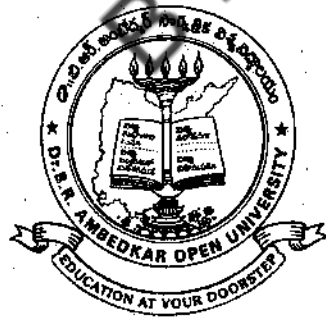


WOMEN'S : RIGHT'S AND LAW



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P.G.Diploma in Women's Studies

Course IV: Women's: Rights and Law

BLOCK – I : WOMEN AND CONSTITUTION

BLOCK – II : WOMEN AND PERSONAL LAW

BLOCK-III : LAWS RELATING TO WORK AND WAGES

BLOCK-IV : WOMEN AND CRIMINAL LAW

BLOCK-V : RECENT CHANGES IN LAW

BLOCK – VI : WOMEN'S RIGHTS AND HUMAN RIGHTS

**Dr.B.R.Ambedkar Open University
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WOMEN'S : RIGHT'S AND LAW

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BLOCK - I
WOMEN AND CONSTITUTION

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UNIT - 1 : CONSTITUTIONAL PROVISIONS FOR WOMEN

Contents :

- 1.0. Objectives
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1.0. OBJECTIVES

The scheme of this unit is vital for understanding the status of women in the Indian context. The scheme is sought to high light and meet the following objectives :

After going through this you will be able

- ◆ to understand the basic nature of the Constitution and it's importance in protecting the status of the subjects
- ◆ explain the goals and values of the Constitution especially in the context of it's historical evolution,
- ◆ to appraise the Constitutional scheme of the Fundamental Rights and Directive Principles which are sought to achieve welfare of the subjects including women.
- ◆ To study the various provisions specifically men for women's protection.
- ◆ To evaluate the adequacy of Constitutional scheme in protecting the women's rights.

1.1. INTRODUCTION :

The democratic status and working of any polity is often expected to be based upon the Constitutional frame work. Constitutions are not merely the documents providing the rules and regulations according to which the State is governed. It contains the provisions covering the relationship between state and it's subjects. State secures to all it's subjects certain

constitutional guarantees in the nature of rights which is reciprocated by the Constitutional obligations of the state. These guarantees or rights through instruments had their history way back from the Magna Carta of 1215; Bill of Rights, 1689 in England; Bill of rights in American Constitution, 1861 & Declaration of Rights of men and citizens 1789 in the French Constitution. All the constitutions that were adopted especially after II World War have invariably assured to their citizens the basic rights of Equality, Liberty and Freedom. Equality in particular is considered as a favourable provision for women striking against gender discrimination.

1.2. IMPORTANCE OF THE CONSTITUTION IN GENERAL :

Constitutional Law is a fundamental law of the country. All the enactments, orders, rules, regulations, notifications or ordinances work within the purview of the Constitution and if they go beyond the provisions of Constitution they are void and not enforceable. From the President of the country to the ordinary citizen all are subject to the Constitution and have to conduct themselves in accordance with it. Thus, it is considered to be paramount Law of the country.

1.3. EVOLUTION OF THE INDIAN CONSTITUTION :

At the dawn of Independence the Indian leaders faced two main problems :

- i) Discrimination based upon social hierarchy of caste system.
- ii) Discrimination based upon sex.

It may be noted that the long drawn freedom struggle brought about awakening among Indian Womanhood. Gandhiji's call for non violent participation of women in freedom struggle worked miracles towards awakening of women and their emancipation. It may be said that the period of freedom struggle can be considered as dawn for women's movement, wherein they could come out of their kitchen kingdom's, unite and voice their grievances. The Nehru committee Report of 1928 and congress declarations of 1931 and 1933 distinctly demanded equality. The Government of India Act, 1935 provided rights to Franchise and civil services under the crown for women also. Gandhi exhorted, "I am uncompromising in the matter of women's rights. In my opinion, she should labour under no legal liability, not suffered by man. I should treat the daughters and sons on a footing of perfect equality".

As a result of Cabinet Mission Plan, the Constituent Assembly to draft the Constitution was convened in 1946. This became a sovereign body after the enactment of the Indian Independence Act, 1947. Out of nearly 341 members in the Assembly there were only about 11 female members and their contribution was little. After due deliberations of two years, eleven months and eighteen days the Indian Constitution was adopted and enacted on 26 November, 1949 and came into force on 26 January, 1950.

The Indian Constitution thus adopted is a fundamental social document designed to achieve planned social change. Political participation, right to elect and right to be elected is guaranteed irrespective of sex, creed, race or caste. The achievement of social and economic revolutions was planned through Part III Fundamental Rights and Part IV Directive Principles of State Policy which are considered to be core and conscience of the Constitution. It may be noted that at the time of adoption of Constitution, India inherited two primary social evils namely, discrimination based upon caste and sex. The Constitutional makers sought to remove these injustices through various provisions of the Constitution.

1.4. GOALS AND VALUES OF THE INDIAN CONSTITUTION :

The Goals and values of the Indian Constitution are highlighted or succinctly crystallised in the Preamble of the Indian Constitution. Preamble states :

"We the people of India, having solemnly resolved to Constitute India into a Sovereign, Socialist, Secular, Democratic Republic and to secure to all it's Citizens,

- Justice - Social, Economic and Political
- Liberty - of thought, expression, belief faith and worship
- Equality - of status and of opportunity and to promote among them all
- Fraternity - Assuring dignity of the individual and the unity and integrity of the Nation.

Social Justice, Economic Justice and Political Justice, the prime goals of the Constitution, requires whatever that is due. Equality, yet another goal of the Constitution, an aspect of justice is expected to be achieved with reference to the status and of opportunity. Liberty of thought, expression, belief and worship is considered valuable in realisation of full potentialities, both physical and intellectual.

Above all these, it is sought to inculcate fraternity assuring the dignity to the individual. These aspirations squarely aim among other things emancipation and entitlement of women.

1.5. SPECIFIC CONSTITUTIONAL PROVISIONS :

The goals, values and aspirations of the Constitution are sought to be realised through the provisions of Part III and Part IV of the Constitution.

1.5.1. Fundamental Rights :

Part III of the Constitution confers Fundamental Rights which are enforceable. These Fundamental Rights afford protection against state action in general except some of the rights conferred under Article 15(2) and Article 17.

1. Right to Equality :

Equality, Liberty and Fraternity were the watch words of French Revolution. There is hardly any Constitution in the world which does not contain provision relating to equality. Even on an international plane this is a guaranteed Right under Art. 7 of the Universal Declaration of Human Rights 1 and Article 20 of the Covenant on Civil and Political Rights. It proceeds on the premise that all human beings are created equal and discrimination is negation of equality. It was rightly observed by Dr. Ambedkar that if Fundamental Rights were to be real, the menace of discrimination has to be guarded against.

Inequalities arise if a person or a body of persons are in a position to dominate other(s) by virtue of their property, power or social standing. These inequalities may be natural and inherent. For e.g. difference in height, intelligence, etc., Again there may be certain inequalities arising out of social policies and relations. For instance, teacher and student, master and servant, and the like. People tolerate and accept these inequalities in the interest of the society. However, people start questioning if inequalities arise, due to unreasonable and irrational policies and relationships, for e.g., inequalities arising out of caste, hierarchy, undue economic domination

and gender discrimination. Hence, any Constitution in the world will try to remove such imbalances by making equality as a value to be persuaded. In such circumstances, State will adopt various strategies to overcome the inequalities. Equality does not mean extending all the Acts of measures of the State equally to all the people. In fact, Anthony Lester observed that genuine equality requires the levelling process, i.e., upliftment of the disadvantaged, depressed and oppressed classes of the society on par with the advantaged and advanced classes.

The provisions relating to equality mentioned from Article 14 to Article 18 have been made keeping in view the above requirement. Article 14 embodies the principle of Equality before Law and Equal Protection before Law to all people. Article 15 prohibits discrimination based upon sex etc. Article 16 assures equal opportunity for all and Article 18 abolishes titles other than military and academic.

Article 14 declares that "the State shall not delay to any person Equality before Law or Equal Protection of the laws within the territory of India". This principle, in general, prohibits discrimination, including gender discrimination. However, it is important to note that equality enshrined in this Article, as noted earlier, is not absolute equality, but it permits reasonable classification based upon intelligible differentia and rational relation to the object sought to be achieved under any act. Thus, a law may be constitutional even if it relates to a single person and if that person is situated in peculiar circumstance and can be reasonably classified. Classification can also be made on the basis, of geographical distinction, historical factors occupations and the like. A new dimension has been given in recent times to Article 14 by providing that Article 14 strikes at arbitrariness and ensures fairness'. The wisdom developed under this Article variedly helped women to overcome arbitrary and discriminatory treatment. For e.g. Air India/Indian Airlines Regulations which say that an air hostess should retire from service attaining the age of 35 years or upon getting married within four years of joining service or on getting the first pregnancy, whichever is earlier, was struck down as arbitrary. Similarly, the court invalidated a Rule under the Indian Foreign Service Rules which required that a women member in service should obtain permission from the Government in writing before solemnisation of marriage and that no married women shall be entitled as of a right to be appointed to the Service. It was observed that such a regulation was a hangover of male domination over the female sex.

It may also be noted that the Principle of Equal Pay for Equal Work comes under this Article and unequal pay among men and women for the same work violates Article 14. Discrimination arises where men and women, doing the same or similar kind of work are paid differently.

Another important provision towards the entitlement of Equality is Article 15. This Article provides that "the State shall not discriminate against any citizen on the grounds of only race, caste, religion, sex, or any of them. However, Article 15(3) provides that 'nothing in this Article shall prevent the State from making any special provision for women and children'.

The word 'discrimination' means 'to make adverse distinctions of Article 15(1) prohibits, inter alia, the adverse distinction based on the ground of sex whereas Art. 15(3) permits special provision in favour of women. The combined effect of Art. 15(1) and 15(3) is that the State can discriminate in favour of women against men but cannot discriminate in favour of men against women. These provisions give scope to the State to ameliorate the disabilities which are peculiar to women.

Thus, it would not be violative of Art. 15 if educational institutions are established by the State

exclusively for women and seats reserved for women exclusively in any educational institution does not violate Art. 15(1)4. It may also be noted that even with reference to awarding punishments for committing crime, women may be exempted. For e.g., in case of adultery, only the male is punishable under Sec. 497 of Indian Penal Code and not the women and this has been upheld by courts.^{5 & 6.}

Similarly, a provision under Criminal Procedure Code which provides for maintenance in favour of women and children only under certain circumstances, is considered by virtue of Article 15(3).⁷

It may be noted, However, that if the discrimination is not merely on the grounds of sex, but based on other aspects it may not be obnoxious to Article 15. For instance, admitting women students in the women's educational institution and boys in the boy's educational institution is not on sexual grounds but due to the scheme of having separate schools for boys and girls.

Again Article 16 guarantees to all citizens, irrespective of religion, race, caste, sex, descent, place of birth or residence, Equality of Opportunity in the matters of public employment or appointment under the State. Equality of Opportunity in matters of public employment is not confined merely to the initial recruitment, but it extends to all benefits accrued during and after employment like salary, increments, leave, super annuities, gratuity benefits, etc., However, this Article guarantees only opportunity for employment. Special reservations or provisions for women in employment are not obnoxious to Art. 16.

As noted earlier, arbitrary rules, in working conditions against women, can also be held void under Article 16 besides Article 14 as in Nargesh Meerza and Muthamma cases.⁹ Similarly, disallowing women apprentice trainees to write internal examinations, on the grounds of working hours of women under Sec. 66 of Factories Act, was considered unwarranted as the denial of opportunity is based upon sex and hence, violative of Art 16(1)10. Further a rule requiring unmarried women to give up their position after marriage was stated to be violative of Art. 16. "The justification put forward by the company in this case was that there was a need to work in teams, with regular attendance and that there is greater absenteeism among married women. But the Supreme Court held that there was no evidence that married women absented themselves more frequently than unmarried women and struck down the restriction. Similarly, in Maya Devi vs. State of Maharashtra¹² a requirement that married women should obtain the husband's consent before applying for employment was held violative of Arts. 14, 15 and 16 where the Supreme Court held :

"This is a matter purely personal between husband and wife. It is unthinkable that in social conditions presently prevalent a husband can prevent a wife for his whim or caprice"¹³

The Court emphasised the importance of economic independence for women and the importance of not creating conditions that discourage such independence. Thus, the 'consent' requirement was held to be unconstitutional, as it amounts to an anachronistic obstacle to women's equality.

However, even with reference to Article 16, if the discrimination is not only on the ground of sex, the court tends to uphold certain restrictions in view of their position. For instance, a government direction that women are ineligible for appointment to all positions in jails except in the positions of matrones and clerks, was considered a valid proposition¹⁴. Hence, the Court upheld the restriction imposed on women's employment in such jails Article 14 and 16

also guarantees equal pay for equal work, which is considered to be only a Directive Principle under Article 39(c)¹⁵. However, it may be pertinent to note that equal pay for equal work depends upon the nature of the work done and cannot be judged on the volume of work. There may be qualitative differences with regard to reliability and responsibility of the assigned work.

Further, favourable interpretation has also been made in recent times about Article 16(4) which provided for reservations in favour of citizens belonging to backward classes who were not adequately represented in the Services of the State. This can be meaningfully interpreted to facilitate reservation in favour of women.

The following fundamental rights are equally applicable to women on par with men. Under Article 19 the following 6 fundamental freedoms, are guaranteed namely,

Freedom of Speech and Expression

Freedom of Assembly

Freedom of Association

Freedom of Movement

Freedom of Residence

Freedom of Trade and Business

It may be noted that these rights are not absolute rights, as they are subject to reasonable restrictions.

Article 20 of the Indian Constitution provides for safeguards against *ex-post-facto* Laws, Double Jeopardy and Self Incrimination. Article 21 of the Constitution guarantees that no person shall be deprived of life and personal liberty, except by procedure established by Law. It has been interpreted in recent times that the word life includes right of privacy too. Right to live with human dignity in fact gives a gamut of rights which are mostly beneficial for women, including the right against torture, custodial violence, right to livelihood, right to medical aid and health care, etc. Article 21 coupled with Public Interest Litigation has brought into light certain humiliations meted out to women. For instance, through a public interest litigation, it was brought to the notice of the Court that the female inmates of Care Home, Patna, were compelled to live in inhuman conditions, in old ruined buildings. The Court directed the State to take immediate steps for the welfare of the inmates and immediately ordered for the renovation of the ruined buildings, pending new constructions and to provide other facilities. The Court directed the State to appoint a full time superintendent to take care of the home and ensure that a doctor visits the home daily¹⁸.

Similarly, Mr. Upendra Baxi, brought to the notice of the Court, about the flesh trade in the protective homes of Agra and the Supreme Court has given necessary directions to protect the women and to ameliorate the conditions of women¹⁹. Yet, another petition was filed by Delhi Domestic Working Women Forum to expose the pathetic life of poor domestic servants, who were subject to severe sexual assaults by seven army personnel when the women were travelling by Maruti Express from Ranchi to Delhi. The Court, besides giving necessary directions to book the culprits, has ordered for the establishment of a Criminal Injurious Compensation Board to ameliorate the conditions of rape victims²⁰.

Similarly, the Court awarded compensation of Rs. 10,000/- to a married woman, who was a victim of police atrocities²¹. It may also be noted that Article 21 can be meaningfully utilised

towards getting necessary protection for the women including the right of procreational privacy. Under a similar provision in America it has been upheld that woman is entitled to the right of procreational privacy²².

Article 22 is a concomitant provision of Article 21 and provides for safeguards against ordinary arrest, detention and also preventive detention under the laws like the National Security Act, TADA, etc. Article 23 of the Constitution prohibits trafficking in human beings which means selling men and women like goods and includes immoral trafficking of women and children. In pursuance of this, the Parliament passed the Suppression of Immoral Traffic among Women and Girls Act (SITA) in 195. This was subsequently changed to Prevention of Immoral Traffic Act (PITA). The evil of prostitution is sought to be overcome by virtue of these enactments.

Articles 25 to 28 of the Indian Constitution guarantees Right to Freedom of Religion. However, the State has retained the power to make laws for the welfare of the people such as enforcing monogamy among Hindus which was held not to be violative of the Freedom of Religion²³.

Articles 29 and 30 in general guarantee the Rights of the minorities. The soul and heart of the Constitution lies in Article 32 which provides for enforcement of the fundamental rights which have been noted so far. It facilitates the grant of various writs in the nature of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-warrant. The writ of Habeas Corpus can be granted against the wrongful deprivation of individuals liberty.

Mandamus is a direction to any public authority to do or not to do anything which is of public interest. Writ of Certiorari is granted against judicial or quasi Judicial bodies if they act in excess of their powers or without jurisdiction. Writ of Prohibition is similar to that of Writ of Certiorari and the difference lies only in time. Writ of Prohibition is issued to temporarily stop the proceedings, whereas, Certiorari is issued after wrongful exercise of the power.

1.5.2. Directive Principles of State Policy :

Part IV of the Indian Constitution from Article 36 to 51 provides for the Directive Principles of State Policy which are not enforceable through any Court of Law even though they are fundamental in the governance of the country. Under this head certain guarantees are granted exclusively for women.

Article 39 envisages that the State shall in particular direct its policy towards securing both men and women, equality, adequate means of livelihood, equal pay for equal work and to see that the health and strength of male and female workers is not abused and they are not forced by economic necessity to enter into avocations unsuited to their age and health.

Article 42 directs that the State shall make provision for securing just and humane conditions of work and for maternity relief. These Directive Principles in general provide for a socio economic order for securing economic justice, social security and community welfare.

1.5.3. Fundamental Duties :

Taking inspiration from the socialist countries a specific Art. 51-A under part IV-A of the Indian Constitution has been incorporated through the 42nd Constitutional Amendment Act 1976. It specifically directs the citizens to renounce practices derogatory to the dignity of women.

1.6 WOMEN AND POLITICAL JUSTICE UNDER THE INDIAN CONSTITUTION :

Indian Constitution envisages to all its citizens, political justice, irrespective of caste, creed, sex and race along with social and economic justice. True to the spirit of the Preamble, the Constitution guarantees the right to elect and be elected irrespective of sex. However, in practice the women do not represent in equal numbers with men in the legislatures including the Parliament. They never exceed single digit percentage of representation in Parliament.

In order to encourage the participation of women in the decision making process, the Constitution (73rd and 74th Amendment) Acts were passed in 1992. They are famously known as the Panchayat Raj and Nagara Palika Amendment Acts. Out of the total number of seats to be filled by direct election in every panchayat and municipality, one-third seats (including the number of seats reserved for SC and ST women) shall be reserved for women. It is envisaged that such reservation of seats be allotted by rotation.

1.7. AN APPRAISAL OF THE ADEQUACY OF THE CONSTITUTIONAL PROTECTION :

It may be worth noting that in the III, IV and IV-A parts of the Constitution there are only seven Articles specifically dealing with women. A perusal of the Constitutional provisions clearly indicate that women are not yet given a fair deal. One cannot even find an exclusive article for women. Eventhough economic plight of the Indian woman is at the root of discrimination, there are very few Articles meant for upholding the economic independence of women. The few rights given to women in the Indian Constitution are placed under the Directive Principles of State Policy which are not enforceable. It may not be out of place to mention that to implement these Directive Principles there is an inordinate delay. For instance, it took nearly eleven years to pass the Equal Remuneration Act. The only silver lining with reference to the Constitution is that of liberal judicial interpretation of various articles infavour of women with reference to participation in the political process. while is laudable to have 1/3 reservation in Panchayat Raj and Municipalities, it would be further beneficial to extend the same reservation to the Assemblies and the Parliament. Necessary Constitutional amendment in this direction is required.

1.8. SUMMARY :

The Indian Constitution is a fundamental social document designed to achieve, planned social change and assurance of political justice irrespective of distinction of sex, creed, race or caste. However, political system cannot be strengthened unless women participate equally with men in the decision making process. Social and Economic revolutions are sought to be achieved through Part III and IV of the Constitution. Though they provide necessary impetus for women and women's emancipation, there are some inadequacies which have to be overcome to realise the emancipation and empowerment of women. If a fundamental law fails in a country to protect women, it will be highly impossible to achieve any progress in any direction. Thus the Constitution of India requires to be supplemented with additional provisions in favour of women in order to secure the Constitutional goal of gender justice.

1.9. GLOSSARY :

1. Right = an authority to do something without anybody's permission.
 2. Preamble = foreword of the Constitution enshrining the goals and objectives.
 3. Gender discrimination = treating women as lesser citizens than men.
 4. Writs = Directive of the Higher Courts to the State or authority regarding the fundamental rights of citizens.
 5. Habeas Corpus = "Produce him alive"
-a directive from High Court or Supreme Court.
-

1.10 REFERENCES :

1. Art. 7 of Universal Declaration of Human Rights reads as follows :

"All are equal before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination, in violation of this declaration and against any incitement to such discrimination".
2. Air India vs. Nargesh Meerza, (AIR 1981 SC 1829)
3. C.B. Muthamma vs. Union of India, (AIR 1979 SC 1868)
4. Dattatreya vs. State, (AIR 1953 Bom. 311)
5. Yousuff Abdul Aziz vs. State of Bombay, (AIR 1954 SC 321)
6. Sowmithri Vishnu vs. Union of India, (AIR 1985 SC 1618)
7. Mt. Choki vs. State, (AIR 1957 Raj. 10)
8. Anjali Raoy vs. State of West Bengal, (AIR 1952 Cal. 825)
9. Air India vs. Nargesh Meerza, (AIR 1981 SC 1829)
C.B. Muthamma vs. Union of India (AIR 1979 SC 1868)
11. Bombay Labour Union vs. International Franchise, (Air 1966 SC 942)
12. Maya Devi vs. State of Maharashtra, (1986 SCR 743)
13. Id at 745.
14. Raghuban Saudagar Singh vs. State of Punjab, (AIR 1972 P & H 117)
15. Ranadhir Singh vs. Union of India, (AIR 1982 SC 879)
16. F.A.I.C. and C.E.S. vs. Union of India, (1988) SCC 91
17. Maneka Gandhi vs. Union of India, (AIR 1981 SC 746)
18. Vikram Deo Singh Tomar vs. State of Bihar, (AIR 1988 SC 1782)
19. Upendra Baxi vs. State of U.P. (1983) 2 SCC 308
20. Delhi Domestic Women's Forum vs. Union of India, (1995) ISCC 14.
21. Aravinder Singh Bagga vs. State of U.P., (1994) 4 SCC 602
22. Roe vs. Wade,
23. State of Bombay vs. Varasu Bapamali, (AIR 1953 Bombay 84)

1.11. RECOMMENDED BOOKS :

1. Durga Das Basu Constitution of India
 2. Paras Diwan Indian Constitutional Law
-

1.12. MODEL EXAMINATION QUESTIONS :

- I. Answer the following questions in 30 lines
 1. what are the goals of Indian Constitution and explain the significance of Fundamental Rights under the Constitution of India.
 2. Critically examine the adequacy of protective provisions for women in the Constitution.
- II. Answer the following questions in 15 Lines.
 1. What is Constitutional Law and what does the Preamble of Constitution means.
 2. What is the significance of Chapters III
 3. What Right is provided by Art. 21.

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WOMEN AND PERSONAL LAW

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UNIT - 2 : LAWS RELATING TO FAMILY AND MARRIAGE

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- 2.2. Hindu, Parsi, Christian and Special Marriage Acts : Common Conditions
- 2.3. The Marriage Ceremonies
 - 2.3.1. Ceremonies under Hindu Marriage Act
 - 2.3.2. Ceremonies under Special Marriage Act
 - 2.3.3. Ceremonies under the Parsi Marriage Act
 - 2.3.4. Ceremonies under the Indian Christian Marriage Act, 1872.
- 2.4. Divorce
 - 2.4.1. Divorce among Hindus, Parsi and Christians.
 - 2.4.2. Maintainance
 - 2.4.3. Custody of Children
- 2.5. Muslim Marriage Laws
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- 2.6. Summary
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2.0. OBJECTIVES :

After going through this unit you will be able to :

- * Discuss the essential conditions of marriage under various statutes.
- * know the effects of a valid marriage and a void or illegal marriage.
- * Explain the Divorce Law and the consequences of the divorce.
- * Explain the Law of Maintenance of wife and children after divorce.

2.1. INTRODUCTION :

Marriage is treated as a sacrament by some religions, and as a contract by others. Whatever be the character, it creates certain rights and obligations on the parties to the marriage. This can be possible only when the marriage takes place in a prescribed manner.

All religions prescribe certain conditions to the marriage. Once the parties satisfy these conditions the marriage should be solemnised in a prescribed manner. All religions prescribe some ceremonies and procedures for the solemnisation of the marriage. These rules, customs and usages formed the Personal Laws.

In our country people are free to follow their personal law as long as the customs do not oppose the public policy.

Our secular legal system has made an attempt to give laws which reflect secular ideas and conform to the international conventions. Our Constitution has conferred the right of religious freedom to the citizens, with reasonable restrictions (Art. 14). As a result, the marriage laws of Hindus, Sikhs, Jains, Buddhists and Parsis are codified with certain changes to suit the changing needs of the society however it could not bring about such changes in the case of Christian and Muslim Personal Laws.

In this Unit, we are going to study the present day marriage laws of India.

2.2. HINDU, PARSI, CHRISTIAN AND SPECIAL MARRIAGE ACTS : COMMON CONDITIONS

As has already been mentioned in the introductory part, all Personal Laws (except the Muslim Law) were codified and changes were brought about to accommodate the changing needs of the society. The secular ideas which find expression in these codes or statutes are common to most of the religions.

All the statutes require certain conditions to be satisfied for a valid marriage. These conditions are :

Consent :

In all civilised societies, there is unanimity on the issue that marriage should take place without force and with full consent of the intending parties. Such a consent is possible only when the intending spouses attain a marriageable age. So the modern Indian Law makers adopted 18 years for women and 21 years for men as the marriageable age.

Similarly, spouses can give a valid consent only if they are of sound mind. Persons who are suffering from mental disorders do not have capacity to give a valid consent. Persons who get recurrent attacks of insanity, epilepsy or other mental disorders the intending persons are not eligible for giving consents to marriage. The marriage is voidable if either party has such a mental disorder.

Polygamy :

In any modern civilised society polygamy or bigamy is prohibited. In all marriage laws of our country (excepting in the Muslim Laws) polygamy is prohibited. Either of the parties should not have a spouse living at the time of the marriage.

Degrees of Prohibited Relationship :

Even in ancient times, the marriage between parties closely related by blood, or by marriage or by fosterage was prohibited. In the modern law also such a marriage is prohibited. Degrees of prohibited relations are however not uniform in all the statutes. This will be discussed in the following paragraphs.

Sapindas or Prohibited Degrees in Hindu Marriage Act :

Parties are not related to each other by affinity. That is to say, they should not be related to each other as *Sapindas*. Sapinda relationship according to the Act, extends upto the third generation in the ascent through mother and fifth in the ascent through father. Further, they should not be related to each other by marriage. Prohibited relationship is relationship of one being the lineal ascendant of the other; or one is the wife/husband of a lineal ascendant or

- 2) descendent of the other or
- 3) if one is wife of the brother or of the father or of the mother of the grandfather, grand mother's brother of the other
- 4) if the two parties are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister; or children of two brothers; or children of two sisters.

However, since the above prohibition is subject to custom or usage governing both the parties in some parts of the country, marriage is permitted between children of brother and sister, and maternal uncle and niece.

Prohibited degrees in Parsi Marriage Law :

Parties are not related through consanguinity (kinship) and affinity (through marriage). It is prohibited to marry one's

mother, maternal grandmother and any of her lineal ascendants,

paternal grandmother and any of her lineal ascendants,

sister or stepsister or their lineal descendants,

mother's stepsister,

father's stepsister,

brother's daughter or any direct lineal descendant of a brother or a stepbrother,

daughter or stepdaughter or any of their lineal descendants,

son's daughter or step-son's daughter or any of their direct lineal descendant,

wife of son or stepson or their lineal descendants (of a son)

wife of daughter's son or daughter's stepson or any of their lineal descendants,

mother of son's wife,

mother of daughter's husband

mother of wife's paternal grandfather and her lineal descendants

mother of wife's maternal grandfather and her lineal descendants

wife's mother and her sister or

wife's father's sister

father's brother's wife and mother's brother's wife

brother's son's wife, sister's son's wife

A Parsi woman should not marry her father or stepfather and

father's lineal ascendants

mother's father & mother's father's lineal ascendants

mother's father's brothers or stepbrothers

brother or stepbrother or their lineal descendants
sister's son or stepsister's son or their lineal descendants
daughter's son or stepsister's son or their direct lineal descendants
father of daughter's husband
father of son's wife
father of husband's grandfather and his ascendants
father of husband's maternal and paternal fathers
husband's father or stepfather
brother of husband's father
brother of husband's mother
husband's brother's son, or his direct lineal descendant
husband's sister's son or his lineal descendants
brother's daughter's husband
sister's daughter's husband

Under the **Indian Christian Marriage Act** marriage is prohibited between the parties who are related by blood and affinity. Though a detailed list is not provided by the Act, the man should not marry any person who is related by blood. She or he should not marry his or her spouse's blood relations.

Prohibited degrees under the Special Marriage Act :

A person should not marry his :

mother or her lineal ascendants (own or stepmothers)
both maternal and paternal grand father's wives
father's mother, and her ascendants
daughter, son's widow, daughter's son's widow, son's son's widow and their lineal descendants
sister, sister's daughter, brother's daughter
mother's sister, father's sister, father's sister's daughter, mother's sister's daughter
mother's brother's daughter.

A woman should not marry

father, and his lineal ascendants
mother's father and his lineal ascendants
stepfather, stepgrand father (maternal & paternal)
son, daughter's husband and their lineal descendants
brother, brother's son, sister's son
mother's brother, father's brother, father's brother's son, father's son
mother's sister's son, mother's brother's son.

2.3. THE MARRIAGE CEREMONIES :

In all marriages there is a requirement of solemnisation of the marriage in the prescribed form. We shall now discuss the various forms of marriage ceremonies under different Acts.

2.3.1 Ceremonies under Hindu Marriage Act :

There are various sects in the Hindu Religion. The ceremonies adopted by Hindus differ from region to region, sect to sect and community to community. However, the Supreme Court has considered the invocation of the sacred fire and Sapthapadi² to be the two basic requirements for a traditional Hindu Marriage. However, by custom, some communities do not insist on sacred fire and Sapthapadi

In these cases, the ceremonies which are required by the custom should be followed (Sec. 7 HMA). In the State of Tamilnadu Swayam maryada³ form of marriages are valid.

It is not compulsory to register a Hindu Marriage, but if parties desire to do so, they may register the marriage, even after solemnisation of the marriage.

2.3.2 Marriage Ceremonies under Special Marriage Act :

For the solemnisation of the marriage under this Act, the following procedure should be followed :

The parties who are intending to marry should give a notice in writing, three months in advance. The notice should contain the details about the bride and bridegroom. It should indicate the names

- of the parties,
- their age,
- their occupation,
- their residential address,
- their permanent address, and

they should indicate the duration of their domicile in that particular locality. (Sec. 5, Sche.2, Sp. M.A.)

This notice should be given to the Marriage Officer (Registrar) of the district, in which at least one of the parties has resided for a period of not less than 30 days preceding the date of the filing of the notice.

On receiving such a notice, the Marriage Officer, enters the true copy of the notice in the Marriage Notice Book. This book is subject to inspection by any person at any reasonable time. Such notice will be displayed at a conspicuous place in the office. If one of the parties to the marriage is living outside the jurisdiction of the office of the Marriage Officer, he will send a copy to the concerned district Marriage Officer (where the other party is living) (Sec. 6, Sp. M.A.).

Any person can raise objections within thirty days of the publication of the notice. Objections can be raised on the ground that the parties are

- a) within degrees of the prohibited relationship
- b) a spouse is living
- c) the party is incapable of giving a valid consent to the marriage or suffering from some mental disorder and
- d) the parties have not completed the age prescribed by the Act (i.e. 21 years for the man and eighteen years for the woman).

On receiving such objections, the Registrar will make enquiries by summoning the witnesses, examining them on oath, compelling the production of documents and receiving evidence on affidavits.

After examining all the above documents and evidences, if he arrives at the conclusion that the objections raised are reasonable, he shall refuse to solemnise the marriage.

The parties, on receiving such refusal from the Registrar, may appeal to the District Court within thirty days of receiving such refusal. The District Court's decision in this matter is final and the District Marriage Officer will have to comply with the Court's order.

If the objection is on the grounds of degrees of prohibited relationship, then the Registrar will have to inquire whether there is a custom in that community or family, which allows marriage between such parties. If customs allows such a marriage, then there is no objection for the solemnisation of the marriage.

Before the solemnisation of the marriage, the parties and three witnesses will have to sign a declaration in the presence of the Registrar and the Registrar will countersign the same.

The marriage may be celebrated at the office of the Registrar or at any other place, where the parties may desire. It should be within the reasonable distance for the Registrar to reach that place. An additional fee, have to be paid by the parties for this purpose.

Marriage may be solemnised in any form; but the most essential part is that the parties should say the following to the other in the presence of the Registrar and three witnesses, in a language understood by the parties -

"I, A take B, to be my lawful wife (or husband)" (Secs. 9, 10, 11, 12 Sp. M.A.)

On solemnisation of marriage the marriage officer shall enter the certificate into the Marriage Register Book and such a certificate is signed by the parties to the marriage and the three witnesses. The certificate is deemed to be conclusive proof of the marriage (Sec. 13 Sp. M.A.).

Any marriages which is celebrated in any form, may be registered under this Act, subsequently, if the conditions of the marriage (under Sec. 4 of this Act) are complied with.

Consequences of Marriage under this Act :

A person who marries under this Act, shall cease to be governed by the Hindu Joint Family Law (this applies to persons who profess Hindu, Buddhist, Sikh and Jain religions). But his rights and disabilities in regard to the property to which he is entitled to succession will not be affected (Secs. 19, 20).

The children of the persons, who are married under this Act, will be governed by the Indian Succession Act, 1925, as far as succession to property is concerned. They will not get any right in the coparcenary property.

2.3.3 Ceremonies under The Parsi Marriage Act, 1936 :

The Parsi Marriage should be solemnised in the Parsi form of ceremony called "Ashirvad" by a Parsi priest. It should take place in the presence of two Parsi witnesses in addition to the presiding priest.

Registration of the marriage and issuing a certificate is compulsory in the Parsi marriage. The

certificate is issued by the officiating priest, duly signed by himself, and two witnesses present at the marriage, and by the bride and bridegroom. The certificate will be sent to the Registrar of the marriages of that place by the priest. A nominal fee of Rs. 2/- shall be paid by the husband for this certificate. The Registrar shall enter the certificate contents in a register kept by him, and he is entitled to retain the fee (Rs. 2/-). This register is open to the public scrutiny by all persons concerned.

The Registrar of the Parsi marriages is appointed by the Chief Justice of High Court of that area or by the State Government (Sec. 7). The Registrar collects a nominal fee of Rs. 2/- for each extract of the certificate. A copy of the certificate is sent to the Registrar General of Births, Deaths and Marriages of the territory (Sec. 9).

Similarly, the decrees of the Parsi Matrimonial Courts for divorce, nullity of the marriage, or dissolution of the marriage is also registered with the registrar of the Marriages (Sec. 10).

2.3.4 Ceremonies under The Indian Christian Marriage Act, 1872 :

It is essential for a Christian Marriage to be registered in the marriage register kept by the Church. It is also necessary to obtain a certificate from the Marriage Registrar. The procedure for filing a notice for the intended marriage is the same as that under the Special Marriage Act. Here, the notice is given to the Registrar of Christian Marriages.

Once the District Registrar is satisfied that the contents are true and there is no legal impediment, he will issue a certificate. After issuing the certificate, the marriage should be celebrated within two months from the date of issuing the certificate.

Solemnisation of the marriage should be in the presence of a marriage Registrar and two or more credible witnesses (Sec. 51). In such a ceremony both the parties shall take an oath to live together as wife and husband.

A Christian Marriage should be solemnised between 6 AM and 7 PM. A special license should be obtained for a marriage to be performed between 7 PM and 6 AM. (Sec. 69).

The Marriage Registrar present at the solemnisation of the marriage, registers the marriage in the marriage register-book kept by the Church and also in the register-book kept by the Registrar of Marriages. A certificate is issued by him. The entries in registers and the certificates are duly signed by the person, who solemnised the marriage, by the Registrar present at the marriage (he need not have solemnised the marriage), and also by the parties married.

All these signatures are attested by two credible witnesses (other than the Registrar and the person who has solemnised the marriage). (Sec. 54).

2.4. DIVORCE :

Ancient Hindu and Christian laws did not provide for the dissolution of the marriage. They have considered marriage sacrament and a life long union. But, in the modern civilised societies, a provision for divorce had to be made, to protect and safeguard interests of aggrieved persons. But the intention of the legislatures and courts is to preserve a matrimonial home rather than break it. Hence the lawmakers had specified certain grounds for dissolution of the marriage.

2.4.1 The grounds for divorce that are common in Hindu, Parsi, the Special Marriage Acts and the Indian Divorce Act (for Christians) :

Any aggrieved spouse can file a petition for the dissolution of his/her marriage on the following grounds :

1. If a marriage is not consummated because of the wilful refusal of one of the parties, the petitioner may file a suit for the dissolution of the marriage. But he/she will have to wait for one year since the solemnisation of the marriage, to file such a petition. The suit will have to be filed within three years of the marriage. Under the Hindu Marriage Act, this is a voidable marriage (Sec. 12A HMA).
2. If one of the parties to the marriage is of unsound mind, and the petitioner is ignorant of this defect at the time of the marriage, and such condition is incurable, the marriage will be dissolved. Court will grant a relief only when it is satisfied that it is not possible for the petitioner to live with such a person.
3. A person can get relief by way of divorce if he proves that his wife was pregnant at the time of the marriage by some one other than the petitioner. He has to prove that he was ignorant of the fact at the time of the marriage. He has to prove further that marital intercourse has not taken place after he came to know of the fact. In this case, suit should be filed within two years of the marriage.
4. If the husband is guilty of either rape, or adultery, or bigamy or any other offence during the subsistence of the marriage, the wife can get relief by way of a divorce.
5. Either of the parties may ask divorce if his/her spouse has treated the petitioner with cruelty.

The definition for the term 'cruelty' is not given in any statute. Only the Muslim Law has defined it, and specified what acts constitute 'cruelty' (this we will discuss in the section Muslim Divorce). In all other cases the Court will have to use its discretion to sanction relief on this ground. Cruelty can be physical or mental. What constitutes cruelty in one case may not be cruelty in another case. For this the Court will have to take the mental condition of the petitioner, social status and all other circumstances into account and come to a conclusion. 'Cruelty' in order to be a ground for divorce must be some such conduct on behalf of the respondent which gives the petitioner reasonable cause of apprehension of injury to the body, mind and health in future¹.

6. A spouse can ask for a divorce, on the ground that the other party caused a grievous hurt intentionally, or infected him/her with venereal disease, or where the defendant is a husband, is compelling the wife to submit herself to prostitution.

In the above three cases, the petitioner should file the complaints within two years of the happening of the above incidents.

7. A party to the marriage can file a petition for a divorce on the ground of desertion for a period of 2 years. If the other party deserted him/her, without any reasonable excuse, then he/she will get a relief.
8. If the parties are living separately for two years (because of the order of the Court for

judicial separation) and the parties had not had marital intercourse, for two years, then either of the parties can file a petition for divorce.

9. If either of the parties changes his or her religion (i.e. ceases to be Hindu/Parsi/Christian/Sikh/Jain as the case may be) the other spouse can ask for a divorce. The petitioner should file the petition within two years after coming to know of the fact.

After one year of the solemnisation of the marriage, if the parties feel that it is not possible for them to live together, and decide mutually to dissolve their marriage, the Court will grant a decree of divorce. This provision was introduced in the year 1988.

In spite of the Court granting restitution of conjugal rights, if the parties live separately for a period of more than one year (from the date of passing of the decree) either of them can file a petition for the dissolution of the marriage.

No relief will be given to a husband who fails to pay the prescribed amount of maintenance to the wife. In addition to the above grounds, a Parsi spouse can pray for the dissolution of the marriage on the grounds that his/her spouse is convicted under the Indian Penal Code, and is serving a sentence of imprisonment for seven years or more. This petition should be filed after one year of the Criminal Court's decision, convicting him/her for a crime.

Procedure for a Christian Divorce :

All the above grounds hold good for a christian couple also, excepting the condition of mutual consent. In case of impotency, parties within the prohibited degrees of relationship, insanity at the time of marriage, and bigamy, the marriage will be declared null and void.

On the other grounds, only a judicial separation will be granted and not dissolution of marriage. After judicial separation for a period of one year and if the parties do not resolve their differences for a period of one year, then it will be a ground for divorce.

Another ground is that the husband may file a petition on the ground that his wife has been guilty of adultery since the solemnisation of the marriage (Sec. 10 Indian Divorce Act).

A wife can file a petition on any of the above grounds like cruelty, desertion etc., coupled with adultery. In other words, she can get a relief of divorce only if she can prove that her husband is guilty of adultery and treating her with cruelty.

2.4.2 Maintenance :

In all the above Acts, where there is no other independent source of income for the wife/husband, the Court may order the defendant to pay alimony during pendency of litigation. This could be a lump sum amount paid at one time, or in periodical installments. The Court may order the petitioner to pay the expenses of the suit also.

At the time of passing the decree of divorce, or on an application afterwards, the Court may fix amount of maintenance to the wife. The amount will be in proportion to the income and other properties of the husband. It is either a gross payment or a periodical payment. This payment may be secured by charge on the movable and immovable property. If the husband is dependent on wife and does not have any independent income, the wife is liable to pay the entire maintenance to him.

The Court may at the instance of either parties, vary, modify or rescind any such order, in the

following cases :

- When the party (in whose favour the maintenance was granted) has remarried or is having sexual intercourse with other persons outside the wedlock, the maintenance amount need not be paid.
- Alimony may be paid either to the wife directly or to her trustee.
- In the case of 'joint property' of the Parsi couple, Court may make such provisions as it deems just and proper, in the final decree.

2.4.3. Custody of Children :

In the case of the children below 18 years of age, the Court may from time to time pass interim orders, in respect of their custody, maintenance and education. The Court will make an order with respect to custody, maintenance and education etc., in the final decree.

It may revoke or suspend or vary from time to time, all such orders, even after the final decree, by an application from an interested party.

Under the Parsi Divorce Law, in a suit where a decree of divorce is granted on the ground for adultery of the wife, the Court may settle a part of her property (which she is possessing) for the benefit of the children. In any case by such settlement shall not exceed one-half of her property.

Similarly, under the Christian Divorce Act, the damages, paid by the wife's paramour will be spent for the children.

2.5. MUSLIM MARRIAGE LAW :

Marriage, according to Muslim Law, is a civil contract. The object of this contract is procreation and legalisation of children'.

Consent :

Under the Muslim Law, any person who has attained puberty and is of sound mind, may enter into contract of marriage (in the absence of evidence, puberty is presumed to have been attained at the age of 15 years).

On behalf of minors and lunatics, their respective guardians can give consent to the marriage.

Essentials for the Marriage Contract :

Since the marriage is a contract, there should be a proposal made by or on behalf of one of the parties to the marriage, in the presence and hearing of two male witnesses or one male and two female witnesses. These witnesses should be sane and adult Muslims. The proposal and acceptance should be made at one meeting. This procedure does not require any religious ceremony nor does it require any written document (S. 252 Mulla).

Polygamy :

A man can have as many as four wives at a time, but a woman cannot have more than one husband at a time (Secs. 255 & 256 Mulla). If a man takes a fifth wife the marriage becomes irregular.

Marriage between persons belonging to different sub-sects :

Marriage between Shias and Sunnis is valid. The rights and obligations of the wife will be governed by the law to which she belongs at the time of the marriage (Secs. 32, 258).

A male muslim can marry a *Kitabi* (a Jewess, a Christian) but he cannot marry a idolatress or a fire-worshipper (a Hindu or a Parsi). Such a marriage is an irregular marriage. A muslim women cannot marry non-muslim. Such marriage is an irregular marriage.

A marriage with a woman who is undergoing the period of *iddati* is also irregular. Iddat is a period during which a muslim divorced woman cannot marry. She has to wait for 3 months to remarry. Similarly, a marriage contracted without witnesses is also a irregular one (Secs. 254 & 257 Mulla).

Prohibited Degrees of Relationship :

A marriage is void when it takes place between persons who are within the degrees of prohibited relationship. Women related by blood, by marriage and by fosterage come in to this category. The list of these relatives is given at the end of the lesson³.

Effects of a Valid Marriage :

A valid marriage confers upon the wife the right of dower, maintenance and residence in her husband's home. It imposes on her certain obligations such as to be faithful and obedient to him, to admit him to sexual intercourse and to observe *iddat* (in the event of divorce). It also creates reciprocal rights of inheritance between the parties.

Effects of an Irregular Marriage :

An irregular marriage has no legal effect before consummation. It can be terminated by either parties, either before consummation, by words showing an intention to separate - that is by saying the words "talaa *I have relinquished you*".

If consummation has taken place, the wife is entitled to dower, proper or specified, whichever is less. She is bound to observe *iddat* for a period of three months. The issue of the marriage is legitimate. The irregular marriage does not create any inheritance rights between wife and husband.

Effect of a Void Marriage :

A void marriage is no marriage at all. It does not create any rights or obligations between the parties. Children born out of this marriage are illegitimate.

Maintenance of wives :

The husband is bound to maintain his wife, so long as she is faithful and obedient to him. He is not bound to pay for her maintenance, if she refuses to have for marital relations with him. If the husband neglects or treats her with cruelty; or refuses to maintain her without any lawful cause, the wife may file a petition under Sec. 125 Cr.P.C. Under the Muslim Law, a wife can refuse to live with her husband and still claim for maintenance on the ground of non-payment of prompt-dower. She cannot claim this relief under Sec. 125 Cr.P.C, but only under their Persona Law.

Under the Muslim Law, there is no provision for interim maintenance during litigation (pendete life).

2.5.1. Divorce under Muslim Law :

A muslim male is free to divorce his wife whenever he desires without assigning any reason. Divorce can be obtained by mutual consent also. In these two cases court intervention is not necessary.

A muslim male can pronounce "talak" thrice orally or by a written document. No particular form or words is necessary for a talak. It need not even be addressed in the presence of his wife nor it be even addressed to her. It is enough if the intention to divorce is proved. Talak pronounced in the absence of the wife takes effect immediately though not communicated to her. She is entitled to her maintenance till she is informed of the divorce. For purposes of dower it is necessary that it should come to her knowledge.

Talak can be a single pronouncement of divorce made during a tarh (period between menstruating) clearly indicating the intention to irrevocably dissolve the marriage. For e.g. "I divorce you irrevocably" or it can be three pronouncements of the would talak during a single tarh period.

A marriage may be dissolved not only by a talak but by a mutual consent called Khula and mubaraat. In case of khula type of divorce, the wife offers to compensate her husband if he releases her from his marital rights, for which the husband accepts the offer and the divorce comes into effect.

In mubara'at, the offer may be made either by the husband or by the wife. In these two cases the wife is not entitled to dower, however she is entitled to maintenance during iddat period. He is bound to maintain his children through her.

Judicial divorce at suit of wife :

A muslim wife can ask for a divorce only by moving a Court. The dissolution of muslim Marriage Act, 1939, was passed to consolidate and clarify the provisions of Muslim Law relating to the rights of women for dissolution of marriage. Under this Act, a woman can approach the Court for dissolution of her marriage on the ground :

1. that the whereabouts of the husband are unknown for a period of four years;
2. that the husband has failed to provide for the maintenance of his wife for a period of two years;
3. that the husband is serving a sentence of imprisonment for a period of seven years;
4. that the husband failed to perform marital obligations without any reasonable cause;
5. that the husband is impotent;
6. that the husband is insane;
7. that she is repudiating the marriage as it was contracted during her minority;
8. that the husband is treating her with cruelty;
9. on the event of her conversion into another religion and
10. on other grounds recognised by Muslim Law.

In Muslim Divorce Law, the term 'cruelty' is clearly defined. According to the Act the following type of behaviour by the husband amounts to 'cruelty' :

- a) habitually assaults her or makes her life miserable by physical and mental torture;
- b) associates with women of evil repute or leads an infamous life;

- c) attempts to force her to lead an immoral life;
- d) disposes of her property, prevents her from exercising her legal rights over it;
- e) obstructs her in the observance of her religious profession or practice;
- f) if he has more than one wife, does not treat the petitioner equally in accordance with the injunctions of Quran.

Repudiation of Marriage :

A marriage is dissolved by way of repudiation. An option to repudiate a marriage is given to a female muslim on the ground that the marriage has taken place before she attained the age of 15 years. For this, she has to prove that the marriage has not been consummated. She can use this option before she attains 18 years of age.

A man can repudiate the marriage on the same ground. But he cannot exercise this right, once he ratifies the marriage either expressly or impliedly, as by payment of dower or by cohabitation. The repudiation will have to be confirmed by a Court and only then will the marriage be dissolved. Until then, the marriage subsists, and if either, parties to the marriage dies, the other will inherit from him/her as the case may be.

2.5.2. Maintenance after Divorce :

Under Sec. 125 Cr.P.C. a divorced wife continues to be the wife of that husband as long as she remains unmarried and does not lapse into unchastity. Our Courts used to grant relief to muslim divorced wives under this section also. But the famous Shah Bano⁴ case gave rise to a lot of controversy. In this judgement a needy divorced wife was granted maintenance under Sec. 125 Cr.P.C. The husband refused to pay it saying that according to Muslim Personal Law, a divorced wife was entitled to maintenance only during the period of iddat. Conservatives among muslims supported his views, and they refused to recognise the definition of a wife under Sec. 125 Cr.P.C. which includes divorced wife. According to them once the marriage is dissolved the wife ceases to be the wife and the divorced husband is not bound to maintain her beyond the period of iddat.

As there was a big agitation, the Central Government was forced to pass a legislation to satisfy the sentiments of the orthodox Muslims. As a result, the muslim Women Protection of Rights on Divorce Act, 1985 was passed. As a result, Sec. 125 Cr.P.C. does not apply to Divorced Muslim Women, unless both the parties express their willingness by a declaration (under Sec. 5 of that Act) to be governed by Sec. 125 Cr.P.C.

If the divorce is communicated to her after the expiry of the iddat period, she is entitled to maintenance until she is informed of the divorce.

If the wife is pregnant at the time of the divorce or during the period of iddat, she is entitled for the maintenance till the delivery of the child.

A widow is not entitled to maintenance during the period of iddat consequent upon her husband's death. Once the marriage is dissolved, she is entitled to her remaining amount of dower

Dower :

Dower or mehr is the sum of money or other property which the wife is entitled to receive from her husband in consideration of the marriage (Secs. 285, 286).

The amount specified for dower should not be less than ten *dirhans* and there is no upper limit for this amount. The husband may fix his entire property as dower to his wife, not having anything for his heirs. Once a claim for dower is made, the Courts should award the entire sum specified in the contract. The amount of dower may be fixed at the time of the marriage or after the marriage. The amount can be increased subsequently.

If the marriage takes place between minors, the father of the husband, who has given consent to the marriage will be liable for the payment of dower.

If the amount is not specified at the time of the marriage, the amount should be settled on par with the dower amount of other female members of her father's family (i.e., her father's sisters). This is called "proper dower".

The amount of dower is split into two parts as prompt dower and deferred dower. Prompt dower is payable on demand, deferred dower is payable at the time of dissolution of the marriage, by death or divorce.

Dower is a debt but it is an unsecured debt. The heirs of a deceased Muslim are not personally liable for the dower debt. Each heir is liable for the debt to the extent of a share of the debt proportionate to his share of the property only.

If she is in possession of her husband's property, in lieu of dower, she is entitled to recover her debt through the rents and profits of her deceased husband's estate. Once the claim is satisfied she has to return the possession of the property to other heirs and creditors.

