the court for divorce under section 13(1A)(i) on the ground that there has been no cohabitation after the decree of separation. His plea was dismissed by the court on the ground that no one could be allowed to take advantage of his own wrong. The court iterated that even after a decree of judicial separation the parties are obliged to do their part for reconsideration and cohabitation. He had a duty as a husband towards the wife and the wife was expected to act as a devoted wife. The husband in refusing to pay maintenance to the wife, failed in his duty as husband and thereby committed a wrong within the meaning of Section 23(1)(a) of the Act.[70] The offence does not get frozen or erased only on passing of a decree or judicial separation which only suspends certain duties and obligations of the spouses without breaking the wedlock. The husband's living in adultery without any remorse was held to be wrong which he intentionally committed to frustrate any attempt to reunite so as to justify rejection of his divorce petition. The husband was not allowed to take advantage of his own wrong of not paying maintenance which was ordered the court earlier and his petition for divorce on the

restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]"

[69] AIR 2001 SC 1285

[70] The Hindu Marriage Act, Section 23(1)- "Decree in proceedings- In any proceeding under this Act, whether defended or not, if the court is satisfied that (a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief"

ground of non-cohabitation after a decree of judicial separation was rejected. "Once cause of action for getting decree of divorce under Section 13(A) arises, it does not crystallise into a right which the court is bound to concede"[71]

The arguments advanced in this case were not very cogent. A wrong founded on an earlier decree in this case- judicial separation should not logically be an obstacle to a subsequently sought relief under Section 13(1A). Further, even after a court battle ended in a decree of judicial separation to expect the husband to act as a dutiful husband and the wife as a dutiful wife appears to be too unrealistic. As far as the wrong of non-payment of maintenance is concerned the court should take it up separately and ensure that the order is complied with and the wife's right to maintenance does not get frozen on court's dismissal of the husband's petition under Section 13(1A) on the ground of his non-payment of maintenance.[72]

In *Madhukar Bhaskar Sheorey v. Saral Madhukar Sheorey*,[73] the question was ether a husband commits a wrong within the meaning of Section 23[74] of the Hindu Marriage

[71] Hirachand Srinivas Managaonkar v. Sunanda, AIR 2001 SC 1285, the court remarked on p.1290
[72] Supra note 21, p.158- 159
[73] AIR 1973 Bom 55
[74] Hindu Marriage Act, 1955, Section 23- "Decree in proceedings, (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that (a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and (b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and [(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and] (c) [the petition (not being a petition presented under section 11)] is not presented or prosecuted in collusion with the respondent, and (d) there has not been any unnecessary or improper delay in instituting the proceeding, and (e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly. (2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties: [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause

Act by not putting in efforts when his wife has obtained a decree of judicial separation on the ground of cruelty and desertion, the wife had obtained a decree of judicial separation in 1965. After three years the husband brought a petition for divorce under Section 13(1A) of the Hindu Marriage Act on the ground that there was no resumption of cohabitation between the parties for more than two years. For more than two years for the decree of judicial separation, resumption of cohabitation between the parties for more than two years as required by the Act prior to the amendment of 1976. The court dismissed the petition of the husband on the ground that Section 13(1A) should be read with and is controlled by Section 23 of the Act under which a petitioner for a remedy cannot take advantage of his own wrong or impediment. Moreover, since the wife had obtained the decree of judicial separation on the ground of cruelty and desertion, according to the lower court, the husband should have assured her that he would treat her well. There was no refusal by the wife for cohabitation. This is the opinion of the court amounted to taking advantage of his own wrong and therefore, he was held not to be entitled to any relief under Section 13(1A) of the Act. Hence, the husband appealed.[75] The court reviewed the earlier cases on the point and traced the history of Section 13(1A) and the relationship between this section and Section 23 of the Act and observed:[76]

(iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.] [(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.][(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]"

[75] Supra note 21, p.152

[76] Madhukar Bhaskar Sheorey v. Saral Madhukar Sheorey, AIR 1973 Bom 55 at p.58

"Section 13(1A) refers to the existing state of affairs and has no reference to a wrong committed by a party to the marriage or by whom the wrong is committed. This provision is totally different from the provisions of section 13(1)(viii) and (ix) which gave the right to apply for divorce only to the wrong party and not to the wrongdoer. It is undoubtedly true that any relief granted by the court will have to take into consideration the conduct of the party applying for divorce by virtue of section 23(1). But such conduct must, in any case after the amendment of Section 13 in 1964, necessarily be the conduct subsequent to the passing of the decree of judicial separation or restitution of conjugal rights and not prior conduct. There is no obligation to remedy the wrong which led to the decree for restitution of conjugal rights or judicial separation."

In *Leela Devi v. Hari Rao,*[77] the High Court of Karnataka held that the spouses had already entered the twilight of their lives and it would be unusual that either of them would find another like partner. As they were living separately for fifteen years the court held that their continued separation sanctioned by court decree would serve the ends of justice. For the period of judicial separation, the court granted Rs. 7500/- as maintenance.

5.5 RIGHT OF MAINTENANCE

A valid marriage gives rise to rights and obligations between the parties inter se and maintenance is one of them. A wife is entitled to claim maintenance not only under the personal laws but also under the provisions of the Criminal Procedure Code, 1973. Under the personal laws only if there are matrimonial proceedings and application for maintenance can be made. But under the provisions of the Criminal Procedure Code,

[77] 1 (2003) DMC 375 Kar

there need not be any such matrimonial proceeding. It may be noted here that under the Hindu personal law there is an additional provision for maintenance. The Hindu Adoption and Maintenance Act, 1956 contains provisions for maintenance of a Hindu wife. A Hindu wife under Section 18 of the Act is entitled to live separately from her husband and claim maintenance if her separate living is justified under the provisions of the Act. Provisions of maintenance of women living in a domestic relationship have also been made under the Protection of Women from Domestic Violence Act, 2005. The provisions of this Act are applicable regardless of religion of the parties.

