



Gender Justice and Feminist Jurisprudence: A Contemporary Perspective



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PREFACE

The pursuit of gender justice remains one of the most urgent challenges of the twenty-first century. Law, as both a mirror of society and a tool for social transformation, plays a decisive role in addressing systemic inequalities and advancing the rights of women and marginalized genders. Within this context, feminist jurisprudence offers a powerful lens to critique existing structures and to reimagine legal frameworks that foster equality, dignity, and justice.

This book, *Gender Justice and Feminist Jurisprudence: A Contemporary Perspective*, seeks to engage with the evolving discourse on gender and law in India and beyond. It brings together constitutional principles, legal debates, and feminist theoretical perspectives to critically examine how law has responded—and continues to respond—to questions of gender inequality, social justice, and human rights.

Rather than viewing gender justice as a settled legal question, the work approaches it as a dynamic and contested space shaped by historical struggles, social movements, and judicial interpretation. By weaving together doctrinal analysis and feminist critique, it encourages readers to see law not only as a set of rules but also as a field of power, ideology, and resistance.

This book is intended for students, scholars, practitioners, and anyone committed to understanding and advancing gender justice. It aims to provide both conceptual clarity and critical insight, fostering meaningful engagement with the challenges and possibilities of feminist jurisprudence in a rapidly changing world.

INDEX

Chapter 1: Gender Justice Under the Constitution of India	1
Chapter 2: Marriage Under Personal Laws.....	41
Chapter 3: Gender Justice and Criminal Law.....	89
Chapter 4: Feminist Jurisprudence	107
Chapter 5: Development of Feminist Jurisprudence	126

Chapter 1

Gender Justice Under the Constitution of India

SOCIAL JUSTICE AND GENDER JUSTICE – INTER-RELATIONSHIP:

JUSTICE:

The word Justice is derived from the Latin term “Justitia” meaning ‘Just’.

Justice – Common Meaning	Justice Legal Meaning
Just, Fair, Impartial, Right, Honesty, Fidelity.	Equality, Liberty, Fraternity, Enforcement of what perceives to be right.

Definitions of Justice:

a) Sir William Blackstone (1723 – 1780):

Defined Justice as “Justice is a reservoir from where the concept of right, duty or equity evolves.

b) Charles Edward Merriam (1874 – 1953):

Defined Justice as “Justice consists of a system of understanding and procedures through which each is accorded what is agreed upon is fair””.

c) John Rawls (1921 – 2002):

Defined Justice as “Justice is the set of principles for defining the appropriate distribution of benefits and burdens of social cooperation after identifying the relevant consideration which determines this balance”.

Easy Understanding of Meaning of Justice:

Prof. Amartya Sen (Indian Economist and Philosopher) explains the meaning of Justice via his story of “Three Children and a Flute”.

“Anne, Bob and Carla are quarrelling and contesting for the ownership and possession of a flute. Anne being the only one knowing how to play a flute claims it for herself. Bob on the other hand counters with claims of poverty and him being unable to buy a flute. Carla claims to have actually made the flute by her own skill and claims she is entitled to own it.”

Anne should have the rightful possession according to the utilitarian view, and similarly Bob according to the egalitarian and Carla according to the liberatianist view of Justice. All these views are correct in one aspect.

Prof. Sen concludes that “there may not indeed exist any identifiable perfectly just social arrangement on which impartial agreement would emerge” and the choosing of any one alternative can appear to be just but is instead arbitrary.

SOCIAL JUSTICE:

Social justice is a normative concept centred on the notion of fairness and the principles of equality, equity, rights and participation.

United Nations celebrates 20th February of each year as “World Social Justice Day.

The notion of social justice is relatively new. None of history’s great philosophers—not Plato, Aristotle, or Confucius or Averroes, or even Rousseau or Kant—saw the need to consider justice or the redress of injustices from a social perspective. The concept first surfaced in Western thought and political language in the wake of the industrial revolution and the parallel development of the socialist doctrine.

It emerged as an expression of protest against what was perceived as the capitalist exploitation of labour and as a focal point for the development of measures to improve the human condition. It was born as a revolutionary slogan embodying the ideals of progress and fraternity.

Following the revolutions that shook Europe in the mid-1800s, social justice became a rallying cry for progressive thinkers and political activists. Pierre-Joseph Proudhon, notably, identified justice with social justice, and social justice with respect for human dignity.

In the contemporary context, social justice is typically taken to mean distributive justice. The terms are generally understood to be synonymous and interchangeable in both common parlance and the language of international relations. The concept of social/distributive justice is implied in various academic and theoretical works and in many international legal or quasi-legal texts (such as the Charter and Universal Declaration) that may only include broad references to “justice”. In certain international instruments, including the Copenhagen Declaration and Programme of Action adopted by the World Summit for Social Development in 1995, references to social justice are more explicit. In the tone-setting first chapter of *A Theory of Justice*, a masterpiece published in 1971, John Rawls refers on several occasions to the “principles of social justice” when formulating his ‘Two Principles of Justice’.

Principle 1. Each person has an equal right to a fully adequate scheme of equal basic rights and liberties, which is compatible with a similar scheme for all.

Principle 2. Social and economic inequalities are to satisfy two conditions: first, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.

The Fundamental Principles of Social Justice:

A. EQUALITY:

Fair access to goods and services is a fundamental principle of social justice. Based on the belief that all human beings are equal before God and the law, the notion of “fairness” as related to access is often linked with the notion of “equality” to imply that all people, regardless of their gender, race, age, class, language, religion and occupation, are entitled to benefit from public goods and resources.

These include access to livelihood, capacities, education, information, health services, employment and job opportunities. In democratic societies, the concept of equality also extends to include the political sphere, with effective decision-making processes in place to ensure an equal voice for all citizens.

B. EQUITY:

The principle of equity derives from the recognition that the concept of fairness as equal or uniform distribution is not always possible or implementable, particularly in view of existing injustices that have prevented or reduced the ability of certain individuals or groups to gain equal access to public goods, resources and opportunities in the first place.

With this in mind, equitable treatment implies that people would get a “deserved” treatment, meaning what is right for them.

Hence, a just society that works towards fairness and opportunities for all its members would also strive to remove or overcome the barriers that hinder certain individuals and groups (for instance, people with disabilities and the poor) from fulfilling their potential by way of maximizing their opportunities.

C. RIGHTS:

Rights as a key principle of social justice can be divided into the following two sub-groups:

- a) legal rights, which include inherited rights, and other lawful rights such as the right to receive payment for one's jobs according to agreed terms; and
- b) moral rights, which include people's basic human rights, liberties and such entitlements as the right of "giving people a say in affairs that concern them and the right of certain groups to particular geographic territories.

In socially just societies, moral rights, even in the absence of legal guarantees, are protected by adequate procedures, norms and rules, some of which are universally accepted, as is the case with human rights, for instance.

D. PARTICIPATION:

Participation in the context of social justice means involving people in decisions that govern their lives. This includes not only engaging them in deciding on the kind of public services needed in their areas but also ensuring their full participation in political and cultural life.

More specifically, the rationale for public participation is twofold and includes:

- (a) achieving better distributive outcomes; and (
- b) strengthening democracy. As to the second point, the notion of participation is linked to power, and participation is believed to shift existing power relationships as it strengthens the position of traditionally weak and marginalized groups and individuals vis-à-vis other such actors as public and social institutions.

MINISTRY OF SOCIAL JUSTICE & EMPOWERMENT, GOVERNMENT OF INDIA: www.socialjustice.nic.in

The vision of this department is to build an inclusive society wherein members of the target groups can lead, productive, safe and dignified lives with adequate support for their growth and development. It aims to support and empower its target groups through programmes of educational, economic and social development and rehabilitation wherever necessary. It engages in the development/ updation of legislation, policies, and guidelines at the national level for effective implementation of the Departments objectives. It oversees the implementation of various laws including:

- i) Protection of Civil Rights Act, 1955
- ii) The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989
- iii) Maintenance and Welfare of Parents and Senior Citizens Act, 2007
- iv) The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013
- v) Transgender Persons (Protection of Rights) Act, 2019.

The National Policy for Older Persons, 1999 is also administered by the Department.

Constitutional Provisions regarding Social Justice:

Part IV of the Constitution lays down Directive Principles of State Policy which though not enforceable by court but it shall be the duty of the State to apply them in making laws.

Article 41, 46 and 47

Other Important Constitutional Provisions: (Refer all these for Social Justice)

Article 17, 338, 338B, 340, 15, 15(6), 16, 16(6), 330, 332, 243D, 243T, 342A.

GENDER JUSTICE:

“Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind”

- **Swami Vivekananda**

‘Gender’ is a socio-cultural term referring socially defined roles and behaviors assigned to ‘males’ and ‘females’ in a given society; whereas, the term ‘sex’ is a biological and physiological phenomenon which defines man and woman. In its social, historical and cultural aspects, gender is a function of power relationship between men and women where men are considered superior to women. Therefore, gender may be understood as a man-made concept, while ‘sex’ is natural or biological characteristics of human beings.

Gender Justice can be defined as the just distribution of power between all the genders of the society in which all of them are valued and placed on equal footing in the society and are capable of pursuing their human rights and freedoms

Gender Justice refers to equal treatment of both men and women and that justice to the fairer sex. No society can progress without gender justice as it particularly concerns workplaces and families providing a framework of human rights as a stepping stone of liberalization, equality, empowerment to all gender and identities leading to societal transformation.

To rectify gender justice, key elements are provided globally which are;

1. Fair treatment of women and men in the substantive standard of equality.
2. Fairness at the interpersonal relations and at the level of institutions mediating and offering redressal when needed.

3. Helps in recognizing and acceptance of long history of gender injustices, which now have to be favored with principles of equality
4. Arbitering the social construction of gender by characterizing the third gender acknowledged as transgenders.

This gave birth to the meaning of gender justices denoting equality and fair treatment of the same or different gender without discrimination.

It seeks to achieve a life of dignity and freedom to women as a basic human right. It includes sharing of power and responsibility between women and men at home, in workplace and in national and international communities. Gender Justice is fundamental to human development and the realization of peaceful, just and inclusive societies. It involves ending inequalities between men and women in law and practice and providing redress for those inequalities.

INTER-RELATIONSHIP BETWEEN SOCIAL JUSTICE AND GENDER JUSTICE:

Sr. No	Social Justice	Gender Justice
1.	Social justice is the principle of fair and equal treatment for all people, regardless of their identity, background or circumstances.	Gender justice is the specific application of social justice to address the inequalities and discrimination that women and gender-diverse people face in various aspects of their lives.
2.	It can be considered as a broad concept in attaining equality for all people.	It is a part of Social Justice

Sr. No	Social Justice	Gender Justice
3.	The Motto of Social Justice is Equality Before Law and also includes Equal Protection of Laws, which is enshrined in Article 14 of Indian Constitution.	The Motto of Gender Justice is Equal Protection of Laws, which is enshrined in Article 14 of Indian Constitution.
4.	Development through social justice is the only way to bring out a positive change in the status of women and change gendered exploitation	It involves crafting strategies for corrective action towards transforming a society in which men and women can be treated as fully human.

PREAMBLE OF THE CONSTITUTION – EQUALITY PROVISIONS:

The features of Indian Constitution are borrowed from some Countries.

The Ideals of Justice (Social, Economic and Political) expressed in Preamble is borrowed from Russia. The Ideals of Liberty, Equality and Fraternity are borrowed from France.

The Constitution is the main and basic document of a country. Every law and rules made in a country is based on the Constitution of a country. A preamble of a constitution gives an introduction to the Constitution. It is a key to open the mind of the framers of the Constitution. The Preamble sets out the guidelines for the people and presents the principles of the Constitution.

The principle of gender equality is enshrined in the Preamble of the Indian Constitution. The Preamble of the Indian Constitution has in it the terms such as “Justice,” “Liberty,” and “Equality.”

The Preamble states that every person should get JUSTICE (social, economic, and political); LIBERTY (of thought, expression, belief, faith, and worship); EQUALITY (of status and opportunity) to everyone – men and women. The Preamble also talks about social justice, which can be achieved only by abolishing all the inequalities. It also talks about political justice – which can be achieved through non-discrimination of men and women in political matters, and economic justice – which can be achieved by paying equally for equal work. Thus, as a basic rule, everyone should be treated equally irrespective of their race, color, sex, status, wealth, title, etc. The Preamble of the Indian Constitution also talks about the “dignity of the individual.” For a person to live with dignity, he should get equal access to fundamental rights (guaranteed under the Indian Constitution).

Political Justice:

Political justice implies that all citizens should have equal political rights, equal voice in the government.

Despite the fact that women participated equally in the freedom struggle and under the Constitution and law, have equal political rights as men, enabling them to take part effectively in the administration of the country, it has had little effect as they are negligibly represented in politics. Their representation in the Lok Sabha is far below the expected numbers.

This has led to the demand for reservation of 33 per cent seats for women in the Lok Sabha and Vidhan Sabha. Political empowerment of women has been brought by the Constitution (73rd Amendment) Act 1992 and 74th Amendment Act 1992 which reserve seats for women in Gram Panchayats and Municipal bodies. Illiteracy, lack of political awareness, physical violence and economic dependence are a few reasons which restrain women from taking part in the political processes of the country.

Economic Justice:

Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring inequalities in wealth, income and property. A combination of social justice and economic justice denotes what is known as 'distributive justice'. Laws to improve the women's condition in matters relating to wages, maternity benefits, equal remuneration and property or succession have been enacted to provide the necessary protection in these areas.

Social Justice:

Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women.

In Kesavananda Bharati Vs State of Kerala, AIR 1973 SC 1461,

It was held that Social Justice is the part of basic structure of Indian Constitution.

In S.R Bommai Vs Union of India, AIR 1994 SC 1918,

It was held that Social Justice and Judicial Review are two basic features of Indian Constitution.

In Valasamma Paul vs Cochin University, (1996) 3 SCC 545,

It was held that human rights are derived from the dignity and worth inherent in human beings. Human rights are the entitlements of every man, woman and child because they are human beings, have been made enforceable as constitutional rights in India.

EQUALITY PROVISIONS IN FUNDAMENTAL RIGHTS-ARTICLES 14, 15 AND 16, ARTICLES 21 AND 23:

Article 14:

It instructs the government not to deny any individual equal protection under the law or impartial enforcement of the laws of India. The "equality before the law" method seeks out a place in all written texts that guarantees universal rights to all persons, regardless of their birth, ethnicity, gender, or race. Equal protection of the law refers to the uniform application of the law to every individual in India's region.

Article 15(1) It forbids the state from discriminating against anyone based solely on their gender, ethnicity, race, nationality, caste, or any combination of these factors.

Article 15(3) It requires the government to make particular arrangements for children and women. As a result, it says that, while the state would not segregate anyone, they might establish special measures for children and women to protect their interests. Article 15(3), on the other hand, encourages debate of laws aimed at encouraging women and children, such as the Children's Sexual Harassment Act, the Domestic Violence Act, the Workplace Harassment Law, Sexual Abuse Legislation (Nirbhaya Act), the Hindu Succession Act Amendment, and so on. This also addresses restrictions on the wife's allowance, marital rape, and the Food Protection Bill.

Article 16:

It demands that all people have an equal chance in events involving education or appointment to any post within the State. Article 16(1) and (2) establish principles for fair employment opportunities in the public sector. Nonetheless, Article 16, Clause 3 specifies that the said article shall not bar Parliament from introducing legislation requiring anyone assigned to any office within that State to reside within

that State or territory of the Union prior to recruitment or allotment to any office within that State. Article 16(4) of the Indian Constitution mandates that facilities be set aside for the benefit of the state's poorest citizens.

In C.B Muthamma vs Union of India (1979) 4 SCC 260

Case facts:

The petitioner is a senior member of the Indian Foreign Service and complains that she had been denied promotion to Grade I of the Indian Foreign Service on the grounds that

- There is a long-standing practice of hostile discrimination against women
- Had to give an undertaking at the time of joining the foreign service that if she were to get married, she would resign from the service
- Had to face the consequences of being a woman and thus suffered discrimination
- The members of the appointment committee of the Union cabinet and respondent No. 2 are basically prejudiced against women as a group.

Issues:

The petitioner has further challenged two rules namely **Rule 8(2) of Indian Foreign Service (Conduct and Discipline) Rules 1961** and **Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre Seniority and Promotion) Rules 1961**, which in short states that a woman member of the service shall obtain permission in writing of the Government before marriage and the woman member may be required to resign any time after marriage if the Government is satisfied that her family and domestic commitments will hamper her duties as a member of the service and under the second rule no married woman shall be entitled as of right to be appointed to the service.

The petitioner's remaining grievance is that during the interval of some months between her first evaluation and the second, some officers junior to her, have gone above her and her career would be affected.

Law:

Constitution of India • Article 14 (equality before the law) • Article 16 (equality of opportunity in matters of public employment)

Judgement:

Judges: Justice V.R. Krishna Iyer and P.N Singhal

This writ petition by Miss Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality.

The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievance of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom.

Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been 5tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action.

And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable.

Both the rules had been stricken down as it violates A 14 and A 16 of Indian Constitution.

Air India vs Nergesh Meerza (1981) 4 SCC 335

Facts of the case

1. The Regulations 46 and 47 of the Air India Employees Service Regulations were seemed to create a certain degree of disparity between male [Air Flight Pursers (AFPs)] and female [Air Hostesses (AHs)], also certain differentiation on the part of AHs was also in dispute, i.e. between AHs working for Air India (A.I.) which is the international organization and between Indian Airlines Corporation (I.A.C.) which is the domestic organization.
2. As per Regulation 46 there was disparity among AFPs and AHs regarding the promotional avenues, retirement ages as well as the conditions under which the service of AHs can be terminated on marriage and pregnancy.
3. Retirement age for AHs was 35 years but for the AFPs the same was 58 years, also an AH's service would stand terminated if she got married within the first four years of her service or on her first pregnancy.
4. Regulation 47 provided for discretion or power on the part of Managing Director to extend the retirement as per his discretion.

Issues:

1. Whether the age of retirement of AHs as per Regulation 46 is reasonable (checking validity as per **Articles 14,15 and 16** of the Indian Constitution)?
2. Whether the grounds of termination of service of an AH on marriage within the first four years of service and on first pregnancy, are valid as per the Indian Constitution (checking its Constitutional validity)?
3. Whether the discretionary power vested with the Managing Director to extend the retirement of an employee is deemed to be excessive delegation?

Judgement:

Judge: Justice Fazal Ali and Justice Syed Murtaza

The Supreme Court in its judgment did not completely strike down both regulations. The Court partially struck down the clauses of regulation 46 and completely struck down regulation 47.

The conditions regarding retirement and pregnancy were ordered to be struck down as it was unconstitutional but the clause regarding marriage was not ordered to be struck down as it was constitutionally valid. It was also recommended by the court to amend the pregnancy clause and change the retirement criteria to third pregnancy than the first pregnancy. This suggestion was made on the reason of public health. The Court also held regulation 47 unconstitutional as it suffered from the excessive delegation and also proper guidelines were not prescribed for the same. Regulation 47 therefore also had to be struck down.

In Githa Hariharan vs RBI (1999) 2 SCC 228

Githa Hariharan vs. Reserve Bank of India case delivered a new viewpoint to the existing situation by referring to the harmonious construction between section 6 of the Hindu Minority and Guardianship Act and the principle of equality. Parents have the unconditional responsibility of raising their children in a safe and protective environment. And in that process, both mothers and fathers have a crucial role to play. Certainly, mothers are deemed secondary in guardianship rights. As per section 6 of the Hindu Minority and Guardianship Act, 1956 a natural guardian of a boy or an unmarried girl is the father and after him the mother, which instantly sabotages the status of women as guardians. Thereby, violating the principle of equality established in the constitution.