2.6. SUMMARY :

Marriage is sacrament for some religions, and a contract for others. Every citizen has the freedom to follow any religion. The Marriage Law is an important Personal Law. Marriage laws of Hindus, Sikhs, Jains, Buddhists and Parsis are codified. Consent is a common requirement and polygamy is prohibited by almost all religious laws except by Muslim Law. All the marital laws prescribe that parties of prohibited degrees cannot marry. Certain ceremonies are required for solemnisation of the marriage. Special Marriage Act requires some procedures to be followed for solemnisation. Though ancient Hindu and Christian Law did not provide for the dissolution of the marriage, modern civilised societies adopted the methods of divorce. Absence of consummation of marriage, unsoundness of one of the parties, wife being pregnant at the time of marriage by another person, husband being guilty of rape or adultery or bigamy, cruelty, desertion, conversion of religion, two year separation without marital intercourse by mutual agreement are the common grounds for divorce in almost all marriage laws. In the absence of independent source of income, a wife or husband is entitled to get maintenance from the other spouse by the order of the court. The court will decide the custody of the child depending on the conditions conducive for the welfare of the child, at the time of granting the divorce or dissolving marriage.

Muslim Law treats marriage as a contract. It permits polygamy to the extent of four wives to a Muslim male, while a woman can marry only. Muslim women are not covered by Section 125 of Cr.P.C. for maintenance.

2.7. GLOSSARY :

1. Polygamy = One person marrying many women.

- | | | | |
|----|---------------|---|---|
| 2. | Bigamy | = | One spouse marrying again during the lifetime of another spouse. |
| 3. | Sapinda | = | Parties related to each other, who cannot marry. |
| 4. | Sapthapadi | = | A ceremony of Hindu Marriage wherein the couple has to walk seven steps together around the holyfire. |
| 5. | Solemnisation | = | Completion of process of marriage. |
| 6. | Talak | = | Divorce by a Muslim man. |

2.8 REFERENCES :

1. Sumitra Devi vs. Bhikan Choudhary, (1985) I SCC 637.
2. Seven Steps taken by Couple around holyfire.
3. Mere exchange of garlands without a priest.
4. Suresh Kumar Gulati vs. Smt. Sulam Gulati, (1983) ALL 225.
5. Mulla, Principles of Mohammedan Law Ed. 16 at pp 248.

2.9. RECOMMENDED BOOKS :

1. Mulla, "Hindu Law" Sixteenth Edition by S.T. Desai 1992.
2. Mulla, "Principles of Mohamedan Law" Sixteenth Edition by Hon'ble Mr. Justice Hidayatullah, 1968.
3.
 - a) The Hindu Marriage Act, 1955.
 - b) The Indian Christian Marriage Act, 1872.
 - c) Special Marriage Act, 1954.
 - d) The Parsi Marriage and Divorce Act, 1936.
 - e) The Indian Divorce Act, 1869.
 - f) The Muslim Women (Protection of Rights on Divorce) Act, 1986.
 - g) The Dissolution of Muslim Marriages Act, (VIII of 1939).
4. Any other book on Hindu Law.

2.7. MODEL EXAMINATION QUESTIONS :

- I. Answer the following questions in 30 lines.
 1. Describe the marriage ceremonies under Hindu Law and Special Marriage Act.
 2. Write short notes on the following :
 - a) Sapindas
 - b) Dower
 - c) Iddat
 - d) Custody of the children on divorce
 3. What is the procedure followed for the solemnisation of the marriage under Indian Christian Marriage Act?
 4. What are the essential conditions of a valid marriage under Muslim Law?

5. 'Under Sec. 125 of the Cr.P.C. the divorced wife continues to be the wife of the divorced husband, for the purpose of maintenance' What is the position of a divorced Muslim wife? Does Sec. 125 Cr.P.C. apply to her? Discuss.

6. What are the grounds for divorce under the Indian Divorce Act, 1869?

7. What are the grounds available for a Muslim male for divorce? Describe the various types of *talak*.

8. What are the grounds available for a Muslim woman for the dissolution of her marriage.

9. Discuss briefly about the maintenance of a wife on divorce under Indian Marriage Laws.

II. Answer the following questions in 15 lines

1. Whether Muslim Personal Law is codified in India?

2. Whether ancient Law prohibited marriage between closely related parties?

3. Mention an important ceremony of the Hindu Marriage.

4. What is Divorce?

BRAOU

UNIT - 3 : WOMEN'S PROPERTY RIGHTS

Contents :

- 3.0. Objectives
- 3.1. Introduction
- 3.2. Women's Property Rights under the Hindu Succession Act, 1956.
- 3.3. Female Succession under Indian Succession Act, 1925.
- 3.4. The Parsi Women's Property Rights.
- 3.5. Muslim Women's Property Rights.
- 3.6. Summary
- 3.7. Glossary
- 3.8. References
- 3.9. Recommended Books
- 3.10. Model Examination Questions.

3.0. OBJECTIVES :

After going through this unit, you will be able to

- * discuss the women's inheritance rights
- * discuss the woman's rights over her property
- * to know the mode of devolution of her property on her death.

3.1. INTRODUCTION :

Article 13 of the Constitution nullifies all the old Acts which take away or abridge the Fundamental Rights confirmed by the Constitution of India & Article 14 of the Constitution guaranteed the fundamental rights to equality and prohibits any discrimination on the basis of gender, religion, race, caste and community.

To what extent Art. 13 of the Constitution effects the Personal Laws of Hindus, Muslims, Christians etc., in India is a question which is difficult to answer. Inequalities existing before the Constitution may have to be abolished by necessary legislation now.

3.2. : WOMEN'S PROPERTY RIGHTS UNDER THE HINDU SUCCESSION ACT, 1956 :

Under the Hindu Succession Act, 1956, when an individual dies, his property devolves on the Class I heirs. The Class I heirs consists of son, daughter, widow, mother and children of the predeceased's children (Sec. 10). According to this Act, there is no difference between male and female heirs. All these people take an equal share in the deceased's property. Predeceased person's children take their father's or mother's share, as representatives of their parents.

Sec. 6 of the Hindu Succession Act deals with coparcenary property. When a male Hindu dies, having an interest in the mitakshara coparcenary property, his interest (his share in the

coparcenary) devolves by survivorship, upon the surviving members of the coparcenary and not in accordance with the Act.

In the Hindu Joint Family or coparcenary, father and sons have an equal share in the property. A female was not entitled to a share in the coparcenary prior to 1937.

In 1937, the Hindu Women's Rights to Property Act was passed. By virtue of this Act, the widow of a coparcener was given a limited estate in her husband's property. By limited estate we mean the right which a woman possessed before the Hindu Succession Act, 1956. Under the law, before 1956, whenever a woman inherited property which was not Stridhan property, she enjoyed it only for her lifetime. She inherited what was called a limited estate, woman's estate or widow's estate. She had a right to enjoy the property during her lifetime and on her death the property was reverted to the last full owner.

By the Hindu Succession Act, 1956, the concept of limited estate was abolished. Whenever a woman succeed inheritance, she acquired full rights just as a male acquires on inheritance.

- * All existing limited estates were enlarged into full estates.
- * The deceased's surviving female relative in the class-I (daughter, wife and mother) also got a share in accordance with testamentary or intestate succession under this Act and not by survivorship.

In 1986, the State Government of Andhra Pradesh, amended Sec. 6 of the Hindu Succession Act - The Hindu Succession (A.P. Amendment) Act, 1986 - Conferring a right by birth on a female child in the joint family property. A.P. was the first State to bring out such a legislation. Maharashtra and Karnataka emulated the example recently. By virtue of this amendment (Sec. 6) a daughter also acquires right by birth and can also ask for a partition of her share in the joint family property. She gets an equal share along with all other legal liabilities. Under this Act, she can ask for the partition of all other properties, excepting residential house of her parents and brothers.

To avoid complications of reopening of partition and litigation, the Act excluded women who have married prior to the passing of this Act, i.e., 1986. This amendment applies not only to the women of Andhra Pradesh but also to women from other States whose ancestral property is situated in Andhra Pradesh.

Stridhana :

Stridhana means women's property. Prior to the passing of the Hindu Succession Act, 1956, women were not entitled to inherit from their male relatives as a matter of right. But they were provided with Stridhana Right. Stridhana consisted of the gifts given to her at the time of marriage by her relatives and her in-laws. A gift made at the time of the marriage (or after the marriage) by her parents, brother, husband, in-laws or any relatives or strangers was part of Stridhana. Property purchased with Stridhana or with savings of income of Stridhana was also Stridhana. Generally gifts were made of movable property, and occasionally of immovable property. Property inherited by her through her mother, daughter and son also was Stridhana. A women's own earnings was her Stridhana.

Rights of a woman over her Stridhana :

According to our old scriptures she can enjoy the property at her pleasure in the following way :

1. The gifts presented to her during her maidenhood by relatives or strangers can be disposed of at her pleasure.
2. During the coverture she can dispose of only those gifts given by her other relatives but not those given by her husband.
3. During her widowhood, she can dispose of Stridhana of every description including the movable property given by her husband. But immovable property given by her husband cannot be disposed of. (Katyayana and Narada's commentaries).

According to the present law, she can enjoy an absolute right over her Stridhana of any description. The only limitation is that when a limited interest is provided in the gift deed, she can enjoy the property during her lifetime only if such a limitation is expressly given.

For the purpose of devolution of a Hindu female property, it is pertinent to know about Stridhana's origin.

Sec. 15 of Hindu Succession Act deals with the succession to a female estate. On the death of a Hindu female, her property, no matter how she acquired, shall devolve on her children and husband (class I heirs). A child of a predeceased child also takes it as a representative of his/her parent.

- 2) The heirs of the husband of deceased woman, comes under Class II heirs category. In the absence of the Class I heirs, her self-acquired property and the property inherited through her husband and father-in-law, devolves on the Class II heirs.
- 3) Her mother and father come under Class III heirs category. The heirs of her father, and mother come under Class IV and V categories.

The property inherited by a female through her father or mother goes to Class III, IV and V categories, in the absence of her children. Hence, 38

though the husband belongs to Class I heir, he does not inherit her property.

Similarly, in the absence of her Class I heirs, the property inherited through father-in-law and husband, devolves on her husband's heirs and not on her parents (even though they are nearer in relationship).

3.2. FEMALE SUCCESSION UNDER INDIAN SUCCESSION ACT, 1925 :

The properties of the persons married under the Special Marriage Act, 1954 are governed by Indian Succession Act, 1925. The children of such marriage could claim property under this Act and not under the Hindu Succession Act. By virtue of Sec. 29 of this Act the Indian Christians are also governed by this Act.

Where a person dies intestate (i.e., without leaving a will) the property devolves upon the wife husband and his/her children and close kindred.

The female successors under the Act :

There is no difference between the shares of the male and female heirs. Females are not excluded by males. They share along with males.

Wife's share in her husband's property :

Wife will get 1/3rd of the deceased person's property and his lineal descendants (children) will take the remaining 2/3rd of the property (Sec. 33).

If the deceased is issueless, but has kindred to him (brothers, sisters, mother and father) the widow is entitled to one half (1/2) of his property and the other half goes to his kindred.

In the absence of any children and kindred, the entire property goes to his wife.

Mother's Rights on deceased son's Property :

If a person dies, leaving his father and mother; after deducting their widow's share, the father succeeds to the remaining property (Sec. 42).

If the intestate's father is dead and mother is living, she is entitled to an equal share along with the deceased's brothers and sisters.

Succession to woman's property :

The property of a deceased woman dying intestate, the husband gets one third of her property (1/3) and 2/3rds of her property goes to her children in equal shares. (Sec. 35).

When a woman dies intestate, leaving no lineal descendants, the property will devolve on her husband (1/2 of the property) and her widowed mother, brothers and sisters take rest.

3.4. PARSİ WOMEN'S PROPERTY RIGHTS :

Chapter III of the Indian Succession Act, 1925, applies to the Parsi Community.

Under the Parsi Succession Law, the property of the woman and man devolves in the same way, in the absence of a will. Where a Parsi dies, the widow/widower and the lineal descendants (children) will take equal share.

In the absence of a widow/widower, children take in equal sharers. If a person dies leaving a parent or both the parents, each parent will get a share which is equal to half of the share of a child.

A predeceased child's child inherits its parents' share. The widow of a predeceased son will also inherit her husband's share along with her children.

3.5 THE MUSLİM WOMEN'S PROPERTY RIGHTS :

Muslims are governed by their Personal Law in the matters of property and marriage. In the Muslim Law of Inheritance, there is no difference between ancestral and self-acquired property. There is no equality among the sexes. In the same level of relationship, a woman inherits only half of what a male gets.

As in the case of the Hindu Personal Law, in Muslim Law also there are a number of schools like Sunnis, Shias, Maliki and Ahmad Ibn Hanbal. In India, Sunni and Shia schools are more prominent and the Law is followed according to these two schools.

Female Inheritance in Sunni Law :

There are three classes of heirs in Muslim Hanafi Law of Inheritance. 1) Sharers 2) Residuaries and 3) Distant kindred.

According to Sirajiyah, the first step would be to pay the funeral expenses, debts and legacies.

from out of the deceased's property. The remaining property would be allotted to the sharers according to their share. Then, if there is any property left after distributing amongst the sharers, the residuaries will take the remaining property.

In the absence of either sharers or residuaries, the distant kindred will succeed the whole inheritance.

Female Sharers :

Wife and mother are sharers.

Wife :

In the normal course, she inherits $\frac{1}{8}$ of her deceased husband's property. A Muslim can have as many as four wives at a time. If there are more wives than one, then the share will be divided equally among them. Under some special circumstances like the absence of a child or a child of a son, the wife gets $\frac{1}{4}$ share.

Mother :

As a sharer she inherits $\frac{1}{6}$ th share under normal circumstances. She gets $\frac{1}{3}$ rd share when:

1. There is no son or a daughter or a child of a son.
2. When there are brothers and sisters (whether full or consanguine² or uterine³).
3. In the presence of a wife/husband or father of the deceased person, she takes $\frac{1}{3}$ of what remains after deducting the wife/husband or father's share.
4. In the absence of a mother of the deceased person :
 - a) paternal grandmother
 - b) maternal grandmothertakes mother's share ($\frac{1}{3}$ rd).

Daughter :

In the absence of a son of the deceased, daughter comes under the category of a sharer. She shares $\frac{1}{2}$ of the deceased's property. In the presence of a son, she is a residuary and is entitled to $\frac{1}{3}$ rd of the residue and the son takes $\frac{2}{3}$ rd of the residuary property.

Grand daughters :

Granddaughters do not inherit as their father's representatives but they inherit as son's daughters in their own right as sharers or residuaries as the case may be. In the presence of deceased's daughter and son they inherit as residuaries, and take $\frac{1}{6}$ share. In the absence of a daughter and son of the deceased they become sharers and inherit $\frac{1}{2}$ share.

Sister :

In the absence of children, father and brothers they become sharers; a full sister inherits as a sharer.

In the presence of a full brother she becomes a residuary. A consanguine sister² becomes a sharer in the absence of full sister³ or in the absence of all the above mentioned heirs. When there is only a full sister, she takes $\frac{1}{6}$ share as a residuary and $\frac{5}{6}$ ths goes to the full sister

Successors for the property of a female :

The order of succession is the same both for a male and female. When a female dies leaving husband, father and mother, husband's normal share is 1/4 of the property. In the absence of a child or a child's son, he gets 1/2 of the property of his wife.

Distant kindred :

In the absence of sharers and residuaries, the property of the deceased's goes to distant kindred. They are descendants of the deceased other than sharers and residuaries.

3.3.(b) Female Inheritance Under Shia Law :

Under the Shia Law of Inheritance wife or husband inherit together with their nearest heirs by consanguinity. The heirs by marriage and heirs by consanguinity (blood relationship) are all sharers. They are nine in number.

1. Husband 2. Wife 3. Father 4. Mother 5. Daughter 6. Uterine brother¹ 7. Uterine sister¹ 8. Full sister and 9. Consanguine sister.

As far as allotment of shares is concerned, there is no difference between Sunni inheritance and Shia inheritance. Their share increases in the absence of certain heirs (as in the case of Sunni inheritance) and decreases in the presence of certain other heirs. The only difference is that they all inherit under the category of sharers.

3.6. SUMMARY :

There are inequalities with regard to property rights of women. In 1937, a widow of coparcener was given a limited estate in her husband's property for the first time. The 1956 Act recognised Shridhans, and limited estate of women as her absolute property. In 1986, the A.P. Government conferred a right by birth on a female child in the joint family property. Section 15 of Hindu Succession Act, 1956 dealt with the succession to a female estate. Section 33 of the Indian Succession Act, 1925 deals with succession of properties of the persons married under Special Marriage Act. Indian Succession Act applies to the Parsi Community. A Muslim women gets half of what male person succeeds. There is need to remove some inequalities still existing in property rights.

3.7. GLOSSARY :

Coparcenary	=	A member of a joint family.
Life Estate/Limited Estate	=	Right of enjoying property only during the life time without having a right to dispose off.
Shridhana	=	The property over which a women has total rights.
Successor	=	A person who inherits property from forefathers.
Full sister	=	Sister by same parents
Uterine sister	=	Sister by same mother
Consanguine sister	=	Sister by same father

3.8. REFERENCES :

1. Sirajiyya, an authority on the Hanafri Law of Inheritance. His works were translated by Sir William Jones. Mr. Rumsey edited Sir William Jones translations.
2. Consanguine sister/brother - sister/brother by the same father
3. Full sister - sister by the same parents.
4. Uterine brother/sister = brother and sister by the same mother.

3.9. RECOMMENDED BOOKS :

1. Mull, "Hindu Law" 16 Ed. By S.T. Desai, 1992.
2. Mulla, "Principles of Mohammendan Law" 16th Ed. By Hon'ble Mr. Justice Hidayatullah, 1968.
3. a) The Hindu Succession Act, 1956.
b) Indian Succession Act, 1925.
4. Any other books on Hindu Law and Muslim Law.

3.10. MODEL EXAMINATION QUESTIONS :

- I. Answer the following questions in 30 lines.
1. What is a 'Joint Family Property' under the Hindu Succession Law? Do women get a share by survivorship under this system?
 2. What is limited estate in Hindu Law?
 3. What constitutes Stridhana or women's property? What were the rights of a women over Stridhana. Discuss.
 4. What is the mode of devolution of the female estate under the Hindu Succession Act?
 5. Discuss the modes of succession under Parsi Law.
 6. Who are the primary female sharers under the Muslim Sunni Inheritance Law?
 7. Who are the primary sharers under Shia Law? What are their shares?
- II. Answer the following questions in 15 lines.
- a) Wife's inheritance under Indian Succession Act, 1925
 - b) Christian mother's right to her deceased son's property.
 - c) A sister's right to her deceased brother's property under Indian Succession Act.

BLOCK - III
LAWS RELATING TO WORK
AND WAGES

BRAOU

UNIT - 4 : LAW OF EMPLOYMENT AND THE CONSTITUTION

Contents :

- 4.0. Objectives
- 4.1. Introduction
- 4.2. Constitutional Provisions that regulate the Law of Employment
- 4.3. Fundamental Rights and Directive Principles
 - a) Equality
 - b) Freedoms
 - c) Right to Life
 - d) Prohibition of Slavery & Forced Labour
 - e) Equal Pay for Equal Work for Men and Women
 - f) Right to Work
 - g) Living Wage Conditions
 - h) Minimum Wages
- 4.4. Summary
- 4.5. Glossary
- 4.6. References
- 4.7. Recommended Books
- 4.8. Model Examination Questions

4.0. OBJECTIVES :

After going through this unit, you will be able to

- * Study the Constitutional provisions of Employment Law and
- * Various safeguards, rights and obligations provided by the Constitution.

4.1. INTRODUCTION :

Constitution of India guarantees certain Fundamental Rights to its citizens. Article 14, Article 15 Article 16 guarantee Equal Opportunities for Employment and Article 11 and Article 23 give a Right to livelihood and a Right to lead dignified life. There are other provisions in the Directive Principles of State Policy which give directions to the State Government to take measures for the betterment of the employees' lives. In this Unit, we will discuss the content and meaning of these Articles.

4.3. CONSTITUTIONAL PROVISIONS THAT REGULATE THE LAW OF EMPLOYMENT :

4.3.1. Fundamental Rights & Directive Principles :

Our Constitution guarantees Fundamental Rights to its citizens. Part III of the Constitution specifies these Fundamental Rights, and they are enforceable in a Court of Law. Any law or executive order which violates a Fundamental Right is liable to be declared void by a High Court or the Supreme Court.

Fundamental Rights guarantee political, legal and social equality. By virtue of this guarantee, the State cannot discriminate between one citizen and another merely on the ground of sex, religion, race, caste or place of birth in matters of any employment offered by the State.

Article 12 of the Constitution defined "the State" for the purpose of Part III and Part IV of the Constitution. According to this Article "the State" includes.

- 1) The Government and Parliament of India;
- 2) The Governments and Legislatures of the States;
- 3) All local or other authorities such as the Panchayats, Port Trust, Municipalities etc. and
- 4) All Public authorities created by a Statute and exercising statutory powers or Governmental or quasi-governmental powers - e.g., L.I.C. and Road Transport Corporation.

Article 13 of the Constitution, nullifies all the old laws (which were in force prior to the commencement of the Constitution) which takes away or abridges the rights conferred by this part of the Constitution.

Apart from Fundamental Rights, Part IV of the Constitution provides Directive Principles of State Policy. These Directions are declared to be fundamental in the governance of the country and the States, while shaping their policies, and directed to observe them. These principles hence are designed to create social, political and economic conditions in which the fundamental freedoms can be effectively enjoyed by all. Fundamental Rights are not to remain largely as formal guarantees. However, Fundamental Rights in Part III are justifiable, that is, can be enforced in a Court, but Directive Principles cannot.

While determining the scope of the Fundamental Rights, the Courts should be guided by Directive Principles. By virtue of the mandate of Equality in Article 14 and 16, some of the Directive Principles assumed the status of Fundamental Rights. Article 14 of the Constitution guarantees a person Equality before the Law and Equal Protection of the Laws. Equality before the Law and Equal protection may seem to mean the same but there is a difference between these two assurances.

a) Equality :

Equality before Law means absence of any special privilege in favour of any individual, and all persons are subjected to law equally. It means that no person is above the law of the land and is subject to the ordinary law. Every person, irrespective of his other status or rank (right from the President to a common man in the street), is responsible for acts done by him or her without lawful justification.

Equal Protection of Law guarantees equal treatment of persons in 'equal circumstances', permitting differentiation in different circumstances. In other words, no one should be either favoured or put under any disadvantages in the normal circumstances. But, in certain circumstances, the law can treat people differently. While doing so, it should show a reasonable justification. Article 14 prohibits discrimination, but permits reasonable classification to attain the objective permitted by the Constitution. The classification must be based upon intelligible, differential and should be related to the purpose sought to be attained.

Thus in a law of prohibition, it would not be unconstitutional to differentiate between civil and military personnel, or between foreigners and Indian citizens - for they are not similarly circumstanced from the stand point of need for prohibition of consumption of liquor². This Article protects against arbitrary discrimination and also against all arbitrary governmental actions.

Article 15 applies only to the citizens of India. It prohibits discrimination against any citizen on grounds of religion, race, caste, sex and the place of birth. In other words, a person should not be treated unfavourably because he belongs to a particular religion, caste, sex, etc.

But, clause (3) of this section, provides an exception to the above prohibitions. Under this clause, the State can make special provision for women and children and under clause (4), the State can make special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16 of the Constitution guarantees equality of opportunity in matters of public employment. All citizens are given an equal opportunity in the public employment. It prohibits discrimination in the matter of any appointment, promotion and termination of the public service.

Clause (3) of this Article makes an exception to this rule. Under this clause, the State Government can prescribe residence as a condition for public employment. Under clause (4), the State may reserve any post or appointment in favour of any backward class of citizens, if in the opinion of that State, that particular class (backward class) is not adequately represented in the services under the State.

Under clause (5), however, in the case of religious institutions, the State may appoint only a person belonging to a particular religion where the public office is related to that.

b) Freedom :

Article 19(1) guarantees six fundamental freedoms to the citizens - they are (a) Freedom of speech and expression; (b) Freedom of assembly; (c) Freedom of association; (d) Freedom of movement; (e) Freedom of residence and settlement and (f) Freedom of profession, occupation, trade or business.

Clause (2) to (6) of this Article permits imposition of reasonable restrictions on these freedoms.

Under Sub clause (g) of 19(1), a freedom is given to practice any profession or to carry on any occupation, trade or business.

Clause (6) of Article 19 permits imposing reasonable restrictions of the freedom. The State can make a law prescribing the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. For e.g., only qualified medical graduates can practice medicine or surgery.

Article (19)(6) permits the State or any Corporation owned or controlled by the State, to carry

on any trade, business, industry or service, to the exclusion, complete or partial, of the citizens.

In other words, the citizens may be restrained from taking up any trade or business or industry in the public interest. In certain fields of business or industry, the State may feel that a State owned Corporation can serve the public in a better way than a private individual. In such circumstances, the State may put a restraint on individuals to take up that trade, or business. The restraints may be partial or complete.

When it imposes restrictions, the restrictions should be reasonable. In one instance, the Supreme Court invalidated the order on the ground that it imposed an unreasonable restriction upon the freedom of business of those engaged in the manufacture of bidi manufacturing during the agriculture season. The object of the Act was to provide measures for the supply of adequate labour for agriculture labour in the season. Instead of completely forbidding the people of that area from going to bidi factory, the government could have regulated the working hours of the bidi factory during the agriculture season. Total prohibition of the manufacturing of bidis amounts to unreasonable restriction³.

Article 19(1)(g) confers a broad and general right which is available to all persons to do work of any particular kind.

The workers whose services are terminated, as a result of the sale of an industry cannot complain that their freedom and choice of work is infringed⁴.

Similarly, restrictions imposed on trade or industry by the State to regulate the trade but not to infringe can be the freedom of trade upon.

c) Right to Life :

Article 21 : This Article gives protection to the life and personal liberty of the citizen. No person shall be deprived of his life or liberty except according to the procedure laid down by law. Till 1978, the Courts, upheld and followed the decision of the Supreme Court in Gopalan vs. the State of Madras⁵. In that case, the majority of the judges held that, if a competent legislature makes a law providing that a person may be deprived of his liberty in certain circumstances, the validity of the law cannot be challenged in a Court of Law. In other words, the legislature has got the power to take away the liberty of a person and the Courts cannot interfere in the matter. But in Maneka vs. Union of India⁸ the Supreme Court overruled the decision in Gopalan's case. The Court held that the State which seeks to deprive a person of his personal liberty must satisfy the requirements of Article 19. Further, the legislature should prescribe a procedure for such deprivation which is not arbitrary, unfair or unreasonable.

The Right to Life under Article 21 includes Right to human dignity¹⁰. The expression 'life' assured in Article 21, does not connote mere animal existence or continued drudgery through out life. This is a Right against torture, cruelty, or unusual or degrading punishment.

This Right includes the Right to livelihood, better standard of life, hygienic conditions in work place and leisure⁶. The Right to Livelihood is to be treated as a part of the Right to Life. In the absence of such treatment, a person can easily be deprived of his or her Right to Life by depriving him or her of their right to livelihood. Such a treatment would not only devoid life of its meaningful content but it would also make life impossible to live. The Right to Life with human dignity encompasses within its fold some of the finer facets of human civilisation which makes life worth living⁷.

d) Prohibition of Slavery & Forced Labour :

Article 23 : This Article prohibits not only slavery but any kind of traffic in human beings. Traffic, here includes, traffic in women or children or the crippled for immoral or other purposes¹⁰. This Article prohibits all forms of forced labour. Forced labour in any form is violative of human dignity and is contrary to basic human values. For liquidation of debt, or remuneration for a service, a person cannot be compelled to perform service if he or she is not willing. No person shall be required to render service to another on payment of anything less than the minimum wages.

In the State of Rajasthan¹², the State made an exemption, passed an Act, during famine relief work. The workers were made to work in famine relief work, for a wage, which was less than the prescribed minimum wage. The Court held that it is violative of Article 14 of the Constitution and such exemption was void. The rights of all workers will be the same whether they are drawn from an area affected by drought and scarcity conditions or came from elsewhere.

The State cannot take advantage of the helpless condition of the affected persons and extract labour or service from them on less payment of wages.

Article 39(d) is a Directive Principle of State Policy. By virtue of the mandate of Equality in Article 14 and 16, some of the Directive Principles have assumed the status of Fundamental Rights. Article 39(d) is one such right.

e) Equal Pay for Equal Work for Men & Women :

Article 39(d) of the Constitution provides that "the State shall, in particular, direct its policies towards securing That there is equal pay for equal work for both men and women"

While interpreting the principle, the Court has to examine issues such as what is equal work? How to evaluate the work? and so on. Sometimes, a job may appear to be similar to another in some points, but vitally different from the other. Some of the criteria employed to differentiate are, the required skill, strain of the work, experience required, responsibility to be undertaken, educational and other qualifications necessary. Sometimes, how the claimants are recruited, as compared with those with whom parity of treatment is claimed, may be relevant.

For a long time, the tendency was to pay less to women workers in an establishment. In an establishment¹³ confidential lady stenographers were getting lesser pay than the male stenographers. A settlement was arrived in 1975, between the management and the employees' union. The settlement was provided for the mode of bringing the pay scales of the lady stenographers on par with their male counterparts. As a result, the basic pay of the lady stenographers' was reduced from Rs. 560 to Rs. 245 and D.A. was increased from Rs. 525 to Rs. 935.25. In all, she was getting Rs. 1180.25 per month and her male counterpart, who had put in an equal number of years of service being paid Rs. 585 by way of basic pay and Rs. 1325.24 by way of D.A., was being paid Rs. 1910.25 gross. She complained to the Authority. The Authority rejected the plea holding that in view of a settlement of 1975, the respondent was not entitled to any relief.

The Supreme Court held that there was discrimination between the lady stenographers and male stenographers. The value and the nature of the work was the same. The years of service was also the same. This cannot be tolerated under Section 4 of the Equal Remuneration Act,

The settlement arrived between the parties cannot be implemented in view of Section 3 of the Equal Remuneration Act.

The Act does not permit the management to pay a section of its employees doing the same work or a work of similar nature, lesser pay contrary to Section 4(1) only because it is not financially able to pay equal remuneration to all.

f) Right to Work :

Article 41 directs the State to uphold Right to Work. "The State, shall, within the limits of its economic capacity and development, make effective provisions for securing the Right to Work, to education and to public assistance in case of unemployment, old age, sickness and disablement and other cases of undeserved want". The State should follow a policy of eradicating unemployment.

g) Living Wage Conditions :

Article 43 gives a direction to the State to provide to all workers, agricultural industrial or otherwise, work, a living wage conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the State shall endeavor to promote cottage industries on an individual or cooperative basis in rural areas.

h) Minimum Wages :

A Minimum Wage must provide not merely for the bare sustenance of the worker but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide for some measure of education, medical requirements and amenities. It should be sufficient to cover the physical needs of a worker and his family. Industry should pay this minimum wage irrespective of its capacity to pay. If an industry is unable to pay to workmen, atleast a minimum wages it has no right to exist.

Article 43 directs the State "to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

'What is a living wage' was defined by Justice Higgins of the Australian Commonwealth Court of Conciliation (in the Harvester case). According to him, it was a wage sufficient to ensure the workmen, food, shelter, clothing, frugal comfort, provision for evil days etc., as well as regard for the special skill of an artisan if he is one'.

According to another definition, the basic wage paid to an adult male employee shall not be less than what is "sufficient to maintain a well conducted employee of average health, strength and competence and his wife and a family of three children in a fair and average standard, comfort, having regard to the conditions of living prevailing among employees in the calling in respect of which such basic wage is fixed, and provided that, in fixing such basic wage earnings of the children and wife of such employee shall not be taken into account.

To sum up, a living wage should enable the male earner to provide for himself and his family, not merely the bare essentials of food, clothing and shelter, but a measure of frugal comfort including education for the children and protection against ill-health, requirements of essential

social needs and a measure of insurance against the more important misfortunes, including old-age.

4.4. SUMMARY :

Constitution provides some Fundamental Rights under Articles 14, 15 and 16., besides guaranteeing equal opportunities for employment. Article 21 and 23 give a Right to livelihood and a right to lead a dignified life. Everyone is entitled to equal protection of law, without discrimination, Art. 16 guarantees equality of opportunity in matters of public employment, with exceptions to backward classes. Freedom of profession or trade is available under Article 19(1). Art. 23 prohibits slavery and forced labour. Art. 39 (d) is a Directive Principle which became a Fundamental Right with judicial interpretation directing the State to secure equal pay for equal work from both men and women. Right to Work (Art. 41), Living Wage Condition (Art. 43) are some more Rights available in the Directive Principles of State policy.

Constitution of India envisages equal employment opportunities for both men and women. The Constitution also provides for a Right to livelihood and a Right to live in dignity equally to both women & men. To achieve these objectives, various enactments were passed by the Parliament. If implemented, these provisions will result in equal treatment to women in the matters of employment.

4.5. GLOSSARY :

Right to Work	=	Every citizen should be provided with an opportunity to work. It is a Directive Principle of State Policy under Art. 41.
Living Wage Conditions	=	Conditions under which the wages help the labour to live on.
Minimum Wage	=	A wage prescribed by the Authority necessary to meet the bare needs and provide education, medicine, etc.

4.6 REFERENCES :

1.1. Constitutional provisions that Regulate the Law of Employment

1. As per S.R. Das J in *Bhudhan vs. State of Bihar*, (1955) SCJ 163.
2. *State of Bombay vs. Balsara*, (1951) SCR 682
3. *Chintamanrao vs. State of M.P.*, (1952) SCR 759
4. *K. Rajendran and others vs. State of Tamil Nadu*, (1982) AIR SC 1107
5. *Gopalan vs. State of Madras*, (1950) SCR 88
6. *Olga Tellis vs. Bombay Municipal Corporation*, AIR (1986) SC 180
7. *Ibid*
8. AIR (1978) SC 597
9. *Consumer Education and Research Centre and others vs. Union of India and others*, AIR (1955) SC 922

10. Sanjit vs. State of Rajasthan, AIR (1953) SC
11. People's Union for Democratic Rights vs. Union of India, AIR (1982) SC 1481
12. Sanjit Roy vs. State of Rajasthan, Ibid
13. Mackinnon Mackenzie and Co. vs. Audrey-D'Costa, (1987) 2 SCC 469
14. The Queensland Industrial Conciliation and Arbitration Act.

4.7. RECOMMENDED BOOKS :

1. Constitutional Law of India, J.N. Padey
2. Selwyn's Law and Employment 7th Edition, Butterworths, 1991

4.8. MODEL EXAMINATION QUESTION'S :

- I. Answer the following questions in 30 lines each .
 1. What are the various provisions under the Constitution which deal with the Right to Work?
 2. Explain the Directive Principles of State Policy concerning the welfare of labour?
- II. Answer the following in 15 lines each.
 - a) Equal Pay for Equal Work
 - b) Living Wage Conditions

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UNIT - 5 : LABOUR LAW UNDER DIFFERENT ENACTMENTS

Contents :

- 5.0. Objectives
- 5.1. Introduction
- 5.2. Minimum Wages Act, 1948
- 5.3. Equal Remuneration Act, 1976
- 5.4. Provident Fund
- 5.5. Employee's State Insurance Act, 1948
- 5.6. Workmen's Compensation Act, 1923
- 5.7. Safety Measures in a Factory
- 5.8. Summary
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- 5.10. References
- 5.11. Recommended Books
- 5.12. Model Examination Question's

5.0. OBJECTIVES :

After going through this unit, you will be able to

- * study various provisions under the enactments for welfare of the labour.
- * study the rights and duties of employees and statutory obligations of employers under these enactments.

5.1. INTRODUCTION :

Under the broad framework of the Constitution, the State passed several enactments aiming at achieving the welfare of the labour in India. The Labour Law under different Acts specified the rights and duties of the workmen and women and imposed certain obligations on the employers. These laws also enumerated the criminal offences, in the form of violations of the provisions, for which the punishments are also prescribed. Some of the enactments were intended to translate the ideals provided under the Directive Principles. For instance- the Minimum Wages Act and Equal Remuneration Act enforce the Fundamental Right to Equality and try to provide for better living conditions for the labour class. Factories Act provides the duty to create healthy working conditions for the workmen and women. In this unit, we will discuss the contents and provisions of various labour welfare enactments and procedures for redressal of grievances, etc..

5.2. MINIMUM WAGES ACT, 1948 :

This Act was passed in 1948. The purpose of this Act was to ensure minimum wages to the labourers and to prevent forced labour in any form.

The concerned Government reviews the minimum rates at regular intervals and the period of interval is not more than 5 years.

To bring any industry or employment under the purview of this Act, the appropriate Government appoints a fact finding machinery. This machinery inquires into facts such as existence of more than a thousand employees in any industry or employment.

The minimum wages may, be fixed in any one of the four ways :

- a) a minimum time rate;
 - b) a minimum piece rate;
 - c) a guaranteed time rate; and
 - d) a overtime rate
- a) A minimum time rate means - that wages so are calculated for work done per hour. The worker should be which given as many hours of work at the end of the day as far he should earn minimum amount of wages.
 - b) Wages are paid as per piece rate also. For example, Rs. 10/- paid for making 100 beedies in a beedi industry. Wages are paid according the number of beedies made.
 - c) Wages may be fixed per hour and per piece. The worker is supplied as many pieces as which may enable him to earn his minimum wages per day. This is called guaranteed time wage.
 - d) A worker is paid extra wages if he works for more hours than the fixed hours. He will be paid extra wage in respect of over-time work done by such employee. This is called overtime rate.

Wages may be fixed per hour, per day, or per month. The employer cannot pay below the minimum wage rate to his employees. (Section 3). The minimum wage must be paid irrespective of the extent of profits, financial conditions of the establishment or availability of labour at lower rate.

In a day an adult cannot work for more than 9 hours period and these 9 hours are inclusive of rest hours.

A child is allowed to work only for 4 1/2 hours, including rest hours (Section 3).

An authorised medical practitioner should certify whether an adolescent be considered a child or an adult. (Under section (3), the wages are fixed in such a way that different minimum wages are fixed for i) different scheduled employments.

- ii) for different classes of work in the same scheduled employment.
- iii) different wages for adults, adolescents, children and apprentices.

under Section 4 there are three ways of fixing minimum wages :

- 1) To fix a basic rate of wage and a special allowance at a rate to be adjusted, as practicable,

with the variation in the cost of living index applicable to such workers;

2) A basic rate of wage with or without cost of living allowance, and the cash value of the concessions in respect of supplies of essential commodities at concession rates made to the worker.

3) An inclusive rate allowing for basic rate, the cost of living allowance and the cash value of the concessions.

These cost of living allowance and cash value of the concessions for commodities are computed by the appropriate authority at prescribed intervals. The appropriate Government will give directions to the appropriate authority to review and fix up the minimum wages.

Procedure for fixing up the Minimum Wage : (Section 5) :

For revision or fixing up the minimum rates of wages, the appropriate Government appoints committees and sub-committees. The function of these committees is to hold enquiries and to advise the Government in respect of minimum wages.

A Central Advisory Board is also constituted by the Central Government to advise the Central and State Governments in the matters of minimum wages.

Central Advisory Board - Composition of the Board :

The members are nominated by the Central Government. An equal number ...

- a) members representing employers and
- b) members representing employees;
- c) independent members not exceeding 1/3 of its total members.
- d) chairman of the Board² will be appointed from among the independent members. (Secs. 8 & (9).

Minimum wages payable under this Act shall be in cash.

But in certain cases where there is a custom to pay the wages in kind (partly or wholly), the Government may authorise the employer to pay in kind.

The Government may also authorise the employer to supply the essential commodities at a concessional rate as wages (partly) (Section 11).

Fixing hours for a normal working day :

An employer can take actual work for 8 hours per day for 6 days in a week. He may take upto 9 hours of work on any day without paying overtime wages, if the total number of working hours do not exceed 48 hours in a week.

Over-time wages :

When an employer takes the work of an employee for more than fixed hours of work per day, he is liable to pay for those extra hours of work. Normally, the rate of overtime wage is fixed as double the minimum wage amount. Sometimes it can be relaxed, but it should be certainly in excess to the normal minimum wage. (Section 14)

When an employer could not take the services of an employee in the normal fixed hours (8 or 9 hours in a day), the worker is entitled to get full day's wage.

If the worker is not willing to work for the fixed hours of time, then he is not entitled to get full day's wages. (Section 15)

Maintenance of registers and records :

Every employer shall maintain registers and records giving the particulars of employees, work performed by them, wages paid to them, receipts given by them and other particulars.

He should exhibit notices of all the above particulars, at a conspicuous place. The employer should issue wage-books or slips to the employees. The particulars of wages are filled in these books or slips in a prescribed manner. (Section 18).

Enforcement Authority :

The appropriate Government appoints Inspectors after notifying in the official Gazette. It may prescribe their powers and jurisdiction.

Powers of an Inspector :

He may enter the premises of any factory or industry (where this Act applies) at any reasonable time. He may take the assistance of some local authority, while conducting an inspection or inquiry. He may ask for any record or document of wages.

He may examine any person, regarding the wages. He may ask for any information regarding wages. He may ask for addresses of persons.

He may seize, or require copies of any register or document which he feels relevant.

The Inspector is deemed to be a public servant and if any person is asked to produce any document or if any person is summoned, he is legally bound to comply. (Section 19).

Claims :

Under Section 20, the State Government appoints an authority to hear the cases of the claims for payment of minimum wages. The person fit to be appointed to hear such claims is

1. a Commissioner for workmen's compensation;
2. any Regional Labour Commissioner of Central Government;
3. Labour Commissioner of a State Government;
4. any Judge of a Civil Court;
5. any Stipendiary Magistrates.

Who can Claim?

1. the employee himself;
2. any legal practitioner;
3. any official of a trade union authorised in writing to act on his behalf;
4. an Inspector
5. any person acting with the permission of the authority;

What type of claims can be made? :

An employee can make the claim when he is paid less than the minimum rate of wages. The Authority can direct the employer to pay to employee the difference of payment. The authority can also ask the employer to pay compensation for deficient payment. This authority can entertain the claim for over-time allowances also.

The employee should make an application within six months from the date of the claim. The authority can condone the delay, if he is satisfied that it is delayed for a reasonable cause.

The authority gives an opportunity to the applicant and the employer to present their cases. They are given the opportunity to produce evidence.

If any one of the parties is not satisfied with the order of the authority, he can appeal to the High Court.

5.3. EQUAL REMUNERATION ACT, 1976 :

This Act was passed to give effect to the provisions of Article 39 of the Constitution.

Section 4 of the Act imposes a duty on the employer to pay equal remuneration to men and women workers for the same work or work of a similar nature. For performing the same work or work of a similar nature the employer cannot pay a lesser amount to any employee on the ground of gender. It was the previous practice of the employers to pay lesser wages to women workers.

To comply with the provisions of this Act, the employer shall not reduce the remuneration rate to the other labourer of the opposite sex (i.e., for men workers).

Where there are more than two rates in any establishment, on the commencement of this Act, the employer is bound to pay the highest rate of wages to men and women workers.

Section 16 of this Act authorises the appropriate Government to make a declaration exempting certain cases, regarding differences in the equal remuneration. In these cases, the employer may impose restrictions regarding remuneration to be paid to the employees. The air hostesses of the Indian Airlines Corporation and Air India, are the glaring examples for this discrimination. The salaries, pensions and retirement benefits are different from that of an air purser who does the same amount and similar kind of work.

While making recruitment for the same work or work of a similar nature, the employer should not make any discrimination against women except in the cases where, employment of women in such work is prohibited or restricted. (Section 5)

Advisory Committee :

An Advisory Committee is constituted by the appropriate Government which consists of not less than ten persons (nominated by the Government) of which one half shall be women. The functions of this Committees are

- 1) To advise the Government, with regard to the extent to which women may be employed in such establishments or employments;
- 2) The Advisory Committee shall have regard to the nature of work, hours of work, suitability of women for employment, the need for providing increasing employment opportunities for women, including part-time employment etc. (Sec. 6)

Where there are any complaints the appropriate Government may appoint officers (not below the rank of a Labour Officer) to hear and decide such complaints or claims. (Section 7)

Appropriate Government may appoint Inspectors to inspect, whether the provisions of this Act are complied with or not. The Inspector may investigate into the non-compliance of the Act within the local limits of his jurisdiction.

He is deemed to be a public servant; he can enter any premises of the building or factory; he can ask for production of the registers and records or any other related documents. He can take evidence of any person found in charge of the establishment or any other person if he feels necessary. The employer or any other person should comply with the orders of the Inspector. For an offence committed under this Act, a complaint can be lodged only by an aggrieved party or the appropriate government or an officer authorised by it. A Metropolitan Magistrate, or a Judicial Magistrate of the First Class shall try these cases. (Section 12)

This Act does not affect women's employment laws giving special treatment to women (such as Maternity benefit).

5.4. PROVIDENT FUND :

The employee's Provident Fund was introduced for the benefit of employees, who do not have any pension scheme. In the case of employees of a factory there is no facility of pension after retirement. So Provident Fund is introduced as a terminal benefit for non-pensionary employees. It is a compulsory savings system. Certain amount of money is contributed by the employer and the employee and deposited in the Fund. The amount is given to the employee at the time of retirement or at the time of leaving the job.

This scheme is extended to Government establishments also but the employer does not contribute anything towards the Fund, as the employee is covered by pension scheme.

The Employees Provident Fund Act was passed in 1952 and it applies to every establishment which is a factory where twenty or more persons are employed. This Act exempted the following establishments.

(Section 16) : 1) Establishments which are registered under the cooperative societies Act. 2) Establishments, employing less than fifty persons and working without the aid of power. 3) It exempted Central and State Government establishments whose employees are already covered under the Central and State Government Provident Fund Scheme.

Scheme : The employer has to make contribution both with regard to his share and with regard to the share of the employee. He can recover the amount of the employee's contribution from the employee. When an apprentice ceases to be an apprentice and becomes a worker, his period apprenticeship will be counted for purpose of the Provident Fund.

Central Board of Trustees : The Central Government, by a notification in the official gazette, constitutes a board of trustees for the territories to which this Act extends. The Board consists of a Chairman, a Vice-Chairman, Central Provident Fund Commissioner (Ex-officio), not more than fifteen persons representing States, ten persons representing the employers of the establishments to which this scheme applies and ten persons representing the employees organisations.

State Board : The Central Government may appoint State Board of Trustees in consultation with the concerned State Governments. The State Boards shall perform duties as assigned by the Central Boards.

Every Board of Trustee (Central Board and State Boards) is a body Corporate, having perpetual

succession and a common seal. It may in its name sue and be sued.

Central Board is headed by a Central Provident Fund Commissioner; He is the Chief Executive Officer of the Central Board and shall be answerable to the Board.

For the efficient administration of the schemes, Section 6 of the Act provides for the mode of contribution. Eight and one thirds (8 1/3%) of the basic wages (dearness allowance¹ and retaining allowance²) has to be contributed by the employer (the employee may be a person directly employed by him or by or through a contractor). The employee's contributions shall be equal to the contributions payable by the employer in respect of him. If the employee so desires, he may enhance his contribution (exceeding 8 1/3% of the basic wages, D.A., and retaining allowance) but the employer is not under an obligation to enhance his share of contribution and his share continues to be 8 1/3% of the basic (D.A. + Retaining allowance). The Central Government may modify this Section and may enhance the contribution rate.

This Section and Paragraph 29 of the Provident Fund Scheme, do not leave any option to employees to pay or not to pay their contribution.

The Act comes into operation by its own vigour and its operation is not dependent on any decision taken by the authorities under the Act. The employers are under an obligation to pay their share of contribution to the Fund within the time prescribed, from the moment the Act and the scheme became applicable to them. No notice or intimation in that respect is necessary to be issued by the authorities.

Employees' Family Pension Scheme :

Central Government may by notification in the official Gazette, frame a scheme, the Employees Family Pension Scheme for the purpose of providing family pension and life insurance benefits to the employees of any establishment or class or establishments to which this Act applies.

The moment the Scheme is framed, a Family Pension Fund comes into existence. Like Employees' Provident Fund, the contributions will have to be made both by employee and employer into the Fund. The portion of the employer will not be more than 1/4 payable under Section 6. This Fund is vested and administered by the Central Board. The scheme may provide for matters like (Schedule III) (1) to whom this scheme should apply; (2) portion of the employee and employer and the manner in which it may be credited; (3) contribution by the Central Government and the manner in which accounts of these Funds are maintained etc.

The Scheme may have prospective or retrospective effect.

Employees' Deposit Linked Insurance Scheme :

Like Family Pension Scheme, the Employees Deposit Linked Insurance Scheme may be framed by the Central Government by notification in the official Gazette. The moment the Scheme is framed, the Fund comes into existence and shall apply to all establishments to which this Act applies. The contribution of the employer shall not be more than 1% of the aggregate of the basic wages, dearness allowance and retaining allowance for the time being payable in relation to the employee.

Inspectors :

The appropriate Government may, appoint such persons as it thinks fit to be Inspectors for the purpose of this Act and may define their jurisdiction. The Inspectors are empowered to inquire

into the information furnished in connection with this Act. He may examine any records, registers or any relevant documents connected with the Scheme.

Where there is a dispute regarding the applicability of this Act to an establishment, such dispute shall be decided by the Central Provident Fund Commissioner, Addl. Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner. These officers determine the amount due from any employer under any provision of this Act the Scheme or the Family Pension Scheme or Insurance Scheme. The officer conducting the enquiry under sub-section (1) shall, for the purpose of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure 1908.

They have the following powers :

- 1) enforcing the attendance of any person or examining him on oath;
- 2) requiring production of documents;
- 3) receiving evidence on affidavit;
- 4) issuing commissions for the examination of witnesses and any other inquiry which is in the nature of a judicial proceeding. The officer who passes an order has the power to review it.

If the parties are not satisfied with the review an appeal lies before the Employees' Provident Funds Appellate Tribunal.

A tribunal consists of a Presiding Officer, who is qualified to be a Judge of a High Court.

Nomination : Each member shall make, in his declaration, a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death. The member may distribute the amount that may stand to his credit in the Fund amongst his nominees at his own discretion.

If the member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by a member in favour of a person not belonging to his family is invalid.

If a member has at the time of the nomination no family, but subsequently acquires a family of his own, such person, shall make a fresh nomination in favour of one or more persons. If he does not make a fresh nomination, then it deemed to be invalid.

A minor can also be nominated by the member, but a major person from the family has to be nominated as guardian of the minor.

Withdrawal : A member can make an application to the Commissioner for withdrawal from the fund for the purpose of purchasing a dwelling house/flat or for the construction of a house or for acquiring site. The amount of withdrawal shall not exceed the member's basic wages and dearness allowance for thirty-six months or the member's own share of contribution together with that amount of the employer's share of contributions.

The withdrawal is granted (1) if the member has completed five years membership of the Fund; (2) the member's own share of contribution with interest thereon in the amount standing to his credit in the Fund is not less than one thousand rupees; (3) the dwelling house/site is free from encumbrances. No withdrawal shall be granted for the purchase of property in a joint name.

5.5 EMPLOYEES' STATE INSURANCE ACT, 1948 :

Employees' State Insurance Act, 1948 was passed to provide certain benefits to employees in case of sickness, maternity and employment injury and to make certain benefits. To carry out the above mentioned functions, an Employees' State Insurance Corporation was constituted.

Composition of the Corporation : The Corporation consists of a Chairman, a Vice-Chairman and a maximum five members appointed by the Central Government. Each State Government (in which this Act is enforced) appoints one representative from their respective States. Similarly, the Central Government appoints, one representative from each of the Union Territories. Ten persons are appointed by the Central Government to represent the employers. These employers are appointed in consultation with the employers' Organisations from all over the country. Ten persons from employees' organisations are also appointed by the Central Government. Two members from medical profession (Doctors) are appointed in consultation with the medical organisations.