In *Ghari Lal v. Surjit Kaur*,[78] the question was whether proceedings under Section 5[79] of the Limitation Act, 1963 for condonation of delay can be considered as proceedings under Section 24[80] of the Hindu Marriage Act. The husband had got ex parte decree of restitution against the wife. After the period of limitation had passed the wife filed an application for setting aside the decree. She also filed an application under Section 5 of the Limitation Act praying for condonation of delay. At the time when this application was pending, she filed an application for maintenance under Section 30 of the Jammu and Kashmir Hindu Marriage Act, 1980.[81] The husband

[78] AIR 1997 J&K 72

[79] Limitation Act, 1963, Section 5- "Extension of prescribed period in certain cases- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

[80] Hindu Marriage Act, 1955, Section 24-"Maintenance pendente lite and expenses of proceedings- Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

[81] Jammu and Kashmir Hindu Marriage Act, 1980, Section 30- "Maintenance pendent-elite and expenses of proceedings- Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, if may seem to the court to be reasonable."

opposed her application on the ground that proceedings under Section 5 of the Limitation Act could not be regarded as proceedings for the purposes of grant of maintenance. However, his plea was rejected and hence, this appeal. The husband's appeal was admitted. The High Court relied on *Puran Chand v. Kamla Devi*[82] where it was upheld that the maintenance is awardable on monthly basis "during the proceedings" which connotes that maintenance is admissible from the time of commencement of the proceedings till they come to an end. According to the court proceedings in trial court ordinarily commences when issues are framed and since there can be no stage of framing of issues in a petition for condonation of delay. In proceedings under Section 5 of the Limitation Act, Section 30 of J&K Hindu Marriage Act cannot apply. So, the court held that application for condonation of delay was not a proceeding within the meaning of Section 30 of the J&K Hindu Marriage Act. The court conceded that this provision helps a litigating spouse who does not have sufficient means to maintain himself or herself. The court observed:

"But at the same time, this provision cannot be used in such a way that it acts as a weapon of sword for harassment of the other party."

Strict construction of provisions can result on hardships to a party sometimes. If a wife for instance, obtains *ex parte* order and the husband files an application for setting aside and condonation of delay for seeking restitution for the order only to harass the wife, should the court deny her expenses to contest the application. Each case is unique and needs to be decided by the court using its own discretion in view of the facts and circumstances.

[82] AIR 1981 J&K 5

In *Sushila Viresh Chhawda v. Viresh Nagshi Chhawda*,[83] the issue was whether litigation expenses of an interim maintenance under Section 24 can be claimed where the main petition is for nullity of marriage.

A husband instituted a suit for nullity of marriage under the Hindu Marriage Act on the ground of fraud. He alleged that the wife was suffering from a big tumour in her ovary which had to be removed along with the ovary only after 8 days of marriage and this serious ailment was concealed at the time of marriage. The wife filed an application for interim maintenance under Section 24 of the Hindu Marriage Act. The husband opposed the application and contended that the marriage was void on account of the fraud committed by her. So, she was not entitled to maintenance. Thus, the family court summarily rejected the wife's obligation without examining the merits. Hence, she filed special leave petition under Article 227[84] of the Constitution. The order of the family court was set aside by the high court. The court held that the wording of Section 24 is very clear that an application for maintenance can be filed in any proceeding under the Act and it observed:

"When a fact of marriage is acknowledged or proved, alimony follows subject, of course, to the discretion of the court in the matter having regard to the means of the

[83] AIR 1996 Bom 94

[84] Constitution of India, Article 227- "Power of superintendence over all courts by the High Court(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction (2) Without prejudice to the generality of the foregoing provisions, the High Court may (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces"

parties and it would be no answer to the claim….that the marriage was void *ipso jure* or was voidable."

In *Surendra Kumar Bhansali v. Judge, Family Court*[85] the question was whether an application under Section 25 of the Hindu Marriage Act is maintainable when an appeal is pending for divorce. Her husband had obtained a decree of divorce against his wife. Thereafter, the wife filed an application under Section 25 for permanent alimony. She also filed an appeal against the decree of divorce. The husband challenged her application for maintenance on the ground that appeal against the divorce decree was pending. So, no order for maintenance under Section 25 of the Hindu Marriage Act could be passed. Nonetheless, a maintenance order was passed. The husband filed a writ petition in the High Court under Articles 226 and 227 of the Constitution praying for quashing of the family court order. The High Court dismissed the husband's appeal and held that an application under Section 25 can be made at the time of passing of the decree or any time thereafter. In the present case since the divorce petition by the husband was decreed and the marriage dissolved, the wife's application was held to be maintainable.

An appeal against a divorce decree does not disentitle a party from applying for maintenance under Section 25 of the Hindu Marriage Act. Under the provisions of Section 25 such application can be filed at the time of passing of the decree or at any time thereafter. The right is not taken away by filing an appeal.

In *Bai Tahira v. Ali Hussain Fissalli Chothia*,[86] the issue was whether payment under Section 127(3) of the Code of Criminal Procedure however insufficient absolved a

[85] AIR 2004 Raj 257
[86] AIR 1979 SC 362

Muslim husband from his liability to maintain his divorced wife under Section 125 of the Code of Criminal Procedure.

Ali Hussain had married Bai Tahira in 1956. This was his second marriage. In 1962 he divorced her. In a settlement between them the flat in which they were living was transferred to her. In addition to this the amount of *meher*- Rs.5000, *iddat* amount Rs. 180 were also adjusted in the settlement but after some years the wife filed an application for maintenance under Section 125 of the CrPC. The magistrate granted her a monthly allowance of Rs. 400 for herself and Rs. 300 for the child. On appeal the order was set aside by the Bombay High Court. Hence, the wife's appeal to the Supreme Court which was allowed.

Under Section 127(3)(b) of the CrPC if a woman receives on divorce the whole of sum payable to her under the customary or personal law then the magistrate shall cancel any maintenance order made in favour of the wife under Section 125 of the CrPC. This provision raised two questions. Firstly, whether the sum received by the divorced woman under the personal law would include dower or *meher* and secondly, whether the wife was barred from claiming maintenance even if the amount paid to her was just nominal. In some cases, the court construed the provisions as including dower or *meher* and hence deny maintenance to the petitioner wife but in some other cases a liberal interpretation was given and the argument that payment of the sum in lieu of *meher* and other household articles will belong to her would absolve the husband of any liability to maintain the wife was rejected. This case settled the question. Krishna Iyer J., held:

"The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate, but cannot annihilate that rate

unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom."