Facts of the Case:

- The petitioner and Dr. Mohan Ram tied a nuptial knot in 1982 and from the wedlock their son (Riahab Bailey) was born in 1984.
- The petitioner by an application requested the Reserve Bank of India for a 9% relief bond in favour of her son with a proclamation, that being the mother she would act as a natural guardian and supervise all the investments.
- However, the application was returned, and the Court instructed the petitioner to present the application signed by the father of the minor son and additionally furnish the certificate of guardianship by a competent authority in her favour.
- Second, there was a divorce proceeding pending between the petitioner and her husband in which the husband prayed for the custody of the child.
- In association with this, he had written many letters to the petitioner asserting that he is the natural guardian of the minor child and they could take no decision without his approval, which has resulted in the present case.

Issue:

Whether the Constitution of India violates section 6 of the Hindu Minority and Guardianship Act?

Judgement:

Judge: Umesh C. Banerjee

Gender equality is a critical element in constitutional law consequently when the term “after” characterizes as disqualification of the mother as a natural guardian during the lifetime of the father will be considered a contravention to constitutional law. “Father being a dominant personality cannot be given preferential rights over mother” therefore, the term “after” in section 6 of the act, should not be interpreted in a narrow sense as “after the lifetime” on the contrary it should be characterized

as “in absence of father” i.e. be it temporary or otherwise or total apathy by father because of any sickness or otherwise the mother would be considered as the natural guardian of the child.

Article 21 of Indian Constitution:

No person shall be deprived of his life and personal liberty except according to the procedure established by law.

Article 21A – The State shall provide free and compulsory education to all children of the age 6 – 14 years (86th Amendment Act 2002)

Lata Singh vs State of UP (2006) 5 SCC 475 – Right to Marriage of Choice

Introduction:

This is a case summary of landmark case which discuss about ‘right to marry’ and ‘inter-caste marriage’ in Indian society. In this case court very specifically called right to marry as a fundamental right. Supreme court also held that inter-caste marriages is a good way to remove the impact of caste system from the society.

The petitioner has filed a petition under Article 32 of the Indian Constitution for passing the writ of mandamus/ certiorari. In order quash the order passed by Trial court under Section 366 (Kidnapping) and 368 of the Indian Penal Code, 1860.

Facts of the Case:

The petitioner Lata Singh, a young woman of age 27 years i.e. major. She has completed her graduation and was pursuing her masters in Hindi at Lucknow University. Due to sudden demise of her parents, she used to live with her brother Ajay Pratap Singh at Lucknow only. Lata left her brother’s home on 02/11/2000; voluntarily married to one Brahma Nand Gupta at Arya Samaj Mandir.

They even had a child out of this wedlock. After two days of marriage her brother lodged a missing person report in nearby police station and police arrested the groom's sisters and sister's husband.

The petitioner alleged that her brothers were furious about the marriage because it was an inter-caste marriage. In order to take revenge of that they went to husband's paternal home and beat the family members. They even locked few members for a couple of days without any meal or water. The brothers of petitioner also lodged a false complaint about kidnapping his younger sister who is not mentally fit to get married by herself. They harassed the family in every possible way. Even threatened the husband's family to kill them and her husband; they even said that they will kill their own sister for committing this sin of inter-caste marriage. The petitioner on the other hand was running from post to pillar to save her husband and his relatives. Petitioner's brothers of a criminal bent. National Human Rights Commission and State Women Commission intervened in the case to help her. They helped her to present the matter before Supreme Court of India. The relatives of her husband got out of jail due to her efforts.

Issue:

Whether the writ petition filed under Article 32 to quash the order of session trial courts is maintainable or not?

Judgement:

Judges: Justice Ashok Bhan and Justice Markandey Katju

The honorable Supreme Court gave the judgement in favor of the petitioner and held that the petition is maintainable. The court set aside the decision of High Court for nullifying the marriage. Court also held that *right to marry is a right of choice which is embodied under Article 21 of the Indian Constitution* which means right to marry with a person of own choice is a fundamental right. Honorable court condemned

practices of honor killing as such practices are penal-able. Court even called the caste system as a curse for the whole society. Finally, court allowed the writ. It ordered the respective department to provide protection to the petitioner, her husband and her in-laws.

Anuj Garg vs Hotel Assn. of India (2008) 3 SCC 1

Section 30 of Punjab Excise Act 1914, prohibited the employment of women in hotels and bars serving liquor.

This case was challenged on grounds of violation of Article 14, 16 and 21 of the Indian Constitution. It was held that Section 30 of the above Act results in an invidious discrimination. It is the State's duty to ensure circumstances of safety, which inspire confidence in women to discharge duties freely in accordance with their professional requirements.

In Neera Mathur vs LIC (1992) 1 SCC 286

In this case, the Supreme Court was shocked to learn that the LIC questionnaire sought information about the dates of menstrual periods and past pregnancies and the petitioner was terminated for not providing correct information to the LIC.

It was held that the questionnaire amounted to invasion of privacy. The Right to personal liberty guaranteed under Article 21 included the right to privacy. Information seeking health can be sought where such information was relevant ie for selling insurance cover, but not for the person seeking employment.

In Budhadev Karmaskar vs State of W.B 2022 SCC Online SC 704.

The case highlights another improvement to Article 21 of the Indian Constitution,[2] the right to live with dignity based on the right to life and individual liberty. It reflects the situation of a sex worker and her family. "It also covers other

fundamental rights of sex workers, such as freedom of trade and employment, the right to vote and the right to access public means of fields. It is a landmark decision that paved the way for securing the rights of sex workers. “The case exposed the vulnerability of sex workers and the social stigma attached to them. The ruling upheld the right of sex workers to live with dignity enshrined in Article 21 of the Indian Constitution.

Facts of the Case:

The appalling case of *Budhadev Karmaskar v State of West Bengal* initially dealt with the brutal murder of Chhaya Rani Pal alias Buri, a sex worker who succumbed to her fatal injuries after being brutally beaten up by the accused, Budhadev.

Due to the abundance of evidence, the accused was convicted by the trial court and by the High Court, whereupon he appeared before the Supreme Court in a criminal appeal, which also confirmed his conviction.

The Apex court, by its judgement and order dated February 14, 2011, considered the social position of sex workers and recognised their right to live with dignity under Article 21 of the Constitution of India.

Acknowledging the barbaric nature of crimes being committed against sex workers, the Apex court also took suo motu action in addressing the problems faced by sex workers owing to the social stigma attached to the profession of prostitution.

For such addressal, the case was converted into a PIL whereby the Apex court directed the Central and State governments to prepare schemes for the rehabilitation of physically and sexually abused women as they too are human beings who, irrespective of their profession, must be treated with utmost dignity. For the effective addressal of the problems faced by sex workers and for providing probable solutions for the same, the Supreme Court constituted a panel with Mr. Pradip Gosh (Senior

Advocate) as its chairman by its order dated July 19, 2011. The panel submitted seven interim reports and one final report in 2016, enlisting its recommendations to be considered by the central and state governments in implementing legislation.

Judgement:

Judges: L. Nageswara Rao, B.R. Gavai and A.S. Bopanna

In its order dated May 19, 2022, the Supreme Court issued directions by virtue of its discretionary power granted under Article 142 to execute complete justice whereby the law is missing on the subject of rehabilitation, protection, and upliftment of sex workers to several authorities to strictly adhere to the directions till legislation is passed by Parliament.

Article 23:

Article 23 prohibits traffic in human beings. Trafficking in human beings has been prevalent in India for a long time in the form of prostitution and selling and purchasing of human beings. This includes Devadasi system prevalent in Andhra Pradesh. To give meaning to Article 23, various laws have been passed to prevent exploitation of human beings in varied forms. The Immoral Traffic (Prevention) Act 1956, and the A.P Devadasis (Prohibition of Dedication) Act, 1988 are legislations which prohibit the practice of prostitution and dedication of devadasis respectively.

In Gaurav Jain vs Union of India (1997) 8 SCC 114.

The conditions of prostitutes in general, and the conditions of their children, in particular are highlighted. The court issued directions for a multipronged approach and mixing the children of prostitutes with other children, instead of making separate provisions for them. It said that women must be viewed more as a victim of adverse socio-economic circumstances than offenders in our society.

In Satyapal Anand vs State of M.P (2014) 4 SCC 800.

In this case, the victims, school going girls were gangraped by 16 persons. The court insisted on certain measures like adequate compensation, insurance and social security schemes may help in rehabilitating rape victim to some extent as their traumatic stress they undergo can never be compensated.

In this case, the court enhanced the compensation to Rs.10 lakhs each by the State.

DIRECTIVE PRINCIPLES OF STATE POLICY: (RELATED TO WOMEN):

These provisions are contained in Part IV of the Constitution.

These principles are not enforceable in any court of law but they are fundamental in the governance of the country and provide for the welfare of the people, including women.

Article 38 (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Article 39(a), The State shall, in particular, direct its policy towards securing - that the citizens, men and women equally, have the right to an adequate means of livelihood.

Article 39 (d), that there is equal pay for equal work for both men and women. The State passed Equal Remuneration Act, 1976 to give effect to the provision.

Article 39 (e), specifically directs the State that it abuses the health and strength of workers, men and women.

Article 42, (Important Provision for benefit of Women). The State shall make provision for securing just and humane conditions of work and for maternity relief. The State had implemented this directive by incorporating health provisions in the Factories Act, 1948, Maternity Benefit Act, 1961 and the Beedi and Cigar Workers (Conditions of Employment) Act 1966 etc.

Article 44 The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. (Uniform Civil Code – UCC)

Uniform Civil Code refers to the proposition of **having a uniform set of civil laws for all citizens of a country, irrespective of their religious or cultural affiliations.**

Mohd. Ahmed Khan vs Shah Bano Begum (1985) 2 SCC 556

The Supreme Court upheld the Rights of the Muslim Women to claim maintenance from her husband even after the Iddat period. Sec 125 of CrPC, is applicable to all religions and overrides personal law, if there is a conflict between the two. It highlighted a need for UCC to remove contradictions based on ideologies.

Sarla Mudgal vs Union of India (1995) 3 SCC 635

The Supreme Court stated that a Hindu husband cannot convert to Islam and marry without dissolving his first marriage. It emphasized that a UCC would prevent fraudulent conversions and bigamous marriages.

Shayara Bano Case AIR 2017 9 SCC 1

The Supreme Court declared Triple Talaq as unconstitutional and violative of Muslim women's dignity and equality. It recommended the Parliament to enact a law to regulate Muslim marriages and divorces.

The implementation of a **Uniform Civil Code (UCC) in India** requires a balanced approach that respects **multiculturalism and diversity**. Inclusive discussions with stakeholders, including **religious leaders and legal experts**, are essential to ensure diverse perspectives are considered. The focus should be on **eliminating practices that hinder equality and gender justice while avoiding reactive culturalism**.

FUNDAMENTAL DUTIES RELATING TO WOMEN:

PART IV A, CONSISTS OF ONLY ONE ARTICE 51-A was added to the 42nd Amendment Act 1976 to the Indian Constitution.

Article 51-A(e) – relates to Women.

It shall be the duty of every citizen of India;

To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.

In Vinay Sharma and ors vs Union of India AIR 2008 Bom.29

This case pertains to allow the couples to make use of diagnostic techniques at the pre-conception stage to have a child of the opposite sex. In this case, a couple had 2 daughters and they are desirous to have a boy child.

The High Court has, in strong and harsh words rejected outright the argument that society does not want a girl child and, therefore, efforts should be made to prevent the birth of the girl child. It was held that, “such tendency offends the dignity of women. It undermines their importance. It insults and humiliates womanhood. It violates woman’s right to life. It violates Article 39(e) of the Constitution and also ignores Article 51A(e) of the Constitution. Sex selection is therefore against the spirit of the law and Constitution.”

Thus, rejecting all the challenges raised about the Constitutional validity of the Act, the High Court dismissed the Petition and directed the State to take all expeditious steps to prevent misuse of diagnostic techniques.

RESERVATION UNDER 73RD AND 74TH CONSTITUTIONAL AMENDMENTS:

Affirmative Action:

Affirmative Action refers to the set of policies of the Government to support members of disadvantaged groups that have historically faced discrimination in the areas of education, employment, housing and respect in the society. Its main goals is to bridge inequalities in access to education, employment, equal pay and better standards of living.

Reservation system in India is a part of Affirmative Action.

Historical Origin of Reservation System:

William Hunter and Jyotirao Phule in 1882, originally conceived the idea of Caste Based Reservation System in India. In 1933, British PM Ramsay McDonald, came out with this idea called “Communal Award”. The award made provision for separate electorates for Muslims, Sikhs, Indian Christians, Anglo Indians and the Dalits. Gandhi was opposed to this as he thought it will divide Hindus and went on a fast until death. B.R. Ambedkar opposed this award. Finally, after long negotiations, Poona Pact was signed with certain modifications which stated that there would be a single Hindu electorate with certain reservations in it.

After India's Independence, Reservations were incorporated to acknowledge the historic injustice done to the members of India's lower classes. It was first made available for 10 years but because of the necessity to retain this system, it is continued till date.

In The State of Madras vs Champakam Dorairajan (1951);

The Madras Government has reserved seats in State Engineering and Medical Institutes for various communities based on classes, religion and race. 4 Medical colleges were maintained by the State of Madras and only 330 seats are there. Champakam Dorairajan filed an application stating the facts of the violation of Fundamental Rights Article 15 and Article 29(2) of the Indian Constitution as she could not get admission in college due to reservation policy of the Government. The court asked the State to reply and it was stated that They are implementing Article 46 and so no Fundamental Right has been infringed. It was held that Fundamental Rights are supreme and Directive Principles of State Policy are only secondary. A.46 cannot override A.15 and so denying admission on the ground of caste is infringement of A.15 and hence it is unconstitutional.

Article 15 (4) is the First Amendment of 1951 to the Indian Constitution. It states that Nothing in A.15 or in A.29(2) shall prevent the State from making any special provision for the advancement of any socially and educationally backwards class of citizens or for SC and ST in Government Institutions.

Article 15(5) is the 93rd Constitutional Amendment Act 2005.

It confers power on the State to reserve seats in favour of backward classes of citizens who are socially and educationally backward in educational institutions including unaided private institutions but excluding the minority institutions.

A.16 is Equality of opportunity in Public Employment:

A.16(4) – State to reserve seats in favour of backward classes (SC and ST included) in public employment.

In the year 1979, Mandal commission was formed. Its task is to Identify those who are backward but doesnot belong to SC and ST. In 1983 report was submitted by

B.P. Mandal. In 1989, VP Singh govt implemented this commission's report. It said that 52% of population excluding SC and ST are socially and educationally backward. So, it recommended 27% reservation for OBC. His Govt was short lived and then came P.V Narasimha Rao Govt and he decides to expand additionally 10% to economically poor sections of society.

In Indira Sawhney vs Union of India (1992) popularly known as Mandal case,

It was held that A.16(4) is an enabling clause. 27% reservation to OBC can continue only if the following conditions are satisfied.

- a. They are Socially and Educationally backward.
- b. The Backward Classes are not adequately represented in public employment.
- c. The Concept of creamy layer shall apply to OBC
- d. Reservation cannot at any point exceed 50%.
- e. The overall efficiency should not be affected as required under A.335 (Subjective Clause). They must have adequate qualification for the post.

Reservation to be only at the time of entry level ie at the time of recruitment and not promotions. It was also held that 10% for economic backwardness among General category is no criteria to extend reservation.

A.16(4A) was inserted in 77th Constitutional Amendment Act 1995. It granted reservations for promotions of SC and ST.

In M. Nagaraj vs Union of India (2005)

It was held that Reservations for promotions of SC/ST is constitutional, if it does not affect the efficacy in the administration.

In 2019, Constitutional Amendment Act was passed, 10% seats in Educational institutions and Government Jobs for Economically Weaker Sections were granted.

73RD AND 74TH CONSTITUTION AMENDMENTS AND RESERVATION FOR WOMEN: (ARTICLE 243D AND 243T – WOMEN’S PROVISION):

Article 40 of the Indian constitution directs the government to establish panchayats to serve as institutions of local self-government. Most states implemented this directive principle along the lines of the recommendations of the Balwantarai Mehta Commission Report.

The commission recommended a ‘three-tier’ system of Panchayati Raj institutions (PRIs), viz. the popularly elected village council (gram panchayat) as the village level basic unit. Block (block is the larger sub unit of a district) council (or panchayat saphithi) at the Block level, and the district council (or the Zilla Parishad) at the district level. Introduction of PRIs was hailed as one of the most important political initiatives in India.

The panchayat raj system has been experiencing ups and downs over the years. The activities of these institutions are broad based but its resource base is very weak. In view of this, the PRIs constituted in various states could not live up to the expectations of the people. Deficient in funds and authority, the panchayats in most states were largely inactive until late 1970s.

Some of the major problems and shortcomings that adversely affected the functioning of these institutions are:

- i. Elections not being held regularly;
- ii. Lack of adequate transfer of powers and resources;
- iii. Lack of power to generate their own resource; and
- iv. Non-representation of women and weaker sections in the elected bodies.

In 1989, the Government Proposed the 64th Constitution Amendment Bill to make it mandatory for all states to establish a three-tiered (village, block and district) system of Panchayats in which representatives would be directly elected for five-year terms. Panchayats were to be given expanded authority and funding over local development efforts. Despite the popular appeal of transferring power to panchayats, the 64th amendment bill was rejected by Rajya sabha.

73rd and 74th Constitution Amendments 1992:

Given its far-reaching consequences, the 73rd Amendment (together with the 74th) is rightly called ‘a silent revolution’ for various reasons. First of all, the PRIs no longer operate at the whim of state governments and their laws. They are now a part of the Constitution and enjoy the status of institutions of self-government, as parliament at the federal level and legislative assemblies at the state level.

The amendment prescribes regular elections every five years and election within six months of the dissolution of any PRI. To ensure free, fair, and timely elections there is a provision for the setting up of state election commission.

The most revolutionary provision is the reservation of one-third of the seats for women in local bodies, along with reservation of seats for scheduled castes and scheduled tribes in proportion to their regional populations.

73rd Constitutional Amendment1992:

It was passed in 1992 and came into force on 24th April 1993.

It brought the Panchayati Raj System to Rural India and was added to Part IX of the Constitution. It contains Articles 243 to 243O.

Women’s Provision:

Article 243D provides

- In every panchayat seat shall be reserved for SC and ST. Not less than one third seats shall be reserved for women.
- Not less than one third seats of the Offices of chair persons shall be reserved for Women.

74th Constitutional Amendment 1992:

It brought Municipality system to Urban India. It gives provisions for establishing 3 types of Municipalities in every State. They are Nagar Panchayat, Municipal Council and Municipal Corporation. It was added to Part IX A to the Indian Constitution. It contains Articles 243P to Article 243ZG.

Women's Provision:

Article 243T provides

- In every municipality seat shall be reserved for SC and ST. Not less than one third seats shall be reserved for women.
- Not less than one third seats of the Offices of chair persons shall be reserved for Women.

For detailed provisions please refer book – Law Relating to Women and children – Mamta Rao.

Women's Participation in Local Government:

There were already some women in local government prior to the passing of the 73rd and 74th Amendments. But they were few and far between. In most cases the state laws prescribed at least one or two seats for women in the old-style PRIs. Very often these seats were filled through nomination.