Three Members of Parliament (two from Lok Sabha and one from Rajya Sabha) are elected by the members of the respective Houses. The Director-General of the Corporation would be the ex-officio member. The term of office of the employees' representatives, employers' representatives, medical practitioners and the Members of the Parliament shall be four years commencing from the date of their appointment or election is notified.

A member shall continue to hold office (after the expiry of his term) until the election of his successor is notified.

The Chairman, Vice-Chairman, Members appointed by the Central Government, members appointed by the State Government and Union Territories, shall hold office during the pleasure of the Government. An outgoing member of the Corporation is eligible for re-appointment or re-election.

A Standing Committee is constituted from among the members of Corporation.

Medical Benefit Council : May be constituted with the Director-General, Deputy Director-General, Health Services (appointed by the Central Government).

Medical Commissioner of the Corporation (ex-officio), one member each from the State (appointed by the State Governments) concerned, 3 members from employers organisation (appointed by the Central Government), 3 members from employees organisations (appointed by the Central Government), 3 members from the medical profession, of whom not less than one shall be a woman (appointed by the Central Government).

The term of office of the appointed members shall be four years from the date on which his appointment is notified.

Director-General : The Director-General is the Chief Executive Officer of the Corporation. He and a Financial Commissioner are appointed by the Central Government, in consultation with the Corporation. The Corporation may recruit other staff of officers and servants.

Powers of the Standing Committee : The Standing Committee shall administer and exercise any powers and functions of the Corporation, under the supervision and control of the Corporation.

Corporation has the power to promote measures for the improvement of the health and welfare

of insured. To function in a more effective way, a Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in certain areas and may delegate powers to them.

Finance and Audit : The Corporation accepts grants, donations and gifts from the Central or State Government, local authority or any individual or body whether incorporated or not for all purposes of this Act. All such amounts which are received are paid into the Reserve Bank of India or any other Nationalised Bank. The account of such amounts is operated by the authorised officer approved by the Corporation.

Purpose for which Fund may be expended : The Fund is mainly for the medical treatment of the insured persons, and their families. Expenditure incurred for the maintenance of the Corporation is also drawn from this Fund. The fund meets the expenses of establishment and maintenance of hospitals, dispensaries and other institutions and the provisions of medical and other ancillary services for the benefit of insured persons, and their families within the limits prescribed. The Fund may be spent on the improvement of the health, welfare of the persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured.

The costs of legal proceedings and expenses to meet other expenditure for the purpose of implementing this Act is also met by this Fund.

Contributions : All employees in a factory are insured under this Act. The contribution to Corporation comprises of employees' contribution and employers' contribution (to the employee).

A casual worker is also entitled to payment of contribution by the employer towards employers' contribution as well as employee's contribution, though he is employed even for a day or two or for a few days in a week.

It is the responsibility of the principal employer in respect of every employee (whether directly employed by him or by through an immediate employer) to pay both the employees contribution and employer's contribution. The employees' contribution is the amount deducted from the wages of the employee by the employer (i.e., the employer recovers the employee's contribution from his wages).

The contribution is payable on the last day of the wage period. An employer cannot contend that it was not possible for him to deduct the wages of employees towards the contribution.

The employer should maintain records of payment of contribution, either in a register or by a card system. The payments should be shown or recorded by means of special stamps (adhesive or stamps or impressions on the book or card).

Inspectors : The Corporation appoints its officials as Inspectors. The Inspectors duties are to examine the records of payment of the contribution. He may ask any principal employer to furnish the necessary details about the contribution or to produce any necessary documents.

Benefits : The insured persons are entitled to the following benefits :

- 1) Periodical payments in case of sickness. He may have to furnish a certificate duly signed by the authorised medical officer appointed under this Act regarding his sickness.
- 2) IN the case of women, periodical payments are made towards maternity benefits. Here also she has to produce her eligibility certificate duly signed by a medical officer.
- 3) Disabled persons, who suffered an injury during the course of employment which resulted in disablement.

- 4) Where an insured person dies as a result of an employment injury, his dependents are eligible for periodical payments.
- 5) Expenses of any medical treatment of the insured person.
- 6) In case of death of an insured person, the eldest member of the family or the person with whom he stayed at the time of his death, will receive the funeral expenses. In this case, the amount will be a fixed sum and be fixed by the Central Government.

In the case of sickness and maternity benefit, the rates and the period for which the payments are to be made will be fixed by the Central Government.

In the case of disablement (for not less than three days) the period and the rate of payment will be fixed by the Government.

In the case of dependents, benefits also (in the event of the employee's death), the same rules will apply.

Benefits not to be combined : Where persons are entitled to more than one benefit, e.g., both sickness benefit and maternity benefit, they have to choose which benefit they shall receive. They are not entitled to get both the benefits at the same time. In case of excessive amounts received by the insured person, the Corporation will recover the excess amount.

Employer's Duty : Where in any factory, due to the neglect of the owner or occupier of the premises, the standard sanitary conditions are not observed, the Corporation may send to the owner of the factory, a claim for the payment of the extra amount towards the sickness benefit. Similarly, the contribution of the employer may be enhanced, if there is a greater incidence of occupational disease.

An employer shall not reduce the wages or dismiss or discharge or punish in any other way during the period of the employee's sickness or maternity (confinement) (Section 72). This is to discourage employers from using the benefits provided under this Act as an excuse or justification for reducing or discontinuing the benefit available to the workmen under their conditions of service on the ground of similarity between the two types of benefits. (Section 73-B and C) (Bareilly Holdings Ltd. vs. Workmen, (1979) Lab. I.C. 600 (SC)).

Employees' Insurance Courts : Section 74 and Section 75 of the Act indicate that the disputes that arise under the provisions of the Act, must be decided by the Employees' Insurance Act and not by a civil court. But the Act does not prevent anybody from launching a criminal proceeding in contravention of the provisions of this Act.

The State Government shall decide the number of Judges to the Court. Any person who has been a Judicial Officer (or is a) or is a legal practitioner of five years standing shall be qualified to be a Judge of the Employees' Insurance Court.

These Courts can decide any question regarding

- a) whether a person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution.
- b) the rate of wages or average daily wages of an employee for the purpose of this Act.
- c) the rate of contribution payable by the principal employer in respect of the employee.
- d) the person who is or was the principal employer in respect of any employee.

e) the right of any person to any benefit and as to the amount and duration of payment.

The Court can review the direction of the Corporation under Section 55-A, regarding the payment of dependents benefits. It can decide any other matter which is in dispute.

It can also settle the following claims for recovery of contributions from the principal employer.....

.... a claim by a principal employer to recover contributions from immediate employer

.... a claim against a principal employer under Section 68.

..... a claim under Section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto.

..... a claim for recovery of any benefit admissible under this Act.

5.6. WORKMEN'S COMPENSATION ACT, 1923 :

The employer is liable to pay compensation to his workmen for the injury in an accident, arising out of and in the course of employment. Workmen's Compensation Act provides for the payment of such compensation to the workmen by their employers.

The employer is liable to pay compensation for the following injuries :

(1) when the injury results in the total or partial disablement of the workman for more than three days;

(2) when the workman contracts a disease peculiar to the occupation;

(3) where death results from the injury the dependents are entitled to compensation.

Three factors must be established to get compensation under Section 3 of this Act.

Firstly, there must be an injury;

Secondly, it should be caused in an accident; and

Thirdly, it should be caused in the course of employment.

Death in ordinary course by some bodily ailment, even in the course of employment, cannot attract the liability of the employer.

The employer is liable to pay compensation, if the injury results in permanent or partial disablement. (Section 2(g)(I)).

When an injury results in only partial disablement then also the workman is entitled to compensation. The injury need not result in the total loss of earning capacity.

Schedule III of this Act deals with occupational diseases peculiar to employment. In this case, contracting of the disease peculiar to the occupation is deemed to be injury by accident.

The worker is entitled to get compensation in the case of occupational disease, if he had worked continuously for a specific period at the employer.

When a workman employed with more than one employer and contracts a disease like infectious diseases, and diseases caused by compressed air etc. specified in Part C of Schedule III to the Act all employers are liable to pay compensation to the employee. The proportion in which they have to pay compensation will be decided by the Commissioner.

The workman can claim any compensation either before a Civil Court or before a Labour Commissioner. He can not move the Court and the Commissioner at the same time. The employee and an employer can enter into an agreement in respect of the compensation, in which case the claim need not be instituted either before a Commissioner or before a Court.

Dependents : When death results from the injury, the workman's dependents are entitled to compensation. The dependents under the Act are the following persons :

- i) his widow, minor legitimate son, unmarried legitimate daughter and a widowed mother;
- ii) Re-marriage of the widow of the deceased workman does not make her cease to be his dependent. She is entitled to receive compensation as there is no provision in this Act to the effect that subsequent events would affect the claim of the dependent to compensation.

Apart from the above dependents, the following persons are also recognised as dependents of the deceased.

ii) a son or a daughter who has attained the age of 18 years and who is infirm and wholly dependent on the earnings of the workman at the time of this death.

iii) a) a widower;

b) a parent other than a widowed mother;

a minor illegitimate son, an unmarried illegitimate daughter-
if married a minor or a widowed minor daughter

d) minor brother, unmarried sister, or widowed sister;

e) widowed daughter-in-law

f) a minor child of a pre-deceased son;

g) a minor child of a pre-deceased daughter where no parent is alive;

h) paternal grand-parent where the parent of the deceased is not alive

who are wholly or partly dependent on the earnings of the deceased at the time of his death.

In English Law, there is a reduction of schedule compensation on the ground of contributory negligence. But under our law, the Act does not provide for reduction of schedule of compensation on the ground of contributory negligence.

Enforcement Authority : The Assistant Labour Officer has to send a report to the Commissioner regarding the claimants. The Commissioner has to know what is contained in the report of the Assistant Labour Officer. The claimants have to prove before the Commissioner that they were the dependents of the deceased at the time of his death.

The employee should be in the service continuously for a period of twelve months (not less than twelve months period). While calculating the wages, (for the purpose of this Act), the wages for the leave period is not calculated. (Section 5).

Commissioner : The State Government may appoint any person to be a Commissioner for workmen's compensation. (Section 20).

The Commissioner may seek the assistance of one or more persons who are familiar with any relevant matter under inquiry to assist him in holding enquiry.

Functions of a Commissioner : The Commissioner has to inquire into the questions in any proceeding as to whether a person injured is or is not a workman. He has also to inquire into the nature and the extent of disablement and the amount of compensation payable. The matter is normally settled by an agreement between the parties.

If the parties fail to come to an understanding, then the matter is referred to the Commissioner by an application.

If a person cannot make an application in a prescribed manner, it can be rectified under the direction of the Commissioner. It cannot be thrown out. Once the compensation is settled by an award - a second application on the ground of aggravation of injury is not maintainable. A person who claimed compensation under this Act, cannot claim compensation under any other Act like Motor Vehicle Act etc.

Powers of the Commissioner : The Commissioner has all powers of the Civil Court under the Code of Civil Procedure 1908 (5 of 1908) for the purpose of taking evidence on oath and enforcing the attendance of witnesses and compelling the production of documents and material objects.

The parties to the claim have to appear before the Commissioner. Where it is permitted, an application can be made on behalf of the party by a Trade Union Leader, Inspector or a member of the Joint Hindu family. The parties (except the witnesses) can appear before the Commissioner either in person or by a legal practitioner or by an officer of the Insurance Company.

The Claimants must be awarded the full amount of compensation under Section 4 even if they claimed a lesser amount. A notice of the accident has to be given to the employer. In the case of an accident, the claim will have to be preferred within 2 years of the occurrence, and in the case of death within 2 years from the date of death.

Medical Examination : Where an accident notice is given, the employer has to arrange for a free medical examination by a qualified medical practitioner within three days of the accident.

Where partial disablement resulted and the workman is under half month wages, he is required to submit himself for medical examination from time to time.

A woman worker shall not be examined by a male doctor without her consent. If she has to undergo the examination by a male doctor she shall go in the presence of another woman.

If she deposits some money she can be examined by a female medical practitioner.

Amount of Compensation (Section 4) : When death results from the injury - an amount equal to forty percent (40%) of the monthly wages of the deceased workman multiplied by 'relevant factor', or an amount of twenty thousand rupees, whichever is more.

Where permanent disablement results from injury - an amount equal to fifty per cent (50%) of the monthly wages of the injured workman multiplied by the 'relevant factor' or an amount of twenty four thousand rupees whichever is more.

Here the 'relevant factor' in relation to workman means the factor specified in the second column of Schedule IV against the entry in the first column of the Schedule specifying the number of years which are the same as completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

For example - on the day of the accident the workman is aged 25 years (Column I) 216.91 is given as relevant factor in (Column II)

Column (1)	Column (2)
Age on the day of accident	Factor
Not more than 25 years of age	216.91

An amount of equal to forty per cent of his monthly wages are to be multiplied by 216.91.

Assuming that monthly wage is - Rs. 600/-

$$40\% \text{ of } 600 = 40 \times 600 = 240$$

$$240 \times 216.91 = \text{Rs. } 52,056-00$$

5.7. SAFETY MEASURES IN A FACTORY :

It is the duty of the employer to take reasonable care for his employees' safety. He should protect them from any possible injury or risk of injury. He should take reasonable care to protect the employee from contracting any industrial disease while at work.

The Factories Act, 1948 was passed to provide health, safety, welfare and other aspects of workers in factories.

Safety Measures : In any factory some fencing has to be provided for the moving part of the machine. Likewise, fly wheels connected to the prime mover, head race and tailrace of every water-turbine has to be enclosed with a fencing.

Every part of an electric generator, motor or rotary convertor, transmission machinery and any dangerous part of any other machinery are to be fenced. (Section 21)

Machinery which does not require to be lubricated while in motion, should be encased.

All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained shall be provided with hand rails. No person should be allowed to carry excessive weights.

The process which involves a risk of injury to the eyes from particulars or fragments thrown off in the course of the process, or it involves risk to the eyes by reason of exposure of excessive light, the worker should be provided with suitable goggles or effective screens. (Section 35).

No person should be allowed to enter into a closed or confined place where there is any gas, fume, vapour or dust is likely to be present to such an extent as to involve risk to the person. If a person has to work in such a place, he has to wear suitable breathing apparatus and a belt securely attached to a rope, the free end of which is held by a person outside the confined place. Sufficient precautions are to be taken regarding the use of portable electric light. In case of explosive or inflammable dust, gas etc., the areas of grinding should be closed and the place must be kept free from dust. naked light must be avoided in the grinding place. (Sections 36 & 37).

Fire : In the event of fire, safe means of escape for all persons should be provided. Fire extinguishers should be provided at a place where any person can reach and operate the extinguisher. (Section 38).

Unsafe Buildings : In any factory, a building or machinery or part of a building is likely to cause imminent danger to human life or safety, the Inspector may serve a notice on the occupier or owner of the factory, pass an order prohibiting its use until it has been repaired or altered. (Section 40 and 40-A).

Guarding against carelessness and indifference on the part of employees. (Section 11) : The employer has to take precautions to guard against the employees' pwn carelessness and indifference. He has to regard the possibility of slips, errors of judgment and momentary forgetfulness to which any ordinary employee is subject to. He is not bound to take safety precautions against foolhardiness on the part of the workman. In case of work with machinery, where inherent dangers are involved, precautions against slips and forgetfulness will have to be taken care of.

In case of skilled and experienced workers, the employer may leave the safety precautions to them. But in the case of young persons, the employer need to take more caution.

It is the duty of the employee to report to the employer about defects in their tools, which appear in the course of their use. It is obligatory on the part of the worker to use all the safety appliances provided by the employer. He should not misuse the appliance and cause harm either to him or anybody. (Section 87-A).

Ordinary Risks of Service : In some industries, the operations involve unavoidable and inherent risk, in which case the employer cannot reasonably be expected to protect his employees. But if an operation involves a real, serious and unnecessary risk, or where it is causing some danger to the general public in the vicinity, he may order the employer of the factory not to employ any person in the operation. Even if he has to employ some persons, he has to see that a minimum number of persons are employed on that job. He may further order to take extra precautions to avoid the accidents. By virtue of this order if any person's employment is affected, his wages and other benefits are protected and it is the duty of the employer to find an alternate job for affected workman.

Health (Section 11) and Welfare Measures : Every factory is to be kept clean and free from effluvia arising from any drain, privy or other nuisance. The work places are expected to be kept clean, and dirt is to be removed from stair cases and passages. The garbage from all parts of the work should be disposed off in a suitable manner. The floor of the work place should be cleaned atleast once in a day; and where it is necessary, it should be disinfected.

The wet floor should be drained effectively and maintained. The walls, partitions, all ceilings or tops of rooms, sides of passages and stair cases are to be painted and maintained clean. Similarly doors and windows are to be painted periodically.

Adequate ventilation should be provided for circulation fresh air. For the construction of the walls and roofs should be made up of such material which keeps the temperature as low as practicable.

If the operations in an industry emit heat and high temperatures, adequate measures are to be taken to protect the workers therefrom.

The rooms should be spacious enough to accommodate the workers. No room should be

overcrowded.

Drinking Water : In all factories, arrangements should be made for drinking water at suitable points.

Adequate number of latrines, urinals and wash places should be provided at convenient places for male and female persons separately. Sufficient number of spittoons should be provided at convenient places and are hygienically kept.

First Aid boxes or cup boards equipped with the prescribed contents should be kept at all accessible places.

Canteens : Where more than 250 workers are working, one or more canteens should be provided with certain prescribed standards. There should be a managing committee, and the workers should have membership in those committees, to manage these canteens.

In every factory wherein more than one hundred and fifty workers are working, suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat their food, should be provided.

These rooms should be properly ventilated. There should be sufficient accommodation for all workers.

Working Hours (Section 51) : An employer can extract work from a worker only for 48 hours in a week. A worker is entitled to a weekly holiday (one full day). The holiday need not be on a Sunday, but any of the three days proceeding or following it. (Section 52).

If a worker has to forego his weekly holiday, he will be compensated within a month, with a compensatory holiday. (Section 53).

A worker need not work for more than 9 hours on a working day. After five hours of continuous work, he should take rest for atleast half an hour. (Sections 54 and 55).

The working hours and rest intervals should not be spread over more than 10 1/2 hours in a day. (Section 56).

Leave with Wages : A worker who worked for 240 days or more is entitled to leave with wages for a specified number of days. An adult is entitled to one day for every twenty days of work performed in the previous calender year.

A child is entitled to one day for every fifteen days of work performed by him during previous calender year.

Enforcement Authority : The State Government may by a notification in the official Gazette appoint an Inspector and assign to him a specific areas of jurisdiction.

The State Government appoints Chief Inspector for the entire State. It may appoint Additional Chief Inspectors, Joint Chief Inspectors and Deputy Chief Inspectors to assist the Chief Inspector

All these officers, in addition to assisting the Chief Inspector, shall exercise the powers of an Inspector through out the State.

A person who has got an interest in any of the factories or in any process of business carried in the factories, or who is holding an office in any of the factories, is not eligible to be appointed as a Chief Inspector or any of his subordinates.

Powers of the Inspectors : Within his local limits, the Inspector may enter (with some persons

who are in the Government service to assist him) any place which is used, or he has a reason to believe that it is being used, as factory. He may examine the premises, plant, machinery, articles or substance. He may enquire into the occurrence of any accident. He can inquire into the nature of the injury, whether it is a bodily injury, disability or otherwise.

5.8. SUMMARY :

As per the provisions of the Constitution, the Government passed several enactments to ensure Minimum Wages, Equal Remuneration to Women, Provident Fund, to Insure Labour against Sickness, to provide compensation to injured or killed workers, and to impose an obligation on managements to provide safe and secure premises to workmen at work places. These Laws give rise to several rights to workers including women, which can be enforced through the enforcing machinery provided by these enactments.

5.9. GLOSSARY :

Provident Fund	=	A terminal benefit for employees who do not have pension scheme
Liability	=	Obligation/Duty
Dependents	=	Persons depending on the employee for living

5.10. REFERENCES :

1. Dearness Allowance includes cash value of food concessions allowed to the employee.
2. Retaining Allowance is that which is payable to the employee during any period in which the establishment is not working for retaining his services.

5.11. RECOMMENDED BOOKS :

1. "Labour and Industrial Laws" by S.N. Misra, Central Law Publications, 1955 Ed.
2. "Labour and Industrial Law" by S.M. Chaturvedi, Central Law Agency - 1991
3. a) Employers' State Insurance Act, 1948
b) Equal Remuneration Act, 1948
c) Factories Act, 1948
d) Employees' Provident Funds and Miscellaneous Provisions Act, 1952
e) Minimum Wages Act, 1948
f) Workmen's Compensation Act, 1948

5.12. MODEL EXAMINATION QUESTION :

- I. Answer the following questions in 30 lines each.
 1. "Minimum Wages are fixed in any one of the four ways". What are those four ways by which the minimum wages are fixed? What is the procedure followed to fix minimum rate of wages under Section 5 of the Minimum Wages Act?

2. What is the composition of the Central Advisory Board under Minimum Wages Act? What are its functions?
- II. Answer the following question ins 15 lines each.
- a) Normal working day
 - b) Overtime wages;
 - c) Powers of an Inspector under Minimum Wages Act;
 - d) Authority who can hear complaints regarding claims under Minimum Wages Act.
4. What are the functions of the Advisory Board under Equal Remuneration Act?
5. What is the composition and functions of Central Board and State Boards under Provident Fund Act?
6. What is the mode of contribution under Provident Fund Scheme?
7. Write short notes on
- a) Employees' Family Pension Scheme
 - b) Employees' Deposit Linked Insurance Scheme
 - c) Withdraws from Provident Fund
 - d) Nominee under Provident Fund
8. What is the composition of the Employees' State Insurance Corporation?
9. What are the benefits available for the insured persons under Employees' State Insurance Act?
- What are conditions and rules that are to be followed to get the benefit?
10. Who are the dependents that claim compensation in case of death of a workman under Employees' Compensation Act?
11. Who are the workmen who can claim under the Employees' Compensation Act? And who cannot claim under the Act?

UNIT - 6 : SPECIAL PROVISIONS FOR WOMEN

Contents :

- 6.0. Objectives
- 6.1. Introduction
- 6.2. Reasons for Protective Discrimination
- 6.3. Special Provision for Women
 - 6.3.1 Maternity Benefits
 - 6.3.2. Procedure for claiming the maternity Benefi
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 - 6.3.4. Dismissed During Absence of pregnancy.
 - 6.3.5. Enforcement Machinery Inspectors
- 6.4. Safety measurers for women working in a Factory
- 6.5. Special Provision for Children
 - 6.5.1. Enforcement Authority
- 6.6. Summary
- 6.7. Glossary
- 6.8. References
- 6.9. Recommended Books
- 6.10. Model Examination Questions

6.0. OBJECTIVES :

After going through this unit, you will be able to :

- * appreciate the reasons for protective discrimination in favour of women
- * discuss the special provisions for women in Indian Law.

6.1. INTRODUCTION :

In the previous unit, we discussed about the equal employment opportunities for men and women. The Constitution prohibits discrimination on the basis of sex, religion, race etc. But it makes an exception to this rule and provides for special protection for some oppressed sections of the society. Women come under this category. In this unit 2, we are going to discuss about those special provisions, and the reasons for providing special protection to women.

6.2. REASONS FOR PROTECTIVE DISCRIMINATION :

Article 14 of the Indian Constitution guarantees equal treatment before law and equal protection under law and article 15 prohibits discrimination on the ground of sex, besides religion, race, caste, or place of birth. Further, Article 15(3) gives power to make special provision in favour of women and children. Article 16 guarantees equal opportunity for all citizens in matters relating to employment to any office under the State. Article 16(2) prohibits any discrimination on the ground of sex, in addition to religion, race, caste and place of birth.

Whenever there is an attempt to make any special provision for women under Article 15(3) there is a hue and cry from all corners of the society, saying that it contravenes the provisions of Article 14, 15 and 16. Many a time the validity of the provision is questioned. It is challenged on the grounds of equality. Making a special provision under Article 15(3) means granting special or protective treatment to women. In this lesson, we shall note the reasons why women deserve a certain favourable treatment, and how discrimination in their favour is justified.

For centuries women did suffer disadvantages as compared to men. Women all over the world were treated as inferior to men. The woman found herself in a state of bondage to some man. It was partly because of the weaker muscle strength as compared to a man. The law also treated women as inferior and denied certain rights to them. Married women in England did not have control over their properties prior to the passing of the Married Women's Property Act, 1882. Till 1928, the women were denied the right to vote for Parliamentary elections. It was felt that the women's proper place was home, and her role in life was that of wife and mother.

The factors which contributed to this image of women were religion, separation between home and work-place in the post Industrial Revolution in Britain, women's inability to control their own fertility, and finally paternalism.

For centuries men controlled religion and only men were religious leaders. This enabled them to develop doctrines adverse to women. They created a bias against women. They indirectly suggested to women right from childhood that they were not capable of leadership. Prof. Mary E Becker² feels that the "Bill of Rights" in the United States did not do anything to rectify this wrong notion. The First Amendment's religious clause beings thus : "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". By virtue of non-intervention in religious matters, the State allowed a free play to religious leaders in propagating and promoting ideas adverse to women, placing her in an inferior position in society. They continue to take a subordinate position. Many religious groups even today do not accept women ministers.

The second factor which made women inferior to men is that, in the post Industrial Revolution period, women in the west had to work outside their homes for economic reasons. But the law ignored the special position of women and treated man and woman alike. The work place was geared to the needs of the man (who did not have any domestic responsibilities). And at the same time, in the public sphere, she was given an inferior position. It was man that was treated as the bread-winner of the family and little value was attached to the woman's contribution in serving the household. It completely ignored her role as a wife and mother in the family. This situation put many women in a disadvantageous position to compete with men.

Women who were forced to take up jobs for economic reasons were given only part-time or

temporary jobs. The employer used to dismiss a pregnant employee during advanced pregnancy or immediately after child birth because of her inability to work during that period. After child birth again the women were forced to take up either a part-time job or home-work to take care of the child. There was no continuity in the employment and hence there was no security in job nor pensionary benefits for women.

Birth control measures were not in vogue and sometimes religion came in the way of birth-control. This situation forced her to confine herself to home most of the time. When she worked outside she was forced to work as hard as man.

The fourth factor which projected woman as inferior, according to feminists like Anne E Morris and Susan M. Nott³ was paternalism. Paternalism originated in the nineteenth century and still continues today and is one of the reasons for women's subordination. In the supposed best interests of women, law assigned women a restricted role in society.

To illustrate, in nineteenth century, under paternalism, seven women were denied entry into a medical school. Lord Neaves in his Judgment in Jex - Blake vs. Senatus of Edinburgh University⁴ stated that though the powers and susceptibilities of women were as noble as those of men, they did not have the same power of intense labour that men were endowed with. He did not want young women to be subjected to severe and incessant work. He denied the seven young women the right to attend the medical school.

In the Indian context, the paternalistic attitude of Manu exempted women from serious learning of vedas and responsibilities of the society or State. Subsequent commentators and law-makers reduced her to the level of a chattel. The British administrators adopted the policy of non-interference in religious matters.

6.3. SPECIAL PROVISION FOR WOMEN :

6.3.1. Maternity Benefits :

Biologically, the woman has to bear children, and nurse them in her early stages. It is the responsibility of the society to see that all care and protection is given to her during pregnancy and after the birth of the child. To take care of the children, women were forced to confine themselves to their households. Employers were reluctant to give them any permanent job, because they did not want to take 'the risk of absence caused by pregnancy'. They either rejected women at recruitment stage or they dismissed them from service at the time of pregnancy. This situation, forced women to either confine themselves to their households or to take up part-time jobs. This situation prevented them from participating and extracting the maximum benefit out of the labour market.

All civilised societies realised that discriminating against women on these lines was not fair. Pregnancy is not a disability but one of natural consequences of married life. Any restriction made on the ground of pregnancy maybe considered to be arbitrary and violative of the fundamental rights - the right of equality and right to life.

The attitude of the society changed and instead of discriminating against them on the ground of pregnancy, the law (all over the world) has given them a special right and benefit - a right to maternity leave and to receive medical benefit during their pregnancy and child birth. This prevented the employers from dismissing their pregnant employees. It enabled women to return to their job after child birth.

In our Country, the Maternity Benefit Act was passed in the year 1961. Under this Act, a pregnant woman is entitled to the payment of maternity benefits such as medical expenses for ante-natal (previous to delivery) and post-natal (after delivering the baby) care. She is entitled to statutory maternity pay (wages during her absence) (Section 5).

To qualify herself for these benefits, she must have been in continuous employment with the employer for a period of eighty days during the last twelve months preceding the date of her expected delivery. In other words, a woman who works continuously for 80 days in a year prior to child birth, is entitled to these benefits.

She is entitled to twelve weeks of maternity leave. She is free to avail this leave six weeks prior to her expected date of delivery - and six weeks immediately after the day of delivery. All these twelve weeks she is entitled to average daily wages.

The mode of calculating the wages is as follows :

The pregnant woman is entitled to an average daily wage. The average daily wage is equivalent to the average wage earned in three months preceding her going on maternity leave. (For e.g., if she had earned Rs. 900/- in the last three months preceding her maternity leave, the average per day would be approximately Rs. 10/-) (Section 5).

Maternity benefit is to be calculated only for the actual working days in a week. Wageless holidays are to be excluded.

The law takes care of the woman who returns for her work after delivery. In the event of death of the woman during pregnancy or after child birth, the family gets the benefit, she would have got if she had not died. The benefit shall be payable for the days upto her death (the day of death is included).

However, if the woman leaves behind her child after death, either during the delivery or immediately after delivery (i.e., during the maternity leave period), the employer is liable to pay for the entire leave period.

In case where the child also dies after some days after mother's death, the employer shall have to pay upto the day of death of the child (the day of death is inclusive in both the cases).

In the factories and establishments covered by the Employees State Insurance Act, 1946, the employees are entitled to medical benefits under that Act. The pregnant woman workers are entitled to claim maternity benefit under Section 50 of that Act.

The women who are not eligible to claim under that Act are entitled to claim under Maternity Benefit Act.

6.3.2. Procedure for Claiming The Maternity Benefit :

Section 6 of the Maternity Benefit Act gives the procedure to be followed for claiming the benefit. The pregnant woman worker should give notice in writing in a specified form to her employer. Under English Law, she is required to give this notice at least 21 days before she goes on leave. Under our Law, she can send this claim notice even after the birth of the child.

In the notice, she should state that she is entitled to maternity benefit. She may also claim any other benefit which she is entitled to besides maternity benefit.

She can receive the amount personally or she may nominate any other person who can receive

such amount on her behalf. She has to prove the pregnancy, undertaking not to work anywhere, and specify the required leave period.

On receipt of such notice and the certificate, the employer shall permit her to absent herself from the work and pay some advance also.

The employer shall have to pay a medical bonus of two hundred and fifty rupees towards pre-natal and post-natal care. (Section 8). When the woman delivers a child, she has to send a certificate of proof of the delivery of a child. On receiving such proof, the employer shall pay the remaining amount of money within 48 hours of delivery of a child.

However, failure to give notice shall not dis-entitle the woman from getting the benefit. She may give notice to the Inspector at a later date, and the Inspector can order the payment of the benefit within a specified period.

If a woman who is entitled for maternity benefit dies before receiving such amount, the amount will be paid to the nominee, or her legal representatives. (Section 7). The Act takes care not only of the normal pregnancy and delivery but also the cases of miscarriage. She is entitled to leave with wages for a period of six weeks. The leave period starts on the day following the miscarriage.

Section 10 of the Act takes care of women suffering from any illness arising out of pregnancy, delivery, premature birth of a child etc. In these cases, she is entitled to an additional period of leave for one month, in addition to the allowed 12 weeks. She is entitled to wages also for this additional one month of leave.

6.3.3. Nursing Breaks :

After the child's birth, when the woman returns to her job, she is allowed to take two breaks during the course of her duty in addition to the rest intervals. She is allowed these intervals to nurse the child. These intervals she can avail till the child attains the age of fifteen months (Sec. 11).

6.3.4. Dismissal During Absence for Pregnancy :

The purpose of this Act is to provide a right to the pregnant woman not to be unfairly dismissed by her employer, for the reason of her being pregnant. In the case Air India vs. Nargesh Meerza¹ the air hostess challenged the regulation of the Indian Airlines and Air India Corporation, which provided for the termination of the services of the air hostesses on first pregnancy. The Air India Corporation contended that pregnant women cannot discharge the duties of an air hostess efficiently as they are likely to develop air sickness in the early stages of pregnancy itself. The Court held that pregnancy is not any disability - and if any woman develops such sickness in the early stages, the Corporation should give 16 months maternity leave to her, instead of 12 weeks. The Court found that after utilising her services for four years, terminating a woman on her first pregnancy amounts to a cruel act and is arbitrary.

If a pregnant woman is dismissed or discharged, for reasons other than pregnancy, the woman is entitled to maternity benefits and medical bonus (Sec. 12).

If a woman is dismissed or discharged from service during her pregnancy or during her maternity leave period for reasons of gross misconduct, the employer may communicate it to her by a written order. Such a woman is not entitled to any maternity benefits.

A woman who is deprived of any maternity benefit or discharged or dismissed on account of her absence (during the maternity leave period), may appeal to the appropriate authority i.e., the Inspector. She has to appeal within sixty days of receiving order of deprivation of maternity benefit or dismissal.

Under Section 4 of the Act, a pregnant woman may make a request to her employer to exempt her from doing any arduous job - or a job which involves long hours of standing. She can also ask for an exemption from doing any job which interferes with her pregnancy or normal development of the foetus. She can stay away from jobs which are likely to cause miscarriage or adverse effect on her health. She can avail this facility for one month prior to the maternity leave period, i.e., six weeks before the expected date of delivery.

A woman cannot be compelled to work in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.

Availing the facilities of exemption from arduous jobs and nursing breaks, do not affect her wages. The employer cannot reduce her wages on account of her not doing her normal amount of work (Sec. 13).

6.3.5. Enforcement Machinery Inspectors :

The appropriate Government may appoint officers as Inspectors to enforce the Act (Sec. 14). The Inspectors may enter any premises where the women employees are employed. They may take the assistance of any local or public authority as they think fit during the inspection.

The Inspector may examine any register or record and notices, which are required to be exhibited by or under this Act.

The Inspector on receiving any complaint regarding the deprivation of the maternity benefits, or unfair dismissal, may make an inquiry.

If an employee is not satisfied with the decision of the Inspector, she may appeal it to the appropriate authority, within thirty days of the communication of such order (Sec. 15).

The abstracts of this Act are exhibited at a conspicuous place by the employer in every part of the establishment in which women are employed.

The employer who acts in contravention of the provisions of this Act is punishable with imprisonment for not less than three months and with a fine not less than two thousand rupees.

6.4. SAFETY MEASURES FOR WOMEN WORKING IN A FACTORY :

It is the duty of the employer to ensure safety of his employees. The Factories Act requires him to take reasonable care to protect his employees from unnecessary risk of injury. These aspects were discussed in detail in Unit-1.7.

In addition to these general safety measures, the factories Act, 1948 provides for some special safety measures for women and children.

Under the Factories Act, no adult worker is required or allowed to work for more than nine hours a day. However, he may take the work for more than 9 hours in some exceptional cases under Section 54. But this exemption cannot be applied in the case of women workers (Sec. 66).

A woman worker's working hours are fixed at 8 hours between 6 A.M. and 7 P.M. In some factories these timings can be marginally relaxed, but in no case beyond 10 P.M. She should not be asked to work between 10 P.M. and 5 A.M.

Where a woman is working in a shift system, the change in the shift can be made only in the week end. During the week there should not be any change in the shift.

In some factories where fish curing or fish canning is carried out, the employer can obtain the permission of the Inspector of Factories, to employ women workers beyond 10 P.M. to prevent damage to the product or raw material. These rules can stay in force only three years at a time.

The Royal Commission on Labour in England recommended less hours of work for women than those prescribed for men. The Commission felt that women who have domestic duties to perform, find long hours of work at work place, a greater strain. We in our legislation adopted that recommendation.

The State Government may prohibit or restrict the employment of women in a factory where some dangerous operations are carried on (Sec. 87(b)).

Sec. 22(2) prohibits employment of a woman in a factory, to clean, lubricate or adjust any part of machinery while in motion. The employer has to take proper care about the adjacent moving machinery where women and children are at work.

Sec. 27 prohibits employment of women in cotton pressing operation in a cotton factory. This section, however, allows the employment of women at the cotton feed end. A partition wall should be erected between the opener-end and feed-end. The height and extent of with is decided by the Inspector.

Sec. 48 requires the provision of a Creche in every factory where thirty or more women regularly work. The Creche is maintained to keep the children of women workers under 6 years of age.

These Creche rooms should be big enough to accommodate all the children of the women. The rooms should be well ventilated and well furnished. There should be a facility for washing and changing of clothes of children. The rooms should be kept clean. In some factories the employer may have to provide for free milk and refreshments for children. The nursing mothers of children should be allowed to feed the children at necessary intervals.

Women workers should have separate bath-rooms, latrines and urinals. These places should be kept clean. They should be at an easily accessible place for the women workers.

In addition to these provisions Sec. 4 of the Maternity Benefit Act prohibits employment of pregnant women in arduous jobs. The jobs which are likely to cause any danger either to the pregnant woman or hampers the healthy development of are prohibited by this section. The Act also provides for payment of full wages for pregnant women who are exempted from arduous jobs.

At one time in England a number of statutes were passed for the protection of women workers. They were not allowed to get near a stationary machine while any other part of the machine was moving (Pearson vs. Belgian Mills Co., (1896) I.Q.B. 244).

The Sex Discrimination Acts of 1975 and 1986, brought a remarkable change in the industrial scene of England. The Feminists viewed that such protection of female employees amounts to discrimination. The restriction on the access to the machines and other tasks may hamper their

opportunities for promotion. All these protection laws have been repealed and the Equal Treatment Directive, made it possible for the women to perform all tasks which were not open to them earlier¹. Only the provisions dealing with those risks associated with pregnancy, child-birth and risks which are peculiar to women are retained.

6.5. SPECIAL PROVISION FOR CHILDREN :

For the purpose of the law of employment the child means a person who has not completed his/her fourteenth year of age¹. Poverty drives a person to send his/her child to work. Sometimes the parent or guardian will receive payment in terms of money or some benefit. Such agreement enables the employer to use the services of the child in any form of employment. In 1933, an Act² was passed to put an end to this evil practice.

Despite the passing of this Act, exploitation of children continue in industries and mines. It is not uncommon for an employer to engage a child in arduous jobs. More often than not the child is asked to do an adult's work and is paid much less than the adult's wage.

Thus the employer wants to reduce his cost by employing children at a lower wages. The parent or guardian cannot resist it as they are not in a position either to fight the employer or to feed the child without sending him to work.

Government all over the world took it upon themselves, to eradicate the evil of child exploitation. As a result, many countries imposed certain restrictions on the employment of child labour:

The Indian Constitution prohibits employment of children below the age of fourteen years in any industry, mine or in any hazardous job (Art. 24). Article 39(f) directs the States to adopt policies designed to protect children from exploitation. It also suggests that the States should create opportunities, and provide facilities for children to grow up in a healthy manner. They should create a free atmosphere for the child to live-in dignity. It is the intention of the Constitution to protect the child during childhood and help him to develop into a healthy youth.

In a country like ours, poverty forces the parents to send their children to work even at a tender age. In pursuance of the provisions of Art. 24 of the Constitution, the Child Labour (Prohibition and Regulation) Act was passed in 1986.

The purpose of this Act is to ban the employment of children under the age of fourteen years in hazardous jobs. It specifies in its Schedule Part-A the occupations in which children are prohibited from being employed.

According to the Act, Part-A contains the following occupations :-

- 1) Transport of passengers, goods or mails by railways;
- 2) Cinder picking, clearing of an ash pit or building operation in the railway premises;
- 3) Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or into or out of a moving train.
- 4) Work relating to construction of a railway station or with any other work where such work is done in close proximity to or between the railway lines;
- 5) Port authority within the limits of any port;

Part - B of the Schedule contains the harmful (for children) processes of work shops. Following are the processes :-

- 1) Bidi making;
- 2) Carpet weaving;
- 3) Cement manufacturing, including bagging of cement;
- 4) Cloth printing, dyeing and weaving;
- 5) Manufacture of matches, explosives and fire works;
- 6) Mica-cutting and splintering;
- 7) Shellac manufacturing;
- 8) Soap manufacturing;
- 9) Tanning;
- 10) Wool Cleaning;
- 11) Building and Construction Industry;

In addition to these occupations or processes, the Central Government can amend and add any other occupation or process to the Schedule (Sec 4). Thus the process of building and construction industry (11th item in Part-B) was added to the schedule at the suggestion of the Supreme Court in the Asiad Case 3.

As has been already mentioned, the economic conditions of this country do not allow either the parents or the Government to keep children away from employment. Hence the Government allows employment of children in certain industries, which are not included in the Schedule. However, Part III of the Act, regulates the conditions of work, and deals with the treatment of the child labourer in the industry.

Sec. 7 of this Act specifies the working hours of the children. The employer should see that child does not work more than six (6) hours in a day. At a stretch the child should not be allowed to work for more than three (3) hours. After 3 hours of work the child should get one hour rest. The total working hours includes rest hours and the waiting time for work on any day.

No child is permitted to work between 7 P.M. and 8 A.M. And a child cannot be asked to take up 'overtime' work load.

On any particular day, a child should be allowed to work at only one establishment. He should not be allowed to take up work at 2 or more establishments on a day.

A child is entitled weekly a whole day holiday. The day should be specified and exhibited on a notice board. The employer should display these notice boards at conspicuous places. The day on which the child can take a holiday, cannot be altered more than once in three months (Sec. 8).

The employer is required to send a notice to the Inspector giving details of the occupation, or processes in which the children are employed. He has to give details regarding the age and health conditions of the child employees (Sec. 9).

The employer has to maintain a register showing the following particulars :-

- a) name and date of birth of the child employee;
- b) hours and periods of work of any child and the intervals of rest to which he is entitled;
- c) the nature of work of any such child, and ;
- d) any other particulars as may be prescribed by the appropriate authority.

The Act also prescribes the health and safety measures that are to be taken in the factories where children are employed. They are more or less the same as prescribed in Factories Act. These measures are discussed in Unit-I, in detail.

In addition to the above conditions the Factories Act made some more special provisions for children.

Sec. 67 of the Factories Act, imposes a duty on the employer to ascertain the age of the children. In the absence of an authentic or reliable document, he has to seek the help of the authorised medical practitioner to ascertain the age of the child. He cannot rely on the statement of the applicant alone (in this case the child labourer himself).

While Child Labourer (Prohibition and Regulation) Act allows 6 hours of work in a day, the Factories Act prescribes only 4 & 1/2 hours of work per day. Under that Act, child is allowed to work for only two shifts.

Sec. 69 of the Factories Act, requires a physical fitness certificate from an authorised Civil Surgeon. The certificate is given only if the Surgeon is satisfied that the child has completed his fourteenth year, and he is fit for a full day's work in a factory. He has to indicate in that certificate, whether the child is fit to take up a particular job in that factory.

This medical examination will have to be done every twelve months. If the child is fit enough he can renew the certificate. If he feels that the child is not fit enough to take up the employment, he should state reasons for not giving the certificate.

The fees for this certificate is paid by the employer and not recoverable from the child's wages.

Sec 22(2) and 23 of the Factories Act, prohibits the employment of young persons, for clearing, lubricating or adjust any part of the moving machinery. Care has to be taken by the employer that the child does not work with machinery which is adjacent to moving machines.

When an young person is employed near a dangerous machine, the employer will have to ensure that the child received proper training to work near the machinery. Or he should be put under the supervision of a person who has through knowledge and experience to handle the machine (Sec. 23).

If a child has to work with such dangerous machines, care will have to be taken regarding the work of the pulleys and belts. A gear control should be there to prevent the belt from creeping back on to the fast pulley.

In every work room a device to cut off power should be installed to meet emergencies (Sec.24).

Sec. 27 of the Factories Act, prohibits children to work in the cotton pressing operations, especially at the cotton opener end. Sometimes the Inspector of Factories may allow the children to work at the feed-end of the cotton pressing factory.

6.5.1. Enforcement Authority :

The appropriate Government may appoint Inspectors to ensure the implementation of this Child Labour (Prohibition and Regulation) Act. An Inspector can enter the premises of any factory, inspect the registers, enquire or question anybody regarding the facilities provided for the child labourer, inspect whether the children are made to work during the prescribed hours of work, and the wages are paid properly.

The Andhra Pradesh, shops and Establishments Act, 1988 prohibits child's work in any establishment (Sec. 20). According to this Act, establishment means Shop, Restaurant, Eating House, Residential Hotel, Lodging House, Theatre or any place of Public Amusement or Entertainment or A Commercial Establishment (Sec. 2 (10)).

The Act also clarified what is commercial establishment in Sec. 2(5). It is an establishment which carries trade, business, profession or any work in connection with or incidental or ancillary to any such trade, business or profession,

- a clerical department of a factory or industrial undertaking
- a commercial or trading or banking or insurance establishment
- an establishment which is under the management and control of the cooperative society
- an establishment of a factory or industrial undertaking which falls outside the scope of the Factories Act, 1948
- any other establishment which the Government may declare to be a commercial establishment for the purposes of (Shops and Establishment) the Act.
- it does not include a shop
- and Sec. 2(ii) and (5) By virtue of Sec. 20, of the A.P. Shops and Establishment Act, 1988, Child Labour is completely prohibited in Andhra Pradesh.

This prohibition of child labour and regulation of working hours and conditions of work do not apply to :

- a) a family business, where the members of a family are involved
- b) to any vocational and technical training institutes run by the Government

6.6. SUMMARY :

The Indian Constitution guarantees equal opportunities to all, irrespective of sex, race, religion etc. But the law has to give special protection to women under Article 15(3), as for centuries, they were not given the opportunity to enjoy the benefit of participation in the labour market. They were discriminated against on the basis of sex and child bearing potential. Pregnancy was considered to be a disability. To counter this prejudice, the Constitution gave women certain extra benefits and facilitated the passing of the Maternity Benefits Act, 1961. The Constitution gives special treatment to women taking into account her biological function and social position.

The law did not ignore her domestic responsibilities as wife and mother; hence it adjusted the working hours at work place, to enable her to take care of the home and at the same time perform her duties efficiently at the work place. The Factories Act, 1948 provides for these,

and other facilities to women.

Like women, children are also vulnerable to exploitation. Hence the Child Labour (Prohibition and Regulation) Act was passed. The Government regulated the working conditions of the children in factories.

6.7. GLOSSARY :

Maternity Benefit	=	benefits provided by law meant for women during the period of pregnancy and after child-birth.
Paternalism	=	domination of father in the family system
hazardous jobs	=	work places involving life risk.

6.8. REFERENCES :

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2. AIR (1981) SX 1831.
3. "Law of Employment " by N.M. Selwyn, 7th Ed. Butterworths at pp. 143.
4. This definition is given by the Child Labour (Prohibition and Regulation) Act, 1986.
5. The Children (Pledging of Labour) Act, 1933.
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- 2.2.1 J.S. Mill - " The subjection of women (1869) and H.T. Essays on Sex Equality" University of Chicago Press - 1970 (pp 129-30)
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- 2.3.1 Sherron A. Franticro vs. Elliol L. Richardson (1973) 36 L Ed., 2nd 583 (Us. Supreme Court)
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- 2.4.1. "Law of Employment " by N.M.Selwyn, 7 th Ed. Butterworths at pp. 143.
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- 2.6.1. N.M Selwyn " Law of Employment " Seventh Ed. Butterworths.
2. "Equal Opportunities " by Helen Collius back well at p. 256.
3. Snow Ball vs. Gardner Merchant Ltd., (1987) ICR 719.

4. It is the opinion of Anne E. Morris and Susan M. Nott 'Working Women and the Law' Published by the Roulidge / Sweet and Maxwell, London & New York.
4. It is the opinion of Anne E Morris and Susan M Nott 'Working Women and the Law' Published by Roulidge / Sweet and Maxwell, London & New York.
5. Strathclyde Regional Council vs. Porcelli (1986) ICR 5564

6.9. RECOMMENDED BOOKS :

- 1) "Working Women and the Law" by Anne E. Morris and Susan M. Nott - Published by Routledge/Sweet Maxwell London & New York 1990.
- 2) "The Equal Opportunities Hand Books" by Helen Collines - Published by Blackwell 1992.
- 3) a) Maternity Benefit Act, 1961.
b) Factories Act, 1948.
c) Child Labour (Prohibition and Regulation) Act, 1986.
d) Children (Pledging of Labour) Act, 1933.

6.10. MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines each.

1. Give reasons, why women deserve for special rights under Article 15(3)?
2. Examine the provisions of the Maternity Benefit Act of 1981, in respect of working women?
3. Explain the procedure for claiming the Maternity Benefit as laid down in Section 6 of the Maternity Benefit Act?
4. Discuss whether a woman can be dismissed from service during her pregnancy in the light of the case AIR INDIA vs. NAGESH MEERZA?
5. What was the role of the Inspectors in the employment of the Maternity Benefit Act?

II. Answer the following questions in 15 lines each.

- (1) What are the safety measures taken by the Government in respect of women workers employed in a Factory?
- (2) Working conditions of child labour in factories or industries?

BLOCK - IV
WOMEN AND CRIMINAL LAW

BRAOU

BRAOU

UNIT - 7 : INDIAN PENAL CODE : OFFENCES RELATING TO WOMEN

Contents :

- 7.0. Objectives
- 7.1. Introduction
- 7.2. Women as a Party to crime
- 7.3. Dowry Crimes
- 7.4. Offences relating to Miscarriage
- 7.5. Offences relating to Kidnapping and Abduction
- 7.6. Summary
- 7.7. Glossary
- 7.8. References
- 7.9. Recommended Books
- 7.10. Model Examination Questions

7.0. OBJECTIVES :

After going through this unit, you will be able to

- * bring about the status of women in Criminal Law in general,
- * highlight various provisions giving special protection to women under Penal Laws.
- * analyze specific offences relating to women.

7.1. INTRODUCTION :

Human being is gregarious and the growth of civilization taught them living in a society. This did not detract them from their quest of seeking security of his life, limb and property. Thus the primary purpose of the state has become the maintenance of peace and public order, the infraction or violation of which is made punishable through the instrumentalities of law. These violations are classified into civil wrongs and criminal wrongs. Wrongs are rights violated and civil wrongs are those wrongs which when committed give rise to the liability to pay damages or compensation. Whereas, the remedy for committing a crime is by way of punishing the wrongdoer. The law concerning the crimes and their punishments is criminal law. The general meaning of the word crime is any violation of law which is punishable by the state or nation because of its effect on the public. Thus, a crime may be defined as a result of human conduct which the penal policy of the state seeks to prevent or any form of human conduct which is forbidden by law under pain of punishment. The fundamental principle of penal liability is embodied in the maxim, 'Actus non facit reum nisi mens sit rea', the meaning of which is - act alone does not constitute an offence unless done with a guilty intent. Therefore, the intention and the act both must concur to constitute a crime.

Penal Law does not discriminate woman in liability aspect, on the other hand it tries to protect women with reference to certain offences. For instance, in the case of adultery where both men and women are the wrong-doers the woman is not punishable even as an abettor. However, the object of penal law is always to punish the wrong-doer and not ameliorating the condition of a victim. Women often being a victim of crime is not suitably protected under various laws. There are certain offences which are committed only against women, for instance, kidnapping of females, rape, miscarriage, dowry deaths, cruelty, eve-teasing and the like. Women are beaten, mutilated, burned, sexually abused and raped, and such violence is a major obstacle in the development of women. These violent acts against women attack their dignity as human beings and leave them vulnerable and fearful. Domestic violence like cruelty and harassment against women keeps her away from participating in development projects and fear of sexual assault like rape, eve-teasing prevents her from taking a job. Thus, violence against women deprives society of their full participation in all aspects of development. Hence the study of women and criminal law is an essential requirement.