Although, the husband had fulfilled his obligation with respect to the *meher* amount of Rs. 5000 and *iddat* allowance of Rs. 180 he could not be absolved of his obligation under Section 125 of the Code.

The court held that the scheme of chapter IX Code is for a social purpose. Ill-used wives and desperate divorcees shall not be driven to the streets but where the husband by customary payment at the time of divorce has adequately provided for series of subsequent payments not required. The adequacy of provision made by him by way of payment is all important and if it is enough for her maintenance no further payment need be made but if the amount is inadequate or illusory then such payment cannot absolve the husband of his obligation under Section 125 of the CrPC.

In *Md. Ahmad Khanv. Shah Bano Begum*[87] the question was to what extent a Muslim husband is liable to maintain his divorced wife under Section 125 of the CrPC, 1973. Md. Ahmad Khan was an advocate who was married to Shah Bano Begum in 1932. They had five children. After living together till 1975 she was driven out of the house by the husband. She filed a petition for maintenance under Section 125 of the CrPC in 1978. Her husband divorced her by irrevocable *talaq* soon after she made an application for maintenance. His contention was that he had no obligation to maintain her after divorce. The husband was ordered to pay her a sum of Rs. 25 per month by the judicial magistrate at Indore. The wife had alleged that the husband was earning Rs. 60000 per year. The Madhya Pradesh High Court, on appeal increased this amount to Rs. 179.20. The husband being dissatisfied with the order filed an appeal

[87] AIR 1985 SC 945

before the Supreme Court challenging the maintainability of the petition as well as his liability to maintain her after the period of *iddat* and after returning her *meher*.

The court examined various authoritative texts and translations of the verses of the holy Quran in support of the view that a divorced woman Muslim woman has a right to be maintained even after expiry of the *iddat* period. The husband's contention that the return of the whole amount of Rs.30000 which under the applicable personal law was payable after divorce under the provisions of Section 127 of the CrPC absolved him from liability for maintenance towards her was not accepted. The court opined that that *meher* was an obligation imposed on the husband as a mark of respect for the wife. It cannot be regarded as a sum payable in consideration of divorce.

The court reiterated the wife's right to maintenance and imposed costs of Rs. 10000 on the husband who had divorced his wife and threw her out of the matrimonial home after forty-three years of marriage and after having five children. The court held that the provision for maintenance under Section 125 of the CrPC is independent of the religion of the parties. It is secular law according to the court applicable to all regardless of their religion.

The judgement led to acrimonious debates and on Muslim women's right to maintenance from the husband after divorce. The controversy and debate on the judgement ultimately led to the passing off the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In *Danial Latifi v. Union of India*,[88] the question was whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 was valid. It was challenged on the ground that it violates Articles 14, 15 and 21 of the Constitution.

The Muslim Women (Protection of Rights on Divorce) Act was enacted after the judgment of the Supreme Court in the *Shah Bano case*[89] where it was held that if the divorced wife is able to maintain herself, the husband's liability comes to an end with the expiry of the *iddat* period but if she is unable to maintain herself, then she is entitled to claim maintenance under the provisions contained in Section 125 of the CrPC. The Muslim Women (Protection of Rights on Divorce) Act was enacted with a view to abrogate the judgment of the Supreme Court in the *Shah Bano case*.

The Muslim Women (Protection of Rights on Divorce) Act is discriminatory and violates the equality and non-discrimination clause of the Constitution. The provisions of the Act are violative of Article 14 of the Constitution. However, in this case the court upheld the constitutional validity of the Act.

In *Dr. Gladstone v. Geetha Gladstone*,[90] the question that arose was of there being no specific statutory provisions which create an obligation on a Nadar Christian to maintain his wife and child. The Indian Divorce Act does have provisions for the court to award maintenance to the wife and children but that can be done only in suits which are filed for judicial separation or divorce. However, the court maintained that every Indian citizen is bound to maintain his wife and children. The duty of a

[88]AIR 2001 SC 3958
[89]Md. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945
[90]I 2003 DMC 617

Christian to maintain his wife and children had earlier come up before the Travancore Cochin High Court in *Cheriya Varkery v Ouseph Thresia*[91] had observed thus:

"In matters not governed by statute or customary law, it is the principles of 'justice, equity and good conscience' that should apply, and it is supposed that those principles are to be found in the Common Law of England. Under that law the Obligation of the husband to maintain his wife is not a mere moral obligation but it is a legal obligation which could be enforced in law although not by direct action by the wife. Therefore, according to the personal law of the Christian in Travancore- Cochin State, the husband has a legal obligation to maintain his wife. The wife is entitled to claim separate maintenance only if there is justifiable cause for her refusal to live with him. The question whether the wife has justifiable cause for refusing to live with her husband will depend upon the facts of each case. desertion by the husband and habitual cruelty are recognised as justifiable causes."

Thus, citing the above case, the court held that it was not in agreement with the contention raised by the counsel about absence of a statutory provision regarding maintenance payable by a Christian husband. In this case the court held that the court has a discretion to fix the maintenance and may award a sufficient amount which it thinks is fit for maintaining the wife and child. The court also held that while fixing this amount it shall take into consideration the income, earning capacity, property and other financial resources of the parties.

A similar issue had come up before the court in *Scariah Varghese v. Marykutty*,[92] and the principle laid down in *Cheriya Varkery's* case[93] was followed and the court held

[91] AIR 1955 Travancore-Cochin 255
[92] 1991 (2) KLT 71
[93] Supra note 91

that a Christian father has an obligation to maintain his wife and children even though there are no statutory provisions.

In *Chako v. Annamma*,[94] a Division Bench of the court considered the duty of the Christian husband to maintain his wife and held that a Christian husband is liable to maintain his wife. The court held the following:

"We feel that we are not bound to hold that a Christian husband has no legal liability to maintain the wife. Criminal Law of the country and the personal law of Indians of other community make it plainly clear that the husband has got a liability to maintain the wife in certain circumstances. This obligation created by the criminal law is certainly applicable to a Christian husband also. The husband is liable to pay maintenance if conditions which would compel the wife to live separately."

The same was upheld by a Division Bench of the Court in Joy v. Usha.[95]

In *Capt. Suneel v. Union of India*,[96] the question was whether an army officer's wife can claim maintenance under the Army Act although she has a relief under Section 125 of the CrPC and Section 24 of the Hindu Marriage Act.