The nominees, invariably, were members of elite families belonging to higher castes and owning substantial land, thus enjoying high status in terms of family, cast, and class. These women were usually related to established political leaders. As symbols of tokenism, they rarely took active interest in the functioning of the PRIs. The new system of reservation and competitive elections based on adult franchise changed this situation radically.

When the provisions for reservations of seats for women were being debated in parliament, several members were doubtful that such large numbers of women would come forward to contest these seats. But these doubts proved to be wrong. In total, for over one million seats reserved for women in all the local bodies, more than five million women candidates contested. Thus, on an average, there were five women candidates contesting each seat. Moreover, some women won unreserved or general seats, defeating their male rivals. Of course, such cases were not many, but they were no less significant.

JUDICIAL APPROACHES TO EQUALITY- FORMAL AND SUBSTANTIVE EQUALITY – SAMENESS, CORRECTIONIST AND PROTECTIONIST APPROACHES OF JUDICIARY

(a) FORMAL EQUALITY:

The idea of formal equality can be traced back to Aristotle and his dictum that equality meant “things that are alike should be treated alike”. (in his book – Nicomachean Ethics). The formal approach to equality and non-discrimination supports the position that a person’s individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. At the heart of most protagonists’ defence of this model is the principle of merit. The liberal argument sets out that formal equality is necessary if the principle of merit is to be maintained in a democratic society.

It prevents the harm which may occur from any arbitrary decision-making process, by permitting the person the opportunity to secure a benefit which may otherwise have been denied and reducing any resultant psychological injury.

E.g. Universal Adult Franchise, Free and Fair Elections, Free press and Mass Media.

An example of a gender-neutral law is S. 24 of Hindu Marriage Act, 1955 which allows both the spouses to file for alimony after the divorce. The beauty of this law lies in its approach of treating the two genders similarly. One, it gives room to recognize every situation. This means it allows the court to give alimony to the wife due to her economic dependency on her husband and also entitles the husband to file for one. Two, it does not place an unnecessary burden on the husband even when the wife is economically independent as this would lead to injustice.

- i. Formal equality stands for equal treatment without discrimination
- ii. It believes that every individual knows how to utilize what is best for him with his capacity.
- iii. It believes on the principle of Merit
- iv. It ensures equal opportunity

Formal equality calls for a comparator. “If a woman and man are at same position in the company and have the same duties, and the woman is not paid equal to the male colleague, she may file a suit for the discriminatory salary. However, in a case when there is no male colleague, she will not have any comparator and irrespective of insufficient salary, she will not be able to show her disadvantaged position.

In **Mackinnon Mackenzie & Co Ltd. v. Audrey D'Costa** (1987) 2 SCC 469), addressed some of these concerns. This was a case where female stenographers were paid less by a private sector firm than the male staff. Though the nature of their duties was the same, female stenographers were discriminated against by labeling the male staff as private secretaries.

The employer had held negotiations with its employees and a settlement was arrived at, which agreed that women stenographers would be given a lower pay scale than their male counterparts. When this settlement was challenged by a woman stenographer, the petitioners argued that there was no gender discrimination and that the nature of work performed by the male and the female stenographers itself was very different. However, the Supreme Court overruled this argument and held discrimination with regard to unequal payment on the grounds of sex of the employee to be illegal and directed equal pay for equal work or work of a similar nature. Further, the court ruled that provisions of the Equal Remuneration Act, 1976 would override any settlement that the employer may enter into with the employees. Through this judgment, the principle of equality was extended to the private sector as well.

(b) Substantive Equality:

Substantive equality considers this disadvantage a socially constructed idea. So, a law based upon substantive principles would aim to end this disadvantage.

Applying substantive equality principles would mean recognizing the disadvantage. So, even in the absence of comparator, if the woman is able to show that her salary is insufficient and it in fact places her at a disadvantage, she might get justice.

Sandra Fredman stated that “Substantive Equality should be viewed as a four-dimensional concept of recognition, redistribution, participation and transformation. The redistributive dimension seeks to redress disadvantage through affirmative action, while the recognition dimension aims to promote the right to equality, the Participative dimension promotes Judicial review and ensures that all those affected by discrimination can be active members of the society and the transformative dimension recognises that equality is not achieved through equal treatment alone and it has to be transformed to accommodate the difference which reinforced the disadvantage and discrimination.”

In Municipal Corporation of Delhi v. Female Workers and Anr. 2000 3 SCC 224,

Under Maternity Benefit Act, 1961, female muster roll workers were denied maternity benefit as they were temporary workers. The argument in support of such law was that since these workers were temporary and not permanent, they were not entitled to the benefit. However, the honourable court did not consider the distinction between a temporary and permanent worker important and rather focused on the rights of women.

This displays how principles of substantive equality were implemented and the sufferings of pregnant women were extinguished to an extent. “Court also discussed that the women working as muster roll workers were already poor and not granting them maternity benefit will add up to their disadvantage. Article 14 was also violated as the temporary workers faced discrimination without any reasonable justification.

Lt. Col. Nithisha & Ors vs Union of India & Ors Writ Petition (Civil) No 1109 of 2020.

The SC issued a judgment declaring that the Army’s criteria on Permanent Commissions indirectly discriminated against women. In this case, 86 Army officers had approached the SC alleging gender-based discrimination in the Indian Army. The army officers were women who had a Short Service Commission (SSC) and were applying for a Permanent Commission (PC) in the army. Although the criteria adopted to select women PC officers were nearly identical to the one used for men, some sub-criteria imposed an unfair burden on women.

The Court held that the Army’s criteria indirectly discriminated against women officers. The Bench stated that invisible forms of discrimination must be eliminated to achieve substantive equality.

SAMENESS APPROACH OF JUDICIARY:

In Sameness Approach, women are constructed as the same as men, and thus, ought to be treated exactly the same as men in law. This sameness approach is invoked in a number of different contexts. It has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate impact of gender-neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equally. (It is same as Formal Equality and refer Formal Equality Notes)

CORRECTIONIST APPROACH OF JUDICIARY:

The **correctionist approach** of judiciary is based on the idea that the law should correct the existing inequalities and injustices in society by providing special protection or benefits to the disadvantaged groups. This approach has been used to uphold laws that grant reservations, quotas, affirmative action or other measures to promote the interests of women, minorities, backward classes or other groups.

Here women are seen to require special treatment as a result of past discrimination. Under this approach, it is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. Proponents of this approach attempt to illustrate how the ostensibly gender-neutral rules of formal equality are not gender neutral at all - but rather, based on male standards and values. As Naudine Taub has argued "rules formulated in a male-oriented society reflect male needs, male concerns and male experience." In such a model, women will only qualify for equality to the extent that they can conform to these male values and standards. Thus, the corrective approach argues that gender differences must be taken into account in order to produce substantive equality for women.

(It is same as Substantive Equality and refer Substantive Equality Notes)

PROTECTIONIST APPROACH OF JUDICIARY:

Here women are constructed as weak and subordinate, and are thus in need of protection. This approach concludes that gender difference can be relevant and therefore must be recognised in law.

Section 497(1) of the Criminal Procedure Code allows the Court to grant bail in non-bailable cases when: the accused is under 16 years of age; a woman; sick; or infirm.

In **Nirmal Kumar Banerjee v. The state** 1972 Cr. L.J. 1582 (Cal). the Calcutta High Court held that the constitutional validity of the provision had to be determined against Article 14, a general provision, read together with Article 15(3), a provision where the State was empowered to allow special treatment for women and children. The provision was held to constitute a reasonable classification, as a female, or a person below 16 years of age, or an infirm person, were not likely to interfere with the investigation or to delay the trial by absconce or interference. While the Court adopts a "holistic approach" to the equality provisions, it continues to interpret discrimination in a way that means any distinction, rather distinctions that disadvantage within the broader meaning of equality. In so doing, the Court's understanding can be seen to be firmly located within a formal model of equality. It upholds the provision by adopting a protectionist position where by women are to be treated in the same way as a person under 16 or someone with an infirmity. Women are seen as weak, as incapable of exercising basic rights in the same way as children and the infirm, and thereby in need of protection.

In **Shahdad v. Mobd Abdullah** AIR 1967 J&K., 120, the provisions of the Civil Procedure Code, which state that service of a summons must be made on a male member of the family, were challenged as violating Article 15. In rejecting the challenge, the Court held: we have to analyse the background in which this rule was enacted. The functions of females in Indian society is that of housewives. Until very recently it was in exceptional cases that ladies took part in any other activity than

those of housewives. Females were mostly illiterate and some of them Parda Nashin. Therefore, in enacting this rule, the legislature had in view the special conditions of the Indian society and therefore enjoined service only upon male members and did not regard service on females as sufficient.

The decision is based on a formal approach to equality, in which any difference can be used to justify differential treatment, and a protectionist approach to gender, in which women are seen as different and as in need of protection.

ROLE OF HUMAN RIGHTS COMMISSION- WOMEN'S COMMISSION AND JUDICIARY IN ENSURING GENDER JUSTICE.

NATIONAL HUMAN RIGHTS COMMISSION, INDIA:

The Indian Parliament has enacted the Protection of Human Rights Act 1993, for the establishment and constitution of the National Human Rights Commission, States Human Rights Commission in States and Human Rights Courts for better protection of human rights. This Act has come into force on 28th day of September 1993. Under Section 2 (1) (d) of the Act, the term “Human rights” has been defined as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India”.

Constitution of Human Rights Commission:

Section 3 of the Act provides for the Constitution of the Commission. It consists of

- a) A Chairperson who has been Chief Justice of the Supreme Court
- b) One Member who is or has been judge of the Supreme Court
- c) One Member who is or has been Chief Justice of the High Court
- d) Two other Members having knowledge of practical experience in matters relating to human rights.

The appointment of the Chairperson and Members of the Commission is made by the President of India on the recommendation of a high-powered Committee consisting of The Prime Minister, Speaker of the House of the People, Minister in-charge of the Ministry of Home Affairs in the Government of India, Leader of Opposition in the House of People, Leader of opposition in the Council of State, Deputy Chairman of the Council of State.

Functions of the Commission:

- a) To inquire into complaints of violation of human rights. The Commission, in such cases may move either on suo moto or on a petition presented to it by a victim or on a direction or order of any court.
- b) To intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court.
- c) To visit Jail or other institution under the control of State Government, where persons are detained or lodged for the purpose of treatment, reformatory or protection to study the living conditions of the inmates and make recommendations thereon to the Government.
- d) To spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through, publications, the media, seminars and other available means.

National Commission for Women:

The National Commission for Women was formed with an intention to establish an equal and just livelihood for women by making legal and constitutional amendments for women in India. The Violence against Women is a fundamental violation of human rights, across nations, societies, cultures and classes and to stop this violation of the fundamental right; this Commission was formed. Problems faced by the women in the country has been one of the biggest concerns of the Government and other authorities. Over the years, many Commissions have been set up by the

Government to look into the welfare of Women in the country. According to the reports of these commissions, all of them state the necessity of setting up an apex body for reviewing and addressing the grievances of women in the country. The demand for setting up a body persisted for long and ultimately to keep the interest of the people, the National Commission for Women Bill 1990 was introduced in the Lok Sabha on 22nd May 1990.

The National Commission for Women was set up in 1992 under the National Commission for Women Act, 1990. This body was established to review the constitutional and legal safeguards for women.

Nearly 31,000 complaints of crimes committed against women were received by the National Commission for Women (NCW) in 2022, the highest since 2014. In 2021, the NCW had received 30,864 complaints while in 2022, the number slightly increased to 30,957.

Chapter 2

Marriage Under Personal Laws

HINDU MARRIAGE:

As per Hindu Law, Marriage is a **sacred ceremony**. Hindus consider marriage as a sacramental union – a permanent, indissoluble and eternal union. The object of Hindu Marriage is to have children, to be able to perform religious rites and sacrifices which man can perform only along with his wife and to have the highest conjugal happiness.

DEFINITION OF HINDU MARRIAGE:

In Lindo vs Belisario (1795), Lord Stowell defined Marriage as

“Hindu Marriage is not merely either a civil or religious contract, it is a contract according to the law of nature where two persons of different sexes engage, by mutual contracts to live together and when they agree for the procreation and bringing up children and for such lasting co-habitation, that in the state of nature would be a marriage”.

CONDITIONS OF A VALID MARRIAGE UNDER HINDU LAW:

Section 5 of The Hindu Marriage Act, 1955 states the Conditions for a Valid Hindu Marriage.

S.5(i) – Neither Party has a spouse living at the time of marriage. (**Bigamy not allowed**)

If the parties have a spouse living, then he/she will be guilty of bigamy under S.17 of this Act and liable to punishment under S.494 (7 years) and 495 (10 years) of Indian Penal Code. The Marriage will be declared Void.

In Santhosh Kumari vs Surjith Singh (1990), It was held that the court is not competent to grant permission to solemnise a second marriage during the subsistence of first marriage, even where a request is made by the first wife to permit her husband to marry a second time.

S.5(ii) – At the time of Marriage, neither party –

- (a) is incapable of giving a valid consent due to **unsoundness of mind**; or
- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity.

S.5(iii) the **bridegroom** has completed the **age of 21** [twenty-one years] and the **bride**, the **age of 18** [eighteen years] at the time of the marriage;

S.5(iv) the parties are **not within the degrees of prohibited relationship** unless the custom or usage governing each of them permits of a marriage between the two;

S.5(v) the parties are **not sapindas of each other**, unless the custom or usage governing each of them permits of a marriage between the two.

(“sapinda relationship” - any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation)

The concept of Hindu Marriage under the Act is still considered as a sacrament.

In Ravinder Kumar vs Kamal Kanta ILR (1973) Bom.1220, It was held that a marriage to be valid under the Act must satisfy the conditions laid down in S.5 and should be solemnised as specified in S.7.

Section 7 of The Hindu Marriage Act, 1955 – Ceremonies for a Hindu Marriage

S.7(1) – Marriage has to be solemnised with customary rites and ceremonies.

S.7(2) – Where such rites and ceremonies include the saptapadi – the marriage becomes complete and binding when the 7th step is taken.

Saptapadi:

The word ‘Sapta’ means Seven and ‘Padi’ means Walking steps. It means walking seven steps by the bridegroom and the bride jointly around the sacred fire pronouncing certain mantras and pledging mutual fidelity with Agni or sacred fire as witness.

Section 8 – Registration of Hindu Marriages

This Act empowers the State Government to make rules for registration of Marriage between two Hindus.

In Seema vs Ashwani Kumar (2008) I.S.C.C 180, It was held that The validity of the marriage will in no way be affected by the omission to make entry in the register.

MUSLIM MARRIAGE:

‘NIKAH’ is a Arabic term which means Union of Two Sexes. In Mohammedan Law, Marriage is regarded as a civil contract.

DEFINITION OF MUSLIM MARRIAGE:

According to **Baillie's Digest** – “A Contract for the purpose of legalising sexual intercourse and procreation of children”.

(Note – Baillie's Digest means it is a book that summarises Islamic Law regarding marriage, divorce, inheritance etc)

Justice Mahmood in Abdul Kadir vs Salima ILR 1886 8 All 149 defined Marriage as

“Muslim Marriage is a civil contract upon the completion of which, by proposal and acceptance, all the rights and obligations which it creates arise immediately and simultaneously”.

Muslim Marriage thus is

- a) A Contract
- b) For the purpose of legalising sexual intercourse and procreation
- c) Legitimation of children
- d) For creating rights and duties between the parties and between each of them and their children.

CONDITIONS FOR A VALID MARRIAGE UNDER MUSLIM LAW:

The Essentials or conditions for a valid marriage are as follows:

i) Ijab wa Kabul (**Proposal and Acceptance**)

Muslim marriage is a contract of two parties. Ijab means proposal along with dower, is made by the bridegroom to the bride. Kabul which means acceptance must be given by the bride at **one meeting**.

Ijab at one day and Kabul at another day makes the marriage void. **Consent** of both the parties must be with **free** will, not under undue influence, misrepresentation or coercion. Under Sunni School, 2 males witness is necessary or it can be 1 male and 2 female witnesses. Under Shia School, witness is not necessary.

- ii) The Parties to the marriage must be of **sound mind**.
- iii) They must have attained the age of puberty. The age of puberty for a girl and boy is **15 years**.
- iv) The Parties to the marriage should **not be within the degrees of Prohibited Relationship**. Here the degrees of Prohibited Relationship is divided into 2 types. They are

- a) Absolute Prohibition – It makes the marriage void.

Consanguinity (Blood Relationship) Eg. Mother and Son

Affinity (Relationship by Marriage) Eg. Wife's Mother

Fosterage (Foster Relationship) Eg. A women taking care of a child who is not a legal child of her's.

- b) Relative Prohibition – It makes the marriage irregular.

Absence of witness, Polygamy, Marriage during Iddat Period etc.

MUTA MARRIAGE:

The term 'Muta' means Enjoyment or use. It is a kind of temporary Marriage for a fixed period ie for a part of the day or for a day or for few weeks, few months or few years.

The period of marriage is fixed by entering into an agreement between the parties on payment of some consideration (dower).

If no time limit is fixed, then it is presumed to be as a permanent marriage. The child born out of Muta marriage is considered as Legitimate and capable of inheriting from the father.

The Muta Marriage comes to end on the expiry of the stipulated period. There is no divorce under this form of marriage as the marriage ends after the expiry of that period.

In Shoharat Singh vs Jafri Bibi (1914):

A Muta form of marriage was contracted for two years. Even after the expiry of that period they continued to live together, without entering a new contract. A child was born to them at the fourth year and the husband died in the fifth year.

Judgement: It would be presumed that Muta Marriage had lasted for 5 years and the child born out of this marriage is Legitimate.

IDDAT PERIOD:

When a Muslim marriage is dissolved by **death or divorce**, the women is required to remain in seclusion (without cohabitation) for a specified period. During this period, she is prohibited to remarry. This period is called Iddat. After completion of this period she can lawfully remarry. The purpose to follow this Iddat is to ascertain the pregnancy of the woman so as to avoid confusion as to paternity.

On **Death** of the Husband, the Iddat Period is **4 months and 10 days**.

If she is Pregnant, then the Iddat will not terminate till her delivery. If delivery or Iddat Period comes before 4 months and 10 days, the remaining period has to be observed.

On Divorce, the Iddat Period is 3 Lunar Months. (1 Lunar month = 29.5 days)

Divorce and Subsequently death occurs before Iddat Period:

Take for Eg. A husband divorced his wife and before the completion of the Iddat period he dies. In this case, the wife is entitled to inherit the property from her husband on the capacity of wife.

From this it is clear that till the completion of the Iddat period, they are still presumed as Husband and Wife. Even if wife dies during this period, the husband is entitled to inherit property from her.

MAHR AND KINDS OF MAHR:

The other name for Dower is Mahr. Mahr is the money or property which the Muslim wife is entitled to receive from the husband in consideration of Marriage.

Definition: According to Tyabji, “Mahr or Dower is a sum that becomes payable by the husband to the wife on marriage either by agreement between the parties or by operation of law”.

Kinds of Mahr:

Specified Dower (Mahr-ul-Mussamat)

It means that the amount of Mahr is specified and settled by the parties at the time of Marriage or after.

Prompt Dower (Mahr-i-Mu'ajjal)

It is payable on demand. Whenever, the dower is demanded by the wife, the husband needs to give the dower. If refused by the Husband, the limitation period starts and the limitation period is 3 years.

Deferred Dower (Mahr-i-Mu'wajjal)

It is payable on dissolution of Marriage ie either on death or divorce of the husband. Here, the **wife can relinquish** her dower and this form of relinquishment is known as **Hiba-e-Mahr**. Once she relinquishes, she is not entitled to Mahr.

