



FICCI-FLO and Amarchand Mangaldas

Laws Affecting Women in India

A Ready Reckoner



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About FLO

FICCI Ladies Organization (**FLO**), the women's wing of Federation of Indian Chambers of Commerce and Industry (**FICCI**) with presence in different States of India through its 10 Chapters, represents women entrepreneurs & professionals. Established in 1983, it is the oldest women business Chamber in Southeast Asia.

It plays a catalytic role in empowering women and girls and recognizing them both at the grassroots as well as the top. FLO undertakes women empowerment at the three levels- grassroots, middle and senior, through various capacity building, skill up gradation, policy advocacy, industry round tables and thought leadership.

Over the years, FLO has carved a niche as being the voice of women entrepreneurs. From exhibitions to inter-state meets, campaigns and industry roundtables, International delegations and B2B meetings, FLO offers an exclusive platform to its members to participate and deliberate on hundreds of topics and cross-cutting themes moderated by industry experts, economists, national and international leaders and noted celebrities. Knowledge and research papers are also brought out by FLO on relevant topics.

Globally too, FLO provides an international platform for networking with business women from across the globe. Eminent personalities from India and overseas have addressed and interacted with FLO members - Hon'ble Prime Minister of India Shri Narendra Modi, Hon'ble Minister of Finance Shri Arun Jaitley, Amartya Sen, Sheryl Sandberg, Priyanka Chopra, Kathleen Stephens; Hon'ble Former President of India Dr. A.P.J. Abdul Kalam, Dr. Kiran Bedi, Smt. Margaret Alva, Ms. Linor Abigail, Hon'ble President of India Shri Pranab Mukherjee, Smt. Sonia Gandhi amongst others.

Besides this, FLO works with International partners such as - UNDP, UNESCAP, UN Women, Asian Development Bank, World Bank, International Finance Corporation (IFC), The Confederation of Asia-Pacific Chambers of Commerce and Industry (CACCI), Women Entrepreneurs Council (CWEC), The International Women's Entrepreneurial Challenge (IWECC), SAARC Chamber Women Entrepreneurs Council (SCWEC), Women Corporate Directors (WCD), GOPIO-GIWC (Women wing of GOPIO - The Global Organization of People of Indian origin), USAID, Hans Seidel Foundation, Goldman Sachs, GIZ, to name a few.



Preface



Neeta Boochra

President FICCI-FLO

Gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to take measures preventing discrimination against women.

However, such legal terminology is not easy to comprehend for the majority of our citizens. As a consequence, most women in India are unaware of their rights and are ignorant of the various provisions made for them.

FLO hopes to empower Indian women by bridging this knowledge gap and, through this Ready Reckoner, we have brought together the various laws and rights of women in a simple and easy to understand language.

In this regard, we believe this Ready Reckoner can make an important contribution towards the ongoing campaign for gender equality in India.

'Equal justice is still a dream, we must work to make it a reality'



Disclaimer

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This Ready Reckoner does not contain all information available on the subject of laws affecting women in India. It should serve only as a general guide and not as the ultimate source of subject information. While best efforts have been used in preparing this Ready Reckoner, FICCI-FLO and Amarchand Mangaldas make no representations of any kind and assume no liabilities of any kind with respect to the accuracy or completeness of the contents. FICCI-FLO and Amarchand Mangaldas shall not be held liable or responsible to any person or entity with respect to any loss or incidental or consequential damages caused, or alleged to have been caused, directly or indirectly, by the information contained herein.

The information in this Ready Reckoner is not intended to be relied upon as the basis for any decision which may affect any person or entity. Independent professional advice should be sought for taking any action on any issue mentioned in this Ready Reckoner. Further, this Ready Reckoner is aimed at providing information on some pertinent laws affecting women as they stand today. Such laws may be subject to change with future amendments and modifications. FICCI-FLO and Amarchand Mangaldas assume no responsibility to update this Ready Reckoner in the event of such future amendments and modifications.



Introduction



Pallavi Shroff

Senior Partner
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Advancing equity for women through advocacy, education, philanthropy, and research has been pivotal to the economic development and dawn of social change in India. This becomes evident as the Constitution of India not only grants equal rights for women, but also aims at empowering and advancing the growth of women in all spheres of life

The phase of transformation succinctly gets captured from the 1820s, when a new empowered image of a woman was taking root in India with socio-religious reformer Raja Ram Mohan Roy's crusades against social evils. He successfully campaigned against Sati - the practice of burning widows, polygamy, child marriage and right for widows to remarry. Best known for his efforts to introduce reforms in the lives of Hindu widows who were considered extremely inauspicious and were blamed for the death of their husbands, Roy promoted a rational, ethical and non-authoritarian platform for such women. He sought to integrate the best features of his country's traditions with modern system of reforms and established a number of schools to popularize education in India.

While traditionally women-oriented laws in India were directed towards abolishing social malpractices, the new legal procedures go on to address the rampant increase in crime against women. Breaking away from archaic philosophies to ensure equality with men and empowering women, there have been substantial amendments in law to develop the essential rights of females. Without their voices, which had long been behind the veil of forbearing demeanor, invaluable legislation would have never been passed. Changes in legal mechanisms have been impacting the ever-evolving social systems of the Indian society which is the need-of-the-hour.

The Indian Penal Code, 1860 has widened the scope of offences against women and set in place a more stringent punishment regime. To save the girl child, the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act) has been enacted, banning sex determination and selection in India and addressing the issue of the declining sex ratio and misuse of technology for sex selection. Procedural laws such as the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 have also undergone significant amendments to make the criminal justice system more responsive to women. There have been specialized laws such as Protection of Women from Domestic Violence Act, 2005, enacted to provide better protection for women at home.

With respect to affirming equality of sexes in ancestral property rights, there have been far-reaching amendments in the Hindu Succession Act, 1956. The law recognizing a woman's right to Hindu undivided joint family property has been significant since this right has been accorded to a Hindu woman for the first time.

Further, several legislations such as the Maternity Benefits Act, 1961, the Equal Remuneration Act, 1976 and more recently, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 have been enacted. This has been done with a view to protect the interests of women at the work place.

Today, women have become the 'Powerhouses' of the fastest growing economy in the world and have been commemorated with some of the most powerful positions in the country. Leveraging this knowledge about women-oriented laws, FICCI - FLO and Amarchand Mangaldas have taken the initiative to present a first-of-its-kind ready reckoner on "Laws Affecting Women in India". This includes rights critical to a woman's biological phases, including the right to birth control and the right to be born, laws governing her marriage, inheritance, succession, various other legal protections accorded to her at the work place and also laws against sexual offences.

Formulated in simple content, this publication would make a brilliant accompaniment for all working women. It presents a ready reckoner of laws to provide requisite information for a woman considering her legal options. While this publication can in no manner be deemed to be a comprehensive manual on women's laws, it is an earnest and humble attempt to bring Indian women's legal rights to the forefront empowering women to better understand their legal rights.

I see it as a "road map" for solutions that can work to improve women's rights in India and equip every Indian woman with knowledge and ability to deal with issues, not just conceptually, but also practically.



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Right to Property



In India, women's access and right of ownership over property, both movable and immovable, in the absence of a will, is governed by succession laws based on religion. Therefore, this chapter seeks to outline the succession laws of various Indian communities and the provisions for succession by wills.

Law Governing Property Rights of Hindu Women

The Hindu Succession Act, 1956 ("**HSA**") is the primary legislation laying down the law on property rights of Hindu women and it applies only to persons who are "*Hindus by birth, followers of the Arya Samaj, Buddhists, Jains, Sikhs and all other persons who are not Muslims, Christians, Parsis or Jews by religion*".

GENERAL RULES OF SUCCESSION IN THE ABSENCE OF A WILL

Intestate death of an individual

An individual is said to die intestate when he or she dies without creating a will. Therefore, the succession of property of such an individual is determined by the rules of intestate succession as laid down under the HSA.

The general rules for succession for Hindu women may be divided into two parts, firstly, succession from the property or estate of a Hindu male dying intestate and secondly, succession from the property or estate of a Hindu woman dying intestate.

Succession from the property or estate of a Hindu male dying intestate

Self acquired and inherited property of a Hindu male dying intestate can be devolved on both his male and female heirs in the following manner:

1. **Firstly**, the property devolves upon the closest heirs of the deceased male, which includes the following:

the deceased's son; daughter; widow; mother; grandson from his son; grand-daughter from his son; grandson from his daughter; grand-daughter from his daughter; widow of a pre-deceased son; great grandson from a pre-deceased son; great grand-daughter from a pre-deceased son; widow of a grandson.

All these heirs inherit the property simultaneously to the exclusion of all other heirs of the deceased.

The rules of inheritance to distribute the estate of the deceased among these heirs are as follows:

- (a) The deceased's widow is entitled to one equal share in the property of the deceased husband;

**Illustration:**

A, a Hindu male, dies leaving behind a widow, W, and 2 children, S and D. In this case:

- W will take 1/3rd share; and
- S and D each will take 1/3rd share.

- (b) The son(s), daughter(s) and the mother of the deceased are also entitled to take one share;

Illustration:

If B, a Hindu male dies leaving behind his mother, M, two sons S1 and S2 and two daughters, D1 and D2, there being 5 heirs belonging to the same class mentioned in point (a) above, each of the heirs will take one share each, i.e., 1/5th

- M will take 1/5th;
- D1 and D2 each will also take 1/5th; and
- S1 and S2 each will take 1/5th.

- (c) Among the heirs in the branch of the pre-deceased son, the share of the pre-deceased son gets equally divided between his widow and the surviving sons and daughters.
- (d) Among the heirs in the branch of the pre-deceased daughter, the share of the pre-deceased daughter gets equally divided between her surviving sons and daughters.

Illustration:

If X, a Hindu male dies leaving behind:

- His son, S;
- A widow (SW) of a predeceased son, S1;
- Predeceased daughter's son and daughter, DS and DD; and
- Predeceased grandson's widow, daughter and son, SSW, SSD and SSS, respectively.

Distribution of property in the abovementioned illustration will happen keeping in mind the fact that there are four branches of heirs in the current example, each of whom will take 1/4th share i.e. S, S1's heirs, predeceased daughter's heirs and predeceased grandson's heirs.

Thereafter, the property will be divided equally between each of the heirs in each branch since they are all heirs closest to the deceased male:

- S will take 1/4th;
- S1's heir SW will take 1/4th;
- Predeceased daughter's heirs, DS and DD will together take 1/4th which they will divide equally amongst themselves and get 1/8th each; and
- Predeceased grandson's heirs, SSW, SSD and SSS will together take 1/4th which they will equally divide amongst themselves and each will take 1/12th.

Property rights of widows

After the 2005 amendment to the HSA, the widow of a predeceased son or widow of a grandson or a brother's widow shall have a right to succeed the estate of a male after his death, even if she has remarried on the date of the opening of succession.

2. **Secondly**, in the absence of any of the closest heirs of the deceased Hindu male mentioned in point 1 above, the property devolves upon the next set of individuals mentioned below, in the order as given below:

- (a) The property first devolves upon the father of the deceased Hindu male.
- (b) In the absence of a father, the deceased Hindu male's property will devolve upon the following people:
- i. Siblings of the deceased Hindu male, i.e., his brothers and sisters;
 - ii. The deceased Hindu male's grandchildren from his son.

Each of these individuals will get one equal share of the property i.e., the siblings will each take one share in the property and the grandchildren from the deceased male's son will also take one share each.



- (c) In the absence of the abovementioned relatives, the deceased Hindu male's great-grandchildren from his daughter shall each get one equal share of the property of the deceased Hindu male.
- (d) In the absence of such great-grandchildren, as mentioned above, the property shall be divided equally among the sons and daughters of the brothers and sisters of the deceased, all of whom get an equal share.
- (e) In the absence of sons and daughters of the brothers and sisters, the paternal grandmother of the deceased shall share the property with the paternal grandfather, in equal proportions, failing which, the widows of the father and brother of the deceased shall each get an equal share.
- (f) In case none of the above relatives are alive, the property gets equally divided between father's sisters and father's brothers, and if they too are not alive, then the property is equally shared between the maternal grandmother as well as maternal grandfather.
- (g) Finally, if none of the relatives mentioned above are alive, then the property gets divided equally between the mother's sister and mother's brother.
- (h) In the above stated relationships, while brothers and sisters may include siblings who are from the same father but different mothers but do not include siblings from the same mother and different fathers.

- 3. Thirdly,** in the scenario where the deceased is survived by none of the relatives mentioned in points 1 and 2 above, then the property shall be given to the next closest relative of the deceased who is related to the deceased through blood or adoption, through a wholly male line of heirs.

It is further pertinent to note that even in case of such heirs related to the deceased wholly through male relatives and by blood or adoption, the male heir closest in generation to the deceased shall be given the highest preference, with further preference being given to successors rather than predecessors.

In case an heir related to the deceased only through males is not available, the last preference for succession of property shall be given to the relative of the deceased who is related to him by blood or adoption but not through males only i.e. a female relative is or was present in the line of succession. In this case, the heir closest in generation to the deceased shall be given the highest preference, with further preference being given to successors rather than predecessors.

Illustrations

- When a man dies intestate and is survived by his sister and his brother's widow and son, the entire property shall go to his sister because the sister, being a closer heir and listed higher in the order mentioned in point 2 above shall take the property to the exclusion of all other heirs.
- Where a man dies intestate leaving behind 4 brothers and sisters from the same parents and one step-brother i.e. from the same father but different mother, as explained, they all are treated as brothers and sisters and shall inherit the property equally as brothers and sisters.



Illustrations

- If X dies, leaving behind only his father's, brother's, son's, son (S) and daughter (D). Then S being a relative related to the deceased wholly through blood and through male relatives will be preferred over D.
- If Y dies intestate and is survived by his sister's daughter and his father's brother's son's son, the property shall go to the sister's daughter who is an heir mentioned in point 2 above, as against the father's brother's son's son who is related to Y wholly through male relatives.

Succession from the property or estate of a Hindu woman dying intestate

Any property acquired by a Hindu female in the course of her life (by succession or by will or self acquired) is her absolute property. Succession of such property, in the event that she dies without having made a will, shall be in the following manner:

1. **Firstly**, in case of a Hindu female dying intestate, the daughters of the deceased shall each get an equal share as the sons and the husband. In case the daughter died before her mother, then her children shall inherit the share she would have got had she been alive, which would be equally divided amongst all of them.

Illustration:

If A, a Hindu female dies leaving behind her husband H, two daughters D1 and D2 and a son, S. In this situation H, D1, D2 and S shall all get an equal share in the property, i.e., 1/4th each. In the event that the daughter D2 dies before the death of A, then upon A's death, D2's 1/4th share of the property will devolve equally upon D2's children.

2. **Secondly**, in the absence of the heirs mentioned in point 1 above, it shall devolve upon the heirs of the husband as if it were the husband's property i.e. as per the rules applicable for Hindu males mentioned hereinabove.

Illustration:

If A dies, leaving behind only her sister, father – in – law and husband's brother, then the property instead of devolving on her

sister will devolve on her father – in – law and husband's brother, as though it were her husband's property. The same rules for devolution will be followed in this case, as in the case of a Hindu male dying intestate.

3. **Thirdly**, in the absence of heirs mentioned in points 1 and 2 above, i.e., in the absence of the deceased husband, children and heirs of the husband, the property shall devolve upon the deceased's mother and father, who can both take an equal share.

Illustration:

If Z, a Hindu female dies intestate, leaving behind only her mother and her father's two brothers, then the mother will have 1/2 share of the property and the remaining 1/2 will devolve upon the father's heirs in his absence, i.e. his brothers, who will each share the 1/2 equally and get 1/4th share each.

4. **Fourthly**, if the parents of the deceased are not alive, then the property shall go to the heirs of the father as per the rules of succession for a Hindu male dying intestate, as if the property belonged to the deceased's father.

Illustration:

If P, a Hindu female dies intestate, leaving behind only her father's brother, B, and her father's brother, B1's, son, S and daughter, D, then the property shall devolve upon her father's heirs as though it were her father's property. B being her father's brother will get 1/2 share in the property and other half will devolve upon B1's children, S and D. Therefore, S and D will together get the 1/2 share that would have devolved upon B1 had he been alive. This 1/2 share will be divided equally between S and D, who will each get 1/4 share.



5. **Lastly**, if the father's heirs are also not alive, the property shall devolve upon the heirs of the deceased's mother, as if was her property.

Please Note!

The rules of inheritance enlisted at points 1-5 above, for devolution of property of a Hindu female dying intestate are applicable to all kinds of property acquired by a woman herself through her own resources i.e. self acquired property, as well as property inherited by her, with only two major exceptions, which are:

- These rules are not applicable in case of properties inherited by the Hindu female from her parents and any such property shall, in the absence of any children or grandchildren of the deceased, be divided among her father's heirs.
- Similarly, for property inherited by the deceased Hindu female from her husband or father in law, in the event of her death without any children or grandchildren, the property shall be inherited by her husband's heirs and not her heirs.

Illustration: If A, a woman, dies leaving behind only a daughter D, then D shall inherit A's entire property as the absolute owner. However, in case of D's death, the share of the property that devolved upon A through her husband shall be inherited by the heirs of A's husband.





Woman's Right Over Coparcenary Property

The HSA underwent a drastic amendment in 2005 and by virtue of this amendment; the law as it now stands recognizes gender equality, especially with respect to coparcenary property.

Concept of a Coparcenary Property

An 'undivided Hindu joint family property' or coparcenary property is ancestral property over which joint ownership is exercised by members of a 'Hindu Undivided Family'. Under the HSA, a coparcener is a person who acquires an interest in the joint family property at the time of his/her birth and can demand partition of such property. A Hindu Undivided Family consists of all persons descended from a common ancestor, which after the 2005 amendment to the HSA, also includes wives and unmarried daughters.

One of the most important features of the amendment to the Hindu law of succession is the grant of equal coparcenary status to both males and females. Before this amendment only males were accorded the status of coparceners. However, after the amendment the following changes have been made:

- (a) The daughter of a coparcener becomes a coparcener by birth in the same manner as the son;

- (b) The daughter shall have the same rights in the coparcenary property as she would have had if she had been a son; and
- (c) The daughter shall also be subject to the same liabilities in respect of the coparcenary property as the son, and any reference to a Hindu coparcener shall include a reference to a daughter of a coparcener.
- (d) It provides daughters the full right of residence in their parental house (explained later in this chapter).

Illustration: If A, a male coparcener in a joint Hindu family property, marries B, a Hindu woman. A and B have two children, a son, S and a daughter, D. As per the rules of succession of coparcenary property as they exist today, S and D will both be considered to be coparceners to the joint Hindu family property and on the death of A, both S and D have the right to ask for partition of the property. D can ask for partition of the coparcenary property even after marriage.

Did You Know?

- Prior to the amendment of the law of Hindu succession, in a joint Hindu family daughters were entitled only to maintenance and not a right to the coparcenary property. Sons, on the contrary, acquired birth right in the ancestral property by virtue of being a coparcener.
- However, principle of equal coparcenary rights of males and females shall not apply to a daughter married before August, 2005 i.e., before this amendment was brought about.



Other changes in the Hindu law of succession after 2005: Recognition of the Concept of Notional Partition

After the 2005 amendment, the share in the joint property of a Hindu male devolves by intestate succession (as explained above) and not by survivorship (i.e., vesting of property in the male relatives surviving the deceased), and the coparcenary property shall be deemed to have been divided as if the partition had taken place before the death of the Hindu male.

This can be explained with the help of the following illustration:

A, a coparcener, dies leaving behind a female relative, B amongst other male heirs. A's interest would devolve on all of A's heirs (including the female relative, B) and the rules of 'intestate succession' would be applicable.

A's interest in the coparcenary property shall be deemed to be the share in the property (through notional partition) that would have been allotted to A if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Absolute Right of A Hindu Woman Over Her Property

Prior to the 2005 amendment in law, women only possessed limited rights over the property acquired by them from their deceased husbands. These rights excluded the right to alienate the property for reasons other than for family necessities or to perform religious ceremonies for the benefit of her deceased husband. Now, under the amended law, a woman has absolute rights over her property and she may alienate such property whenever she deems fit.

The law governing property rights of Hindu women states that 'any property possessed by a Hindu female', is to be treated as that woman's absolute property, irrespective of whether it was acquired before or after the commencement of the law governing rights over such property. This property is to be held by her as a full owner and not as a limited owner.

The law further clarifies that for the purposes of this provision, the word 'property' includes:

1. both movable and immovable property acquired by a female Hindu by inheritance; or
2. property acquired by her through partition; or
3. through maintenance or any maintenance amount that remains outstanding; or
4. by gift from any person, whether a relative or not, before, at or after her marriage; or
5. property acquired by her through her own skill or property purchased by her; or
6. Any other property held by her as '*stridhan*', i.e. gifts given to a Hindu woman before and after her marriage.



Woman's Right to a Share in the Parental Residential House

Prior to the amendment of the laws of succession in 2005, if a deceased is survived by two heirs, one being male and the other female, the female heir was not allowed to request partition of the ancestral property until the male heir chose to divide their respective shares in their parental dwelling house. If this female heir were a daughter, she had the right to reside in the home if she is unmarried, divorced or widowed.

However, after the amendment to the laws of succession for Hindus, the difference between a female and male inheritor has been abolished, now even female inheritors can claim partition of the ancestral property.

Inheritance rights of converted relatives and their heirs

If a relative converts from Hinduism, he or she is still eligible for inheritance. The descendants of that converted relative, however, are disqualified from receiving inheritance from their Hindu relatives, unless they have converted back to Hinduism before the death of the relative.



Law Governing Property Rights of Muslim Women

Islamic law has evolved through various schools of thought such as the **Hanafi, Maliki, Shafi'i, Hanbali** schools. This section deals with the Hanafi school of thought, which applies to Sunnis in India.

Succession Under *Hanafi (Sunni)* Law

Islamic law does not recognize the concept of joint family property and there is no distinction between the joint family property and personal property. Since all properties devolve by succession, the right of the heir does not come into existence till the death of the ancestor. Women are entitled to inherit property.



Did You Know?

Once a person dies, his/her property is first applied to repay funeral expenses and debts which the deceased may have incurred. It is only after such payments, the remaining property is distributed among the heirs as per the laws of succession.



Principles of Succession

The heirs of the deceased woman or a man are divided into three categories- (i) Sharers, (ii) Residuaries and (iii) Distant Kindred.

- Of which, the Sharers have the first right of entitlement in the deceased's property.
- Each of the Sharers is entitled to a fixed share and the remainder of the property gets distributed among the Residuaries. The scheme is laid down in such a manner that

there is always property remaining after allotting the shares to the Sharers, which gets distributed among Residuaries.

- In the absence of the Sharers, the Residuaries take the entire estate.
- In the absence of both the Sharers and the Residuaries, the estate devolves on the Distant Kindred.
- In the absence of Sharers, Residuaries and Distant Kindred, the estate goes to the State.