7.2. WOMEN AS-A PARTY TO CRIME :

Women as an abettor, offender and victim of a Crime in general under the Indian Penal Code :

Before proceeding to discuss the various offences and punishments, it is pertinent to note something about the parties to a crime. Parties to the crime include the accused or offender, the abettor or accomplice and obviously the victim. The word accused is not defined in the code. It is derived from the word accusation. Accusation means, a charge that one has been guilty of a crime. The person against whom the charge is made is the accused. Therefore, accused means the person who is charged for violating the law relating to human conduct. He is also called as the offender. Generally, the participants in a crime are divided into two categories. Principles of first degree, and principles of second degree. A principle in first degree is the person who actually commits the offence. Who-ever aids or abets the actual commission of crime either at the place where it is committed or elsewhere is a principal of second degree, for eg. abettor. The Indian Penal Code in very clear terms defined who is an abettor. According to Section 108 I.P.C., an abettor is a person who instigates or aids in the commission of an offence. He is also considered as an accomplice. Accomplice is one concerned or involved with other in the commission of a crime.

A victim is he or she whose right is violated or who has suffered injury resultant of the act.

The Indian Penal Code does not show any difference of treatment between men and women accused. The same principles of liability apply. In criminal law men and women are treated equally. However, there are certain provisions which tried to protect women victims - for instance (i) Sec. 304-B and Sec. 498-A lays down the presumption as to dowry deaths and cruelty on women to protect her from being harassed for dowry. (ii) Secs. 376-A to 376-D provides special protection from custodial rapes. (iii) Sec. 228 prohibits publication of the name of the rape victim, or the proceedings of the trial to safeguard the rape victim from being exposed to unnecessary adverse publicity. But there are very few provisions under the Criminal Procedure Code which provide special protection to the women accused.

7.3. DOWRY CRIMES :

One of the burning problems of the day in the Hindu Society is the dowry demand and commission of cruelty and atrocity by the husband and in-laws in the case when the woman brings no or insufficient dowry. There are hundreds of thousands of cases of daughters-in-law whose plight and predicament in their in-law's homes, high incidence of criminal assault, criminal brutality and bride burning. One comes across every morning in the news papers reports of dowry-deaths and criminal cruelty on women. Though the legislature has enacted the Dowry Prohibition Act, we could not prevent this totally. Few provisions have been inserted into the Indian Penal Code also, regarding dowry deaths and cruelty on women, to prevent those crimes; in addition to the Dowry Prohibition Act. For effective understanding of dowry deaths one should have a clear idea about the offences of culpable homicide and murder. Hence, in this unit let us to discuss the general provisions relating to Homicide and Murder, Dowry deaths and cruelty by husband or his relatives.

7.3.1. General Provisions Relating to Murder in Indian Penal Code :

Of all the offences under the Indian Penal Code homicide or murder is the most violent offence for the reason that it forcibly brings an end to the very existence of a human being on earth. Murder or Homicide means the killing of a human being by another human being. Killing can be defined as causing death to an individual directly by an act or omission. But every death of a human being is not criminal. Causing death is not punishable under justifiable or excusable homicides. Hence, homicides can be generally classified into lawful and unlawful homicides. Homicides are lawful when they are justifiable and excusable. Examples for justifiable homicides are : (i) Where death is caused by mistake of fact or while doing a justified act. (Secs. 76-79 IPC). (ii) Where death is caused while exercising the Right of Private Defence of body or Property (Secs. 100 and 103 IPC).

Examples of Excusable homicide : Where death is caused by an insane or intoxicated person etc. (Secs. 80, 82, 84, 85 and 92 IPC). Similarly unlawful homicides can be classified into two major heads, murder and man-slaughter (Culpable homicide). The distinction between these two offences lies in the fact that in the former one kills another with premeditated malice known as 'malice afore thought'. (Eg. A shoots z with the intention of killing him. Z dies in consequence, A committed murder). The other is mere killing under other circumstances. (Eg. causing death by negligence). These divisions of homicide can be shown in a tabular form.

Homicide

Lawful		Unlawful	
Justifiable	Excusable	Murder	Manslaughter
Secs. 76-79	Secs. 80, 82	Sec. 300	Secs. 299,
81,100 and	84, 85 and	IPC	304-A, 305,
103 IPC	95 IPC		and 306 IPC

7.3.1.1. Culpable Homicide :

Culpable Homicide is the first unlawful homicide defined under Section 299 IPC. It is causing of death by doing an act-

- (1) with the intention of causing death;
- (2) with the intention of causing such bodily injury as is likely to cause death; and
- (3) with the knowledge that he is likely by such act to cause death.

Punishment for this offence is provided under Sec. 304 IPC and it is either life imprisonment or imprisonment for ten years or fine or both. The word 'Act' in the definition includes commission as well as omission. The mental element referred to in Sec. 299 IPC is intention or knowledge. The intention refers to either death itself, or bodily injury which is likely to cause death, where as knowledge refers to death itself. Therefore, three aspects in culpable homicide.

- (1) an intention to cause death;
- (2) an intention to cause a dangerous injury; and
- (3) knowledge that the death is likely to happen.

7.3.1.2. Murder :

The offence of murder is defined in Sec. 300 IPC. This section explains when the culpable homicide amounts to "murder" and when it amounts to "Culpable homicide not amounting to Murder". According to this section, a culpable homicide amounts to "Murder" if it comes within the scope of any of the following four clauses :

- (1) If the act by which death is caused is done with the intention of causing death; or
- (2) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (3) If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; and
- (4) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death or commits such act, without any excuse for incurring the risk of causing death or such bodily injury aforesaid.

Therefore, causing death by conduct coupled with an intention to cause death is culpable homicide amounting to murder. Similarly, causing death by intentionally inflicting a bodily injury likely to cause death also amounts to murder unless it falls within one or other exceptions to Sec. 300 IPC. Further, causing death by conduct known to be likely to cause death is culpable homicide only, but it amounts to murder if the conduct is so imminently dangerous, that death or bodily injury likely to cause death must in all probability must occur.

It has to be noted carefully that under Sec. 300 IPC there is no presumption of murder if the act does not come under any of the exceptions mentioned therein. In deciding the question whether the culpable homicide amounts to murder or not, it will be erroneous. It was observed by Peacock, C.J.² that it does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in Sec. 300 IPC. To render culpable homicide into murder, the case must come within the purview of Clauses 1 to 4 of Sec. 300 IPC., the burden of proof lies with the prosecution. But, such a presumption is laid down under Sec. 304-B IPC, which

deals with the offence of dowry death.

7.3.1.3. Dowry Death (Sec. 304-B IPC) :

A new section 304-B IPC relating to dowry death was inserted by the Dowry Prohibition (Amendment) Act, 1986, to give effective implementation to the Dowry Prohibition Act. Under this section where the death of woman is caused by any burns or bodily injuries or occurs otherwise than under normal circumstances within seven years of her marriage and is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with any demand for dowry, such death shall be called dowry death and such husband or relative shall be deemed to have caused her death. For the purpose of this section 'Dowry' shall have the same meaning as in Sec. 2 of the Dowry Prohibition Act, 1961.

Thus Sec. 304-B IPC lays down the presumption that, if the woman dies with burns or injuries within 7 years of the marriage and if there is evidence that soon before the death she is subjected to harassment by her husband in connection with dowry, it will be deemed to be a dowry death. It is the burden of the accused to establish that it is a natural death and she has not been so harassed before her death either by himself or by his relatives, i.e., the burden of proof is shifted from the prosecution to the accused.

Such a presumption is not there in any other offence of the Indian Penal Code. A similar presumption has been inserted in the Indian Evidence Act under Sec. 113-B by the same amendment Act. According to this section, it lays down that when the question is whether a person has committed a dowry death of a woman and it is shown that soon before her death, she had been subjected to cruelty by such person for or in connection with any demand for dowry, the court shall presume that such person has caused the dowry death.

7.3.2. Cruelty on Women by Husband or Relatives of Husband : (Sec. 498-A IPC) :

According to Sec. 498-A IPC whoever being the husband or relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to 3 years and shall also be liable to fine. For the purpose of this section, cruelty means :

- (1) any willful conduct which is of such a nature as is likely to drive a woman to commit suicide or to cause grave injury or danger to life or limb or health (Whether natural or physical) of the woman; and
- (2) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

An illustrative case under Sec. 498-A IPC is that of *Inder Raj Malik vs. Sunita Malik*³ in which the Delhi High Court has discussed the scope and constitutional validity of Sec. 498-A IPC. In this case the allegations of the complainant (wife) are - she was continuously threatened and harassed by her husband and in-laws that her son would be taken away unless she meet their demands even by compelling her parents to sell their immovable property. The word cruelty is defined in the explanation to include the harassment of a woman with a view to coerce her or any other person related to her to meet any unlawful demands for any property, the conduct of the husband and in-law's clearly comes within the scope of this explanation and hence they

were convicted under Sec. 498-A IPC.

Sec. 498-A IPC does not create any situation for double jeopardy. This provision is distinguishable from Sec. 4, Dowry Prohibition Act because in the latter mere demand of dowry is punishable and existence of an element of cruelty is not necessary. Sec. 498-A IPC deals with aggravated form of the offence. It punishes such demands of property or valuable security from the wife or her relative as are coupled with cruelty to her. Hence a person can be prosecuted in respect of both the offences punishable under Sec. 4, Dowry Prohibition Act and Sec. 498-A IPC.

7.4. OFFENCES RELATING TO MISCARRIAGE :

Causing the death of an unborn child in the mother's womb is not a murder, because in order to make a person liable for culpable homicide or murder there must be a 'being' in existence. A person must have taken birth before he meets with death. There cannot be killing of a child in the womb. Hence, a statute has made foetus destruction a special offence. In the Indian Penal Code also causing miscarriage or injuries to unborn children are dealt separately (Chapter 18, Secs. 312 to 318). But causing the death of a living child or quick born child, i.e., if any part of the child has been brought forth, though the child may not have breathed or been completely born may amount to culpable homicide. (Explanation 3 to Sec. 299 IPC). If any part of the child has been brought forth from the womb, the child is considered as a living human being. So complete birth is not necessary. Chapter 18 of the Code dealing with offences against human body refers to the offences relating to the birth of the children. The main offences under the chapter are :-

- (1) Causing miscarriage;
- (2) Injuries to unborn children;
- (3) Exposure and abandonment of infants; and
- (4) Concealment of birth

7.4.1. Causing Miscarriage : (Sec. 312 of IPC) :

Miscarriage means premature expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed, i.e., destruction of the child in the mother's womb or termination of pregnancy. Under Sec. 312 IPC, if a miscarriage is caused voluntarily it is an offence unless the purpose of it is to save the life of the woman. The offence includes cases where the woman herself causes miscarriage. The punishment for causing miscarriage can be imprisonment for a period upto three years or fine, if the woman is at the later stages of pregnancy the imprisonment can be upto seven years.

According to the Medical Termination of Pregnancy Act, 1971 pregnancies may be terminated by the registered medical practitioner under the following circumstances :

- (a) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; and
- (b) There is a substantial risk that if the child is born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Except in these two cases, voluntary causing miscarriage is an offence punishable under Sec. 312 IPC.

7.4.2. Causing miscarriage without the women's consent : **(Sec. 313 IPC) :**

Under Sec. 313 IPC causing miscarriage is additionally punishable if it is done without the women's consent. When miscarriage is caused without the women's consent, it is an offence punishable with an imprisonment for life or upto 10 years and fine. Under this Section, the person procuring abortion alone is punished. Further, if it is an act done with the intent to cause miscarriage of a women with child causes her death, it is also specially punishable. The punishment may vary is accordance with the act done with or without the consent of the women. According to Sec. 314 IPC if the act intended to cause miscarriage is done with the constant of the women, the punishment is imprisonment upto ten years and fine. If the act is done without the consent of the women, the punishment is grave. It is imprisonment for life and is also liable for fine.

All these provisions of the Indian Penal Code virtually banned abortions except when the same was caused to save the life of the pregnant women. The Medical Termination of Pregnancy Act, however, has liberalised abortion rules by making them punishable under certain circumstances. But according to this act, pregnancies can be terminated only by a Registered Medical Practitioner possession recognised medical qualification and experience or training in Gynaecology and obstetries.

7.4.3. Offences against unborn child : (Sec. 315 and 316 IPC) :- **(OR) Injuries to unborn Children :**

If any person does anything with the intention of preventing the child from being born alive or causing it to die after its birth, he/she commits an offence under Sec. 315 IPC. But if such an act is done in good faith in order to save the life of the mother, it is not an offence contemplated by the section. Whereas Sec. 316 IPC refers to an offence of causing death to the unborn child while attempting to cause the death of a pregnant women. An offence under this section is committed when a person does something which he knows is likely to cause the death of a pregnant women but the women does not die and the child she is carrying dies. The punishment for his offence is imprisonment upto 10 years and fine.

7.4.4. Abandonment of Child under 12 and concealment of Birth : **(Secs. 317 and 318 IPC) :**

Secs. 312 to 316 IPC mentioned above, deal with causing death or miscarriage of the unborn child.

Secs. 317 and 318 IPC insist upon the maintenance and care of the child by making certain acts as offences punishable. Though these two topics do not strictly come within the ambit of miscarriage and abortions, it may yet be useful to refer to them here.

Abandonment of Child Under 12 : (Sec. 317 IPC) :

When the father or mother or any person having the care of a child under 12 years of age, leaves or exposes the child in any place with the intention of wholly abandoning the child, he commits an offence under this section and is liable for punishment upto 7 years or fine or both.

If the child dies in consequence of the exposure, the offender will also be guilty of murder or culpable homicide as the case may be. The gist of the offence is bare exposure. It is not necessary that it must be attended with likelihood of endangering the health or life of the child.

Concealment of Birth : (Sec. 318 IPC) :

When a person tries to conceal the birth or attempts to conceal the birth of a child intentionally, when such child dies before or after or during its birth, by secretly burying or in some manner disposing off the dead body of the child, he/she commits an offence under Sec. 318 IPC and is liable to be punished with imprisonment upto two years or with fine or with both.

7.5. OFFENCES RELATING TO KIDNAPPING AND ABDUCTION : (SEC. 359-374 IPC) :

7.5.1. Kidnapping and Abduction in General :

The object of this offence is to protect the interests of the children of tender ages and also the interests of women from being abducted or seduced for improper purposes. Literally, kidnapping means carrying a person (especially a child) by illegal force. This offence is also known as child stealing. Abduction is an aggravated form of kidnapping and it means, inducing a person to go from any place by compelling him by force or by deceitful means. Generally kidnapping is of two kinds : (Sec. 359 IPC) :

- (1) Kidnapping from India; and
- (2) Kidnapping from lawful guardianship.

7.5.2. Kidnapping from Lawful Guardianship :

Sec. 361 IPC defines the offence of kidnapping from lawful guardianship. According to this section, whoever takes or entices any minor under 16 years of age if male and 18 years of age if female or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship. In order to constitute the offence of kidnapping, the following essential ingredients have to be satisfied :

- (a) taking or enticing a minor or a person of unsound mind.
- (b) such minor must be under 16 years of age if male and under 18 years of age if female;
- (c) such taking or enticing must be out of the keeping of lawful guardian of such minor or person of unsound mind.
- (d) such taking or enticing must be without the consent of the guardian.

Therefore, kidnapping means taking or enticing a minor or an unsound person away from the custody of lawful guardian without his consent. A minor is a person who is under 16 years of age in the case of boy and 18 years of age in the case of girl. The word 'taking' means physical taking but it need not be by force. If the minor girl leaves her father's protection knowing or having full capacity of knowing of what she was doing, the accused cannot be deemed to have taken her away from her lawful guardianship. (S. Varadarajan vs. State of Madras, AIR 1965 SC 942). This ruling was followed by the High Court of Himachal Pradesh in Khyali Rani vs. State of H.P.⁵ Where the minor girl left her father's protection knowing and having capacity to

know the full import of what she was doing and voluntarily joined the accused. It was held by the court that the offence of kidnapping cannot be said to have been committed.

Therefore, in order to attract the offence of kidnapping something more has to be proved than mere finding the girl with the accused. Active participation by the accused information of the intention of the girl either immediately prior or sometime before she left her father's house is required to be established.

Mistake of fact as to the age of the Girl :

Even if the accused in good faith believed that the girl attained the age of majority, he will not be protected under Sec. 79 of IPC because mistake of fact will operate as a good defence only if-

- (a) it is bonafide, i.e., believed in after the exercise of due care and attention; and
- (b) the conduct in question would be lawful under the supposed state of things, otherwise it would be impossible for the accused to contend that he believed himself to be justified by law in acting as he did.

So mistake as to the age will not be a sufficient justification for the reason, that even his supposition is true his action will not be justifiable in law. Another important requirement is such taking must be out of the keeping of lawful guardian and without his consent. Lawful guardian means any person lawfully entrusted with the care and custody of the minor.

A lawful guardian is different from the legal guardian. A lawful guardian is a guardian whose custody is merely sanctioned by law. For example : the head-master of a school under whose protection the girl is placed. Legal guardian is the guardian recognised or appointed by law such as parent, karnavan etc., Sec. 361 IPC insists only on lawful guardianship, therefore, defacto guardianship is sufficient to sustain prosecution under this section.

To constitute the offence of kidnapping the girl should be within the custody of lawful guardian. Under Hindu Law, a father is the guardian of his children and is ordinarily entitled to their custody. A mother cannot have a right to the custody of her legitimate children adversely to the father. If a mother removes a girl from her father's house for the express purpose of marrying her without his consent, it will amount to taking out of the keeping of the lawful guardian. If the husband and wife live separately and the children are given in the custody of the wife under an order of the court, the father cannot take away the children from the mother. If he does so, he will be guilty of kidnapping. Whereas under Mohd. Law, if the father takes away a son under 7 years or a daughter under puberty from the custody of the mother, he can be said to kidnap his own child because the mother is by law, the lawful guardian.

At the same time the minor need not be in the physical possession of the guardian because the word keeping means protection and control manifested not by continual action but as available on necessity arising. For example : taking a girl from market also amounts to kidnapping. (Geetha's case 1904 6 Bom. L.R. 785). But such taking should be without the consent of the guardian, i.e., consent of the minor is immaterial. The offence is complete when the minor is actually taken from the lawful guardianship. To sum up, if the minor leaves her parental home completely uninfluenced by any promise, offer of inducement emanating from the accused, there is no offence of kidnapping. If the accused laid a foundation by inducement or threat etc, it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him.

7.5.3. Kidnapping, abducting or inducing women to compel her for marriage etc. (Sec. 366 IPC) :

Sec. 366 IPC makes kidnapping or abducting a women to compel her to marry against her will an offence. The ingredients of this section are :

- (a) the women must be kidnapped or abducted.
- (b) the kidnapping or abducting must be :
 - (i) with the intention of forcing her to marry any person against her will; or with the knowledge that she is likely to be compelled to be married against her will; and
 - (ii) in order to force her or seduce her to illicit intercourse.

Any person who induces a women to go from any place by means of criminal intimidation or abuse of authority or any method of compulsion in order that she may be forced or seduced to illicit intercourse commits an offence under this Section. Seduction in this section means not merely parting for the first time by a girl of her virtue, but includes subsequent illicit sexual intercourse as well. The punishment for this offence is imprisonment upto ten years and fine. This offence is not compoundable and is triable by a court of sessions.

7.5.4. Procurement of a Minor Girl : (Sec. 366-A IPC) :

Under Sec. 366-A IPC whoever, induces a minor girl under the age of 18 years to go from any place or to do any act with the intention or knowledge that she will be forced or seduced to illicit intercourse with another person is said to have committed an offence. The ingredients of this offence are :

- (1) the girl must be induced to go from a place or to do something.
- (2) the girl must be under eighteen.
- (3) the intention of taking away the girl must be to force or seduce her to have illicit intercourse with another person.

This offence is punishable with imprisonment upto 10 years and triable by a court of sessions.

7.5.5. Importation of a Girl from Foreign Country : (Sec. 366-IPC) :

Importing a girl under 21 years of age from a foreign country or from the state of Jammu and Kashmir with an intent or knowledge that she will be forced or seduced to illicit intercourse is an offence punishable under Sec. 366-B IPC. The ingredients of the offence are :

- (1) a girl must be imported from out-side India.
- (2) she must be under 21 years of age.
- (3) the intention must be force or seduce her to illicit intercourse.

This offence is punishable with imprisonment upto 10 years and triable by a court of sessions.

The offences mentioned under Secs. 366 and 366-A and 366-B IPC deal with taking away women for forcing them to illicit intercourse. Illicit intercourse means sexual intercourse between persons not united by marriage or by any union or tie which though not amounting to a marriage. The offence of prostitution, however, stands on a different footing.

7.5.6. Selling and Buying a Minor for Prostitution : (Secs. 372 and 373 IPC) :

Provisions relating to the sale or purchase of persons below the age of 18 years for immoral purposes are provided under Sec. 372 and 373 IPC. According to Sec. 372 IPC selling, letting to hire or otherwise disposing of any person under the age of 18 years for the purpose of prostitution or illicit purpose or knowing it to be likely that such person will at any age be used for such purposes is said to have committed an offence.

The ingredients of this offence are :

- (a) a person should be sold, let, hired, or disposed in some manner.
- (b) a person should be under 18 years of age
- (c) the selling, letting, hiring or disposing must be done with intention or knowledge of likelihood that the person will be used for;
 - (1) Prostitution.
 - (2) Illicit intercourse with any person.
 - (3) any unlawful or immoral purpose.

Even if it is intended that the girl is used for prostitution at a future date, after she has completed 18 years of age, the offence is still committed. The person who disposes a minor girl to a prostitute, a brothel keeper or manager will be presumed to have done it with the intention of using her for prostitution. Similarly, buying, hiring or otherwise obtaining possession of a minor girl under the age of 16 years for the purpose of prostitution is said to be an offence under Sec. 373 IPC.

The ingredients of this offence are :

- (a) Buying, hiring or by some means obtaining possession of a person.
- (b) The person must be under 18 years of age.
- (c) The buying or obtaining possession must be with the intention or knowledge of likelihood that the person will be used for prostitution, illicit intercourse, or immoral purposes.

Where any prostitute or a person keeping or managing a brothel house obtains possession of a minor girl, the presumption is that he has done so in order to use the girl for prostitution or other immoral purpose, and is punishable either under Sec. 372 or 373 IPC. These two sections provide punishment for persons trading in minor girls for prostitution or immoral purposes. Both of them are contrast sections. The former deals with the person who sells or hires etc., whereas the latter deals with persons who buys or hires etc.

Both the offences are not compoundable and triable by Sessions Court, Metropolitan Magistrate or Magistrate of First Class. Punishment is 10 years imprisonment and also liable to fine

Thus the Indian Penal Code does not tackle the problem of prostitution itself. This is done by a Special Act known as Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA), (presently PITA). On 9th May, 1950 India signed the International Convention for the Suppression of Immoral Trafficking in women and girls. In pursuance of signing the international

convention, the SITA was enacted.

7.6. SUMMARY :

Criminal Law provides punishment to offenders as a remedy for violating the rights of persons. Penal law does not discriminate women in liability aspect, except in case of adultery. Women could be a criminal by being an active participant or an abettor. There are some provisions of law which provide special protection to women victims. Dowry death has been specifically defined in the chapter of Homicide, which deals with culpable homicide and murder, Section 299 defined culpable homicide, while Section 300 dealt with offence of murder. Section 304-B relating to dowry death was inserted in 1986. Section 498-A deals with the cruelty on women by husband or relatives of husband. The offences relating to miscarriage or injuries to unborn children are dealt separately under Sections 312 to 318. Abandonment of child under 12 years and concealment of birth are also offences. Sections 359-374 deal with kidnapping women from their lawful guardians and offence of abduction. Procurement of minor girls for illicit intercourse is an offence under Section 366-A, importation of a girl from foreign country was made an offence under Section 366-B while selling and buying a minor for prostitution is an offence under Section 372 and 373.

7.7. GLOSSARY :

Abet	=	Aiding, encouraging or inciting another
Abettor	=	A person who abets or instigates the crime
Accuse	=	To say that someone has committed a crime or to charge someone with a crime.
Accused	=	Person or persons against whom accusation is made
Accusation	=	An act of saying that someone has committed a crime.
Apostasy	=	Abandonment of one's religion, principles, or party
Charge	=	An accusation or official statement in a Court accusing someone of having committed a crime.
Charge-sheet	=	A document listing the charges which a magistrate will hear, or listing the charges against the accused together with details of the crime committed.
C.J.	=	Chief Justice, the presiding Judge of a Supreme Court, or Court of Appeals.
Crime	=	A flexible term for violations of law which are punished by the State or Nation because of their effect on the public.
Criminal	=	A person who is guilty of committing a crime
Criminal Law	=	Jurisprudence concerning crimes or their punishments
Evidence	=	Proof of either written or spoken statement of facts which helps to prove something at a trial

H.M.A.	=	Hindu Marriage Act. A law governing the marital relationships of Hindus.
I.E.A.	=	Indian Evidence Act- Law dealing with evidence.
I.P.C.	=	The Indian Penal Code - Law governing crimes and their punishments, or A Territorial Law which prohibits particular behaviour and impose a penalty for the commission of it.
Magistrate	=	A public or judicial officer who tries cases in police cases
Malice afore thought	=	Ill-will or a formed design to do an unlawful act or a freely formed intention of a man to pursue a course of conduct.
Mens rea	=	Criminal intent or evil intent or guilty intent, or state of mind required to be guilty of committing a crime.
Sessions	=	The acts of sitting, i.e., sitting of a Court for the transaction.
Sessions Court	=	Magistrate's Court for a district which is held for a special reason.
tort	=	Legally recognised private injuries or wrongs which do not arise as a result of breach of contract; or Civil wrong done by one person to another entitling the victim to claim damages.
Trespass	=	An act of interfering with the land or goods of another person.
Trespass to the person	=	Tort of harming someone by assault or false imprisonment.
Trial	=	The examination of the issues in a civil or criminal suit by an authorised court.
Willy-nilly	=	Willing or unwilling compulsorily

7.8. REFERENCES :

2. Gora Chand Gopee's case referred in B vs. Govinda, 1876 1 Bom. 344-46.
3. Raj Malik vs. Sunita Malik, 1986 Cr.L.J. 1910.
4. Varadarajan vs. State of Madras, AIR 1965 SC 942.
5. Khyaliram vs. State of H.P., 1979 Cr.L.J. 620.

7.9 RECOMMENDED BOOKS :

- (i) Criminal Law — P.S. Atchuten Pellay
- (ii) Indian Penal Code — M.P. Tandon

7.10 MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines each.

1. Explain in general how the women is protected as an abettor, accused and victim under the Indian Penal Code?
2. What are the recent trends under the Indian Penal Code to punish the persons causing dowry death?
3. What is the law relating to criminal miscarriage?
4. Define and distinguish kidnapping and abduction?

BRAOU

UNIT - 8 : INDIAN PENAL CODE : RAPE & OTHER OFFENCES

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8.0. OBJECTIVES :

After going through this unit, you will be able to

- * analyse the criminal law with regard to rape with reference to latest changes and decisions of the court.
- * explain the offences relating to marriage and dignity of women.

8.1. INTRODUCTION :

Rape is a serious violation of honour of women which inflicts defilement and dishonour on the entire family. Several offences like Bigamy and Adultery are made punishable to protect the institution of marriage. The rape law underwent several changes and new offences like gang rape and custodial rape were added besides making the law more favourable to women with reference to definition, procedure and evidence. Outraging the modesty of women and indecent

representation of the women are some more offences made punishable to protect the honour and dignity of women.

8.2. SEXUAL OFFENCES :

The Indian Penal Code does not punish incestuous intercourse within the prohibited degrees of relationship although social ethics condemn such relationships. Whatever be social reproach to such incests, they are not offences under the IPC. Any such incestuous sexual intercourse will become punishable only when it is done without or against the consent of the women in which case it becomes an offence of 'Rape' under Sec. 375 IPC. Excepting the husband, all other persons are liable for having sexual intercourse with a women against her consent. Absence of consent is the only essential ingredient of the crime.

8.2.1. Rape :

The simple definition of rape is one man having sexual intercourse with a women against her consent. It is forcible ravishment of a women. Literally it means forcible seizure. It destroys the women's Supreme honour and is regarded as an offence of great heinousness and as such deserves capital punishment. The offence owes its enormity to the defilement and dishonour it reflects on the whole family. Secs. 375 IPC defines the offence of rape. According to this section, a man is said to commit 'Rape' who has sexual intercourse with a women under circumstances falling under any of the following six descriptions :

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

The offence of rape first of all requires that there must be sexual intercourse by a man with a women, and it must have been taken place under any of the circumstances falling under the six clauses of Sec. 375 IPC. No offence of rape is committed if a man has sexual intercourse with his own wife, provided the wife is above 15 years of age. Consent of the women is a valid defence to the accused. Consent means active consent in the mind of a person to a particular act done by another. Such a consent must be free and valid one. If it is obtained by misrepresentation, it will not invalidate consent in criminal law, although it will in civil law of contracts.

Eg : If a man says to women, 'I will marry you but now I must have sexual connection with you' and she agrees for it. The man's act is not rape even if he breaks his promise later. Therefore,

want of consent of the victim is the essence of the crime. The prohibited act in rape is non-consensual sexual intercourse and the guilty state of mind is an intention to commit i.e., the mental element (mens rea) is an intention to commit an act or the equivalent intention of having the intercourse willy-nelly not caring whether the victim consents or not. Hence, a bonafide belief that the women had consented is a valid defence to the accused.

But, if such consent is obtained by putting her in fear of death or hurt, then it is not a valid consent. The scope of this clause has been explained by the S.C. in *Tukaram and another vs. State of Maharashtra*¹, where the victim was alleged to have been raped by the accused police constables at the police station where she had to in connection with a complaint filed by her brother. It was held by the Supreme Court that unless the fear was shown to be that of death or hurt, it would not vitiate the consent. It was the Mathura's Judgment that shocked and outraged the sensibilities of many women organisations, lawyers, academicians etc. It raised an unprecedented public outcry and others became the pivot point for a demand to change the law relating to rape, as a result of which the criminal law (amendment) Act, 1983 was passed, by the parliament which reenacted Secs. 375 and 376 IPC with modifications and inserted Sec. 376-A to D and Sec. 228-A to the Indian Penal Code.

8.2.2. Recent Changes in Rape Laws :

The sections relating to rape were amended by the Criminal Law (Amendment) Act, 1983. This Act brought changes in the IPC, Cr.P.C. and also in the I.E.A.

8.2.3. Changes brought about in the Indian Penal Code :

- (1) Sec. 375 IPC was amended and the definition of the offence of rape has been widened.
- (2) Sec. 376 IPC was amended and the punishment for the offence of rape is enhanced. Now under the amended section.

(a) the accused is liable for imprisonment which shall not be less than 7 years but which may be imprisonment for life or for a term which may extend to 10 years and also liable to fine. In case the woman raped is his own wife and is not under 12 years of age, the punishment is two years imprisonment or fine or both. (Sec. 376 (i) IPC).

(b) Clause (2) of Sec. 376 IPC prescribes punishment enhanced/custodial rapes such as rapes by the police officer or by a public servant or by a Manager or Superintendent of a Jail, remand home or other place of custody, or by the manager or the staff of a hospital, and also in case of rape on a pregnant woman or rape in women when she is under 12 years of age or in cases of gang rapes. In all the above cases, the accused is liable for imprisonment which shall not be less than 10 years but which may be imprisonment for life and is also liable to fine.

(3) Secs. 376-A, 376-B, 376-C and 376-D were inserted. Sec. 376-A IPC prescribes punishment in case the husband had intercourse with his wife during separation/under the section whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment for a term which may extend to two years and also liable to fine.

8.2.4. Custodial Rape : (Sec. 376-B IPC) :

Deals with intercourse by a public servant with a woman in his custody. Whoever, being a public servant, takes advantage of his official position and induce or seduces, any woman, who is in his custody as such public servant subordinate to him, to have sexual intercourse not amounting to the offence of rape shall be punished with imprisonment for a term which may

extend to five years and shall also be liable to fine.

Sec. 376-C IPC : Prescribes punishment for intercourse by Superintendent of jail, remand home or other place of custody by taking the advantage of his official position. Punishment is 5 years imprisonment and also liable for fine.

Sec. 376-D IPC : Prescribes punishment for intercourse by any member of the management or staff of hospital with any woman in that hospital by taking advantage of his official position.

In all these four cases, the act of the accused does not amount to rape, because the women is a consenting party. But it declares the act as an offence because the consent of the women is obtained by the accused by taking advantage of his official position or the women is induced or seduced by taking advantage of his official position.

8.3.5. Identity of Victim : (Sec. 228-A IPC) :

Was inserted into the code. It refers to disclosure of identity of a victim of certain offences. According to clause (1) of Sec. 228-A IPC whoever prints or publishes the name or any matter which may make known the identity of any woman against whom an offence under Secs. 376, 376-A, 376-D IPC is alleged to have been committed is said to have committed an offence punishable with imprisonment for two years and shall also be liable to fine.

Clause (2) prohibits publication of the name or any matter which may reveal the identity of the victim and clause (3) prohibits printing and publication of any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (2) without previous permission of such court.

In all these cases punishment prescribed is imprisonment for two years and is also liable to fine. The offence is cognizable and bailable and can be tried by a Sessions Court.

8.3.6. Changes brought about in the Criminal Procedure Code :

(1) Sec. 327 Cr.P.C. has been suitably amended to safeguard the rape victim from being exposed to unnecessary adverse publicity, by stating the trial of rape shall be conducted in-camera.

8.3.7. Changes brought about in the Indian Evidence Act :

In a large number of cases, particularly, where the prosecutrix (Victim) is the only eye witness the accused persons are acquitted for want of proof. To overcome this situation, the Evidence Act was also amended by the Criminal Law (Amendment) Act, 1983. One of the significant features of this amendment was insertion of Sec. 114-A with respect to the presumption as to absence or consent. According to this section -

"In a prosecution for rape where sexual intercourse is proved and the question is whether it was without the consent of the women and the women with whom rape is alleged to have been committed or attempted states in her evidence before the court that she did not consent, the court shall presume that she did not consent".

8.3.8. Corroboration of Complainant Story :

Till recently it was considered as well settled law that in all the prosecutions for rape the testimony of the complainant lady or the girl should be corroborated by the evidence of other disinterested

persons. But the Supreme Court in *Rameshwar Kalyan Singh vs. State of Rajasthan*, AIR 1952 SC 54, held that corroboration is not essential according to the strict interpretation of the relevant sections 133, 114 and 157 of the Indian Evidence Act. In this case the appellant, Rameshwar was charged with committing rape on a young girl Ms. Purni -8 years of age and the question was whether the complainant made by the girl to her mother regarding the incident and the mother's testimony about it can be accepted. The Court said that no corroboration beyond the statement of the child to her mother was necessary.

So, if a woman does come forward and says that she has been raped her evidence itself should be enough to prove her case and there is no need for any corroborative evidence², because ordinarily a woman will not take her reputation by levelling a false charge concerning her chastity.

8.3. OFFENCES RELATING TO MARRIAGE :

Marriage is the foundation of happiness in family and its strength gives stability to society. Law has rightly recognised its value both in the civil and criminal branches and gives protection to marital ties by punishing their violations by affording adequate remedies in civil law and by prescribing severe punishments in criminal law. The Indian Penal Code in its Chapter XX (Secs. 492-498) deals with the offences relating to marriage. Mock or invalid marriage, bigamy and adultery are the main offences in this chapter. But, all these offences presuppose existence of valid marriage to make the offender liable for punishment.

8.3.1. Mock or Invalid Marriage : (Sec. 493 IPC) :

The gist of the offence lies in cohabitation caused by a man deceitfully inducing a belief of lawful marriage. A man who deceives a woman into a belief that a certain ceremony which he causes to be performed by some accomplice constitute a valid marriage and thus induces or entices a woman to cohabit with him, will be punishable under this section i.e., deceitfully causing a woman not lawfully married to him and to cohabit or to have sexual intercourse with him under belief is said to commit the offence of mock or invalid marriage. The essential ingredients of this offence are :

- (a) A man whether married or unmarried.
- (b) He must deceive a woman and cause her to believe that she is lawfully married to him; and
- (c) Must further induce her to cohabit with him, i.e., to live with him as a wife.

The complaint must be made by a person aggrieved by the offence and the complaint is triable by a sessions court and punishable for a term upto 10 years and also fine. The offence is not compoundable.

Similarly, dishonestly or with a fraudulent intention going through the ceremony of being married knowing that no lawful marriage thereby created is said to have committed an offence under Sec. 496 IPC which deals with a marriage ceremony fraudulently gone through. The ingredients of this offence are :

- (a) a person must have dishonest and fraudulent intention.
- (b) with such intention he must go through the ceremony of being married.

(c) he must do so knowing that by going through such a ceremony, he is not lawfully married.

This offence is punishable with imprisonment which may extend upto a term of 7 years and also liable to fine. This offence also is not compoundable. This section applies to cases in which a ceremony is gone through which would in case constitute a valid marriage and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or in which effect is sought to be given by a proceeding to some collateral fraudulent purpose.

The difference between these two offences lies in, under Sec. 493 IPC there is deception on the part of the man and cohabitation or sexual intercourse consequent on such deception. The offence under Sec. 496 IPC requires no deception. The offence under Sec. 496 IPC requires no deception, no co-habitation or sexual intercourse as a sine quanon but a dishonest or fraudulent abuse of marriage ceremony is necessary.

8.3.2. Bigamy : (Secs. 494 & 495 IPC) :

The different personal laws of Indians made monogamy compulsory. Therefore, one cannot marry second time while the other spouse is alive. In addition to that Sec. 494 IPC declares the second marriage as void marriage and the person is also liable for an offence of bigamy.

According to the Section 494 IPC whoever marries second time during the life time of the first spouse, the second marriage is void by reason of its place during the life of such husband or wife, and is guilty of bigamy. The essential ingredients of this offence are :

- (a) the person must be married once.
- (b) the first wife or husband must be living.
- (c) during the existence of the first wife or husband, a second marriage must be contracted.
- (d) the second marriage must be void according to the personal law of the person.

However if the first marriage has been declared void by a court of competent jurisdiction, if the spouse has been continually absent and not heard of for 7 years or more, then the person does not commit any offence even if he marries a second time. Hence, there are two exceptions to this offence. The student should note that there are three conditions for the operation of the latter exception :

- (a) continual absence of one of the parties for a period of seven years.
- (b) the absent spouse not having been heard by the other party as being alive within that time.
- (c) disclosure : The party marrying must inform the person with whom he or she marries the real state of facts.

Under English Law, there is another exception, namely bonafide belief in the spouse death³.

The Hindu Marriage Act made monogamy compulsory among Hindus and thus, a Hindu cannot marry a second time while the other spouse is alive. Sec. 494 IPC makes monogamy the rule for all ie., the Hindus, Buddhists, Jains, Sikhs and the like. To sum up, the rule is applicable to all communities except to Muslim Men. Existence of first valid marriage is a condition precedent to make the offender liable. If the first marriage is not a valid one, no offence will be committed by contracting a second marriage, for eg. If 'A' who has married a lady 'B' within prohibited

degrees of affinity, again marries 'C' he will not be guilty of bigamy for his first marriage with 'B' was not a valid marriage. Similarly, where a second marriage, which is alleged to be the bigamous one, is not valid for the reason that essential ceremonies have not been performed, the prosecution would fail. In *Kanwal Ram and others vs. The Himachal Pradesh, Administration*⁴, the Supreme Court laid down the rule that in a bigamy case, the second marriage is a fact, that is to say, the essential ceremonies constitution it must be proved. Mere admission of marriage by the accused is not evidence of it for the purpose of proving marriage in a bigamy case.

But in *Gopal Lal vs. State of Rajasthan*⁵, the Supreme Court held that the second marriage though void as per Section 17 of the Hindu Marriage Act still it would attract Sec. 494 IPC where a spouse contracts a second marriage, while the first marriage is still subsisting. The spouse would be guilty of bigamy of 494 IPC, if it is proved that the second marriage is a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. The voidness of the marriage under Sec. 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Sec. 494 IPC because the second marriage will become void only because of the provisions of Sec. 17 of the Hindu Marriage Act.

What Sec. 17 of the Hindu Marriage Act contemplates is that the second marriage must be according to the ceremonies required by law. If the marriage is void, its voidness would only lead to civil consequences arising from such marriage. This Sec. 17 has to be read in harmony and conjunction with Sec. 494 IPC. Therefore, merely because the second marriage is void under Sec. 17 HMA, it cannot be said that Sec. 494 IPC will not be attracted. The combined effect of Sec. 17 HMA and Sec. 494 IPC is that, when a person contracts a second marriage while the first marriage is subsisting, he commits the offence of bigamy.

Mohammedan Law allows a minor an option to ratify or repudiated a marriage on attaining majority. The Hanifi law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage.

8.3.3. Effect of Conversion

If the wife is a Hindu, conversion of the husband from one religion to another is not a good defence for the wife to marry another man. A Hindu married women who is having a Hindu husband living marries a Mohammedan or a Christian, even though she has become a Mohammedan or Christian, is guilty of bigamy (*The Government of Bombay vs. Millard's case*). In *Rakey Bibi vs. Anil Kumar*⁷, the Special Bench of the Calcutta High Court clarified the effect of conversion in Sec. 494 IPC. The court held that under Hindu Law the apostasy of one of spouses does not dissolve the marriage. If one of the non-muslim married parties adopts Mussalman faith in a foreign country, the marriage is automatically dissolved if the other spouse does not adopt the same faith before the completion of three menstrual periods, does not apply to the case of a non-muslim nationals of a country whose state religion is not Islam, i.e., like India.

Similarly in *Ramkumari's case*, it was held by the Court, that a non-christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity.

But if the wife is a Mohammedan and her husband changes his religion, the marriage tie is dissolved and the wife will not be guilty of bigamy even if she marries again. The personal law of Muslims prevails in this case. But under the dissolution of Muslim Marriages Act, 1939 the renunciation of Islam by a born Muslim married women on her conversion to a faith other than Islam does not dissolve her marriage. She can, however, obtain a decree for dissolution of her

marriage on any of the grounds mentioned in Sec. 2 of the Act.

If the wife is a Christian, conversion of the husband from one religion to another is not a good defence for the wife to marry again. Further, a Christian cannot by embracing Mohammedan faith marry a second time during the life time of his first wife (*Skinner vs. Orde*). If he does so, he is liable for the offence of bigamy.

The punishment for this offence is imprisonment upto 7 years and fine. The offence is compoundable when permission is given by the Court before which the case is pending. The offence is triable either by a court of sessions or Metropolitan Magistrate, or Magistrate of First Class.

Sec. 495 IPC prescribed the punishment for the aggravated form of bigamy, namely concealment of former marriage from person with whom a subsequent marriage is contracted. The married man who by posing himself as unmarried, induces a modest women to become, as she thinks his wife, but in reality his concubine, and the mother of an illegitimate issue is guilty of one of the most cruel frauds that can be conceived. The ingredients of this offence are :

(a) the person must have been married once already.

(b) he must contract a second marriage by concealing the fact of first marriage from the person with whom the subsequent marriage is contracted.

This offence is punishable for a term which may extend upto 10 years and also liable to fine.

These provisions even apply to a women who deceived a man in similar circumstances.

Proof of Marriage : In all prosecutions for offences relating to marriage, strict proof of marriage is necessary Sec. 50 of the Indian Evidence Act provides that opinion evidenced by mere conduct shall not be sufficient to prove marriage in prosecution under Chapter XX of the Indian Penal Code.

8.3.4. Adultery :- Special Protection for Women :

Literally, adultery means having sexual relationship outside the wed-lock, i.e., extra-marital relationship. The Indian Penal Code not only prescribes monogamy as a rule under Sec. 494 IPC but also prevent extra-marital sexual relationships. Adultery may be defined as, 'Consensual Sexual intercourse between a married person and a person of the opposite sex during the subsisting of the marriage'. (Raydon on Divorce as quoted in Atchuthan Pillai). Adultery is not an offence under the English Law. It is only a tort for which the husband can sue the wrongdoer for damages. Sec. 497 IPC defines the offence of adultery as :

"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without consent or connivance of that man, such sexual intercourse not amounting to the offence of rape is guilty of the offence of adultery"

The ingredients of the offence of adultery are :

- (1) the accused should have sexual intercourse with the women in question.
- (2) she was the lawfully married wife of another man.
- (3) the accused should know or had reason to believe that she was lawfully married wife of another man.
- (4) the husband of the women did not consent to or connive at such intercourse, and

(5) the sexual intercourse so held did not amount to rape.

So, adultery must be consensual act of both man and the women. It differs from rape only in this aspect because adultery may be committed with the consent of the women, whereas in rape, it must be without her consent or against her will. The punishment for this offence is imprisonment which may extend to a term of five years or fine or both, and it is a non-cognizable offence. However, the women is not punishable under this section, she cannot be charged even as an abetter of the offence. This is nothing but the special protection given to the women. The Law Commission observed that, "in the peculiar circumstances of India, where married women are subject to various disabilities it is not fair that they should be punished. The condition of women in this country is different from that of the women in other countries, they are married while still children, they are neglected for other wives while still young.

The Constitutional validity of Sec. 497 IPC was challenged before the Bombay High Court in Yusuff Abdul Azeez's case⁷, as violative of Article 15 of the Indian Constitution as there shall be no discrimination based on sex. The Constitutional validity of Sec. 497 IPC was upheld by the Court basing on the fact that, 'what led to this discrimination in this country is not the fact that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Sec. 497 IPC a position in law which takes a sympathetic and charitable view of the position of women in this country.

This ruling was confirmed by the Supreme Court in Sowmithri Vishnu vs. Union of India⁸. In this case the Constitutional validity of Sec. 497 IPC is challenged as violative of Art. 14 of the Constitution on the following grounds :

It makes irrational classification between men and women because -

(a) It confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the women with whom her husband has committed adultery;

(b) The gist of the offence lies in having the husband has sexual intercourse or relations with an unmarried women, the result is that, husbands have a free licence under the law to have extra maxital relationship with unmarried girls.

The Court rejected all the contentions and held Sec. 497 IPC valid. The definition of the offence of adultery is not violative of any constitutional provision. At the time of framing the code, it is commonly accepted that it is the man who is the seducer and not the women. The position may have undergone some changes over years and the legislature has to consider whether Sec. 497 IPC should be amended appropriately so as to take note of the transformation which the society has undergone.

The so far as the second issue is concerned, it was held by the Court that Sec. 497 IPC does not envisage the prosecution of the wife by the husband for adultery, because the offence is defined in such a way that it can only be committed by a man, not by a women. Indeed, the section expressly provides that the wife shall not be punishable even as an abetter. Therefore, no grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of law is that the wife who is involved in an illicit relation with another man is a victim and not the author of the crime. The offence of adultery is considered by the legislature as an offence against the sancity of the matrimonial home, an act which is committed by a man. Hence, those men alone are brought under the net of the law.

As far as the third issue is concerned, it was observed by the Court that law does not confer

freedom upon the husbands to be licentious. It only makes a specific kind of extra-marital relationship an offence, the relation between a man and a married women. An unfaithful husband risks or perhaps invites a civil action by the wife for separation. Further, it was observed by the Court that the alleged transformation in feminine attitude for good or for bad may justly engage the attention of the law makers when the reform of penal law is undertaken. They may enlarge the definition of adultery to keep pace with the moving times. But until then, this law must remain as it is and as it is does not offend either Art. 14 or Art. 15 of the Constitution.

8.4. OUTRAGING THE MODESTY OF WOMEN :

Modesty means the quality or fact of being modest i.e., chastity, purity of the women. Outraging means causing a gross or violent injury or an act of wanton mischief. It is a gross offence to the moral feelings. Morality of a women will depend upon the national, social and cultural values and customary norms of the country. There are three provisions in the Indian Penal Code protecting the modesty of women. One is the main Section 376 IPC relating to rape. The other two provisions are contained under Secs. 354 and 509 IPC. Sec. 354 IPC defines the offence of assaulting or using criminal force to a women with an intention to outrage her modesty and Sec. 509 IPC refers to insult to female modesty, i.e., eve-teasing.

Out-raging the modesty of Women : (Sec. 354 IPC) :

According to this section, whoever assaults or uses criminal force to any women intending to outrage or knowing it likely that he will thereby outrage her modesty is said to have committed an offence. The essential ingredients of this offence are :

- (1) There must be some assault or use of criminal force on a women. Criminal force means use of physical force upon a person without her consent, and with the intention of causing or knowing that will be cause injury, fear or annoyance to the women.
- (2) The assault or criminal force must be used with the intention of outraging her modesty.

Infact, outrage of female modesty will differ according to the country and race to which a women belongs. What is an outrage to the modesty of one women would be thought as nothing by another. To place hands on the shoulder of a women will be an outrage to an Indian Women, but may not be to a European Lady. Examples to such an outraging acts are : A teacher taking indecent liberty with female students, or a doctor stripping naked a female patient under the pretence to examine her.

To Constitute an offence under Sec. 354 IPC the reaction of the women concerned is not the test. In *State of Punjab vs. Major Singh*⁹, the accused major had caused injuries to the vagina of a 7 1/2 months old child by fingering. He walked into the room where the girl is sleeping at 9-30 PM, then after having switched off the lights, he stripped himself naked below the waist and knelt over her and performed indecent acts of unnatural lust on her private parts rupturing her hymen and causing a tear on her vagina.

It was argued for him that, since the child concerned had not developed sufficient sex instinct it would not be said that her modesty was violated. But, this contention was rejected by the Court and he was convicted under Sec. 354 IPC. It was observed by the court, 'The essence of a women's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping the women possess a modesty capable of being outraged'. Hence, whoever uses criminal force to her with an intention to outrage her

modesty commits an offence punishable under Sec. 354 IPC.

The culpable intention of the accused is the crux of the matter. Though the reaction of the women is relevant, its absence is not always decisive, for eg, the accused, a doctor, with a corrupt mind touches the body of a women who is under the spell of anesthesia, she may be sleeping and unable to appreciate the significance of the act, but the offender is punishable under this section. Therefore, from her very birth a women possess the modesty and it is the attribute of her sex.

This offence is punishable with imprisonment upto two years or with fine or with both. The offence is triable by First Class or by Second Class Magistrate.

Insulting the Modesty of Women : (Sec. 509 IPC) :

According to Sec. 509 IPC 'whoever, intending to insult the modesty of a women utters any word, makes any sound, gesture or exhibits any object, intending that such a word or sound shall be heard, or that such gesture or object shall be seen by such women or intrudes upon the privacy of such women is said to have committed an offence. The ingredients of this offence are :

- (1) there must be an intention to insult the modesty of a women.
- (2) the insult may be caused by words, gestures, or by exhibiting any objects (eg. absence pictures).
- (3) the accused should have an intention that these words shall be heard and gestures and exhibition must be seen by the women.
- (4) the insult may be caused by intruding upon the privacy of the women.

The intention to insult the modesty of the women is the essential ingredient of the offence. If it is committed in a public place, it would be punished under Sec. 294 IPC. This offence is lesser than the offence punishable under Sec. 354 IPC. If the act goes to the extent of using criminal force, it is punishable under Sec. 354 IPC. If it involves entry into the woman's property it is punishable as an aggravated form of criminal trespass. Sec. 376 IPC protects women from rape. Therefore, Sec. 509 IPC is a residuary provision, enacted to punish the acts which would not fall under the above sections and thus it provides special protection to women. Eve-teasing comes within the scope of the offence.

8.5. SUMMARY :

Rape is forcible ravishment of a women. A man is said to commit rape who has sexual intercourse with a women against her will and under circumstances explained by Sec. 375. Consent obtained by putting her in fear of death or hurt is not a valid consent. In 1983 several changes were made in law of rape. Punishment for the offence is enhanced, new criminal offences like gang rape and custodial rape were introduced. Some protective provisions to conceal the identity of women victim and trial in camera were provided. A presumption of absence of consent was made possible by amending Evidence Act.