In Hasina Bano vs Alam Noor (2007)

Wife demanded the payment of Mahr. The husband denied his liability as she had relinquished her right through an agreement. It was held that, once relinquished, she would be prevented from claiming the same after being divorced under Muslim Women (Protection of Rights of Divorce) Act, 1986.

Unspecified Mahr (Mahr-ul-Misl)

In case the Mahr has not been specified at the time of Marriage, it will be fixed according to the status of the wife's family, family traditions, beauty etc.

According to Hedaya, it was stated that the Wife's age, beauty, intellect and virtue will also be considered in fixing the Mahr / dower.

The above pertains to the kinds of Mahr.

SPECIAL MARRIAGE ACT, 1954:

The Special Marriage Act is a law which **allows solemnization of marriages with or without going through any religious customs or rituals**.

People from different castes or religions or states get married under this Act in which marriage is solemnized by way of registration.

The prime purpose of the Act was to **address Inter-religious marriages and to establish marriage as a secular institution bereft of all religious formalities**, which required registration alone.

REGISTRATION CONDITIONS UNDER THE SPECIAL MARRIAGE ACT, 1954:

Section 4 – Conditions relating to Solemnization of Special Marriages

- a) Neither party has a spouse living at the time of marriage.
- b) Neither party – is
 - i) Incapable of giving a valid consent due to unsoundness of mind
 - ii) Even if capable of giving valid consent, has been suffering from mental disorder and unfit for marriage or procreation of children
 - iii) Has been subject to recurrent attacks of insanity
- c) Male has completed 21 years and Female 18 years.
- d) The parties are not within the degrees of prohibited relationship.

Section 5 – Notice of intended marriage

The parties to the marriage should give notice in writing to the Marriage Officer of that district. One of the parties to the marriage must have resided in that district for a period not less than 30 days at the time of giving notice.

Section 6 – Marriage Notice Book and Publication

Marriage officer shall enter the details in the Marriage Notice book and this book shall be open for inspection at all reasonable times without fee by any person

desirous of inspecting. Such notice will be published and a copy will be affixed to some conspicuous place in his office.

Section 7 – Objection to Marriage

Any person before the expiry of 30 days of notice published, can object to the marriage. If no objection received, then after 30 days, the marriage will be solemnized.

Section 8 – Procedure on receipt of objection

If objection is made, then the Marriage Officer shall not solemnized the marriage until he had inquired into the matter of objection. But he shall not take more than 30 days from the date of objection for the purpose of inquiring. If the objection is reasonable and genuine, then he can uphold the objection. The remedy to the parties to the marriage is that, they need to appeal it in the District court (where Marriage officer office is present) within a period of 30 days. Decision of the District court on such appeal is final and Marriage Officer shall act according to the court's decision.

Section 9 – Power of Marriage Officer

Marriage officer shall have all the powers vested in Civil Court under Civil Procedure Code 1908 and the proceeding shall be deemed to be judicial proceeding.

He can issue summon, enforce the attendance of witness, Compel the production of documents, Receive evidence on affidavits and issue commissions for the examination of witness.

Section 10 – Procedure on receipt of objection by a Marriage Officer Abroad

If the objection is reasonable, he can forward the same to Central Government and based on the decision of Central Government, he shall act accordingly

Section 11 – Declaration by Parties and Witness

Before the marriage is solemnised, the parties and 3 witness shall sign a declaration form and same shall be counter signed by the Marriage Officer

Section 12 – Place and Form of Solemnization

The parties can get their marriage solemnized at the office of the Marriage Officer or a place within reasonable distance from the office.

Section 13 – Certificate of Marriage

When the marriage has been solemnized, the Marriage Officer enters the details in the Marriage certificate book and such certificate shall be signed by parties and 3 witnesses.

This certificate is a conclusive evidence that a marriage has been solemnized.

Section 15 – Registration of Marriage Celebrated in other Forms

The unique feature is any marriage solemnised under any law, may be registered under the Act.

Conditions

- Ceremony of marriage has been performed and they are living together as husband and wife.
- Neither party has more than one spouse living at the time of marriage
- Neither party is an idiot or lunatic at the time of registration
- The parties had completed the age of 21 years at time of registration

- Parties are not within the degrees of prohibited relationship
- Parties has been residing in the district for a period of not less than 30 days when the application is made

IIIn Feroz Khan vs Union of India (2007), It was held that the Special Marriage Act, 1954 does not bar the registration of marriage between an Indian National and citizen of other country.

In **The Hindu** **Newspaper dated April 20, 2023** it was stated that the Supreme Court slams section 5 of Special Marriage Act requiring prior Notice. Chief Justice of India, Justice Chandrachud observed that this Act is enacted to protect couples but these provisions lay them open to invasion by the society.

JUDICIAL SEPARATION (S.10):

Judicial Separation is a medium under the law to give some time for self-analysis to both the parties of a disturbed married life. Law gives a chance to both the husband and wife to rethink about the extension of their relationship while at the same time guiding them to live separately.

By doing this, the law allows them the free space and independence to think about their future path and it is the last option available to both the spouses for the legal breakup of the marriage.

Section 10 of the Hindu Marriage Act, 1955 provides the Judicial Separation for both the spouse, those who are married under the Hindu Marriage Act, 1955. They can claim the relief of Judicial Separation by filing a petition. Once the order is passed, they are not bound to have cohabitation.

The spouse can file a petition for Judicial Separation under S. 13(1)(i) to S.13(1)(vii) and S.13(2)(i) to S.13(2)(iv) of The Hindu Marriage Act 1955. The grounds for

Divorce and Judicial Separation are the same. (Refer the grounds for Judicial Separation below)

DIVORCE UNDER PERSONAL LAWS:

DIVORCE

The Latin word "divortiōm," which itself is a derivative of "disvertere," is the source of the English word "divorce." Dis stands for "apart," and verere is Latin for "to turn." It denotes turning apart. Divorce is the legal separation of a couple's marriage vows.

Divorce is a process by which marriage comes to an end. In other words, it can be stated as Dissolution of Marriage. After this the parties are freed from their matrimonial affairs and are free to marry again.

DIVORCE UNDER HINDU MARRIGE ACT, 1955:

S.13 of Hindu Marriage Act, 1955 states the Provisions for Divorce and Judicial Separation

S.13B – Divorce by Mutual Consent

S.14 – No petition for divorce to be presented within one year of marriage

The following are the grounds for divorce as well as for Restitution of Conjugal Rights under Hindu Law. **The grounds for Divorce and Judicial Separation (S.10) are the same.**

S.13(1)(i) - ADULTERY

Consensual Sexual affair between a married person with another other than his/her spouse during the subsistence of the Marriage can be termed as Adultery. Here, the

burden of proof is on the part of the petitioner. Circumstantial evidence is accepted. S.497 of Indian Penal code states Adultery is an offence but in 2018 this was decriminalized. But it can still be used as a ground for getting divorce.

In Joseph Shine Vs Union of India 2018 SCC online SC 1676

The offence of Adultery was decriminalized. Since S.497 of IPC is a gender biased provision, it was contended to be made as a gender-neutral law.

CJI Mishra and Justice Khanwilkar, states that “Women cannot be asked to think the way society desires”.

In Chiruthakutty vs Subramaniam (1987), The wife became pregnant despite of vasectomy operation. The court did not grant divorce and held that in the absence of proof that the operation was successful and there was no cohabitation between them after the vasectomy operation by the husband.

S.13(1) (ia) – CRUELTY

It means such conduct as to cause physical violence of causing bodily hurt or danger to the person of petitioner. The word cruelty is not defined in the Act. In Dastane vs Dastane (1970), the following 5 tests were laid down in determining whether a given conduct amounts to legal cruelty.

- The acts of cruelty should be proved according to the law of evidence.
- There should be an apprehension of harm/real injury in petitioner's mind.
- The apprehension should be reasonable with regard to socio-economic and psycho physical conditions of the parties.
- The petitioner should not have taken advantage of his position.
- The petitioner should not have condoned (pardoned) the acts of cruelty.

Cruelty can be classified as Physical Cruelty and Mental Cruelty. Examples of Physical cruelty are Repeated beating, stabbing, causing fracture, Making them starve without giving food etc.

Mental cruelty includes Abusive language, Frequent demand for dowry, ill treatment of children etc.

In Sreepadachandra vs Vasantha, it was held that the act of wife abusing and insulting the husband in public amounts to cruelty.

S.13(1)(ib) – DISERTION

It means leaving or abandoning the spouse by the other spouse without reasonable cause. For desertion, 2 conditions must be satisfied, they are ;

- Intention to live separately
- Intention to bring cohabitation to end permanently

Both of the above must be done without reasonable cause and without consent.

Here, the Burden of Proof always lies on the petitioner. The period of desertion must not be less than 2 years preceding the date of the petition.

S.13(1)(ii) – CONVERSION OF RELIGION

If a party to the marriage has ceased to be a Hindu by conversion to another religion; divorce can be obtained.

Under this clause 2 conditions must be satisfied, they are;

- Respondent has ceased to be a Hindu
- He has converted to another Religion

S. 13(1)(iii) – MENTAL DISORDER

If a party to the marriage is of unsound mind and/ or has been suffering continuously or temporarily from a mental disorder of such a kind and to such an extent, that it is not practically possible for the other person to live with him/her peacefully, then in such a situation, the aggrieved spouse has a right to seek divorce.

E.g. Schizophrenia (Serious Mental Disorder), Hallucinations (Seeing or hearing something which is not true), Delusions (a false belief) etc

S.13(1)(iv) – LEPROSY (deleted section) : By the Personal Laws (Amendment) Act 2019 – Leprosy was removed as a ground for divorce and judicial separation.

S.13(1)(v) – VENEREAL DISEASE

If any parties to the marriage has been suffering from venereal disease in the communicable form which may pose a risk to the life of the other party, then the other party has a right to seek divorce or judicial separation.

S.13(1)(vi) – RENOUNCING THE WORLD

Renouncing the world amounts to civil death as one who enters into a religious order severs his connection with all members of his natural family. It means a person becoming an ascetic or sanyasi. Such transformation would be complete only when one renounces all worldly interests by performing the requisite ceremonies and formalities.

S.13(1)(vii) – PRESUMED DEAD

If they whereabouts of one spouse are unknown for a period of 7 years, the other spouse can presume his/her death and can institute a petition for dissolution of the marriage.

S.108 of the Evidence Act states that “a person is presumed to be dead if he is not heard for seven years. For e.g., The husband is presumed dead and the wife marries again. Now the husband re-appears after 8 years, in this case the second marriage will not be valid and also, she will be guilty of bigamy. To avoid this risk, this section provides that a petitioner may obtain a decree of Dissolution of Marriage on this ground, Once the Marriage is dissolved, he is free to marry again.

S.13(1A) (i) – NON-RESUMPTION OF COHABITATION FOR ONE YEAR OR MORE

If the disputing parties do not reconcile or resume matrimonial life within one year under Section 10 – Judicial Separation), either of the spouses can file a petition for divorce under section 13.

S.13(1A)(ii) – NON-COMPLIANCE OF DECREE OF RESTITUTION OF CONJUGAL RIGHTS

If the parties do not resume matrimonial home within one year after obtaining the decree of Restitution of Conjugal rights, either party can file a petition for divorce under section 13.

S. 13 (2) - EXCLUSIVE GROUNDS TO SEEK DIVORCE BY A HINDU WIFE ALONE. Here only the Hindu wife can file a petition for divorce under the following grounds.

i) S.13(2)(i) - REMARRIAGE

Bigamy is an offence under S.494 of IPC. When a husband whose wife is alive marries again can be termed as bigamy. For ex, If ‘A’ is the husband, ‘B’ is the first wife and he married ‘C’, then ‘B’ can seek divorce taking this as a ground from claiming divorce. The marriage with ‘C’ will be treated as Void as per Section 11 of the Hindu Marriage Act, 1955.

S.13(2)(ii) - HUSBAND GUILTY OF RAPE, SODOMY OR BESTIALITY

It enables the wife to obtain divorce where the husband since the solemnisation of marriage is guilty of rape, sodomy or bestiality. It is not necessary that the husband should have been convicted of any of these offences in any criminal proceedings.

S.13(2)(iii) – NON-RESUMPTION OF COHABITATION

This provision was inserted by the 1976 Amendment. Wife obtains a decree or order for maintenance either under S.18 of Hindu Adoption and Maintenance Act 1956 or S.125 of Crpc.

If Cohabitation has not been resumed after 1 year or more after the decree, then the wife can use this as a ground to avail divorce.

S.13(2)(iv) – REPUDIATION OF MARRIAGE

Marriage was solemnised before the women attained the age of 15 years and she repudiates (rejects) the marriage after attaining the age of 18 years, then she can use this as a ground to apply for divorce whether the marriage has been consummated or not.

In *Indira vs Balbir Singh* (1995), It was held that presenting the petition by the appellant in itself amounts to repudiation, particularly when no form of repudiation was provided under the statute.

SECTION 13B – DIVORCE BY MUTUAL CONSENT

The provision for dissolving marriage through mutual consent in India is mentioned in Section 13(B) of the Hindu Marriage Act by the Marriage Laws (Amendment) Act, 1976.

Mutual Consent Divorce or Mutual Divorce occurs when the husband and wife agree that they can no longer live together and that divorce is the best option. They make a joint petition to the court without making any accusations against each other.

The first occasion that the notion of divorce by mutual agreement was applied to Section 13B was in **Leela Mahadeo Joshi v. Mahadeo Sitaram Joshi (1991)**, which was heard in the Bombay High Court. Section 13B of the Hindu Marriage Act, 1955, provides for divorce with the mutual consent of the parties.

However, it should be noted that this clause was not in the Hindu Marriage Act, 1955. Forcibly ending marriages without the other party's permission became commonplace after the enactment of this law. Often, women were forced to divorce their husbands due to their husband's treatment of them. Consequently, the creation of a divorce by mutual consent clause was necessary to raise the position of women in the community. Because of this, Section 13-B was included in the Marriage Law Amendment Act, 1976.

THREE CONDITIONS ARE REQUIRED TO BE SATISFIED:

- i) That both the parties have been living separately for a period of one year or more
- ii) That both the parties have not been able to live together anymore
- iii) That both the parties have mutually agreed that their marriage to be dissolved.

In **Jayasree vs Ramesh (1984)**, Both the parties filed a petition for divorce under section 13B. Subsequently the husband alone filed a petition to withdraw. It was held that once consent is given it cannot be withdrawn without the consent of the other spouse.

In Sureshta Devi vs Omprakash (1992), The Supreme Court has settled the above controversy and held that consent given for mutual divorce can be withdrawn unilaterally ie by either one of the parties. However, the court has the discretionary power to grant divorce.

In Section 13B(2), 6 months waiting period is prescribed. This time is provided to both the parties to reconsider the divorce. But this waiting period is optional

In Shilpa Sailesh vs Varun Sreenivasan (2016) , Supreme Court states that “If there are no chances of reunion and there are chances of fresh rehabilitation, the court should not be powerless in enabling the parties to have a better option.

Irretrievable Breakdown Theory can be relied by the courts if it considers the marriage of the couple is irretrievable.

IRRETRIEVABLE BREAKDOWN THEORY:

The breakdown theory of divorce says that if a marriage had broken down without any possibility of restoration then it should be dissolved. The theory believes that if a marriage has broken down irretrievably, therefore divorce should be granted.

Where neither of the spouses can live peacefully together and acquire the benefits of a married relationship, then it is better to dissolve the marriage through mutual consent as there is no use in keeping and retaining the empty shell.

The theory presumed the breakdown of relationship de facto. If the parties to marriage are living separately for longer period of time ('two or three years or more) with or without any reasonable cause, and all their attempts to restore the foundation of marriage failed, it will be presumed by laws that relationship is totally unworkable, both emotionally and physically dead with no hope of resumption of spousal duties.

NEW DIVORCE RULES IN INDIA 2023:

i) Waiving the Mandatory 6 months period for Rehabilitation:

The court may decide as per the facts and circumstances of the specific case whether there is a need to order six months rehabilitation period or whether the couple should be immediately allowed to divorce. This was observed in the Supreme court ruling in the Akanksha vs Anupam Mathur case. The court was satisfied that the couple had taken a conscious decision to divorce, and there was no point in requiring the parties to wait for another six months for divorce.

ii) Irretrievable Breakdown of Marriage, a Valid Ground for Divorce:

In Sangamitra Ghose Vs. Kajal Kumar Ghosh case, the Supreme Court observed that the marriage between the parties was irretrievably broken down and that there was no possibility to repair the bond of the marriage. The apex court, therefore, ordered that the couple can divorce on the ground of the irretrievable breakdown of the marriage. Supreme Court has the power to dissolve a marriage on the ground of Irretrievable breakdown under Article 142(1) of the Constitution.

DIVORCE UNDER MUSLIM LAW:

GROUND ON WHICH DIVORCE OR JUDICIAL SEPARATION CAN BE APPLIED UNDER MUSLIM LAW:

Section 2 of Dissolution of Muslim Marriage Act, 1939 states nine grounds on which a Muslim wife can obtain a decree of divorce / Judicial Separation: -

- a) **ABSENCE OF HUSBAND:** whereabouts of the husband are not known from the past four years. Dissolution of marriage decree on this ground will take effect after six months from the date of such decree is passed, and during that period if the husband appears in person or through an authorized agent. Court if satisfied from same may set aside the said decree.

- b) FAILURE TO MAINTAIN- If a husband fails to provide maintenance to his wife for two years. There is no defence available before husband on the ground of poverty, failing health or unemployment.
- c) IMPRISONMENT OF A HUSBAND- If the husband is imprisoned for seven years or more.
- d) FAILURE TO PERFORM MARITAL DUTIES- If, without any reasonable cause, the husband is unable to perform his marital obligations for three years.
- e) IMPOTENCY OF HUSBAND- husband was impotent at the time of marriage and continues to be so. If the husband within one year from the date of the order obtained by wife for dissolution of marriage on the grounds of impotency on application satisfies the Court that he ceased to be impotent. If the husband satisfies the court, then no decree shall be passed on this ground.
- f) INSANITY, LEPROSY OR VENEREAL DISEASE- If the husband is insane or suffering from leprosy, or any venereal disease from a period of two years, judicial divorce by wife can be claimed on the same ground.
- g) REPUDIATION OF MARRIAGE BY WIFE- If a girl is married before the age of 15 years by her father or guardian, then under Muslim law she has been provided with a right to repudiate such marriage after attaining the age of 18 years provided that marriage is not consummated. She is entitled to a decree of divorce for same.

GROUND OF DISSOLUTION RECOGNISED BY WIFE ALONE IN MOHAMMEDAN LAW-

Wife is also entitled to obtain a divorce on the ground recognised valid under the law.

- a) CRUELTY BY HUSBAND-

If the husband treats his wife with cruelty, then she can approach the Court and claim for a decree of judicial separation on the same ground.

Some of the ways through which grounds for cruelty could be claimed as follows.

Physical assault.

Making defamatory statements affecting her reputation.

Forces her to lead an immoral life.

Obstructing her from practising her religion.

Husband having more than one wife and does not treat them equally.

TALAQNAME:

Talaqnama is talaq given in the written form. Talaq via talaqnama can be provided in the absence of wife and also there is no necessity to be signed in the presence of Qazi or wife's father.

- Husband has to execute a proper deed.
- A deed must contain the name of the women whom he has divorced and his name.