Who all constitute "Sharers", "Residuaries" and "Distant Kindred" are mentioned in the following table:

Sharers	Residuaries	Distant Kindred
<ul style="list-style-type: none"> ➤ Father ➤ Paternal Grandfather ➤ Husband/wife ➤ Mother ➤ Daughter ➤ Grandmother ➤ Son's daughter ➤ Half brother/sister (i.e., children from a common mother) ➤ Full sister ➤ Consanguine sister (sister through a common ancestor). 	<p>Residuaries are the customary heirs, i.e., the nearest male heirs to the deceased such as brother, son, son's son.</p> <p>Among the Residuaries, the males nearer to the deceased will inherit the entire remaining property excluding other Residuaries.</p> <p>For example: If the deceased leaves behind a son's son and a brother's son, then the son's son (being nearer to the deceased) will inherit the entire remaining property excluding the brother's son.</p>	<p>Distant Kindred are those persons who are related to the deceased by blood, but are neither sharers nor Residuaries such as daughter's children and brother's daughter, etc.</p> <p>The rule of inheritance among the Distant Kindred is that the nearer Distant Kindred to the deceased will inherit the remaining property excluding the distantly related Distant Kindred.</p> <p>For example: If a person dies leaving behind his daughter's son and his brother's son- then the daughter's son will inherit the property excluding the brother's son.</p>

It should be noted that following six Sharers inherit as Residuaries in certain circumstances:

- The father- when there are no children of the deceased person.
- Paternal grandfather / great-grandfather - when there are no children/father of the deceased person.
- Daughter- in the presence of a son of the deceased person.
- Son's daughter- in the presence of a son's son of the deceased person.
- Full sister- in the presence of a full brother of the deceased person.
- Consanguine sister- in the presence of a full brother of the deceased person.

Both, male and female heirs of the deceased have a right to inheritance. However, the female heir inheriting in the same category as a male heir receives half the share of that of a male heir. The mother and father of the deceased are an exception to this rule as both of them are entitled their respective share as Sharers. The rule also does not apply to half siblings (this has been explained in the portion relating to half siblings).

Illustration

This means that if A, a woman leaves behind a son, C, and a daughter, D. C will receive double the share of D.



Inheritance by Women

Rights of inheritance of Daughters:

- The daughter falls under the category of a Sharer in the estate of the deceased parent, in the event there is no son. If there is only one such daughter, she then inherits one-half of the share in the property of the deceased parent.
- When there are two or more daughters and no son, all of them would inherit as Sharers and they will jointly inherit two-thirds of the share in the property which can be divided amongst them in an equal proportion.
- In exceptional cases, when there is only one daughter as the sole heir of a deceased i.e., there is no other heir in any of the classes; she takes her one-half share as a Sharer and the other half as Residuary. In effect, the entire property devolves upon her.
- In cases where the deceased leaves behind a son and a daughter, then the daughter inherits in the position of a Residuary. She then no longer receives her fixed share as a Sharer. As also stated above, the daughter then gets half the share of the son.

Rights of inheritance of Wife

A widow is always a Sharer in the property of her deceased husband. She receives one-eighth of the share of her husband's property, if the husband dies leaving behind his wife and children or grandchildren (son/daughter). In the absence of any children, the widow will receive one-fourth of the property of her deceased husband.

Rights of inheritance of Mother

Mother always remains a Sharer in her son or daughter's property. However, the mother's share varies in the presence of other heirs of the deceased in the following way:

- The mother receives one-sixth share in the property of her deceased son or daughter's property, if the deceased also leaves behind children, grandchildren or two or more brothers or sisters, or even one brother and one sister.
- The mother will receive one-third share in her son or daughters property if there are no children or grandchildren or more than one brother or sister of the deceased.



- If the deceased leaves behind his or her mother, father and spouse (husband or wife) then the mother will not inherit her usual share as provided above, but will receive only one-third share of what remains after deducting the husband or wife's share in the property.

Illustration

If a woman dies leaving behind her father F, her husband H, and her mother M. H, as Sharer, will inherit one-half of the property. The mother will receive one-third of that one-half, that is, one-sixth. F will receive the remaining one-third of the share in the position of a Residuary.

Rights of inheritance of Sisters

Sisters are Sharers in the property of their deceased siblings (full brothers or full sisters). If a deceased leaves behind only one sister, she will receive one-half of the share in the property. If there are two or more sisters, then all of them together shall receive two-third share in the property.

However, the following principles have to be kept in mind:

- A sister, though a Sharer in the property of her deceased sibling, is not a primary heir. She receives her share only in the absence of children, grandchildren, father and paternal grandfather of her deceased brother or sister.
- If the deceased leaves behind a full brother, then the full sister receives a share in the position as a Residuary. The share of the sister in this case will be one-half the share which the full brother receives.

Illustrations

- If a man, P, dies leaving behind a mother, M, a widow, W, a son, S and a daughter, D: The share of the mother, M, is one-sixth of the property. The widow, W, receives one-eighth and the remaining property goes to the children (with the rule that the son, S, will get double the share of the daughter, D).
- If a man, P, dies leaving behind only his mother, M, and a widow, W, but no children: The mother, M's share will be one-third share of the property and the widow will receive one-fourth of the share. The remaining property shall go to the distant kindred of the deceased, if any.



ILLUSTRATIONS OF HOW A WOMAN'S PROPERTY DEVOLVES WHEN SHE DIES WITHOUT A WILL:

As explained in the principles of inheritance discussed above, following are certain instances of how a woman's property devolves in case she dies without a will:

If a woman dies leaving behind a widower and two sons: The share of the widower will be one-fourth as sharer and the remaining property is divided between the two sons, each receiving one-half of the remaining property.

If a woman dies leaving behind a widower and one son and one daughter: The share of the widower shall be one-fourth and the remaining property shall be distributed between the son and the daughter (daughter will receive her share in the position of a Residuary). The son shall receive a share twice that of the daughter, as per the principle discussed above.

If a woman dies leaving behind a widower only without any children: The share of the widower shall be one-half of his wife's property. The remainder of one-half share of the property shall be distributed amongst the Distant Kindred, if any.

If a woman dies leaving behind a widower and her father, without any children: The share of the widower will be one-half of the property as a Sharer. The remaining one-half of the property shall be inherited by the father as Residuary.

If a woman dies leaving behind only a son and her father: The share of the father shall be one-sixth of the property as a Sharer. The son shall inherit five-sixth as a Residuary.

If a woman dies leaving behind a mother and a father and no children or husband: The share of the mother will be one-third as Sharer. The father shall receive two-thirds as Residuary.



Illustrations:

- Thus, if X, a woman, dies leaving behind a mother, M, a son, S, and a daughter's son, D, then M as sharer will take one-sixth as Sharer and S will take the remaining five-sixth as residuary. D will be totally excluded from the inheritance, since he is Distant Kindred.
- If P, a woman, dies leaving behind his mother M, son S and son's son B, his property will devolve to M- who will receive one-sixth of the property and the remaining shall go to S as Residuary. B will be completely excluded. Similarly, If P leaves behind his father F, and grandfather G, then only his father F will inherit excluding G.

RIGHTS OF INHERITANCE OF HALF SIBLINGS (HAVING A COMMON MOTHER):

A half-brother and/or a half-sister are not primary heirs. They inherit only in certain circumstances as follows:

- A half-brother or a half-sister is excluded from inheritance by any children of the deceased, son of any such children, father and paternal grandfather.
- Whenever a half-brother and/or a half-sister inherit a share in the property, they take equal share. The rule of a son or a brother receiving a share twice to that of a daughter or a sister respectively, does not apply between a half-brother and half-sister.
- A half-brother or a half-sister receives one-sixth share in the property as Sharers. Where there is more than one half-brother or half-sister, they receive one-third share together, and share it between them equally. Here also, the rule of a son or a brother taking a share twice to that of a daughter or a sister respectively, does not apply.

Did You Know?

- A person who has renounced Islam will be allowed to inherit the property from his deceased Muslim relation. However, the descendants of this person who has renounced Islam will not be able to inherit.
- Under the Sunni law, if an heir has caused the death of the deceased-intentionally, accidentally or by mistake, he/she is excluded from inheritance.
- Under Sunni law, an illegitimate child is not allowed to inherit from the father. He/she can only inherit from the mother and relations through the mother.
- Under Sunni law, the mother is allowed to inherit from the property of an illegitimate child.





Law Governing Property Rights of Women from other Communities

The succession laws for all communities in India that are not Hindu, Muslim, Buddhist, Jain or Sikh are governed by the provision of Indian Succession Act, 1925 ("**ISA**"). Thus, Christians, Parsis and Jews fall under the purview of the ISA.

Property Rights of Communities under the Indian Succession Act (Except Parsis):

The law provides that persons covered under the provisions of the ISA and who die intestate, i.e., without a valid will detailing the disposal of all their property, the wives or husbands or the kin of such persons shall inherit the property.

Did You Know?

Prior to an amendment to the ISA, in the year 2002, if an Indian Christian widow by means of a valid contract had been excluded from her share in her husband's property, she would have no right to inherit her husband's property, upon his death. However, with the amendment in the year 2002, this provision was done away with as it was considered discriminatory.





Moreover, the ISA clearly provides for the respective shares that widows may inherit in different scenarios, for example when there may or may not be descendants or kin surviving the deceased husband. Lineal descendants mean legitimate children born in lawful wedlock. Kin here means relations by blood. The different scenarios governing the share to be inherited by a widow are as follows:

➤ **When the deceased is survived by descendants as well as a widow**

The widow shall inherit one-third of the deceased's property and the remaining shall go to the lineal descendants.

➤ **When the deceased is survived by kin and a widow only, no descendants**

The widow in this case shall inherit one-half of the property from the deceased and the other half shall go to the kin.

➤ **When there is only a widow**

The widow shall inherit the entire property from the deceased.

➤ **Where there are children and no widow.**

Where a person dies intestate, leaving behind only children and no widow, the share of such and all children shall be as follows:

➤ **When the deceased is survived by only one child but no widow**

In case of a single surviving child (son or daughter), the entire property of the deceased shall be inherited by the said child.

➤ **When the deceased is survived by more than one child but no widow**

In cases where there is more than one child, the property shall be divided equally.

Did You Know?

Under the ISA, Christian daughters can inherit a share in their parents' property in addition to her *stridhana* paid to her during her marriage. Payment of *stridhana* at the time of marriage does not mean exclusion of a daughter from a right to inherit her parents' property.

Widowed mothers are also entitled to inherit property from a deceased child. If the mother is the only survivor to the intestate, she shall inherit all the property. If any brothers and/or sisters and/or children of such siblings may also be surviving in addition to the mother, then the share gets divided in as many shares between each of the siblings and the mother equally.

Parsis under the Indian Succession Act

- The law of inheritance for Parsis has been provided for separately under the ISA.

Did You Know?

Children of a Parsi father and a non-Parsi mother would be Parsis if they are admitted and profess the Zoroastrian religion. However, children of a Parsi mother and non-Parsi father will not qualify as Parsis.

Greater equality and improvement of rights of succession between male and female Parsi heirs in parental property were introduced in 1991. With an amendment in 1991, now where a male or a female Parsi dies intestate, leaving a widow (or widower) and children, each and all of them will receive an equal share in the property of the person who has died intestate.

Furthermore, if a male or female Parsi dies, leaving behind only children, then all the children shall receive equal shares. In case of the Parsi leaving behind one or both parents, in addition to children, the parent or both parents shall receive half of the share of each child.

There is no distinction between heirs born during the lifetime and after the death of the intestate. Also, any heir that has predeceased the intestate without leaving behind a survivor, such as a widow or a widower, his share shall not be taken into account while partitioning the property. However, where a predeceased child being a daughter, leaves behind any children, her share shall be divided equally among her children.

Furthermore, where a Parsi dies intestate leaving behind no heir but a widow or a widower, or a widow/widower of a lineal descendant, the property shall be divided amongst the survivors as follows:



➤ **Where the deceased is survived by a widow or widower but no widow or widower of a lineal descendant**

The widow or widower shall take half the property.

➤ **Where the deceased is survived by a widow or widower and also a widow or widower of a lineal descendant**

The share of the widow or widower of the intestate shall be one-third share in the property.

The share of the widow or widower of the descendant shall be one-third share in the property.

The remaining one-third share of the property shall be divided equally amongst them.

➤ **Where the deceased is survived by no widow or widower but more than one widow or widower of a lineal descendants**

Two-thirds of the property shall be divided amongst the widow or widower of all the lineal descendants.

The residue properties in all the above scenarios shall be distributed amongst the relatives of the intestate in the order specified in the ISA, followed by the next of kin, and so on.

Did You Know?

With the 1991 amendment, widowers of relatives of a person who dies intestate, upon remarriage were also excluded from inheritance in the intestate's property. Prior to the 1991 amendment, only widows of relatives of a person who dies intestate upon remarriage in the lifetime of the person who dies intestate, were not entitled to receive a share in the property of such an intestate.

What is property?

Please note that the concept of property has different connotations in different legislations. However, in common parlance, property includes both movable or immovable property, owned by an individual or jointly by a group of individuals. The idea behind property rights is "ownership" over a property, which confers exclusive control to an individual over a property, to the exclusion of others. This right includes the right of enjoyment and disposal of a property.

Examples of Property:

1. Immovable property includes land (agricultural and non agricultural), buildings, apartments, houses, commercial complexes.
2. Movable property includes jewellery, cash, shares, investments, antiques, vehicles, artifacts, furniture, fittings, household goods, art and paintings.



Wills

A 'Will' is a legal document through which a person expresses his or her intention of disposing his or her property after his or her lifetime. The law relating to wills for persons, male or female of all religions except Muslims is covered under the ISA.

In case a person dies without a will, his or her property shall be dealt in keeping with the personal laws as applicable.

It must be noted that a will comes into effect only after the death of a person who has made a will. A will can cover the disposal of both movable and immovable properties which are owned by the person making the will. Such movable and immovable property shall include not just property owned by the person at the time of making the will, but can also include those properties which may be acquired by the maker of the will after the date of the will.

Capacity to make a Will

Any person has the capacity to make a will as long as he or she is of sound mind, memory and understanding. A person wishing to make a will should have the capacity to understand the nature and extent of his or her property. The person should also be the absolute owner of the property he or she is disposing of by means of the will.

Execution of a Will

FORMAT OF A WILL:

- There is no prescribed format for a will.
- A will can be made in any language or form.
- The use of technical terms is not required while making a will.
- The will may be handwritten or typed.
- The will must clearly express the intention of the person making the will.

SIGNING OF A WILL:

- The person making the will must put his or her signature to the document in order to validate it.
- If a person is illiterate or is incapable of signing, then he or she is permitted to affix a mark in place of a signature as a proof of validation.

- Even the initials of the maker can be treated as a signature of the will and are sufficient.
- The maker of a will is also permitted to make another person sign on his or her behalf in his or her presence and by his or her direction.

WITNESSES TO A WILL:

- It is compulsory for a will to be attested by two or more witnesses.
- It is not necessary for these witnesses to sign the will at the same time as making of the will or be aware of the contents of the will.
- It is also compulsory that each of the witnesses sign the will in presence of the maker of the will.
- Once the witnesses have attested the will, the will is said to be completely and validly executed.

SUSPICIOUS WILLS:

Once a will is duly signed and attested it is presumed to be valid, unless proven otherwise.

- A will may be challenged on grounds such as:
 - The person making the will is of unsound mental condition;
 - The signature of the maker of the will is not genuine;
 - The will has been obtained by fraud, coercion or undue influence exercised on the maker of the will.

The person who raises such a challenge is required to prove his claim in the court.





REGISTRATION OF WILLS:

It is not mandatory to register a will in order to make it legally valid. The Supreme Court has affirmed this point and stated that the genuineness of a will cannot be doubted merely on the grounds of non-registration. However, a will may be registered since the registration provides strong legal evidence of its validity.

REVOCATION OF WILLS:

There are no restrictions on the number of times that a will can be changed. An earlier will may be revoked by making another will. However, the making of a new will does not revoke a former one, unless the new will in express terms revokes the former will.

ALTERATION OF WILLS:

The law provides for methods to alter an executed will. In order to make a valid alteration, there must be a signature of the person making the will and the signatures of the attesting witnesses in close proximity of the alteration. Otherwise, the executed will should be accompanied by a memorandum referring to such an alteration and should be signed by the maker of the will as well as the attesting witnesses.

PROBATE:

A Probate is a copy of the will along with a certificate of the court verifying that the will has been proven. It is conclusive evidence of the validity of the will, its due and valid execution and the capacity of the person making the will. Probate is compulsory only to Hindus, Buddhists, Sikhs and Jains.

Wills Under Muslim Personal Law:

Wills or vasiyats for Muslims is covered under the Muslim personal laws. Muslims are not permitted to dispose of their entire property through a will. A maximum of one-third of the property of a Muslim person can be disposed off by means of a will, after excluding the funeral expenses for the deceased and his or her debts. The will may be in oral or written form and there is no mandatory requirement of signature or attestation by witnesses.



Marriage, Divorce and Live-in Relationships



Introduction

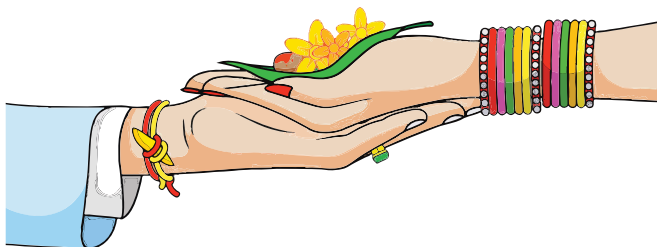
In India, a woman enjoys the freedom to solemnize her marriage in accordance with the rites and rituals of her religion, i.e. as per “Personal Laws of Marriage” or in a completely secular manner under the ‘Civil Laws of Marriage’ enacted by the Legislature. These codes not only govern the aspect of solemnization of marriage but also aspects of divorce and maintenance. This chapter broadly highlights certain legal aspects of, (I) Marriage; (II) Divorce; (III) Maintenance under the personal law of each religion as also under the Civil laws; (IV) Child Custody; and, (V) Live-in Relationships, which would be pertinent to a woman.

I. Marriage a Hindu Marriage



A marriage solemnized between two Hindus domiciled in any part of the country is governed by the Hindu Marriage Act, 1955. The term ‘Hindu’ includes not only persons who are Hindu by religion, but also Sikhs, Buddhist and Jains.

This Act encompasses all persons who are not Christians, Parsis, Muslims or Jewish.



Did You Know?

Where either of the spouse is a person to whom this Act is not applicable, their marriage will not be governed by this Act, although the marriage may have been solemnized as per Hindu rites and rituals.

This Act even applies to spouses who may not be currently residing in India but are otherwise domiciled in India.

Conditions for a valid marriage

Hindus are free to solemnize their marriage in accordance with the rites, ceremonies or customary practices of their religion or community. However, there are certain conditions which must be complied to constitute a valid marriage, namely:

- Neither party has a living spouse at the time of solemnization of the marriage;
- Neither party is incapable of giving consent (on account of unsoundness of mind or mental disorder);



- The bridegroom ought to be at least 21 years of age and the bride 18 years of age at the time of marriage;
- The parties are not within the *degrees of prohibited relationship*, unless permitted by the usage or custom followed by both the parties;
- Parties are not *Sapindas* of each other, unless permitted by the usage or custom followed by both the parties.

Once the above conditions are satisfied, a marriage solemnized according to the customary rites and ceremonies will be considered valid. Where the rites and ceremonies include *Saptapadi*, i.e., taking of seven steps by the bridegroom and bride jointly before the sacred fire, then the marriage is considered complete and binding on the completion of the seventh step.

Examples of Prohibited Relationship and Sapinda

Degree of Prohibited Relationship	<ul style="list-style-type: none"> • A daughter cannot marry her father and grandfather. Similarly, a mother cannot marry her son or grandson. • A son cannot marry his stepmother. • A person cannot marry his daughter-in-law or son-in-law. • If the two are brother and sister; uncle and niece; aunt and nephew or children of brothers and sisters.
Sapinda	<ul style="list-style-type: none"> • Sapinda relationship with reference to any person extends up to his or her second cousin from the mother's side and his/her fourth cousin from the father's side.

Did You Know?

Registration of Marriage

In 2006, the Hon'ble Supreme Court of India directed compulsory registration of marriages solemnized in various States and Union Territories. National Capital of Delhi has passed an order on April 21, 2014 requiring every marriage solemnized in Delhi to be registered within 60 days, irrespective of the caste, creed and religion professed by either party.

Registration of marriage acts as a proof of marriage. However, mere registration cannot make a void or invalid marriage into a valid one.

Similarly, non-registration of the marriage does not make the marriage void or voidable. Failure to register may result in fine.

Bigamy

One of the fundamental conditions for a valid marriage is that a person can only have one living spouse at a certain point of time. Therefore, bigamy or polygamy is absolutely prohibited under the Hindu law of marriage and is a punishable offence.

Where a person has a living spouse at the time of marriage, then the second marriage will be invalid and the spouse of the second marriage

will not enjoy the legal status of a wife or husband. For the offence of bigamy to be made out, both the first and the second marriage ought to be a valid and lawful one.

It is interesting to note that the Hon'ble Supreme Court of India in the year 1995 has also held that a Hindu husband cannot marry a second time simply by embracing Islam without first lawfully dissolving the first marriage. It was observed that such a subsequent marriage would be void and the husband liable to be prosecuted for bigamy.



b. Muslim Marriage



Marriage between Muslims is commonly referred to as '*Nikah*'.

Muslim marriages are not governed by a codified statute but are governed by their customary practices and rituals. Certain jurists believe that a Muslim marriage is purely a civil contract while others believe it to be in the nature of *ibadat* (worship). Unlike a Hindu marriage, it is not a sacrament.

Further, there are various distinct categories within Islam, the two main being, Shia and Sunni, each having differing customs and practices. These two schools differ in the manner they interpret Islamic personal law. For example, Shia recognizes two kinds of marriages, namely, permanent and temporary or '*Muta*' while according to the Sunnis, temporary or *Muta* marriages are void. However, marriages both under Shia and Sunni tenants mandate certain common conditions that need to be satisfied for the marriage to be valid.

Conditions of a valid marriage

For a valid Muslim marriage, both the husband and wife must be Muslims. Apart from this, there are also certain other conditions that need to be satisfied, namely:

- The parties to the marriage must be sane and must have attained the age of puberty. However, due to laws restraining child marriage, the groom ought to be at least 21 years of age and the bride at least 18 years of age.
- There should be a proposal i.e. '*Ijab*' made by or on behalf of one and an acceptance i.e. '*Qubul*' of the proposal by or on behalf of the other. It is important that both the proposal and acceptance are clear and unambiguous and expressed at once, during one sitting. The *Ijab* or the proposal can be initiated by or on behalf of either the man or the woman.
- Either two male or one male and two female Muslims (all adults and sane) are required to witness the marriage.
- Muslim marriage also requires payment of '*Mahr*' by the man to the woman. *Mahr* is a mandatory gift that is paid by the man as a token of respect to the woman whom he proposes to marry. This can be paid either at the time of marriage or at a specified time thereafter. A Muslim man pays *Mahr* to the woman to show his capacity to maintain her.

A Muslim man is permitted to marry up to four wives at a time provided he treats them with equality. However, if he is apprehensive that he will not be able to do justice between them and treat them with equality, he is enjoined to marry only one. A Muslim woman, on the other hand, can only have one husband.

Prohibitions in marriage

Akin to marriages between Hindus, there are certain prohibitions under the Muslim personal laws for marriage. These prohibitions may be absolute or relative.