Mock marriage, Bigamy and Adultery are some offences which disturb the institution of marriage. These provide for prosecuting of criminals which also give rise to marital relief under different enactments. Though the IPC defined the offences like outraging the modesty of women and indecent representation of women, it is not strong enough to protect the dignity of women.

Law still needs effective changes to protect the women from sexual offences.

A number of incidents are reported in the press regarding the offences against women especially rape, molestation, kidnapping, family violence, dowry, wife-beating, alcoholism, eve-teasing etc. There has been a constant rise in the crime against women and hardly a day passes without reports in the news-paper or a magazine of a rape or assault having taken place both in the rural and urban areas. The problems of exploitation of women and young girls in prostitution and the flesh trade is another example. Thus, women in India continue to be the lesser sex. If such offences are not merely a problem of law enforcement but also indicative of the disabilities and inequalities from which the women in our country continue to suffer despite the Constitution provisions for equality, social justice and protection of women. Demography, health education and skill development, participation in economic activity, decision making, political participation, etc., are examples of indicators denoting the status in the society. These indicators are all adverse as far as women are concerned.

Infact, many of the new forces and impulses in the society and polity, such as modernisation, technological change and development have affected women adversely and further reduced her status in the home as well as in the community.

8.6. GLOSSARY :

Mens rea	=	Guilty intention
Custodial rape	=	Rape by the persons in charge of custody of the victim women
Gang rape	=	Commission of rape by more than one person
Prosecutrix	=	Rape victim who deposes in support of prosecution

8.7 REFERENCES :

1. Tukaram and another vs. State of Maharashtra, AIR 1979 SC 185.
2. Rafiq vs. State of U.P., SCR 1, 1981 pp 401 to 404; and State of Maharashtra vs. Kewal Chand Jain, JT 1990 SC p. 61.
3. R vs. Tolson
4. Kewalram and others vs. The H.P. Administration, AIR 1966 SC 614.
5. Gopal Lal vs. State of Rajasthan, AIR 1979 SC 713.
6. Rakeybibi vs. Anil Kumar, AIR 1948 Cal. 119.
7. Yusuff Abdul Aziz vs. State of Bombay, AIR 1951 Bom. 472.
8. Sowmithri Vishnu vs. Union of India, AIR 1985 SC 1618.
9. State of Punjab vs. Major Singh, AIR 1967 SC 63.

8.8. RECOMMENDED BOOKS :

1. Law Relating to Women and their Rights - Bhatnagar, Women & Law - G.B. Reddy
2. Law Relating to Offences Against Women - V.K. Dewan.

8.9. MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines.

1. Examine when a sexual assault amounts to rape? Can a husband be guilty of rape of his own wife?
2. What are the changes brought about by recent amendment in the rape laws ?
3. Explain how women is protected in the commission of the offence of adultery?
4. How the out-raging the modesty of women or indecent representation of women are made punishable under Criminal Law?

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UNIT - 9 : PROVISIONS UNDER THE CRIMINAL PROCEDURE CODE RELATING TO WOMEN

Contents :

- 9.0. Objectives
- 9.1. Introduction
- 9.2. Provisions Regarding Arrest and Search of Women
- 9.3. Provisions Regarding Medical Examination of Women
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- 9.5. Provisions Regarding Summoning Women to the Police Station
- 9.6. Provisions Regarding Incamera Proceedings
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9.0. OBJECTIVES :

After going through this unit, you will be able

- * To appraise the distinction between Substantive Law and Procedural Law.
- * To create awareness among the students about availing Substantive Rights through appropriate procedure.
- * To make the students understand procedural technicalities in approaching the Court, Police and other Implementing Machinery.

9.1. INTRODUCTION :

Indian Penal Code is a substantive law. It defines various offences and prescribes punishments that can be imposed if the accused is proved guilty. The procedure that has to be followed to establish the guilt of the accused is prescribed under the Criminal Procedure Code, 1973. It is procedure that shows the law in action and tells us how it is worked. It is, therefore, proper to consider how women are treated under Criminal Procedure Code. The IPC does show its concern to prevent the exploitation of women. This is further manifested in the various provisions of Cr.P.C., in regard to the search, medical examination, detention, summoning of women in

general, including in particular women accused of an offence. Besides this special protection under Cr.P.C., the Constitutional and legal safeguards applicable in the field of personal liberty are as much available to women, as they are to others.

9.2. PROVISIONS REGARDING ARREST AND SEARCH OF WOMEN :

The Cr.P.C., provides certain rules as to the mode of arrest and search of the accused. Sec. 46 lays down that "in arresting a person, the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested unless there be submission of custody by word or action". The Law Commission units report on the 'Rape and Allied Offences', expressed the view that a provision should be added to the effect that in the case of women, their submission to custody shall be presumed, unless proved otherwise, and that the police officer should not actually touch the person of the women for making the arrest. But this recommendation is not yet implemented. In this context the Commission also expressed the view that except in unavoidable circumstances, no women should be arrested after sunset and before sunrise. For this purpose, the Commission recommended² the insertion of a new sub-section in Sec. 46 of Cr.P.C. as Sec. 46(4). This was proposed in the Cr.P.C. (Amendment) Bill, 1988 clause 9 but was lapsed.

Under Sec. 47 Cr.P.C. when a police officer has reason to believe that a person to be arrested has entered into any place and the officer enters that place in pursuit of the offender and if the place is occupied by females who observe purdah, the police officer must give notice to the females in the room that they must withdraw themselves from the room before he can enter the place.

Sec. 51 Cr.P.C. confers power on the police officer to search the arrested person and place in safe custody all articles, other than wearing apparel found on him. Clause (2) of this section provides that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

Before making a personal search, the searching officer should give the grounds of arrest to the accused, where no such grounds are given, the search becomes illegal³. It is the duty of the searching officer making a search to obtain independent and respectable witnesses⁴.

9.3. PROVISIONS REGARDING MEDICAL EXAMINATION OF WOMEN :

A number of sections of the Cr.P.C. 1973, deal with the medical examination of the accused. Such examination, as contemplated by the code is of two types :

Medical Examination of the accused at the instance of the investigating agency in order to secure evidence of crime is the first type. Such examination can be undertaken to secure evidence of crime and the procedure is prescribed under Sec. 53 of the Code. According to this section, it is to be done by a medical practitioner at the request of the investigating agency. Here, the code makes a specific provision by requiring that in the case of a female accused, the examination should be done by a female medical practitioner only. - Sec. 53(2) Cr.P.C.

There is however, another type of medical examination contemplated by Sec. 54 of the code where the accused himself or herself desires the examination in order to prove his or her

innocence. Where a female accused desires such an examination in order to prove her innocence, she can avail herself of the facility provided in the relevant sections of the code. This section confers an important right on the arrested person. It is the right of an arrested person to have his medical examination done. Hence a person in custody is in need of protection of the nature conferred by Sec. 54 of the Cr.P.C. But often the arrested person does not know his or her rights in this respect. It is the duty of the magistrate to inform the arrested person about his/her right to medical examination in case he has complaints of physical torture, or maltreatment in police custody⁵. Such a provision is necessary to safeguard against custodial torture and exploitation. However, if the magistrate considers the request to be vexatious or for defeating the ends of justice, he may refuse it.

9.4. PROVISIONS REGARDING DETENTION OF WOMEN :

When a person is arrested, the police officer can keep in custody for a period of not exceeding 24 hours (Sec. 57 Cr.P.C.). Before expiration of this period, the arrested person has to be produced before the nearest magistrate who can under Sec. 167 Cr.P.C. order his detention for a term not exceeding 15 days on the whole, or he/she can be taken to a magistrate who has jurisdiction to try the case, and such magistrate can remand the person into custody for a term which exceed 15 days but not more than 60 days.

In regard to the detention of a women after arrest, a matter which requires to be considered is the place where she is to be detained. This question was also examined by the Law Commission in its report on 'Rape and Allied Offences'. The recommendation of the Commission was that, if there are no suitable arrangements in the locality for such detention, the women should be sent to an institution established and maintained under the Women and Children Act (Licensing) Act, 1956.

Further Sec. 98 Cr.P.C. confers power on the District Magistrate to make an order for the immediate restoration of a women to her liberty or the female child to her proper custody, where such a women or a female child under sixteen years has been abducted or unlawfully detained for an unlawful purpose. Necessary force may be used in carrying out this order, but both the detention and the purpose must be unlawful.

9.5. PROVISIONS REGARDING SUMMONING WOMEN TO THE POLICE STATION :

The Code of Criminal Procedure has a lengthy chapter on the investigation of offences. Chapter XII gives various powers to police officers engaged in investigation. Sec. 150 (1) Cr.P.C. authorises police officer making the investigation under this chapter to summon any person believed to be acquainted with the facts of the case and such a person can be directed to come to the police station for the purpose of investigation. But, in the case of persons below 15 years and also in the case of all women, it is specifically provided under the provision to Sec. 160(1) Cr.P.C. that, they should not be called to the police station for the above purpose, but they should be examined at their place of residence. Though this is an important safeguard to women, there is no specific sanction provided in the section for its infringement. Summoning a women in violation of this rule may attract a charge under Sec. 166 of the IPC i.e., public servant disobeying direction of law with an intent to cause injury to any person.

9.6. PROVISIONS REGARDING IN-CAMERA PROCEEDINGS :

The place in which a trial shall be held shall be deemed to be an open court to which public may have access. But Sec. 327 of the code empowers the magistrate to exclude the public generally or any particular person from the court room in such matter as ought to be conducted in privacy. This is what is known as in-camera proceedings. Under Clause (2) of Sec. 327 Cr.P.C. it was provided that an inquiry into a trial of rape or an offence under Secs. 376 or 376-A to 376-D of the IPC shall be conducted in-camera. Where any proceedings are held in-camera, it shall not be lawful to any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court. Violation of this provision attracts criminal charge under Sec. 288-A of the IPC.

9.7. PROVISIONS REGARDING BAIL FOR WOMEN :

There are certain special provisions relating to bail of particular reference to women. The Code of Criminal Procedure, 1973 when dealing with the question of bail, takes into account the fact that women deserve special consideration by giving the court a discretion to release a women on bail, even where there is a serious charge. Sec. 437 Cr.P.C. gives power to the court or a police officer to release an accused on bail in a non-bailable case, unless there appears reasonable grounds that the accused has been guilty of an offence punishable with death or life imprisonment. But a person under the age of 16 years or a women or a sick or infirm person may be released on bail even if the offence charged is punishable with death or life imprisonment.

Thus the code while directing the court not to release a person on bail where the offence is punishable with death or life imprisonment, takes care to provide that this prohibition shall not apply where the accused is a women.

9.8. CAPITAL SENTENCE ON PREGNANT WOMEN :

Indian Penal Code still retains capital punishment for murder and a few other offences, though so far as murder is concerned, it is now awarded only in the rarest of rare cases. There is no special relaxation in favour of women as far as capital punishment is concerned. But Sec. 416 of the Code of Criminal Procedure, 1973 provides that if a women sentenced to death is found to be pregnant the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to life imprisonment.

Imprisonment for Life :

Sec. 432 of the Code of Criminal Procedure, 1973 empowers the appropriate government to suspend or remit sentences conditionally or other wise in practice, the net effect of remissions granted by the State Government was such that life imprisonment came to be reduced to about 10 to 12 years imprisonment. Besides, Sec. 432 of the Code provides that without the consent of the person sentenced, the appropriate government may commute certain sentences. This position was, however, substantially changed when in 1978 Sec. 433-A was inserted into Cr.P.C.

Sec. 433-A of the Code provides that notwithstanding anything contained in Sec. 432 where a sentence of imprisonment for life is imposed on conviction of a person for an offence or where death is one of the punishments provided by law or where a sentence of death imposed on a person has been committed under Sec. 433 Cr.P.C. into one of imprisonment for life, commutation

shall not be permissible to less than 14 years. This rigid restriction obviously works hardship in the case of women prisoner, sentenced to imprisonment for life. It is not proper that the law should insist on the female prisoner's undergoing minimum 14 years imprisonment mandatorily as laid down in Sec. 433-A Cr.P.C. In many cases categorical application of this section to women prisoners may cause grave hardship. In *Man Ram vs. Union of India*⁶, the Supreme Court expressed some uneasiness about the rigid approach reflected in Sec. 433-A Cr.P.C. in general.

The facts of a recent Allahabad High Court case⁷ illustrate how in practice situations may arise when the sentence of life imprisonment may still prove to be severe in the facts of a particular case. A mother had committed murder of her infant son and then herself attempted to commit suicide. She was aged only 17 years at the time of the offence. There was no apparent motive for the murder, which was committed in rage. As a result of the women's act, she has not only lost her son but she had also lost the sympathy of her husband, who refused to keep her in his house after this tragic incident. The Allahabad High Court, while awarding the sentence of life imprisonment to the women, made in its judgment observations to the effect that the case was one in which part of the sentence of imprisonment should be reduced by the State Government under Sec. 432 of the Code of Criminal Procedure, 1973.

9.9. PROVISIONS RELATING TO MAINTENANCE OF WOMEN :

In addition to the Hindu Adoption and Maintenance Act, 1956 the right of maintenance has also been granted to the wife under Sec. 125 of the Cr.P.C. The scope of these two laws is different. Sec. 125 Cr.P.C. provides a summary remedy and is applicable to all persons. This section gives effect to the fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions apply and are applicable whatever may be the personal law by which the persons concerned are governed.⁸

Under Sec. 125 Cr.P.C. a magistrate of the first class may order a monthly allowance for the maintenance of a man's wife or child or father or mother at a monthly rate not exceeding Rs. 500/- if it is provided that a man has sufficient means and despite having sufficient means neglects or refuses to maintain his wife etc., who is unable to maintain herself and minor children whether married or not. If the person fails to pay maintenance in spite of the magistrate orders, the magistrate may levy an amount as a fine and recover it from the man.

If the man offers to maintain his wife on the condition that she lives with him, the magistrate may after considering the grounds of refusal, if any, by the woman make an order under this section. According to this section, if a husband has married a second time or kept a mistress it will be a sufficient ground for the wife's refusal to live with him. But, if the wife is living in adultery or without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent, then the provisions of this section will not apply. The magistrate is empowered to increase or vary the allowance if the circumstances require (Sec. 127 Cr.P.C.). The person in whose favour an order of maintenance is made is entitled to a copy of the order without any payment.

In the famous *Sha Bano* case⁹, the Supreme Court held that Sec. 125 Cr.P.C. was applicable to all irrespective of their religion. It was therefore applicable to Muslim women also. However, recently the Parliament passed a Muslim Women's (Protection of Rights on Divorce) Act, 1986 which provides other remedies for Muslim Women and allows them to use the remedy provided

by Sec. 125 Cr.P.C. only if the husband consents to it.

The object of this section is to avoid vagrancy by providing that a magistrate may up a limited extent see that a wife and children are maintained by husband.

It provides summary procedure which does not cover entirely the same ground as the civil liability of a husband or father or son under his personal law to maintain his wife, children or parents. If any substantial issue of civil law is raised by the parties, their remedy lies only in the civil court. Therefore, the findings of a magistrate under this section are not final and the parties can legitimately agitate their rights in a Civil Court.¹⁰

Thus a wife or child have two remedies available for securing maintenance. The first is a suit in a civil court, in which a decree may be obtained for an amount commensurate with the status or means of the party liable. Even arrears of past maintenance can be recovered under this Section. The maintenance could be made a charge in the property. The decree can be enforced against his property in case of his death. The second remedy is a proceeding under this section. It is a cumulative remedy. This remedy is open to a wife or child either legitimate or illegitimate. The mere existence of a decree of a civil court awarding maintenance does not oust the jurisdiction of the magistrate to make an order under this section on the application of the wife. Thus the Code of Criminal Procedure provides for maintenance of women¹¹.

9.10. SUMMARY :

Criminal Procedure Code is a confiscation of procedures regarding investigation into crimes and the prosecution of criminals. The police authorities are expected to observe some norms when they search or arrest the women. They have to give sufficient notice to purdanasheen women to withdraw from the room which the police intends to search. Only women police personnel should search the women. Even the medical examination of women should be done by the women medical officer only. Certain special provisions were made regarding detention and summoning the women. The proceedings regarding rape case should be held in-camera, violation of which will be an offence under IPC. If the women convict is warded capital punishment and she is a pregnant the execution can be postponed or commuted to life imprisonment at the discretion of High Court. Government may remit the sentences of women convicts. Section 125 of Cr.P.C. provides a summary remedy to all persons including wife and children, regarding the maintenance.

Still there are certain lacunae in the law which need attention. Most of these safeguards are often not observed in practice because there is no independent agency to ensure that they are complied with. Therefore, there should be a provision in the code that when a young person below 15 years or a women is examined by the police during investigation, a relative or friend of the person to be examined, or a representative of a recognised organisation interested in women and children's welfare should be allowed to be present.

9.11. GLOSSARY :

Arrest	=	Seizing of a person and detaining him in custody by lawful authority.
Bail	=	Releasing an arrested person from custody after payment has been made to a court as guarantee that the person will return to face trail.

or

To set at liberty a person arrested or imprisoned on written security taken for his appearance on a day and at a place named.

Capital Sentence	=	A penalty which results in the loss of the convict's life. It is abolished in several states.
Cr.P.C.	=	Criminal Procedure Code - Code which provides procedure to be followed in criminal proceedings.
Criminal Proceedings	=	Any proceeding in which a government seeks to prosecute a person for an offence and to impose upon him a penalty of a criminal character.
Custody	=	Care, in criminal law, detention (i.e., being kept in prison or in a cell.
Detention	=	Keeping someone so that he cannot escape.
In-camera Proceedings	=	Proceedings to be held in the chambers of the Judge, i.e., secretly or privately. Public are not permitted to present.
Investigation	=	Examination to find out what is wrong; examining the details of a case by a person having authority.
Magistrate	=	Judicial authority who tries cases in a police court. A public civil officer possessing such power, legislative, executive or judicial as the government appointing him may ordain.
Maintenance	=	To supply of necessaries to a person, wife and children, or person who are unable to provide for themselves.
Search	=	An exploration or inspection of a person's house, premises etc. by a public officer i.e., a police officer for the purpose of discovering evidence of a crime, or a person who is accused of a crime.
Search Warrant	=	A written order issued by a court for a probable cause, specifying the place where a search is to be made and the things to be looked for, and directing that when found, they should be brought before the court.
Sentence	=	A judgement of punishment in a criminal proceeding, i.e., legal punishment given by a court to a convicted person.
Summons	=	A court or writ commanding a party named therein to appear in a court on or before a specified date and defend the complaint in action commenced against him. It should also notify the party that, in case of his failure to do so, judgement by default will be rendered against him for the relief demanded in the complaint.
	--	to call someone to come.
	--	it is a document which starts a legal action in the court.

9.12. REFERENCES :

1. Law Commission of India - 84th report on rape and allied offences.
2. Some questions of substantial law, evidence and procedure (April, 1980) page 14, para 384.
2. Ibid Paras 3 and 8
3. Rabindranath Prusty vs. Orissa, 1984 Cr.L.J. 1392 Orissa.
4. Raghubir Singh vs. Punjab, AIR 1976 SC 9.
5. D.J. Vaghala vs. Kantibhai Jethabai, 1985 Cr.L.J. 974 Guj.
6. AIR 1980 SC 2147.
7. Rukmini Devi vs. State, 1989 Cr.L.J. 548 D.B.
8. Nanak Chand vs. Chandra Kishore, AIR 1970 SC 446.
9. Mohd. Ahmad Khan vs. Shah Bano Begum, 1985 Cr.L.J. 875 SC.
10. Nandlal Mishra vs. R.L. Misra, 1960 3 SLR 431.
11. Wife includes women who has been divorced or has obtained divorce from her husband and has not married.

9.13. RECOMMENDED BOOKS :

- | | | |
|-----------------------------|---|--------------------------------------|
| 1. Kalkar | : | Lectures on Criminal Procedure Code. |
| 2. Saxena | : | Criminal Procedure Code. |
| 3. Ratan Lal and Dhiraj Lal | : | Criminal Procedure Code. |
| 4. M.P. Tandon | : | Criminal Procedure Code. |
| 5. R.B. Kelkar | : | Outlines of Criminal Procedure Code. |
| 6. S.N. Misra | : | Criminal Procedure Code. |
| 7. Sarkar | : | Criminal Procedure Code. |
| 8. D.M. Basu | : | Criminal Procedure Code. |

9.16. MODEL EXAMINATION QUESTIONS :

I Answer the following questions in 30 lines each.

1. Explain the special provisions regarding women provided in Cr. P.C. during investigation ?
2. Analyse the provisions of Cr. P.C. during prosecution of Women ?
3. Explain when a person is liable to maintain his wife or parents.

BLOCK - V
RECENT CHANGES IN LAW

BRAOU

UNIT - 10 : DOWRY PROHIBITION ACT

Contents :

- 10.0. Objectives
- 10.1. Introduction
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- 10.3. The Evils of Dowry System
- 10.4. Social action against the practice of Dowry
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 - 10.4.4. Central Legislation
 - 10.4.5. Amendments made in 1984 to the Dowry Prohibition Act, 1961.
 - 10.4.6. Amendments made in 1986 to the Dowry Prohibition Act, 1961.
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- 10.5. Judicial precedents on Dowry Death Cases.
- 10.6. Summary
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- 10.9. Suggested Readings
- 10.10. Model Examination Questions

10.0. OBJECTIVES :

After going through this unit, you will be able to

- * Examine the background and consequences of dowry system from the time of its inception upto the present.
- * Review the legislation on dowry prohibition and the role of judiciary in dealing with dowry offences in India.

10.1. INTRODUCTION :

Dowry has become a social evil, a veritable curse vitiating and undermining the family peace, harmony and growth. It has affected people from all walks of life, the rich and the poor alike. The problem of dowry has ruined a number of families and created many unhappy homes.

Of late it has been seen that, not only brides but also prospective teenaged girls out of sheer frustration are driven to commit suicide for obvious reasons of unbearable torture and trauma.

Occasionally quite a number of instances have come to light where men or their relatives resort to physical violence and criminally assault women for not bringing or insufficient bringing of expected dowry. Yet another consequence of the evil of dowry is the development of sex delinquency, of which the society mocks and parents remain helpless to see their helpless daughter(s) living a promiscuous life. A survey conducted by the National Academy of Administration, Mussoorie points out that many girls have undertaken to live in promiscuous life just to earn enough for meeting the dowry expenses at their marriages.

Dowry demand has also contributed for an irretrievable break down of marriages and consequent divorce situations leaving the women to suffer badly for no fault of theirs.

The rates of dowry, vary from caste to caste and mostly depend upon the groom's accomplishments, family status and other attainments, such as, education, employment, wealth and other material acquisitions. Occasionally the bride's side bears the expenses of the would be groom's education, employment, prospects, or in acquisition of wealth either in India or abroad. There are also incidents where dowry is demanded on behalf of the groom's on the plea of providing similar dowry at their daughter's/sister's marriage.

Figures given in the 'Lok Sabha', 1989, indicate that there is 65% increase in dowry deaths. A soaring number of bride burning cases proves that the government has not succeeded in checking crimes against women.

10.2. HISTORICAL BACKGROUND OF DOWRY :

The ancient marriage (Vivah) rites in the vedic period are associated with Kanyadan or the ceremony of gifting away the bride, specially in the Bramha and Prajapatya forms of marriage. According to Hindu Shastras, the meritorious Act of 'dan' or Ritual Gift is incomplete till the receiver is given a dakshina. Thus Kanyadan became associated with Varadakshina i.e., the gift in cash or kind by the father of the bride to the bridegroom. This Varadakshina or dowry included ornaments and clothes, which the father of the bride could afford, and were given away as the property of the bride. This had however, only a symbolic value in the entire marriage ceremony as it was not considered respectable for the groom or his parents to ask for ornament of specific value.

Dowry among Hindus was not unknown in Ancient India. Ancient scriptures approved of wealth given to a bride at the time of her wedding, which is known as her 'stridhana'. But the 'dowry' should not be confused with the term 'stridhana' which has special significance and has different meaning in the annals of legal world. The expression 'stridhana' has been variously defined and some of them are enumerate as under :-

Manu enumerates six kinds of Stridhanas :-

- 1) Gifts made before the nupital fire,
- 2) Gifts made at the bridal procession,
- 3) Gifts made in token of love,
- 4) Gifts made by father
- 5) Gifts made by the mother,
- 6) Gifts made by a brother.

All the commentators are agreed that the above is not an exhaustive enumeration of Stridhana. To the above list Vishnu adds :-

- (i) Gifts made by a husband to his wife on supersession, that is on the occasion of his taking another wife,
- (ii) Gifts, subsequent, that is, those made after marriage by her husband's relations or her parent's relations;
- (iii) Sulka or marriage fee;
- (iv) Gifts from sons and relations.

Earliest references to dowry show that it was mainly a pre-occupation of kings and of the very rich who could indulge in luxurious display.

It is reported that Parvati, the consort of Lord Shiva, received slaves, horses and elephants, cattle and vehicles, grains, jewels, clothing and gold vessels. There are mythological references of dowry in Mahabharata, Draupadi, Uttara, Subhadra also brought rich presents of horses, elephants and jewels with them.

In 'Valmiki Ramayan' 'Balakanda' (Chap. 74 verses 3 & 4) expresses that King Janaka of Mithila gave Sita a large dowry of "a hundred thousand cows, woollen clothes, countless silken robes and richly decorated elephants, horses and chariots, male and female attendants, numberless gold coins and many other gifts".

During the Mughal period, dowry was a common feature. However, Akbar realised that although a rich dowry of such dimensions was possible for his son, such an example might make life very difficult for his proper subjects. So he appointed Tui-hegs (or masters of marriage) to keep a strict check on those who might demand exorbitant dowries from them¹.

Now the custom of giving and taking of dowry has increased in all groups - Hindus, Muslims, Christians all alike through a process of sheer osmosis. The Hindu Dowry tradition is firmly entrenched among the Roman Catholics of Goa and the Syrian Christians of Kerala as Verghese² found during her studies. Now dowry has become a menace to society often compelling girls to commit suicide. It is nothing but an extraction of money or valuable items from bride's father. On the one hand it has lowered down the status of women in society and on the other hand it has given an impetus for earning black money and several malpractices at social level.

The evils of dowry have become so pernicious that a large number of women are being murdered, burnt or assaulted every year on the altar of dowry. Hardly a day passes, when the news of suicide, murder or bride burning for dowry are not flashed in the dailies in some or the other parts of the country. Surprisingly enough, recently the Hindustan Times³ published a banner news, "Dowry torture on increase in U.K.", stating that bride burning and other dowry related brutalities among the Asian families are on increase and have become now a major problem in London, Leicester and Birmingham. In Delhi, in the first ten months of 1986, 56 women were killed for dowry and about 3,108 dowry complaints were filed in spite of stringent laws. In Bihar also, the evil has been like an epidemic. A large number of women are being forced to commit suicide or are burnt to death for dowry. The Hindustan Times⁴ daily reported 125 dowry deaths in Begusarai area only every year. In Andhra Pradesh the number of dowry deaths increased from 15 cases in 1983 to 162 in 1986 and to 250 in 1989.

Though dowry is an all India phenomenon, there are some communities and groups which are relatively free from the menace of this custom. Most of the Muslim communities, the non-Catholic Christians outside Kerala and the Parsees do not have dowry as an essential part of the marriage ritual. The Nagar Brahmins of Gujarat, the Khatrias of U.P., and the Mathur

Kayasthas do not have dowry as a custom. But today, even those belonging to this non-dowry category have taken to dowry, and look upon it as a prestige symbol. Dowry is practised among almost all the castes of the Hindus in all states. So do the Agarwals and other Vishya groups in the Hindi speaking areas, the Rajputs and Kayasthas and landlords of Bihar of U.P. in the South, the Reddys, the Kammas, the Velmas and well do to Brahmins, the mudaliars, the Chettiars and Lingayat groups and the Christians (in Kerala) are known for their passion for dowries⁶.

The probable factors that have influenced the growth of Dowry system are :

- (1) The parents desire to see that their daughters are well placed.
- (2) The attitude of the people with regard to dowry giving and taking as a matter of status and social prestige.
- (3) Uncertainty about future economic support by the son induces a father to demand dowry.
- (4) Caste elements and the practice of hypergamous marriages.
- (5) The custom of joint family system.
- (6) Non-productive role of women in the economic partnership of their husband.
- (7) Compulsiveness of marriage, particularly among the Hindus.

10.3. THE EVILS OF DOWRY SYSTEM :

The consequences of the demand for dowry are, obviously, disastrous not only for the wife and the husband and their two families, but also for the marriage itself. The moment it is made, it creates a wide chasm between the two families which can never be filled as the demand by its very nature is such that it cannot be fully met because it is not a one time demand but a string of demands which follow one another ceaselessly. It also sets the husband and wife apart as they are instantly identified with the two adverse camps and the relationship comes under an increasing strain.

Dowry is demanded and expected as a matter of right and if not forthcoming, pressure is applied to extract it and even extort it. The woman becomes a hostage in the hands of the husband's people. First, her whole future is threatened by the possibility of the marriage breaking up and she being left high and dry because the process of marriage for her is by and large irreversible. Worse still, she is in the immediate danger of physical maltreatment and being alone in a strange household with no one on her side she often suffers physical abuse. In any case, being constantly among hostile people she loses her mental and psychological peace and her efforts to adjust to the new life get a serious setback. Still the main consideration before her is to somehow protect the marriage because a breakup is always fraught with even more serious consequences. In this precarious situation she is exploited fully to put pressure on her parents and their reluctance or inability to fulfil the demands invites further wrath upon her which many a time results in extreme physical harm.

Dowry system is a great pernicious evil. It has drawn many girls to suicide, to save their parents from economic drudgery. Many are duped into the brothels or service of doubtful nature or resort to prostitution.

10.4. SOCIAL ACTION AGAINST THE PRACTICE OF DOWRY :

10.4.1. Work done by Social Reformers :-

The social reformers of the 19th and early 20th centuries beginning with Raja Rammohan Roy, Ranade, Karve, Ranabai, Ishwara Chandra Vidya Sagar, Mahatma Gandhi, Mahatma Jyotiba Phule and Dr. Babasaheb Ambedkar has striven hard for the abolition of various social evils including the evil of dowry system from which the Indian women suffered. Mahatma Gandhi laid special stress on the abolition of dowry system.

However, the society, because of its traditions and greed, has not yet fulfilled the cherished desire of mahatma Gandhi and other social reformers.

10.4.2. State Legislation on Dowry Prohibition in Pre-Independence India :-

Long before India become independent, the then provincial Government of Sind passed an enactment known as 'Sind Deti-Leti Act, 1939' with a view to deal effectively, the evil of dowry system. The provisions of this Act did not apply to Mohammadans, Parsees, Christians and Jews.

Section 2 of the Act prohibits payments and giving of gifts or presents in kind, not only on the occasion of marriage but also on festivals or auspicious days, or on account of birth of the child. Section 3 said that, "No person shall give or accept or agree to accept any payment as a part of the contract of any betrothal on marriage". Section 4 said that such acceptance or giving shall not be in excess of such limits specified in a list. Penal provisions were contained in Sec. 8 which presented punishment for contravening Sec. 3 and 4 with simple imprisonment which may extend to one month or with fine which may extend to Rs. 1,000/-.

Even though the Act contained exhaustive provisions which, 'inter alia', prohibited giving and taking dowry as part of contract of betrothal or marriage; prescribed limits for giving and taking of dowry as per specified list and provided punishment for contravention of the provisions of the Act, yet the enactment had neither any impact nor could create the desired effect.

10.4.3. State Legislation on Dowry Prohibition after Independence :-

The State Governments had from time to time passed legislation to prohibit the custom of dowry. The Bihar Dowry Restraint Act was passed by the Bihar State in 1950. The State of Andhra Pradesh passed the Andhra Pradesh Dowry Prohibition Act, 1958 and Jammu and Kashmir passed Jammu and Kashmir Dowry Restraint Act in 1960. All these enactments made an attempt to ban dowry.

The Andhra Pradesh Dowry Prohibition Act, 1958 defined "dowry" as any property or valuable security given or agreed to be given "as consideration for any betrothal or marriage". It made the act of giving or taking of dowry as unlawful and any agreement in that regard as void. It had also made the act of giving or taking or abetting the giving or taking of dowry punishable with imprisonment upto 6 months or fine upto Rs. 1,000/- or with both. It further provided that an offence under that Act would be tried by a first class magistrate 'on a complaint' made within one year from the date of offence.

These enactments failed to achieve the objectives for they contained loopholes. In the first place, it was not possible to prove that any amount so paid or any property so given were "as consideration for the betrothal or marriage" and secondly, because of the absence of any agency for initiating action on the contravention of the provisions of the said acts as the bride's parents would not, in the interest of girl, prefer a complaint.

10.4.4. Central Legislation :-

As the problem of dowry was assuming enormous proportions, it started agitating the minds of the people both outside and inside the State Legislatures and the Parliament. Right from the inception of First Lok Sabha, the matter was raised in the Parliament time and again and various proposals for restraining dowry were introduced in Parliament in the form of Private member's Bills. During the course of discussion on a nonofficial Bill, sponsored by Smt. Uma Nehru M.P., in the Lok Sabha on 27 Nov., 1953, the then Minister of Law gave an assurance to the House that a Bill on the subject would be prepared in consultation with the State Governments. In pursuance of the assurance a Bill was subsequently prepared and submitted for consideration of the Cabinet in the light of the views expressed by the State Governments. The Cabinet then decided that the proposal might be held in abeyance till the enactment of the Hindu Succession Act. After the enactment of the said Act in 1956, the Government felt that a separate legislation to prohibit dowry was not a matter of urgency. However, since the problem continued to increase by leaps and bounds, the issue was raised repeatedly by members in Parliament and certain Private Members Bills on the subject were introduced in various State Legislatures as also in the Parliament. In view of the persistent nature of the problem and an account of pressure both at political and social levels, the Government finally decided to process the legislation. As a result, the Dowry Prohibition Bill, 1959, with the main object of eradicating the evils of dowry system, was introduced by the government in the Lok Sabha on 24 April, 1959. After some discussion, the Bill was referred to a Joint Committee of both Houses of Parliament in September, 1959 for examination and Report. The Joint Committee presented their report with some amendments in the Bill on 19 November, 1959. When the bill, as reported by the Joint Committee, was taken up for consideration in Lok Sabha, the Lok Sabha, in their wisdom, made an amendment in the Bill, as reported by the Joint Committee, by inserting Explanation I to clause 2 of the Bill so as to make it clear that bonafide gifts might not be deemed as dowry. However, when the Bill, as passed by Lok Sabha, was taken up for consideration in Rajya Sabha, the Rajya Sabha in their wisdom, did not accept the aforesaid amendment to the Bill proposed by Lok Sabha. As the House (Lok Sabha and Rajya Sabha) finally disagreed as to the amendments to be made to the Bill in question, the Bill was considered at the Joint sittings of both houses of Parliament held on 6 and 9 May, 1961, came into force from 1 July 1961.

Even after the enactment of the Dowry Prohibition Act, 1961, the problem of dowry system, on account of diversity and variety of custom prevalent in different parts of the country, continued to grow in different ways and this has been engaging the attention to the Government for some years. In order to check the growth and to curb the evils of the system, the Central Government allowed the individual State Governments to process and carry out amendments in the Dowry Prohibition Act, 1961 in the light of local conditions. Accordingly, under Article 246 (2) read with Article 254(2) of the Constitution of India, the Governments of Bihar, West Bengal, Orissa, Haryana, Himachal Pradesh and Punjab passed enactments amending the Dowry Prohibition Act, 1961 in their application to their respective states.

10.4.5. Amendments made in 1984 to the Dowry Prohibition

Act, 1961 :-

The legislation on the subject enacted by Parliament i.e., the Dowry Prohibition Act, 1961, and the far reaching amendments which had been made to the Act by a number of the States during the seventies had not succeeded in containing the evil. Government had been making various efforts to deal with the problem. In addition to issuing instructions to the State Governments and the Union Territories administration with regard to the making of thorough and compulsory investigations into cases of dowry deaths and stepping up anti-dowry publicity, the Government referred the whole matter for consideration by a Joint Committee of both the Houses of Parliament.

The Joint Committee had recommended that the definition of "Dowry" contained in Sec. 2 of the 1961 Act should be modified by omitting the expression "as consideration for the marriage" used therein on the ground that it is well-nigh impossible to prove that anything given were a consideration for the marriage for the obvious and simple reason that the giver i.e., the parents who are usually the victims would be reluctant and unwilling to set the law in motion. Thus, the Dowry Prohibition Act, 1984 amended Section 2 of the Dowry Prohibition Act, 1961. In the original act "Dowry" was defined as "any property or valuable security given or agreed to be given "as considered of marriage". Now the substituted words for underlined portion are "in connection with the marriage".

Section 3 had been completely recast. The amendments are mainly two :

- (a) punishment for the offence of taking or giving dowry has been enhanced and the minimum punishment has been laid down;
- (b) the explanation 1 to Section 2 of the original act exempted presents made to the bride and bridegroom at the time of marriage by parents, relations and friends have been put in sub-section (2).

Original Section 4 has been amended in two respects :-

- (a) the minimum and maximum punishment has been laid down.
- (b) for the prosecution of the offender now no sanction of the State Government is needed. The amending Act of 1984 has reduced the time limit within which the third party who has received the dowry or who is in possession of it should return it to the bride from one year to three months.

A new sub-section (3-A) to Section 6 has been appended under which, the accused, even after his conviction, is required to transfer the dowry to the women within the time specified in the order.

Under clause (b) of the Old Section 7(1), it was not stated as to who could file a complaint for the prosecution of a dowry offence, and therefore it caused some difficulties of interpretation. Under the amended clause any one of the following persons can file a complaint :

- (a) Aggrieved person;
- (b) A parent or other relative of the aggrieved party and;
- (c) Any recognized welfare institution or Organisation.

Now cognizance of a dowry offence can also be taken by the court; (1) on the basis of its own

knowledge, or (2) on the basis of a police report of the facts which constitute an offence under the Act.

Under the Old Section 8, dowry offences were non-cognizable, bailable and non-compoundable. The amending Act, 1984 made them cognizable.

10.4.6. Amendments made in 1986 to the Dowry Prohibition

Act, 1961 :-

The increasing number of dowry deaths was a matter of serious concern. The extent of the evil had been commented upon by the Joint Committee of the Houses to examine the working of the Dowry Prohibition Act, 1961. It was therefore, proposed to amend the Dowry Prohibition Act, 1961, the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1972.

(i) Amendment of Section 2 :- In the Dowry Prohibition Act, 1961, in Sec. 2, for the words "or after the marriage", the words "or any time after marriage" shall be substituted.

(ii) Amendment of Section 3 :- Punishment for giving or taking dowry has been extended to five years imprisonment and with fine which shall not be less than Rs. 15,000/- or the amount of the value of such dowry, whichever is more.

(iii) Insertion of New Section 4-A :- This section prescribes any advertisement, through periodical, journal or any other media, by a person regarding offering a dowry with imprisonment and fine.

(iv) Amendment of Section 6 :- As per (B) when a woman dies within seven years otherwise than due to natural causes, that property shall be transferred to her children, in the absence of her children to her parents.

(v) Amendment of Section 7 :- As per amendment any statement given by the person aggrieved shall not be subject to a prosecution under this Act.

(vi) Insertion of New Sections 8-A and 8-B :- As per Sec. 8-A where any person is prosecuted for taking or abetting or the demanding of dowry, the burden of proving that he had not committed an offence under those sections shall be on him. As per Sec. 8-B, the State Government may appoint as many Dowry Prohibition Officers as it thinks fit and specify the areas in respect of which they shall exercise their jurisdiction. The State Government may appoint an Advisory Board.

(vii) Substitution of New Section for Section 10 :- Under Sec. 10 State Government may make rules.

(viii) A new Section 304-B relating to Dowry death was inserted in the Indian Penal Code by the Dowry Prohibition (Amendment) Act, 1986.

Section 304-B reads :-

"(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called Dowry Death and such husband or relative shall be deemed to have caused her death.

(2) whoever commits dowry death shall be punishment with imprisonments for a term which shall not be less than 7 years but which may extend to imprisonment for life".

A presumption as to Dowry death as against the accused has also been inserted in the Evidence Act after Sec. 113-A as Sec. 113. Corresponding change was introduced in the Criminal Procedure Code of 1973, by which it was made a non-bailable, cognizable or non-cognizable offences.

In this connection reference should necessarily be made 498-A also subsequently inserted in the IPC which defines "cruelty by husband or relatives of husband".

10.4.7. Offences Punishable under the Dowry Prohibition Act,

1961 :-

Before dealing with any specific offence punishable under the Dowry Prohibition Act, 1961, it is necessary to know that Dowry is according to the provisions of law and the judicial decisions on it.

(i) Definition of Dowry :-

Dowry means the property which a woman brings to her husband at marriage, sometimes used for a dower, sometimes a gift given to or for a wife at marriage, a natural endowment⁷.

Section 2 of the Dowry Prohibition Act defines dowry as follows :-

"In this Act, "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 after the marriage in connection with the marriage of the said parties, but does not include dower or Mehr in the case of person to whom the Muslim Personal Law (Shariat) applies.

Explanation II - The expression 'Valuable Security' has the same meaning as in Section 30 of Indian Penal Code".

The concept of "Dowry" which embraced in its ambit the presents made to the newly wedded wife which were to form part of her Stridhana has not at all been affected by the provisions of the Dowry Prohibition Act⁸. A voluntary and affectionate giving of dowry and traditional presents would thus be plainly out of the ambit of the particular definition under the Act and once that is so the rest of the provisions thereof would be equally inapplicable.

(ii) The offence of giving and taking of Dowry : (Section 3) :

What is prohibited under Section 3, Dowry Prohibition Act, is giving or taking or abetting the giving or taking of dowry after the commencement of the Act. No dowry is given or taken after the commencement of this Act. Section 3 does not prohibit asking for return of the dowry paid prior to the commencement of the Act as a result of divorce or estrangement between the parties to the marriage. If the bride's father had paid the dowry after the commencement of the

Act or the husband has taken the dowry after the commencement of the Act, then undoubtedly it will come within the mischief of Section 3 of the Act subject, of course, to provisions of Sec. 69.

(iii) The Offence of Demanding Dowry : (Sec. 4) :

The object of Section 4 of the Act is to discourage the very demand for property or valuable security as consideration for a marriage between the parties thereto. Section 4 prohibit the demand for 'giving' property or valuable security which demand, if satisfied, would constitute an offence under Section 3 read with Section 2 of the Act.

(a) Demand of Dowry before Fixing Actual date for Marriage :

According to the provisions of the Act, the agreement for payment of property or valuable security is necessarily to precede the performance of marriage. In the case of Srikanta Krishna Ghosh vs. Indu Kumari Ghosh,¹⁰ according to the averment made in the complaint petition, when the question of fixing the actual date of marriage was under consideration before the parties demand for a sum of Rs. 10,000/- was made by the petitioners. Whether this allegation is correct or incorrect that is to be seen at the time of trial but at this stage the assertion made in the complaint petition cannot be rejected.

(b) Demand must be made for Property or Valuable Security :

The provision of Section 4 would be applicable in a case in which any property or valuable security was agreed to be given as consideration for marriage but the same was not actually given and therefore demand was made for the same.

There is no allegation that Rs. 5,000/- was ever agreed to be given as consideration of the marriage. No where in the complaint petition it is said that the demand of Rs. 5,000/- is made as a consideration for the marriage. The demand of Rs. 5,000/- is alleged to have been made after the solemnization and consummation of the marriage. There is no allegation that the demand of Rs. 5,000/- was made as consideration for the marriage. Therefore, the allegations made in the complaint petition do not constitute any offence under Sections 3 or 4 of the Act.¹⁰

(c) Demand must be of property agreed to be given :

It is clear that for bringing a case under Section 4 there must be demand of a property agreed to be given as a consideration for the marriage of the parties. A demand by one party from the other of an agreement to pay certain amount as a consideration for the marriage would constitute a demand as contemplated by Section 4. In this way that when the petitioners demanded an amount of Rs. 5,000/- from the respondent, they in first demanded an agreement from respondent that they would pay the said amount.¹²

(d) The Date of Offence :

In the case of L.V. Jadhav V vs. Shankar Rao Abasaheb Pawar,¹³ the highest Court had widened the scope of the demand of dowry as given in Section 4 of the Act by laying down that it is not necessary that the demand of dowry should have been agreed to by the other party at the time of settlement of the marriage in order to constitute the offence under Section 4 of the Act. Mere demand of dowry items as consideration for the marriage was held to come within the mischief of Section 4 of the Act. A single bench of the Punjab and Haryana High Court in Nirdosh Kumar vs. Smt. Padma Rani alias Meena,¹⁴ also laid down the same proposition of law.

Dowry to be for the Benefit of the Wife or Her Heirs : (Section 6) :

No doubt, demanding, giving or taking or agreement to give or take a dowry are all invalid as per Section 3, 4 and 5 of the Dowry Prohibition Act. But, if in violation of those provisions dowry is given and received, the consequence is not that the transaction is invalid, the consequence is that provided for in the Act itself in Section 6. As per the Section 6, the plaintiff is bound to transfer the property to the women and he is a trustee until such transfer for the women. In other words the beneficial interest in the transaction is with the women and the plaintiff transferee is only a trustee. If he fails to transfer within the time limited he is punishable with imprisonment or with fine.

Prior to the Amendment of 1984 the provisions of Section 6 and 7 (b) lays down that are manifestly anomalous. Section 6 lays down that where any dowry is received by any person other than the bride that person has to transfer the same to the bride within three months of the marriage and if he fails to do so within the prescribed period, he shall be punishable for violation of this section. In other words the offence is committed only after the expiry of prescribed period if the person receiving the dowry fails to transfer the same to the bride within the period. Section 7(b) provides that no court shall take cognizance of any such offence except on a complaint made by the bride, her parents, other relatives or by any recognised welfare organisation in this behalf. A comparative reading of Sections 6 and 7 as it stood before the amendment and after the amendment would clearly show that an offence under Section 6 of the Act has been taken out of the purview of the limitation which existed earlier to the amendment.¹⁵

To sharpen the teeth of the Dowry Prohibition Act reference may be made to the Criminal Law (Amendment Act, 1983) and the Criminal Law (Second Amendment Act, 1983) which are important steps. The enactments have amended the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act and have inserted new sections, which provide remedial measures against cruelty to women, bride burning etc.

Cruelty to married women has been made a substantive offence by inserting a new section 498-A in the Indian Penal Code by Criminal Law (Second Amendment Act, 1983).

A new Section 113-A has been inserted in the Indian Evidence Act which provides that when suicide is committed by a married women there is presumption of abetment by husband or any one of the relatives;

- (a) if a women commits suicide within seven years of her marriage; and
- (b) her husband and relatives have subjected her to cruelty.

Section 174(3) of Cr.P.C. provides for the postmortem by a civil surgeon or by a qualified doctor in case of suspicious death or if the police officers considers it desirable. Under this Section it is mandatory to go for the examination of the body when a women dies in the following circumstances :-

- (a) suicide by a women within seven years of her marriage;
- (b) any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such women.
- (c) the case relates to the death of a women within seven years of her marriage and any relative of the women has made a request on this behalf.

Section 304-B was inserted in the Indian Penal Code by the Dowry Prohibition Amendment)

Act, 1986 with a view to combat the increasing menace of dowry deaths. It lays down that where the death of a women is caused by any burns or bodily injury or occurs otherwise than under normal circumstances" within seven years of her marriage and it is shown that soon before the death of the women she was subjected to cruelty or harassment by her husband or his relations for or in connection with any demand for dowry, such death shall be called "Dowry Death" and the husband or relatives, shall be punishable with imprisonment for a minimum of seven years but which may extend to life imprisonment.

As per the explanation to the section, the "Dowry" for the purposes of this section shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

10.4.8. Amendments made in Other Penal statutes dealing with Dowry Offences in India :-

Please Check the above one

10.5. JUDICIAL PRECEDENTS ON DOWRY DEATH CASES :

The Judges have from time to time expressed their deep concern on bride burning cases and once provokingly observed :-

"It is an unfortunate and disturbing phenomenon that has recently arisen in many parts of our country that instances of bride killing are alarmingly on the increase. If society should be ridden of this growing evil, it is imperative that whenever dastardly crimes of this nature are detected and the offence brought home to the accused, the courts must deal with the offenders most ruthlessly and impose deterrent punishment.¹⁶

But so far life imprisonment has been the rule and death sentence an exception in dowry death cases, too. In fact, in a number of cases of bride burning, death sentence awarded by the Trial Courts or High Courts has been converted into life imprisonment by the Supreme Court.

In a famous case of bride burning,¹⁷ Lachma Devi (mother-in-law) was acquitted by the Trial Court and the Rajasthan High Court on Nov. 20, 1985 gave her the extreme penalty of death sentence by public hanging. But the Supreme Court declared that the execution of death sentence by public hanging would be a "barbaric practice" clearly violative of Article 21 of the Constitution.

10.6. SUMMARY :

In Manusmriti, the ideal with regard to the status of women, placed before the Indian Society, had been expressed in the following words :

However, it is most alarming and distressing to note that in the Indian Society, where almost half of the population, i.e., women, who were once worshipped and highly respected, today find themselves tortured, harassed, abandoned, divorced, murdered and are forced to commit suicide on account of the evils of dowry system.

Despite the Dowry Prohibition Act, 1961, and the amendments to that Act, and several other measures taken both by the Central and State Governments with a view to deal effectively with the problems; statistics reveal numerous cases of married women being harassed, tortured, murdered, burnt and even forced to commit suicide on account of the evils of the dowry system.

The Dowry Prohibition Act, 1961, was a culmination of several unsuccessful efforts to wipe out the practice. The several loopholes in the Act have only emboldened dowry takers and stultified the legal system. The very definition of the concept with its saving clauses has confounded the confusion on what is prohibited and why. The saving of dowry given voluntarily in the form of presents, though subject to certain conditions creates enough opportunities for dowry seeker to escape the penal provision of the law. The preparation and maintenance of list of gifts (of dowry) received is an innovation though of dubious value in the present circumstances. It is indeed doubtful whether genuine lists will be maintained because of the absence of any such custom in that regard.

The Act made the taking and giving of dowry as dowry offence, but the Act did not make any difference between the giver and the receiver of the dowry. It is difficult to implement the Act because both giving and taking of dowry are being kept in secret and nobody is ready to go and complain about the demanding or giving of dowry.

The Dowry Prohibition Act still remains a toothless enactment despite the multipronged efforts to make the law more stringent and effective and to eradicate the pernicious practice.

The Criminal Law (Second Amendment) introduced a new Section 498-A in the Indian Penal Code for protection of married women from subjection to cruelty from her husband or from relatives of the husband.

Observation reveals that though the section is framed with good intention its consequences are not good, it has bad effects on future marital life of husband and wife. It disturbs marital harmony. This section is not at all beneficial keeping in view all social aspects of life. After trial the accused persons if acquitted files suit for malicious prosecution against wife and her parents and if convicted the only remedy left to wife is to go and reside with her parents with her children because husband and his relatives are not ready to accept them because of strained relations formed between husband and wife after criminal trial. Facing criminal trial is taken as stigma on one's reputation. After trial under Section 498-A there is no patching up between the husband and wife. Remedies left with such wife is to file maintenance proceedings or file divorce petition because Section 498-A does not have provisions for reconciliation or for compounding the case during the pendency of trial.

By and large the judiciary has in recent years shown an activism and keenness in stamping out dowry related offences. Yet, there have been serious impediments in the way. On occasions, the inability of the judiciary itself is not being able to comprehend the psychology of dowry victims and dowry offenders has led to acquittals tarnishing the image of the courts and bringing the law into disrepute.