In 1995 the parties got married under the Hindu Marriage Act but subsequently their relationship deteriorated and in 2001 the husband filed a petition for divorce under Section 13 of the Hindu Marriage Act. The wife filed criminal complaints under

[94] 1993 (1) KLT 675
[95] I.L.R. 1996 (2) Kerala 580
[96] AIR 2004 Del 95

Section 406[97] and 498A[98] of the IPC against the husband and his parents and thereafter, a case was registered. She also petitioned the Army Commander, Headquarters for maintenance allowance. After giving a hearing to the husband the Army Commander passed an order sanctioning deduction of 22% from the pay of the petitioner husband towards maintenance of the wife. Against this came the present write petition by the husband.

The contentions of the husband in appeal were:

1. That he never neglected to maintain his wife.
2. That he had made sufficient provision for her by depositing an amount of Rs. 200000 as fixed deposit out of which she has fraudulently withdrawn Rs. 100000.
3. That she was earning Rs. 5000 per month.
4. That the wife made an application to the Army Commander for grant of maintenance instead of making an application for maintenance under Section 125 of CrPC or under Section 24 of the Hindu Marriage Act in the divorce proceeding
5. The Commander-in-Chief has passed an order for deduction from his pay at the rate of 22% without considering merit of the case and recommendations of the Commanders-in-Charge of the command.

There was one important issue to be decided. The court held that the power to grant maintenance under the Army Act are separate from and independent of the provisions

[97] Indian Penal Code, 1860, Section 406- "Punishment for criminal breach of trust- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both"

[98] Indian Penal Code, 1860, Section 498A- "Husband or relative of husband of a woman subjecting her to cruelty-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

contained in Section 125 of the CrPC and Section 24 of the Hindu Marriage Act. Section 90(i) of the Army Act provides for deduction from the salary of an officer of any amount required by order of the central government or any prescribed officer to be paid towards the maintenance of his wife or his legitimate or illegitimate child. Under Rule 193 of the Army Rules, the prescribed officer for purposes of clause (i) of Section 90 is the Chief of the Army staff or the Officer commanding the Army. Moreover, Army Order 23/94 contains a detailed procedure to be followed before ordering the deduction of any sum from the pay and allowances of an officer. In the light of the afore mentioned provisions the wife was entitled to claim maintenance by making application to the army authorities.

Under the Army Act there are clear and elaborate provisions as well as procedure for granting maintenance to wives of Army Officers. A wife is entitled to claim maintenance under these provisions instead of the provisions in the Code of Criminal Procedure or the Hindu Marriage Act. So, the provisions of the CrPC and the Hindu Marriage Act relating to maintenance do not debar an Army Officer's wife from claiming maintenance under the provisions of the Army Act.

In *Monika Rana v. Yogeshwar Singh Sapehia*,[99] the question was whether a husband having incapacitated himself from earning can claim maintenance from his wife. The husband was a B.Sc. B.Ed. graduate who filed application for divorce under Section 9 of Hindu Marriage Act against his wife on the ground of desertion and cruelty. He further filed a petition for maintenance and litigation expenses under Section 24 of the Hindu Marriage Act. He contended that he had no means of livelihood nor did he have any property but the wife was a J.B.T. teacher and a government employee. The wife denied his contentions and said that the husband was a man of sufficient means

[99] AIR 2011 HP 54

and could support himself since his father was a retired principal of a senior secondary school and his mother was working as headmistress. The wife contended that he had sufficient landed property and the husband did not want to work. She said she was willing to maintain him if he lived with her. The additional district judge decreed his application and ordered the wife to pay him monthly allowance of Rs. 500 and Rs. 2000 for the proceedings. Against this order the wife filed this appeal. After going through the facts and relevant judicial decisions the court held that the husband himself had incapacitated himself and it was not that he was seeking a job but could not find any. The support from his parents could also be taken into account when assessing his income. The offer from the wife that she was ready and willing to maintain him in case he joins her in staying with her. So, the order for maintenance was set aside.

Although, under the provisions of the Hindu Marriage Act a husband is entitled to claim maintenance from the wife. But if he incapacitates himself, he cannot claim maintenance.

In *Badshah v. Urmila Badshah Godse,*[100] the questions were:

1. Whether a wife who has been defrauded into a bigamous marriage entitled to maintenance under Section 125 of the CrPC even though such marriage is legally void?
2. Can the husband who has committed a fraud take advantage of his own wrong to defeat the wife's claim on the ground that her marriage being void she has no right against him and he has no duty towards her for maintenance?

[100] AIR 2014 SC 869

These questions had arisen earlier also not only before the high courts but even before the Supreme Court but the opinions were divided. Helpless and innocent wives had to suffer due to technicalities of law. The present judgment resolved the problem.

A wife filed a petition for maintenance for the child and herself under Section 125 of the CrPC.[101] The husband opposed the petition on the ground that there was no legal marriage and hence no liability on his part. The marriage was contracted when the husband was already married. The fact of his marriage was concealed and fraudulently a marriage was contracted with the petitioner. She was kept completely in the dark about the earlier marriage. The lower court however, allowed her claim. It was acknowledged that there could not have been a legal marriage between them as

[101] Code of Criminal Procedure, 1973, Section 125-"Order of Maintenance for wife, children and parents(1) If any person having sufficient means neglects or refuses to maintain-(a) his wife, unable to maintain herself, or (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority; (b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation. - If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

the husband was already married. The husband could not be allowed to take advantage of this situation created by himself. Maintenance at the rate of Rs.1000 per month to the wife and Rs.500 per month to the child was thus, awarded. Against this the husband filed the present appeal.