POINTS TO BE CONSIDERED FOR A VALID TALAQ:

- Talaq pronounced under intoxication is not recognised valid under Muslim law.
- For a valid talaq, intention is not an essential element.
- Husband may give talaq by mere words without any talaqnama or deed.

TALAQ AND FORMS OR VARIOUS MODES OF TALAQ – REFER PPT

DIVORCE UNDER CHRISTIAN LAW:

Sub-section (1) of Section 10 of the Divorce Act 1869, which contains the ground of divorce which runs [Grounds for dissolution of marriage] Any marriage solemnized, whether before or after the commencement of the Indian Divorce

(Amendment)Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, there spondent

- i. has committed adultery, or
- ii. has ceased to be Christian by conversion to another religion, or
- iii. has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition, or
- iv. has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy, or
- v. has for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, or
- vi. has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive, or
- vii. has wilfully refused to consummate the marriage and the marriage has not therefore been consummated, or
- viii. has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent,
- ix. has deserted the petitioner for at least two years immediately proceeding the presentation of the petition, or
- x. has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

MAINTENANCE UNDER PERSONAL LAWS:

The legal definition of maintenance is the financial support that is paid by one ex-spouse to another pursuant to a legal separation or divorce.

This financial support is for the wife's or the divorced wife's livelihood, for her children, for the maintenance of the property, and in certain cases, even to enable her to be adequately represented in the lawsuit.

HINDU LAW – MAINTENANCE:

The relief of maintenance is considered an ancillary relief and is available only upon filing for the main relief like divorce, restitution of conjugal rights or judicial separation etc.

Further, under matrimonial laws if the husband is ready to cohabit with the wife, generally, the claim of wife is defeated. However, the right of a married woman to reside separately and claim maintenance, even if she is not seeking divorce or any other major matrimonial relief has been recognised in Hindu law alone.

A Hindu wife is entitled to reside separately from her husband without forfeiting her right of maintenance under the Hindu Adoptions and Maintenance Act, 1956.

The Act envisages certain situations in which it may become impossible for a wife to continue to reside and cohabit with the husband but she may not want to break the matrimonial tie for various reasons ranging from growing children to social stigma.

HINDU MARRIAGE ACT, 1955:

S.24 - MAINTENANCE PENDENTE LITE:

The term Pendente means Pending and Lite Means Litigation. The term “Pendente Lite” refers that a Suit is pending while the litigation continues. It states that Maintenance is pending during the pendency of litigation.

During the pendency of the proceeding, court finds that either husband/wife has no independent income to provide his /her support and cannot able to pay the expenses of the proceeding. Then on application of that spouse, the court may order the other spouse to pay

- a) the expenses of the proceeding
- b) monthly sum which is reasonable with respect to income of the spouse

In Ishwar Singh vs Hukum Kaur AIR 1965 All 464

The facts are Husband is neglecting her and she was entitled to get monthly allowance. But the husband denied the marriage (She had married him without divorcing her first husband). So it was held that, so long as the marriage is subsisting, a spouse cant get maintenance under the Act.

In Sohan Lal vs Kamlesh AIR 1984 P&H 332

It was held that the object is to ensure that any party against whom matrimonial litigation is proceeding, should not suffer injustice due to poverty.

Either of the spouse can claim interim maintenance. This provision applies to cases of

- a) Restitution of Conjugal Rights (S.9)
- b) Judicial Separation (S.10)

- c) Void Marriages (S.11)
- d) Voidable Marriages (S.12)
- e) Divorce (S.13)

For the grant of Maintenance, the court will consider

- a) The Position and Status of the Parties
- b) Reasonable wants of the claimants
- c) Income of the claimant
- d) Income of the opposite party
- e) Number of persons the opposite party has to maintain

In *Gulab Chand vs Sampati Devi* (1986), Maintenance was granted to wife and her children.

Date from which Maintenance is payable

The exact date is not specified in this section. It is at the discretion of the judges whether to award maintenance from the date of the petition or to the date of the order.

In *C. Krishnan vs Ponmudi* (1992), Maintenance was granted from the date of filing the application. On appeal, it was modified to be given from the date of service of summons in the petition for divorce.

S.25 – PERMANENT ALIMONY AND MAINTENANCE:

It provides long term financial support after the decree

It can be awarded at the time of passing of the decree for divorce.

The awarded amount can be a gross sum or a periodical sum or a monthly sum.

It applies to section 9 to 13 of Hindu Marriage Act 1955 and application can be made at the time of passing the decree.

Only if the decree is passed, Maintenance can be granted. If case is dismissed, then maintenance will not be granted.

The court may at the instance of either party vary, modify or rescind the maintenance order if it is satisfied that there is a change in the circumstance of either party and it is deemed just.

S.18 – HINDU ADOPTIONS AND MAINTENANCE ACT 1956:

It is a statutory right given to a hindu wife to live separately without forfeiting her claim for maintenance during the lifetime of her husband (without divorce). Here the maintenance is claimed by the wife during the subsistence of the marriage. Wife is entitled to live separately if the husband is guilty of Dissertion, Cruelty, Bigamy, keeps concubine, ceased to be Hindu and Any other reasonable cause. She loses her right when she becomes unchaste or ceases to be a Hindu.

S.19 – Obligation of Father-in-law to maintain Daughter-in-law if she does not have the ability to maintain herself from the estate of her parents.

S.20 – Imposes obligation upon parents to maintain their children both legitimate and illegitimate.

S.20(2) – Children are entitled to maintenance during their minority and daughter - till she gets married.

MAINTENANCE UNDER MUSLIM LAW:

Wife loses the right to maintenance in the following cases

- a) She is minor, incapable of consummation
- b) Is disobedient

- c) Never visited her husband house
- d) Deserts him

An agreement between a Muslim and his first wife, made after his marriage with a second wife, providing for, certain maintenance if she could not in future get on with second wife is held not void on the grounds of public policy.

Valid Conditions for Agreement

- a) Husband treats wife with cruelty – she claim right to separate residence or maintenance
- b) Brings subsequent wife – previous wife can claim maintenance
- c) Brings his other wife to matrimonial home – previous wife will reside with her father's house and he will give her maintenance
- d) Disagreement with each other – entitled to maintenance

Maintenance of Children

A Muslim father is bound to maintain his sons until they attain puberty and daughter until married. He is responsible for widowed or divorced daughter.

If the father is poor or infirm, Mother is bound to maintain and failing her it is the duty of parental grandfather.

Muslim Women (Protection of Rights on Divorce) Act, 1986

S.3(1)(a) – Applies to divorced women with regard to reasonable and fair provision for the maintenance.

The special enactment prevails over the general enactment.

She can file under S.3(1)(a) and not under S.125 of crpc

MAINTENANCE UNDER CHRISTIAN LAW:

A Christian woman can claim maintenance from her spouse through criminal proceeding or/and civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it.

In criminal proceedings, the religion of the parties does not matter at all, unlike in civil proceedings.

Section 36 of the Indian Divorce Act, 1869 (IDA) are similar to S.24 of HM ACT. However S. 36 of IDA differs in the respect that the maintenance pendente lite and interim maintenance can only be claimed by the wife and not by the husband. If a divorced Christian wife cannot support her in the post divorce period she need not worry as a remedy is in store for her in law.

Under S.37 of the Indian Divorce Act, 1869, she can apply for alimony/maintenance in a civil court or High Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime.

The Indian Divorce Act, 1869 which is only applicable to those persons who practice the Christianity religion *inter alia* governs maintenance rights of a Christian wife.

In every such case, the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable:

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part as to the Court seems fit.

MAINTENANCE UNDER CRIMINAL PROCEDURE CODE:

S. 125 OF CRPC – ORDER FOR MAINTENANCE OF WIFE, CHILDREN AND PARENTS:

(1) If any person having sufficient means neglects or refuses to maintain-

- (a) his wife, unable to maintain herself, or
- (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
- (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or
- (d) his father or mother, unable to maintain himself or herself,

It should be kept in view that the provision relating to maintenance under any personal law is distinct and separate. There is no conflict between the two provisions. A person may sue for maintenance under s.125 of Cr.P.C. If a person has already obtained maintenance order under his or her personal law, the magistrate while fixing the amount of maintenance may take that into consideration while fixing the quantum of maintenance under the Code. But he cannot be ousted of his jurisdiction. The basis of the relief, under the concerned section is the refusal or neglect to maintain his wife, children, father or mother by a person who has sufficient means to maintain them. The burden of proof is on him to show that he has no sufficient means to maintain and to provide maintenance.

Section 125 gives a statutory recognition to the moral, legal and fundamental duty of a man to maintain his wife, children and aged parents. Although this section also benefits a distressed father, the main thrust of this section to assist women and

children. Article 15(3) of the Indian constitution envisaged that the state can make special provision for woman and children. Section 125 is also along the lines of Art.39 of the Indian Constitution that states that the State shall direct its policy towards ensuring that all citizens both men and women have equal access to means of livelihood and children and youths are given facilities opportunities in conditions of freedom and dignity.

The term ‘maintenance’ has been generally interpreted to include food, clothing and lodging. However, in recent time it has been held that any other requirements, i.e., necessary for a person to remain fit healthy and alive is also to be included within periphery of the term ‘maintenance’

In Mohd Ahmed Khan vs Shah Bano Begum (1985)

45 years after the marriage, the husband divorced his wife by pronouncing triple talaq and failed to provide maintenance. Wife filed petition for maintenance under S.125 Crpc. It was held that maintenance has to be given and is applicable to all women irrespective of religion under the code.

In Ram Chandra Giri v. Ram Suraj Giri 1980, where the father of a minor son neglected to provide maintenance, a petition was filed under section 125 of CrPC. Thereupon the father contended that the son has a good physic and was healthy and hence he had the ability to fend for himself. The Court rejected the contention and stated that the concept of potential earning capacity cannot be applied to, minor children as that would defeat the very purpose legislation.

ADOPTION RIGHTS AVAILABLE TO A HINDU WOMEN:

The provisions related to adoption for Hindus is codified under the Hindu Adoption and Maintenance Act, 1956. The subject of ‘adoption’ is stated in chapter II under section 5 to 17 of the Hindu Adoption and Maintenance Act, 1956.

S.8 of the Hindu Adoption and Maintenance Act, 1956 deals with the capacity of a Hindu Female to adopt a child. It states three conditions for a female Hindu to be capable to adopt a child:

- She should be of sound mind.
- She should be a major.
- She should not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or is of unsound mind.

A widow, divorced women and unmarried women, gets the right to adopt a child under Hindu Law.

S.11 - A Hindu female who adopts a child under this act should follow certain conditions for adoption. If a son is being adopted, the adoptive mother should not have a Hindu son, grandson or great-grandson at the time of adoption. Similarly, if a daughter is being adopted, the adoptive mother should not have a Hindu daughter, granddaughter, or great-granddaughter at the time of adoption. Further, if a male child is being adopted by a Hindu female then the adoptive mother should be at least twenty-one years older than the child.

In Raushan Devi vs Ramji sah (2002)

The trial court held that it is not a valid adoption. The Appellant court stated that the plaintiff had given her consent, and so a valid adoption is taken place. Hence adoption cannot be held invalid.

Subsequent adoption of deed of cancellation does not affect the status of the adopted son.

Adoption can never be cancelled by Adoptive father, Adoptive mother and Natural parents. Adopted child cannot renounce his/her status.

UNIFORM CIVIL CODE:

India is a diverse country with multiple religions and ethnicities living within its borders.

Uniform Civil Code =) All Sections of the society irrespective of their religion shall be treated equally according to the Nation's Civil Code.

It covers areas like - Marriage, divorce, maintenance, inheritance, adoption and succession of the property.

It is based on a concept that there is no connection between the religion and law in this Modern Civilisation.

Pre - Independent Era (colonial Period).

i) The Lex Loci Report of October 1840:

It stressed the importance, need and necessity of uniformity in the codification of Indian Law relating to Crimes, Evidence and Contracts. It also recommended that Personal Laws of Hindus and Muslims should be kept outside of such codification.

ii) The Queen's 1859 Proclamation:

It promised absolute Non-interference in Religious matters. So, it is understood that criminal laws were codified but personal laws continue to be governed by separate codes for different religions.

After Independence – Uniform Civil Code in Indian Constitution:

During the drafting of the Constitution, prominent leaders like Jawaharlal Nehru and B.R. Ambedkar, pushed for a Uniform Civil Code. But there were opposition from religious fundamentalists.

So, Uniform Civil Code was not made a Fundamental Right but this was included in **Part IV of Article 44**. It states that “The State shall endeavour to secure the citizen a Uniform Civil Code throughout the territory of India”.

PREAMBLE, FUNDAMENTAL RIGHTS – GUARENTEEING SECULARISM:

- a) Article 15- No discrimination on grounds of religion, race, caste, sex or place of birth
- b) Article 25- Freedom of conscience and free profession, practice and propagation of religion, subject to reasonable restrictions on the grounds of public order, health and morality
- c) Article 25 (2)-provides for regulating secular activities associated with religious practices, social welfare and reform.
- d) Article 26- Right to establish and administer religious institutions.
- e) Article 27- Prohibits the state from levying a tax, proceeds of which are used for the benefit of a particular religion
- f) Article 28- deals with the issue of religious instruction in educational institutions

42ND Constitution Amendment of 1976 inserted Secularism in the Preamble

In *S.R.Bommai vs Union of India*, Supreme Court held that Secularism is the basic feature of the Constitution.

Progressive Uniform Civil Code - Goa Civil Code:

Goa is the only State of India to have a Uniform Civil Code in the form of a common civil law.

- a) It allows equal division of income and property between husband and wife and children.
- b) Every birth, marriage and death have been registered compulsorily

- c) Muslims who have their marriage registered in Goa, can't practice polygamy or divorce through triple talaq
- d) Each spouse is entitled to half the property in case of divorce.

It has certain drawbacks too. By usages and customs, Hindu men has the right to bigamy. Eg. If wife fails to deliver a child before 25 years, he is permitted to remarry.

Indian Constitution - Sixth Schedule and exceptions and exemption:

Articles 371 (A) to (I) and the sixth schedule of the constitution of India provides certain protections or rather exceptions to the states of Assam, Nagaland, Mizoram, Andhra Pradesh and Goa with respect to family law.

Section 1(3) of the Code of Civil Procedure, specifically provides that it shall not apply to the State of Nagaland and the tribal areas.

Similarly, the Code of Criminal Procedure (CrPC), 1973, is not applicable to the State of Nagaland and to the tribal areas.

Tradition of Minority Tribes:

Garo and Khasi tribes of Meghalaya are matriarchate, that is, they follow a female line of descent and property is inherited by the youngest daughter. Among the Garos, the son-inlaw comes to live with his wife 's parents. Mikirs if the girl is an heiress and an only daughter, she does not leave her house upon marriages.

Personal Laws that dis-privilege Women in India:

Mohd. Ahmed Khan vs Shah Bano Begum 1985 - Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of

national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which entrusted with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

In Sarla Mudgal vs Union of India 1995 – Framing of Uniform Civil Code was insisted by the Court.

National Commission for Women (NCW) to Convention on Elimination of All Forms of Discrimination Against (CEDAW) women have repeatedly argued that registration of marriages would go a long way in addressing discrimination towards women and children.

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

Medical Termination of Pregnancy Act, 1972, section 3 provides that at the time of termination of pregnancy if the wife is a minor consent of the husband is required. It is evident that still minor women children are being conceived.

Manu, one of the ancient Hindu law givers, in Manu Smiriti, stated that a woman should be guarded throughout her lifetime and the duty is of the male member of the family. Her father guards her in childhood, her husband guards her in youth, and her sons guard her in old age, a woman is not fit for the independence

Section 6 of the Hindu Adoption and Maintenance Act, 1956 seems to have been constructed on the above understanding.

in the case of married girl- husband; ...

From this, it is understood that women is kept in the lowest pedestal than men.

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

Multiple pleas filed by Muslim women highlight discriminatory practices such as instant divorce, contract marriage (Muta), and short-term marriage to another man in case of divorce (Nikah halala) allowed under Islamic law.

Sikhs' marriage laws are covered under the Anand Marriage Act of 1909, but they lack provisions for divorce, resulting in Sikh divorces being governed by the Hindu Marriage Act.

Adoption laws also vary across different religions, with Parsis, for example, not recognising adoptive daughters' rights, while an adoptive son only has the right to perform the last rites of the father, but has no other rights of inheritance or maintenance under Zoroastrian practices. Proposals to change the adoption law have been met with opposition from the community. The discriminations in the personal laws have to be amended before framing of the Uniform Civil Code.

Challenges in Implementing Uniform Civil Code:

I) Diverse personal laws and customary practices:

There is significant diversity in customary practices among communities across India, making uniformity difficult to achieve. Additionally, many personal laws lack codification, and enforcing uniformity could interfere with these practices

II) Pending Litigations:

Several public interest litigations (PILs) are currently pending before the Supreme Court of India, seeking protection for women and regulation of laws related to divorce, guardianship, and succession.

III) Opposition from religious groups:

The Uniform Civil Code proposal has faced opposition from various religious groups, who argue that it infringes upon their rights and religious freedom.

IV) Lack of political consensus:

Achieving political consensus on the implementation of a Uniform Civil Code has proven challenging due to differing opinions and ideologies among political parties

V) Plurality of Indian society:

Cultural diversity cannot be compromised for the sake of uniformity.

VI) False perceptions:

Many people still do not know what the uniform civil code really means.

VII) Political Sensitivity:

The issue of a uniform civil code is a **highly sensitive and politicised issue in India**, and it has often been used for political gain by various parties.

VIII) Misinformation about UCC:

Minorities believe that this is the way of imposing majority views on them.

SUCCESSION:

The Succession starts at the time of the death of the person.

It is described under two categories.

- a) Intestate Succession
- b) Testamentary Succession

HINDU LAW:

Property held by a woman before codification in 1956 is divided into two categories

- a) Stridhana or property which she is the absolute owner
- b) Non- stridhana (Women Estate) or property which she is the limited owner.

The term **Stri** means Women and **Dhana** means property.

S.14(1) – The property acquired by skill and exertion is included in Stridhana and it is her absolute property.

HINDU SUCCESSION ACT 1956:

After the commencement of the Act, She becomes the absolute owner of the properties which she inherits through law.

S.14 of the Act states that Property of the Female Hindu to be her absolute property.

S.3(g) of Hindu Succession Act 1956 defines **Intestate** as “A Person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect”.

GENERAL RULES OF SUCCESSION IN CASE OF FEMALE HINDUS:

Section 15 of the Act prescribes general rules of succession in the case of female Hindus.

For the purpose of succession her property is divided into three catagories.

- 1) Property inherited by a female from her father or mother
- 2) Property inherited from her husband or father-in-law
- 3) Property which she herself acquired

The property of a female Hindu dying intestate shall devolve:

1. firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
2. secondly upon the heirs of the husband;
3. thirdly, upon the mother and father;
4. fourthly, upon the heirs of the father; and;
5. lastly, upon the heirs of the mother

S.15(2)(a) Any property inherited from her parents, shall devolve upon the heirs of the father in the absence of any son or daughter (including the children of pre deceased son or daughter)

S.15(2)(b) If the property is inherited from her husband or father-in-law, it shall devolve upon the heirs of the husband in the absence of son or daughter (including the children of pre deceased son or daughter)

Section 16 talks about order of succession and manner of distribution among heirs of a female Hindu

S.23 deals with special provisions related to dwelling houses. If a female Hindu inherits a dwelling house along with male heirs, she has no right to claim partition of such house until the male heirs divide their respective shares. But she has right to reside if

She is unmarried or

Has been deserted by her husband

Has separated from her husband

Is a widow

AMENDMENT ACT OF 2005:

The above gender discriminatory provision was removed by the 2005 Amendment which came into effect from 9.9.2005

S.23 which restricts her right to partition and right to reside was omitted in the amendment Act.