Both Shias and Sunnis regard certain prohibitions in marriage as absolute and any marriage that takes place in violation of such conditions is regarded as void or *batal*. These include marriages:

➤ Where the man and woman are related by blood

A man is prohibited from marrying his mother or his grandmother, his daughter or his granddaughter, his niece, aunt, his real or half sister, etc. A woman cannot marry her brother or her paternal or maternal uncle.

However, cousin brothers and sisters can get validly married.

➤ Where the man and woman are related by marriage

A man is prohibited from marrying his wife's mother or grandmother, his wife's daughter or granddaughter, wife of his father or wife of his son, etc. Similarly, a woman cannot marry her husband's son, or husband's great grandson or the husband of her daughter or granddaughter.

Apart from the above, the Sunni sect has certain relative prohibitions that makes the marriages irregular (*fasid*), but not invalid. For example, marriage between a man with his wife's sister during the lifetime of the first wife is an irregular marriage. Such a marriage can be regularized if the husband divorces the first wife. Another example of an irregular marriage is when a man marries a fifth wife. Shias regard such marriages as void while the Sunnis consider them irregular.

Did You Know?

Under the Sunni school of thought, a Muslim man can validly marry a non-Muslim woman who is a *Kitabia* i.e. a Christian or Jewess. However, this is prohibited by the Shia community.

For the Muslim woman, both Sunni and Shia sects prohibit her from marrying a non-Muslim, even a *Kitabia*.



'Mahr' (Dower)

Mahr has been described as an obligation imposed on the husband as a mark of respect for the wife. It is meant to be a security (maintenance) to protect the wife in case of abandonment, divorce or neglect by the husband.

Mahr can be in the form of money and/or goods and is exclusively reserved for the use of the wife. Payment of *Mahr* could be immediate (prompt), or deferred. Prompt *Mahr* is payable on demand and deferred *Mahr* is payable on divorce or death of the husband.

It is also possible for a wife, out of her free consent and volition, to remit her dower either entirely or in part. Such consent should not be obtained on the basis of any misrepresentation, coercion or pressure.

c. Christian Marriage



Christians are persons who profess the religion of Christianity and their marriage can be performed only in accordance with the Indian Christian Marriage Act, 1872. Under this law, a marriage can be performed where either the husband or wife is a Christian. Hence, though a Hindu and a Christian cannot get married under the Hindu Marriage Act, they can solemnize their marriage under the Christian Marriage Act.

A valid marriage under this law requires the marriage to be solemnized by persons who have been specifically licensed to do so under this Act. The marriage must be performed in a particular form as provided under this Act and must be duly entered in the Marriage Register, maintained for this purpose. Accordingly, marriage under this Act is required to be compulsorily registered.



Did You Know?

Time and Place of Marriage

As a general rule every marriage under this law is required to be solemnized between the hours of six in the morning and seven in the evening. Further, the place of marriage can only be a Church. Exceptions are, however, made where a special licence has been granted to a clergyman of the Church.

d. Parsi Marriage



Marriage between Parsis is governed by the Parsi Marriage and Divorce Act, 1936. The word 'Parsi' means a Parsi Zoroastrian, i.e. a person who professes the Zoroastrian religion. A marriage between a Parsi and a non-Parsi is not covered by this Act.

A valid Parsi marriage needs to fulfill certain conditions, failing which the marriage is considered as invalid. However, a child born out of such a marriage is considered as a legitimate one.

Conditions of a valid Parsi Marriage:

The conditions for a valid marriage are:

- The husband and wife should not be in a prohibited relationship.
- The marriage should be solemnized according to the Parsi ceremony of '*Ashirvad*' conducted by a Parsi priest in the presence of two other witnesses.
- The groom ought to be at least 21 years of age and the bride at least 18 years of age.



Like Hindus and Muslims, Parsis also prohibit marriages between a man and a woman who are within certain prohibited degrees of relationships. Prohibited relationships under Parsi law include relations through man or woman's father, mother, son, daughter, wife, husband, sister or brother. However, marriages between Parsi cousins or between a Parsi man and his distant niece do not come within the prohibited degrees of relationship.

Parsi law also prohibits bigamy. Where a Parsi man or woman marries despite having a living spouse at that time, such a marriage shall be void. The position holds good even if the Parsi has changed his or her religion or domicile.

Certification of Marriage

A Parsi marriage is required to be certified immediately after solemnization by the officiating priest. This certificate is signed by the priest, the bride and bridegroom as well as the two witnesses present. Thereafter, the marriage is registered by the Marriage Registrar.

f. Special Marriage Act, 1954

A marriage under the Special Marriage Act 1954 is commonly referred to as 'Civil Marriage'. The Act applies to all of India except the State of Jammu & Kashmir. Additionally, citizens who are domiciled in areas to which the Act applies but who are in the State of Jammu & Kashmir are also included.

A man and a woman can get married under the Special Marriage Act irrespective of the religion or community they may belong to. Couples opt for a civil marriage not only when the bride and groom belong to different religions or communities, but also those who do not wish to get married under the laws governing their religion.

Persons who can opt for a civil marriage

Following persons of the same religion can opt for a civil marriage:

- Where both the bride and groom are Hindus, Buddhists, Jains or Sikhs;
- Where both the bride and groom are Muslims;
- When both the bride and groom are Christians.

Following are examples of some inter-religion marriages that can only be solemnized under the Special Marriage Act:

- Where the marriage is between a Hindu and a non Hindu i.e. Muslim, Christian, Parsi, etc;
- Where the marriage is between a Muslim man and a woman not belonging to the community of *Kitabia* (People of Book) i.e. Jews and Christians;
- Marriage between a Muslim woman and a non-Muslim man.



Conditions for a valid civil marriage

There are certain condition precedents for a valid civil marriage, namely:

- Neither the bride nor the groom has a living spouse at the time of marriage;
- Neither party is suffering from any mental illness or disorder;
- Parties are not within the prohibited degrees of relationship, unless permitted by the custom governing at least one of the parties;
- If the marriage takes place in Jammu & Kashmir, both the parties should be citizens of India and domiciled in a place where this Act applies.

Procedure for Civil Marriage

- Notice of Intended Marriage in the specified form to be submitted by the parties to the Marriage Officer of the district in which at least one of them reside for at least thirty days immediately before the date of notice.
- This notice is published/put-up by the marriage officer inviting objections, if any.
- If no objection is received, parties can get married after thirty days of publication of notice.
- The marriage may be solemnized at the specified marriage office.

After solemnization of marriage, certificate of marriage is entered into Marriage Certificate Book which is conclusive evidence of a valid marriage. This certificate is signed by the parties and three witnesses.

g. Foreign Marriage Act, 1969

An Indian citizen working or residing abroad may solemnize their marriage with another Indian citizen or a foreigner under this Act. The religion or personal law of the couple is not relevant. However, it is important that the conditions laid down in this Act are satisfied.

For a valid marriage under Foreign Marriage Act, neither party should have a spouse living, or suffering from a mental illness. Additionally, the bridegroom should be at least 21 years of age and the bride 18 years. Unless permitted by the custom, the couple should not be within the degrees of prohibited relationship.

For the purpose of solemnizing a valid marriage under this law, a procedure similar to the procedure under the Special Marriage Act has been envisaged. Further, a marriage is required to be registered by marriage officers in the foreign country, who are appointed amongst the Indian diplomatic and consular staff in those countries. Such an officer may refuse to solemnize the marriage if it is prohibited by any law in force in the country where it is to be solemnized.

Getting married under this Act is entirely optional and its provisions do not adversely affect the validity of a marriage solemnized in a foreign country under the laws of that country.

II. Divorce

Divorce is the legal dissolution of marriage. Just like the varied religious communities in India have their own personal marriage laws, the divorce procedure too varies, according to the personal laws of the couple seeking divorce.



All Hindus, Buddhists, Sikhs and Jains can seek divorce under the Hindu Marriage Act 1955. The Muslim, Christian and Parsi communities, on the other hand, have their own personal laws governing dissolution of marriage. Spouses belonging to different religious communities and castes can seek divorce under the Special Marriage Act, 1956. There is also the Foreign Marriage Act 1969, governing divorce laws in marriages which have been solemnized in a foreign country where at least one spouse is an Indian citizen.



a. Dissolution of marriage between Hindus

Dissolution of marriage solemnized between two Hindus is codified under the Hindu Marriage Act. However, before dissolution, HMA also provides recourse to 'Restitution' and 'Judicial Separation'.

Restitution of Conjugal Rights

As per Hindu laws, a spouse is entitled to cohabitation with the other spouse. However, where one spouse abandons the other without a reasonable excuse, the aggrieved spouse has the option of seeking restitution of conjugal rights from a judicial forum.

If the court is satisfied about the grounds made out for restitution, an order for restitution of conjugal rights can be granted.

In some cases, the courts have denied a relief of restitution where the husband was guilty of mental cruelty or ill-treating the wife. Further, courts may deny restitution if there is considerable delay in seeking such relief.

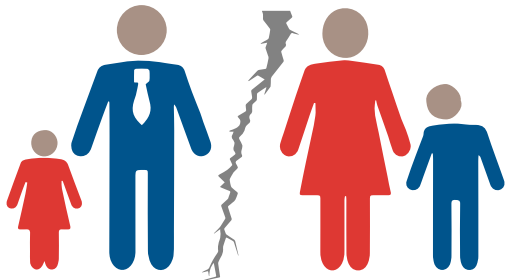
It is open for the parties to seek divorce if there has been no restitution for a period of more than one year despite a direction ordering the spouses to cohabit.

Judicial Separation

Judicial separation is a suspension of the active marital life between the husband and wife by order of a court. This means that the husband and wife are no longer under any obligation to cohabit or perform marital obligations for each other.

The grounds on which a party may seek judicial separation is the same as the grounds for seeking divorce (as discussed separately), for example, adultery, cruelty, desertion, unsoundness of mind, contraction of a venereal disease by either of the spouses, etc.

Passing of a decree of judicial separation does not prevent the parties to subsequently resume cohabitation and start living together as husband and wife. Since the marriage is not dissolved, the parties are not required to undergo the ceremony of marriage to start living as a husband and wife. The parties can even apply to the court for setting aside the order of judicial separation.



Did You Know?

If the parties are judicially separated, then on the death of one of the spouse, the inheritance rights of the other spouse remains unaffected as the marriage has not been legally dissolved.

If the parties are divorced, the marriage comes to an end and the divorced spouse does not have any inheritance rights in respect of the assets of the deceased spouse.

Divorce

Both husband and the wife can get their marriage dissolved by filing for divorce in the competent court. However, such a petition cannot be filed till the lapse of one year since the date of marriage except in cases of exceptional hardship.

Grounds for dissolution of marriage:

Both husband and wife can file for divorce on the following grounds:

- Adultery;
- Cruelty after marriage;
- Desertion for a continuous period of at least two years;
- Conversion to another religion;
- Mental disorder;
- Suffering from virulent and incurable form of leprosy, or a venereal disease;
- Renouncing the world;
- Not being heard of as being alive for a period of seven years or more.

Out of the above, the most widely invoked ground for divorce by women is 'Cruelty'. It is not every act of cruelty that entitles an aggrieved spouse to seek divorce. The Courts have held that the cruelty must be so



grave as to come to the conclusion that the aggrieved spouse cannot be reasonably expected to live with the other spouse. This aspect has been dealt separately in the chapter “**Cruelty**”, where the two variants of cruelty namely, mental or physical have been discussed in detail.

In addition to the aforesaid grounds, there are individual grounds available to the wife for seeking divorce:

- The husband has been guilty of rape, sodomy or bestiality since the solemnization of marriage;
- Cohabitation between the spouses has not been resumed for more than one year after the husband has been directed to provide maintenance to the wife;
- Her marriage was solemnized before the age of 15 years and she has repudiated the marriage after attaining the age of 15 years but before the age of 18 years.

Parties to the marriage also have an option to jointly apply for divorce. A petition for divorce by mutual consent is required to be filed by both the parties jointly and is maintainable only upon fulfillment of certain conditions, namely:

- Both the parties have been living separately for a period of one year or more;
- They have not been able to live together; and
- They have mutually agreed that the marriage should be dissolved.

In cases of divorce by mutual consent, the court does not give any directions to the parties for 6 months since the date of presentation of the petition. This period is often referred to as the 'cooling off period', so as to allow the husband and wife to reconsider their decision. After the cooling off period and not later than 18 months after presentation of the petition, if the petition is not withdrawn, the Court will grant the divorce.



Did You Know?

In a recent judgment (2014), the Supreme Court, in order to do complete justice between parties, has held that in the peculiar facts of the case the six-month cooling period should not come in the way of allowing the plea for dissolution of marriage by mutual consent when it has broken down irretrievably.

For a divorce by way of mutual consent, the Court is required to be satisfied about the consent of the parties. If one of the parties withdraws the consent, or if it is found that there is no consent at the time of the enquiry, divorce will not be granted by the court.

Interestingly, in a proceeding for divorce, the Court if it considers fit, can order an alternative relief of judicial separation.

After divorce has been final, the parties can lawfully marry each other again and there is no bar on such re-marriage.

Where can you file for divorce?

A party can file its petition for divorce before the District Court in whose jurisdiction

- The marriage was solemnized; or
- The other spouse resides; or
- The parties to the marriage last resided; or
- The wife resides, if she is seeking divorce; or
- The person seeking divorce resides, if the other spouse resides outside India or has not been heard of being alive for the past seven years.

As a general rule, courts are required to hear the petition for divorce and decide the same within six months. An appeal against the decree of divorce must be filed within ninety days from the date of the order.



b. Dissolution of Muslim Marriage

Divorce under the Muslim law can be done by two ways, one is through Court, and the other is out of Court. Dissolution of marriage out of court, i.e. by way of *Talaq*, is an option that is only available to the husband, who can do so unilaterally, without assigning any reason. This position is common amongst all schools of Muslim Law.

Dissolution of Marriage without recourse to Court

Under this mode, the marriage can be dissolved either by the husband (*Talaq*), or by mutual consent (*Khula* or *Mubara'at*) or through the wife by delegation of the husband (*Talaq-i-tafweez*).

(a) ***Talaq***: A Muslim man may divorce his wife without assigning any cause. There exist certain kinds of *Talaq* namely:

- *Talaq Ahsan*
- *Talaq Hasan*
- *Talaq-ul-biddat/Talaq-i-bidai*

Talaq may be by spoken words (oral) or by a written document (*Talaknama*). It is not necessary for the wife to be present when the *Talaq* is pronounced, and can be later informed of the same.

Further, Courts have held that for the *Talaq* to be valid it must be preceded by an attempt of reconciliation between the parties by two mediators. In the absence of such attempt, the divorce will not be valid. This is often referred to as the injunction of *Quran*.

(b) Divorce by mutual consent (Khula or Mubara'at)

In this form, divorce may take place by mutual consent of the husband and wife and depending on the terms of the contract between the two may be called *Khula* or *Mubara'at*. A *Khula* is divorce by consent at the instance of the wife in which she agrees to give a consideration out of her property (*Mahr*) to the husband for her release from the marriage. *Mubara'at* is a divorce by mutual consent.

(c) Divorce by delegation (Talaq-i-tafweez)

Ordinarily, it is only the husband who can pronounce *Talaq* on his wife. However, the husband can delegate this authority to the wife or to a third party by agreement. This is known as divorce by delegation. Thus, an agreement can be made either before or after marriage by which the wife can be given the liberty to divorce herself from the husband under certain specified conditions which are reasonable and not opposed to Muslim Law. This may include the husband marrying a second wife.

Divorce by recourse to Court

Judicial divorce can be granted only under the Dissolution of Muslim Marriages Act, 1939. This Act only entitles a Muslim woman to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- Absence of the husband for four years;
- Negligence or failure to provide maintenance for a period of two years;
- Imprisonment of the husband for a period of seven years or more;
- Failure to perform marital obligations for a period of three years (without reasonable cause);
- Impotency;
- Suffering from insanity for a period of two years or from leprosy or virulent venereal disease;
- Marriage below 15 years of age and its repudiation before attaining the age of eighteen years;
- Cruelty;
- On any other ground which is recognized as valid for the dissolution of marriages under Muslim law.

It is relevant to note that this law also protects the rights of the woman to the dower she is entitled to, notwithstanding the dissolution of marriage.

c. Divorce between Christians

Divorce between the Indian Christians is governed by the Indian Divorce Act, 1869. Broadly speaking, this Act permits parties to either seek judicial separation or dissolution of the marriage or pray that it be declared as null and void.

This Act permits both the husband and wife to seek a decree of judicial separation, on the grounds such as adultery, or cruelty, or desertion without reasonable excuse for two years or more. Such a decree is considered a partial qualified divorce wherein the parties are separated and forbidden to live or cohabit together without affecting the marriage itself.

Parties are also permitted to seek dissolution of marriage on the grounds such as '*adultery*', '*conversion*', '*cruelty*' and '*desertion*'. In addition, a wife can also obtain divorce on the grounds of '*rape*' and '*sodomy*' by the husband. This Act further permits parties to seek divorce by mutual consent. However a separation of two years has been provided as against other legislations which provide for one year separation period before filing a petition for divorce.



e. Divorce between Parsis

As discussed earlier, the provisions regarding divorce between Parsis are governed under the Parsi Marriage and Divorce Act, 1936. According to the Parsi Laws on divorce, any married person may sue for divorce on grounds such as failure to consummate the marriage, the other party having a living spouse at the time of marriage or adultery.

This act also recognizes 'Cruelty' as a ground for divorce. However, it is interesting to note that only "grievous hurt" is considered to be cruelty under the provisions of the Parsi laws on divorce. Mental cruelty has not been spelt out as a ground for the dissolution of marriage.

f. Divorce under Special Marriage Act, 1954

The grounds and the manner for dissolution of marriage under this law are substantially similar to the Hindu Marriage Act. The same grounds for divorce such as adultery, cruelty, desertion, incurable unsoundness of mind or mental disorder are available to the husband and wife. An additional ground of the spouse undergoing a sentence of imprisonment for seven years or more has also been provided to the parties. Individual grounds for divorce by a woman such as the husband being guilty of rape, bestiality or having failed to resume cohabitation within one year after an order of maintenance has been passed, are also provided. Additionally, the spouses can also approach the court for a mutual decree of divorce.

Like the Hindu Marriage Act, a party to a civil marriage can also seek judicial separation on the grounds of divorce illustrated above or seek restitution of conjugal rights in the event either party has withdrawn from the society of the other spouse without reasonable cause.

g. Divorce under Foreign Marriage Act, 1969

A marriage solemnized under this law or any marriage outside India where at least one of the parties is an Indian citizen can be dissolved in the same way as a special marriage. This is for the reason that provisions relating to divorce, judicial separation and restitution under the Special Marriage Act have been made to equally apply to foreign marriages solemnized under this law or to any other marriage solemnized in a foreign country where at least one party is an Indian citizen.

III. Maintenance

This section briefly describes a wife's right to maintenance under different laws. All personal laws accept the basic idea of the woman having a right to be maintained, in the event of dissolution of marriage. However, the amount of maintenance that she may be entitled to varies not only according to the personal laws governing her but also as per the decision of the judges.

a. Maintenance under Hindu Law

Under Hindu Laws, a wife's right to be maintained by her husband arises out of the status of the marriage itself. A Hindu wife's right to maintenance may arise in either of the following situations:

- Where she is living with her husband;
- Where she is living separate from her husband for a justifiable reason;
- Where she lives separate from the husband under a decree of court, like judicial separation, or when the marriage is dissolved.

There are two different legislations that contain provisions for giving maintenance to a Hindu wife:

- **Hindu Adoption and Maintenance Act, 1956**
- **Hindu Marriage Act, 1955**

The Hindu Adoptions and Maintenance Act, 1956

This Act allows a Hindu wife to claim maintenance from her husband during the subsistence of their marriage. However, where the wife has divorced, her maintenance rights under this Act will also cease.

Here, the right to claim maintenance is absolute and unaffected by the financial condition of the husband. However, she will lose her right if she deviates from the path of chastity or converts into other religion.

In certain situations, a Hindu wife can claim maintenance even when she is residing separately from her husband, without necessarily seeking divorce or any other matrimonial relief. These include:

- Desertion or willful neglect;
- Cruelty;
- Virulent form of leprosy or venereal diseases or any other infectious disease;
- Any other living spouse;
- Husband ceasing to be a Hindu;
- Any other cause justifying living separately.



Quantum of Maintenance

It is within the discretion of the courts to decide if any and if so what amount of maintenance a wife is entitled to. Once the court concludes that the wife is entitled to maintenance, the following factors will be relevant in determining its quantum:

- ▲ position and status of the parties;
- ▲ reasonable wants of the wife;
- ▲ if the wife is living separately, whether she is justified in doing so.
- ▲ value of the wife's property and any income derived from such property, or from the wife's own earning or from any other source;
- ▲ number of persons entitled to maintenance.

The amount of maintenance so fixed may be altered subsequently in the event of change of circumstances.

Hindu Marriage Act, 1955

Both the husband and wife have a right to seek maintenance from the other during or after conclusion of matrimonial proceedings (like divorce or judicial separation) under this Act. However, without any matrimonial proceedings, maintenance cannot be claimed. Usually, maintenance is ordered to be paid from the date of filing of the petition.

Interim maintenance

Where maintenance is sought during pendency of the matrimonial proceedings, it is often referred to as maintenance *pendente lite* or interim maintenance. Here, a spouse can seek personal maintenance as well as expenses as interim maintenance. An application for interim maintenance can be made even if the trial stage of the matrimonial proceedings has concluded and the matter is at the stage of appeal.

For interim maintenance, the husband or wife, as the case may be, will have to show that he/she does not have any independent income sufficient for maintenance and to meet the expenses of proceedings.

In general, matters involving interim maintenance are heard by the courts and decided expeditiously.



Effect of non-compliance of order granting interim maintenance

- The court can order that such a person shall not be heard in the main matrimonial petition till he or she pays the maintenance.
- The court may initiate contempt proceedings for non compliance of its order.

Permanent Maintenance

Permanent maintenance is granted only when a specific application is made. Such an application can be made by the husband or wife, either at the time a verdict is passed in the matrimonial proceedings or any time after.

However, where the matrimonial proceedings are dismissed, that is an order of divorce or judicial separation is not granted, then permanent maintenance cannot also be granted. Hence, where the husband's attempt to seek divorce is dismissed, then the wife's request for permanent maintenance will also not survive.

There is no fixed formula for fixing the amount of maintenance as each case depends on its own facts and circumstances. However, the following factors have been considered as relevant by the courts:

- ▲ The status of the husband and wife;
- ▲ Needs of the parties;
- ▲ Means and capacity of the husband/wife to pay, having regard to reasonable expenses for his or her own maintenance and others whom they may be required to maintain under law;
- ▲ Actual earning as well as the potential earning capacity of the other party. There is a presumption that every able-bodied person has a capacity to earn;
- ▲ The income earned by the person seeking maintenance is also a relevant factor.