The court took into account totality of the circumstances and adopted a realistic approach- an approach which could serve the purpose behind the beneficent laws notwithstanding their technical rigmaroles. Although, the husband was already married he concealed this fact from her and trapped her into a marriage. He cannot be allowed to take advantage of his own wrong. There is a difference between a situation where the petitioner is innocent and does not have knowledge and is defrauded and one where with full knowledge and being aware of all facts, she enters into a marriage which is legally not valid. The court thus observed:

"While dealing with an application of destitute wife and hapless children or parents under this provision [Section 125 CrPC] the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India… Therefore, it becomes the bounden duty of the courts to advance the cause of social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society."[102]

Also, "…We should avoid a construction which would reduce the legislation to futility and accept the…construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for

[102] Badshah v. Urmila Badshah Godse, AIR 2014 SC 869, p.875

defrauding the wife. Therefore, at least for the purpose of Section 125 CrPC such a woman is to be treated as the legally wedded wife."[103]

In a situation where unequals have to fight a battle the stronger cannot be allowed to take advantage of his own wrong and the technicalities of law to defeat the weaker party who has already been defrauded once. So, in this case, the court as a temple of justice took a pragmatic approach to protect a discarded wife and helpless children. The judgment will go a long way in discouraging and bittering unscrupulous men from fraudulently contracting marriages and then getting away from the liability to support the woman and the children. The judgment also overruled a number of earlier judgements where denying maintenance to innocent wives who were duped into void relationship by fraudulent.

5.6 DOWER

Dower under Muslim law is a sum of money or other property promised by the husband to be paid to the wife as a mark of respect for the marriage. It is a legal incident of a valid marriage. So, even when dower is expressly not fixed or mentioned at the time of marriage the law confers the right of dower upon the wife. The payment of dower is enjoined by the law upon the husband.[104]

In *Syed Sabir Husain v. Farzand Hasan,*[105] the parties belonged to the Shia school of Muslim law. The father contracted the marriage on behalf of his minor son and made himself surety for the payment of *meher* of his minor son. After sometime he died. The question was whether the father and after his death, his estate, was liable for the payment of his son's *meher*? The court held that the father was liable for the payment

[103] Ibid., p. 877
[104] Asaf A. A. Fyzee, Outlines of Muhammadan Law, Oxford University Press, p.105
[105] (1937) 65 IA 119

of his son's dower and thus, each of his legal heirs were responsible for a portion of wife's claim in proportion to the share received by the particular legal heir on distribution from estate of the deceased. However, the liability of the legal heirs was only to the extent of inheritance received by them from the deceased and their liability was not personal.

However, where a father stipulates on behalf of his minor son in Hanafi law, the father is not personally liable for the dower.

In *Mohammed Sadiq v. Fakhr Jahan*,[106] the question was whether different sums of money received by the wife during the lifetime of the husband can be treated as having been paid in discharge of husband's obligation to pay the dower.

A marriage was contracted between the parties and the dower settled was Rs. 50000. The wife received from her husband during his lifetime amounts of money in the aggregate exceeding the amount settled as *meher* on the wife. The largest of such payments was Rs. 3000. There was no evidence that these payments were intended by the husband to satisfy the dower debt. The Privy Council held that such payments were not to be treated as having been made in satisfaction of the dower debt.

In *Maina Bibi v. Chaudhri Vakil Ahmad*,[107] the question was what is the nature of wife's right to her dower or *meher*?

One Moinuddin died in 1890 leaving behind his immovable property and his widow Maina Bibi. Maina Bibi entered into possession of his property. In 1902 some of the legal heirs instituted a suit for recovery of their shares of property. The widow pleaded that the estate was gifted to her or in the alternative she was entitled to

[106] (1931) 59 IA 19
[107] (1924) 52 IA 145, 151

possession until her dower was paid. In 1903 the trial court passes a decree for possession in favour of the plaintiffs on the condition that they paid a certain sum by way of dower and interest within six months. The widow continued in possession and the sum was not paid. In 1907 Maina Bibi attempted to make a gift of whole of the property the property to someone else. The plaintiffs challenged this gift. The Privy Council held that the widow had no power to make a gift of the properties and could not transfer the shares of the legal heirs to anyone else. While discussing the nature of widow's right of retention the court said that the widow's right to retain her husband's property in lieu of her dower is her personal right given by Muslim law to safeguard the position of the widow.

5.7 CONCLUSION

The real test of any government is the judicial system. It is the duty of the judiciary to act as an impartial guardian of civil rights. Also, the concept of a written and rigid Constitution which is always in need of the interpretation of its provisions requires a Supreme Court for this purpose.[108] The Indian judicial system holds an important place in the country as it looks into the validity of laws, their interpretations and implementation. These laws are mostly framed by the legislature. It settles the mutual disputes and disputes which arise out of the Centre and the States disagreements. The states also come within the jurisdiction of the judiciary. The judiciary protects the rights and liberties of the citizens. Justice which must be fair and just to all without any discrimination against anyone is expected from our judiciary. Moreover, efficiency of the government largely depends on the impartial, independent and positive justice meted out by the courts. When the legislature of the county ends up

[108] Vol. 9, No. 4, A.C. Panda, The New Constitution of India, The Indian Journal of Political Science, Indian Political Science Association, Oct-Dec, 1948 p. 63-64, URL: https://www.jstor.org/stable/42743223

enacting laws which infringe the freedom and security of the individuals and the executive does not perform its duties like enforcing the law, the only way out from a situation like this is the efficiency and impartiality of the judiciary. Judiciary is often forced to take over in certain ways the duties of the executive to ensure justice for the people.[109]

In a democracy, good governance is absolutely necessary for any state and the three organs of the government form the three pillars of good governance and lack of cooperation and harmony among them can lead to an environment of administrative anarchy. In such circumstances, the independence and fearlessness of the judiciary makes the basic core of the democracy. In our Constitutional scheme, the Indian judicial system works as a catalyst to ensure justice for every citizen. Keeping in mind the changing situations and times, the nature of the Indian judicial system has become social and economic. The Constitution of India has given details regarding the composition, working and role of judiciary. The Constitution of India has provided for an independent and reliable judiciary because the founders of the Constitution were aware of the fact that only an independent and fearless judiciary which is free from the legislative and the executive control can play an active role. Constitutional provisions concerning the independence of the judiciary has strengthened the belief that the Indian Constitution has assigned an active role to the judiciary. This is evident from the variety roles which have been entrusted with the judiciary such as guardian of the Constitution, as final interpreter of the Constitution, as an arbitrator to settle the disputes between the Union and the States on the one hand and amongst the states on the other. Also, the final interpretation and decision relating to the Constitutionality of