In Rathnakar Rao Sindhe vs Leela Ashwath (2007)

It was held that female heir can claim partition against male heirs and the restriction on her right ceased to be effective from 9.9.2005.

GUARDIANS AND WARDS ACT 1890:

The Guardians and Wards Act, 1890 is a secular act which provide the laws for guardianship to all communities irrespective to their religions and prescribes the whole procedure of appointing the guardians by court.

It is based on the doctrine of “Parens Patriae”. (The Latin term Parens Patriae means Parent of the Nation. Those who can't look after themselves will be looked after by the State.)

As far the Courts are concerned, they have the sole responsibility to look after the welfare of the minor falling under their care.

This Act extends to the whole of India.

S.4 (2) – “Guardian” means a person having the care of the minor or his property or of both person and property.

S.4 (3) – “Ward” means a minor for whose person or property or both there is a guardian.

PROVISIONS REGARDING THE PROCEDURE FOR OBTAINING GUARDIANSHIP UNDER THE GUARDIANS & WARDS ACT:

S.7 – POWER OF THE COURT TO APPOINT GUARDIAN

The court can appoint a Guardian when it is satisfied that it is for the welfare of the minor.

It can make an appointment of the guardian for his person or property or both.

If there was any de-facto guardian before the appointment of guardian by court, the court shall end the guardianship of that de-facto guardian.

(A De-facto Guardian is a person who takes continuous interest in the welfare of the minor or in the management and administration of his property without any authority of law).

S. 8 – PERSON’S WHO CAN APPLY TO BE APPOINTED FOR GUARDIAN BY COURT

A court shall make an order for the appointment of a guardian only in following cases-

- on the application of person desirous of being to be, the guardian of the minor, or
- on the application of a relative or friend of the minor, or
- on the application of the collector of the district or other local area within which the minor ordinarily resides or in which he has property.

S.9 – COURTS WHICH HAS JURISDICTION TO ENTERTAIN APPLICATION

If the application is for the guardianship of the ‘person’ of the minor alone, an application can be made in the district court where the minor ordinarily resides

If the application is for the ‘property’ of the minor, an application can be made either to the district where the minor resides or to the district court where he has the property.

S.10 – FORM OF APPLICATION

An application can be made by any person or by a collector, as the case may be.

If it is made by any person, it shall be in the form of a petition signed and verified in the manner prescribed by Civil Procedure Code 1908. It should contain

- a) the name, sex, religion, date of birth and ordinary residence of the minor.
- b) Where the minor is the female, whether she is married, and if so, the name and age of her husband

- c) The nature, situation and approximate value of the property of the minor
- d) The name and residence of the person having the custody or possession of the person or property of the minor
- e) What near relations the minor has and where they reside
- f) Whether the guardian of the minor has been appointed by any person entitled to make such appointment
- g) Whether the application is for the appointment or declaration of the guardianship
- h) Where the application is to appoint the guardian – the qualifications of the proposed guardian
- i) Where the application is to declare the guardian – the grounds on which the person claims
- j) Any other particulars, that is necessary to state in the application

If the application is made by the collector, it shall be by a letter addressed to the court and forwarded by post or in any other manner it may be found convenient and shall state the above-mentioned particulars.

The application must be accompanied by the declaration of the willingness of the proposed guardian and it has to be signed by him and attested by at least **Two** Witnesses.

S.11 – PROCEDURE ON ADMISSION OF APPLICATION

If the Court is satisfied that there is a ground for proceeding on the application, then it shall fix a day for hearing. It shall serve the notice of application and the date fixed to hearing to

- a) The parents of the minor
- b) The person, if any, named in the petition or letter as having the custody or possession of the minor or property or both

- c) The person proposed in the application to be appointed or declared guardian, unless the person is himself the applicant
- d) Any other person to whom, in the opinion of the Court, special notice of the application should be given.

Notice shall be posted in the conspicuous part of the court and of the residence of the minor and otherwise published subject to any rules made by the High Court.

S.12 – Interlocutory Order for production of Minor and Interim Protection of the Minor

The Court may direct the person who has the custody of the minor shall produce him at such place and time as the court fixes. It may make further order for the temporary custody and protection of the person or property of the minor

Without the consent of the parents, Court will not place the female minor in the custody of her husband.

S.13 – HEARING OF EVIDENCE

On the day fixed for hearing, the court shall hear such evidence in support of or in opposition of the application

S.14 – SIMULTANEOUS PROCEEDINGS IN DIFFERENT COURTS

If the case is filed and proceedings are made in more than 1 court, then each court may stay the proceedings. If those courts are both subordinate to the same High Court, they shall report to the high court, and it shall determine in which court the case shall be proceeded.

Courts are related to different high courts; the Court shall be guided and acted upon the orders it receives from respective State Governments.

S.15 – APPOINTMENT OR DECLARATION OF SEVERAL GUARDIANS

If in the personal law of the minor, two guardians to be appointed, then the court may appoint joint guardians.

The Court may also appoint Separate Guardian for the minor and also Separate Guardian for several properties of the minor.

S.16 – APPOINTMENT OF GUARDIAN BEYOND JURISDICTION OF THE COURT

If the Court appoints a guardian for any property situated beyond the local limits of its jurisdiction, then the court which has that jurisdiction, on receiving the certified copy of the order, accept him as duly appointed guardian.

S.17 – MATTERS TO BE CONSIDERED BY THE COURT IN APPOINTING GUARDIAN

The court shall consider the welfare of the minor with regard to

- a. Age, sex and religion of the minor
- b. The character and capacity of the proposed guardian
- c. The wishes, if any, of the deceased parent
- d. Any existing or previous relations of the proposed guardian
- e. If the minor is old enough to form an intelligent preference, the court may consider that preference

The Court shall not appoint or declare any guardian against his will.

S.19 - CASES IN WHICH COURT AS NO POWER TO APPOINT A GUARDIAN

The Court shall not have power to appoint the following persons as Guardian

- a) A minor married female whose husband is unfit to be a guardian
- b) A minor whose father and mother is living but unfit to be a guardian

R.V. Srinath Prasad v. Nandamuri Jayakrishna & Ors 2001

The guiding principle, however remains the best interest of the child. A custody order passed, therefore, can never be final in nature. On multiple occasions, the Supreme Court has observed that with the change in the circumstances, the wards can seek for alteration in the order of custody proceedings.

Anjali Kapoor v. Rajiv Baijal, 2009 the Court took into consideration the fact that the child was living with the grandparents for a long time and the environment was conducive for his growth. Therefore, the custody of the child was handed over to the grandmother, rather than the father

Chapter 3

Gender Justice and Criminal Law

Dowry Prohibition Act, 1961:

Dowry:

A dowry is a transfer of parental property, gifts, property or money upon the marriage of a daughter.

Locally Dowry is called Varadhachanai in Tamil, Dahej in Hindi, , Daaj in Punjabi, Jehaz in Urdu and Arabic, Joutuk in Bengali, Jiazhuang in Mandarin, ceyiz in Turkish, Dot in French, Daijo in Nepali, Miraz in Serbo-Croatian and in various parts of Asia as *Serotwana*, *Idana*, *Saduquat*, or *Mugtaf*.

In Ancient Period Dowry system existed in India, Babylon, Ancient Greece, Roman Empire, China, Europe, England, Russia, United States of America and Brazil.

Dowry – Definition:

According to **Section 2 of Dowry Prohibition Act 1961**, Dowry is defined as

“dowry” means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before [or any time after the marriage] [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation II.-The expression ‘valuable security’ has the same meaning as in Sec. 30 of the Indian Penal Code (45 of 1860).

Section 30 of I.P.C.: “The words “valuable security” denote a document which is, or purports to be, a document where by any legal right is created, extended, transferred, restricted, extinguished or released, or where by any person acknowledges that he lies under legal liability or has not a certain legal right”.

Difference between Dowry and Stridhana

Stridhana:

Stri means women and Dhan means property. Stridhan is a gift that is voluntarily given to the bride by her parents, relatives or friends before or after marriage. Self-acquired properties of the women are also considered as Stridhan.

Dowry refers to any property or valuable security that is given or agreed to be given by the bride’s family to the groom’s family before, after or during the time of marriage.

The difference between dowry and stridhan are as follows.

Sr. No.	Dowry	Stridhan
1	Any property or valuable security that is given or agreed to be given by the bride’s family to the bride-groom family before, after or during the time of marriage	Stridhan is a gift that is voluntarily given to the bride by her parents, relatives, husband or his family either before or after marriage. Self-acquired properties of the women are also considered as Stridhan

Sr. No.	Dowry	Stridhan
2	The Element of demand, undue influence or coercion is present	The Element of demand, undue influence or coercion is absent.
3.	It is illegal and unethical.	It is considered legal and an empowering aspect of women's life
4.	Dowry Prohibition Act 1961 is enacted to prevent the giving and taking of dowry, as in 1900's the incidence of Dowry deaths is too high.	There is no such Act enacted to prevent Stridhan as it is a voluntary act and the women has absolute right in that property
5.	It does not give Financial independence to the bride because it is demanded and taken by the groom's family	It gives Financial independence and aids in empowerment of women as the property and other valuables belongs exclusively to her.
6.	Dowry deaths are a crime and punishments are prescribed under IPC under section 304B.	Criminal breach of trust under sec 405 of IPC occurs if the bride groom and his parents refuse to return the articles given in marriage.

Acts amounting to offence under Dowry Prohibition Act 1961.

Giving or taking dowry is considered as an offence under Dowry Prohibition Act, 1961.

Section 3 of the Dowry Prohibition Act, 1961 states that the punishment for this offence is imprisonment which shall not be less than 5 years and with fine which shall not be less than 15000 rs or the amount of the value of such dowry, whichever is more.

Demanding of dowry is also punishable under **Sec 4** for the term of six months to 5 years and fine upto Rs.!5000.

S.5 states that any agreement for the giving and taking of dowry is void, and it shall not have any value in the eyes of law.

S.7 to S.10 deal with the procedural aspects of dowry prohibition.

INDIAN PENAL CODE AMENDMENTS IN 1983 AND 1986:

The appropriate target of criminal law not only limited to dowry problems but the violence connected with dowry also comes under the purview of criminal law. Failure of dowry legislation and increase in rate of dowry death led to the Criminal amendment in the year 1983 and 1986 by adding section 304-B and 498-A.

Dowry Death-Section 304-B IPC: - The offence under section 304-B defines “Dowry Death” is the death caused to woman by burns or bodily injury, or under unnatural circumstances within seven years of her marriage, where it is shown that she was harassed or put to cruelty by husband or his relatives in relation of dowry the punishable with a term of seven years to life imprisonment. The period of seven years would be considered as cut period for reason that seven steps taken by bride and bride groom of the sacred nuptial fire for completion of marriage where one step is considered as one year. Supreme Court in the case of **state of Punjab v. Iqbal Singh (1991) 3 SCC 1** explained the period of seven years as it is considered to be turbulent one after which the legislature assumed that the couple would have settled down in life.

Cruelty on woman by Husband or Relatives-Section 498A, IPC:

When her husband or his family member subjects the woman to cruelty or harassment. Cruelty by her husband or relatives has been made punishable with imprisonment up to three years and fine u/s 498-A. The word cruelty means both

mental and physical torture. It consists of any wilful conduct likely to drive the woman to commit suicide or to cause danger to her life, limb or health, mental or physical or harassment to coerce her or any other person by making an unlawful demand for dowries such as property or any goods.

Intentional Death of women –Section 302 IPC: – If a person intentionally causes woman death, then punishable under section 302 IPC.

Fourthly, Abetment of Suicide of Woman- Section 306 IPC: - If husband and his relatives create a situation which led to the suicide of woman within seven years of marriage fall within the ambit of section 306.

CODE OF CRIMINAL PROCEDURE,1973 AMENDMENT IN 1983:

Section 174 and 176 deals with the investigation and enquiries related to the causes of unnatural deaths by police and magistrate respectively. The amendment act of 1983 makes mandatory for

police to send the body for post-mortem examination if the death of woman occurred within seven years of marriage in a matter of suicide or any dubious matter. It also empowers executive magistrate to inquiry into the death of a woman in similar circumstances.

INDIAN EVIDENCE ACT,1872 AMENDMENT IN 1986:

A new provision, **section 113B** has been created regarding the burden of proof in dowry death according to which court has to presume that a dowry death was caused by the person who is shown to have subjected the woman to cruelty or harassment soon before her death. This provision is inserted inorder to strengthen the prosecution hands by permitting a certain presumption to be raised if certain fundamental facts are established and the unfortunate incident of death has taken place within seven years of marriage.

Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013. (POSH Act 2013)

- i) It is an Act to provide protection against sexual harassment of women at workplace
- ii) Prevention and redressal of complaints of sexual harassment.

The Act had in its background the famous Vishaka case of 1997. Vishaka guidelines was framed.

In Medha Kotwal Lele vs Union of India (2013), the SC highlighted the non-compliance and non-adherence to Vishaka guidelines in workplace in India urged the need for a legislative enactment.

This Act contains 30 sections and 8 chapters.

Section 2(n) defines Sexual Harassment.

“Sexual harassment” includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: —

- (i) physical contact and advances; or
- (ii) a demand or request for sexual favours; or
- (iii) making sexually coloured remarks; or
- (iv) showing pornography; or
- (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature

Section 2 (h) – Internal Committee means an Internal Complaints Committee constituted under S.4

Section 2(i) – Local Committee means the Local Complaints Committee constituted under S.6

Chapter 2 of the Act requires an employer to set up an Internal Complaints Committee at each office or branch of an organisation employing atleast 10 employees to hear and redress grievances pertaining to sexual harassment.

Section 4 deals with the constitution of Internal Complaints Committee.

- a) The Chairperson of ICC will be the senior most woman worker of the workplace
- b) Not less than Two members who are employees and committed to cause of women or social work
- c) One member from the non-governmental organisation.

Women should constitute 50% of overall committee members. The Committee members can hold office for a period not exceeding 3 years.

Chapter 3 provides for the provisions related to the constitution and jurisdiction of Local Complaints Committee.

The Government has to set up a Local Complaints Committee at the district level, to investigate complaints regarding sexual harassment where ICC has not been constituted because such establishments (eg. Companies) may have employees less than 10 persons.

Section 6 deals with the Constitution and jurisdiction of Local Complaints Committee (LCC).

The district officer shall constitute LCC which shall consist of

- a) A chair person – eminent woman in the field of social work related to the cause of the women.
- b) One member from taluk level
- c) Two members from non-governmental organisations – one member should have knowledge of law and one member from SC, ST or Backward classes.

Procedure (Section 9 – 18) – Complaints under Internal Complaints Committee and Local Complaints Committee

The process to be followed for making a complaint and inquiring into the complaint are given under S.9 to S.18.

- Any aggrieved women have to make complaint in writing before the ICC within **3 months** from the date of incidence. (Exception – If the committee decides to extend the period it can do so)
- The Committee shall complete the enquiry within a period of 90 days from the date of filing the complaint. The committee has the power of civil court to conduct enquiry.
- The committee can conduct conciliation at the instance of the aggrieved woman. If compromise is reached, the committee shall not conduct the enquiry of the complaint. If Compromise not reached, then enquiry will be conducted.
- If the employee has committed the act of committing sexual harassment, it shall make complaint to the police within 7 days and recommend the employer to take action against the employee.

Powers of the Commission:

It has the power of Civil Court to conduct enquiry.

The committee during the enquiry may recommend the transfer of aggrieved woman or employee.

The woman can even be given 3 months leave, If the case so warrants.

All the names of the parties are to be kept in confidence and cannot be disclosed even under Right to Information Act.

Any amount payable to the women shall be deducted from the salary of employee. If he had resigned already, it will be recovered from him as land revenue. The District Collector shall initiate the recovery of land revenue within 60 days from the date of receipt of order from committee. The Committee is empowered to recommend punitive measures to employer against woman who has made false and malicious complaint (S.14). It can punish the person who has given false evidence or forged document during the enquiry. An employer who fails to constitute a committee or fails to implement the recommendations of the committee, may be punished to the extent of 50,000 rs as fine. A repetition of the same could result in the penalty of fine being doubled. Government can take action of cancelling the license of the establishment.

Employer's Obligation (Section 19)

- a. To provide safe working environment
- b. Display the penal consequences of indulging in sexual acts in the conspicuous place of the work place. Display the composition of ICC
- c. Organise workshops and awareness programmes for employees on issues of sexual harassment of workplace.
- d. Treat sexual harassment as a misconduct under the service rules and initiate action against the misconduct.
- e. Monitor the timely submission of reports by ICC.

EQUAL REMUNERATION ACT 1976

Prefatory Note (Meaning of Prefatory is beginning or introduction – for your reference)

Article 39 of the Constitution states that State has to make policies towards securing equal pay for equal work for both men and women. In order to implement this Article 39, this Act was passed.

Equal Remuneration Bill Ordinance was promulgated by the President in the year **1975** which is known as **International Women's year**. Later Equal Remuneration Act was passed in 1976.

This Act contains 3 chapters and 18 sections.

Objectives of the Act:

- i) To provide equal remuneration to men and women workers for the same nature of work
- ii) Prevent discrimination on the ground of sex against women in the matter of employment.
- iii) Prevent discrimination against women in the matter of recruitment.
- iv) To establish Advisory Committees to promote employment opportunities for women.

This Act has overriding effect as per Sec 3. That is, if there is any inconsistency in provisions relating to this Act with any other law, only this law will prevail.

S.4 states the **duty of employer to pay equal remuneration** to men and women from same nature of work and **S.5** states that **no discrimination to be made while recruiting** men and women workers.

S.6 deals with Advisory Committee. To increase employment opportunities to women, the appropriate Government can constitute Advisory committees. The committee shall consist of not less than 10 persons who are nominated by the appropriate Government and of which one-half (50%) shall be women.

The Government will appoint officers, not below the rank of Labour officer to hear and decide claims and complaints (**S.7**).

Section 10 deals with **penalties**. If the employer fails to maintain any register or fails to produce any document or refuses to give any information concerned with workers, then shall be punishable with simple imprisonment of 1 month or 10000 rs fine or both.

If he has acted in a manner which contravenes to the provision of the Act, then imprisonment for a term of 3 months to one year and fine 10000 to 20000 for offence committed for first time. Offence repeated means, it shall extend to 2 years.

In Mackinnon Makenzie & Co Ltd vs Audrey D' Costa (1987) 2 SCC 469

Lady stenographers were paid less than male stenographers but both had the same nature of work. It was held that this is discriminatory and stated that the employer is obliged to pay equal remuneration to both men and women employees who are doing the same nature of work.

In People's Union for Democratic Republic Vs Union of Idia (1982), Women were only paid Rs7 per day and Men were paid Rs. 9.25 per day for similar nature of work. It was held that the authorities must pay equal wages to both men and women.

Law relating to Obscenity and Indecent Representation of Women:

The Laws relating to Obscenity and Indecent Representation of Women are as follows:

Obscenity:

Obscenity refers to an Indecent expression which could be displayed through words, actions or gestures that outlines sexual conduct. Decency means avoiding the use of obscene language and gestures.

Provisions relating to obscenity is included in Section 292 to 294 of IPC.

Sec 292 and S.293 of IPC prohibits publication and sale of obscene books, pamphlets, paper, writing, drawing and representation which shall be deemed to be lascivious (lustful) or appeals to prurient (materials having tendency to excite lustful thoughts) interest. This includes obscene advertisements too.