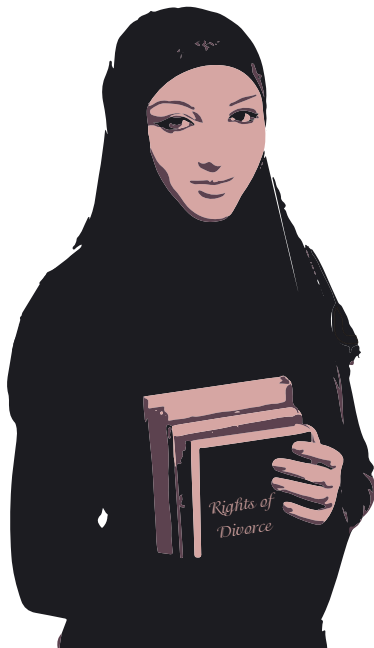
The courts also have to take note of the fact that the amount of maintenance fixed should be such as to ensure reasonable comfort. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.

If the parties opt for dissolution of marriage by way of mutual consent, then they can agree on a mutually acceptable amount of permanent maintenance to be paid by one to the other party.

Unlike interim maintenance, conduct of the parties may be looked into at the time of deciding the permanent maintenance. In some cases, adultery and/or cruelty on the part of the wife may disentitle her from claiming maintenance.

Maintenance on Re-marriage

An order of permanent maintenance can be varied or rescinded if the other party gets remarried. However, this will not be the case where the maintenance amount was agreed between the parties following a divorce by mutual consent.



b. Maintenance under Muslim Law

During the continuance of the marriage, a Muslim woman is entitled to be maintained by her husband, irrespective of the fact that she has means to maintain herself. It is generally understood that the wife's entitlement has priority over the children, parents and relatives.

However, if the marriage is invalid or the wife refuses to cohabit for no reasonable cause, then she may lose her right to be maintained. The wife will be entitled to live separately where the husband treats her cruelly or where she has not been paid prompt dower etc.

Under the Muslim Women (Protection of Rights on Divorce) Act, 1986, a divorced Muslim woman is entitled to the following:

- A reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by the husband;
- If she also maintains the children born to her before or after the divorce, then the husband is required to make a reasonable and fair provision and maintenance for a period of two years from the date of birth of such children;
- She is also entitled to receive an amount equal to the sum of *Mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter;
- All the properties given to her before, during or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

Did You Know?

The Hon'ble Supreme Court of India has clarified that under the Muslim Women (Protection of Rights on Divorce) Act, 1986, right of a divorced Muslim woman to maintenance is not restricted to only till the *iddat* period. It was held that the divorced Muslim woman's right to be maintained extends to her whole life unless she gets married for a second time.



c. Maintenance under Christian Law

A Christian woman can ask for both interim and permanent maintenance from her husband under the Indian Divorce Act, 1869.

The order for interim maintenance granted by the court cannot exceed one fifth of the husband's average net income for the three years next preceding the date of the order. Such an order can continue until matrimonial relief is passed in the matrimonial proceeding.

Permanent maintenance can be granted by a court at the time of granting a decree for dissolution of marriage or for judicial separation. The maintenance amount can either be a lump sum amount or a sum paid annually or monthly, for a term not exceeding the wife's life. Here, the court will consider the fortune (if any) of the wife, ability of the husband, and conduct of the parties.

However, if the matrimonial proceedings are dismissed and the marriage is valid and subsisting, then no claim for maintenance survives.

Husband's right to maintenance

Under the Divorce Act, 1869, a Christian Husband does not have the right to claim any maintenance from his wife.



d. Maintenance under Parsi Law

The Parsi Marriage and Divorce Act, 1936 recognizes the right of both the Parsi husband and wife to claim maintenance-both during the pendency and conclusion of a matrimonial proceeding.

Interim maintenance can only be sought during the pendency of matrimonial proceedings for sustaining oneself and meeting the expenses of the proceedings. After taking into account the income of both the parties, the court may fix such amount of interim maintenance as it considers reasonable.

Like Christian law, an order for permanent maintenance is made at the time of granting dissolution of marriage or judicial separation. The maintenance amount can either be a lump sum amount or a sum paid annually or monthly, for a term not exceeding the life of the person seeking maintenance. Here, the court will consider the income, property and conduct of the parties.

The court can vary or modify the order of permanent maintenance in the event there is a change in circumstances of either the Parsi husband or wife. Such change in circumstances could be the re-marriage of the person receiving maintenance, or if the woman receiving maintenance becomes unchaste or the man has sexual intercourse outside wedlock etc.

f. Section 125 Criminal Procedure Code ("CrPC")

Apart from claiming maintenance as per one's personal laws, a woman also has the option of taking recourse to the quick and speedy remedy provided under Section 125 of the Code of Criminal Procedure. This provision can also be invoked by a divorced woman, irrespective of her religion.

There are essentially three requirements under this provision-

- The husband must have "sufficient means". If he is found capable of earning, the court deems him as having sufficient means. Here, the burden of proof is on the husband to show that he has no sufficient means to maintain and to provide maintenance.
- The husband has refused to maintain or has neglected to do so.
- The wife is unable to sustain herself.



Landmark Decision on Right to Maintenance

In the Shah Bano case, the Hon'ble Supreme Court of India held that any person irrespective of their religion can seek maintenance under Section 125 of CrPC.

"...Whether the spouses are Hindus or Muslims Christians or Parsis pagans or heathens is wholly irrelevant in the application of these provision. The reason for this is axiomatic in the sense that Section 125 is a part of the code of Criminal Procedure not of the Civil Laws which define and govern the right and obligations of the parties belonging to particular religions like the Hindu Adoptions and Maintenance Act the Shariat or the Parsi Matrimonial Act."

However, any maintenance received by the wife under her personal law will be factored in while determining the quantum of maintenance she is entitled to under CrPC.



Key Points for Maintenance under section 125 of the CrPC

- Wife can claim interim maintenance, subject to the final determination of the court in the matrimonial proceedings.
- There is no ceiling on the maximum amount of maintenance that can be granted.
- Minor children and parents unable to maintain themselves can also take the help of this provision
- A wife can be denied maintenance under this provision if she is living in adultery or refuses to live with her husband for no sufficient reason.
- If the husband and wife are living separately by mutual consent, then the wife cannot claim maintenance under this section.
- The Magistrate has the power to issue a warrant and even order for imprisonment to ensure compliance with the order of maintenance.



g. Maintenance under Special Marriage Act, 1954

In case a man and a woman are married under the Special Marriage Act, claim for maintenance has to be made as per the procedure given in the Act.

The court has the power to order the husband to pay interim maintenance to a wife during the pendency of any matrimonial proceeding if she does not have independent income sufficient for her support and for expenses of the proceedings. The wife can also claim permanent alimony and maintenance from her husband by making an application at the time of grant of matrimonial relief, or at any time thereafter.

While securing the amount of maintenance, the husband's property and his ability, the property of the wife and the conduct of the parties are relevant factors. Such maintenance order can be modified subsequently in case the wife remarries or there is any other material change in the circumstances of either party.

The provisions for maintenance as contained in the Special Marriage Act also apply to marriages solemnized under the Foreign Marriage Act, 1969.

Custody of the Child Post Divorce

Child Custody becomes an important issue of concern after the separation of the couple. The Supreme Court of India has consistently held that in deciding cases of child custody the first and paramount consideration is the welfare and interest of the child and not the rights of the parents.

a. Custody under Hindu Law

- The law for appointment and declaration of guardians and related matters, irrespective of caste, community or religion, is the Guardianship and Wards Act, 1890.
- Under this Act, minor children, under the age of five, are committed to the custody of mother, boys older than five years have been committed to the custody of father and older girls to the custody of mother.



- However, under this Act, there is no strict rule as to the custody of the child and the primary factor in arriving at such a decision is the welfare of the child.
- For a child above the age of nine, his/her preference must also be taken into account as to the custody. However, this too is subject to the welfare of the child.
- A mother who is proven to neglect the child in during infancy is not handed with the child custody.

b. Custody under Islamic Law

- Islamic law gives a preferential treatment to the mother over a father in the matter of child custody.
- Under different communities in Islam, different periods have been prescribed for the right of child custody.
- The prescribed period for the custody of the boys is also different from the prescribed period for the custody of girls.
- Some Islamic communities follow the period of child custody with the mother in case of boys as low as the time till the child has weaned from the mother. Among other communities in Islam, the period for child custody with the mother is till the son has attained the age of puberty.
- For girls, the period for child custody with the mother is also different for different Islamic communities and ranges from the time the girl has attained puberty, in certain communities, till the time the girl has been married, in others.

c. Custody under Christian Law

- Christian law does not have any specific provisions for child custody;
- The issue of child custody has been addressed by the Indian Divorce Act, 1869 which is applicable to all the religions of the country;
- The court in making the decision of child custody needs to ensure that the custody of child be given to most suited parent, which is based on a number of factors such as the father's age, sex and religion.

d. Factors affecting Child Custody

Either parent can approach the court if they are unable to determine the child's custody mutually. The court looks into various factors before deciding that which parent would get the custody of the child. The most important factor for deciding the child custody is the welfare of the child, whereas there are many more factors which need to be considered by the courts, for instance:



- The age, sex and religion of the child;
- Personal law of the father;
- The character and capacity of the proposed guardian;
- Any existing or previous relations of the proposed guardian with the minor's property. In case the minor's property is shared with the mother and she is otherwise a suitable guardian, the court will regard the property relationship as an additional factor in the mother's favor;
- The minor's preference if she or he is old enough to form an intelligent preference, usually accepted as about nine years old;
- Separation of siblings - Courts prefer to keep children united and award custody of both to either the mother or the father.

However, the mother cannot be denied the custody of the child on the mere fact that she is economically less secure than the father. This is on account of the fact that the maintenance of the child remains the father's responsibility irrespective of the custody of the child.

e. Mother's Rights in relation to Child Custody

- The mother can interact with her child or children during the times specified in the court custody order;
- She can schedule activities during times when she has custody of the child;
- The mother must be free from the father's control, interruptions, or threats during visitation appointments;
- She can notify a judge or the police if the custody order has been violated in any way;
- She can petition the court to enforce changes to a custody order or visitation schedule;
- She can obtain prevent the father from transporting the child out of state.

f. Mother's Responsibilities with Regards to Child Custody

The mother's child custody responsibilities include:

- The obligation to obey court custody and visitation orders at all time.
- The obligation to continually serve the child's best interest when making important child-rearing decisions.

- The obligation to interact with the child's father in a cooperative and peaceful manner.

g. Can Court Custody Orders Be Changed or Modified?

If the court determines that it is necessary to change or modify a custody order, it may do so at a later stage. Any changes to an existing child custody order must serve the child's best interest before the interests of either parent.

Child custody orders are commonly changed under the following circumstances:

- The parent has abused or physically injured the child
- The parent is to relocate to a different geographic region (for example), if the parent has taken a new job in a different state, and this move would effect the visitation schedules
- The child has developed different needs over the months or years.

Did You Know?

Working women and Child Custody

In a child custody case, the Bombay High Court rejected the argument that working women do not get time to attend to kids and consequently held that this could not be a consideration for determining child custody.



Live-in Relationships

What are “live-in relationships”?

The phrase “live-in relationship” commonly implies co-habitation between a couple made without the formal institution of marriage. It thus signifies an arrangement where two people agree to live together under the same roof, without legal rights and obligations of a marriage.

While there is no specific law validating or regulating live in relationships in India, countries such as USA, UK, France and Philippines, have given varying degrees of recognition and protection to the live-in relationship arrangements, however, there are no laws which specifically recognize the rights and obligations of a couple cohabiting without marriage in India.

The Supreme Court of India in recent years has, however, ruled that live in relationship between two consenting adults of heterogeneous sex, who are not previously married, is legally permissible.



Did You Know?

In the year 2014, the Hon'ble Supreme Court of India has indicated to the Indian parliament to consider the impact of live-in relationships on the women partners and children and to bring about a proper legislation to protect their interests even when the relationships may not be in the nature of marriage.

Legal Status of Live-In Relationships in India

The Indian position with respect to the rights and obligations arising out of a live-in relationship remains ambiguous.

Presumption of Marriage

- ▲ The Hon'ble Supreme Court of India while addressing an issue similar to live-in-relationships in 1978, had held that there is a strong presumption of marriage when the validity of the marriage of a couple *living together* as husband and wife was questioned 50 years later on the ground of proof of their marriage ceremony.

- ▲ In 2011, in a similar spirit, the Supreme Court took the view that the term “wife” must be perceived broadly for purposes of payment of maintenance so as to include relationships where the man and woman have been living together as husband and wife for a considerably long period of time, without really requiring a strict proof of marriage, in order to claim maintenance. The Supreme Court also emphasized that continued stable cohabitation between a couple as man and the wife would create a strong presumption in favor of marriage.

- ▲ In light of the above views taken by the Hon'ble Supreme Court of India, any partner in a live-in relationship, including a woman partner, may not be able to claim any legal rights in the partner's property, unless there is a prolonged, stable cohabitation in the nature of a marriage.

Children from Live-in-Relationships

- ▲ Another important concern for a couple in a live in relationship is the legitimacy of children born out of such relationships.
- ▲ In the year 2010, the Hon'ble Supreme Court of India has taken a view that that a live in relationship where the individuals have been living together as husband and wife for a long time creates a presumption in favor of marriage. Therefore, it was held, that the children born out of such a relationship cannot be held to be illegitimate.
- ▲ However, the Hon'ble Supreme Court of India has also clarified that the property right of such children are restricted to the personal property of the parents and do not extend to the Hindu coparcenary property or the rights of other relatives.



▲ It has been emphasized by the Hon'ble Supreme Court of India that where the individuals have been cohabiting for a long time and presumption in favor of marriage is created, then the property rights of the children born of such relationship can be determined in a similar manner as property rights of children born of void or voidable marriages which restricts the property rights of such children to the self-acquired property of the parents and does not extend them to the coparcenary property or property of other relatives.

Given that personal laws under different religions as well as specific statutes do not recognize the concept of "live-in-relationships", women's rights in live-in relationships would be dependent on the judgments by various Indian courts.

Protection of Women in a Live-In-Relationship

The Protection of Women from Domestic Violence Act, 2005 (the "DV Act") protects the rights of all women who are or have been in a "domestic relationship".

The phrase "domestic relationship" has been broadly defined to include women who have been co-habiting a house with their partners in a relationship akin to marriage.

In the year 2011, in that in light of the Parliament's acknowledgement of "relationship in the nature of marriage" under the DV Act, the Supreme Court has held that a live in relationship may be recognized as

a relationship akin to marriage for the purposes of the DV Act, provided the following pre-conditions are satisfied:

- The two individuals hold themselves out to be spouses in front of the society;
- The two individuals are of legal age to marry;
- They must be qualified to enter into a legal marriage, for instance, each party must be unmarried; and
- They should have voluntarily cohabited and held themselves out as being spouses to the society for a significant period of time.

The Supreme Court had taken a further view in this case that for any relationship to be "in the nature of marriage", the parties must live together in a "shared household" and sharing weekends or merely one-night stands would not make it a "domestic relationship" entitled to benefits under the DV Act.

Accordingly, women in a live in relationship may fall under the ambit of the DV Act if the live-in-relationship fulfills the requirements laid down by the Supreme Court in its judgment of the year 2011 (as described above).

Details of protection ensured to women under the DV Act have been discussed in a separate chapter on "**Domestic Violence**".



Adopting a Child

“Anyone who ever wondered how much they could love a child who did not spring from their own loins, know this: it is the same. The feeling of love is so profound, it's incredible and surprising.”

– Nia Vardalos



Adoption is a way of providing a permanent family for children who cannot be brought up by their own parents for a variety of reasons. It is an age old practice which is followed in all parts of the world.

Historically, the Indian society has accepted adoption and the rights of the child as an heir to the property of the family but as a legal concept adoption was available only among the members of the Hindu community and certain other religious denominations where it evolved as a custom in the society. This chapter broadly sets forth laws regarding Adoption in India.

Adoption under Hindu Law

The adoption for and by **Hindus** is governed by the Hindu Adoption and Maintenance Act, 1956. Accordingly, only **Hindus** can be adopted or adopt under this Act.

Did You Know?

Prior to this Act only a male child could be adopted, but the Act made a provision that a female child may also be adopted.

Who is considered a Hindu under Hindu Adoption and Maintenance Act?

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

The Act requires that both the person adopting and the child so adopted must be lawfully capable of taking in adoption and being adopted respectively. The adoption is completed by an actual giving and taking after which, a ceremony called ‘*data homan*’ (oblation to the fire) is performed. However, this ceremony may not be essential in all cases as for the validity of adoption.



Who can adopt□

Male

Any male Hindu, who is of sound mind can adopt. However, consent of his wife is required if he is married.

Female

Any female Hindu, who is of sound mind, can adopt if:

- she is not married;
- her marriage has been dissolved; or
- she is a widow.

It must be noted where the woman is married it is her husband who has the right to adopt with her consent and not the woman herself.

Who can give the child in adoption□

- Only the father or mother or guardian can give the child in adoption.
- Only the father if he is alive shall have the right to give in adoption, but such right shall not be exercised without the consent of the mother.
- The mother may only give the child in adoption if the father is dead.
- The guardian of the child may give the child in adoption with the prior permission of the court if both the father and mother are dead or have abandoned the child. The court while granting permission should be satisfied that the adoption is for the welfare of the child.

Did You Know?

The Act prohibits transfer of payment between the parties i.e. the party willing to adopt or the party willing to give a child for adoption.

Who can be adopted□

- Only Hindu children can be adopted.
- The child must be unmarried, unless there is a custom applicable to the parties which permits persons who are married being taken in adoption.

In every adoption, the following conditions must be complied with:

1. Adoption of a son	The adoptive father or mother by whom the adoption is made must not have a living Hindu son, grandson or great grand son (whether by legitimate blood relationship or by adoption)
2. Adoption of a daughter	If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a living Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption)
3. Male adopts a daughter	If the adoption is by a male and the person to be adopted is a female, the adoptive father is at least 21 years older than the person to be adopted;
4. Female adopts a son	If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least 21 years older than the person to be adopted.
5. Adopting same child by two different persons	The same child may not be adopted simultaneously by two or more persons (does not refer to if both persons are adoptive mother and father).

Some other key conditions:

- Adopted children cannot marry any person whom they could not have married if they had continued in the family of their birth.
- Any property which vested in an adopted child before the adoption shall continue to vest in him or her, including the obligation to maintain relatives in the family of their birth.
- Adopted children shall not be divested (to deprive, as of rights or property) by any person of any estate which vested in them before the adoption.



Did You Know?

Right of adoptive parents to dispose of their properties

According to the Act, an adoption does not deprive the adoptive father or mother of the power to dispose of their properties by transfer *inter vivos* (i.e. transfer or gift made during one's lifetime) or by will.



Adoption Procedure

Stage I

- Prospective adoptive parent(s) should register themselves with Adoption Coordinating Agency or with the State Adoption Cell.

Stage II

- A Home Study report of the prospective adoptive parents will be prepared by a social worker of the Agency. To allay the fears and apprehensions of the prospective adoptive parent(s), pre-adoptive counseling sessions will be undertaken by the social worker during the preparation of the home study report. Additionally, documents relating to the financial and health status of the prospective parent(s) will be part of the aforementioned Home Study Report.
- The Agency will then make a suitable reference from amongst the admitted children legally free for adoption.

Stage III

- After the said Home Study has been accepted and approved, a child will be shown to the prospective adoptive parent(s).
- The agency will take care to match a child meeting the description, if any, desired by the parent(s).
- In case of placement of older children (above the age of 6), both written and verbal consent of the child will be obtained.

Stage IV

- Once a successful matching has been done, the agency will file a petition in the court for obtaining the necessary orders under the Act.
- The above process will normally be completed in 6-8 weeks.

Post Adoption

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. Once the Adoption has been validly completed then no adoption can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.





Did You Know?

Lakshmikant Pandey vs Union of India was a landmark case regarding the adoption of Indian children by persons inside and outside India. In this case in the absence of any legislation, the Supreme Court framed elaborate guidelines.

The Supreme Court of India's Bench consisting of Justice P. N. Bhagwati, Justice R. S. Pathak and Justice Amarendra Nath Sen created a scheme for regulating both inter-country and intra-country adoptions. The bench held that any adoption in violation of or, non-compliance with, the guidelines may lead to strict action including prosecution. Before this path breaking judgment, there was no law to regulate **inter-country adoptions** and such lack of legal regulation could cause incalculable harm to the welfare of Indian children.

For years, social activists have used these directions to protect children and promote desirable adoptions. More recently, the Government of India framed a national policy for both inter country and intra country on the basis of this path breaking judgment.

Guardianship as Adoption

Personal law of Muslims, Christians, Parsis and Jews do not recognize adoption. As non-Hindus do not have an enabling law to adopt a child legally, those desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardian and Wards Act, 1890. However, this does not provide to the child the same status as a child born biologically to the family. This legal guardian-ward relationship exists until the child completes 21 years of age after which it ceases to exist.

Did You Know?

The Supreme Court has held that, "there is nothing in the Mohammedan Law similar to adoption as recognized in the Hindu System. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption. However, an adoption can take place from an orphanage by obtaining permission from the court under Guardians and Wards Act."





However, non Hindus, still have the chance of adoption under the Juvenile Justice (Care and Protection of Children) Act, 2000. A historic judgment was passed by the Supreme Court in 2014 which states that any person can adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2000 irrespective of his or her religion and even if the personal laws of the particular religion does not permit it.

This Act enables all non Hindus to be capable of adoption even if their personal law does not permit adoption. However, the children so adopted should either be orphan, abandoned or surrendered children.

How to become a Guardian

▲ A petition has to be filed by the prospective parents in the District Court (where the minor resides).

▲ The petition made by the parents addressed to court must contain the following:

- The name, sex, religion, date of birth and ordinary residence of the minor;
- The nature, situation and approximate value of the property;
- The name and residence of the person having the custody or possession of the person or property of the minor;
- What near relations the minor has, and where they reside;
- Whether a guardian of the person or property or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law;
- Whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;
- Where the application is to appoint a guardian, the qualifications of the proposed guardian;
- Where the application is to declare a person to be a guardian, the grounds on which that person claims; and
- The causes which have led to the making of the application.

▲ The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses.

▲ The Petition would be reviewed by the court who shall consider the following:

- The welfare of the minor and shall factor in the age, sex and religion of the minor;

- The character and capacity of the proposed guardian and his relation to the minor;
- The wishes, if any, of a deceased parent;
- If minor is old enough to form an intelligent preference, the court may consider that preference; and

▲ Once the court is convinced, Guardianship will be awarded to the parents.

The Guardians and Wards Act, 1890 was enacted, to supersede all other laws regarding Guardianship. It became the only non-religious universal law regarding the guardianship of a child, applicable to all of India except the state of Jammu and Kashmir. This law is particularly outlined for Muslims, Christians, Parsis and Jews as their personal laws don't allow for full adoption but only guardianship. It applies to all children regardless of religion, race or creed.

Juvenile Justice (Care and Protection of Children) Act, 2000

Juvenile Justice (Care and Protection of Children) Act, 2000 is a subsequent act that provides for adoption. It provides a holistic approach to the rights of Indian children for both care and protection and provides for adoption irrespective of the religion of the adopting parents. It was amended by the legislature in 2006, adding childless couples to the eligibility criteria and made the courts become arbitrators of dispute instead of the previously sanctioned Juvenile Justice Board.