Other factors operating against effective implementation of the Act are :

- (a) Granting of bail to dowry offenders which enables them to temper with evidence.
- (b) The hesitancy of independent and honest witnesses to come to court.
- (c) The failure to communicate the provisions of the Dowry prohibition Act to those who can use it to obtain relief against dowry offenders.

The evil practice of dowry, can be eradicated to some extent, if there is education information in the society, with regard to human values in the place of materialistic values. Probably these are some of the contributory factors which may bring some change in the present trend and which have to be practised and preached to the younger generation. The parents, should make

their daughters bold, self-reliant, resistant to face any problem. This can be achieved by giving them good education and equal property rights without any discrimination.

10.7. GLOSSARY :

1. Bailable Offence : Bail is a security given for the due appearance of a prisoner in order to obtain his release from imprisonment. In a bailable offence a temporary release of a prisoner can be obtained upon security.
2. Consideration : Consideration is the price, motive or matter of inducement of a contract.
3. Cognizance : Cognizance means the acceptance of a cause by the Court for hearing and decision; to take notice of a dispute.
4. Cruelty : The legal conception of cruelty is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger.
5. Non-Compoundable Offence : The compounding of an offence means that the person against whom such offence has been committed has received some benefit to act as an inducement for his desiring to withdraw his complaint. Once an offence is compounded, no court can take further action in the matter. The legislature has allowed certain offences to be compounded. Non-compoundable offence means an offence which cannot be compounded.
6. Non-Cognizable Offence : Non-cognizable offence means an offence for which a police officer has no authority to arrest without warrant.
7. Valuable Security : Valuable Security denotes a document which is a document whereby any legal right is created, extended, transferred or extinguished or released or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right. For instance, where a person writes his name on the back of bill of exchange, the effect of this endorsement is to transfer the right to the bill to any person who may become the lawfully holder of it. The endorsement is a valuable security.

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9. Gantupalli Rama Subhatha vs. Gunta Rajamma, 1975 ALT 106.
10. 1983 BLJR 262.
11. Kashi Prasad vs. State of Bihar, 1980 BBCJ 612.
12. Shankar Rao Abasaheb Pawar vs. L.V. Jadhav, 1983 HLR 590.
13. 1983 - 4 SCC 231.
14. 1984 - 2 Rec. Cri. R. 2397.
15. Bakshish Singh vs. Anita Kumari, 1985 Chandigarh Cr. Cases 203 HC.
16. Veerbhan Singh and another vs. State of U.P., AIR 1983 SC 1002.
17. Kailash Kaur vs. State of Punjab, AIR 1987 SC 1368.

10.9. RECOMENDED BOOKS :

1. Awasthi, S.K. & Lal, U.S., 1989, Law relating to Dowry Prohibition,
2. Diwan, Paras, 1990, Dowry and Protection to Married Women.
3. Ghosh, S.K. 1984, Women in a changing society.
4. Hooja, S.L. 1969, Dowry System in India.
5. Patnai, Raghunath, 1988, 'Dowry as a Social Evil : An Evaluation for Rendering Legal Aid', Journal of the Indian Law Institute, Vol. 31, 4, pp. 570-576.
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10.10. SAMPLE EXAMINATION QUESTIONS :

1. Define Dowry and trace the origin of Dowry in India?
2. Define Dowry Offence and Critically examine the provisions of the Dowry Prohibition Act, 1961?

Answer the following in 15 lines each :

1. What is Dowry Death? How to prevent Dowry Deaths in India?
2. Describe the provisions regarding the trial of Dowry Offences?

UNIT - 11 : PREVENTION OF IMMORAL TRAFFIC ACT (PITA)

Contents :

- 11.0. Objectives
- 11.1. Introduction
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- 11.3. Plight of Sex Workers
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- 11.7. legal Measures against Prostitution
 - 11.7.1. Immoral Traffic (Prevention) Act, 1956
 - 11.7.2. Meaning and Definitions
- 11.8. Offences of Prostitutions
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- 11.9. Other Remedies
 - 11.9.1. Corrective Institution
 - 11.9.2. Special Police Officer and Advisory Body
 - 11.9.3. Protective Home
 - 11.9.4. Notification of Address of previously convicted Offenders
 - 11.9.5. Special Provisions
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- 11.11. Difficulties in Enforcement
 - 11.1.11 Need of Education & Correction
- 11.12. Summary
- 11.13. Glossary
- 11.14. Recommended Books
- 11.15. Model Examination Questions

11.0. OBJECTIVES :

After going through this Unit, you will be able to :

- * Explain the social dimensions of the prostitution as affecting the rights and dignity of women.

- * Understand the Legal measures and its Utility.
- * Understand the need for moral education and spread of information about the ill-consequences of prostitution.

11.1. INTRODUCTION :

The Prostitution is considered to be the oldest profession as its reference was found in every ancient script. The women-young and adolescent are driven to this immoral trade more by the gangs to make money out of them, though there are instances of individual women opting this profession out of sheer poverty and lack of other source of earning. Though deemed to be a profession, legally it is not permitted. It is an affront to the dignity of women community and symbol of immorality of the society as a whole. More than satisfying the sexual urge, the prostitution is being sponsored and maintained by the gangs for money. The reasons for the spread and sustenance of prostitution are many. Poverty, unemployment, gender discrimination, lust generated by obscene literature and films, over-all-moral depravation and above all the underworld mafiagangsters are the real causes of this flesh trade. From ancient society to present day modern civilisation, the evil of prostitution continued to exist in every part of the world. Assuming monstrous proportions, the prostitution has been affecting the health of the community and human values as such.

11.2. INTERNATIONAL AGREEMENTS :

To eradicate the social-evil of prostitution and immoral traffic in human beings several International Agreements and Covenants were signed. The United Nations suggested several measures to suppress the traffic in human beings for the purposes of sexual exploitation and slavery etc., to its member nations.

The General Assembly of the United Nations has approved an International Agreement for the Suppression of slave traffic, which was originally signed on 18th May, 1904 and later amended on 3rd December, 1948.

There were two International conventions convened by United Nations to make covenants for the suppression of traffic in women and children. International Convention for the Suppression of the Traffic in Women and Children dated 30th September, 1921 was amended by the Protocol approved by the General Assembly of the United Nations on 20th October, 1949. Another International Convention for the Suppression of the Traffic in persons for exploitation and prostitution was signed at New York on 9th May, 1950. India is also a signatory to this International Covenant. It imposed an obligation on signatory nation to pass a legislation to prevent the immoral traffic in human beings. Our Constitution prohibits the trafficking in human beings through Article 23.

11.3. PLIGHT OF SEX WORKERS :

Sex Workers are mere victims of the socio economic frame of the society. They are depressed, deserted and victimised classes of poor women involved in this profession for generations.

The story of Surat Sex Workers is very pathetic.

They have no other financial support on account of unemployment liability of aged parents, and school going children, or physically handicapped, incapable male members of their family.

They are in the profession perhaps since the inception of city and the Mughal era. There being no alternative the prostitutes are constrained to indulge in the profession not for any special benefit or financial gain but for mere existence. As many as 2000 sex workers of Surat City went to High Court of Ahmedabad demanding setting up of rehabilitation homes for them and immediate action against harassing police. Around 130 petitioners claimed that their profession was a necessary evil to maintain a healthy society; as due to TV channels, western culture, and porno materials available, the maturity of the individual was seriously being affected, leading to an alarming rise in sexual offences. Prostitutes could provide the outlet for budding sex criminals. Surat workers prayed for protection and right to live in the same locality as builder's lobby was threatening them to vacate only to grab the land worth crores of rupees. They alleged that police were not allowing them to go out of the house even for buying essentials, not even to open windows. If she went out, she was greeted with filthy language, abuses and threats by police. During dark hours police force their entry and demand to satisfy their urges if not threaten with dire consequences. Interestingly, no single offence under the Immoral Traffic (Prevention) Act, was booked. Referring to provisions of this Act, they submitted that the Act was not meant to render prostitution a criminal offence, or punish a women merely because she sold her body for survival. The aim of the Act was to inhibit or abolish commercialised vice, in an organised means of making money.

The plight of a sex-worker is the same anywhere in the world.

11.4. NATIONAL COMMISSION FOR WOMEN :

The National Commission for Women (NCW) visited the red light areas of Mumbai, Calcutta, Varanasi and other places during 1995-96 and discovered the helplessness of prostitutes as they were victimised by procurers and pimps. The members of NCW net more than 2000 sex workers, and their children, who are forced to sell their bodies for as little as Rs. 2.

The NCW organised a week-long conference during August, brought together prostitutes, prison chiefs, economists, and criminal lawyers in an effort to focus on the lives of the deprived all over the country. A total of 58 prostitutes participated in the session. "Unless and until the girls are rescued from the clutches of flesh traders, inter-state gangs, Mafia groups, and kothas, nothing can be done in this regard" - said Mohini Giri, Chairman, NCW. A sex worker revealed the dubious role of NGOs (Non-Government Organisation). According to her "NGOs take the money from Government and other agencies, of which 75% goes in maintaining their opulent buildings, air conditioners, cars and phones. None of NGOs comes forward to help when the police arrest and beat us.

According to Bharatiya Patita Uddhar Sabha, there are 1100 red light areas in the country comprising 23 lakh prostitutes, and most of the NGOs work only on paper. The President of Sabha alleged that "Every year atleast Rs. 3 crore goes to police's pocket as the infamous hafta. A Calcutta sex worker said "The police demand money every day on the spot. Their charges vary from Rs. 5,000 to Rs. 10,000. We make about Rs. 100 a day, out of which Rs. 50 goes to brothel owner".

They face callousness everywhere. Most of the sex workers are infected with deadly disease AIDS, mainly, due to their ignorance about AIDS. Society is cruel to them. They have neither right to live with dignity nor allowed to die with dignity. Their children were refused admission in schools, and hospitals deny them treatment. Elderly sex workers are driven out of brothels after they lost youth and earning capacity. They end up as beggars.

A study in Asia Pacific Region :

The subject of sexual trafficking in women in Asia Pacific region was discussed at a meet organised by women's education, productivity and research organisation (WEDPRO).

Global consumerism is also a factor. Trafficking in women has become globalised and technologised on the Internet, said Aurora de Dios, Director of Conspectus Foundation Inc (one of the organisations in the Philippine network against trafficking in women) and Deputy Commissioner of the National Commission on the Role of Filipino Women (NCREW).

All too often women fall victims to promises of decent employment abroad and end up sex slaves. Poverty can make women vulnerable to big money offered by labour recruiters, who methodically scour the provinces for domestics, food servers, sales ladies and other seemingly legitimate workers abroad. A recent report suggested that around 60,000 Filipino children and women were exploited like that.

Legalisation of Prostitution : A Point of View :

Prostitution is institutionalised in some places and countries, Amsterdam grew into sex-capital of the world. Flesh trade there, is not only rampant, but also open and exhibited. Women in glass houses with small booking counter woo the men on street. It is nothing but a market.

There is a view point in support of legalisation of brothels so that the unavoidable profession is regulated, and health checked. But legalising of brothels will cause an enormous growth in such trade. Prostitution may go beyond streets leading to rampant child prostitution. The instances of individuals involving in a small scale flesh trade may spread. Law could have been virtually useless regarding curbing the immoral traffic, yet the people should know the prostitution is bad and illegal. The impossibility of controlling should not result in legalising the immoral crime. Can we extend the same argument and say as murders are not controlled let us legalise, regulate and tax murders. Instead of making the law very harsh as to penalising the prostitutes who are already the victims of the society, the stress should be more on their rehabilitation.

Rehabilitation :

The National Commission for Women is rightly fighting for rehabilitation of commercial sex workers in the red light district of Baina in the Port town of Vasco near Panaji. The NCW Chairperson has strongly objected the Goa State Government plan to evict hundreds of commercial sex workers, most of whom came from Andhra Pradesh, Tamil Nadu and Karnataka. Baina has come into focus lately because a sustained campaign against the commercial sex workers had been recently launched. The residents of the port town had conducted several campaigns against the flesh trades since flesh trade had given rise to crime and anti-social activities. Numerous murders have been committed and innumerable liquor bars shared the prosperity of the flesh trade. Recently, a group of Vasco citizens including women attacked the sex workers. This was followed by an assault on residents.

The Police harassment and apathy on the part of the state to rehabilitate the prostitutes are the main reasons for the existence and flourishing of sex trade. The untimely death of a former prostitute at Chanchalguda Jail in Hyderabad (during November, 1997) is an example. Based on a letter from social worker explaining the flourishing flesh trade in Mehaboob Ki Mehandi (Old City area of Hyderabad) where minor children were also driven into brothels, the Chief

Justice of A.P. High Court directed the CID women Protection Cell to enquire and report. After several raids she initiated prosecution against brokers, Sethanis and Financiers. Surprisingly, she did not spare some of the police constables who were aiding and abetting the prostitution. The CID Officer proposed to rehabilitate 60 prostitutes and urged the State to provide necessary training for their self employment. Pending such training, all the 60 women were sent to rescue home, where they could not be maintained due to paucity of funds and infrastructure. Inordinate delay in implementing rehabilitation measures embarrassed the police officers, who were constrained to bring the "rescued" prostitutes to Chanchalguda prison for temporary custody and not as a punishment. While brokers and Sethanis who were released on bail and enjoying free life outside, the prostitutes were being confined for no sin or crime. As the much announced release was eluding the hapless women languishing in prison, the lethargy and red tapism in the Government departments continued to haunt them. One of the inmates, Latha was frustrated and suffered mental depression ultimately leading to her death. There are reports that four more women are suffering similarly.

11.5. VIOLATION OF HUMAN RIGHTS : UN DOCUMENTS :

Trafficking in women is a human rights violation. Say UN Documents. The UN has many documents that local advocates can use to admonish government for inaction on trafficking in women, child prostitution, debt bondage etc. They are (1) The 1949 convention for the suppression of the Traffic in persons and of the exploitation of the prostitution of others. (2) The declaration for eliminating of violence against women in 1993. (3) The Belgium platform for Action of 1995; and (4) The Convention on the protection of migrant workers and their families.

11.6. OBJECT OF THE ACT :

The aim of the Immoral Traffic (Prevention) Act 1956 is not abolition of prostitutes and prostitution, as such and make it per se a criminal offence or punish a woman because she prostitutes herself and the purpose of the enactment was to inhibit or abolish commercialised vice namely the traffic in women and girls for purpose of prostitution as an organised means of living. This was observed in case of *Re Rathnamala*, (AIR 1962 Mad. 31) and also in another case of *Shanta vs. State*, AIR 1967 Guj. 211). The Act is a social legislation with double objective both penal and ameliorative and the legislature not only wanted prostitution to be stopped but be provided with rehabilitation of prostitutes, as held in the case of *Shefali Banerjee vs. State*, AIR 1969 Cal. 544.

11.7. LEGAL MEASURES AGAINST PROSTITUTION :

11.7.1. Immoral Traffic (Prevention) Act, 1956 :

In accordance with the International Convention for the Suppression of the Traffic in persons, New York, 1950 and to secure the rights under Article 23, "The Suppression of Immoral Traffic in Women and Girls Bill, 1954" was approved and the Suppression of Immoral Traffic in Women and Girls Act, 1956 was passed. As the immoral trafficking is not confined to girls and women only, but spread to males also, the name of the Act was changed into "The Immoral Traffic (Prevention) Act" in 1986 by an amendment.

This Act is aimed at the suppression of sexual exploitation for commercial purposes or to make

it a living out fit. The Act deals with the socio-economic problem of prostitution and contains several provisions to prevent this social-evil. It punishes the practice of prostitution in or around certain places of religious worship, educational institutions and hospitals.

11.5.2. Meaning and Definitions :

The expression "prostitute" means a women who offers her body to indiscriminate intercourse, especially for hire. Such a person would answer description of a public prostitute also, as distinguished from a women who is kept by some person exclusively in which case she can be said to be kept by that person and to be not available for the purpose of prostitution to others.

It has been defined in the Random House Dictionary as a person, usually, a women, who engages in sexual intercourse for money; where; harlot; a person who willingly uses his talent or ability in a base and unworthy way, usually for money; to let (oneself) out as a prostitute. A public prostitute is a women who is a prostitute by profession and whose trade is to let out her body on hire to all visitors or to all visitors of a specified class.

Brothel :-Section 2 (a) (i) defined "Brothel" : Brothel includes any house, room conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes.

Child :-Section 2 (a) (ii) defined "Child " : Child means a person who has not completed the age of sixteen years.

Major :-Section 2 (c) (i) defined "Major" : Major means a person who has completed the age of eighteen years.

Section 2(c) (ii) defined "Minor" : Minor means a person who has completed the age of sixteen years but has not completed the age of eighteen years.

Meaning of Keeping a Brothel :-A place once used for the purpose of prostitution is not the brothel. The place to which a person goes and freely asks for a girl, where person is shown girls to select from and where he does engage a girl for the purpose of prostitution. It was held in Krishna Murthy vs. Public Prosecutor, Madras, AIR 1967 SC 567, that the "brothel" means the place being used as a brothel and the person in charge was so keeping it. It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it. Bhula Mia vs. State, AIR 1969 Cal 416, the prosecution has to prove that in the premises a female indulges in the act of offering her body for promiscuous sexual intercourse on hire whether in return for money or kind.

Either flirtation with a stranger or to attract the attention of persons of the opposite sex may be regrettable or immodest but perse it does not amount to soliciting for the purpose of prostitution. It was observed in the case of In Re; Kamala, AIR 1966 Mad 312, that it may be very regrettable that a women dressed gaudily, bedecks herself with flowers, and generally behaves in an undignified manner by giggling and making gestures in a public place. That may be very bad example of modesty set to others, but it is a far distinct from such a socially regrettable conduct.

11.8. OFFENCES OF PROSTITUTIONS :

11.8.1. Keeping a Brothel :

Section 3 : Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.

Section 3 (2) intends to punish the tenants, lessee, occupier or owner, leasser or landlord of any premises or their agent if he lets the same, uses or knowingly allows any other person to use the premises as a brothel, with upto two years of imprisonment on first conviction along with fine upto Rs. 2,000 and in the event of second or subsequent conviction with rigorous imprisonment for a term which may extend to five years and also with fine.

11.8.2. Living on earnings of Prostitution :

Section 4(1) punishes a person over the age of eighteen years who knowingly lives on the earnings of the prostitution of any other person, upto with imprisonment upto two years and fine upto 1000 or with both. Where such earnings relate to the prostitution of a child or minor, the punishment will be more, i.e., not less than 7 years and not more than 10 years of imprisonment. The persons living with and directing the prostitutes and acting as a tout or pimp on behalf of prostitute will be punishable under Section 4(1) above.

11.8.3. Procuring or inducing a person for Prostitution :

If any person procures or attempts to procure a person with or without his consent, induces a person to go from any place for prostitution, or induces a person to carry on prostitution, such person shall be punishable with rigorous imprisonment for a term not less than three years and not more than seven years and also with fine upto Rs. 2,000. (Section 5(1)). This section prescribes severe punishment for committing the above offence in respect of a child or a minor.

11.8.4. Detaining a person in brothel :

Section 6(1) intends to punish for detaining any person in any brothel or anywhere with intent that such person may have sexual intercourse with a person who is not the spouse of such a person with not less than 7 years of imprisonment of either description, which may extend to life or ten years and shall also be liable to fine.

11.8.5. Prostitution in Public Place :

Section 7 defines and prescribes punishment for prostitution in the vicinity of public places such as public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police

or Magistrate. Punishment could be upto 3 months or imprisonment. Punishment increases to seven years if this offence is committed in respect of a child or minor.

Under Section 7(3) the State Government may, having regard to the kinds of persons frequenting any area, by notification, direct that prostitution shall not be carried on in such area.

11.8.6. Seducing or Soliciting :

If any person from public place (b) by words, gestures wilful exposure of her person (whether by sitting by a window or on the balcony of a building or house or in any other way) or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of any person for the purpose of prostitution; or

(b) Solicits, or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing such public place or to offend against public decency for the purpose of prostitution; shall be punishable on first conviction with imprisonment for a term which may extend to six months, or with fine upto Rs. 500/- or with both; and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year and also with fine upto Rs. 500/-.

11.8.7. Soliciting and Buying Minors for Prostitution :

Indian Penal Code :-Sections 372 and 373 of Indian Penal Code deal with selling or buying of minor girls for the purpose of prostitution.

Section 372 :-Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 373 :-Punishes the persons for buying minors for the purpose of prostitution with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

11.9. OTHER REMEDIES :

11.9.1. Corrective Institution :

In case of the female, offender is convicted for prostitution in public places or for soliciting or seducing for the purposes of prostitution, having regard to character, state of health and mental condition in a corrective institution, in lieu of a sentence of imprisonment.

11.9.2. Special Police Officer and Advisory Body :

Section 13 provides for appointment of Special Police Officer to deal with offences under this Act and to constitute an Advisory Body with five non-official members from leading social welfare workers of that area to associate with and advise the Special Police Officer regarding working of this Act. While Section 14 declares offences under this Act as Cognizable, Section 15 empowers the Special Police Officer under certain circumstances, to search without warrant. According to Section 16 a Magistrate on information, may direct the special officer to enter into a brothel and to remove therefrom the person living or carrying on prostitution, and produce

her before him.

11.9.3. Protective Home :

The State Government may in its discretion establish as many Protective Homes and corrective institutions under this Act; and maintain such Homes in the manner prescribed. Section 21(2) prohibits any person or authority other than the State Government to establish or maintain the protective homes or corrective institutions.

11.9.4. Notification of Address of previously convicted Offenders :

Section 11 of the Immoral Traffic (Prevention) Act provides for a notification of residence of previously convicted offender, to help the people in general to avoid such persons, or to be careful about them.

If any person is convicted for an offence under this Act, or for sexual offences under IPC by a Court with imprisonment for a term of two years or upwards, or by a Tribunal, with imprisonment of a life term, is within a period of five years after release from prison, again convicted of any offence under this Act, the Court may order that his residence be notified for a period not exceeding five years from date of expiration of second sentence.

11.9.5. Special Provisions :

In order to effectively enforce the law, and expedite the prosecution and trial, the Immoral Traffic (Prevention) Act provided for several special procedures.

All the offences under this Act are not cognizable under Section 14, and the police officers were given powers to enter and search without warrant under some circumstances laid down under Section 15. There are provisions for instituting special courts to try these offences (Section 22-A), and Court is empowered to try cases summarily.

11.10. PROSTITUTION PER SE NOT AN OFFENCE :

The Madras High Court answered the question whether prostitution per se is an offence saying that the prostitution is per se not an offence but the Act intends to inhibit or abolish the commercial vice.

This enactment was directed against the increasing and growing trade of flesh, to suppress immoral traffic in women and girls. The Act restricts the movements of prostitutes and to deport such of them as the methods of their operation in an area may demand. In the case of State of Uttar Pradesh vs. Kaushailya, AIR 1964 SC 416, the Court examined the question of reasonability of restriction on freedom of movement of a prostitute by deportation under the Act. It was held that reasonableness of a restriction depends upon the values of life in a society. If in a particular locality the vice of prostitution is endemic, degrading those who live by prostitution and demoralising others who come into contact with them, the legislature may have to impose restrictions on the right of the prostitute to move about and to live in a tissue of her choice. If the evil is rampant, it may also be necessary to provide for departing the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. There cannot be two views of the question of its control and regulation. It was held that such a restriction was reasonable.

11.11. DIFFICULTIES IN ENFORCEMENT :

In fact, the law to suppress the immoral trafficking in women and girls is not effectively being enforced due to several reasons including corruption in the police department, delay in prosecution and powerful unity among the law-breaking gangs who involve in illicit liquor trade, smuggling, and immoral trafficking of women. The Protective Homes and Corrective Institutions were either not established or serving no purpose as none is committed for the cause. Pimps and brokers and powerful traders in flesh trade escape the punishments while poor exploited and innocent women reach the prisons. The law do not envisage to curb the voluntary prostitution and its provisions have not much impact in suppressing in voluntary prostitution. While institutionalised prostitution is getting consolidated and being spread in every town and touching upon the villages also, individual, and unorganised flirting is assuming serious proportions of sexual immorality falling no short of prostitution, which law cannot stop. General fall and overall degeneration in moral standards contribute to growth of sexual immorality, which if isolated affect the family, if assume the trade proportions affect the society. Liberalisation and privatisation of industry in the name of meeting the global competition is also throwing the society open to the vices growing all over the world. More than community customs, traditions and religious practices, the deceptive marriages, kidnaps, failed loves, destitutions and love for leading a luxurious life bringing women into the world of prostitutes. The urge for making quick money and quick promotions is one of the reasons for increasing sexual immorality which at any time may grow into the business of prostitution. The children who grew in an atmosphere of neglect or swallowed some bitter experience of life as an adolescent or had initial fascination towards free life, force them to adopt style of prostitutes. When sex becomes way of life it is always too late and it becomes difficult to withdraw. Apart from dreadful viral diseases transmitted by sex, the AIDS is the latest baffling consequences of prostitution and sexual immorality.

11.11.1 Need of Education & Correction :

Though it is practically impossible to eradicate the vice of prostitution from the society, the state has to make an all out effort to contain it from assuming serious commercial proportions. Sex education, better care of the girls during their adolescent period, education of girls are some of the measures that can stop voluntary prostitution. If consequences out of child marriages developed into the prostitution in earlier days, the dowry and dowry related violence, disturbance at domestic life, the sexual atrocities on women like kidnapping, abduction, rape, bride burning, dowry murders and exploitation of women are forcing some of the victims into this flesh profession, while the criminals turn it into a flesh trade. The Courts and prosecution machinery should take care of these cases and see that victims are really rehabilitated.

11.10. SUMMARY :

Prostitution is a vice and its commercial element makes it a punishable offence under the Immoral Traffic (Prevention) Act, 1956.

'Prostitute' means a woman who offers her body to indiscriminate sexual intercourse, especially for hire. It is difficult to know when the prostitution started as profession in India. But its emergence as a social system is because of the rigidity of marriage rules like monogamy and the wife being regarded as the private property of her husband plus the sexual urge of man in man-dominated society. When the physically and socially powerful men started shaping the

life and destiny of women, the rights of women for were the casualty and the prostitution is a by-product. They reduced women as sex objects, and commercial campaign vehicles of consumer goods. There is also a surprising view that prostitution is a necessary evil as this acts as a protective thermostat or shock absorber of society, against the rape of respectable girls and women.

The Immoral Traffic (Prevention) Act, 1956 prescribed punishment for several offences. like Keeping a brothel or allowing premises to be used as brothel. Living on earnings of prostitution Procuring, inducing a person for prostitution. Detaining a person in brothel Prostitution in or in the vicinity of public place. Seducing or soliciting for purpose of prostitution. Selling or buying a minor for purpose of prostitution .

The Act imposes severe punishments for repeated offences by convicted persons. Varied amounts of fine can be imposed for various kinds of offences and their repetition. Detention in a correction institution. Notification of address of previously convicted offenders . Rescue of person, removal of prostitute from brothel and to produce such person before the Magistrate . Reference to Protective Home with direction to proper care, guardianship, training and medical and psychiatric treatment. Closure of brothel and eviction of offenders from premises Prostitute may make an application for an order that she may be kept in a protection home or provided care and protection by Court . Removal of prostitute from any place . Protective Home may be established by the State or State may give licence to existing protective homes with some conditions.

11.13. GLOSSARY :

Brothel	=	a place used for sexual exploitation.
Cognizable offence	=	any offence, notice of which can be taken inspite of no formal complaint.
Seduction	=	to induce to have sexual intercourse
Soliciting	=	to invite or urge to immorality
Summary trial	=	a speedy trial cutting short regular procedure
AIDS	=	Acquired Immune Deficiency Syndrome - a Viral disease affecting the system.
Procuring	=	to induce, to pimp, to contrive to obtain, or bring about.
Inducing	=	to bring in, to prevail on

11.14. RECOMMENDED BOOKS :

1. Law Relating to offences against Women, V.K. Dewan.
2. Indian Penal Code, M.P. Tandon.

11.14. MODEL EXAMINATION QUESTIONS :

1. What are the different kinds of punishable offences under Immoral Traffic (Prevention)

Act ?

2. Whether there are any remedies other than Punishments?
3. Is it possible to eradicate prostitution as a trade. Give your suggestions?

BRAOU

UNIT - 12 : CHILD MARRIAGE RESTRAINT ACT

Contents :

- 12.0. Objectives
- 12.1. Introduction
- 12.2. Concept of Child Marriage
- 12.3. Definitions
- 12.4. Punishment
- 12.5. A Cognizable Offence
- 12.6. Amendment
- 12.7. Effect of Child Marriage
- 12.8. Injunction to restrain a Child Marriage
- 12.9. Summary
- 12.10. Glossary
- 12.11. Recommended Books
- 12.12. Model Examination Questions

12.0. OBJECTIVES :

After going through this unit, you will be able to :

- * Explain the evil consequences of child marriage and the need to eliminate this social evil.
- * Understand the need for propagating the information about this Law.

12.1. INTRODUCTION :

Physical development and mental maturity make the marriage more happy and viable unit of a family. There is a well considered view that child marriages should not be allowed. However there is sufficient textual authority to indicate that the ancient Hindu jurists favoured early marriages of girls. Traditional Law givers of Hindu Society, Manu, Yajnavalkya, Goutam, Vasistha and Boudhayana supported the child marriages. By the time British rule came to be established, child marriages became very common. Those were the days where the family of bridegroom had to pay price for the bride which is called kanyashulkam. It amounted to sale of brides. Marriage of child brides with old men for consideration of high price resulted in widowhood for innocent children much before they attained puberty. The rigid and conventional families did not allow the re-marriage of widows. Child marriage, being itself a social evil led to untold sufferings for young widows. Society, neighbours and her own parental family members heaped insults on her and converted the widow into a bonded labour. Several reformists like Raja Rammohan Roy in Bengal and Gurajada Apparao in Andhra Pradesh fought for legal restraints on Kanyashulkam and child marriage and pleaded for making widow marriage a legally valid act. It is in this context Child Marriage Restraint Act was passed in 1929. This

Act made an attempt to fix a minimum age limit of marriage for boys and girls.

12.2. CONCEPT OF CHILD MARRIAGE :

Traditional Hindu families used to believe that Kanyadanam (offer of virgin bride) would fetch "Punyam" (the result of good deed) Kanya was defined as a girl of around eight years and she would continue to be a kanya till she attains puberty. This belief led the families to perform the child marriages.

Ashta varshat bhavet kanya (kanya is a girl of eight years) was the ancient saying that is in vogue even today.

A child bride had to be carried in a basket according to some of the traditional celebrations of a marriage, by the brother of the mother of the bride, as if she is presented like a gift to the bridegroom. Sometimes a bride of more than twenty five years old is also carried in a basket by one or more maternal uncles.

12.3. DEFINITIONS :

Section 2 of the Child Marriage Restraint Act, 1929 defined child, child marriage and contracting party as follows :

- a. Child means a person, who, if a male, is under twenty one years of age and if a female, is under eighteen years of age;
- b. Child Marriage means a marriage to which either of the contracting parties is a child;
- c. Contracting Party to a marriage means either of the parties whose marriage is or is about to be thereby solemnised; and
- d. Minor means a person of either sex who is under eighteen years of age.

Valid age of contracting parties :

Originally, this Act has prescribed the age of the bridegrooms as eighteen years and that of the bride as fifteen years, but by the Child Marriage Restraint (Amendment) Act, 1978, the words eighteen and fifteen stand substituted by twenty one and eighteen respectively and now for a valid marriage, the bridegroom should have completed the age of twenty one years and the bride should have completed the age of eighteen years.

12.4. PUNISHMENT :

Section 3 of the Child Marriage Restraint Act punishes a male above eighteen years and below twenty one contracts a child marriage with imprisonment which may extent to 15 days, or with fine which may extend to one thousand rupees, or with both.

Section 4 intends to punish the male adult for marrying a child. It says whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine.

Apart form the contracting parties, this Act intends to punish parents or guardians and whoever performs; conducts or directs any child marriage. Section 5 prescribes punishment for solemnising a child marriage. It says "whoever, performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months and shall also

be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage". Section 6 imposes punishments for parents and guardians for promoting or not preventing the child marriages. It says "where a minor contracts child marriage, any person have charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine". However, this section provides that no women shall be punishable with imprisonment. That means only fine can be imposed. There is a presumptive clause also in this section. According to this, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

12.4.1. A Cognizable Offence :

Section 7 makes it a cognizable offence under the Code of Criminal Procedure, 1973, for the purposes of investigation and for the arrest of a person without an order of a Magistrate. However, no Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence, i.e., the child marriage, is alleged to have been committed.

12.5. AMENDMENT :

This Act of 1929 stands amended by the Child Marriage Restraint (Amendment) Act, 1978, child now means a person who, if a male, has not completed twenty-one years of age and if a female, has not completed eighteen years of age. It provides that offence under this Act may be investigated upon by a police officer under the Code of Criminal Procedure as if they are cognizable offences. However, such police officer shall not have the power to arrest a person without an order of a Magistrate. This Amending Act has also amended Sections 5, 6, 12 and 18 of the Hindu Marriage Act, 1955 and Section 60 of the Indian Christian Marriage Act, 1872. In clause (iii) of Section 5 of the Hindu Marriage Act, for the words eighteen years and fifteen years the words twenty one years and eighteen years respectively stand substituted. By omitting clause (vi) of Section 5 and Section 6 of the Hindu Marriage Act, the minimum age of marriage for a bridegroom has been raised to twenty one years and that for a bride to eighteen years, and provisions of a marriage through a guardian have come to an end. Section 5 of Hindu Marriage Act provides several conditions for a valid marriage.

12.8. EFFECT OF CHILD MARRIAGE :

A child marriage performed in contravention of this Act, will not be either void or invalid. The marriage is perfectly valid. Only consequence of such a marriage is that the parties contracted and those promoted will be held liable for punishment. Though the Act laid down the minimum age for marriage, some criticised that the law was not serious about it. It appears that by this law the Parliament has attempted to prevent child marriages, though not to prohibit them. Under the Special Marriage Act, 1954 such marriages are void, because the Special Marriage Act is meant for literate educated and advanced section of people who ordinarily contract civil marriages. Whereas the Hindu Marriage Act affects great masses of people who are illiterate, backward, and tradition-ridden people who think that child marriage is traditionally a valid one. Making such marriages void would result in another social problem as thousands of such marriages which could not have been prevented would have become void causing a great

confusion. Basic purpose of this law is educative and preventive. A child marriage can be prevented from being solemnized.

12.7. INJUNCTION TO RESTRAIN A CHILD MARRIAGE :

The Civil Courts can issue an injunction to restrain a child marriage. Under their ordinary civil jurisdiction and under Section 12 of the Child Marriage Restraint Act have power to issue an injunction to prohibit it from being performed. According to Section 12, the Court may, if satisfied that information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized issue an injunction against the persons contracting, and those promoting the child marriage. Prior to that, the Court has to issue a notice and afford an opportunity to show cause against the issue of the injunction.

Section 12(5) provides for a punishment for those who violate the injunction. Whoever knowing that an injunction has been issued against him under sub-section (1) of Section 12 disobeys such injunction shall be punished with imprisonment of either description (simple or rigorous) for a term which may extend to three months or with fine which may extend to one thousand rupees or both. This section also contains a provision that no women shall be punishable with imprisonment.

Apart from these punishments under this Law, the Civil Courts have power to issue attachment for contempt, and in cases of contempt the powers of the Court are wider.

In order to check the growth of the population, the question of increasing the minimum age of marriage for males and females was also considered. Such increase of the minimum age of marriage will result in lowering the total fertility rate on account of latter span of marriage life. It will also result in more responsible parenthood and in better health of the mother and child. A bill introduced for this purpose in 1976 lapsed with the dissolution of the Lok Sabha.

The Phenomenon called Child Marriage in some parts of the country cannot be eradicated overnight. General awareness and scientific education and legal measures with fear of punishment will control this problem. As the society is advanced the child marriages are receding.

12.8. SUMMARY :

Performing the marriage of persons who are younger than the prescribed age limit is called child marriage. The Child Marriage Restraint Act, 1929 is aimed at preventing such marriages. Originally this Act has prescribed the age of the bridegroom as eighteen years and that of the bride as 15 years, but by the Amendment in 1978, the age limit is increased to 21 in case of a male, and to 18 for female. The Act prescribed punishments of imprisonment and fine for those who contracted and promoted child marriage. However, the marriage in contravention of the age limits prescribed under this Act will not render the marriage void. The Act basically is educative and preventive as the marriage in contravention of this Act are valid.

The Act provides an exemption in case of women, saying that no women shall be punishable with imprisonment. According to Section 7 the child marriage is a cognizable offence.

A Civil Court can prevent a Child Marriage from being solemnized.

women and was later adopted individuals.

British India tried to suppress it and it was successful to some extent. According to them this practice died out. But its apparent resurgence in 1987 is quiet distressing. Orthodox people are trying to legitimise this barbaric custom in the garb of tradition and culture. Women who have been campaigning for their rights over the past many years are dismayed at the sudden resurgence and are equally shocked over its acceptance by both other women and men. On September 4, 1987 Roop Kanwar, a young woman became a 'Sati' when her husband, Mal Singh expired. According to several investigations Roop Kanwar was forced to take the extreme step, which was orchestrated by the villagers and her in-laws. Since then people were thronging to Deorala to see the place where Kanwar was burnt alive keeping the head of her husband's body in her lap, on the pyre.

After this, people were organising celebrations to commemorate the first death anniversary of Roop Kanwar, who, they believed, became Sati Mata, The Goddess. In response to petitions by six women's organisations, the Supreme Court on 21-9-1988 stayed recitals from 'Bhagavat Gita' on that occasion.

According to unofficial estimates around 40 cases of widow immolations occurred, since 1981. (A Report in the Hindu, dated No. 10, 1996). Every act was public 'function', where a stage was built over which 'Sati' was 'performed'. "Whole thing was so arranged that she cannot escape even if she wants. It is a subtle coercion so that it looks the woman is doing it on her own volition", a researcher lamented.

In a book 'Sati' edited by Mulk Raj Anand, various writers expressed a view that no Sati takes place 'voluntarily'.

It is basically not a women's issue alone. It is an affront to peaceful progress of a civilized society.

Another writer Romila Thapar in her paper on "Prospective History", in the book 'Sati', said: "What is of significance today is not just the incidence of widows becoming Satis but the attempt to justify a custom at a particular historical juncture, a justification which involves more than merely a custom for it symbolises an attitude towards women as well as a view what is regarded as tradition. It is defended as being a recognised symbol of Hindu values especially those concerning the idealised relationship between husband and wife; the assumption being that it was required in theory of all Hindu Women. It bears no evidence as to its basis and origin. It is a barbaric aberration, in the name of tradition, of human rights.

Even an analysis of Roop Kanwar case reveals that it is not possible to invite such a horrible death on one's own volition. She was burnt alive, and forced into it.

Trial by Fire; a BUJ Report :

(The condensed form of "Trial By Fire" - a fact finding report by "Bombay Union of Journalists on Roop Kanwar's Death").

Far from being voluntary, in fact, Roop Kanwar's Sati was the result of combination of events and actions which indicate the helplessness of the teenaged widow. Preparations for the sati began immediately after Mal Singh's body was brought to the village in the morning. Roop Kanwar, who got an inkling of this, escaped from the house and hid in one of the dhani (barns) in the surrounding fields. The preparations had to be stalled as a search was made for her.

Roop was found covering in the barn and dragged to the house and put on the pyre at around 1.30 p.m. On her way, she is reported to have walked unsteadily and was surrounded by Rajput youths. She was also seen to have been frothing at the mouth. She is seen to have struggled to get out when the pyre was lit, but Rajput youths with swords surrounding her made her escape impossible. As to who lit the pyre, there can be no doubt that she did not light it herself. Eye witnesses clearly stated to the police that it was lit by 15 year old Pushpendra Singh, the dead man's youngest brother. Eye witnesses reported to the police that they heard her shouting bachao and crying for help. She was struggled to get out but was weighed down with the coconuts and the heavy logs of firewood and also pushed back by armed youth. The sight of her flailing arms about for help were interpreted by the villagers to mean that she was showering her blessings on them".

Neither the report of BUJ ("Trial by Fire") nor the eye witnesses quoted by it or by the FIR were not pursued by the prosecution. The Neem-ka-thana Additional District and Sessions Judge on October 11, 1996 acquitted all 32 accused in Roop Kanwar's murder saying that there was no evidence.

The following is the extract from the original Hindi Judgement of that Court.

"Thus from the evidence of the prosecution witnesses, out of these witnesses, no witness was present prior to the occurrence and they did not see anyone placing Roop Kanwar on the pyre or forcing her to sit on the pyre nor was Pushpendra seen giving the fire to the pyre. It is also not established from the evidence of these witnesses that in their presence the accused persons conspired with each other by burning Roop Kanwar and committing her murder nor any scheme was prepared or conspiracy was made or assembled for committing the offence to this effect".

The pyre in this instance was lit by some one else- a fact confirmed by the then President of Rajasthan Unit of the Janata Party, the Late kalyan Singh Kalvi, a vociferous defender of Sati. He claimed that his own nephew was one of the armed Rajput youths who surrendered the funeral pyre. It is ostensibly to protect the Sati but in effect making her escape or rescue impossible. That automatically made the death a case of murder rather than suicide. The fact that the accused have now been let off the hook mainly for want of evidence - hardly exonerates them or the crime but would not or dared not testify the court.

Sati is fortunately a rare occurrence even in those parts of the country where it was once routinely practised and where it is still hailed by many as a glorious tradition.

13.2. THE COMMISSION OF SATI (PREVENTION) ACT, 1987 :

Immediately after the barbaric incident of Sati occurred in Deorala of Rajasthan, the Government quickly enacted the Commission of Sati (Prevention) Act, 1987. It is intended to provide for the more effective prevention of the Commission of Sati and its glorification and for matters connected with or incidental thereto. It says "Sati or burning or burying alive of widows or women is revolting to the feelings of human nature and is no where enjoyed by any of the religions of India as an imperative duty.

13.2.1. Definition :

Section 2(109c) defined Sati :- "Sati means the burning or burying alive of

- (i) any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or

(ii) any women along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the women or otherwise.

13.2.2. Glorification :

In relation to Sati, Glorification includes, among other things, - (i) the observance of any ceremony or taking out of a procession in connection with the commission of Sati, or (ii) the supporting, justifying or propagating the practice of Sati in any manner; or (iii) arranging of any function to cuogise the person who has committed Sati; or (iv) the creation of a trust, or the collection of funds, or the construction of a temple or other structure or the carrying on of any form of worship or the performance of any ceremony threat with a view to perpetuate the honour of, or to preserve the memory of, a person has committed Sati.

13.2.3. Commentary :

Sati or widow burning :

V.K. Dewan tried to locate this custom from ancient books. According to Max Muller the custom of widow burning is traced among Greeks and Sythians. In the book of Peter Mundy, instance of burning of a widow at Surat in 1630 with a sketch was given. It depicts a widow having on her lap the head of her deceased husband while burning. A Portugese traveller, described the instance of sati in the Vijayanagar Kingdom. Though sati can be traced in Greeks, Germans and other races, this practice is generally confined to princely castes only. However there is no Vedic mention nor mantra recitation for widow burning. Even Griha sutra do not provide any "procedure" for this. Manu Smriti is silent about it. It is stated in Strabo (XVT. 30 and 62) that the Greeks under Alexander found Sati practiced among the Cathaei in Punjab. Mahabharata is very sparing in its reference to widow burning. Madri, the favourite wife of pandu burnt herself with her husband's body. In the Virataparva, Sairandri was ordered to be burnt with Kichaka. The Mansala parva says that four wives of Vasudeva, viz., Devaki, Bhadra, Rohini and Madira burnt themselves along with his body and other queens like Satyabhama went to a forest for tapasya. The Vishnupurana also says that eight queens of Krishna, Rukmini and others, entered into fire on the death of Krishna.

Rajatarangini of kalhana also cites at several places examples of Sati. From history records, the practise of sati is noticed during Gupta era 510AD. There is a Nepal inscription of 705 AD where Rajyavati, widow of Dharmadeva, bids her son Mahadeva to take the reins of Government that she may follow her husband. Among the well known examples of Sati is that of Ramabai wife of Peshwa Madhavrao I in 1772A.D. The Jauhar practised by the Rajput ladies of Chittoor and other areas, by jumping into fire after the death of their husbands to avoid upspeakable atrocities at the hands of the victorious Muslims are too well known. All these instances are not impositions of death on women. Sati was not imposed, somehow grew and it is absolutely incorrect to say that it was imposed, men on women. Sati practice might have been because of some sentiments, totally different suited to the circumstances then. It was confined to kings and warriors, because the wives of conquered kings and warriors were made targets of their vengeance. The vengeance for their husbands was wrecked on the wives by carrying them as captives and making them to work as slaves. Though several smritikaras disapproved such a practice, but once it took the root, some commentators and digest writers were found to support it with arguments of heavenly abode, devotion to her husband to be praised by heavenly damsels, that as long as a women does not burn herself in fire on the death of her husband she is never free from being born as a women.

If appears that widow burning prevailed more in Bengal during the centuries immediately preceding its abolition than anywhere else in India. Even in Bengal the number of Satis must never have been very large. In some parts of Rajasthan it is still in vogue. The admiration and reverence for the so called courage of women in becoming sati or performing the jauhar for cherishing their ideals of womanly conduct, is false which in reality is the instance of subjugation of women by the men.

A women who commits sati is glorified and immortalised by these sections of people by building memorials and the "Satimaata" is worshipped as a deity. The place of sati is respected as "sati-sthal" and attracts large number of people every year. It is said that there are still around 130 sati temples in India and nearly half of them in Rajasthan. The Deorala incident where Roop kanwar belonging to a comparatively educated family was driven to this act, revived this old evil. The law prohibiting Sati was promulgated 150 years ago, but the recent Deorala incident giving nationwide publicity making law-makers to promulgate new law and new provisions to prevent this assault on the dignity and life of women.

13.2.4. Punishment :

Whoever attempts to commit sati and does any act towards such a commission shall be punishable with imprisonment for a term which may extend to one year or with fine or with both : (Sec. 3)

The Provision under this Section makes it mandatory for the Special Court to take unto consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charged of the offence at the time of the commission of the act and all other relevant factors before convicting any person.

13.2.5. Abetment of Sati :

Section 4 defines abetment of Sati :

Any of the following acts, or the like shall be deemed to be the abetment, namely :

(a) Any inducement to a widow or woman to get her burnt or buried alive along with the body of her deceased husband or with any other relative or with any article, object or thing associated with the husband or such relative irrespective of whether she is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other cause impleading the exercise of her free will;

(b) Making a widow or women believe that the commission of sati would result in some spiritual benefit to her or her deceased husband or relative, or the general well-being of the family;

(c) Encouraging a widow or women to remain fixed in her resolve to commit sati and thus instigating her to commit sati;

(d) Participating in any procession in connection with the commission of sati or aiding the widow or women in her decision to commit sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;

(e) Being present at the place where sati is committed as an active participant to such commission or to any ceremony connected with it;

(f) Preventing or obstructing the widow or women from saving herself from being burnt or buried alive;

(g) Obstructing or interfering with the police in the discharge of its duties of taking any steps to prevent the commission of sati.

If any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also liable to fine. If any person attempts to commit sati, whoever abets such attempt either directly or indirectly shall be punishable with imprisonment for life and shall also be liable to fine.

13.3. PREVENTION OF SATI :

Part III of the Commission of Sati (Prevention) Act gives some powers to Collector or District Magistrate to prohibit certain acts. If the Collector is of the opinion that sati is about to be committed, he may by order prohibit the doing of any act towards the commission of sati by any person in any area or areas specified in the order. The Collector may prohibit, by order, the glorification of sati in any area. Whoever contravenes such an order is punishable for a term which shall not be less than one year which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees. (Section 6).

13.4. POWERS OF STATE GOVERNMENT :

Section 7 empowers the State Government to direct the removal of temple or other structure which is in existence for not less than 20 years, where worship or other activities in glorification of sati is going on or perpetuating the honour of, or to preserve the memory of person who committed sati. The Collector or District Magistrate is empowered under sub-section 2 of Section 7 to order removal of temple or structure. If they are not removed by order or direction, the Government or the Collector can cause the structure or temple be removed through a police officer. New temples or structures can be removed by the Collector and if the temple is older than twenty years, they can be removed by the State Government. Section 8 empowers the Collector or the District Magistrate to seize any funds or property collected or acquired for the purpose of glorification of sati. Any such seizure has to be reported to Special Court.

13.5. SPECIAL COURTS :

In order to provide a speedy and effective remedy the Act created special courts to try the offences relating to Sati. Part IV Section 9 says that all offences under this Act shall be triable only by Special Court constitute under this Section. The State Government shall by notification constitute one or more special courts. It shall be presided over by the Judge appointed by the State Government with the concurrence of the Chief Justice of the High Court. The Judge should be of the rank of Sessions Judge or an Additional Sessions Judge. The Government has to appoint a Special Public Prosecutor in each Special Court, an advocate with atleast seven years of experience is eligible for the post of Special Public Prosecutor.

Section 1 and 12 deal with the powers of the Special Court regarding the cognizance of any offence on complaint or police report, and trial of any offence. Section 12(3) provides for expeditious trial by day-to-day examination of witnesses.

Section 13 provides for forfeiture of Funds or property of a person convicted under this Act.

An appeal is provided from the judgement of Special Court to the High Court (Section 14) within 30 days from the date of judgement.

Part V gives a protective cover to the Government and its officers from suits, prosecution or any other legal proceedings for any action done by them in good faith under this Act.

Another important feature of this Act is that the burden of proof is fixed on the accused : According to general principles the prosecution has to prove the charge on the accused, while accused in defence have no burden of proof. Under this Act, the accused has to prove that he had not committed any offence under this Law. (Section 16).

The Act took meticulous care in each and every aspect of the offences relating to sati and the procedure to prove the guilty. Through Section 17 it imposed an obligation on certain persons to report about the Sati, and to assist the police in the execution of the provisions of this Act, all village officers and others specified by Collector, and inhabitants have an obligation to report their knowledge about the happening of Sati whoever contravenes this provision shall be punishable with imprisonment of either description for a term which may extend to two years and also shall be liable to fine. According to Section 18 the person convicted of an offence under Section 4 shall be disqualified from inheriting the property of the person in respect of whom such sati has been committed. Section 19 imposes a disqualification on person convicted under Sati Act, and bars this person from contesting election for about a period of five years since release of the convict. Section 19 of this Act amends the Representation of the People Act 1951 to impose an additional disqualification.

13.6. COMMENTARY :

The Government made this enactment a very comprehensive in defining the crime of sati, its abetment in detail and its glorification, making special provisions creating a Special Court and in imposing the legal obligation on every one who come across with the reliable information of possibility of an occurrence of sati to report, the rule of burden of proof, procedural powers, additional disqualifications etc. There are provisions for speedy trial and day to day hearing of a witness. The Act envisages the forfeiture of the property of the convict and removal of the temple or structure raised in honour of sati.

Though it is a good law, its execution is again the discretion of the State Government. The acquittal of accused in the Deorala incident of Sati, celebration of annual festivals at the sati-sthal of that place and activities of glorification attracting general public reveal the weaknesses in the execution of the law. Law is adequate but not fully enforced by the executive. The very fact of existence of temples and structures on sati-sthals and annual celebrations and worship of sati-mata at several such places prove the lack of will on the part of executive to enforce the law. It is for the Human Rights societies and Women Organisations to seek the strict enforcement of law and force the State to resort to using of the strong powers given by the Act.

The Defects in Sati Law :

The serious draw-back of the 1987 anti-sati law is that it negates the fundamental social reality that sati is not a voluntary act comparable to suicide, that sati is murder. Thus the definition of sati under Section 2(c) is not comprehensive to include this aspect. According to it, it is only an act of "burning or burying alive" of a widow or a women. While Section 3 prescribes the punishment for an "attempt to commit Sati" and Section 4 for "abetment of Sati". But it is not

equated with murder. The Act speaks of it as a voluntary act.