S.294 of IPC prohibits obscene acts and songs. If any one does obscene acts in public place or sings, recites or utters any obscene songs or words in public place – shall be punished with imprisonment for a term which may extend to 3 months or fine or both.

In Promila Kapur vs Yash Pal Bashin (1989)

The Delhi High court examined the book titled “Indian Call Girls”. It was held that it was nothing wrong if a sociologist made research on the subject of call girls in order to know the reasons as to how and girls enter this profession.

S.354 states that assaulting or using criminal force to outrage the modesty of women. The punishment is 1 year to 5-year imprisonment and with fine.

Indecent Representation of Women:

To prevent indecent representation of women in numerous forms, Parliament passed **Indecent Representation of Women (Prohibition) Act, 1986**. The object of the Act is to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner. The penalty (S. 6) includes imprisonment which may extend to 2 years and fine which may extend to 2000rs on first conviction. On subsequent conviction, it may extend to 6 months to 5 years and fine 10,000 to 1,00,000rs.

S.67(A) of Information Technology (Amendment) Act, 2008 states that a publishing obscene or sexually explicit materials in electronic form will lead to punishment of 5 years imprisonment and fine 10 lakh rs for first offence and for subsequent offence it is 7 years and fine 10 lakh rs.

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection Act, 1994 (PCPNDT Act)

Objectives of the Act:

- To prohibit the misuse of pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide.
- To prohibit advertisements of the techniques for detection or determination of sex.
- To regulate the use of techniques only for the specific purpose of determining genetic abnormalities or disorders.
- To provide punishments for violation the provisions of the Act.
- To provide deterrent punishment to stop such inhuman acts of female foeticide.

Scheme of PCPNDT Act:

This Act contains 34 sections and 8 chapters.

It **regulates** Genetic Counselling centres,

Laboratories, clinics and also pre-natal diagnostic techniques. It envisages the establishment of a Central Supervisory Board and Advisory Committee.

It calls for the registration of Genetic Counselling Centres, Genetic Laboratories or Clinics. It also prescribes penalties for the offences.

Regulation of pre-natal diagnostic techniques:

S.4 – permits the use of pre-natal diagnostic techniques only for detecting

Chromosomal abnormalities

Genetic metabolic diseases

Haemoglobinopathies

Sex-linked genetic diseases

Congenital anomalies or any other abnormalities.

If anyone conditions, this pre-natal diagnosis technique can be carried out.

1. When the pregnant woman is above 35 years of age.
2. Where the pregnant woman has already undergone two or more spontaneous abortions or foetal loss
3. Where the pregnant woman has been exposed to potentially dangerous agents like drugs, radiation, infection or chemicals.
4. Where the pregnant woman or spouse has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.

Prohibitions:

S.6 prohibits Genetic Centres, Laboratories and Genetic Clinics from conducting any tests for **determining the sex of a foetus**. The same prohibition applies to Individuals also.

If pre-natal diagnosis techniques are used and the sex of the foetus is known, then **S.5 prohibits communication of the sex of the foetus to the pregnant woman or to any of her relatives.**

Any form of communication by words or sign is prohibited.

Guidelines before using the pre-natal diagnostic techniques.

S.5 lays down certain conditions which have to be fulfilled before carrying out this process.

1. Obtain her consent after giving her an explanation in the language she understands.
2. Give her a copy of her written consent,
3. Explain the side effects and the consequences of using the technique on the pregnant woman.

Unless and until these conditions are fulfilled, this tests should not be carried out.

Central Supervisory Board:

S.7 – 16A deals with Central Supervisory Board.

The Act directs the Central Government to Constitute the Central Supervisory Board.

- a. Minister and Secretary of the Ministry of Family Welfare
- b. 3 members – one member from Ministries of Central Government in charge of woman and child development, one member from Ministry of Law and one member from Director General of Health Services of Indian Medicine and Homeopathy.
- c. 10 Members – Eminent doctors, gynaecologists, paediatricians, social scientists, women welfare organisations. 3 women members of Parliament, 4 members to be appointed by CG.

Functions of the Board:

S.16 deals with the following functions of the Board.

1. To advise the Government on policy matters relating to the use of pre-natal diagnostic techniques.
2. To review and implement the Act and to recommend changes of the said Act.
3. To create public awareness against the practice of determination of sex and female foeticide.
4. To lay down the code of conduct to be observed by persons working at Genetic Counselling centres, Genetic Laboratories and Genetic Clinics.
5. To supervise performance of various bodies constituted under the Act and To take appropriate steps to ensure its proper and effective implementation.

Appropriate Authority: The Government Under **S.17 can appoint one or more appropriate authority** for Union Territories and State will appoint appropriate authority for respective States to prevent prenatal sex determinaton leading to female foeticide. Their functions are as follows:

- a. To grant, suspend or cancel registration of a Genetic Counselling Centre, Laboratory or Clinic.
- b. To enforce standards for such Centres, Laboratories or Clinics.
- c. To investigate complaints of the breach of the provisions of the Act
- d. To take appropriate Legal action against the use of any sex selection technique by any person at any place either by suo moto or by receiving notice from others.
- e. To create awareness against the practice of sex selection
- f. To recommend the board regarding any modifications required in rules with change in technology or social conditions.
- g. To take actions on the recommendations of the Advisory Committee regarding suspension or cancellation of license,

Advisory Committee

The Central Government or State Government shall constitute an Advisory Committee for each appropriate authority to aid and advise it in the discharge of its functions.

Registration:

Under **S.18** of the Act, No Genetic Counselling Centre, Genetic Laboratories or Genetic Clinic **can function unless they are duly registered under the Act**. Only if Appropriate Authority is satisfied, it will grant a certificate of registration under S.19. If Requirements have not been compiled, then it will reject the application for registration.

The appropriate Authority under **S.20 can cancel or suspend a registration**, if found the Centre had misused diagnostic techniques. An appeal can be made against such suspension or cancellation within 30 days to Central Government or State Government whichever is appropriate under S. 21.

Prohibition of Advertisement relating to Sex determination

S.22 of the Act states that no person, organisation, Genetic Counselling Centre, Genetic Laboratories or Genetic clinic including centres having ultrasound machine or imaging machine or scanner or any other technology capable of determining sex of the foetus shall issue, publish or distribute or communicate any advertisement in any form, including Internet, regarding facilities of pre-natal determination of sex. If any person contravenes this provision, then the punishment is **imprisonment for a term which may extend to 3 years and with fine which may extend to 10000rs.**

S.27 of the Act makes every offence cognizable and non-bailable and non-compoundable. Metropolitan Magistrate or Judicial Magistrate of First Class can try this offence.

They shall take cognisance if the complaint is made by the appropriate authority or a person who has given not less than 15 days notice of the offence to the appropriate authority.

In Centre for Enquiry and Allied Themes vs Union of India (2003), the Supreme Court directed all States to confiscate ultra sound equipments from clinics that are being run without licenses to stop illegal sex-determination.

In Malpani Infertility Clinic (P) Ltd vs Appropriate Authority (2005),

A writ petition was filed by an NGO, CEHAT (Centre for Enquiry and Allied Themes) in 2001, against the activities being carried out by the Malpani Infertility Clinic which are banned by the PCPNDT Act. The petitioners diagnostic centre was allegedly carrying out prohibited activities involving pre-natal sex determination leading to female foeticide. This case was filed to challenge the order issued by the Appropriate Authority under the provisions of PCPNDT Act, 1994 which suspended the registration of the clinic. They ie the petitioners in their affidavit defended that the sex determination test was done on the ground of “family balancing”. It was held that this Act strictly bans this provision as this leads to female foeticide. Later they tendered apology through another affidavit and stated that only wrong committed by them was to continue the advertisement on website. The court gave appropriate directions for the implementation of the Act and thereby disposed of the petition.

Chapter 4

Feminist Jurisprudence

WOMEN'S POSITION:

According to Mahabharata, the following categories of persons are to be excluded from the place where the king holds consultations – “dwarfs, humpbacked persons, lean men, lame and blind men, idiots, eunuchs and women”. (Most often women were treated as objects, and lumped together with other items of property – Villages, gold and cows).

Manu and Chanakya, the ancient law givers, barred women from any responsibilities. They were not even considered fit to be witnesses.

According to **Confucious (551 – 479 BCE) Chinese Philosopher**, the subordination of woman to man was one of the supreme principles of government.

Aristotle (384 – 322 BC) Greek Philosopher – Greek family with the subordination of wife, children and slaves is natural and the best form of family structure. He also hold the view that Women are naturally inferior and are meant for procreation.

Feminist Jurisprudence has two terms. The term ‘Feminist’ refers to ‘in favour of female’ and Jurisprudence means ‘study of law’. Feminist jurisprudence means the philosophy of law based on three equality which are political, economic and social equality of sexes. According to this theory, law is not neutral and power is given in the hands of the males. This theory is also known as ‘Feminist Legal Theory’.

Feminism is an old concept. The term ‘Feminism’ was first coined by Francois Marie Charles Fourier in 1837, French Philosopher. He believed that all important jobs should be open to women on the basis of skill and aptitude rather than on

account of gender. **Mary Wollstonecraft** is the mother of feminism. In her book, 'A Vindication of the Rights of Women' in 1792, Women's right and equality was established.

A pamphlet was published in 1791 in France in which French politician Charles Maurice de Talleyrand-Perigord recommended public education for men but private education for women since they live more secluded lives. Her rebuttal claims that only free people can be virtuous citizens. She explores the oppression of women by men and argues that no society can be either virtuous or moral while half the population are subjugated by the other half.

Feminism is the global idea in which both Men and Women both deserve equal rights namely Social, Political and Economical.

It is a collection of social theories, political movements and moral philosophies with opposing and conflicting views largely motivated by experiences of women, with reference to inequalities in terms of social, political and economic backdrop. It is a social, political and economical movement aimed at establishing equal rights and legal protection for women.

4 waves of Feminism

- a) 19th and early 20th century (1850 - – It was concerned with women's right to vote, Right to Education. It promoted equal property rights for women.
- b) Second wave – 1960's and 1970's. It refers to women's liberation movement for equal legal and social rights. It had the slogan "The Personal is Political". It criticised the idea that women could find fulfilment only through child rearing and home making. It focussed on Reproductive right, Equal pay for Equal work, Movement against domestic violence.

- c) Third Wave – Early 1990's. It focusses on Women's lives irrespective of race, ethnicity, class, religion, gender and nationality are all significant factors while discussing Feminism.
- d) Fourth Wave – 2012. It focussed on empowerment of women and the use of internet tools. It seeks gender equality and argues for equal pay for equal work. It opposes sexual harassment, body shaming in media.

THEORIES OF FEMINISM

1. Liberal Feminism

The historical origin of Liberal Feminism goes back to the 18th century – the Enlightenment Period of Western Europe.

It was the Age of Reason. The thinkers of this era such as Mary Wollstonecraft, John Stuart Mill touched the nature and role of women. The concept is Individualism; ie an individual possesses the freedom to do what he wishes without interference from others.

Mary Wollstonecraft – Women are first and foremost human beings and not sexual beings. Women are rational creatures, capable of governing themselves by reason.

John Stuart Mill – The Legal subordination of women over men is wrong in itself and it ought to be replaced by perfect equality between them.

The Liberals accepted the common arrangement by which Man earns the family income and wife superintends the domestic expenditure.

The wife if she goes out to work, will not be able to perform child rearing and house management and therefore a wife should contribute by her household duties. The differences are accepted but they both are considered equal. They advocated that they must have civil rights such as Right to Vote and Right to education.

2. Radical Feminism

Kate Millett, Shulamith Firestone, Germaine Greer and Ellen Frankfort are some well-known Radical Feminists.

It started around 1969 – 1970. The Radical Feminists believe that the roots of subordination lie in the biological family. The biological distinction is used to distinguish social functions and power. It results in male domination of power over women.

They assert that patriarchal system is preserved via marriage and family through sexual division of labour in society. They want the removal of sex distinctions but also they claimed that there is no place for men in their lives. Man was considered as an enemy and subordination was seen as biopsychological supremacy of male over female.

They opposed the sexual objectification of women, raising public awareness about such issues as rape and violence against women, and wanted to introduce Reproductive rights, Reproductive technologies, Abortion as feminist issues.

3. Socialist Feminism

Social Feminists believe that the powerlessness of women in society is rooted to four basic structures.

They are Production, Reproduction, Sexuality and Socialisation of children. Family reinforced women's oppressive condition. They argued that women's oppression is based on unpaid household work.

But they are not anti-man unlike Radical feminists. They believe in collaborating with men if they support women's cause. They do also believe that women's issue are specific and they need focused analysis and attention.

4. Post Modern Feminism

Post Modern Feminism states that all women are different and there is a possibility that women can't speak in a unified voice or they can be universally addressed. Various women will have different reactions to technologies, depending upon their own class, race, country and other factors.

There is no behaviour which is universally associated with either masculinity or femininity. What is considered masculine in some societies may be considered feminine or gender-neutral in others. So a Feminist theory is not possible.

5. Cyber Feminism

Cyber Feminism is a term coined in 1994 by Sadie Plant (Director of Cybernetic Culture Research Unit, Britain). It describes the work of feminists interested in theorizing, critiquing and exploiting the Internet, cyberspace and new-media technologies in general. Cyber Feminism advocates women's use of new information and communication technologies for empowerment. This theory arose in late 1980's and early 1990's. An example of cyberfeminism is the Iranian Women's Cyber Army (IWCA) which was formed in 2006. It is a group of Iranian Women who use hacking and other computer related activities to protest against the Iranian Government's policy on women's rights.

6. Multi-cultural or Global Feminism

It seeks the betterment of the lives of women. It emphasizes empowerment for women. It understands and addresses the needs of all women regardless of race, class, colour, age and physical disability. It recognises all other differences and not just gender. It focusses on Inclusion of oppressions based on gender, age and ethnicity, Intersection on gender with race and the exploitation of women in developing countries.

As far as **India** is concerned, the 19th century social reformers supported Liberal feminists. They focussed on eradicating social customs like Sati, Child Marriage and supported widow remarriage. They considered that women have to be educated so that they could become better wives and mother.

The ideas of Sexual freedom, Sexual preferences of women are still not widespread in India.

DIFFERENCE BETWEEN SEX AND GENDER:

People often use the terms “sex” and “gender” interchangeably, but this is incorrect. Sex refers to biological physical differences, while gender is how people identify. “Sex” refers to the physical differences between people who are male, female, or intersex. A person typically has their sex assigned at birth based on physiological characteristics, including their genitalia and chromosome composition.

This assigned sex is called a person’s “natal sex.” Intersex is a general term used for a variety of situations in which a person is born with reproductive or sexual anatomy that doesn’t fit the boxes of “female” or “male.” Sometimes doctors do surgeries on intersex babies and children to make their bodies fit binary ideas of “male” or “female”.

Being intersex is a naturally occurring variation in humans, and it isn’t a medical problem — therefore, medical interventions (like surgeries or hormone therapy) on children usually aren’t medically necessary. Being intersex is also more common than most people realize. It’s hard to know exactly how many people are intersex, but estimates suggest that about 1-2 in 100 people born in the U.S. are intersex.

Gender, on the other hand, involves how a person identifies. Unlike natal sex, gender is not made up of binary forms. Instead, gender is a broad spectrum. A person may identify at any point within this spectrum or outside of it entirely.

People may identify with genders that are different from their natal sex or with none at all. These identities may include transgender, nonbinary, or gender-neutral. There are many other ways in which a person may define their own gender.

Gender also exists as social constructs — as gender “roles” or “norms.” These are defined Trusted Source as the socially constructed roles, behaviors, and attributes that a society considers appropriate for men and women.

Sr. No	SEX (NATURE)	GENDER (CULTURE)
1.	Sex is a Biological Composition of a human body	Gender is a Social and Cultured difference between male and female.
2.	Sex depends on biological features such as chromosomes, sex organs, hormones and other physical features.	Gender depends on the social factors such as Social role, position, behaviour or identity which is imposed by human society between men and women
3	It can be stated as a Nature made concept.	It is a Man made concept.
4	It refers to physical differences between people who are male, female or intersex.	Here, a people identity include Men, Women or transgender.
5	Classification of Male and Female Comes under Sex catagories.	Masculine and Feminine comes under Gender catagories.
6	Examples include Child bearing of women, Reproductive systems, Growing of beards etc.	Girls are made to wear jewels, Parents rebuke their sons when they are crying as crying is considered as girly attitude.

WOMEN EMPOWERMENT AS A SOCIAL CHANGE & ROLE OF LAW IN EMPOWERING WOMEN

WOMEN EMPOWERMENT

The freedom or the liberty to make decisions about themselves, their health, career, education, and, more importantly, their life and choice is known as women's empowerment.

Women's empowerment means that women should be treated equally to men in social, economic, and political fields. It is essential for the overall development of a country.

Empowering women also helps them to feel more confident as it enhances their decision-making power.

The principle of 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 adopt measures of positive discrimination in favour of women. From the Fifth Five Year Plan (1974-78) onwards has been a marked shift in the approach to women's issues from welfare to development.

In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women. The 73rd and 74th Amendments (1993) to the Constitution of India have provided for reservation of seats in the local bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.

OBJECTIVES OF NATIONAL POLICY FOR EMPOWERMENT OF WOMEN

1. Creating an environment through economic and social policies for full development of women to realise their full potential.
2. Equal access to participation and decision making of women in social, political and economic life of the nation.
3. Strengthening legal systems aimed at elimination of all forms of discrimination against women.
4. Building and strengthening partnerships with civil society, particularly women organisations.

SOCIAL CHANGE

Social change is a change in the norms and conducts of people towards society. As social norms and values change, laws too have to be reinterpreted.

Eg. To remove slavery from India, Inda Slavery was passed in 1843. Later in Indian Penal Code 1860, it was declared as an offence under S. 370 and S.371. In 1948, UDHR (Universal Declaration on Human Rights in Article 4 states that slavery and slave trade shall be prohibited in all forms. Article 23 of Indian Constitution 1950, which is a Fundamental Right state to prohibit human trafficking and forced labour. Report on Global Estimates on Modern Slavery was published on 12th September 2022 by ILO (International Labour Organisation), and it states that 50 million people were living in modern slavery in 2021. Report: Global Estimates of Modern Slavery: Forced Labour and Forced Marriage (ilo.org)

So laws have been reinterpreted or amended to make world without slaves or to make people aware so that they will not be exploited by personal or commercial gain.

WOMEN EMPOWERMENT AS A SOCIAL CHANGE:

It is evident that social change or transformation is taking place in the society. Feminism in India is brought by Men and they focussed on eliminating Sati system. Raja Ram Mohan Roy started his own campaign against Sati system as he in his childhood, was deeply moved by seeing his own 17-year-old sister-in-law being forced to commit Sati and was burnt alive. The following are the social changes that are made by the State for empowering women.

a) Education:

Equal access to education for women and girls will be provided. Reducing the gender gap in secondary and higher education will be a focus area. Gender sensitive curriculum will be developed at all levels of education system in order to address sex stereotyping as one of the causes of gender discrimination.

In Tamil Nadu, 50% subsidy to women to buy scooters and free laptops with Internet for girls is provided in Class 11 and 12.

Kerala is the first State in the country to make sanitary napkin vending machines mandatory in all higher secondary schools.