Remember

Only authorized adoption agencies are legally allowed to assist in adoption. Always make sure that the agency guiding you through the process is authorized



Eligibility

The law is sensitive to needs and changes in modern society, unlike the previous legislations on adoption this Act allows women to adopt a child irrespective of their marital status. A childless couple may adopt or even a couple with biological son or daughters can adopt a child of the same sex as them which unfortunately the Hindu Adoption and Maintenance Act did not provide for. The table below lays down the detailed criteria for eligibility. **Composite Age** in the table below would mean the summation of the individual ages of the couple.

Did You Know?

People in live in relationships are not considered couples for the purposes of adoption under the Juvenile Justice Act.

Parents Status	Child Age	Parents Age
Couple	Between 0 – 3 years	Individual age of either parent should not be less than 25 years and not more than 50 years Maximum Composite Age should be less than 90 years
Couple	Above 3 years	Individual age of either parent should not be less than 25 years and not more than 55 years Maximum Composite Age should be less than 105 years
Single	Between 0 – 3 years	A prospective adoptive parent should not be more than 40 years and less than less 30 years
Single	Above 3 years	A prospective adoptive parent should not be more than 50 years and less than less 30 years

Adoption procedure under the Juvenile Justice (Care and Protection of Children) Act, 2000

- The parents approach the voluntary coordinating agency or the child welfare agency in their area.
- They register themselves at the agency.
- Preliminary interview with the couple to assess their basic motivation for adoption, emotional health, quality of marital life, family background, attitude towards adoption and scrutiny of application and relevant documents.
- The placement agency is identified; so is a suitable child.
- A home study report is prepared by the social worker.
- The prospective parents are made to meet the identified child.
- A doctor selected by the prospective parents medically screens the child for diseases or genetic abnormalities.
- The parents make a final decision and file the relevant papers through their lawyer.
- The child is taken in pre-adoptive foster-care.
- A court hearing takes place.
- The court issues a decree and the adoption is sealed.





Certain Institutional Resources for Adoption:

S.No	Name & Address of the Agency	Contact Person / Phone / Fax / Email Address
1.	Voluntary Coordinating Association C/o Director, Women Development & Child Welfare Department, Govt. of Andhra Pradesh, 8-3-222, Ameerpet, Vengalrao Nagar, Hyderabad - 500 038, Andhra Pradesh	Ms. Y.V. Anuradha, Director Email: wdcwho@rediffmail.com
2.	Member Secretary Bihar Adoption Coordinating Agency Nagma Niwas, House No. 300, (above the Eye World Shop), Near R.K. Mission Ashram, Nala Road, Patna - 800 004.	Ms. Daisy Narain Email: bvca@satyam.net.in bvca@rediffmail.com
3.	Coordinating Voluntary Adoption Resource Agency (CVARA) 4 Deen Dayal Upadhyaya Marg, New Delhi-110002	Mrs. Leila Baig, Member Secretary Email: cvara@zeeaccess.com / cvara@bol.net.in
4.	Voluntary Coordinating Agency for Adoption 'Prerna', Mangal Prabhat Trust Building, Opp. St. Xevier's High School, Mirzapur, Ahmedabad - 380001, Gujarat	Mr. Natubhai Patel, Honorary Secretary Email: natubhaipatel@yahoo.com
6.	Voluntary Coordinating Agency 3, Bima Chhaya, Opp. Chintamani Deshmukh Garden, Mahatma Phule Road, Mulund (E), Voluntary Coordinating Agency 3, Bima Chhaya, Opp. Chintamani Deshmukh Garden, Mahatma Phule Road, Mulund (E), Mumbai - 400081, Maharashtra	Ms. Asha Rane, Chairperson Email: vcamumbai@yahoo.co.in
7.	Voluntary Coordinating Agency (Punjab) Director Department of Social Security & Women & Child Development Government of Punjab, SCO-102-103, Sector-34A (Near Passport Office) Chandigarh-160034, Punjab	Shri Raj Kamal Chaudhari, Director
8.	Voluntary Coordinating Agency for Child Adoption Indian Council for Child Welfare, NO. 5, 3rd Main Road (West), Shenoy Nagar, Chennai - 600030. Tamil Nadu	Mrs. Rangashree Srinivas, Member Secretary Email: adopttn@vsnl.net
9.	Voluntary Coordinating Agency IYC Community Centre, 1st Cross, 2nd Block, R.T. Nagar, Bangalore - 560032, Karnataka	Dr. Aloma Lobo, Chairperson Email: vcablr@vsnl.net



Remember

Adopt from:

- Recognized Indian Placement Agencies
- Shishu Grehas getting grant-in-aid from Central Government
- LAPA (Licensed Adoption Placement Agencies)

(Adoption Coordinating Agencies and State Adoption Cells may also be contacted. For more details, please access website i.e. www.adoptionindia.nic.in)

Do not adopt from:

- Unlicensed Agencies / Homes
- Nursing Homes/Hospitals
- Any unrelated person





Woman's Right to Birth Control and Right to be Born



This chapter deals with the laws affecting women relating to pregnancy and birth of female child. The first part of the chapter talks about sexual and reproductive rights of women and discusses the law providing for medical termination of pregnancy (i.e. abortion) in certain circumstances. While termination of pregnancy may be permissible, it cannot be misused for sex-selective abortion particularly when the foetus is female. The second part of the chapter covers the illegality of use of pre-natal diagnostic techniques for determining or detecting the sex of the unborn child and sex-selective elimination and its consequences.

Sexual and Reproductive Health

“Reproductive freedom is critical to a whole range of issues. If we can't take charge of this most personal aspect of our lives, we can't take care of anything. It should not be seen as a privilege or as a benefit, but a fundamental human right.”

— Faye Wattleton

Reproductive rights are essential human rights and freedoms relating to reproduction and reproductive health. Women's control over their own childbearing is a key component of reproductive rights which are fundamental to their health and equality.

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.

Medical Termination of Pregnancy in India

In India, a woman may legally opt for termination of pregnancy by registered medical practitioners in certain circumstances under the **Medical Termination of Pregnancy Act, ("MTP Act")**.

When is Medical Termination of Pregnancy permissible?

Ordinarily, a pregnancy can be terminated only when a medical practitioner is satisfied as to the existence of any of the following grounds:

1. The continuance of pregnancy would involve a risk of **life of the pregnant woman**; or
2. The continuance of pregnancy would involve a risk of **grave injury to the pregnant woman's physical or mental health**; or
3. There is a substantial risk that **if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped**; or
4. If the pregnancy is a consequence of **rape**, since such situation is understood to constitute grave injury to the mental health of the pregnant woman; or



5. If the pregnancy has occurred as a **result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children**, since such situation is understood to constitute grave injury to the mental health of the pregnant woman;
6. Risk to the health of the pregnant woman by reason of her **actual or reasonably foreseeable environment**.

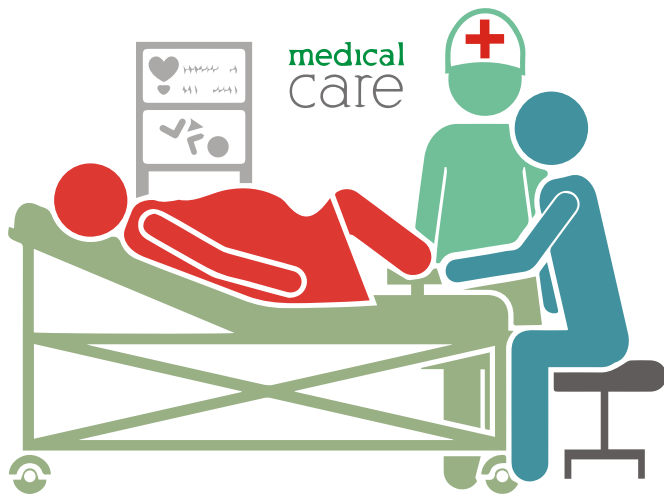
Time Limits for Medical Termination

As of now, the time limit for terminating a pregnancy under law is 20 weeks. Approval of one medical practitioner is required for terminating a pregnancy *within 12 weeks* of the gestation period. However, approval of two medical practitioners is required if the length of the pregnancy *exceeds 12 weeks but does not exceed 20 weeks*. The only exception to the 20-week limit is when the termination of such pregnancy is necessary to *save the life of the pregnant woman*.

Consent of the Woman

Written consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. No express or implied consent of husband or relatives is required for getting the pregnancy terminated under the Act.

The only exception to this is in cases where a woman has not attained the age of 18 years, or is a mentally ill person, in which scenario her guardian's written consent would be required for termination of a pregnancy.



Exercising Reproductive Choices in a Marriage

While a pregnancy cannot be terminated without the consent of a woman, the Hon'ble Supreme Court of India has held that (i) if a husband opts for an operation of vasectomy without medical reason and without the consent or knowledge of his wife and similarly if the wife undergoes sterilization or abortion without medical reason or without her husband's consent or knowledge or (ii) there is a unilateral decision by either the husband or wife not to have a child; it may amount to mental cruelty and constitute a ground for divorce.

However, where the relationship between a husband and wife is already strained and there are differences, the husband cannot compel his wife to give birth to the child or interfere in her decision to carry on with or terminate her pregnancy, since the unwanted pregnancy would naturally affect the mental health of the pregnant woman. The Punjab and Haryana High Court observed in such a situation that *"A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child."*



Who can qualify to terminate pregnancy

Only a registered medical practitioner who possesses any recognized medical qualifications, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as mandated, can perform the procedure for termination of pregnancy.

Place for Termination

All abortions are to be carried out in a government hospital or an institution approved by the Government, except in cases where it is immediately necessary to save the life of the pregnant woman.

Confidentiality of identity of pregnant woman

The law guarantees absolute confidentiality to a woman irrespective of her age. The identity of the pregnant woman has to be kept completely confidential and the records maintained by the establishment for this purpose are not open for inspection by any person except having authority under the law.

Where application is made by an employed woman whose pregnancy has been terminated, the registered medical practitioner shall grant a certificate to this effect for the purpose of enabling her to obtain leave from her employer. However, the employer is prohibited from disclosing this information to any other person.

Punishment for medical termination of pregnancy beyond the scope of MTP Act

1. Medical termination of pregnancy on any grounds other than those specified in MTP Act is an offence punishable under the Indian Penal Code (IPC). Whoever voluntarily:
 - ▲ causes a woman to miscarry or;
 - ▲ causes miscarriage without woman's consent (except done in good faith to save her life); or
 - ▲ causes death of a woman due to an act done with the intent of causing miscarriage; or
 - ▲ acts with the intent to prevent the child from being born alive or causing death after its birth,

shall be punishable with imprisonment ranging from 3 years to life.

2. Determination of the sex of the unborn child and termination of pregnancy on such ground is absolutely prohibited and would constitute a further offence under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as discussed in the next part.



Ban on Sex Selection and Sex-selective Abortion

“It is no exaggeration to call this gendercide. Women are missing in their millions—aborted, killed neglected to death.”

— The Economist, Leaders, Gendercide, March 6, 2010

The prevalence of female foeticide constitutes the most egregious violation of human rights in our society.

Brief Background on the issue of Sex-Selection

India has rapidly progressed in the last decade, with the distinction of being one of the fastest-growing economies in the world. More and more girls are going to school and getting educated. More and more women are getting employment. Women are excelling in every field, whether as businesswomen, scientists, farmers or political leaders.

Yet, paradoxically, the proportion of women in the overall population has decreased over the exact same period in which women's economic, social and political rights have improved. The prevalence of the practice of pre-birth elimination of female foetus is the largest culprit.

Female foeticide or sex-selective elimination is one of the worst forms of violence against women where a woman is denied her most basic and fundamental right: “the right to life”. It is a practice that involves pre-natal sex detection of the foetus and a subsequent abortion if it is female. The methods of detection may vary from amniocentesis and chorionic villi sampling to the most commonly used ultrasonography.



The practice of sex selection has resulted in rapid decline in the ratio of females to the male population, which is widely attributable to the, following factors:

- (i) social preference for the male child and discrimination against women and girls;
- (ii) desire to have smaller families but not without sons;
- (iii) easy availability and accessibility of technology and its widespread misuse for pre-conception and pre-birth sex selection.

Law banning Sex Determination and Selection In India

To address the issue of the declining sex ratio and to prevent the misuse of technology for sex selection, **Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act)** has been enacted.

PCPNDT Act mainly provides for:

1. Prohibition of sex selection before or after conception.
2. Regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders with a view to ensuring their scientific use for which they are intended.
3. Permission for the use of pre-natal diagnostic techniques only by registered institutions.
4. Prohibition of the use of pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide.
5. Prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex.
6. Penalties and punishment for violation of the provisions of the Act.

Sex selection includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.

Pre-natal diagnostic procedures mean all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man or of a woman before or after conception, for being sent to a genetic laboratory or genetic clinic or conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception.

Pre-natal diagnostic test means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus (product of conception at any stage from fertilization to birth) conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.

Absolute Prohibition of Sex Selection

1. PCPNDT Act contains an absolute prohibition of sex selection to the effect that no person, including a specialist or team of specialists in the field of fertility, shall conduct or cause to be conducted or aid in conducting themselves or by another person, sex selection on a woman or a man or both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.
2. No person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.
3. No person including the person conducting pre-natal procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

Conditions for Use of Pre-Natal Diagnostic Techniques

1. Pre-natal diagnostic techniques shall not be conducted except for the purpose of detection of:
 - chromosomal abnormalities;
 - genetic metabolic diseases;
 - haemoglobinopathies;
 - sex-linked genetic diseases;
 - congenital anomalies or any other abnormalities or diseases as may be specified by the authorities from time to time, that too on fulfillment of any of the above conditions.

Thus, the said techniques are to be used only to detect abnormalities in the foetus and not for sex-selection or sex-selective abortions.

2. No pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons recorded in writing that any of the following conditions are fulfilled, namely:
 - Age of the pregnant woman is above 35 years;



- The pregnant woman has undergone two or more spontaneous abortions or foetal loss;
- The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
- The pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;
- Any other condition as may be specified by the authorities from time to time.

Written consent of Woman

No person shall conduct the pre-natal diagnostic procedures unless:

- He/she has explained all known side and after effects of such procedures to the pregnant woman concerned;
- He/she has obtained her written consent to undergo the procedure in the language which she understands; and
- A copy of the written consent obtained from the pregnant woman has been given to him/her.

Who can file a complaint under PCPNDT Act

1. An important aspect of PCPNDT Act is that although all offences under the Act are non-bailable, considering the technical and medical issues involved in such cases the entire role for implementation of the Act and filing of complaint is given to the appropriate authority who is a person with a medical background appointed by the Government for the respective districts.
2. A Court can take notice of any offence under the PCPNDT Act on a complaint made by the:
 - (i) appropriate authority or by a person/social organization etc. on his/her behalf; or
 - (ii) by a person/social organization who has given notice of at least 15 days to the appropriate authority of the intention to make a complaint before the Court.
3. A complaint can only be made before the Court of a Metropolitan Magistrate or Judicial Magistrate First Class in the first instance.

Who can be an offender and punished for sex selection

It is most important to re-emphasize first and foremost that sex determination itself is an offence under PCPNDT Act, regardless of whether it is followed by abortion or not.

1. Every person who conducts pre-conception and pre-natal diagnostic techniques against PCPNDT Act or contravenes any of its provisions can be an offender.
2. Any person who seeks the aid for sex selection or for conducting prenatal diagnostic techniques on any pregnant women for unauthorized purposes, shall be punishable with imprisonment up to 3-5 years and with fine which may extend to Rs. 50,000 to Rs. 1,00,000. Of course, if the sex detection is followed by termination of pregnancy, it would also constitute an offence and be liable for punishment under IPC.
3. However, the woman who was compelled to undergo such diagnostic techniques or such selection will not be liable for prosecution unless the contrary is proved.

Expedition Hearing & Disposal of Cases under PCPNDT Act

Courts have expressed concerns about the fact that a number of cases registered under PCPNDT Act have been pending in lower Courts for years and called for their speedy disposal on utmost priority.

The Hon'ble Supreme Court of India has directed that various Courts in the country should take steps to dispose of all pending cases under PCPNDT Act within 6 months.



Women at Work: Employment Laws

“The test for whether or not you can hold a job should not be the arrangement of your chromosomes.”

– Bella Abzug



Introduction

The principle of gender equality is enshrined in the Constitution of India. The Constitution grants equality to women and empowers the state to adopt measures of positive discrimination in favour of women.

There are many labour law statutes with special provisions for women, including the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948, the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 and various state specific shops and establishments acts. However, the purview of this Ready Reckoner is limited to the following major statutes:

- The Equal Remuneration Act, 1976;
- The Maternity Benefit Act, 1961;
- The Employee State Insurance Act, 1948;
- The Factories Act, 1948;
- The Mines Act, 1952;
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; and
- Miscellaneous Laws and Safety Guidelines

Did You Know?

- ILO's Global Employment Trends 2013 Report suggested that India's labour force participation rate for women fell from over 37% in 2004-05 to 29% in 2009-10.
- Out of 131 countries with available data, India ranked 11th from the bottom in female participation in labourforce.



The Equal Remuneration Act, 1976

Introduction

- The Equal Remuneration Act, 1976 has been passed to give effect to Article 39 of Indian Constitution which envisages that the State shall direct its policy towards securing that there is equal pay for equal work for both men and women.
- The Act provides for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex in the matter of employment.
- An employer is prohibited from discriminating against women:
 - While recruiting for the same work or work of a similar nature, or
 - In any condition of service subsequent to recruitment such as promotions, training or transfer.

Enforcement Mechanism

Complaint under the Act: Salient Features

- Complaints can be filed by any worker either directly or through a lawyer, official of a registered Trade Union, authorized inspector or by any other person acting with permission.
- A group of women workers employed in the same establishment with a similar claim may file a single complaint.
- The appropriate authority, after making inquiry, may order the payment of the difference in the wages to the woman worker in case equal wages are not paid.
- Appeals can be made within thirty days from the date of such order.

Repercussions for Non-Compliance

- If any employer contravenes obligations relating to:
 - payment of equal remuneration between men and women workers or,
 - fails to carry out any direction made by the appropriate Government,

The employer shall be punished with a fine of at least ten thousand rupees or with imprisonment for a term between three months to two years. Where the employer is a company, directors and other officials may also be held liable for punishment.

The Maternity Benefit Act, 1961

Introduction

- The Maternity Benefit Act, 1961 was enacted to regulate the employment of women in certain establishments, with respect to the period preceding and subsequent to child birth and provide women with maternity benefits.
- The Act is applicable to every factory, mine or plantation, including government establishments and also to shops and establishments (which employ ten or more persons).
- Factories or other establishments to which Employees' State Insurance Act, 1948 are not covered under this Act, unless specifically provided.

Regulation of Nature and Period of Work

- Women are barred from working at their place of work for the first 6 weeks after delivery or miscarriage and employers are prohibited from knowingly employing women during this period.
- Women may request their employers not to assign them to any arduous or physically taxing work which may interfere with their health and the foetus, in the one month preceding a period of six weeks from their expected delivery date and even during the six weeks period, if the woman is working in that period.
- The employer cannot deduct any amount from the woman's normal daily wages due to such change of work.

Payment of Maternity Benefit and Other Benefits

Maternity Benefit:

- Every woman is entitled to the payment of maternity benefit for the period of her maternity leave.
- Maternity benefit is the average amount of the wages being paid to a woman on the days on which she has worked during the period of three months before her maternity leave.
- A woman does not get maternity benefit, if she has not worked in the establishment of an employer for a period of less than eighty days in the twelve months before the date of her delivery.
- The minimum period prescribed for which any woman shall get maternity benefit is twelve weeks of which not more than six weeks must precede the date of her expected delivery.



- If a woman dies during or immediately after her delivery and the child has been delivered, maternity benefit must still be paid to her nominee or legal representative. However, the maternity shall be payable only for a period upto the day of her death.
- However, if the child too dies during the same period, then the maternity benefit must also be paid for the days till the child's death.

Availing Maternity Benefit

- A woman shall give notice in writing, to her employer to avail maternity benefit.
- The written notice to the employer must also state the date from which the woman will be absent from work. The date of absence must not be more than six weeks earlier from the date of her delivery.
- If a woman has not served a notice when she was pregnant, she must give a written notice as soon as possible, after the delivery of the child.
- Failure to give notice does not disentitle a woman to maternity benefit or any other related amount payable to the woman.

Medical Bonus

If the employer does not provide the woman with pre-natal confinement or post-natal care free of charge, the employer should provide a medical bonus ranging from Rs. 1,000 to Rs. 20,000.

Leave Entitlement

In case of miscarriage, medical termination of pregnancy or a tubectomy operation, the woman can apply for maternity benefit for a period of two weeks. A woman can take leave for a maximum period of one month in addition to the legally entitled leave for two weeks, with wages at the rate of maternity benefit.

Nursing Breaks

A woman is allowed two daily breaks of fifteen minutes for nursing the child at work, till the child is fifteen months old.

Protection of Woman Employee under the Act:

- Women cannot be dismissed by employers while on maternity leave.

- If a woman is dismissed for a case other than for gross misconduct, during the period of her pregnancy, she is entitled to her maternity benefit or medical bonus.
- In case of a gross misconduct, the order depriving the woman of the maternity benefit and medical bonus must be given to her in writing.

Repercussions of Non-Compliance

For the Employer

- If the employer fails to pay any amount of maternity benefit or dismisses a woman worker during the period of the maternity leave or on the ground of her taking such leave, may face imprisonment which may range from three months to one year, or fine ranging between Rs. 2,000 to Rs. 5,000, or both.

For the Employee

- If a woman employee works in another establishment after availing the maternity benefit from her employer, she may be refused the payment of her benefit.





The Employees' State Insurance Act, 1948

Introduction

The Employee's State Insurance Act, 1948, envisages an integrated social insurance scheme that would protect the interest of workers in several contingencies such as maternity, temporary or permanent physical disablement, sickness, death due to employment injury. The Act applies to all factories including the factories belonging to the Government.

Maternity Benefit

Maternity Benefit refers to the periodic payments made to an insured woman employees insured under this Act in case of pregnancy and covers various sorts of complications arising out of pregnancy such as miscarriage and pre-mature delivery.

The ESI Act contemplates maternity benefits to an insured woman under following circumstances:

Did You Know?

The term "insured woman" refers to those women employees for whom payments have to be made by the employers as per the provisions of the Maternity Benefits Act and who are thereby entitled to claim the benefits under the Maternity Benefits Act from them.

Procedure to be followed for claiming maternity benefit

- In order to claim maternity benefit, an insured woman must give a notice of pregnancy to Employees State Insurance Corporation along with requisite proofs of pregnancy.
- A woman claiming maternity benefit after her labour or for miscarriage must do the same within thirty days of the labour or miscarriage.

- Maternity benefit may also be claimed on behalf of a deceased woman, leaving behind a child, by her nominee or legal representative, within thirty days of her death.
- If the child also dies during such period, then the benefit can only be claimed for the days up to and including the day of the death of the child.

When Does Maternity Benefit Become Payable?

Maternity benefit is payable from the date on which it is claimed by a woman.