[109] Vol. 69, No. 1, M. M. Semwal and Sunil Khosla, Judicial Activism, The Indian Journal of Political Science, Indian Political Science Association, Jan-Mar, 2008, p. 113, URL: https://www.jstor.org/stable/41856396

laws has been allotted to the judiciary. Being an interpreter of the Constitution, the judiciary has to interpret its own role according to the changing socio-economic conditions of the society. It appears that the Constitution of India has provided an active judiciary and has widened the frontiers of its jurisdiction as an activist known as judicial activism rather than confining it to the interpretive role. However, the judiciary has been able to understand its active role, inspired by the vision of the Constitution, in the recent past and has intended to impart new directions and dimensions of justice-social, economic and political. So, the role of the judiciary is not only interpretative but is also of laying down new norms of law for the changing socio-economic scenario to understand the ideals enshrined in the Constitution because the society demands active judicial role, particularly in matters of family and civil suits. Judiciary has widened its role along with stepping in those areas where there is inaction by the executive.[110]

The Supreme Court has on a number of occasions held that even a post card received from an unknown person will be treated as a petition. The approach and working of the judiciary have undergone a change because the of the erosion of values in public life since the1970s have brought into focus the Supreme Court of India. Judicial activism through public interest litigation is a means for achieving justice for all. The Supreme Court has adopted an active role having regard for the socio-economic conditions prevailing in our country. Judiciary has interpreted various fundamental rights and socio-economic rights enshrined in the part III and IV of the Constitution of India. The resurrection of rights like right to live in healthy environment in *M.C. Metha v Union of India case*[111] right to education in *Unnikrishnan v State of Andhra*

[110] Ibid., p. 118
[111] AIR 1987 SC 1086

Pradesh case[112] and the right of the prisoners to be treated with human dignity[113] have been made enforceable through judicial activism and are interpreted into Article 21.[114]

The importance of judiciary in the legal system is in the creation, promotion and internalisation of constitutional morality which is necessary for making a constitutional government a limited government and not one with arbitrary powers or unbridled control. In these challenging times, it is integral that we go back to the Ambedkarite corpus and recoup the key conception of fraternity and constitutional morality as a path to a more constitutional future.[115]

[112] IR 1993 SC 2178
[113] Sunil Batra v. Delhi Administration, 1980 AIR 1579
[114] Supra note 10, p. 121,
[115] Vol. 29, No. 1, Aravind Narain, What Would An Ambedkarite Jurisprudence Look Like?, National Law School of India Review, Student Advocate Committee, 2017, p. 20, URL: https://www.jstor.org/ stable/10.2307/26459197

CHAPTER SIX

CONCLUSION AND SUGGESTIONS

6.1 CONCLUSION

Importance of the institution of marriage in India is unquestionable. Society considers marriage not only as standard of respectability but also the goal of life. Marriage gives personal and financial security, social acceptability, stability of life and legality for cohabitation. A person's life is considered incomplete without marriage. So, parents bring up their daughters primarily preparing them for the purpose of marriage. They are encouraged to keep special fasts and offer special prayers to get good marriage partner. They are taught to sacrifice to their career or give up their job in order to fulfil their marital obligations. Parents become increasingly desperate and nervous after their daughter crosses the "marriageable age". Even before the completion of her studies if she gets a good match their joy knows no bound. Marriage is always a great celebration with pomp and show and for this, parents are even willing to borrow money from others or sell off their landed property. It is an occasion to which not only the girl, the boy and the parents look forward but even the society is interested. The institution of marriage is considered socially important not only for the children but also for the parents. So, more often than not it is a lavish show with ugly display of wealth taking it to be a onetime show in life without even a remote imagination about its breakup or failure and thinking about what will happen thereafter. It is an occasion of festivity and it is considered indispensable for a majority of Indians.[1]

[1] Vol. 45, No. 3/4, Poonam Pradhan Saxena, Matrimonial Laws and Gender Justice, Journal of the Indian Law Institute, Indian Law institute, Family Law Special Issue, July-December 2003, p. 335, URL: https://www.jstor.org/stable/43951868

The parties realise harsh realities of life after the celebrations are over and their normal life begins. After marriage the wife leaves behind her family and residence to join the family of her husband. She takes the husband's surname resulting in the transformation of her identity and with it also her personality and sometimes even her clothes. An overnight transformation of a girl into a woman, from a carefree life to one full of responsibilities with her being answerable for each and every action of hers. Her husband's residence becomes her matrimonial home with her duty and responsibility for its maintenance. Though with marriage, a man's emotional and financial responsibilities increase, there is, however, no change in his name, identity, family or in the way he dresses or his residence, as he continues to live amongst his relatives as before. The concept is that a man is a wage earner of the family with the responsibility of providing the wife with a roof over her head. In majority of the cases his eligibility to marry is decided on the basis of an employment and even though he may be capable of setting up an independent home for him and his wife, he is not expected to do so or shift his residence but is enjoined to live in his father's house with them even after marriage. The wife's responsibility is, therefore, to not only look after the husband and his needs but also of his parents and other family members, who share the house with him.[2]

India is a melting pot of cultures. Here, diversity is the rule rather than an exception. It has a plethora of matrimonial legislations. The applicability of which varies depending on the religion and domicile of the parities. So, the laws on marriages can be categorised into two categories. The first category of laws is those which are religion based, available to persons belonging to a specific religious community and the other are the secular laws available to every Indian regardless of their religion. In

[2] Ibid., p.336

the first category are the Hindu Marriage Act, 1955, The J&K Hindu Marriage Act 1980, Goa, Daman and Diu laws, Mohammedan laws of Muslims and other enacted legislations, Parsi Marriage and Divorce Act, 1936, The Indian Christian Marriage Act, 1872, The Indian Divorce Act, 1869 and in the second category are the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969. These laws lay down:

1. The formalities and the procedures to be complied with at the time of solemnization of marriage.
2. Conditions of a valid marriage.
3. Rights and duties of the parties during the wedlock.
4. Matrimonial reliefs as well the grounds therefore, in the event of matrimonial disputes.
5. Other incidental matters such as mmaintenance, custody and guardianship of children and distribution of spousal property.