Educated women understand their rights and duties better and therefore can contribute towards nation-building as well. Beti Bachao Beti Padhao is the right policy intervention by the Government of India in this regard.

b) Health:

Women should have access to comprehensive, affordable and quality health care. The reduction of Infant mortality and Maternal mortality which are sensitive indicators of human development is a priority concern. Measures will be adopted to ensure the reproductive rights of women.

Strict implementation of registration of births and deaths would be ensured. Women's traditional knowledge about health care will be recognised through proper documentation and its use will be encouraged.

c) Nutrition:

Women face the risk of malnutrition problems especially during infancy and childhood, adolescent and reproductive phase. Nutritional needs of women at all stages of women has to be met. The Central and State Governments has introduced many policies like anti polio drops to the children of less than five years of age and many anti diseases doses at various stages of pregnancy to the pregnant women. There is also provision for free and frequent checkup during pregnancy at every primary health care centre which is generally available in every panchayat.

d) Maternity benefits to regain health of employees:

Article 42 states that the State shall make provision for securing just and humane conditions of work and for maternity relief.

Rule 43 of Central Civil Services (Leave) Rules, 1972 states that the Central Government female employee is entitled to 180 days' maternity leave. Rule 43B states that she is entitled to maternity leave for 60 days if she adopts a child.

The Maternity Benefit Act 1961, empowers the women to avail twelve weeks paid maternity leave to the organised sector employees.

e) Women in difficult situations:

They include women in extreme poverty, destitute women, women in conflict situations, women affected by natural calamities, women in less developed regions, the disabled widows, elderly women, women heading households, migrants, women who are victims of martial violence, deserted women and prostitutes etc. Measures

and programmes will be undertaken to provide them with special assistance. In Gaurav Jain vs Union of India, 1977, the Supreme court has issued directions for protection of women from prostitution and rehabilitation of their children.

f) Empowerment under Laws:

The police is prohibited to arrest a lady after sunset and before sunrise except under exceptional circumstances under Sec 46(4) of Crpc Amendment Act 2005.

A women is given protection against harbouring her husband ie it is not considered as an offence under S.52A of IPC. (except under S.157 – persons hired for an unlawful assembly and S.130 (State Prisoners) Harbouuring means supplying a person with food, shelter, money, clothes etc to evade apprehension.

Section 416 of CRPC states that pregnant woman cannot be executed with death sentence. The Legal Services Act 1987 provides that all women are entitled to free legal aid.

Major Women Empowerment Schemes in India

Beti Bachao Beti Padhao 2015 – Prevention of gender biased and sex selection abortions. To ensure the protection and survival of girl child and to ensure the education of girl child.

Mission Shakthi 2016 – Aims at strengthening the interventions for the safety, security and empowerment of women. It seeks to realize the Governments commitment to ‘Women-led’ development.

Pradhan Mantri Ujjwala yojana 2016 - This scheme aimed to provide clean cooking fuel, specifically LPG, to rural and underprivileged households. These households traditionally relied on fuels like firewood, coal, and cow-dung cakes, negatively impacting their health and the environment.

By devising suitable schemes and by checks and balances in its implementation the cent percent women empowerment is likely to become a reality. Women Empowerment as a social change not only develops her but the whole nation into a developed, virtuous, prosperous and well-being nation.

ROLE OF LAW IN EMPOWERING WOMEN:

Position of women (Write about the women position of women in ancient, medieval and contemporary periods)

In 1848, Savitribai Phule became the first woman educator in India. This gave women the courage that they can get out of the clutches of various forms. With the freedom struggle going on, women's empowerment was the most important agenda for various social reformers and freedom fighters. Various social reformers like Raja Ram Mohan Roy, Iswar Chandra Vidyasagar, and even Mahatma Gandhi promoted women's education, various other social norms like the abolition of sati, and banning child marriages, etc. This national uprising led to various reforms like the Abolition of the Sati Act 1829, the Hindu Widow Remarriage Act, 1856, The Child Restraint Act, 1929, The Women's Right to Property Act, 1937, etc. The position of women in society started getting better after independence. The Hindu Marriage Act, 1955, The Hindu Adoption and Maintenance Act, 1961, and The Dowry Prohibition Act, 1961, etc. were reforms that were implemented to save women from all forms of social injustice.

The foundation of women empowerment is laid in our Constitution.

Article 14 guarantees Equality Before Law and Equal Protection of Laws.

Article 15 prohibits gender-based discrimination.

Article 15(3) permits the State to positively discriminate in favour of women by enacting special legislations.

Article 16(1) and (2), provides opportunity to all citizens in matters relating to employment.

Article 23 prohibits traffic in human beings.

Article 39A directs the State to provide free legal aid for securing justice to every citizen

Article 42 – Make provisions for just and humane conditions of work and maternity relief

Article 51A states that it is the duty of citizen to renounce practices that are derogatory to women.

In Mackinnon Mackenzie Co Ltd vs Audrey D Costa AIR 1987 SC 1281, it was held that unequal remuneration to lady stenographers and male stenographers was discriminatory.

In Dattatraya v. State of Bombay AIR 1952 SC 181, the Supreme Court held that the State can establish educational institutions for women only.

A) PROPERTY RIGHTS OF WOMEN:

Equality cannot be achieved if women are financially not independent and honourable Supreme court has strengthened and protected a woman's right in the context of a family and in the matter of **Vineeta Sharma v Rakesh Sharma (2020)**, the Court held that daughters by virtue of their birth would have equal coparcenary rights in Hindu Undivided Family property (HUF). They cannot be excluded from inheritance, irrespective of whether they were born before the 2005 amendment to the Hindu Succession Act, 1956. Pre-amendment of 2005 the law was discriminatory in terms of daughters claiming rights in inheritance and the inheritance in the case of a son.

While a son could claim a share in HUF property as a matter of right, a daughter, ceased to have any such right upon her marriage as after that she was considered to be a part of her husband's family.

B) GENDER EQUALITY IN WORK PLACE:

Gender equality is a virtue that needs to be part of every periphery and dimension, and it was a very advanced judgment where the Court in the matter of **The Secretary, Ministry of Defence v BabitaPuniya &Ors (2020)**. it was held that all women army officers are eligible for permanent commissions, allowing them to be in commanding roles, making all the women officers at par with their male counterparts when it comes to promotions, rank, benefits and pensions, thereby fortifying their position in the defence sector, an institution with rigid gender norms. The judgment is remarkable as it broke any stereotypes and pre-conceived notions. The women, weaker sex as they were called, were not considered to be efficient enough for such kind of jobs where male-dominance has taken-over for centuries, but the judgment not only upheld the efficiency of women but also recognised them as an equal gender and not a weaker sex.

C) SEXUAL HARRASMENT:

Sexual harassment was targeted, and Court very sensitively not only took cognizance but also provided measures for the safety of women at the workplace by framing very detailed guidelines in the case of *Vishakha v State of Rajasthan*. The Court directed the employers to ensure not only the safety to women against sexual harassment but also to provide an unbiased mechanism for the redressal of such grievances.

Sexual harassment violates the gender equality and takes away the fundamental right of women envisaged by the Constitution under the Art. 14 and 21 granting right to equality and right to life, including the right to live in a dignified life.

The guidelines of the Court given in Vishakha's case eventually were transformed and formalised in legislation and enactment by the name of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, was passed helping the feminist movement achieve another milestone in the way of absolute equality amongst the genders.

D) RIGHT TO PRIVACY

In *Neera Mathur vs LIC* (1992) 1 SCC 286

In this case, the Supreme Court was shocked to learn that the LIC questionnaire sought information about the dates of menstrual periods and past pregnancies and the petitioner was terminated for not providing correct information to the LIC. It was held that the questionnaire amounted to invasion of privacy. The Right to personal liberty guaranteed under Article 21 included the right to privacy. Information seeking health can be sought where such information was relevant i.e. for selling insurance cover, but not for the person seeking employment.

Apart from Constitutional commitments, there are various women specific laws such as

- The Immoral Traffic (Prevention) Act, 1956
- The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986)
- The Indecent Representation of Women (Prohibition) Act, 1986
- Protection of Women from Domestic Violence Act, 2005
- The Child Marriage Restraint Act, 1929
- The Medical Termination of Pregnancy Act, 1971
- Code of Criminal Procedure, 1973 – It contains provisions favouring women
- The Equal Remuneration Act, 1976
- The Pre-Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act 1994 etc.

United Nation Principles on Women Empowerment

1. Establish high level corporate leadership for gender equality.
2. Treat all men and women equally at work.
3. Ensure the health, safety and well-being of all women and men workers.
4. Promote education, training and professional development for women.
5. Measure and publicly report on progress to achieve gender equality.

International Conventions on Women Empowerment

Convention on Elimination of All Forms of Discrimination Against Women

Write about the provisions of CEDAW

National Policy for Women Empowerment

1. Creating an environment through economic and social policies for full development of women to realise their full potential.
2. Equal access to participation and decision making of women in social, political and economic life of the nation.
3. Strengthening legal systems aimed at elimination of all forms of discrimination against women.
4. Building and strengthening partnerships with civil society, particularly women organisations.

National Commission for Women It was set up in 1992. Its objectives are

1. To keep a check on the legal protections that are available to women
2. To recommend legal measures
3. To solve the grievances and issues of women
4. To help the Government in implementing various policies for women

Conclusion:

Global Gender Gap Report 2023 – India stands in 127th position out of 146 countries and its overall gender gap is 64.3%. Remaining 35.7% yet to be achieved through devising and implementing plans, policies, rules and laws.

Gender Discrimination (short notes)

Gender Discrimination refers to the practice of granting or denying rights or privileges to a person based on their gender. In some societies, this practice is longstanding and acceptable to both genders. Certain religious groups embrace gender discrimination as part of their custom. However, in most industrialized nations, it is either illegal or generally considered inappropriate. Attitudes toward gender discrimination can normally be traced back to the roots of certain segments of society. Much of the discrimination is attributed to stories such as a woman being made from man's and societal practices such as dowries paid to fathers by prospective husbands to purchase their daughters to be wives. The Equal Pay Act of 1963 was intended to end that discrepancy. The law stated that "no employer shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees. The Equal Pay Act officially gives women protection under the law in regards to equal pay for equal work, but inequities still exist in almost every employment sector.

Gender Injustice in India:

1. Pre-natal sex-selective Abortion:

The most extreme expression of the preference for sons is female infanticide and sex selective abortion. A study in a Bombay hospital found that 96% of female were aborted.

2. Sexual Harassment at work places:

It is a harassment of a sexual nature, typically in the work place. Sexual harassment is considered a form of illegal discrimination. Sexual harassment at work place is not an isolated phenomenon but a manifestation of the larger gender discrimination in society.

3. Female are malnourished:

India has exceptionally high rate of child malnutrition, because tradition in India requires that women eat last and least throughout their lives, even when pregnant.

4. Women are uneducated:

Families are far less likely to educate girls than boys and far more likely to pull them out of school, either to help out at home or from fear of violence. So women and girls receive far less education than men both due to social norms and fears of violence.

5. Women are in Poor health:

Females receive less health care than males. Many women die in childbirth. The practice of breast-feeding female children for shorter periods of time reflects the strong desire for sons.

6. Women are overworked:

Women work longer hours and their work is more than the men. (agricultural Work)

Chapter 5

Development of Feminist Jurisprudence

FEMINIST AWAKENING & PROTEST:

Only in the last 200 years of western civilisation, has the idea that women should have equal rights with men been given serious consideration.

Before Industrial Revolution in Europe, the power of church stood heavily against this suggestion.

Most women – worked to serve husbands, bear children, keep homes or if unmarried, support ageing parents.

Campaigners for women rights, however, were isolated and no movements were emerged for women's right and their emancipation.

The most important event in the history of feminism was the Seneca Falls Convention crystallising in the Seneca Falls Declaration, 1848. This convention was called by Elizabeth Cady Stanton and Lucretia Mott.

It criticized marriage laws, conditions of employment and property laws. A certain beginning was made by the women organisations.

Towards the end of 19th century, the campaign for women's right in US and Europe became increasingly focussed on the Right to Vote as a symbol of equality.

During this era, Laws were passed entitling women to separation orders and alimony and also giving them the right to control their own property and buy shares.

The growth of business and laws against exploitation gave women a chance to become teachers, nurses and secretaries. Despite all these changes, equality with men had not yet attained.

The struggle for Vote gained momentum after World War I. In the US, it was won in 1920, In Britain 1928 and in France after World War II in 1946.

Contraception was advocated but the Catholic Church denied such right. The Psychological harm and social deprivation affecting a mother and her unwanted child have been increasingly recognised. Abortion was legalised. The Legal battle to improve women continued, but discrimination remained. The spread of education broadened the knowledge of women.

Another cause was the shift from women's dependant position to economic awakening. So Civil Rights movement emerged.

In 1970's feminist efforts and organisational work had greatly aroused.

Gender Discrimination gave rise to legal remedies. But then discrimination has not ended. During the last quarter century, the re-emergence of feminist movement has led fundamental rethinking of discrimination doctrine. Now Gender differences are focussed rather than Gender disadvantages.

Protest of Feminism

A beginning was made in the Senaca Falls Declaration, 1848 the world over to fight for the rights of women. It opened the gates of feminism world over.

Feminism in UK and in US has been following a trend towards liberalisation. In 20th century women in African states, Turkey, Denmark, Switzerland and Pakistan demanded greater equality than male counterparts.

Indian women started to voice their demands not as wives or mothers but as individuals claiming recognition as Individual humanbeings. This was a battle to free women from the subordination of social and legal disabilities.

EMERGENCE OF FEMINISM IN UK

The Feminist movement in UK can be divided in 4 stages:

First stage 1840 to 1870: Women's organisation worked on a variety of issues

Second Stage 1871 – 1905: Focussed on gaining the Right to vote and was dominated by constitutional women's suffrage organisations.

Third Stage 1905 – 1918: Enfranchisement of women over 30 years of age was adopted ie Women over 30 years have a right to vote.

Fourth Stage 1919 – 1930: Extension of women's franchise to include all women over 21 years of age.

After 1930, fight was against discriminatory practises, laws and decisions and also for the personal liberty and rights outside conventional politics.

EMERGENCE OF FEMINISM IN US

The Feminist movement in US can be divided in 4 stages:

First stage 1820 – 1869: There were no permanent organisations for women and their issues include women's right in marriage, divorce, property, employment and suffrage

Second Stage 1869 – 1890: Permanent commissions came into being

Third Stage 1890 – 1920: These movements were further broadened and new leaders emerged.

Fourth Stage 1920 – 1930: Attempted to gain public support on other issues. It marked the raising of women's demands for access to education, equal rights in entering professions, equal right to vote and more legal rights etc.

19th Amendment was made to the US Constitution in 1920, and women got the Franchise right ie the Right to Vote.

On 14th December 1961, John F Kennedy signed an executive order establishing the Presidents Commission on the Status of Women. The Commission need to examine and suggest remedies to combat prejudices and outdated customs that act as barriers to the full realisation of women's basic rights. It was the first official body to examine the status of women in US. In this commission, the Civil and Political rights of women was reviewed which resulted in analysing the State and Federal laws. All laws relating to women namely labour, social security, marriage, child custody, property rights etc. was studied. The Commission recommended that all the legal restrictions in the field of marriage and property, to be removed which prohibited married women to own property, enter into business, contract and control their own earnings.

It recommended to pass Equal rights amendment but it was neglected. In 1963, President Kennedy signed the Equal Pay Act which prohibits discrimination on the basis of sex. By 1967 all the 50 States had such a commission.

During the late 19th and early 20th centuries, many States passed laws restricting the employment of women to certain occupations, establishing maximum hours, minimum wages, maximum weight to be lifted etc. to protect women of the exploitation from the hazards of industrial life

In 1960's there was a re-emergence of feminist movement.

In *Stanton vs Stanton* (1975), This case specified 21 years as the majority for boys and 18 for females. The statute would terminate a father's obligation to support the girl child three years earlier than the son. It was argued that females will be married earlier and so they needed little support. Men required support and education because they were destined to work and earn.

US Supreme Court struck down this provision as it is a violation of equal protection.

But later emphasis was laid to alter these existing social norms.

Feminism in India:

In India, basically there were three phases of feminism. Unlike the western world, the feminist movement in India was actually initiated by men. The efforts of the men lead to abolishment of Sati practice in India. It was meant for the upliftment of women so that they can join forces with others in the freedom struggle. Postindependence as the Constitution of India guaranteed Equality between sexes.

1850 - 1915

The first phase was able to uproot practices such as Sati and remarriage of widows, forbid child marriage, reduce illiteracy etc.

E.g. Prohibition of Sati Act 1829, The Widow Remarriage Act 156, Child Marriage Restraint Act 1929.

1915 – 1947:

Gandhi legitimized and expanded Indian women's public activities by initiating them into the nonviolent civil disobedience movement against the British Raj. He exalted their feminine roles of caring, sacrifice and tolerance; and made them to enter in public life. Also, national level organizations such as All India Women

Conference (AIWC) and the National Federation of Indian Women (NFIW) came up in the second phase. These organizations aimed at issues relating to women's political rights, leadership and roles in parties etc

Post Independence:

The opportunities were demanded for both the genders. The state of Kerela in this regard is much advanced as compared to other states. This state has the highest literacy rates and traditionally, before amendment in the Hindu Law, it was a common practice to give daughters and wives a portion of the property.

Due to increase in the feminist movement and growing knowledge about feminism various Acts are specially made for women rights such as The Immoral Traffic (Prevention) Act, 1956, The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986), The Indecent Representation of Women (Prohibition) Act, 1986, The Commission of Sati (Prevention) Act, 1987 (3 of 1988), Protection of Women from Domestic Violence Act, 2005, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The setting up of the National Commission for Women in the year 1992 was a big step to promote and protect rights of women.

We are currently in the Fourth wave of Indian Feminism and it is a journey worthwhile. We have seen the MeToo movement getting its pace and fighting through the dark side of society. India has witnessed a long journey of feminist movement and we have been ardent advocates of Feminist Jurisprudence since the beginning. We have ensured that the voice of the voiceless and the discrimination and pain rendered by women are heard. For instance, we had demonstrations, protest during the Nirbhaya Gang Rape Case which pressurised the authorities in filing the charge-sheet in the case as early as possible, there were demonstrations when Dr. Priyanka Reddy was brutally gang raped and murdered, which led to hue and cry

and the government and police of Hyderabad were on their toes to work on the case. All these examples are proof that the feminist movement never lost its spark.

Feminist jurisprudence has developed at its own pace in our country. But there are still some gaps which need to be filled, some bridges to cover the distance between the government and the underprivileged. The feminist movement in India needs more push, there are many more amendments which require our attention, many laws which are discriminatory in nature, the gender pay gap which still persist, the safety of women is still not ensured, promoting of rape culture via movies, songs and jokes need to be curtailed.

Feminist jurisprudence seeks to redress and analyze more traditional practices and theories. Thus, it focuses on the ways in which the laws have been structured. So, it cannot deny the needs and experiences of women. Furthermore, it claims that the patriarchy infuses the legal system along with its workings. So, it is an unacceptable state of affairs.

Consequently, feminist jurisprudence is not a politically neutral approach. Rather it is a normative approach. Because it challenges the basic level concepts and categories rather than analyzing them. Furthermore, it asks what has been implied in distinctions, traditional categories, rejects, and concepts. Thus, it rejects them if they imply the women being subordinated. Thus, in this sense, feminist jurisprudence is a normative approach. Also, it claims that the traditional law and jurisprudence are also implicitly normative. It sees the working of law as being permitted by moral and political judgments about women's worth and how a woman is to be treated. These judgments are not according to women's understanding of themselves, nor with the liberal concepts of fairness and equality.

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