Repercussions of Non-Compliance

For the Employer as well as the Worker: Penalties

- Any person who knowingly makes or causes to be made any false representation or statement to tamper with the payments due under this Act may be punished for an imprisonment upto six months or fines not exceeding two thousand rupees or both.
- If any person fails to pay any contribution due to be paid, that person is punishable with an imprisonment for a term up to three years.

For the Employee: Disqualification from Receiving Benefits

- A woman worker may be disqualified from receiving any maternity benefit if she refuses to be medically examined, without any reasonable cause.

A woman worker may refuse to be examined by anyone other than a midwife or female doctor.





The Factories Act, 1948

Introduction

Factories Act, 1948 has been enacted with the view to regulate the working conditions for all workers in factories, including men and women. The Factories Act is applicable to factories as defined under the Act.

What is a factory?

A “Factory” under the Factories Act means:

- any premises, with ten or more workers, working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or,
- Where twenty or more workers are working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power.

Beneficial Provisions for women

For protecting and safeguarding the interests of women working in factories, exclusive provisions have been incorporated in this Act:

● Work Timings

Women are permitted to work only between the hours of 6 a.m. and 7 p.m. While the State Government may vary these timings, however, such a variation must not authorize the employment of any woman between the hours of 10 p.m. and 5 a.m.

Did You Know?

After a ruling of the Andhra Pradesh High Court, an amendment was made to the Factories Act empowering the State Government to make rules providing exemptions from the restrictions for work timings for women working in fish-curing or fish-canning factories, to prevent damage or deterioration in any raw material.

● Prohibition of Work in Hazardous Occupations:

- The employment of women in pressing cotton where a cotton opener is at work has been specifically prohibited, owing to the hazardous nature of the activity.
- No woman must be allowed to clean or lubricate or adjust any part of any machine if such cleaning, lubrication or adjustment would expose the woman to the risk of injury.
- States such as Punjab and Gujarat have made rules prohibiting or restricting the employment of women in manufacturing process or operations carried out in a factory which expose them to a serious risk of bodily injury and have also prescribed maximum weights which may be lifted or carried by adult women, adolescents and children employed in factories.

● Special Beneficial Facilities

- States such as Punjab, Gujarat and Karnataka provide for suitable room(s) for the use of children under the age of six years of women, working in factories. Such rooms must be under the charge of women trained in the care of children and infants.
- These states also provide for suitable facilities for washing and changing clothes for women, sufficient and separate toilet accommodation facilities for men and women.



Did You Know?

The Ministry of Labour and Employment has proposed to amend the Factories Act through the Factories (Amendment) Bill, 2014 by introducing the following provisions in further interest of women:

- Separate shelters and rest rooms for male and female workers to ensure privacy and better relaxation for workers of both sexes.
- Removing restrictions regarding employment of women on certain machines in motion, near cotton-openers.
- Empowering the state government to allow women to work during night hours in a factory or group of factories if there are adequate safeguards for safety, health and comfort of women (including night crèches, ladies' toilets and transportation from the factory to their residence).
- Imposition of restrictions on employment of pregnant women and persons with disability in certain areas of work.



Repercussions on non-compliance of the provisions



In case of any contravention, the occupier or manager of the factory both shall be guilty of an offence, punishable with imprisonment for a term up to two years or with fine up to one lakh rupees or both.



If the contravention is continued after conviction, further fine extending to one thousand rupees for each day on which the contravention is continued, may be levied.





Did You Know?

- The “Occupier” of a factory means the person who has ultimate control over the affairs of the factory. In case of a company or firm, any one of the directors or partners is deemed to be the Occupier.
- In the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory, are deemed to be the Occupier.
- A “Manager” is a person nominated as manager by the concerned undertaking, under the Factories Act or for purposes of Standing Orders.
- Any person authorised by the said Manager may also be construed as a Manager.

The Mines Act, 1952

Background

Owing to the reason that a “factory” does not include a “mine” operations in mines are governed by a separate enactment, called the Mines Act, 1952 (**The “Mines Act”**).

The Mines Act contains provisions for measures relating to the health, safety and welfare of workers in the coal, metalliferous and oil mines.

Protection of women working in mines

- A woman can be employed in a mine only between the timings of 6 a.m. and 7 p.m.
- A woman is not allowed to work in any part of a mine which is below the ground.
- Every woman employed in a mine above ground shall be allowed an interval of at least eleven hours between two working days.

Special Beneficial Facilities

- There must also be separate toilets for female workers.

Did You Know?

The Ministry of Labour and Employment has proposed to amend the Mines Act:

- So that the penalties are made more stringent, so that any offender is not let off with a token penalty.
- It is also proposed that the Mines Act should also specifically contain provisions regarding pregnant women.

Repercussions on non-compliance of the provisions

- Violation of any provision of the Mines Act will be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.



MISCELLANEOUS LAWS/SAFETY GUIDELINES

▲ Apart from the laws described above, there are multiple laws which are state specific and govern employees/workmen of a respective state in which they are in force. These state laws also provide for specific provisions for the protection of women.

▲ For instance, the Shops and Establishment Act and the rules passed thereunder, which has been passed at the state level by various states, provide for various protective as well as beneficial provisions for women, including fixed work timings, maternity benefits, prohibition from working in any dangerous work, safety measures etc.

Did You Know?

Safety guidelines for working women may vary from state to state.

For instance, the Delhi Police has issued a directive in compliance with the Ministry of Home Affairs, Notification No. U-11036/ (i) UTL, for organizations to observe the following safety measures for the women employees:

- Maintain a data base of all employees, security personnel, cab drivers and contractual workers.
- Hire the security personnel as far as possible from licensed agencies only.
- Ensure verification of past history/backgrounds of all their employees.
- Ensure that women employees are not made to travel alone with the cab driver during the night and a duly verified security guard is invariably deployed in each cab carrying women staff.
- Choose the route in such manner that as far as possible a woman employee is not the first one to be picked up or the last to be dropped.
- Ensure that the cab involved in transportation of women employees drops such employees right at their houses, remains halted at the point where a women employee has been dropped till she confirms about her arrival/reaching at her residence.
- Ensure that, whenever the house of a woman employee is so located that the approach road is not motorable, the duly verified security guard accompanies the employee on foot upto her house and takes a confirmation about her safe arrival.
- Exercise effective check and control on the vehicle's movement in order to check any unwarranted activities of the cab drivers.
- Get GPS system installed in the cabs used in the transportation especially for women employees.



Women at Work: Sexual Harassment

“Life means not only physical existence; it means the use of every limb or faculty through which life is enjoyed. ... The right to life includes the right to a healthy environment.”

– Justice P. N. Bhagwati

Introduction

Sexual Harassment is a common professional hazard faced by working women on the basis of their gender. Sexual Harassment at the workplace is considered violation of a working woman's right to equality, life and liberty. It creates an insecure and hostile work environment which discourages women's participation in work. This in turn adversely affects their social and economic empowerment and the goal of inclusive growth.

The law on sexual harassment is governed by the Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal Act, 2013 (hereinafter referred to as the “**Sexual Harassment Act**”). It is mandatory for all organizations (private sector as well as public sector) to ensure that women are protected against any form of sexual

harassment while at work. To this effect each employer or organization is required to formulate a committee to inquire into and address complaints of sexual harassment of their women workforce.

What is Sexual Harassment?

Sexual Harassment includes any one or more of the following unwelcome acts or behavior (whether directly or by implication):

- physical contact and advances; or
- a demand or request for sexual favours; or
- making sexually coloured remarks; or
- showing pornography; or
- any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Did You Know?

Prior to 1997 there were no formal guidelines to deal with sexual harassment at the workplace in India. It was only through the land mark case of Vishaka & Ors. v. State of Rajasthan in the year 1997 that the Indian Supreme Court for the first time defined what constitutes sexual harassment at workplace and provided detailed guidelines to employees and employers for redressal of complaints of sexual harassment. These guidelines were popularly known as the Vishaka guidelines.

While the Vishaka guidelines were continued to be enforced by the Indian courts, the Sexual Harassment Act only came in to force on December 9, 2013.



In addition, following circumstances (if connected with the behaviour of sexual harassment) may also amount to sexual harassment-

- promise of preferential treatment in employment;
- threat of detrimental treatment in employment;
- threat about employment status; or
- creating a hostile work environment; or
- humiliating treatment likely to affect health or safety.

Examples of Sexual Harassment

Direct Actions/Conduct

- Physical contact and advances;
- Overt sexual remarks;
- Sexual touching, assault or molestation;
- Voyeurism;
- Indecent exposure;
- Sexual assault;
- Sexual propositions in lieu of job offers or career advancements, or other offers;
- Stalking: either physically or indirectly including through social media networks (such as Facebook, Twitter, etc.);
- Humiliation, in a sexist manner;
- Indecent and inappropriate communications through emails, phone calls, messages and notes;
- Displaying pornography or sexually explicit materials such as pictures, pin up's, cartoons, photographs in the office premises;
- Limiting employment prospects of female workers through direct sexual advances or by making fulfillment of such advances a requirement for employment offers.

Indirect Actions/Conduct

- Sexually colored remarks or sexist jokes or innuendos;
- Making indecent sexual gestures or acts;
- Uncomfortable physical nearness to a woman's body, e.g. accidental brushing past a woman;
- General references to physical and/or sexual attributes of a woman;
- Discussing sexual experiences or pornography in a public place which could be overheard by women co-workers;

- Unwelcome, unrequited intimacy including embracing, patting on specific parts of body or standing uncomfortably close;
- Showing of unrequited romantic interest;
- Leering, staring or lingering gaze at a woman's body.

Meaning of sexually coloured remarks

- Whilst, the Sexual Harassment Act does not define what a sexually colored remark is, it has been held by Central Administrative Tribunal that complementing and remarking on the dress and looks of a woman, would amount to '*sexually coloured remarks*'.
- The ILO (Employment and Occupation) Convention in 1996 adopted the General Surveys on Equality in Employment and Occupation Convention and defined sexual harassment to include "*any insult or inappropriate remark, joke, insinuation and comment on a person's dress, physique, age, family situation, etc; any unwelcome invitation or request, implicit or explicit, any lascivious look or other gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault*".



Did You Know?

Gender discrimination could also amount to sexual harassment.

The High Court of Delhi has noted *the need to expand the scope of the definition of sexual harassment to include sex based harassment*, as defined under various international covenants including CEDAW.

The High Court defined discrimination on the basis of sex as *'practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender'*.

What is Work Place?

"Workplace" includes:

- any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit of the Government;
- any private sector organization carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial or the services sector;
- hospitals or nursing homes;
- any sports institute or stadium;
- any place visited by the employee during the course of employment including transportation; and
- a dwelling place or house (in the context of domestic help).

Who is an Employer?

- The head or any person responsible for the management, supervision and control of the workplace;
- Officer appointed by the appropriate Government or the local authority;
- The person discharging contractual obligations with respect to the employees;
- In case of a household, the person who employs or is benefitted by the employment.

Who is an Employee?

An employee includes:

- Any person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis;
- Any person appointed either directly or through an agent, including a contractor;
- Any person working for remuneration or not, or working on a voluntary basis or otherwise, and
- A co-worker, a contract worker, probationer, trainee and apprentice.

Who to Approach: Internal Complaints Committee

Obligation to constitute ICC

Every employer is required to constitute a committee by the name "Internal Complaints Committee" (the "ICC") to address complaints of sexual harassment.

Constitution of ICC: A Woman Centric Approach

The ICC shall consist of following members:

- A Presiding Officer, who must be a woman employed at a senior level at workplace from the employees;
- Minimum two members from amongst employees preferably committed to the cause of women or have had experience in social work or have legal knowledge;
- Member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment; and
- At least, one-half of the total Members so nominated must be women.



Complaint of Sexual Harassment

- Any aggrieved woman may make a complaint of sexual harassment to the ICC in writing or to the local complaints committee in case the ICC is not constituted.
- The complaint must be made within a period of three months from the date of incident of sexual harassment and in case of series of events from the date of last such incident.

Did You Know?

The Sexual Harassment Act mandates the constitution of a Local Complaints Committee by a District Officer appointed under the Act to receive complaints of sexual harassment for an establishment where ICC has not been constituted because the workplace has less than ten workers, or if the complaint is against the employer himself.

Inquiry into Complaint

- The ICC is required to inquire into the complaint.
- The ICC is empowered to summon the attendance of any person and examine him or her on oath and order for the discovery and production of documents.
- The inquiry must be completed by the ICC within a period of 90 days.
- The ICC shall make inquiry into the complaint in accordance with the principles of natural justice such as giving each party an opportunity to be heard.
- Parties are not allowed to be represented by a legal practitioner at any stage of proceedings before the ICC.

Interim reliefs to a woman during pendency of inquiry:

The ICC can recommend the following measures to the employer:

- Transfer the aggrieved woman/respondent to any other workplace.

- Grant leave to the aggrieved woman upto a period of three months (in addition to any other leave the aggrieved woman is entitled to)
- Restrain the respondent from reporting on the work performance of the aggrieved woman or writing a confidential report
- Grant any other prescribed relief.

Conclusion of Inquiry

- On the completion of an inquiry under the Act, the ICC must provide its finding to the employer within a period of ten days from date of completion of the inquiry (the same must also be provided to the concerned parties).
- Where the allegation is not proved, the ICC shall recommend the employer that no action be taken.

Disciplinary Action

Where the allegations stand proved, ICC shall recommend the following which need to be acted upon within a period of sixty days:

- To take action for Sexual Harassment treating it as a misconduct under applicable service/prescribed rules.
- Deduct from salary/wages of the respondent an appropriate sum which may be paid to the aggrieved woman or her legal heir.
- To take any action including a written apology, warning, reprimand or censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from services or undergoing a counseling session or carrying out community service.

Determination of compensation

The ICC may consider the following while determining compensation:

- Mental trauma, pain, suffering, emotional distress caused to the aggrieved woman;
- The loss in career opportunity due to any incident of Sexual Harassment;
- Medical expenses incurred for physical or psychiatric treatment;
- Income/financial status of the respondent; and
- Feasibility of payment in lump sum or in installments.



Provision for Conciliation

- The ICC before initiating an inquiry at the request of the aggrieved woman may take steps to settle the matter through conciliation. Once a settlement is arrived at, no further inquiry shall be conducted by the ICC.
- Monetary settlement should not be a basis of conciliation.
- If the terms of settlement are not complied with, the aggrieved woman may inform the ICC, who shall proceed with the inquiry.

Punishment for False or Malicious Complaint/False Evidence

- Strict action must be taken against any person (including the aggrieved woman) from making any false or misleading complaint or producing false evidence in accordance with the provisions of service or prescribed rules.

Time Frame under the Sexual Harassment Act

Three Months

Written complaint to be filed

ICC to send a copy of complaint to the accused 7 Days

10 Days

Accused to file reply to the complaint along with supporting documents

Inquiry to be completed by ICC 90 Days

10 Days

Report to be submitted by ICC to employee after completion of hearing

Employee to act on the recommendation of the ICC 60 Days

90 Days

Filing of appeal, if any

- Such a disciplinary action could include: written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating any such person from service.

Appeal against the Decision of the ICC

- Any aggrieved person with the orders of the ICC may appeal to the court in accordance with the provisions of the service or prescribed rules or to the applicable appellate authority prescribed under the Sexual Harassment Act.
- The appeal must be preferred within a period of 90 days from the date of recommendations by the ICC.

Duties of an Employer

An employer must ensure the following:

- Providing a safe working environment for women employees;
- Display at any conspicuous place in the workplace, the penal consequences of sexual harassments;
- Organise workshops and awareness programmes at regular intervals for sensitizing the employees;
- Provide necessary facilities to the ICC for dealing with the complaint and conducting an inquiry;
- Assist in securing the attendance of respondent and witnesses before the ICC;
- Provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law;
- Must assist the woman in initiating action, where the perpetrator is not an employee, in the workplace at which the incident of Sexual Harassment took place;
- Treat Sexual Harassment as a misconduct under the service rules and initiate action for such misconduct;
- Monitor the timely submission of reports by the ICC; and
- Formulate and disseminate an internal policy for prohibition, prevention and redressal of Sexual Harassment at the work place.



Sexual Offences Against Women

“A world without rapists would be a world in which women moved freely without fear of men. That some men rape provides a sufficient threat to keep all women in a constant state of intimidation ... Rather than society's aberrants or 'spoilors of purity,' men who commit rape have served in effect as front-line masculine shock troops, terrorist guerrillas in the longest sustained battle the world has ever known.”

– Susan Brownmiller
Against Our Will: Men, Women, and Rape (1975)



This chapter deals with sexual offences against women. The first part focuses on the offence of rape and the reforms brought about in the Indian Penal Code (**IPC**) and related laws, post the brutal Nirbhaya rape case, owing to the widespread media attention and public outrage. It also talks about the issue of marital rape and the position in India. The second part discusses other sexual offences such as stalking, pornography and voyeurism and the laws in that regard.

Rape

Every woman is entitled to respect for her life and the integrity and security of her person. Every woman has the right to express and exercise complete sexual autonomy including with respect to her relationships and choice of partners. Rape is not only reprehensible invasion of a woman's body but is violation of her bodily integrity, independence of body and mind and right to live with dignity.



Facts Relating to Rape in India

- According to the data released by National Crime Records Bureau:
 - On an average, 92 women are raped in India every day.
 - There has been a glaring upward trend in the incidence of reported rapes during 2009-2013. These cases have reported an increase of 3.6% in 2010 over 2009 and an increase of 35.2% in 2013 over 2012.
- In 2013, as many as in 94.4 % of rape cases, the offenders were known to the victims, which included neighbours and parents/close family members and relatives.



Legal Definition and Ingredients of Rape

To constitute rape, two ingredients are essential under IPC:

1. Sexual activity

A man commits rape if he forcibly-

- a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) inserts, to any extent, any object or any body part, not being the penis, into the vagina, urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any body part of a woman so as to cause penetration in the vagina, urethra, anus or any body part of such woman or makes her to do so with him or any other person; or
- d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

2. Lack of Will or Consent

The above sexual acts would constitute rape in any of the following seven circumstances:

- a) against the will of the woman;
- b) without the consent of the woman;
- c) with the consent of the woman, when such consent has been obtained by putting her or any person in whom she is interested, in fear of death or hurt;
- d) with the consent of the woman, when the man knows that he is not her husband and she has consented because she believes that he is another man to whom she is or believes herself to be lawfully married;
- e) with the consent of the woman but at the time of giving such consent, she is unable to understand the nature and consequences of that to which she is giving consent by reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance by man personally or through another person;
- f) with or without the consent of a woman, when she is under 18 years of age; or
- g) when the woman is unable to communicate consent.



What amounts to consent

Question of consent is the most important question for consideration in a case of rape. For a sexual act to constitute rape, it should have been done without the woman's will or consent.

Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates her willingness to participate in the specific sexual act. To absolve a person from criminal liability, consent must be given freely and must not be obtained by fraud or by mistake or under a misconception of fact.

What does not amount to Consent- Illustrations

- a) Lack of physical resistance by a woman to the act of penetration shall not be regarded as consenting to the sexual activity.
- b) Consent known to be given by (i) a woman under *fear of injury or a misconception of fact* or (ii) a woman who from *unsoundness of mind, or intoxication or the administration of any stupefying or unwholesome substance by the man, is unable to understand the nature and consequence of the act to which she gives her consent*; would not amount to a real consent so as to absolve the man of the offence of rape.
- c) Consent obtained by deceiving and misrepresenting to the woman is not valid consent.

There is no straitjacket formula for determining whether consent given by the woman to sexual intercourse is voluntary or given under a misconception of fact, and the peculiar facts and circumstances would be considered in each case.



Age of Consent

The age of consent is 18 years, which means that any sexual activity with a woman below the age of 18 will constitute statutory rape irrespective of her consent.

Sexual Intercourse or Activity on Promise to Marry – Rape or Consensual Sex?

The Hon'ble Supreme Court of India has held that if a man has consensual sex with a woman with the intention to marry her, then it cannot be termed as rape, even though the marriage does not take place.

The Court held that "There is a clear distinction between rape and consensual sex. The Court must very carefully examine whether the accused had actually wanted to marry the victim, or had *mala fide* motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception."

Thus, the Court will examine whether at the outset, the man had no intention of keeping his promise to marry the woman. There may be a case where the woman agrees to have sexual intercourse on account of her love and not solely on account of any misrepresentation by the man as such. A man cannot be convicted for rape unless the Court is assured of the fact that from the very beginning, he had never really intended to marry the woman.

Acts which do not amount to rape

- (i) medical procedure or intervention; and
- (ii) sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age.

Forced sex by husband does not amount to rape

Marital rape is non-consensual sex in which the perpetrator is the husband. The Indian law does not recognize rape within the bonds of marriage. A husband would not be guilty of rape even if he forces himself sexually upon his wife without her consent.

Forced sexual intercourse by husband with his wife during separation is prohibited- If a man has sexual intercourse with his own wife, who is living separately, whether under a decree or otherwise, without her consent, shall be punishable under the IPC with imprisonment ranging from 2 to 7 years and fine.

Other relevant information in the context of forced sex by husband

While IPC excludes marital rape and the husband cannot be prosecuted for rape, there are certain other provisions in law which may be of relevance:

- Domestic Violence Act offers a civil remedy for marital rape, inasmuch as it includes physical, sexual, verbal and emotional abuse within the ambit of domestic violence in case it harms or injures or endangers the health or life or well-being of the woman. Excessive and unreasonable demands for sex or demands for unnatural sex have been considered forms of cruelty and may entitle a woman to a divorce.
- Section 498A of IPC provides for punishment against matrimonial cruelty and it has been held in certain cases that "perverse sexual conduct by the husband" may amount to cruelty.

Court denied bail to the man in a case where he subjected his wife to unnatural sex and also took her nude photographs without her will. The Court held that **"...In India, marital rape is not covered by the ordinary rape laws and is a form of non-criminal domestic violence. Also, IPC provides that sexual intercourse or sexual acts by man with his own wife, the wife not being under 15 years of age, is not rape; in fact exempts spouses from prosecution except in cases of legal separation. Some cases, however, are in fact covered by the ordinary laws relating to assault and unnatural sex/ sodomy as in the present case, for use of violence to claim sex is clearly not acceptable.... Marital rape is offensive to morality and liberty and any kind of sexual perversity requires to be exposed, addressed and condemned"**.



Testimony of the “rape” survivor is sufficient for conviction

The Hon'ble Supreme Court of India has held that the survivor of sexual assault is not treated as accomplice but is an injured complainant or witness, and as such, her evidence does not require corroboration from any other including the evidence of a doctor. In a given case, even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the woman, unless the same is shown to be infirm and not trustworthy.

Punishment for Rape

1. Whoever commits rape shall be punished with imprisonment for a term of at least 7 years, which may extend to imprisonment for life, and shall also be liable for fine.
2. **Aggravated Rape and punishment in cases of rape by relatives or known persons or persons in position of control etc.** - The law provides for enhanced punishment of rigorous imprisonment for a term of at least 10 years which may extend to imprisonment for the remainder of that person's natural life, and also fine, particularly in such cases where a man:
 - a) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
 - b) being in a position of control or dominance over a woman, commits rape on such woman; or
 - c) commits rape on a woman knowing her to be pregnant; or
 - d) commits rape on a woman when she is under sixteen years of age; or

- e) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- f) commits rape repeatedly on the same woman.