Child marriages rampant in the past are not uncommon even today in our society despite prohibition by the law. It is a perennial malady of Indian society which has persisted through ages with disastrous consequences on the health of the wife's health, career as well as security. Due to early marriage when the wife is neither well educated nor mature enough for her household responsibilities, she cannot be a good mother for her children. Efforts to curb child marriages through the instrumentality of law started in the beginning of the nineteenth century but the evil has not been rooted out from the society even in the first quarter of the twenty first century. The Child Marriage Restraint Act was passed in 1929. It prescribed the minimum age for the girl and the boy as 14 and 18 respectively. By an amendment in 1949, the age of the girl was raised to 15 and in 1978, the ages for the girls and the boys were raised to 18 and 21 respectively. Prescribing different marriageable ages for boys and girls runs

counter to the equality and anti-discrimination provisions of the Constitution. Also, it gives less time to the girl to prepare herself through education and intellectual development compared to the boy.

The grounds of divorce which exist today under all the personal laws were identified and recognised long back. Since then, the society has evolved, circumstances have changed and the position of women has changed substantially due to their education, employment and empowerment. In this light the grounds for divorce and judicial separation need to be re-examined. Also, certain matrimonial reliefs such as restitution of conjugal rights and their raison d'être need to be reviewed in new light.

Cases have come before courts where wives have been tortured for dowry for many more than seven years before the disastrous end of the marriage either by the death of the wife or by divorce. Marriage is a permanent institution and in view of the human life span period of seven years is too less in the Indian society where the wife is always persuaded or exhorted by her own family to continue to suffer as long as possible. Instead of condemning her suffering the Indian society glorifies it.

Whether under international law or under municipal law only the consenting parties are bound by an agreement. An agreement is binding on a person because he has given his consent and this is why an agreement is binding only on the parties to the agreement and non-parties are not bound by the agreement because they have not given their consent. In law of contract, we have the doctrine of privity of contract. Marriage in every modern legal system is a matter of agreement. So, it should be founded on the basic principles of an agreement and the requirements of a valid agreement should also be the requirements of a valid marriage. The *sine qua non* of an agreement is consent. So, for a valid marriage under the personal laws consent of the

parties must be made mandatory. Women and men are equally competent to give their consent for marriage. Any agreement even in the form of marriage entered into without the consent of even one of the parties cannot be expected to last long. So, lack of consent by even one of the parties to the marriage should be recognised as a ground of nullity for the marriage.

Personal laws play an important role in India as they apply to all Indians in respect of certain matters which are essentially personal in nature or which are family matters. These matters are close to the heart of the people and they are closely related to them. The matters are to an extent rooted in the religious faith, belief and worship of the people.

One of the important matters governed by the personal laws in marriage and all matters concerning or existing out of marriage. Marriages are contracted for lifetime but as they are considered a boon but they may turn odious and become a bane and, in such situation, they need reliefs and the law provides them in the form of matrimonial remedies. The reliefs are not homogenous and vary from personal law to personal law. Matrimonial reliefs are inadequate under most personal laws and the personal laws have different approaches and postulates for such reliefs. The matrimonial reliefs under the personal laws have neither human rights approach nor do they meet the international human rights standards. Some of the matrimonial reliefs under the personal laws are against the constitutional mandate on equality and antidiscrimination. The role of the judiciary has been significant. It has stepped in to mitigate the injustice and ameliorate the hardships of the weaker party who is normally the wife. But it has been able to provide only piecemeal solutions depending on the cases as and when they came before it.

So, there do not exist sufficient number of matrimonial reliefs under the personal laws in India and ones that do exist are inadequate and far below the international human rights standards.

6.2 FINDINGS

The findings of my research are as follows:

1. There is no legislation on family planning and family health in India.
2. All the grounds for divorce which exist have been enacted years back. No new grounds of divorce have been added in recent times in any of the personal laws whereas society on the other hand has moved on and developed rapidly because of information technology and artificial intelligence and so much more.
3. Under the Indian Penal Code, 1860, Section 304B[3] and the Dowry Prohibition Act, 1961 which makes dowry death a specific offence if the death of the woman has taken place due to burns or bodily injury which are not normal within 7 years of her marriage. The 7 years clause is too less a time and women go through torture for 10 years or perhaps even more.
4. Under no personal law does there exist the same marriageable age of the girl and the boy. All the provisions of the international instruments and the

[3] Indian Penal Code, 1860, Section 304B- "(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

Constitution of India that shout out equality are seen being infringed as no personal law requires the age of the girl to be same as that of the boy.

5. Personal laws do not expressly mention about consent of the parties. Other than Muslim personal law, consent of the parties in matters of marriage has not been mentioned anywhere.
6. Irretrievable breakdown of marriage is not there as a ground of divorce in any of the personal laws or even the Special Marriage Act, 1954 for that matter. It has just been an initiative by and of the judiciary.

6.3 SUGGESTIONS

The concluding chapter concludes the thesis by providing the following suggestions:

1. A family is not only the basic unit of a society but also it is the most important unit. Only healthy and happy families can make a healthy and happy society and only their union can make a strong and prosperous state. Attention must be paid to the progress and well-being of families. This is why various international instruments on human rights and rights of women speak about family health, family planning. They impose obligation on the state parties to enact laws in his regard. However, in India no law has been enacted on family health and family planning. So, there is an urgent need to enact laws for the protection and regulation of family health and family planning. Also, the state should take initiatives directly or through NGOs to educate people and spread awareness about family healthy and family planning.
2. All personal laws and their provisions for divorce were developed or enacted long back. When the social circumstances were different. Since then, our traditions have evolved and there has been a socio-cultural transformation of

our society. Women have moved forward in education and employment. The Constitution proclaims India to be a society guaranteeing justice, social, economic and political; liberty of thought, expression, belief, faith and worship and equality of status and opportunity. New grounds for divorce consistent with the constitutional vision must be identified and recognised. New social needs and aspirations of people have emerged. New considerations which were irrelevant earlier have become relevant now.

3. In Indian society a girl is mentally prepared by her parents and other relatives to expect and accept the worst when she goes to her in-laws after her marriage. The roles of mother-in-law and sister-in-law have become proverbial in our society. After marriage when she goes to her in-laws, she is prepared to accept trouble and tormenting. So, when she starts facing what she expected she does not normally consider it even worth reporting to her parents who she thinks will not do anything. She continues to suffer silently and the years roll by. By the time the breaking point is reached in the form of her death many years have passed. So, the 7 years clause in Section 304B[4] should be amended and the 7 years period should be increased to at least 12 years.