Thus a woman who is forced to commit sati, and survives as her attempt fails, should be held guilty for voluntary suicide and liable to punishment for six months imprisonment. Without prosecuting the woman as principal offender in this crime, it is not possible to catch all those who prepare, conspire, participate and help the commission of crime.

Section 2(b) of the Act defined "glorification" and Section 5 prescribed punishment. But the continuing worship and celebrations at various sati temples will not come under the frame of this section. Section 7 of Part III empowers the State Government to remove temples and structures but not if they are more than 20 years old. So clearly temples such as the Rani Sati Temple are protected. Section 8 empowers the administration to seize properties and funds. The Act does not include punishment to donors who are big business houses. It limits collection of funds only.

Part IV of the Act provides for Special Courts. But none is instituted so far. Section 19 which disqualifies the people's representatives from contesting elections if convicted under the Act, was never invoked at all. And significantly, the Act did not have retrospective effect to cover the Deorala incident. Even according to its prospective effect, it would have applied to the culprits of the offence of "glorification". Despite Section 8, the amounts collected at chunri ceremony outside the Deorala Sati Mandir was not confiscated. In spite of a Supreme Court order, on Sept. 9, 1988 preventing "Chunri" ceremony glorifying sati, within Rani Sati Mandir, the trustees held the ceremony outside the mandir. Though court ordered to deposit the amount collected in a nationalised bank, none did it. Immediately after passing of this Central Act, one Calcutta based trustee of the Jhunjhunu Sati mandir filed a writ petition in Calcutta and obtained an order to perform annual puja without any intervention.

Even in 1996, a ten day "mahayaga" from November 24 to mark the 400th anniversary of Rani Sati was performed as a victory celebration as all the accused were acquitted in Deorala incident. Jaipur High Court issued an interim order on November 27 against the performance of the function "inside the temple building" while allowing it. The Court directed that the "chunri mahotsav" and the installation of 51 kg. gold kalash be stopped. The order came on fourth day of mahayaga. When a contempt petition filed against the district administration it was posted after three weeks to file their counter affidavit. Meanwhile mahayaga was successfully completed.

Despite the Act, the plan to build a temple to commemorate the immolation of Roop Kanwar may come up at any time as that site now is marked by Roop Kanwar's forlorn and faded "chunri" atop a trishul surrounded by some 20 rusty swords where daily prayers are offered.

The impact of sati worship at the post-independence Rani Sati temple cannot be ignored. This temple at Jhunjhuna, is the mother of all Sati temples. The phenomenon of sati revival in Rajasthan is directly linked to the phenomenal expansion of the commercial returns of the Jhunjhunu Rani Sati Temple.

This has led to the proliferation of sati temples all over the state, particularly the Shekawati region comprised of Churu, Sikar and Jhunjhunu districts. And wealthy businessmen hailing from this region have established sati temples in other parts of the Country - Bombay and Delhi and in several foreign countries. According to a report there are not less than 28 widow immolations within a radius of 200 miles of the Jhunjhunu sati temple since Independence. There is a turnover of Rs. 4 crore from the annual mela there.

Women are extremely subjugated in the Rajput style of life and sati is the live example. Highest rates of illiteracy in Rajasthan with only 11 per cent of it among women took the State to the highest rank in illiteracy.

13.7. SUMMARY :

Sati, as a social crime, an affront to life and dignity of women deserves to be condemned by law and society. No amount of customary practice can ratify the widow burning as symbol of tradition. It finds no support in Vedas or any other ancient scripts.

This is largely prevalent in a group form in some royal or warrior families. British India tried to suppress it. But its apparent resurgence in 1987 at Deorala of Rajasthan when Roop Kanwar was burnt alive with her husband's body, was distressing event. That incident was immediate reason for the enactment called "The Commission of Sati (Prevention) Act, 1987". It is intended to provide for more effective prevention of the widow burning and glorification of sati.

This Act defined Sati and Glorification of Sati and prescribed harsh punishments for those offences. The Act is comprehensive as it includes several sections regarding the prevention of Sati by giving powers to Collector or District Magistrate to prohibit certain activities which facilities commission and glorification of Sati. The State Government is also empowered to direct removal of temples and other structures build in memory of Sati-mate, at Sati-sthal. The Act also envisages constitution of Special Courts for trying the offences under this Act in a speedy manner. The Special Courts have special powers. Another distinctive feature of this Act is to shift the burden of proof on to accused to prove that he has not committed the charged offence.

The Act also contains provisions of forfeiture of the funds and properties collected for the purpose of worshipping the sati-maata and the properties of the accused person on the proof of the charge. It disqualified a convict to entitle for inheritance of the property. It also imposes an additional disqualification on the convicts preventing them from contesting any election for about five years since release of the convict.

There is need to educate the people about the lack of any basis or reason behind the practice of this social crime which mostly amounts culpable homicide amounting to murder. The Act is very comprehensive and powerful but it requires a strong will be enforce the provisions by the execute. This barabarc social evil can end only by creating awareness about the rights to life and dignity of women and the voluntary groups should agitate for strict enforcement of law. The education programme should include the propagation of provisions of this law also.

13.8. GLOSSARY :

Sati or Sati Sahagamana	=	widow burning or wife dying along with husband or widow immolation.
Sati-maata	=	a belief that a widow, after committing sati would become a goddess
Sati-sthala	=	the place where sati was committed, where a temple or structure is built in reverence of sati-maata
Jauhar	=	the high caste of warriors or kshatriya or rajput

Summary trial	=	an extra ordinary trial with speed, provided under Criminal Procedure Code and under this Act
Burden of Proof	=	responsibility of proving a fact.

13.9. RECOMMENDED BOOKS :

Law relating to offences, against women : V.K. Dewan Indian Penal Code : S.D. Gour.

13.10. MODEL EXAMINATION QUESTIONS :

1. What is the origin and reason for the spread of Sati?
2. Explain "Sati" under the Commission of Sati (Prevention) Act and its glorification?
3. Suggest measures to remove this social crime?
4. What do you mean by "Sati". Is that a Crime?
5. When did Roop Kanwar became Sati and what is the result of the prosecution of accused in this case?
6. Is there any mention about this sati in ancient scripts?
7. What is the name of the Act which punishes Sati?
8. What are the disqualifications prescribed under the Sati Act?

BRAVO

UNIT - 14 : PROHIBITION OF PRE-NATAL SEX DETERMINATION

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14.0. OBJECTIVES :

After going through this unit, you will be able to

- * explain the regulation of diagnostic techniques through this latest legislation;
 - * understand the provisions of the Act intended to prevent the misuse of technology; and
 - * the relevance of the Act in protecting the dignity of women.
-

14.1. INTRODUCTION :

The advancement of medical science brought a great relief to humanity from the pains and sufferings due to diseases. Especially in the field of diagnosis, the medical science expanded by leaps and bounds, with which one can see the inner problems of the body on the small screen and the surgeon's blade can reach the place where exactly the problem exists, without a cut on the body. The diagnosis became very easy and accurate; so that the doctor need not guess, experiment and delay the treatment. Accuracy is the important feature of the advancement. But the pre-natal diagnostic techniques are being used for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is found to be discriminatory against the female sex and affects the dignity of women. The increasing problem of dowry and ostentatious marriage ceremony with unlimited expenditure coupled with raising domestic disturbances made the life of female child a miserable one even before delivery. Some even went to the extent of getting rid of female child in the womb itself, as they could know the sex in advance.

14.2. NEED FOR A REGULATION :

There are several New Reproductive technologies targeting at women bodies, affecting their control over bodies, bodily processes or products. Pre-Natal Diagnostic Techniques are basically meant for detection of congenital malformations in embryo, e.g., Amniocentesis, Chorionic Villi Biopsy etc. There are sex selection techniques which are used for selecting the sex of the unborn offspring before and after conception. The sex determination test can be used for predicting rather than determining the sex of the unborn. In various parts of the world, pre-natal diagnostic techniques are used exclusively for detection of congenital disorders. Ever since these techniques entered our country in early 70's, they are being misused mainly for sex determination and subsequently for sex-selective-abortions. There are several sex determining centres in North and West India, Gujarat and Maharashtra being at the top in such clinics. They are mostly not conforming to the required medical standards and not manned by the qualified medical persons. Most of the aborted cases are of the females. Irrespective of caste or creed, the parents from classes where the rate of dowry is very high did not want to add any more female members in their families. So the sex determining clinics are patronising the fathers who discriminate against girls. Increasing female foeticide in long run result in imbalance leading to greater incidence of rape, sharing of women within and outside the wedlock, abductions and in general affect the mobility and freedom of women. Besides bride burning for dowry and in the name of sati, killing female unborn offsprings in womb became another form of elimination of women. Before the advent of pre-natal sex determination, the Medical Termination of Pregnancy was grossly misused for sex selective abortions. On the other hand, a new process of sex pre-selection is also being evolved by researchers. A company in United States is offering a package deal with 80 per cent accuracy of selecting the sex before the conception, by the

technique of sperm separation, and by bringing about conception through artificial insemination with semen fraction rich in Y- Chromosomes, to develop a male embryo. Even Non-Coital Reproductive Techniques such as test tube babies and surrogate arrangements or in-vitro fertilization- embryo transfer mechanism are being used to implant selective embryos, mostly the male.

All these scientific techniques and facilities resulting out of continuous research in medical science are being used to eliminate the female population. There are strong lobbies advocating the sex - selective abortions as an effective population control tools. In fact they are used to reduce the women population. This unscientific phenomenon is a great threat to the very existence of female sex besides being an affront to dignity and freedom of a women. Hence there is a need to make a law to control the misuse of scientific techniques affecting the very existence of fair sex.

It is pathetic to note that a female embryo is not allowed to form at the first instance, if formed, they detect it to be of female and remove it, if survived a girl child is discriminated by parents; if married, the in-laws burn her for money called dowry; and if survived the husband, she is killed under a killer tradition called "sati". Female is neither allowed to be conveyed nor survive before or after the birth; all through scientific methods to achieve unscientific targets, and under illogical religious traditions.

Hence there is a need to impose legal controls over use of scientific techniques to the detriment of women folk.

The Act contained provisions to prohibit the misuse of pre-natal diagnostic techniques for determination of sex of the foetus. It prohibited the commercial advertisement of pre-natal diagnostic techniques for detection or determination of sex. According to the Act, the use of pre-natal diagnostic techniques for the purposes of detection of specific genetic abnormalities or disorders required permission. Such a use also will be regulated, under certain conditions by the registered institutions and the violations of the provisions of the Act would result in punishment.

14.3. DEFINITIONS :

14.3.1. Pre-natal Diagnostic Procedure :

"Pre-natal diagnostic procedures" means all gynecological or obstetrical or medical procedures such as ultra-sonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant women for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic tests. (Section 2(i)).

"Pre-natal diagnostic techniques", includes all pre-natal diagnostic procedures and pre-natal diagnostic tests; (Section 2 (J)).

"Pre-natal diagnostic test" means ultrasonography, or chorionic villi, blood or any tissue of a pregnant women conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobin apathies or sex-linked diseases. (Section 2 (k)).

"Pre-natal" generally means before birth or something concerning the child in the womb.

14.3.2. Gynecologist, Mecial Geneticist :

"Gynecologist" means a person who possesses a post graduate qualification in gynecology and obstetrics. (Sec. 2 (f)).

"Medical Geneticist" means a person who possesses a degree or diploma or certificate in medical genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining any one of the medical qualifications recognised under Indian medical Council Act, 1956 or a post graduate degree in biological sciences. (Section 2 (g)).

Pediatrician means a person who possesses a postgraduate qualification in pediatrics. (Section 2(h)).

14.3.3. Genetic Clinic :

Genetic clinic means a clinic, institute, hospital, Nursing Home or any place by whatever name called, which is used for conducting pre-natal diagnostic procedures. Whereas genetic counselling centre means a clinic, Institute, Hospital, Nursing Home or any place, by whatever name called, which provides for genetic counselling to patients. (Section 2 (c) & (d)).

14.4. REGULATION OF GENETIC CLINICS :

14.4.1. Registration :

Section 3 of the Act imposes a restriction on functioning of Genetic Centres without registration. The registration was made compulsory to facilitate the regulation. Section 3 says that "no genetic counselling centre, genetic laboratory or genetic clinic, unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques.

14.4.2. Obligation to employ qualified persons :

Sub-section 2 of Section 3 imposes a statutory obligation on Genetic Centres to appoint only qualified persons. It says "no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall employ or caused to be employed any person who does not possess prescribed qualifications".

Sub-section 3 prescribes a ban on medical persons to practice at an unregistered place. No medical geneticist, gynecologist, pediatrician registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person any pre-natal diagnostic techniques at a place other than a place registered under this Act.

14.5. REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES :

14.5.1. Prescribed Purposes :

Chapter III, Section 4 of the Act restricts activities or conducting pre-natal diagnostic procedures only for the purposes prescribed under Sub-sections 2 and 3. The purposes for which pre-natal diagnostic tests shall be conducted are as follows :

- (i) Chromosomal abnormalities;
- (ii) Genetic metabolic diseases;

- (iii) Haemoglobinopathies;
- (iv) Sex-linked genetic diseases;
- (v) Congenital anomalies;
- (vi) Any other abnormalities or diseases as may be specified by the central supervisory Board. (Section 4 (2)).

14.5.2. Conditions for Conducting Test :

Section 4 (3) prescribes some conditions to be fulfilled before conducting any pre-natal diagnostic test for the above purposes. They are : (i) the age of the pregnant women is above thirty five years; (ii) the pregnant women has undergone two or more spontaneous abortions or foetal loss; (iii) the pregnant women had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; (iv) the pregnant women has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease; (v) any other conditions as may be specified by the Central Supervisory Board.

Unless a qualified person is satisfied about the fulfillments of above conditions, no pre-natal diagnostic technique shall be used or conducted.

14.5.3. Restrictions on Husband :

This Chapter also imposes a restriction on the husband of the pregnant women or any other relative from seeking or encouraging the conduct of any pre-natal diagnostic test for the purposes other then permitted by Section 4 (2).

According to Section 5 a pregnant women has to be informed about all known side and after effects of pre-natal diagnostic procedures and her written consent in the prescribed form to undergo such procedure. A copy of her consent has to be handed over to her pregnant women.

14.5.4. Ban on revealing Sex of foetus :

Any person conducting pre-natal diagnostic procedures shall not communicate to the pregnant women concerned or her relatives, the sex of the foetus by words, signs or in any other manner (Section 5 (2)).

14.5.5. Prohibition of Sex-determination :

Section 6 prohibits determination of sex. No Genetic Counselling Centre, or Genetic Laboratory or Genetic Clinic or no person, shall conduct pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus.

14.6. CENTRAL SUPERVISORY BOARD :

Chapter IV deals with the Constitution of Central Supervisory Board to advise the Government on policy matters relating to use of pre-natal diagnostic techniques. The board has to review the implementation of the Act and to create public awareness against the practice of pre-natal determination of sex and female foeticide. It is also expected to lay down code of conduct to be observed by persons working at genetic counselling centres, genetic laboratories and genetic clinics (Section 16).

Section 7 deals with the Constitution of central supervisory board with the minister in charge of the ministry of family welfare as the chairman, ex-officio, the secretary of family

welfare as the vice-chairman, ex-officio. Two members from women and child development and of Law and Justice will be the ex-officio representatives of Central Government. The Director General of Health Services of the Central Government, three women members of Parliament, two from Lok Sabha and one from Rajya Sabha, four members representing the States and Union Territories in rotation, will be the members. Besides, ten members can be appointed two each from eminent medical geneticists, eminent paediatricians, eminent social scientists, eminent gynaecologists and obstetricians and representatives of women welfare organisations. There shall be a member secretary not below the rank of Joint Secretary. Section 14 prescribed some disqualifications for being appointed as members of the Board, while section 8 prescribed different terms of office to members. Any member may be reappointed as per Section 15.

14.7. APPROPRIATE AUTHORITY AND ITS POWERS :

Chapter V Section 17 deals with the appointment of Appropriate Authority by the Central Government, for Union Territories. A State Government can appoint one or more Appropriate Authorities for the State, to deal with the problem of pre-natal sex determination leading to female foeticide.

The Appropriate Authorities can grant, suspend or cancel registration of a Generic Counselling Centre, Genetic Laboratory, or Genetic Clinic. The Authority can enforce standards prescribed, investigate complaints of the breach of provisions of this Act or the rules made thereunder and take immediate action. It can seek and consider the advice of the Advisory Committee Constituted under Sub-section 5 of Section 17. Advisory Committee consists of three medical experts, one legal expert, one officer from information and publicity, and three eminent social workers of whom one shall be from women's organisations.

Section 18 under Chapter VI provides procedure for Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics. Appropriate Authority shall consider the application and grant registration if satisfied that such centre is in a position to provide much facilities, maintain such equipments and standards as may be prescribed. After an enquiry and satisfaction that all requirements were fulfilled, the Appropriate Authority shall grant a certificate, which can be renewed. Section 20 deals with the cancellation or suspension, suo moto, or on complaint after issuing a notice and giving a reasonable opportunity of being heard to the Genetic Clinic etc., by the Appropriate Authority. The aggrieved Genetic Centre can prefer an appeal from the order of the suspension or cancellation of registration under Section 20, by the Appropriate Authority to the Central or State Government if the order is issued by the Central or State Appropriate Authorities respectively.

14.8. OFFENCES AND PENALTIES :

14.8.1. Advertisement prohibited :

Section 22 of Chapter VII prohibits advertisement in any manner and distribution of advertisement or publicity material regarding the facilities of pre-natal determination of sex available at any centre. Any person who contravenes such prohibition shall be punishable with imprisonment of a term which may extend to three years and with a fine which may extend to ten thousand rupees.

14.8.2. Punishment for Medical Persons :

Any medical person either as owner or employee or as an honorary consultant, if contravenes any of the provisions of the Act shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to 50 thousand rupees. The name of such registered medical practitioner who has been convicted shall be reported by Appropriate Authority, to the State Medical Council for taking necessary action including the removal of his name from the Register of the Council for a period of two years for the first offence and permanently for the subsequent offence.

Any person who seeks the aid of genetic Centre or medical person for conducting pre-natal diagnostic techniques on any pregnant women (including such women unless she was compelled to undergo such diagnostic techniques) for the purposes other than those specified in clause 2 of Section 4 shall be punishable with imprisonment for a term which may extend to three years and with a fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine may extend to fifty thousand rupees. (Section 23).

14.8.3. Presumption of pressure from Husband :

Section 24 provides for a presumption that the pregnant women has been compelled by her husband or the relative to undergo pre-natal diagnostic technique and such person shall be liable for abetment of offence under sub-section 3 of Section 23, and shall be punishable for the offence specified under that section.

Section 25 prescribes punishment for contravention of the provisions of the Act or rules for which no specific punishment is provided, of the imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

If any person committed an offence under the Act was in charge of and was responsible to the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. If the company committed any offence which is attributable to any neglect on the part of any director or manager secretary or other officer, such person also shall be deemed to be guilty of that offence.

14.8.4. A Cognizable Offence :

According to Section 27 every offence under this Act shall be cognizable, non-bailable and non-compoundable. Such an offence shall be taken cognizance of by the Court only when the Appropriate Authority makes a complaint or any other person complaining after giving notice of not less than thirty days to the Appropriate Authority.

14.9. RECORDS; INSPECTION & SEIZURE :

Section 29 imposes a duty of maintaining the records, charts, forms, reports and consent letters besides other required documents for a period of two years and make them available for inspection to the Appropriate Authority. In case there is any criminal or civil proceedings instituted against any genetic counselling centre, Genetic Laboratory or Genetic Clinic, the latter have to keep records till the final disposal of such proceedings.

Appropriate Authority can examine the record and seize the record if that may be used as evidence of the commission of offence punishable under this Act. The provisions of the Code of Criminal Procedure relating to searches and seizures shall apply to every search or seizure made under this Act.

Immunity :

Section 31 provides immunity to the officers of State, Centre, or appropriate authority for anything done in good faith or intended to be done in pursuance of the provisions of the Act, from being questioned in court of law through civil or criminal or any other legal proceedings.

There is an absolute need to regulate the clinics and centres which are engaged in pre-natal diagnostic techniques because of their gross abuse leading to female foeticide. A long felt demand to make a law on this aspect was fulfilled in 1994. This being a new enactment, its functioning and effect in controlling the pre-natal diagnostic centres is to be observed. The Regulating Authority, which is called "Appropriate Authority" under his Act, has to live upto the expectations to serve the purpose of Law. Parents in general have to develop a positive attitude towards girl child.

14.10. SUMMARY :

This unit aims at studying the provisions of the new legislation "pre-natal diagnostic Techniques (Regulation and Prevention of Misue) Act, 1994 and its legal consequences. There was a dire need to prevent rampant and silent female foeticide through the new technique called "pre-natal diagnostic technique". It intended to regulate the use of such techniques by controlling the centres equipped with gadgets used for such purposes. Pre-natal generally means before birth or something concerning the child in the womb. Pre-natal diagnostic procedures means all gynaecological or obstetrical or medical procedures such as ultra-sonography foetoscopy, taking or removing samples of amniotic fluid.

Section 3 imposes an obligation on Genetic Centres to get registered to engage in pre-natal diagnostics, and to appoint only qualified persons. The Act, under Chapter III restricts the tests for the purposes of detecting some diseases and anomalies only. When the centres intend to conduct tests on pregnant women, the centres must ensure that she is above thirty five years and some more conditions, making it essential to conduct the test. Neither husband nor any other relative can seek the conduct of pre-natal diagnostic test. There is also a ban on those conducting the test not to disclose the sex of the foetus by words or signs or in any other women. Section 6 prohibits determination of sex. The Act provides for constitution of Central Supervisory Board to advise the government on policy matters regarding the use of these techniques. It also envisages appointment of appropriate authorities which can grant, suspend or cancel registration of Genetic Centres, besides enforcing standards and hearing complaints against them.

The facility of pre-determination of sex of foetus cannot be advertised. If anybody contravenes this prohibition, he shall be punished with a term which may extend to three years and with a fine upto Rs. 10,000. If a medical person contravenes the provisions of this Act, he will be liable to the punishment described above, and the subsequent conviction will result in severe punishment like the term extending to five years and fine upto Rs. 50,000. Besides above punishments, the name of such registered medical practitioner, may also be removed by the

Medical Council on being reported by the Appropriate Authority, either permanently or temporarily. Any other person seeks the aid of Genetic Centre or medical person for conducting such test on any pregnant women for the purposes other than those specified in clause 2 of Section 4, shall be punishable with imprisonment for a term which may extend to three years and with a fine upto Rs. 10,000 and on subsequent conviction with imprisonment which may extend to five years and with fine upto Rs. 50,000/-.

The Genetic Centres have to maintain the records and charts and consent letters and make them available for inspection and if needed seizure by the Appropriate Authority. Section 31 provides immunity to officials acting under the Act from civil, criminal and other legal proceedings. A long need to have the law on the field was fulfilled in 1994. There is a need to effective enforcement of law and a change in the attitude among the parents towards female child in womb.

14.11 GLOSSARY :

Pre-natal	=	something concerning the child in the womb.
Diagnosis	=	finding the disease or detecting the illness.
Subsequent Conviction	=	a person being punished for an offence which he committed again.

14.12 RECOMMENDED BOOKS :

1. Offences Relating to Women - V.K. Dewan 1996.
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14.13. MODEL EXAMINATION QUESTIONS :

I Answer the following questions in 30 lines.

1. What are the permitted purposes for which the pre-natal diagnostic tests can be conducted under the Act?
2. Describe the various controls available under the Act and its effect on the misuse of pre-natal diagnostic tests?

UN IT - 15 : MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Contents :

- 15.0. Objectives
- 15.1. Introduction
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- 15.7. Summary
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15.0. OBJECTIVES :

After going through this unit, you will be able

- * To discuss the Medical Termination of Pregnancy Act as a health care measure,
- * To explain that abortion cannot be a method of controlling population,
- * To motivate women to adopt Contraceptives,
- * To make the students aware of the Medical Termination of Pregnancy Act.

15.1. INTRODUCTION :

In India, the Hindu Orthodox sanskritised Common Unities regarded abortion as a sin. It is believed that abortion or "Bhroona Hatya" is a sin and whoever commits this sin will go to hell after death. Even Islam and Christianity are also against this practice. In the past a greater value was attached to women who had given birth to a large number of children. In the patriarchal families the right over the reproductive capabilities is vested in the hands of male members. Women in such a set up hardly has right to exercise a choice to have a baby or not to have a baby.

Most Religions have condemned acts intended to destroy an unborn child or to prevent its live birth. However, this rigid attitude of the moralists came to be modified out of sheer necessity. A liberal attitude has been adopted, where the mother's life is in danger.

Before 1971, Section 312 of the Indian Penal Code made the miscarriage a crime both by abortionists and the pregnant women who caused herself to miscarry. The law permitted

miscarriage only in the case of serving the life of a Pregnant Women. This code was adopted more than a century ago with the two objectives in mind that first the performance of an abortion was dangerous to the life of the member and second it averted the population growth which was considered necessary for the existence, and welfare of the society. But this policy resulted in two ill-consequences. First the women seeking abortion were left at the mercy of unscrupulous quacks who exhorted more money from them and endangered their health. Second, in due course of time, the incidence of illegal abortions increased, which resulted in the death of a number of women.

But with the change of time, the social system and public opinion have undergone drastic changes. With the result the law also has changed. It is viewed that the abortion operation is no more dangerous for the health of the pregnant women when performed by a competent medical practitioner. Recognizing the need for liberalisation in 1971, a separate Act was passed under the title of "Medical Termination of Pregnancy Act (MTPA). This Act is a supplement to the provisions relating to abortion of the Indian Penal Code. This Act has immensely benefited the women.

In this unit you will come to know more about the scope and importance of Medical Termination of Pregnancy Act, its relevant provisions and how the abortions are essential for the purpose of saving the life of a women.

15.2. ABORTION IN PRIMITIVE SOCIETIES ;

Abortion is know to the human society since ancient times. Evidences show that abortion was practised even in prehistoric and primitive societies by using various modes and procedures.

The Hindu Philosophy regards the birth of a son as sacred as he continues the family line and perpetuates the name of his ancestors. So a son continues to have a significant place in Hindu Society for practical purposes of Succession and performing religious duties. It is this attitude that led women adopt various modes of fertility control namely abortion. Although references to abortion as a sin were found place in the thought of many Hindu sage thinkers (Manu, Yajnavalkya, Katyayana, Kautilya) sterilisation was practised by various means in order to avert the birth of a girl child.

In primitive societies abortion was practised by indulging in violent exercises like jumping, skipping, running, carrying heavy weights, adopting strenuous postures, irritating uterus by heat, by interference through foreign agents, etc. Besides the oral use of fruits and herbal drugs such as pappaya fruit, unripe pine apple, thill and jaggery, the seeds of dactus carota and also through the intervention of the milky juice of calotropic gigantea, etc., were used as abortifacients in the past.

These traditional and unscientific methods are still in practice for performing clandestine and illegal abortions among tribal and rural communities. Wooden and bamboo sticks with some herbal medicines popularly known as "abortion sticks" are prevalent for conducting illegal abortions by traditional birth attendants and quacks.

If we examine the Indian Society very closely, it becomes apparent that women is placed at a disadvantaged position with regard to the decision making in opting abortion. In all probabilities a women has to keep it as a secret. Irrespective of the reasonable grounds an abortion attracts an unsolicited and undue attention and give rise to strong rumours. It is also very difficult to

maintain secrecy mainly because of the risk involved. Perhaps medical advancement of the techniques of the abortion has rendered a great help precisely in avoiding the risk.

In pre-industrial societies a certain degree of equality between sexes is observed and sexual codes do not exhibit a male bias-unwanted pregnancies do not carry severe social sanctions and stigma especially among the unmarried girls. The society permitted abortion in order to avoid incompatibility between child rearing duties and economic activities.

15.3. ABORTION :

Definition :

The word abortion is derived from the Latin word "aborini" meaning to get detached from its proper site. Strictly speaking, the word "abortion" refers to the termination of pregnancy during the first trimester. If it occurs during the second trimester it is termed as "miscarriage". The one taking place during the last trimester is termed as "Premature Birth".

Abortion is forcible expulsion of embryo from the womb before it can live on its own. Theoretically in medical usage, abortion is defined as termination of pregnancy before the foetus becomes viable (capable of living independently).

Abortion may occur spontaneously from the natural causes or may be artificially induced.

Types of Abortion :

Abortions are of two types :

- (1) Natural abortion
- (2) Artificial abortion

(1) Natural Abortion :

Natural abortion most commonly occurs in the first trimester and may result from any one of the following causes. When the pregnant women suffers from

- (a) high fever;
- (b) viral diseases like small pox, measles, or influenza;
- (c) Syphilis;
- (d) sudden emotional disturbances like shock, high fever, fear, joy or sorrow
- (e) an accidental injury to the abdomen; or
- (f) when the foetus dies in uterus from any cause.

Natural Abortion can be divided into two types.

- (a) Spontaneous abortion; and
- (b) Accidental abortion

(2) Artificial Abortion :

Artificial Abortion is of two types.

- (a) Justifiable Abortion; and
- (b) Criminal Abortion.

(a) Justifiable Abortion :- When abortion is induced for justifiable or therapeutic reasons, it is called justifiable abortion. It is defined as one which is induced in (a) good faith (b) to save the life of the pregnant women or (c) when there is a substantial risk, that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Justifiable abortion can be induced only by a registered medical practitioner with required skill and experience.

(b) Criminal Abortion :- It is defined as the abortion which is induced with criminal intent. It refers to the unlawful and deliberate destruction and expulsion of the products of conception. Criminal abortion is generally induced between the second and third months of pregnancy because by then the woman is not only fairly certain that she is pregnant but also because her pregnancy goes undetected by others at this early stage. Criminal abortion may be induced by drugs or mechanical trauma.

Hazards of Abortion :

Abortions, whether spontaneous or induced, whether in the hands of skilled or unskilled person are almost always fraught with hazards, resulting in maternal morbidity and not infrequently mortality.

The common abortion hazards are hemorrhage, shock, sepsis, uterine perforation, severe anaemia and future sterility. Abortion is least dangerous below 8 weeks. Studies indicate that the risk of death is 7 times higher for women who wait until the second trimester to terminate their pregnancy. The Indian law, i.e., Medical Termination of Pregnancy Act, 1971 (MTPA), allows abortions only upto 20 weeks of pregnancy.

15.4. GROUNDS FOR TERMINATING PREGNANCY :

Section 312 of the Indian Penal Code permits miscarriage only for saving the life of the pregnant women. However, the MTP Act of 1971 has liberalised the grounds for terminating the pregnancy. They are categorised into five.

- (1) Medical Grounds
- (2) Eugenic Grounds
- (3) Humanitarian Grounds
- (4) Socio-Economic Considerations
- (5) Failure of Contraceptive devices.

(1) Medical Grounds :- The MTP Act provides termination of pregnancy where continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health.

(2) Eugenic Grounds :- The Act provides the termination where there is substantial risk of the child being born with serious handicaps due to physical or mental abnormalities.

(3) Humanitarian Grounds :- The Act provides the termination where the pregnancy is alleged by the pregnant woman to have been caused by rape. The problems of pregnancy caused by a rape may affect the mental health of the mother.

(4) Social-Economic Consideration :- A popular argument in favour of abortion is based on the absolute right of the woman to control use of her body. She has a right to an abortion on demand to terminate any pregnancy which she does not want.

The poor economic status of the family or the inability of the parents to provide the basic needs for a child is also given as a valid reason for abortion.

(5) Failure of Contraceptive Devices :-The Act provides the termination where any pregnancy occurs as a result of failure of any device or method used by any married women or her husband for the purpose of limiting the number of children.

15.5. ABORTION AND STATUS OF WOMEN :

The low status of women within and outside the family has close relationship with the knowledge of fertility control methods. For improving the status of women, for maintaining good health of a women and for the effective implementation of population control, it has been recognised that education will stimulate rational thinking and develop a cautious attitude towards child-bearing and child-rearing practices. More concerted efforts in educating women are needed. The education and employment of women tend to delay the marriages as well as enhance the decision-making power of women both inside and outside family. Therefore, the female employment should be encouraged.

15.6. SCOPE AND IMPORTANCE OF MEDICAL TERMINATION OF PREGNANCY ACT IN INDIA :

The Medical Termination of Pregnancy Act is neither restrictive nor liberal. It is only a permissive law lending itself to flexible interpretation.

Provisions under Indian Penal Code :

Sections 312 to 316 deal with the causing of miscarriage. These sections are given as follows :-

Section 312 :-Section 312 of the Indian Penal Code refers to abortion with the consent of the women. The section says that whoever voluntarily causes a miscarriage, if it is not done in good faith to save the life of the women shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both. If the women is in advanced stage of pregnancy or quick with child shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

(1) With Child :-With Child means pregnant where a women was causing herself to miscarry on the ground that she had only been pregnant for one month. There was nothing which could be called foetus or child.

Miscarriage :-Miscarriage is the premature expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed.

Quick with Child :-Quickening is the name applied to peculiar sensations experienced by the mother, normally after the fourth or fifth month of pregnancy.

Section 313 :-Section 313 deals with abortion without the consent of the women. Whoever commits the offences defined in the section without the consent of the women, whether the women is quick with the child or not, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Section 314 :-This section deals with the death caused by the act done with intent to cause

miscarriage. Whoever, with intent to cause the miscarriage of a women with child and which causes the death of such women shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and if the act is done without the consent of women shall be punishable either with imprisonment for life or with the punishable as above mentioned.

Section 315 :-It deals with the act done, with intent to prevent child being born alive or to cause it to die after birth.

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive or causes it to die after its birth, shall if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment or either description for a term which may extend to ten years or with fine or with both.

Section 316 :-It deals with causing death of quick unborn child by act amounting to culpable homicide. Whoever does any act under such circumstances and does by such act cause the death of a quick unborn child shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Definitions :

Guardian :-If a women has two guardians i.e., one for her person and the other for her property, the consent of the guardian of her person is necessary and not that of the guardian of her property.

Lunatic :-Lunatic is a person of unsound mind. The consent given by a lunatic is not legally valid. The consent of the guardian of the person of the lunatic is necessary.

Minor :-According to the Indian Majority Act, 1875, Minor means a person whose age is below 18 years.

Registered Medical Practitioner :-The registered medical practitioner is a person who can perform the termination of pregnancy, must have experience or training in gynaecology and obstetrics.

Person or Persons who can perform Abortion :-The Act authorizes a Registered Medical Practitioner (RMP) having experience in gynaecology and obstetrics to terminate the pregnancy of a women on the above said grounds, when the length of pregnancy does not exceed twelve weeks. If it is more than twelve weeks the opinion of two registered medical practitioners is required to terminate the pregnancy. However, these can be relaxed in case of termination of pregnancy where the registered medical practitioner forms an opinion in good faith that the termination of such pregnancy is immediately necessary for saving the life of the pregnant women.

The Place where Abortions can be Performed :-Section 4 of the MTP Act prescribes place where abortions can be performed. They are allowed only in Government hospitals or places approved by the Government. Abortions can be performed in clinics or hospitals with minimum necessary equipment. Only a doctor is allowed to do the emergency operation to save the life of a women.

Besides, if the women is below 18 years or a lunatic, her guardian's written consent is necessary. In other cases the pregnant women's consent is essential.

Women can now freely go to the family planning clinics, if the length of the pregnancy does not exceed 20 weeks. In case the pregnancy does not exceed 12 weeks a registered medical practitioner can form a view about the mental health of the women and terminate it. However, if the pregnancy exceeds 12 weeks the opinion of two registered medical practitioners would be necessary for terminating the pregnancy.

Conclusion :-Abortion is not purely a medical affair. It is a complex problem with social, psychological, moral and medical implications. For improving the status of women, for maintaining good health of a women and for the effective implementation of population control, it has been recognised that education will stimulate rational thinking and develop a cautious attitude towards child-bearing and child-rearing practices. More and more efforts in educating women are needed. Every women has a right to an abortion on demand to terminate any pregnancy which she does not want.

From the present study it has been made clear that the abortions are made for the purpose of saving the life of a women. This Act has immensely benefited the women.

15.7. SUMMARY :

Abortion was considered a sin in Ancient India. Most of the religious condemned it. Till 1971 the IPC considered miscarriage a crime except in permitted conditions. In 1971 Medical Termination of Pregnancy Act supplemented provisions in IPC regarding abortion.

The Abortions are two types-natural and artificial. While natural abortions are either spontaneous or accidental, artificial abortions are either justifiable or criminal. Abortions are justifiable for therapeutic reasons. Unlawful and deliberate destruction and expulsion of the product of conception is criminal offence. Abortions are fraught with hazards like morbidity or mortality, haemorrhage, shock, sepsis and sterility etc. Pregnancy can be terminated on medical, eugenic, humanitarian, socio economic considerations or on failure of contraceptive devices.

If abortion is not done in good faith to save the life of the women, it shall be punished with imprisonment for three years or with fine or with both. If the women is in advanced stage of pregnancy, it shall be punished with seven years imprisonment and fine. Section 313 punishes abortion without her consent. If death is caused during abortion the punishment will ten year imprisonment, by Section 314, ten year imprisonment is prescribed for causing death of child who is born caused to born alive.

The Act helped women to save their lives by permitted abortions.

15.8. GLOSSARY :

Morbidity	=	State of illness
Mortality	=	risk of dying. It is an important component of population growth and change.
Contraception	=	It is a deliberate birth control method. It can be a family planning device, drug, substance or technique employed to delay or prevent births.
Haemorrhage	=	Bleeding Heavily

Doctus Carota = A kind of Medicinal Herd.

Calotropic Gigantea = A kind of Medicinal Herb

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2. Singh B.P. 1991 Women, Birth Control and Law, Deep and Deep
Publications, New Delhi.
3. Christopher Tietze 1983 Induced Abortion - A World Review (5th edition).
The Population Council, New York.
4. Hunting P. Ford 1981 The Medical and Emotional Consequences of
Teenage Pregnancy, De Brook Advisory Centres,
London.

15.11. MODEL EXAMINATION QUESTIONS :

I. Answer ther following questions in 30 lines each.

1. Define Abortion and discuss the types and hazards of abotions.
2. What are the grounds for terminating Pregnancy? When can the abortions to done
legally? Where abortions can be performed?
3. Discuss the scope and importance of MTP Act, 1971?
4. Discuss the provisions for abortion under Indian Penal Code?
5. Examine the position of abortion in primitive societies?

II. Answer the following questions in 15 lines each.

- (a) Miscarriage.
 - (b) Section 312 of Indian Penal Code.
 - (c) Section 313 of Indian Penal Code
 - (d) Quick with Child.
 - (e) Criminal Abortion.
 - (f) Justifiable Abortion.
11. MTP and status of Women?

BRAOU

UNIT - 16 : TRANSPLANTATION OF HUMAN ORGANS ACT

Contents :

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16.0. OBJECTIVES :

After going through this unit, you will be able to

- * Understand the evolution of medical science in transplanting the human organs to cure the diseases and provide comfort to ailing persons, and its impact on the social values.
- * Commercial transactions and unethical practices in dealing with human organs and need to prevent it, and
- * The provisions of A.P. Transplantation of Human Organs Act, 1995.

16.1. INTRODUCTION :

The research and studious efforts of medical scientists resulted in several new inventions in resolving the diseases health problems of humanity and providing comfort for the persons, suffering from various ailments. Transplantation of organs in the human body is one of the boons science gave to the humanity. The process of transplantation achieved spectacular success around the world whereby the scope for extending the life span of human beings is largely

expanded. But, at the same time, it was commercialised by the money mined traders. Illegal trading in human organs apparently for therapeutic purposes gained national and international dimensions. The new life saving technique became a way for selling the human organs. Soon, the Government realised the need for regularising the transplantation of human organs. Rampant trade in kidneys was unethical and exploitative of the poor. The poor and economically distressed sections found kidneys as the way of making quick money by selling them. Lack of resources and information among the poor who were ready to sell their kidneys took them into the trap of brokers, who made huge profits while original owners of kidneys got meagre price.

A slum area in Chennai, Vil vakkam acquired the name of "Kidney Vakkam" as 90 per cent of its residents sold out their kidneys for a throw away price ranging from Rs. 30,000 to Rs. 80,000, while the brokers made huge profits. According to a Report published in Eenadu, 18th January, 1998, p. 27 (Sunday), India is exporting kidneys to Germany, Japan, Turkey, Saudi Arabia, Syria, Greece, Venezuela etc., and a survey revealed that atleast two thousand persons in India are selling out their organs per year; and the turnover of human organ trade is touching Rs. 40 crores. Unfortunately, the value of Indian kidney is damn cheap compared to those of other countries.

16.2. OBJECTIVES OF THE ACT :

Indian Parliament passed "The Transplantation of Human Organs Act, 1994 with the initiation of the Legislatures of the States of Goa, Himachal Pradesh, and Maharashtra in pursuance of Clause (1) of Article 252 of the Constitution. It came into existence from 15th May 1994 by repealing the two existing Acts, namely the Ear Drums and ear ones (Authority for use for therapeutic purposes) Act, 1982, and to Eyes (Authority for use for Therapeutic purposes) Act, 1982. Andhra Pradesh passed a separate Act entitled Andhra Pradesh Transplantation of Human Organs Act, 1995, mostly based on the lines of the Central Act. Before becoming an enactment, it was witnessed promulgation of two successive ordinances.

According to preamble of the Act, the objective behind the Act is three-fold-to provide

1. for the regulation of removal, storage, and transplantation of Human Organs for therapeutic purposes;
2. for the prevention of commercial dealings in human organs; and
3. for matters connected therewith or incidental thereto.

Human Organ means any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body. (Sec. 2(i)).

Transplantation means the grafting of any human organ from any living person or deceased person to some other living person for therapeutic purposes. (Sec. 2(p)).

"Therapeutic Purposes" means systematic treatment of any disease or the measures to improve health according to any particular method or modality.

16.3. TRANSPLANTABLE HUMAN ORGANS :

There are several human organs that can be transplanted in place of incurable deceased part of other persons. Cornea (eye) can be grafted to regenerate the sight. Ear drum, Ear bones, Heart, Lungs, Liver, Kidneys, Pancreas, Pericardium (layer around the heart to be grafted after cardiac

surgery) blood vessels, the skin, and bones from different parts can be transplanted. According to a report the prevailing prices of the human organs is as follows :

Eye	Rs. 50,000
Heart	Rs. 1,00,000
Pericardium	Rs. 25,000
Kidney	Rs. 60,000
Pancreas	Rs. 30,000
Liver	Rs. 40,000

Science provided a scope for transplanting the hands and limbs from dead person to a needy handicapped by the micro vascular replantation technique. Ears, Palms, Fingers, Ankles also can be replanted. Except brain transplantation almost all parts of human body can be transplanted.

16.4. CADAVAR TRANSPLANTATION :

A safe and advisable process of securing the human organs in cadavar transplantation. In case of a brain-death, several human organs can be removed from the dead body within forty eight hours after the death. Generally people dying of brain injury in an accident will be of much help in providing a crop of human organs. Patients slipping into coma, and brain dead persons are the sources of cadavar transplantations. The only difficulty will be the procurement of the consent of near relatives of such brain dead persons. The scientific awareness of utility of the several organs for number of living persons if cadavar type of transplantation is permitted, should be created and the relatives should be convinced about it. Vigorous campaign on the lines of campaign for eye donations should be taken up for "cadavar" donations. Another difficulty would be the medical testing of the health of such organs belonging to a dead body within 48 hours after death.

Brain stem death means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified by the concerned authority. (Sec. 2(d)).

Cornea, Heart, Lungs, Kidneys, Liver, Pancreas, Blood Vessels, Bones and Several other parts can be removed under cadavar transplantation technique. This is one of the best methods to prevent commercial dealings in human organs. But it requires lot of education about reason, need and helping nature to prepare persons to pursuit donation of organs.

16.5. SOURCES OF HUMAN ORGANS :

16.5.1. Donations by Persons :

Human organs cannot be removed by any Hospital or Registered Medical Practitioner, unless such removal is authorised by the donor as per the methods and conditions prescribed by this Act. Section 3 of the Act provides that any donor may authorise the removal of any human organ of his body for therapeutic purposes. At that time of authorisation, one must be in full consciousness, and he must have been explained about the consequences of such removal. This section also imposes a duty on the doctor to remove it only in the presence of the spouse of the donor, and if the spouse is not living, the presence of daughter or son, or sister or brother or mother or father.

If the donor authorised in writing in the presence of two or more witnesses, spouse, or other relatives (as explained in the above order), before his death, the removal of the human organ can be done by the authority of the person, having lawful possession of the dead body of the donor, unless he has any reason to believe that the donor had subsequently revoked the authority. (Sec. 3 (2))

16.5.2. Brain-Stem-Dead Bodies :

In the absence of such authority, a person having possession of dead body of donor may also authorise the removal (Sec. 30). Sec. 3(4) permits only a registered Medical Practitioner to remove the organs. And before removing he must satisfy that the life is extinct or that his brain-stem death is certified. In case brain stem death occurred for a person less than 18 years of age, any of parents may authorise removal.

Section 4 imposes restrictions on removal of organs when (i) there is a legal need to perform an inquest on the dead body. A person, to whom the possession of dead body is given only for cremation, cannot authorise the removal. (Sec. 4(2)).

16.5.3. Unclaimed Bodies :

In case a dead body is lying in hospital or prison and not claimed by any of near relatives within 48 hours after the death, the management or any person authorised by management of prison or hospital can authorise removal of organ (Sec. 5). But if management has reason to believe that any near relative is likely to claim, such removal cannot be authorised. (Sec. 5(2)).

Section 6 deals with removal of organs from the bodies sent for post mortem examination. If a body is sent for post mortem examination for (i) medico legal purposes by reason of the death caused by accident or other unnatural cause; or (ii) for pathological purposes, the competent authority can authorise removal of human organs.

This Act locates three sources of human organs;

1. By donations either by the person, or by those who have the custody of dead body;
2. From brain-stem dead bodies;
3. From unclaimed bodies and bodies sent for post mortem.

As the Act imposes a 'ban' on dealings and commercial transfer of human organs, there is a need for encouraging donations of human organs from the persons, who can authorise removal of organs, and from those who have possession of dead bodies.

16.6. RESTRICTIONS ON TRANSFER OF ORGANS :

Section 9 permits transplantation of human organs removed from the body of donor before the death, into the body of recipient only when the donor is near relative of the recipient.

16.6.1. Who are near relatives :

Section 2(i) explained who are near relatives : "Near relative" means spouse, son, daughter, father, mother, brother or sister.

16.6.2. Unrelated Donors :

If a donor authorises removal of his organ for transplanting into the body of a person who is not

a near relative, out of affection or attachment towards the recipient or for any other special reason, such human organ shall not be removed and transplanted without the prior approval of authorisation Committee. (Sec. 9(3)).

16.6.3. Regulation of Hospitals :

Chapter III of the Act provides for regulation of hospitals conducting the removal, storage or transplantation of human organs. Sec. 10 says the hospital or the medical practitioner should be necessarily registered under the Act to conduct such activities. Sec. 10 (c) repeats the restriction that human organs shall be removed only for therapeutic purposes. However, section 10(2) provides that the eyes or the ears may be removed at any place from the dead body of a donor for therapeutic purposes. Here 'ear' includes ear drums and ear bones. Section 11 imposes a prohibition on authorisation to remove any human organ for any purpose other than therapeutic purpose. According to Section 12, it is the duty of the doctor to explain possible effects, complications and hazards connected with such activity.

16.7. APPROPRIATE AUTHORITY :

Chapter IV provides for creation of appropriate authority for granting registration, renewing it, suspending or cancelling it, to enforce standards, to investigate complaints and to inspect hospitals periodically. Section 13(1) says that the government shall appoint by notification one or more officers as appropriate authorities.

Every hospital has to apply for registration within 3 months from commencement of Act, if not, it shall cease to engage in any such activity (Sec. 14). The appropriate authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act, grant the certificate of Registration. (Sec. 15(1)).

Section 16 empowers the appropriate authority to give show cause notice to any hospital on complaint, and to suspend the registration after giving a reasonable opportunity of being heard to the hospital. It can also suspend the registration without such notice, if it is necessary and expedient so to do in the public interest, for reasons to be recorded in writing.

Any person aggrieved by the decision of appropriate authority may prefer an appeal to the government within 30 days from the date of receipt of the order.

16.8. PUNISHMENTS :

Any person who renders services to or at any hospital and who for purposes of transplanation, conducts, associates with or helps in any manner in the removal of human organs without authority shall be punished with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees. (Sec. 18(1)).

If a doctor is convicted under Sec. 18(1), his name shall be reported to the state medical council for taking necessary action, including removal of his name from register of the council for 2 years for first offence and permanently for the subsequent offence.

If the payment is involved in transplantation of human organs, any concerned person shall be punished with a period not less the 2 years of imprisonment to seven years and a fine not less then ten thousand rupees.

Section 19 provides for punishing the persons involved in commercial dealings in transplantation of human organs, or indulges in publication and distribution of advertisement inviting supply

of human organs. A provision under this Section says that the court may, for any adequate and special reason to be mentioned in the judgement, impose a sentence of imprisonment less than two years and fine less than Rs. 10,000/-.

For any contravention of other provisions of this Act or any rule made, shall be punishable with imprisonment for a term which may extend to 3 years or with fine which may extend to five thousand rupees (Sec. 20.).

If the offence is committed by a company or any person incharge, company and such persons shall be deemed to be guilty. A person, who is charged with above offence can be exempt from liability if the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (Sec. 21).

The Court cannot take cognizance of an offence under this Act except on a complaint made by the appropriate authority or by a person who gave 30 days notice to appropriate authority of the alleged offence. A metropolitan magistrate or a Judicial magistrate of the first class shall try the offence punishable under the Act. (Sec. 22).

Rules made under this Act, (Andhra Pradesh Transplantation of Human Organs Rules, 1995) prescribe duties to medical practitioner before removing human organs and tests to be conducted. (R. 4).

Rule 5 prescribes that current and accepted scientific methods should be adopted to preserve the removed organs to ensure viability for the purpose of transplantation. Rule 9 prescribed the requirements of hospital seeking registration under the Act. It contained details of equipment and operation room facilities required for transplantation.

16.9 CRITICAL ANALYSIS OF THE ACT :

Buying and selling of human organs is undoubtedly unethical; and it will result in exploitation of poor. A mere outlawing the commerce in human organs is not enough. Prescribing punishments and penalties for dealers in this transaction is either causing a serious shortage of much needed organs like kidneys or clandestine trade in human organs. Even after the Central Act is passed in 1994, there was an open market of kidneys in Chennai (A Report by Frontline, Dec. 26, 1997; p. 64). Sellers of kidneys were represented as donors out of affection, and commercial transaction was described to authorisation committee as 'altruistic' - non-commercial. Two persons convinced authorisation committee in Tamil Nadu as 'near relatives' of buyers with dress, tilak (mark on forehead), and staged photograph. Scores of such poverty driven sales of kidneys have taken place in Karnataka and Tamil Nadu, by misrepresentation to authorisation committee. In 1995 Police cracked down on an organised kidney trade of alarming proportions (Frontline, March 10 and July 28, 1995). After this transplantation of Human Organs 1994 Act was adopted by several states in 1995. A doctor broker nexus profited from the sale of kidneys by poor Indian donors to rich Indians and, to a shocking extent, foreign patients with end stage renal disease.

The law established an institutional structure to authorise and regulate human organ transplants. It recognised, for the first time, the concept of brain stem death, opening the way for a programme or organ transplants from cadavers. While permitting transplantations of organs donated by 'near relatives', who are mother, father, brother, sister, son or daughter or spouse, the Central Act 1994, allowed donations from a time donor who is not a near relative but is willing to donate his or her organ to the recipient "by reason of affection or attachment towards the

recipient or for any other special reasons" provided that the removal and transplant of the organ has the prior approval of the Authorisation Committee established under the Act (Sec. 9(3)). The A.P. transplantation of Human Organs Act, 1995 contain similar provision under Sec. 9(3). Through this provision any paid-donor can escape the liability under these laws by misrepresenting about affection or attachment or any other special reason. It is the biggest leak available in the law. Since this Act came into force, this clause provided a cover for hundreds of illegal commercial kidney transfers.