3. **Punishment for rape resulting in death or persistent vegetative state of the woman**- Whoever commits rape and in the course of such act inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term of at least 20 years, but which may extend to imprisonment for the remainder of that person's natural life, or with death.

4. **Punishment for sexual intercourse by a person in authority or fiduciary relationship not amounting to rape**

If a person who is in a position of authority or in a fiduciary relationship abuses such position to induce or seduce any woman under his custody/charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to rape, shall be punished with imprisonment ranging from 5 to 10 years and fine. The term 'sexual intercourse' refers to all acts outlined above in the context of rape.

5. **Punishment for Gang Rape**

There has been a horrific rise in the cases of gang rape, be it the Nirbhaya rape case in Delhi or the Shakti Mills rape case in Mumbai, wherein a woman is raped by persons constituting a group or acting in furtherance of common intention. The punishment for gang rape ranges from imprisonment for at least 20 years to life, and with fine. The fine shall be paid to the woman who has been raped and should be just and reasonable to meet her medical expenses and rehabilitation.





Few salient features of trial of rape cases and other sexual offences

- The trial should be preferably presided over by a female Judge.
- In cases of rape or other offences involving sexual intercourse, the trial is required to be completed as far as possible within two months from the date of filing of the chargesheet.
- The inquiry into and trial of rape or other offences involving sexual intercourse shall be conducted in camera, i.e., in private, with absolute confidentiality as to the identity of the woman.
- Presumption as to absence of consent: In cases of aggravated rape, the Court shall presume that the woman did not consent.

Evidence of woman's character or previous sexual experience not relevant in cases of rape

In cases involving rape or other sexual offences discussed in this Chapter, where the question of the woman's consent is in issue, evidence of the character of the woman or her previous sexual experience with any person is not relevant on the issue of consent or quality of consent. Further, it is not permissible to put questions in cross-examination of the woman as to her general character or previous sexual experience with any person for proving such consent or quality of consent.

Other Sexual Offences

Outraging the modesty of a woman by assault of criminal force

Any person who assaults or uses criminal force towards a woman with an intention to outrage her modesty or knowing that such act is likely to outrage her modesty, is liable for punishment with imprisonment for a period ranging from 1 year to 5 years and fine.

The exact ingredients which constitute 'outraging the modesty of a woman' have not been defined. However, the Supreme Court has held that if any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged, he is to be punished. The Court held that the "*act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, would be an outrage to the modesty of a woman; and in such an event knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object.*" A few illustrations wherein the Courts held that the modesty of a woman has been outraged are where:

- a man stopped a woman on the way and forcibly caught hold of her hair and planted a kiss;
- a man slapped a woman on her posterior.

Insulting the modesty of a woman by inappropriate words, sounds, gestures, etc. (without use of physical assault as such)

If any person utters any word, makes any sound or gesture or exhibits any object intending for such word or sound to be heard or such gesture or object to be seen by a woman or intrudes upon the privacy of such woman with an intention to insult the modesty of a woman, he will be liable for punishment with imprisonment up to 3 years and fine. The examples of such offence would be:

- Making vulgar gestures;
- Singing songs with vulgar gestures;
- Making lewd remarks.



Guidelines issued by Supreme Court for eve-teasing to various stakeholders

- Deputation of plain-clothed female police officers and installation of CCTV cameras in public places to monitor the acts of eve-teasing.
- Persons in charge of educational institutions, places of worship, cinema theaters, railway stations, bus-stands are required to report the incidents of eve-teasing to the nearest police station or Women's Help Center.
- It is mandatory for the crew of a vehicle to report any incident of eve-teasing committed in a public vehicle to the nearest police station. Failure to do so should lead to cancellation of the permit to ply.
- Establishment of Women's Helpline to curb eve-teasing.
- Responsibility on the passers-by to also report such incidents to police or Women's Helpline.

Sexual Harassment

A man is guilty of committing the offence of sexual harassment if he indulges in any of the following:

- a) physical contact and advances involving unwelcome and explicit sexual overtures; or
- b) demand or request for sexual favour; or
- c) showing pornography against the will of a woman; or
- d) making sexually coloured remarks.

Any man who commits the offence specified in a) to c) above, he shall be punished with rigorous imprisonment for a term up to three years, or with fine, or with both. Any man who commits the offence of making sexually coloured remarks against a woman shall be punished with imprisonment for a term up to one year, or with fine, or with both.

Voyeurism

Any man who watches or captures the image of a woman engaging in a "private act" or disseminates such image is liable for the offence of voyeurism. Such "private act" includes watching in a place which would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

The offence of voyeurism is committed even if the woman consents to the capture of any images or any act but not to their dissemination to third persons, in which even such dissemination shall also be punishable. The punishment for voyeurism is imprisonment for 1 to 7 years.

The offence of voyeurism is also punishable under the Information Technology Act, 2000.



Disrobing a woman or compelling her to be naked

Any man who assaults or uses criminal force to any woman or abets such an act with an intention of disrobing or compelling her to be naked is liable to be punished with imprisonment of 3 to 7 years and fine.

Stalking

The offence of stalking is committed if a man:

- (i) follows a woman and contacts or attempts to contact her to foster personal interaction repeatedly despite clear indication of disinterest by the woman; or
- (ii) monitors the use of Internet by the woman, including email or any other form of electronic conversation.

However, such conduct does not amount to stalking if the accused person proves that:

- (i) the conduct was pursued for preventing or detecting crime and that the State had entrusted such man with duty to prevent and detect such crime; or
- (ii) the conduct was pursued under any law; or
- (iii) the conduct was reasonable and justified in the particular circumstances.

A man who commits the offence of stalking is liable to be punished with imprisonment up to 3 years and fine upon first conviction and imprisonment up to 5 years and fine upon subsequent conviction.

Stalking is not a minor offence; it severely impairs a woman's freedom of expression and movement apart from other mental stress and ramifications. There have been instances wherein stalking led to further heinous crimes such as rape and murder being committed.

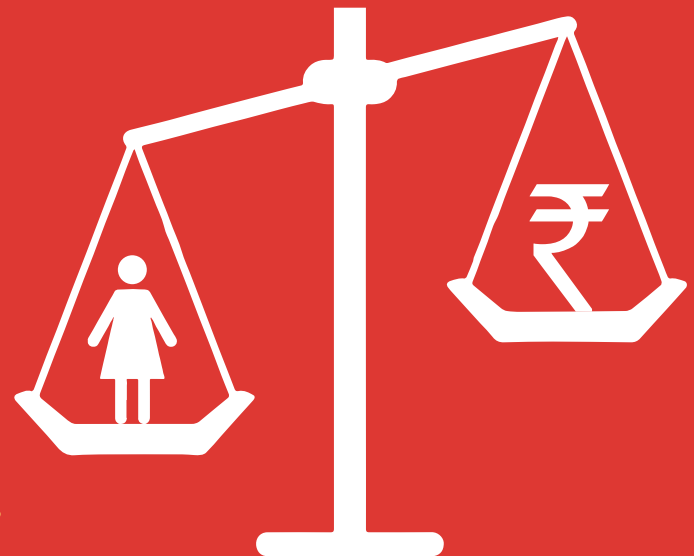




Dowry

“The terrorist is dowry, and it is spreading tentacles in every possible direction.”

- Hon'ble Supreme Court of India in
Kamlesh Panjiyar vs. State of Bihar (2005) 2 SCC 388



Introduction

Dowry is a practice associated with the institution of marriage in India, which in very broad terms involves the giving of gifts from the bride's side to the groom's side at the time of marriage. This chapter broadly sets forth the laws prohibiting dowry in India.

Prohibition on Dowry

In India, dowry is prohibited under the Dowry Prohibition Act, 1961. This Act defines dowry as:

- any property or valuable security given either directly or indirectly or promised;
- by one party to a marriage to the other party to the marriage or by the parents of either party to a marriage; and
- to either party to the marriage or to any other person in connection with the marriage of the said parties.

Further, the Indian Penal Code and the Indian Evidence Act also contain provisions for curbing dowry related violence in India.

Specifically, the Dowry Prohibition Act provides the following:

- Giving and receiving of dowry is an offence where a court can initiate proceedings upon its own knowledge or on the basis of a police report, even if the aggrieved person has lodged no such complaint.
- A person found guilty of taking or abetting the giving or taking of dowry, can be given a prison sentence of at least five years and may also be fined.

Unlike most crimes, including murder, wherein law puts the burden of proof on the complainant and the accused is considered innocent till proven guilty, in the case of dowry related offences, a husband and his family have to prove that they did not make dowry demands and what was given by the bride's parents were voluntary gifts.

Returning Dowry

The Act states that where any dowry is received by any person other than the bride, that person will transfer the dowry to the woman within three months after the date of marriage or within three months after the date of receipt. Failure to transfer a woman's dowry may result in punishment.

Dowry and Gifts

Under the Act 'dowry' is forbidden but 'gifts' are allowed. The anti-dowry law cannot be invoked against the giving of presents at the time of marriage to the bride without any demand having been made provided that such presents are entered in a list maintained in accordance with the rules provided under the Act. Presents given to the groom are also allowed under the Act, provided no demand has been made and they are entered in a list and provided that '*such presents are of a customary nature and the value thereof is not excessive in relation to the 'financial status of the person who gives such presents'.*

Rules issued by the Central Government under the Dowry Prohibition Act state that both the bride and the groom shall maintain a list of presents received by each of them at the time of the marriage. The rules state that the bride and the groom shall prepare and sign the list of presents at the time of the marriage or as soon as possible after the marriage.



Such lists are required to contain the following information:

- ▲ A brief description of each present;
- ▲ The approximate value of the present;
- ▲ The name of the person who has given the present; and
- ▲ Where the person giving the present is related to the bride or bridegroom, a description of such relationship.

Reporting Dowry Harassment

What should your complaint include?

- Details of marriage including wedding card, marriage certificate, photos, videos etc.
- Name(s) of accused persons and their details like addresses and passports etc.
- Details of harassment like duration, time period, place and type of harassment.
- Details of demand of dowry, if any
- Bank statement, if you have drawn dowry from the bank.
- Details of the cheque if you have paid the dowry in that form.
- Details of the person to whom it was handed over.
- In case of physical violence, details of injuries and type of weapon.
- Doctor's prescription or case sheets of the treatment of such injuries.
- Details of the elders who had arranged the marriage and who tried to patch up the differences.
- Places where the mediation/counseling sessions were held
- Details of witnesses, especially independent witnesses and your own children.
- Any written agreements during marriage.
- Details of gifts in the form of movable property like jewels/cash/garments/vehicles and immovable property like plots/flats.
- Any written/voice communication between the partners, the victim and the parents in the form of letters, emails, voice records, etc.
- Reasons for the delay in lodging the complaint, if any.
- Signature of the victim and contact number

- Sourced from the Pune Rural Police Website available at <http://www.puneruralpolice.gov.in>



Punishment for 'Dowry Death'

Under the Indian Penal Code:

- if the death of a woman is caused by burns or bodily injury, or occurs under abnormal circumstances,
- within seven years of her marriage and it is shown that just prior to death she was subject to cruelty by her husband or his relatives,
- in connection with demands for dowry,
- such a death would be called a 'dowry death' and the husband or relative would be held responsible for her death.

The person held guilty of a '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.

Conclusion

The persisting problem of dowry related offences stems from the social belief that it is justified to give and demand "gifts" from the bride's family during a wedding. Marriages are intended to give social and legal recognition to a relationship between two individuals and allow their families to participate in enhancing this relationship. Gifts, which are dowry in disguise, should be discouraged since the biggest assets in marriage are the two individuals who are part of it. Eradication of the social custom of dowry shall also impact the social mentality that a girl child is an economic liability.

Certain Institutional Resources

S.No	Name & Address of the Agency	Contact Person / Phone / Fax / Email Address
1.	National Commission for Women, 4, Deen Dayal Upadhyaya Marg, New Delhi-110002. Email: ncw@nic.in	Online Complaint Registration: http://ncw.nic.in/onlinecomplaintsv2/frmcomplaints.aspx Contact Information of all State level Commissions for Women: http://ncw.nic.in/frmliststatecommission.aspx
2.	Delhi State Commission for Women, C-Block, 2nd Floor, Vikas Bhawan I. P. Estate, New Delhi-110 002	Email: msdcw.delhi@nic.in Website: http://www.delhi.gov.in
3.	Maharashtra State Commission for Women, Road Number 2, Gandhi Nagar, Bandra East, Mumbai, Maharashtra 400051	Email: cp.mscw@maharashtra.gov.in Website: https://mscw.maharashtra.gov.in/
4.	U.P. State Commission for Women IIIrd Floor, Rajya Manav Adhikar Bhawan, T.C. - 34, V, Vibhuti Khand, Gomati Nagar, Lucknow - 226010	Email: up.mahilaayog@yahoo.com Website: http://mahilaayog.up.nic.in/index_english.htm
5.	West Bengal Commission for Women, "Jalasampad Bhavan", (Ground Floor & 10th Floor), Block-DF, Sector - I, Salt Lake City, Kolkata-700 091	Email: wbcw@vsnl.net, info@wbcw.org
6.	Rajasthan Commission for Women, Lal Kothi, Tonk Road, Jaipur	Email: ladmari.jain@gmail.com rajyamahilaayog@gmail.com
7.	Karnataka Commission for Women, 1st Floor, KHB Building, Cauvery Bhawan, K.G. Marg, Bangalore-560 009	Email: kscwbang123@gmail.com Website: http://kscw.org/
8.	Assam State Commission for Women, Beltola, Near Sankardev Netralaya, Guwahati-781028	Email: ascwguwahatia@gmail.com Website: http://womencommissionassam.gov.in/



Cruelty

“There is one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable and never tolerable. Men must teach each other that real men do not violate or oppress women – and that a woman’s place is not just in the home or the field, but in schools and offices and boardrooms.”

- Ban Ki-moon,
Secretary General of United Nations



A. Introduction

In India, physical and mental violence against a woman, when she is married, can amount to cruelty, which is a valid ground for seeking the dissolution of the marriage. Such cruelty is also a criminal offence punishable under the criminal laws of India. This chapter highlights such laws.

The United Nations defined “**Violence against Women**” in 1993 in Declaration on the Elimination of Violence against Women. It defines it as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

B. Cruelty as a Ground for Divorce

Various personal laws in India provide cruelty as a ground for seeking divorce/matrimonial reliefs.

Under the Hindu Marriage Act, 1956 either party to a marriage (the husband or the wife) can apply for a decree for judicial separation or divorce on the ground that the other spouse has treated such person with cruelty.

What Constitutes Cruelty□

Indian courts through numerous judgments have provided some guidance on what acts would constitute cruelty, for the purposes of allowing the dissolution of a marriage. The most important judicial decision in relation to cruelty under Hindu Marriage Act is that of *Dastane v. Dastane*. In this case, the Supreme Court of India made the following observations:

1. In a case, where cruelty has been alleged, inquiry has to be made as to whether the conduct charged as cruelty *is of the nature as to cause in the mind of the person who is alleging the cruelty a reasonable apprehension that it will be harmful or injurious for her to live with her spouse/partner.*
2. Cruelty need not necessarily be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such danger. Harm or injury to health, reputation or the like would be an important consideration in determining whether the conduct of a spouse amounts to cruelty or not.

Since facts and circumstances of each case vary infinitely, over the years, the Indian judiciary has developed certain principles that help in determining the existence of elements of legal cruelty:



- a. To amount to cruelty, the acts must be of a nature more serious than the mere wear and tear of married life.
- b. Cruelty may be inferred from the whole facts and matrimonial relations and interactions of the parties in their daily lives.
- c. Cruelty, by character, is cumulative. Every minor or major act must be judged in relation to its surrounding circumstances and the physical and mental condition or susceptibilities of the innocent spouse and the offender's knowledge.
- d. The existence of cruelty depends not only on the magnitude of the act but also, at times, on the consequence of such act.
- e. Actual intention on the part of one spouse to injure the other is not an essential factor.

Mental Cruelty

Cruelty is not only limited to physical violence. It may also include mental cruelty. Courts have held that mental cruelty is the acute mental pain and suffering that would cause more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party.

Definition of Mental Cruelty

“Mental Cruelty- As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse”

-Black's Law Dictionary, 8th Edition





Courts in India have stated that a straight jacket formula or fixed parameters for determining mental cruelty is not possible. Mental

cruelty may have to be inferred from the whole facts and matrimonial relations of the parties and interactions in their daily life.

Examples of Acts Considered as Legal Cruelty

Based on various instances, provided below is an illustrative list of acts that have been held by courts in India to be cruelty, for the purposes of granting a dissolution of marriage under the Hindu Marriage Act:

- a. Any direct or indirect misconduct that affects a spouse. For instance, a spouse's failure to perform his/her conjugal relationships, can indirectly amount to cruelty.
- b. Unwarranted indifference to the victim's health, callous neglect, extreme boorishness, deliberate refusal to co-operate and calculated harassment in matters relating to the household and children of the marriage may be elements which would entitle the injured spouse to relief.
- c. Drunkenness, per se, is not cruelty, but persistent drunkenness after warnings that such conduct is inflicting pain and misery on the spouse may well amount to cruelty.
- d. Threats of physical violence, which are of such character, that the victim has reasonable ground to apprehend that such threats may be carried into effect, can amount to cruelty.
- e. Derogatory remarks against a spouse and close relatives in written complaints, allegations of illicit sexual relations and sexual perversity will amount to cruelty.
- f. Frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable and hence such acts can amount to mental cruelty.



Examples of Acts not Considered as Legal Cruelty

- a. Mere coldness or lack of affection cannot amount to cruelty.
- b. Unhappiness because of unruly temper of a spouse does not necessarily amount to cruelty. It is also not sufficient to show that a spouse is moody, inconsiderate, mean, selfish or stingy.
- c. Mere jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset, may not be a ground for grant of divorce on the ground of mental cruelty.
- d. Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

Condoning Cruelty

As discussed physical and mental cruelty is a ground for divorce under the Hindu Marriage Act. However, the Act states that cruelty is a condonable marital offence. If the victim has condoned the act(s) of cruelty complained, then a petition for dissolution of marriage has to be dismissed. Condonation is forgiveness, express or implied, for commission of a matrimonial offence with the implied condition that the offence will not be repeated and reinstatement of the spouse to his/her original position that they would have occupied before the offence was committed.

For instance, if a wife files a petition for divorce on the ground that the husband is involved in an extra-marital affair, but while the proceedings are ongoing, if the wife forgives the husband and they resume their matrimonial relationship, the same would amount to condonation of the marital offence of cruelty and the relevant court of law may not grant a decree of divorce to the wife.

C. Cruelty as A Criminal Offence

In addition to certain acts of cruelty against a woman is a criminal offence, which is punishable under the Indian Penal Code, 1860. The Act makes cruelty, by husband or his relatives a punishable offence.

Ingredients of Offence of Cruelty under Indian Penal Code

The Act states that the following ingredients constitute an offence of cruelty:

1. Cruelty it is to be determined/inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is important to establish that the woman has been subjected to cruelty continuously /persistently or at least in close proximity to the time at which a complaint is lodged under the Indian Penal Code.
2. For an act to fall within the ambit of cruelty under the Indian Penal Code, the act/harassment must be in furtherance to extract money unlawfully from the woman by the man or his relatives.



Cruelty for the purposes of the Indian Penal Code includes mental cruelty also.

Penalty

The Indian Penal Code provides that if the husband or any of his relatives subject the wife to cruelty, they can be punished with prison sentence for up to three years and also fine.

Under the Indian Penal Code once a complaint of cruelty is made, the police is required to register the complaint and can make arrests, based on the complaint, without obtaining a warrant or initiate investigation without seeking the permission of the court.

The offence is non-bailable.

Did You Know?

In one leading judgment by the Madras High Court in 2008, guidelines for dealing with offence of cruelty have been laid out, including:

- Complainants should be provided with adequate security at Government Home and interest of the children must be taken care of.
- Stridhan properties are to be restored at the earliest to the victims and legal aid may be arranged for them through State Legal Services Authority for immediate redressal of their grievances.
- Social workers with experience may be nominated and housed in the same premises of All Women Police Stations along with Dowry Prohibition Officers.

These guidelines have been adopted by various other High Courts including the Delhi High Court. However, these guidelines have not been uniformly adopted across all Indian states.



Domestic Violence

“Yatr naryasto pojyantay,
ramantay tatr devta”

*Where women are provided place of honor,
gods are pleased and reside there in that household*

– Manu Smriti



Introduction

Right to life and a right to live with dignity is a fundamental right of every person and is guaranteed under the Constitution of India. The phenomenon of domestic violence is widely prevalent in India but has remained largely invisible in the public domain due its inherent nature of it being family related.

This chapter relates to the Protection of Women from Domestic Violence Act, 2005 (the “DV Act”) which is a laudable piece of legislation that was enacted in 2005 (and came in to force on October 26, 2006) to provide legal recourse to victims of domestic violence. It addresses the limitations of legal remedies already available to a victim and specifically addresses:

- real life experiences of women facing violence at home;
- reasons and nature of the violence; and,
- immediate requirements of an aggrieved woman.

The main aim of the DV Act is to protect the constitutional rights of women in India and is thus a vital legislation that addresses the critical issue of domestic violence. The immediate remedies available to women under the DV Act aim to combat the social phobia in victims of violence and address the reluctance in women to report cases of violence faced by them at home.

The DV Act provides:

- protection to women;
- who are or have been in a relationship with the abuser;
- where both parties have lived together in a shared household; and

- where both parties are related by consanguinity, marriage or through a relationship in the nature of marriage and includes relationships with family members living together as a joint family.

The DV Act enables married women, single women living with the abuser, sisters, widows, and even mothers to file a complaint against the abuser.

Societal Menaces Underlying Domestic Violence

- Marriage, active gender discrimination and diminished women’s agency through limited economic opportunity through stifled opportunity for independence are aspects of patriarchal household structure in India;
- Domestic violence often happens in India as a result of dowry demands.
- Hesitancy to report cases of domestic violence due to misconception that it is always the woman’s fault for provoking domestic abuse.
- Socioeconomic class, educational level, and modern family structures lead to differences in the beginning and later take the shape of domestic violence. Women in India who are more educated than their husbands, earn more or are the sole earners in their families face a high risk of domestic violence.

How the DV Act aims to combat the menace of domestic violence?

- The DV Act provides for the rights of women to secure housing whilst pursuing a complaint against domestic violence.
- The DV Act provides for appointment of protection officers and registration of non-governmental organizations as service



providers for providing assistance to the aggrieved women with respect to her medical examination, obtaining legal aid, safe shelter and other immediate remedies and protection required by such aggrieved women.

- The DV Act empowers the Magistrate to pass protection orders in favour of the aggrieved woman to prevent the abuser from aiding or committing a further act of domestic violence or other specified act, entering a workplace or any other place frequented by the aggrieved woman, attempting to communicate with her, isolating any assets used by both parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

What Constitutes a Case for Protection from Domestic Violence

- What is the relationship between the aggrieved woman and the abuser;
- Is or was there a co-habitation between the victim and abuser;
- What is/was the nature of such co-habitation;
- What is the form of abuse;
- Is it an actual abuse or a threat to abuse;
- Is the abuser an eligible respondent (abuser against whom a complaint can be filed) under the DV Act.