4. Liability to pay maintenance on the ground of marriage arises on account of the other person's inability to maintain. This is essentially an economic or financial issue arising out of obligation on the ground of marriage. Maintenance is payable so that the other party is not driven to starvation, destitution or vagrancy. It has nothing to do with the gender of the sufferer. So, maintenance should be payable irrespective of the gender of the party. This will also be consistent with the equality and anti-discrimination clauses

[4] Ibid.

of our Constitution as well as the international instruments on human rights. Only, under Hindu law and Parsi law maintenance is payable to the husband as well as the wife. Under other personal laws maintenance is not payable to the husband by the wife. So, appropriate amendments should be made.

5. On marriage comes to an end a person's education. Continuing education after marriage becomes extremely difficult if not impossible specially for women. Women also lose many of their freedoms on account of their marriage. Development of her all-round personality for the purpose of her employment and career normally ends on marriage. So, prescribing lower marriageable age for girls is not only discriminatory running counter to the equality clauses of the Constitution but it is also a denial of many opportunities and freedom to them. It is also violative of the international instruments on human rights and protection of women. The law should prescribe same marriageable age of 21 years to both girls and boys.
6. Marriage in every modern legal system is a matter of agreement. So, it should be founded on the basic principles of an agreement and the requirements of a valid agreement should also be the requirements of a valid marriage. The *sine qua non* of an agreement is consent. So, for a valid marriage under the personal laws consent of the parties must be made mandatory. Women and men are equally competent to give their consent for marriage. Any agreement even in the form of marriage entered into without the consent of even one of the parties cannot be expected to last long. Restitution of conjugal rights is quite baseless and should be removed because it barely serves as a remedy.
7. Once a marriage is dead for all practical purposes fixing the blame or guilt of the party or parties responsible for it is an exercise in futility. If a marriage

does not work out both the parties are responsible for it or sometimes, they may not be responsible as the circumstances or the reasons for it may be beyond their control or they may not be responsible for it. Even if one of the parties alone can be blamed for it the reasons or circumstances may or may not be entirely under his control but is it worthwhile to enquire or investigate whether the reasons or circumstances are within his control or not. At the best the circumstances or the reasons may be beyond the control of the party or the parties and therefore, they are not responsible or alternatively at the worst a party or parties are guilty and responsible for it. But in either case the end result is the same and that is that the marriage is dead. If the end result is same and the marriage has ended, is it worthwhile to investigate the reasons for the failure of the marriage and establish the guilt of one of the parties or the level of guilt of both the parties? Any attempt to do this is a futile exercise. Therefore, when the marriage is dead for the parties for all practical purposes and cohabitation between them has become impossible it must be accepted that the marriage has broken down irretrievably. However, it should by itself be recognised as a ground for divorce. But this irretrievable breakdown of marriage has not been recognised as a ground for divorce under any of the personal laws. Although it has been judicially accepted in some cases. Therefore, necessary amendments should be made in the personal laws to include irretrievable breakdown of marriage as one of the grounds of divorce when the marriage is dead and there are no chances of its revival.

8. Many of the problems of discrimination, discrepancy and inequality in the personal laws in general and matrimonial reliefs in particular can be solved by enacting a Uniform Civil Code applicable to all but if the problem was simple

the solution would have come perhaps in 1950s after the commencement of the Constitution as it was promised in Article 44 of the Constitution.[5] From its inception the problem is not only complex but also it is deep-rooted. India is a unity in diversity. It is a multi-cultural, multi-lingual and multi-religious society. The traditions, customs, mores and ethos of people in different parts of the country not only vary widely but are also heterogenous and even contradictory. Therefore, any one of the following models in this regard may be suggested:

(i) There can be a Uniform Civil Code in family matters compulsorily applicable to all citizens regardless of their race, religion, caste or place of birth.

(ii) There can be a Uniform Civil Code in family matters applicable to all citizens regardless of their race, religion, caste or place of birth if they opt for it by a declaration before the prescribed authority in this regard.

(iii) The different personal laws may be allowed to operate subject to the Constitutional provisions relating to equality and anti-discrimination and international human rights standards contained in the international human rights instruments.

(iv) All personal laws may be allowed to remain in operation subject to amendments to be made through legislation where there is violation of basic human rights or gender injustice.

(v) The personal laws may be allowed to operate as they exist and the government and the state should directly or indirectly induce, encourage and promote reforms in the personal laws from within each system.

[5] Constitution of India, Article 44- "Uniform civil code for the citizens- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

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ANNEXURE

Convention on the Elimination of All Forms of Discrimination against Women

Adopted and opened for signature, ratification and accession by General Assemblyresolution 34/180 of 18 December 1979

entry into force 3 September 1981, in accordance with article 27(1)

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in thedignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and thespecialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and thespecialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against womencontinues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect forhuman dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education,training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for theelimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1

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

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to thisend, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person,organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of theinferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of trafficin women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms withmen, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly electedbodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public andpolitical life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basisof equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the samestandard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achievethis aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particulary those aimed at reducing, at the earliest possible time, anygap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls andwomen who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families,including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in thefield of employment in order to ensure, on a basis of equality of men and women, the same rights, inparticular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria forselection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work ofequal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidityand old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding ofthe function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of formeremployment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particularthrough promoting the establishment and development

of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful tothem.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health careservices, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services infamily planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economicopportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity andwater supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure incourts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legaleffect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to themovement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equalityof men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and fullconsent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in mattersrelating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children andto have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, aprofession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuableconsideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action,including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the UnitedNations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened bythe Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the

persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately afterthe first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a memberof the Committee shall appoint another expert from among its nationals, subject to the approval of theCommittee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for theeffective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of

obligations underthe present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure. 2. The Committee shall elect its officers for aterm of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order toconsider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at anyother convenient place as determined by the Committee.

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary-General of the United Nations shall transmit the reports of the Committee to theCommission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to theachievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving thefull realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the presentConvention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited withthe Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by thedeposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken inrespect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentiethinstrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text ofreservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not bepermitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which areequally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.