The DV Act empowers women to file a case against a person with whom she is having or has had a 'domestic relationship' in a 'shared household' and who has subjected her to 'domestic violence'.

What constitutes a Domestic Relationship?

- Any relationship between two persons who live, or have at any point of time lived together in a shared household is considered a 'domestic relationship'.
- This includes a relationship to the abuser by blood, marriage or adoption and also covers sisters, widows, mothers, daughters and women in relationships of cohabitation (single women).
- The DV Act also protects women in fraudulent or bigamous marriages, or in marriages deemed invalid in law.

What constitutes a Shared Household?

- A shared household is one where the aggrieved woman lives or has lived in a domestic relationship a marriage or a live in relationship) either individually or along with the abuser.

- Such a household should be owned or tenanted, either jointly by both of them or by either of them.
- It also includes a household that may belong to the joint family of which the abuser is a member, irrespective of whether he or the aggrieved woman has any right or title in the shared household.

What is the nature of Abuse?

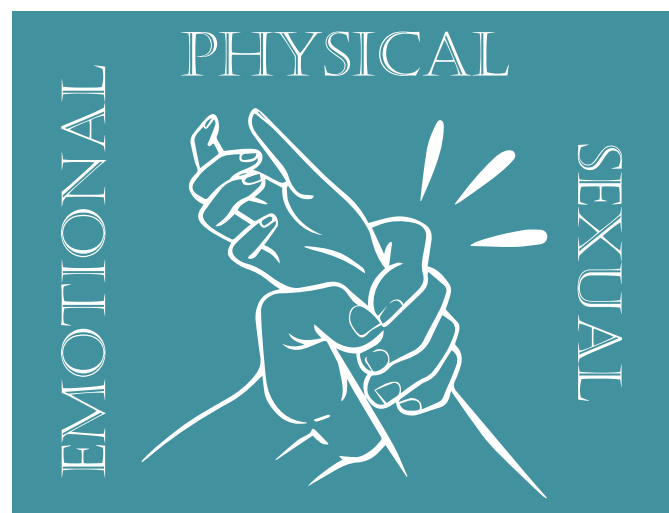
- Domestic Violence includes actual abuse or the threat of abuse that is physical, sexual, verbal, emotional or economic.
- Any act, omission or commission by the abuser that harms or injures or has the potential to harm or injure will be considered as domestic violence.
- Even a single act of domestic violence is punishable and women do not have to suffer a prolonged period of abuse.

Against whom can a complaint be filed under the DV Act?

Any male member who has been in a domestic relationship with the aggrieved woman and also against a relative of the husband or male partner (i.e. father and mother, or even siblings of the husband or male partner) can be proceeded against under the DV Act. The Act does not permit any female relative of the husband or male partner to file a complaint against the wife or female partner.

Forms of Domestic Violence

Domestic Violence includes all forms of actual abuse or threat of abuse of physical, sexual, verbal, emotional and economic nature that can harm, cause injury to, endanger the health, safety, life, limb or well-being, either mental or physical of the aggrieved woman.





Any act, omission or commission or conduct of the accuser shall constitute domestic violence in case it –

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

The DV Act deals with several forms of abuse that were either not addressed earlier, or that were addressed in ways not as broad as done here. The following acts can be classified as domestic violence:

Physical Abuse

- an act or conduct causing bodily pain, harm, or danger to life, limb, or health;
- an act that impairs the health or development of the aggrieved woman;
- an act that amounts to assault, criminal intimidation and criminal force.

Slapping, pushing, punching, grabbing, public humiliation, burdening them with drudgery, neglect of their health problems, kicking, biting, hitting, throwing objects, strangling, beating, threatening with any form of weapon, or using a weapon are examples of physical abuse.

Sexual Abuse

- any conduct of a sexual nature that abuses, humiliates, degrades, or violates the dignity of a woman.

Unwanted kissing, touching, or fondling; sexual/reproductive coercion; rape; and marital rape are examples of sexual abuse.

Verbal and Emotional Abuse

- any insult, ridicule, humiliation, name-calling;
- insults or ridicule for not having a child or a male child;
- repeated threats to cause physical pain to any person in whom the aggrieved woman is interested.

Name-calling, degradation and blaming; stalking; and isolation, harassment by way of unlawful dowry demands to the woman or her relatives, insults on account of the victim's not having any children or male children are examples of verbal and emotional abuse.

Economic Abuse

- depriving the aggrieved woman of economic or financial resources to which she is entitled under any law or custom or which she acquires out of necessity such as household necessities, stridhan, her jointly or separately owned property, maintenance, and rental payments;
- disposing of household assets or alienation of movable or immovable assets;
- restricting continued access to resources or facilities in which she has an interest or entitlement by virtue of the domestic relationship including access to the shared household.

Did You Know?

Indian laws do not have a provision to prosecute marital rape. Even if a woman's husband has sexual intercourse without her consent, he cannot be prosecuted for rape. However, excessive and unreasonable demands for sexual intercourse, or demands for unnatural intercourse have been considered forms of cruelty and may entitle a woman to a divorce.





Reliefs Available to an Aggrieved Under DV Act

A woman who is victimized by acts of domestic violence will have the right to

- (a) Immediate relief by availing the services and assistance of police officers, protection officers, service providers, shelter homes and medical establishments. These are organizations and agencies recognized by State Governments to provide immediate relief to victims of domestic violence;
- (b) file a complaint of domestic violence and seek immediate protection orders and residence orders by way of an injunction; and
- (c) file her own complaint under Section 498 A of the Indian Penal Code for matrimonial cruelty.

What is an 'Injunction' and how does it apply to domestic violence cases?

An injunction is a court order directing a person to do or not to do something. A woman has a lot of flexibility regarding what she can request the Court to order. For instance, if she is being stalked by somebody (including her husband), she can obtain injunctions against the person coming near her home or place of work, or even telephoning her.

Procedure for Seeking Protection Under DV Act

The DV Act allows every woman so abused, to file a complaint to the protection officer, police officer or first class magistrate in the form of 'Domestic Incident Report' (similar to FIR). Complaint can be filed by the aggrieved woman or her relatives.

The aggrieved person or any other witness of the offence on her behalf can approach a Police Officer, Protection Officer, and Service Provider or can directly file a complaint with a Magistrate for obtaining orders or reliefs under the Act. The informant who in good faith provides information relating to the offence to the relevant authorities will not have any civil or criminal liability. The court is required to take cognizance of the complaint by instituting a hearing within 3 days of the complaint being filed and the court shall endeavor to dispose of every application within a period of 60 days of the first hearing.

The Magistrate, after hearing the aggrieved person and the accused and upon being satisfied that domestic violence has taken place or is likely to take place, shall pass protection orders in favour of the aggrieved person and prohibit the accused from:

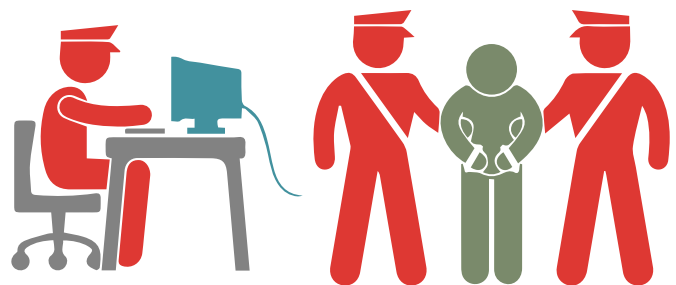
- committing any act of domestic violence;
- aiding or abetting in the commission of acts of domestic violence;
- entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
- causing violence to the dependents, other relatives or any person who give the aggrieved person assistance from domestic violence; or
- committing any other act as specified in the protection order.

Complaint to Protection officer or Police: This Act ensures the reporting of cases of domestic violence against women to a 'Protection Officer' who then prepares a Domestic Incident Report to the First Class Magistrate and forward copies thereof to the police officer in charge of the police station within the local limits of jurisdiction.

Application to the Magistrate: An application for seeking relief from domestic violence can be presented, by the aggrieved or any other person, to the magistrate in whose jurisdiction:

- the aggrieved person permanently or temporary resides or carries on business or is employed; or,
- the abuser permanently or temporarily resides or carries on business or is employed; or,
- the cause of action arises.

An aggrieved who was subjected to domestic violence whilst living with her husband outside India may approach the magistrate of the area in which she temporarily resides when in India.





Reliefs Granted by Court

Protection orders: After giving an opportunity to the aggrieved woman and abuser of being heard if the magistrate is satisfied that a case of domestic violence has taken place or is likely to take place, may pass a protection order in favour of the woman prohibiting the respondent from the following acts:

- Aiding or abetting in the act of domestic violence;
- Entering the place of employment of aggrieved woman or if the person is a child, it's school or any other places;
- Attempting to communicate in any form;
- Alienating any assets, held or enjoyed by both parties jointly or individually by the abuser including her stridhan;
- Causing violence to the dependents, or other relative or any other person who provides assistance to the aggrieved woman

Residence orders: The magistrate being satisfied that an act of domestic violence has taken place, may also pass a residence order:

- Restraining the abuser from dispossessing or in any manner disturbing the peaceful possession of the shared household;
- Directing the abuser to remove himself from the shared household;
- Restraining the abuser or his relatives from entering any portion of the shared household where the aggrieved woman lives;
- Restraining the respondent from alienating or disposing of the shared house hold or encumbering it
- Restraining the abuser from renouncing his right in the shared household;
- Directing the abuser to secure same level of alternate accommodation for the aggrieved woman as enjoyed by her or to pay rent for the same if the circumstances so require.

The DV Act secures a woman's right to reside in the matrimonial or shared household with her husband or partner even when a dispute is on and even if she has no title or rights in the household. A husband who is accused of domestic violence cannot, during the pending disposal of the case, prohibit/restrict the wife's or female partner's continued access to resources or facilities to which she is entitled by virtue of the domestic relationship, including access to the shared household.

The Supreme Court has ruled in a recent judgment that a wife's claim for alternative accommodation lie only against her husband and not against her in-laws and that her right to 'shared household' would not extend to the self-acquired property of her in-laws.

The law provides that if an abused woman requires, she has to be provided alternate accommodation and in such a situation, the accommodation and her maintenance has to be paid for by her husband or male partner, as the case may be.

No order shall be made against women under this section. Magistrate may impose additional condition and pass any other order to protect the safety of the aggrieved woman or her child. Magistrate is also empowered to order direction, to the concerned station house officer of the police station to give protection to the aggrieved woman to assist in implementing his order. Magistrate may also direct the abuser to give stridhan or any other property or valuable security to the aggrieved woman.

Monetary relief: The magistrate may direct the abuser to pay monetary relief to meet the expenses of the aggrieved woman and her child as a result of domestic violence and such relief includes:

- Loss of earnings
- Medical expenses
- Loss caused due to destruction or removal or damage of any property
- Pass order as to maintenance for the aggrieved person as well as her children if any

The quantum of relief shall be fairly consistent with the standard of living to which the aggrieved person is accustomed to. On failure of the accused to make such payments, the Magistrate may order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

Custody orders: Magistrate can grant temporary custody of any child or children to the aggrieved woman or to the person making application on her behalf and specify the arrangements for visit of such child by the abuser. Magistrate can refuse the visit of such respondent in such case if it may harmful to the interest of the child.

Compensation orders: Magistrate may pass order directing the respondent to pay compensation to the petitioner for injuries including mental torture and emotional distress caused by the acts of domestic violence committed by the respondent.

Any relief available under this Act may also be sought in any other legal proceedings before a civil court, family court or criminal court and such relief may be sought in addition to and along with relief sought for in suit, or legal proceeding before civil or criminal court.



An aggrieved, who has also been deprived of financial resources by the accused, may file a suit as an indigent person thereby availing of rebate on court fee and related litigations costs which may be deducted eventually from the monetary relief awarded to the aggrieved.

Penalty/Punishment Under the DV Act

For Accused (abuser)

- The breach of Protection Order or interim protection order by the accused is a cognizable and non-bailable offence.
- It is punishable with imprisonment for a term, which may extend to one year or with fine, which may extend to twenty thousand rupees or with both.
- The accused can also be tried for offences under the Indian Penal Code and the Dowry Prohibition Act.

Liabilities and Restrictions imposed upon the accused

- He can be subjected to certain restrictions as contained in the Protection and Residence order issued against him.
- The accused can be made accountable for providing monetary relief to the aggrieved woman and her children and pay compensation damages as directed in the Compensation order.
- He has to follow the arrangements made by the court regarding the custody of the child or children of the aggrieved woman as specified in the Custody order.

Certain Institutional Resources

S.No	Name & Address of the Agency	Contact Person / Phone / Fax / Email Address
1.	National Commission for Women, 4, Deen Dayal Upadhyaya Marg, New Delhi-110002. Email: ncw@nic.in	Online Compliant Registration: http://ncw.nic.in/onlinecomplaintsv2/frmcomplaints.aspx Contact Information of all State level Commissions for Women: http://ncw.nic.in/frmliststatecommission.aspx
2.	Delhi State Commission for Women, C-Block, 2nd Floor, Vikas Bhawan I. P. Estate, New Delhi-110 002	Email: msdcw.delhi@nic.in Website: http://www.delhi.gov.in
3.	Maharashtra State Commission for Women, Road Number 2, Gandhi Nagar, Bandra East, Mumbai, Maharashtra 400051	Email: cp.mscw@maharashtra.gov.in Website: https://mscw.maharashtra.gov.in/
4.	U.P. State Commission for Women IIIrd Floor, Rajya Manav Adhikar Bhawan, T.C. - 34, V, Vibhuti Khand, Gomati Nagar, Lucknow - 226010	Email: up.mahilaayog@yahoo.com Website: http://mahilaayog.up.nic.in/index_english.htm
5.	West Bengal Commission for Women, "Jalasampad Bhavan", (Ground Floor & 10th Floor), Block-DF, Sector - I, Salt Lake City, Kolkata-700 091	Email: wbcw@vsnl.net, info@wbcw.org
6.	Rajasthan Commission for Women, Lal Kothi, Tonk Road, Jaipur	Email: ladmumari.jain@gmail.com rajyamahilaayog@gmail.com
7.	Karnataka Commission for Women, 1st Floor, KHB Building, Cauvery Bhawan, K.G. Marg, Bangalore-560 009	Email: kscwbang123@gmail.com Website: http://kscw.org/
8.	Assam State Commission for Women, Beltola, Near Sankardev Netralaya, Guwahati-781028	Email: ascwguwahatia@gmail.com Website: http://womencommissionassam.gov.in/



Women and Crime: What Every Woman Should Know

“The most common way people give up their power is by thinking they don't have any.”
- Alice Walker



Introduction

The Indian criminal justice system provides for a number of protective measures designed specifically for women. These protections endeavor to create an environment of safety and security for women so as to encourage and facilitate them to report crimes against them. In particular, these protections are aimed at making the criminal justice system more sensitive and responsive to women. Additionally, there are various protective measures, which afford substantial rights to women, during the time of search and seizure, examination and arrest.

In this chapter, we have set out some of the basic rights and protections women have under the Indian Penal Code, 1860 (“**IPC**”), Code of Criminal Procedure, 1973 (“**CrPC**”) and the Indian Evidence Act, 1872.

Overview of some basic Rights and Protections available under Criminal Law

Reporting of Crimes:

- ▲ The Supreme Court in 2013 has clarified that the police cannot refuse to register an FIR even if considerable period of time has elapsed since the occurrence of the offence.
- ▲ The Government of India has issued a directive in 2013 clarifying that the police cannot refuse to register the FIR on the ground that the offence being reported had occurred

outside the territorial jurisdiction of the police station. An FIR can be registered at any police station under the 'Zero FIR' ruling of the Supreme Court, which will thereafter be transferred to the police station having territorial jurisdiction in the matter.

- ▲ In case the police officer concerned refuses to register the FIR, the substance of the information can be sent in writing and by post to the Superintendent of Police concerned.
- ▲ If a police officer refuses to record information on receiving a complaint regarding occurrence of any of the IPC offences against women mentioned below, then such woman has the right to take legal action by approaching the Court.

Did You Know?

The state police in Bihar, Delhi, Haryana and Jharkhand and the State Commissions for Women in Chhattisgarh, Gujarat and Kerala enable online filing of complaints by women.



Special Provisions for Reporting of Crimes by Women:

Did You Know?

The following acts against women have been criminalized under the IPC:

- Physical contact and advances involving unwelcome and explicit sexual overtures or sexually colored remarks;
- A demand or request for sexual favors;
- Compelling a woman to view pornography against her will;
- Assault or use of criminal force with an intent to outrage the modesty of a woman;
- Assault or use of criminal force for the purpose of disrobing or compelling a woman to be naked;
- Voyeurism;
- Stalking;
- Acid attacks;
- Usage of words, gestures or acts with the intent of insulting the modesty of a woman;
- Rape and gang rape;
- Sexual intercourse by a husband with his wife during separation without her consent;
- Sexual intercourse by a person in authority in abuse of his position.

▲ A woman seeking to report the occurrence of any of the above-stated offences against her is entitled to have the same recorded by a woman police officer or any woman officer.

▲ A woman who is temporarily or permanently mentally or physically disabled on account of having been subjected to any of the above-stated offences (except Acid Attack) is entitled to have her report recorded at her residence or at a convenient place of her choice. If required, such report may be recorded in the presence of an interpreter or a special educator.

▲ A rape victim is entitled to have her statement recorded at her residence or in the place of her choice, and as far as practicable, by a woman police officer in the presence of her parents or guardian or near relatives or social workers of the locality.

▲ A rape victim undergoing investigation is required to be examined by a registered medical practitioner employed in a Government run hospital or a local authority and in the absence of such practitioner, by any other registered medical practitioner, with her consent or consent of a person competent to give consent on her behalf.



- The victim will be sent to such registered medical practitioner within 24 hours of the Police receiving information relating to commission of such offence.
- All hospitals, public or private, shall immediately provide first aid or medical treatment, free of cost to victims of acid attack or rape and shall immediately inform the police of such incident.
- Every such woman has the right to free legal aid.

Guidelines issued by the Hon'ble Supreme Court of India for examination of sexual assault cases

- The complainants of sexual assault cases should be provided with legal representation.
- Legal assistance will have to be provided at the police station.
- The police should be under a duty to inform the victim of her right to representation before any questions are asked of her.
- Every police station should keep a list of advocates to represent victims who do not have a particular lawyer in mind or whose own lawyer is unavailable.
- Victim anonymity must be maintained in all rape trials, as far as possible.

- Where the victim of rape or any other sexual offence is a minor, courts are bound to take appropriate measures while recording evidence to ensure that such woman is not confronted by the accused.

Did You Know?

- The character or sexual history of the woman is not relevant on the issue of consent during prosecution for the offences of rape, gang rape, sexual intercourse by husband upon wife during separation, sexual intercourse by a person in authority, sexual harassment, stalking, voyeurism, assault with the intent to disrobe a woman or outrage her modesty, etc.
- During a rape prosecution, if the victim states that she did not provide consent for sexual intercourse, then the presumption would be that there was no consent.

Rights of Women during Arrest, Search and Seizure

- As a general rule, a woman can be arrested only by a woman police officer. If the arrest is by a male police officer, he cannot touch the person of the woman for making her arrest.
- A woman cannot be arrested after sunset and before sunrise. This stands true even when there is a woman police officer present. Only in exceptional circumstances, can a woman police officer with prior written permission of a competent judicial magistrate arrest a woman after sunset and before sunrise.
- At the time of being arrested one has the right to be informed of the full particulars of the offence for which one is being arrested as well as any other grounds of the arrest. In addition, one has the right to nominate a friend, relative or such other person who would be informed about the arrest as well as the place of detention by the police.



- ▲ A woman, after being arrested can be searched only by another woman and with strict regard to decency.
- ▲ Upon arrest, if the police require a medical examination to be conducted, this can be done only by or under the supervision of a registered woman medical practitioner. Similarly, the examination of the body can be done only by or under the supervision of a woman medical officer and in case a woman medical officer is not available, by a woman medical practitioner.
- ▲ A woman can be interrogated only at her place of residence and cannot be compelled to go to the police station or any other place for purposes of any interrogation.
- ▲ In case the arrest has been caused without a warrant, the person so arrested cannot be detained in custody beyond 24 hours, unless directed by a special order of the competent magistrate. In cases of women, if the competent magistrate authorizes further detention in police custody, such detention shall be in a remand home or a recognized social institution.
- ▲ If the accused hides in the house of a woman who according to custom does not appear in public, the police cannot enter the house or break it open unless notice and reasonable facility is given to her to withdraw herself.

Did You Know?

All-women police stations have opened in many states in India such as Tamil Nadu, Uttar Pradesh, Andhra Pradesh, Gujarat, Rajasthan, Jharkhand, Madhya Pradesh, Punjab, Chhattisgarh, Haryana, Arunachal Pradesh, Himachal Pradesh.



Acknowledgements

We would like to express our utmost gratitude to **Ms. Neeta Boochra, President, FICCI - FLO** and **Dr. Manju Kalra Prakash, Executive Director, FICCI - FLO**, whose vision and valuable contribution to the conceptualization of this Ready Reckoner played a pivotal role in helping us shed light on extremely pertinent issues concerning women's everyday lives.

This humble effort would not have been so seamlessly brought forth without their indispensable suggestions which helped us provide in a simplistic manner, an understanding of certain laws relevant to women, which was vital for furthering the awareness of such laws.

Additionally, we would like to thank **Ms. Smita Marcus, Assistant Director at FICCI - FLO** for her invaluable contribution, constant support and enthusiasm.

In the modern age, it is extremely essential for women in the country to be informed about the diverse rights and reliefs available to them under law, and it is for this reason, we at **Amarchand Mangaldas**, have undertaken this initiative at the instance of **FICCI - FLO** to assist women in being further equipped in different spheres of their lives.

Lastly, we would like to thank, **YOU**, the woman of today for inspiring us to take this initiative by stepping out with each passing day and leaving a sizeable mark in society.

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Akshath Goyal
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Abhay Peshin
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Aditya Seth
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Neha Pal
Senior Executive –
Corporate Communications

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- Number of lawyers: 700+

Our services

Founded in 1917, Amarchand Mangaldas is an award winning full-service law firm to a wide range of premier clients, including domestic and multinational corporations and financial institutions. Often viewed as 'the firm of preference' in India, the Firm helps its clients achieve their goals by combining global standards with local expertise. Having worked on many of the biggest and high profile cases in the region, the Firm continues to remain at the cutting edge of Indian law and has developed a near-instinctive understanding of the issues, opportunities and challenges posed by the ever evolving and complex Indian business and legal environment. Quite often, Amarchand Mangaldas has been in the unique position of being an adviser on the public policy formation in India. Distinguished partners of the firm have been members of many legislative panels to assist the Government of India with a legal perspective on policy related matters.

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- Ranked 20th globally – 'ACRITAS' Fifth Global Elite Law Firm Brand Index 2014
- Best Law Firm, India, 2014 & 2013 by Euromoney's Asia Women In Business Law Awards.
- Employer of Choice, 2014 and Indian Deal Firm of the Year 2014, 2013, 2012 and 2011 consecutively by Asian Legal Business (ALB).



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