Dr. M.K. Mani, Chief Nephrologist at Apollo Hospitals, Chennai, in his article "The Law is an Ass" in the National Medical Journal of India, September-October issue, 1997, wrote "The Stalwarts of the unrelated live donor programme continue to do as many transplants as they did before the Legislative Assembly adopted the Act. What is more, they do them with the seal of approval from the authorisation committee and are therefore a very satisfied lot. The law, which was meant to prohibit commercial dealings in human organs, now provides protection for those very commercial dealings".

Though the Act contains several other sensible regulations like necessary registration for hospitals prescribing standards, such weak provisions defeat the very purpose of law. There is a need to remove such a provision of "affection and attachment or special reason" for sale of organs under the cover of donations from unrelated donors, and to encourage cadaveric donations, instead.

So far no conviction was reported or complaint is made under this Law, which shows the apathy of administration towards this serious problem.

16.10. CADEVERIC DONATIONS : THE SOLUTION :

Whether law is defective or effective, real problem is the shortage of organs for transplantation in several thousands of diseased persons. The gap between the demand for and the availability of transplantable organs is always widening. According to a research project nearly 15,000 patients were waiting for renal transplants, 938 for hearts, and 344 for livers in 1992, in UK. (B. New, M. Solomon, R. Dingwall and S. Mcttale 'A Question of Give and Take', Research Project on transplantation of human organs, London : King's Fund Institute, 1994).

When cadaveric donations are not even known in our country, the western countries were facing procedural complications and medico legal problems in harvesting the organs from dead bodies. Around 16 dead patients who were medically suitable as organ donors were unused because of objections raised by Coroner (a public official who inquires into cause of person's death) in UK. (A. Bodenham, J.C., Berridge and G.R. Park "Brain-Stem Death and Organ Donation". British Medical Journal, 299 (1989). Such problems are serious in USA also (C.L. Jaymes and J.W. Spinger. 'Decreasing the organ Donor shortage by increase communication between Coroner, Medical Examiners and Organ Procurement Organisations', Amer. J., Forens, Med. Path. 15 (1994), 156). In western countries, there are problems of medical care of potential donors, reluctance on the part of medical care of potential donors, reluctance on the part of medical staff and on the part of relatives of recipients. (R.E. Wakeford and R. Stepney 'Obstacles to Organ Donation' Birt. J. Surg. 76 (1989), 435 and W.B. Ross 'Increasing Organ Donation - A review, Scott, Med. J. 34 91989) 451).

There should be transplant coordinators responsible for liaison at regional and hospital levels. Such coordinators were working closely with the United Kingdom Transplant Support Service,

and able to contact suitable recipient teams rapidly - shortening the time between death and procurement and at the same time; increasing the number of organs harvesting from a single donor. They also form major link between the intensive care unit, the surgical teams involved and the relatives. (D. Gentleman, J. Easton and B. Jennet - 'Brain Death and Organ Donation in a Neuro-Surgical Unit : Audit of Recent Practice'. Brit. Med. J. 301 (1990), 1203).

At the same time sources of organs must be pooled-in in an organised manner. Establishing a wider source of organs, including those who die in the casualty department or in the medical wards as a result of cerebro-vascular accidents.

The less controversial of these procedures involves the use of 'non-heart beating or asystolic' donors. (T.J.M. Ruess, J.P.A.M. Vroeman and G. Koostra, 'Non-heart beating Donors' : A successful contribution to organ procurement', Transplant Proc. 18 (1986) 408).

As there is possibility of nobody having a right to anybody else's organs, there cannot be any law making it possible to harvest organs from dead persons, without the written authority given by the person before death, or by his near relatives. Thus there is a need to utilise three main routes to improvement in the supply of cadaver organs - they are education, introduction of incentives, or greater use of law as it stands. The news and entertainment media should be extensively used for propagating the need of cadaveric donations of organs. One route to the public conscience could be through the general practitioner's surgery with posters encouraging patients to register their agreement to donate in their files. This proposal has already attracted support from general practitioners in UK. (Vautrey; 'Increasing the number of Organ Donations'. Brit. Med. J. 308 (1994), 1512) Patients registering with medical practitioner will be able to send their donor wishes to the National Health Service Organ Donor Register via the Local Family Health Service Authorities. Such a system of Registration should be evolved by Medical and Health-Departments in our country also.

Even if commercialism is to be banned, there is a room for an alternative approach. Instead of inducement of money, there should be an incentive like having a hospital bed or ward named after the deceased, (J.S. Pliskin, 'Cadaveric Kidneys for Transplantation " Is there a need for more? Journal of Forensic Science, UK 21, (1976), 83) preferred status to the consentor in case of medical need in future, payment of funeral expenses, payment to a charity and assistance with life insurance policy. (P. Kittur, M.M. Hogan, V.K. Thukral, et al., 'Incentives for Organ Donation?' Lancet, 338 (1991), 1441).

Live Donations :-The supply of organs could be significantly increased by the free use of living donors. At present live donation is limited to that of kidneys or portions of pancreas, but the field is rapidly growing to include lobes of the liver (G.Mc. Bride, 'Living Liver Donor', Brit. Med. J., 299 (1989), 1417) and of the lung (P.A. Singer, M. Siegber, P.F. Whittington et al., 'Ethics of Liver Transplantation with Living Donors', New English Journal of Medicine, 321 (1989) 620) since liver tissue regenerates quite readily, as segments of liver could be regarded as tissue similar to be bone marrow. (L.R. Shaw, J.D. Miller, A.S. Slutsky et al., 'Transplantation with Live Donors', Lancet, 338 (1991), 678).

16.11. SUMMARY :

Transplantation of human organs is one of the new methods of curing some diseases and providing comfort to the diseased. It is one of the boons the science gave to the humanity. It achieved spectacular success around the world, whereby the scope for extending the life span

of human beings is largely expanded. But it was commercialised by the money-minded traders exploiting the poor donors of organs. The new life saving technique became a way for selling and human organs. The Government realised the danger after the organised illegal trade in Kidneys was unearthed in Bangalore, Mumbai and Chennai, and enacted 'The transplantation of Human Organs Act, 1994'.

16.12. GLOSSARY :

Transplantation	=	Grafting of human organ from any living person or diseased person to some other living person for treatment purposes.
Therapeutic purpose	=	Systematic treatment of any disease.
Cadaver Transplantation	=	Process of securing the human organs from brain-stem dead bodies.
Brain-Stem-Death	=	The stage at which all functions of the brain stem have permanently ceased.
Human Organs	=	Any part of human body with structural arrangement of tissue, eg., Kidneys, Eyes, Heart, Pericordium, Pancreas, Liver etc.,

16.13. RECOMMENDED BOOKS :

1. A.P. Transplantation of Human Organs - Dr. N. Maheswara Swamy.
2. A. Bodenham, J.C., Berridge and G.R. Park? "Brain Stem Death and Organ Donation", British Medical Journal, 299 (1989).
3. C.L. Jaynes and J.W. Springes : 'Decreasing the Organ Donor shortage by Increasing Communication between Coroner Medical Examiners and Organ Procurement Organisations'. American Journal of Forensic Medicine, 15 (1994).

16.14. MODEL EXAMINATION QUESTIONS :

I, Answer the following questions in 30 lines each .

1. Why should there be a prohibition on sale of human organs?
2. Critically analyse the enforcement of the Act in preventing the illegal trade in organs?
3. What is the solution for the problem of shortage of human organs for therapeutic purposes?

BRAOU

UNIT - 17 : COMMON CIVIL CODE

Contents :

- 17.0. Objectives
- 17.1. Introduction
- 17.2. Common Civil Code
 - 17.2.1. Inheritance
 - 17.2.2. Marriage Laws
 - 17.2.3. Maintenance
- 17.3. Summary
- 17.6. Glossary
- 17.7. References
- 17.8. Recommended Books
- 17.5. Model Examination Questions

17.0. OBJECTIVES :

After going through this unit, you will be able to

- * Understand the need for uniform civil code i.e., common law regarding marriage, inheritance and maintenance.
- * Analyse the difficulties involved in enforcing the similar code to people of different religions & cultures.

17.1. INTRODUCTION :

In India, law relating to marriage and inheritance is governed by personal law i.e., based on religious scriptures. In a secular state like ours, application of different laws gives rise to sociological and legal problems. In this lesson we are going to discuss the need for a common civil code and the difficulties to introduce such a code in our country.

17.2. COMMON CIVIL CODE :

The framers of Indian Constitution resolved to construct a secular state and to provide an equal treatment and status to all its citizens. India is a country with diverse religions and cultures. To achieve the ideals of the Constitution, all people should be given an equal treatment before law, and a uniform Civil Code should govern all people alike. Art. 44 of the Constitution States that "The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India".

People of India are governed by their religious customs and practices, in the matter of marriage and inheritance. As a result, women of all religions take an inferior place in the society.

India is a signatory to the International Covenant on Civil and Political Rights which

stipulates that equality of status is to be enjoyed by all human beings without any discrimination based on gender. The covenant also directs the States to abolish customs, ancient laws and practices which abridge the primary concept of equality between men and women.

Most of religion in the country like, Hindu, Sikh and Buddhist and Parsi are governed by laws which reflect secular ideas. Their ancient personal law was amended to make it secularised. But muslims are still governed by laws of theological origins where of some of the provisions clearly oppose the some of the International Conventions. While other communities have succeeded in secularising their personal law to a certain extent, Muslims are still governed by the unchanged religious law.

In all these personal laws, the gender equality is not there. Some of the glaring examples are given below :

17.2.1. Inheritance :

Muslim Women can inherit property of father and husband. But their share is limited to half of what their male counterparts inherit. As far as ancestral property is concerned Hindu Women stand at a disadvantageous position (except in the States of Andhra Pradesh, Maharashtra and Karnataka). There is no uniform law for all the citizens in the matter of inheritance. The right to equality between genders is also not recognised.

17.2.2. Marriage Laws :

(a) **Marriageable Age** :-Hindus, Christians and other adopted 18 years for women and 21 years for men as marriageable age. But the Muslim personal law permits contracting of marriage when the spouses attain puberty. In the absence of evidence, puberty is presumed to have been attained at the age of 15 years.

(b) **Polygamy** :-Polygamy is opposed to public policy. In our country, the muslim male is free to have as many as four wives at a time. Where a Monogamy is the rule for muslim Women. The muslim women have to bear with this ancient law.

In our country all other religious communities have abolished polygamy. Bigamy is punishable under Sec. 494 of the IPC.

(c) **Divorce** :-A muslim male is free to divorce his wife without assigning any reason, whereas a female has to assign a valid reason for divorcing her husband. There are no equal terms for men and women.

In christian community, a male can divorce his wife on the ground of adultery. A women can get divorce on the ground of adultery coupled with some other marital offence. However, this provision of law was struck down on basis of gender inequality.

In Hindu, Sikh, Jain, Parsi and Buddhist religions there are equal terms for both male and female as far as divorce law is concerned.

The difference in the law in personal matters gives rise to some complications in legal as well as sociological aspects.

In a recent case before the Supreme Court, a Hindu married man developed intimacy with another hindu female. Both of them converted into islam and got married without having the first marriage dissolved under law. (Sec. 17 of the Hindu Marriage Act, 1955 prohibits bigamy;

under Sec. 494 of the IPC, a person is liable to be punished for bigamy).

The question before the Court was whether the second marriage was valid. Strictly speaking, it may not be a void marriage, as the parties cease to be Hindus and Hindu Marriage Act does not apply to them. But then, the first marriage which was solemnized under the Hindu Marriage Act was not dissolved by the same Act. The Court held that mere conversion of Islam and marrying again would not dissolve the Hindu Marriage. The second marriage by a convert would be in violation of the Hindu Marriage Act, and also punishable under Sec. 494 of the IPC. The Court held that the second marriage was void.

While deciding this case, the Court emphasised the need for a uniform Civil Code, and to dissociate religion from social relations and personal laws. When one section of the community is allowed to adopt polygamy the other sections also would be tempted to adopt that practice, under the guise of religion.

17.2.3. Maintenance :

Under Sec. 125 of the Cr.P.C. a divorced wife continues to be the wife of that divorced husband for the purpose of maintenance. The Courts used to apply this provision to all communities till 1986. In the famous Shah Bano's² case, the Supreme Court granted maintenance to a Muslim divorced wife, under Sec. 125 Cr.P.C. The Muslim husband refused to pay maintenance, pleading that the Muslim Wife is entitled to maintenance only during the period of *iddat* and not beyond that period. They refused to accept the definition of 'wife' under Sec. 125 of the Cr.P.C. There was a big hue and cry and Parliament brought out the Muslim Women's (Protection of Rights on Divorce) Act, 1986, exempting all Muslim divorced women from the purview of Sec. 125 Cr.P.C.

While deciding this case also, the Supreme Court felt the need for a uniform Civil Code. Divorced Muslim Women do not have any independent means of livelihood and they have to depend either on near relatives or at the mercy of the Wakf Boards. In our Country, all women, to whichever religion they belong, are basically uneducated and economically dependent on male members. They are reluctant to remarry after divorce, because of personal and sociological reasons. They might have crossed the marriageable age at the time of divorce. Adherence to personal law has placed the Indian Muslim women at a disadvantageous position compared to women belonging to other religions. They are at a disadvantage visa-vis their male counterparts.

Our secular legal system cannot accommodate discrimination on the ground of religion. Matters like marriage and succession which are secular in character will not fall under the guarantee given under Article 25, and 26.

Art. 25 guarantees freedom to practice religion and to perform rituals subject to certain restrictions. All civilized societies agree on the issue that the practice of polygamy is injurious to public morals. Such practices and customs can be abolished by the State just as it prohibited the practice of *Sati*, human sacrifices and child marriages. Religion can be practiced and observed as long as it does not harm the individual and the society. Where the welfare of the society is affected, the religious practices should be given a go-bye.

The evolving of a uniform Civil Code is not an easy task. There are conceptual differences in Hindu Law, Muslim Law and other personal laws. For example, the law of inheritance of

Hindu and Muslims differs to a great extent.

Similarly, in the marriage laws, the prohibited degrees of relationship varies from religion to religion.

In our country, attachment to the religion is so high that it will not be given up easily. Religious sentiments will persist for a long time.

The beneficiaries of the religious laws and customs also oppose the idea of reforming the personal law and introducing a uniform Civil Code. But to comply with Constitutional mandate to introduce a uniform Civil Code, and to bring about equality among men and women, religion should be limited to be practiced only at a personal level. It should not be enforced by the State. Eventually, a single uniform Civil Code should prevail among all people.

In a secular country like ours, matters like marriage and inheritance should be separated from religion. People should be treated equally before law. This is possible only by introducing a uniform Civil Code for the entire country.

17.3. SUMMARY :

In all personal laws of this country, the gender equality is not there. While Hindu, Sikh, Buddhist and Parsis are governed by laws reflecting secular equalities, Muslim Law is still governed by laws of theological origins. However, there are inequalities in almost all personal laws. In inheritance, the female muslim takes half of what male counter parts take. Hindu women stand in a disadvantageous position except in a few states. A Muslim Girl can marry after 15 years while, the marriageable age in other religions is 18 years. Regarding divorce, a muslim male is free to divorce his wife without assigning any reason while the women has to assign a valid reason. The law relating to maintenance is also different for Muslim Women, who are exempted from the protective cover of Section 125 Cr.P.C.

It is difficult to evolve a common civil law as there are conceptual differences among various religions. People should emerge themselves beyond the limited considerations and religious sentiments to live equality.

17.4. GLOSSARY :

Inheritance	=	Right of successors to receive the property from ancestors.
Maintenance	=	An amount granted by the Court to be paid by husband for living of his wife & children.

17.5 REFERENCES :

1. Smt. Sarla Mudgal vs. Union of India, 1995 (2) (SCSN)ALD.
2. Shah Bano's case, AIR 1985 SC 945.

17.6. RECOMMENDED BOOKS :

1. Family Law by Prof. G.C.V. Subba Rao.
2. Family Law by Paras Diwan.

17.7. MODEL EXAMINATION QUESTIONS :

I. Answer the following question in 30 lines each.

1. Discuss the aspects for and against the introduction of a Common Civil Code?
2. Is the Common Civil Code a necessary measure for removing prejudice against women in the matters of inheritance, divorce and maintenance?

BRAOU

BRAOU

BLOCK - VI
WOMEN'S RIGHTS AND HUMAN
RIGHTS

BRAOU

UNIT - 18 : SURROGATE MOTHERHOOD

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18.0 OBJECTIVES :

After going through this unit, you will be able to

- ◆ Understand scientific advancement which gave rise to new situations like offering womb on rent for procreation of children for others
- ◆ To have a new look at the natural rights of women is needed in the wake of rapid strides

made in the human genetic and reproductive technologies. (iii) understand what is surrogate motherhood and its social ethical and legal implications.

18.1 INTRODUCTION :

Irrespective of gender differences, every person is having a natural right to their body. It forms part of Right to Life which was guaranteed by Article 21 of the Constitution. Procreation of children is part of this Right to Life. There are revolutionary developments in medical science with significant breakthroughs in reproductive technology. Any scientific advancement is to serve the mankind. Test tube babies, artificial insemination, in-vitro fertilization, sex-selection, surrogate motherhood are some of the new expressions reflecting the novel aspects of modern life posing a new challenge to the legal control of social behaviour. These new reproductive technologies have a far reaching impact on the ethical, moral standards of society, especially on the marital relations between the spouses. This revolutionary medical advancement tends to offer the woman a freedom of choice to have or not to have or to space out or to design her own child or a child for an infertile group. Amongst these medical advances the most controversial and debated issue has been the concept of " Surrogate Motherhood ".

Due to increased medication, sometimes unwanted, and wide spread chemical pollution of environment affecting the general strengths of a human being, infertility is increasing alarmingly, in modern society. Hitherto, adoption was the only method available for a childless couple, till the medical science found out insemination and in-vitro fertilization as the alternative process to have a child through non-coital reproductive technique. The other natural way is coital reproduction through another woman, which may not be acceptable to Pro-Ethical altruistic puritans.

18.2 MEANING OF SURROGACY :

Surrogacy is a practice whereby a woman carries a child for another with the intention that the child should be handed over after birth either for a fee or voluntarily. This carrying of a child may take different forms. A mother who cannot bear a child for herself may commission another woman to carry a child for her. The mother who asks another to carry the pregnancy for her is called " COMMISSIONING MOTHER", and the woman who agreed to bear the child in the womb is called the " CARRYING MOTHER". The commissioning mother may provide the egg, so she is called the " GENETIC MOTHER" also. The genetic father is the husband of the commissioning mother or an anonymous donor. The child's conception and birth involves several combinations of persons at different contexts. Surrogacy involves artificial insemination, where the carrying mother is the genetic mother inseminated with the semen to the infertile woman's husband. In case the egg and semen come from the commissioning couple through in-vitro fertilisation and the resultant embryo is transferred to and implanted in the carrying mother, it is the surrogacy involving artificial insemination. These are some of the possible combinations of persons who are relevant to the child's conception and birth. The advancement of science provided an alternative to reproduction through sexual intercourse, making surrogate motherhood a common form of non-coital reproduction (non sexual reproduction).

18.2.1 Surrogate Mother :

The "Surrogate mother" is the term generally used to describe gestating mother, who lets her womb out. According to Oxford Dictionary a surrogate is a substitute for a person in a specific

role or office. It has explained like this "A person acting the role of mother, a woman who bears a child on behalf of another woman, from her own egg fertilised by the other woman's partner. According to Marguarie Dictionary, a "surrogate" is a "substitute", a woman cannot be the surrogate mother of a child she bears.

It is a arrangement where a woman agrees to become pregnant and bear a child for another persons (Commissioning Couple) to whom custody of child will be transferred immediately after the birth. Surrogate motherhood is not a treatment for the historical problem of infertility, but it is a means for procuring a child genetically related to atleast one person of the childless couple.

18.2.2 Kinds of Surrogacy :

If the surrogacy involves payment of money, it is termed as "Commercial surrogacy", if not, it is called "Altruistic surrogacy". Altruistic surrogacy arrangement arises out of love or friendship involving only friends and relatives.

18.2.3 Reasons for surrogacy :

Woman who cannot retain the conceived foetus due to a history of spontaneous abortion may demand her partner to go for this scientific technique to fulfill the dream of having a child. Sometimes kidney diseases or multiple sclerosis may threaten the very life of pregnant woman. In the advanced mechanical and commercial world, it may not be unimaginable for a figure conscious woman desiring some other woman to bear a child for here husband. Career may also be cited a reason for encouraging the husband to go for surrogate arrangement.

18.2.4 Two methods of surrogacy :

In practice two methods of surrogate motherhood are employed :

1. One commissioning father donates a sperm which is introduced but insemination for in-vitro-fertilisation with oocytes of a woman, the surrogate mother. The insemination can be natural or artificial. The custody of child will be surrendered to the biological father, who donated the sperm. This is the common method of surrogate motherhood. This is called partial surrogacy, because the genetic origin is found in one of the commissioning parents. In the last 20 years in the United States over 1000 births using this method have been reported.

2. Second mother is also through invitro-fertilisation, but preceded by transplantation of embryo from a woman's ovum after it is fertilised in vitro, into uterus of the surrogate mother. The child will be given back to donor of ovum.

This procedure of utilising invitro-fertilisation (IVF) has been termed 'Full' surrogacy since the commissioning parents may have provided all the genetic material for the child. IVF surrogacy is comparatively rare. For example, the first recorded birth in Australia took place in 1988. Between 1989 and 1991 eleven requests for IVF surrogacy and in 1994 a failed attempt at such a procedure in Victoria was reported.

18.3 HISTORICAL BACKGROUND :

First surrogate motherhood was reported from Britain on 4th January 1985. For \$ 7475, Kim Cotton agreed to bear a child. She is a 28 year old married woman with two children. She was inseminated with the hiring husband's sperm for an American couple. Within hours of birth, the Social Service direction, Alan Gorst, the Council Authority in North London burough of Barnet,

said the council was responsible for the welfare of all babies born in the area and opined that any money transaction involving a child would be unlawful. (The Hindusthan Times, New Delhi, 6 Jan. 1985)

The report of 16 member Committee of Enquiry chaired by Dame Mary Warnock, appointed by the Health Department in UK in 1982 emphasised that sale of a child for money consideration is inherent in nearly all cases of surrogacy.

However, the committee recommended legal recognition of heterologous artificial insemination and setting up of statutory body to monitor infertility services and invitro-fertilisation.

18.4 MISNOMER OF SURROGACY :

A Canadian writer Suzanne Rozell Scorsonne (Suzane Rozell Scorsonne, "Surrogate Motherhood and its human costs", Electronic Journal of Law, Canada, Volume 1, No. 1 Article 2) says that the term "Surrogate" in this sort of case is actually a misnomer. A "surrogate" is a "delegate" or "proxy", whereas the one contracted woman is, infact, the genetic, biological mother of the child, and surrogate to no one. A newer form, gestational surrogacy, uses in vitro fertilisation to implant an embryo conceived from the ovum and sperm of the contracting couple in a woman who carries and nourishes a child who is not genetically related to her, surrendering the baby to the contracting (or commissioning) parents at birth.

According to Dr. Poornima Advani, consulting physical therapist and a Doctorate in Criminal Law " a procedure meant to provide the missing ingredient and yield succour to a female manner unable to carry a foetus to full terms, has been misused, ill-used, and commercialised, raising queer issues regarding the rights of a third party involved in the process.. Its misuse by the affluent who desire to have their genetic child coupled with the luxury of the wife not having to bear the pains of procreation have popularised the procedure more than it was intended for. (Dr. Poornima Advani, The Song of The Hired Mother : The Lyrics of Surrogacy ", Law and Medicine, 1997, Volume 3, p. 107)

"With woman coming forward to receive an embryo to surrender her entire instinct of motherly love, the most sublime and divine of emotions that human beings have ever known or shall ever fathom hereafter. Is this the Almighty had created mother's love for?" asked Dr. Advani.

Comercialisation of the surrogacy facility has allowed a free play for brokers, service agencies who advertise in the classified columns of newspapers. One such advertisements found in the Pioneer, which reads "wanted motherhood on loan. For a happy, educated purpose, those separated or unmarried but adult, may please contact... Married woman should have the consent of the husband. Adequate compensation. Baroda woman first preference". (The Pioneer, Delhi, 19th April 1995)

Another advertisement talked about very large compensation. It says "wanted surrogate mother to bear child for a young, rich, good looking Brahmin couple. Very large compensation. If required comfortable and secure future life assured..." (The Pioneer, Delhi, 5th August 1994)

Very soon we may find a column in classified ads "womb for sale" or "womb for lease". There may even "want" positive genetic features like good height, characteristic features, beautiful

teeth-line, and fair complexion.

18.4.1 Legal controls on surrogacy in different countries :

Australia imposed a ban on commercial surrogacy, whereas voluntary surrogacy is made acceptable. England's Warnock Committee allowed it with certain limitations. France banned surrogate mother as violating bodies of women and subverting adoption. Germany imposed a total ban on all forms of surrogacy.

Most of the states do not allow commercial surrogacy, but do allow voluntary surrogacy though contracts are not enforceable. In Minnesota it is criminal offence to enter into or arrange surrogacy contracts. Nevada approved surrogacy with conditions (Pre-insemination, court approved agreement contingent upon fertility status of both women and clearance through the State Welfare Division; also court maintains until the child is six months old) According to New Jersey Law, surrogacy contracts are not illegal but they are unenforceable.

American Bar Association recommended uniform treatment through-out U.S. According to ABA surrogacy can be accepted as an option for married couple with infertile wife, with a provision that upto 180 days of conception surrogate mother can cancel the contract; after 180 days the child belongs to the married couple, if the contract is not cancelled.

18.4.2. USA

Regulation of surrogate arrangements vary from state to state. Nevada amended its adoptive statutes in 1988, but failed to specifically address the issue of surrogacy contracts. However there is a reference in this amendments to "illegal surrogacy contracts". Louisiana passed legislation declaring surrogacy contracts null, void, and unenforceable. It does not provide penalties for violation. Indian passed a law in 1988 which declared all surrogacy agreements, written or oral, which provide compensation to be unenforceable. It does not criminalise them.

Kentucky also enacted a law making compensation for surrogates and surrogate brokers illegal and surrogate contracts unenforceable. However, if there is no written contract and no compensation involved, surrogate agreements are permissible. Penalties for violation of this Act came from the child selling statutes and include \$ 500 to \$ 2000 fines and six months imprisonment.

Michigan legislation (1988) provides 5 years of imprisonment and \$ 50000 fines for surrogate brokers. It is a crime to enter into or assist in the formation of surrogacy contract for compensation. Nebraska's law make surrogacy contracts null and void and unenforceable, if compensation is involved.

Couples in the west are vigorously adopting this alternative reproductive techniques. As it is most often practiced in the United States, the woman - the so called surrogate, contracts with a man to be inseminated with his sperm and to bear a child that she will turn over to him at birth. The surrogate is paid her expenses and a fee (usually around \$ 10000). Also, a medicating agency and/or lawyer gets fees ranging from \$ 10,000 to \$ 25, 000. As of 1990, there have been about 4000 such births in USA.

There are also gestational surrogacy arrangements in which the contracting woman has no genetic relationship to the child. The eggs and sperm of the contracting couple are brought together in a laboratory and the resulting embryo then implanted in the surrogate. As of 1990,

there were eighty such births.

18.6.3 U.K. :

The Surrogacy Arrangements Act, 1985 prohibits commercial agencies from engaging women to act as surrogate mothers. Breach of the prohibition is punishable with a fine of upto 2000 pounds or three months imprisonments. Surrogate mothers and commissioning parents are exempt from liability. Advertising surrogacy services is punishable with a similar maximum fine (Oxford Dictionary of Law` 3 Ed. pg. 391)

An order of the court made under section 30 of the Human Fertilization and Act 1990, which provides for a child to be treated in law as the child of the parties to a marriage if the child has been carried by a woman other than the wife as a result of human assisted reproduction. Application must be made within six months of the child's birth and the child's home must be with the husband and wife at the time of the application.

In United Kingdom, the Health Minister, Tessa Jowell announced on 12.6.1977 that laws to impose greater controls on surrogate motherhood will be considered by an independent inquiry to be set up by the Government, after a services of cases that high lighted the way legislation is failing to prevent commercialisation. There was public concern over the case of Karen Roche, who is understood to have received 12,000 pounds in expenses from a Dutch couple to have a baby for them. She later decided to have the child and keep it.

18.5 NIRMALA EPISODE :

Nirmala, a poor house-wife from Chandigarh raised a basic issue, by asking the court to permit her to bear a child for a child-less couple on consideration for a sum of money. Forced by poverty and illness of her husband, Nirmala (30 years old) asked the court to allow her to rent out her womb.

For the first time in the history of the country the law was faced with a peculiar situation when the woman pleaded before a Chandigarh court to declare her proposal to "rent out her womb" as legal and constitutional. She also demanded "legitimacy" for yet to be born child. Her husband, Chand Ram was bed-ridden for a couple of years after being incapacitated by a paralytic attack following about of a high fever. Faced with penury and no means to pay for the expensive medicines prescribed by doctors for her husband, Nirmala agreed to enter into a contract with a childless couple. "They approached me to bear his (a retired Air Force Officer) child and offered to pay Rs. 50,000/-, a decent place to live and sufficient food for any family" Nirmala said. (Report in The Hindu, dated June 10, 1997)

Nirmala, an illiterate, does not understand the artificial insemination or test-tube babies. But she is ready to do anything for the treatment of her husband, she says. When a police constable warned that here act would attract suppression of immoral trafficking Act, Nirmala contacted an Advocate and went to court seeking mandatory injunction and declaration os to-be-born child as legitimate offspring of the couple. She also wanted a declaration that Rs. 50,000/- she receives from the Air Force Officer couple for bearing their child, as her legitimate earning. Nirmala finds nothing wrong in her view it would be just a temporary job for nine months. She also said that she would suppress her natural motherly feelings for the new born.

The President of Arya Samaj, Hissar, Mr. Hari Singh saini, has supported Nirmala's claim. He quoted Rigveda to confirm that her request was not improper. However orthodox and religious personalities reacted strongly against her request. They termed it as immoral and improper.

Navjit Singh Brar, Counsel for Nirmala said "we are seeking legal status for surrogate mothers". According to a report published in "The week" (The week, dated June 22, 1997, p.33) an eminent family lawyer Anasuya Dutt of Mumbai strongly opposed the plea for a legislation on surrogate motherhood. She considers it as an individual problem and not an social issue at all "why legalise surrogacy? Why allow the state even into our wombs>" she said.

There is an opinion that legislation of surrogate births would lead to further exploitation of poor women and reduce motherhood to a commodity in the market. It may take even a distorted shape of legitimacy to the prostitution.

As the surrogacy involves consent of the husband of carrying mother, it cannot be an offence of Adultery as defined under Sec. 497 of IPC, a case, like that of Nirmala will not attract provisions of IPC. A single and isolated act of sexual contact with another person cannot be described as immoral trafficking or prostitution under section 2(f) of Immoral Traffic (Prevention) Act, 1956 and thus, will not fall under the punishable crimes of that Act.

As on today, under Indian Law, Nirmala must have not committed any offence or wrong by entering into an agreement for bearing child for others on payment of a sum as consideration.

If it is accepted that there is a need to regulate the possible demand from several women like Nirkala for a similar declarational due to different reasons, including poverty what type of controls can be imposed on surrogacy? Legislation on the subject is bound to be complicated. There are several problems like health hazards relating to pregnancy and medically assisted methods of conception such as invitro-fertilization whether such legislation permit surrogate conception through sexual intercourse, it will lead to several other questions like how many times a woman can participate in copulation, or how any times a woman can rent her womb etc.

The rights and duties of women and men in the roles of commissioning couple and carrying woman have to be redefined. The rights of child and the relations with two couple and other aspects also need to be legally explained.

When scientific methods of alternative child getting techniques are available, a total prohibition in use os such technology for helping a genuine childless couple to get a baby, is unthinkable, according to Dr. R. Anitha Ral (whose lecture was summerised in Research Notes, monthly bulletin from the Research Forum, Andhra University, Vol.3, No.6, dated Sept.26, 1997). It is also not practically possible to detect and compel surrogate parents from desisting to fulfill their task of bearing a child for commissioning couple. Thus all surrogacy contracts cannot be prohibited as criminally unlawful. In the absence of such a prohibition, a question arises as to its control. As the issue involves some personal basic rights, even the regulation may lead to complicated disputes. If commercial surrogacy is prohibited as suggested by some Jurists to avoid exploitation of intermediaries, it may further result in exploitation of "mothers" with their wombs. Payment of consideration amounts cannot also be prohibited totally. Another possible complication is the genuine demand of surrogate mother's relationship with the child, if she accepted it out of compassion and not for money.

18.6. BABY M CASE (1986) :

This highly published case involves a custody dispute between a father and a surrogate mother. The father William Stern had contracted with the mother, Mary Beth Whitehead, to bear a child through artificial insemination. The contract provided following terms.

Ms whitehead would assume the risks of pregnancy and child birth. She would submit to a psychiatric evaluation for which Mr. Stem would pay. Mr. Stem had right to name the child. That in the event of death of Mr. Stem's wife. Mrs whitehead would not abort the child. In addition she would undergo aminocentesis and if the child were found to have genetic or congenital abnormality it would be aborted if Mr Stem would assume legal responsibility for the child once it was born \$ 10000 and all medical expenses.

The mother did not agree to part with the baby after birth pleading that the baby had become part and parcel of her intrinsic system. The New Jersey Supreme Court held that the man who provided sperm was legal father, and the woman providing the egg was the legal mother. The legal battle for the custody of child between genetic father and surrogate mother resulted in handing over the child to genetic father, the surrogate being left with visitation rights. (M 217 N.J. Super 313, 512; re Baby M. 525 A 2 ed. 1128 (N.J. Super ch. 1987)

The lower court held that surrogacy contract was enforceable, and the sterns were given custody of Baby M. The whiteheads appealed, asking the court to determine "Surrogacy Contracts" unenforceable and void. The court determined the contract to be invalid and unenforceable because they are contrary to public policy as it determines custody before the birth of the child without considering the best interest of the child.

The court further held that the issue of custody is determined solely by the child's best interests, and it agreed with the lower court that it was in Melissa's best interests to remain with the sterns. However, Mrs. Whitehead, as baby M's legal and natural mother, is entitled to have her own interest in visitation considered.

Reviewing this judgement, Bonnie Steinbock in her article " Surrogate Motherhood as pre-natal adoption" says respect for individual freedom requires us to permit people to make choices which they may later regret" she quoted "abortion and adoption" as such choices. She preferred regulation to total prohibition of surrogacy as an alternative reproductive technique.

Dr. Poornima Advani equated surrogated motherhood with adultery. According to her, impregnation of a woman by a man whom she is not married to, makes it similar to adultery. This also complicates the issue of legitimacy of the child which depends on many factors like change of mind of one or both of the intended parents or even the surrogate, an intervening break in the marriage etc., said Dr. Advani. She also felt that surrogacy agreements violate the principles of human rights, unethical and contrary to public policy, besides violating the statutory requirements as babies are not goods. She recommended that the consent of the husband as a necessary factor to negate charges of adultery and adoption as a legal requirement to establish the status of the child with rights of inheritance.

18.7. SURROGATE MOTHERHOOD AND LEGAL IMPLICATIONS :

By offering money to women concerned for surrogacy may lead to a invasion of their private lives. It may, thus, result in exploitation of women in a new way. Another question whether renting out the womb is against public policy, if it permits transfer of money for the use of woman's organ, womb? The carrying mother may be in a position to demand for money in addition to the agreed amount or some other problems including the health may develop. In case of abortion, several other complications may also crop up. The amount of compensation to the various sufferings agony and clinical problems, may not be possible to be easily assessed,

and every payment could become a point of a dispute.

The carrying mother may develop affection towards the child born and may breach the agreement to retain the child, resulting in new questions of law. On the other side, the commissioning couple may reject the baby born out of carrying mother on any reason, including genetic defect, if any.

Above all the void regarding the relationship of carrying mother i.e., surrogate mother with the child. She may claim the custody rights or any other legal relationship with the child she is carrying or give birth to, the basic problem being that the sperm and ova are drawn from two different persons, as she is not the owner of the genetic material, her relationship cannot be easily described. Except the contractual relationship, the carrying mother has neither a role nor a right over the child according to the contract. But her physical motherhood and umbilical bond, if not genetic, with the child give new dimensions to the legal dispute, if any.

Surrogacy remains a complex problem either in the presence or absence of any express provisions of law.

Apart from the above, surrogacy may result in several complex socio-legal problems in the family of the surrogate mother. At times, her marital home may be broken, or it may remain a social stigma forever and may result in an identity crisis of the child. The commercial element of surrogacy on one hand and the genetic complexity of the relationship on the other hand are two issues which made "surrogacy" a unique puzzle of law.

18.8. A CONTRACTUAL ARRANGEMENT :

As it involves two couples for this kind of non-coital reproduction, there is a need for surrogate motherhood contracts. Whether a woman is having a right to enter into a contractual agreement to bear a child and receive money for the service? What is the public policy as to the enforcement of these contracts? Does it interfere with the autonomy of a woman. It involves definitely the interference with the person of the woman and so it is an interference with her personal right. The Right to Life is a comprehensive one. Does it include the Right to Procreate children? Whether these contracts of surrogate motherhood and their enforcement or prohibition is a violation of that right to procreate?

There are two schools of thought. One says that as the woman has a right to her person, it includes the right to procreate which facilitates the surrogate motherhood contracts too. Once she has a right to enter into a contract to procreate children for other childless couples, it should be enforceable. The second type of opinion is that it amounts to interference of a third person into a private partnership of the couple and changing the process of procreation. The private conjugal life of a validly married couple cannot be interfered with, as a matter of law and that can be viewed as a violation of privacy of the couple and of the woman too. Another important problem is that as a consequence of this surrogate motherhood contract, the relationship between the mother and the child gets distorted, leading to several social problems of identity. From moral and religious point of view, the very concept of conception and purpose of marriage, which is regarded as the procreation of children for continuing the line of the clan, gets basically changed with this unprecedented scientific invention of new styles of reproduction.

A comparison of the Jewish, American, English and Australian Laws present a point that surrogate motherhood dramatically alters social norms, and creates many different view points. No matter

which legal body is dealing with this issue, they all face same moral and ethical dilemma : that a child born out of surrogacy has a bond with both the genetic mother and the surrogate mother. The bond between these two women and this child is immutable and cannot be changed by law.

18.9. SURROGACY : SOCIAL COMPLICATIONS :

Besides raising all contradictory legal issues, the surrogacy raises several social complications. It leaves the child in identity crisis, which is totally a different dimension. First the child's motherhood is doubtful, and secondly the doubts about identity continue beyond the mother also. Even under the natural law motherhood is conclusive proof and fatherhood is a presumption. In surrogacy, the law is incapable of deciding the basic question i.e., which of two women is real and legal mother. Child's life, future and social existence would become a very complex problem in the absence of a correct identification. The other issues are commodification of womb and child, quality of product, embryological exploitation, etc.

18.9.1. Three types of Mothers :

Anita stuhmcke says that the reproductive technology created three types of mothers: (a) The genetic mother, who donates or sells her eggs, (b) the surrogate or gestational mother who carries the baby, (c) The social mother who raises the child. The splitting of the construct of motherhood into three roles may lead to the potential erosion of the family structure, she said. This is something like destroying a family for furtherance of another family.

18.9.2. Child Commodification :

The birth of a child is regarded as a sacred event and it is an occasion of joyous celebration. That is commercialised and child is commodified by tagging a price card to just born child or for her gestating mother's womb.

18.9.3. Quality of " Product": 'Baby Doe' Case :

Once you introduce a market mechanism for acquiring a child fosters, it generates a demand for "product quality". The commissioning couple, paying large sums of money to obtain a child may reject an imperfect child.

An example of this is the 1983 "Baby Doe" case. Mrs. Judy stives, a Michigan housewife, agreed to bear a child for Alexander Malahoff and his wife for a fee of \$ 10,000. All went well until child was born, when it was discovered that he suffered from microcephaly a condition whereby the child has an abnormally small head and often turns out to be mentally retarded. Mr. Malahoff no longer wanted the child, and told the hospital to withhold treatment. Mrs. Stiver also rejected the child, saying that there had been no maternal bonding. The hospital went to court and won permission to care for the child and the Michigan Department of Social services fostered the child out. (L Tager, "Surrogate Motherhood, Legal dilemma" (1986) 103 South African Law Journal 393) The Stivers accepted that the child was their own. Mr. Malahoff reacted by suing stiver for not producing the child he contracted for and the stivers countered by suing their doctor, lawyer and psychiatrist for not advising them properly, about marital sex. They also sued Malahoff for invading their privacy by making the matter public and alleged that the child's sperm. (K. Andrews, "The Educative Role of Law : Options for Regulation in Surrogacy" in Surrogacy - In whose Interest? Proceedings of the National Conference, 1991, Mission of St James and St John at 98)

Commercialism, market economy, product quality are the words which are not suitable for human reproduction. Commodifying the child, and consumerism of womb are sufficient for prohibiting the commercial surrogacy.

Thus we can conclude that the market mechanism, which is vital part of commercial surrogacy will lead to surrogates being selected for the positive attributes they offer, the couple as wanting a child for their own ends.

The movement the contract involves payment of money or a fee, surrogacy may become a case of baby-selling.

In case of an altruistic surrogacy, one cannot generally say that it is "baby-selling". Judge Sorkow in Baby M case said that if a biological father paid the surrogate for her willingness to be impregnated and carry his child to term, it birth the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what already his. The Judge characterised the contract as a bargain for "totally personal service". According to him surrogacy is a pre-conception contract, and because commissioning father makes a genetic contribution to the child, he is a natural parent. It is therefore argued that a natural parent cannot purchase a right in the thing in which he already holds an interest-parenthood. Further payments made to the surrogate mother are viewed as compensation for services as rendered and not as a fee for selling the baby.

However, the fact remains the same in two kinds of surrogacy i.e., a child is conceived to be given away. A compensation or a fee - will not make any substantial difference because the child is treated as transferable property.

In this kind of commodification of "child" scant regard is paid to emotional and psychological impact on the child. The motherhood, and the childhood, their umbilical bond, motherly touch, affection and identity with the mother are very vital aspects which will go a long way till the end of the child's life. Surrogacy causes an emotional disturbance to the child creating a problem of serious crisis of identity. With two mothers or two fathers, a child's life would be much more miserable than an illegitimate child. Thus this mechanism of surrogacy leads to bastardisation of progeny, simply in the name of satisfying the desire to have a child. It will affect the psychosocial well being of the child, after knowing that its gestating mother conceived only to give up after delivery. It may even lead to commodification of parenthood.

As suggested by Dr. Poomima Advani, persons with a family history of malformation, mendelian disorders or chromosomal derangement should be barred from being donors. They also should be free from diseases like Asthma, Juvenile diabetes, mellitus, epletic disorder, hypertension, psychosis, leucoderma, malignancy and the like specially those with hereditary trends already confirmed.

18.9.4 . Embryological Exploitation :

The reproduction capability of lower class or poor women will become their unexpected source of money, as middle and higher class couple may "commission" them to fulfill their desire to have a child, which eventually end up in embryological exploitation. If, in the name of altruistic surrogation, no amount is paid to surrogate mother, it would be a serve exploitation.

The surrogacy arrangements reduce the surrogate mother as an emotionless vessel-a breeding machine and less than human. The feeling of sudden severence of emotional tie would cause a

serious mental stress for woman.

As several legislative enactments and moral codes oppose commercial surrogacy, love and affection are necessary for replacing the "fee" element to generously help a childless couple to get a child. The altruistic surrogacy is permitted by several legislative measures based on the moral fabric of human society. Infact, such undefined and uncertain consideration in altruistic surrogacy, may make surrogacy a worse arrangement than simple "commercial" surrogacy with a fixed price.

Sometimes altruistic surrogacy is more exploitative than commercial surrogacy, as it makes impossible for surrogate mother to keep the child if she so desires, the loss of her family as retribution may be too much for her to give up whereas, it may be easier for a commercial surrogate mother to cancel the contract.

If childlessness, and a strong desire to have a child is the genuine purpose, adoption is the only right course available. Even the western laws suggested "adoption" as a measure to end the legal conflicts in surrogacy.

At the same time, it is not advisable to totally disuse the scientifically evolved technique of continuing the progeny of the clan through surrogacy and IVF methods. Following are a few suggestions.

1. However, in the best interests of society and the new born child, there is a strong need to restrict the application of the new technique to help only childless couple on considerations of love and affection including payment of expenses.

2. It's commercial application, brokerage, advertisements through media, for protecting the "figure" and for luxury of avoiding conception and delivery pains, for avoiding the "wastage" of time (Nine months in pregnancy and then years for rearing the child) should be totally banned.

3. A regulating authority with medical and legal experts be formulated to process and permit the application of childless couples, and those coming forward to surrogate.

4. The medical and legal records regarding the surrogacy contracts must be kept confidential, with the provision for an access to children born out of such arrangements.

5. All agreements and arrangements beyond this authority must be treated null, void and unenforceable.

6. Surrogate mothers, in permitted cases, should be given visiting rights, and right to share affection of the child she gave birth to.

7. Medical problems, if any, shall be dealt by the commissioning parents in consultation with the regulating authority and other medical experts.

8. For all legal, social and practical purposes the genetic parents should be treated as the "Real parents of the child".

18.10 : SUMMARY :

Every person has right to their body, to life and right to procreation of children. Surrogate motherhood is one of the new scientific advancements posing new challenge to legal control of social behaviour. The mother who asks another to carry the pregnancy for her is called "Commissioning Mother", and the woman who agreed to bear the child is called the "Carrying

mother". As the commissioning mother may also provide egg - she is also called Genetic Mother

First surrogate motherhood is reported in 1985 when Kim Cotton gave birth to a child for an American couple for \$ 7475. In this process, a woman has to surrender, along with child, the sublime love and emotions. Commercialisation of surrogacy allowed a free play for brokers, service agencies who advertised in classified columns of newspapers.

Surrogacy is not the only answer to infertility. Woman's body cannot be used as a baby-making machine. The relationship between the child and surrogate mother becomes a doubtful void. Only contractual relationship is available between them. Even that is not a legal and enforceable relationship according to various statutes all over. It may also left surrogate mother with several socio-legal complexities, her family with stigma, particularly in orthodox families in India...

It results in doubt about the real, legal and genetic mother of child born out of surrogacy arrangement. Thus the identity of child becomes a complex problem ; his future and social existence also will be complicated.

Lower class women and their embryos may be exploited by rich and luxurious families, whose women do not want to 'waste' their time and energy for begetting a child for reasons of career or figure protection. Potential degradation of women as in Baby M case, and potential threat to the child as in Baby Doe case threaten the sacred umbilical bond.

If childlessness and strong desire to have a child is the genuine purpose, adoption is the right royal course available under law. Even the western laws suggested 'adoption' as a measure to end the legal conflicts arising out of surrogate arrangement.

At the same time, it is not advisable to totally disuse the scientifically evolved technique of continuing the progeny of the clan through surrogacy and IVF methods. New technique should be restricted to help only childless couples out of love and affection including payment of expenses. Its commercialism should be prohibited and treated as crime. A regular Authority with medical and legal experts should be formulated to process and permit genuine childless couples and those of coming forward to surrogate. All agreements and arrangements beyond this Authority must be null and void. Child's welfare must be considered as utmost important issue in cases of disputes over the custody of child. The genetic parents should be treated as 'real parents' for all legal, social and practical purposes. Medical problems, if any, shall be dealt by the commissioning parents in consultation with the Regulating Authority.

18.11. GLOSSARY :

IVF	=	In-Vitro-Fertilization
Surrogate	=	Substitute for a person in a specific role or office.
Commercial Surrogacy	=	Surrogacy for a price
Altruistic surrogacy	=	Surrogacy out of love and friendship without involving a fee.

18.12. RECOMMENDED BOOKS :

1. Dr. Poornima Advani "The Song of the Jired Mother : The Lyrics of Surrogacy". Law & Medicine, National Law School University, Bangalore, Vol. 3 1997.

2. Dr. R. Anitha Rao, Surrogate Motherhood, Research Notes, Research Forum, Andhra University, Vol. 3, No. 6, dated 16.8.'97.
3. Shlomit Joy Oz, "Genetic Mother vs. Surrogate Mother which mother does the law recognize!". A comparison of Jewish Law, American Law and England's Law.
4. G. Corea, The Mother Machine, The Women's Press, London, 1988.

18.13. MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines each.

1. Why several countries permitted altruistic surrogacy and imposed penalties on commercial surrogacy?
2. Do you agree with imposition of total ban on surrogate Motherhood?
3. What is your solution to Nirmala's episode ?

BRAOU

UNIT - 19 : ELIMINATION OF ALL TYPES OF DISCRIMINATION AGAINST WOMEN

Contents :

- 19.0 Objectives
- 19.1 Introduction
- 19.2 Status Equality
- 19.3 Protective Discrimination
- 19.4 Reservations for Women
- 19.5 Provisions of Criminal Law : Protective Discrimination
- 19.6 Compensation to rape victim
- 19.7 Personal Laws & Discrimination of women
- 19.8 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- 19.9. Summary
- 19.10. Recommended books
- 19.11. Model Examination Questions

19.0. OBJECTIVES :

After going through this unit, you will be able to know

- * The rights of woman ;
- * Various constitutional and other legal provisions assuring the equality to women ;
- * Several judicial decisions which upheld the right to equality and special protection under the law owing to general physical conditions of women.

19.1. INTRODUCTION :

Even after five decades of equal rights given by the Constitution, women in our country remain a consistently disadvantaged group. Right to equality before law and equal protection of law remains only on the paper and at the level of theory as the various personal laws in force in the country and followed by different communities deny equality to women in several personal matters.

The women remain the poorest members of each class, earning less than men because they tend to be concentrated in jobs that pay less, and work longer hours since paid employment is frequently combined with domestic labour and the care of the young,, the sick or the aged. The law alone cannot change the scene of inequality and gender discrimination. The Constitution and several enactments provided the required legal base, but the justice has to be built over

that.

A non-governmental organisation "Sakshi" studied the judicial perceptions on women in situations of violence and how such perceptions reflect the women's sad plight. Sakshi says India's Constitutional promise of gender equality comes closest in articulating the relationship between law and life, between men and women. But nowhere has that promise faced greater neglect than in the area of violence against women.

To realise a women's aspiration to live with dignity guaranteed in Article 21 of the constitution a complete transformation is needed in women so that she must cease to see themselves in the roles of mother and wife only.

19.2. STATUS EQUALITY :

Among all the issues concerning the women, the "status" and "equality" are very important. Right to equality is fundamental of all fundamental rights that a woman can claim. Our constitution provides this "right to equality", (i.e.,) equality to men and women. Discrimination based on caste, gender and religion is prohibited by Art. 14 and Art. 15. Our country made an official commitment at the world conference to set up a commission for women's rights to act as a public defender of women's Human Rights.

Despite its status as fundamental right, equality is still eluding away from woman. It became a never ending battle for equality by women. Even some of the laws whose constitutional validity was upheld, contain provisions of discrimination against women. Certain personal laws still retain some gender based differential treatments. Rule of law is not coming to the rescue of women so far as the "equality" is concerned, due to several constraints.

Art. 14 used two expressions "equality before the law" and "equal protection of the law". Such expressions are common in almost all written constitutions which guaranteed fundamental rights. Art. 15(1) directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them. While Art. 15(1) provides a shield against discrimination 15(3) provides positive protective cover for special treatment for women. Article 16, inter alia, prohibits discrimination on the ground of sex alone. Hence, protective discrimination against women is permitted. Article 14 though guarantees equality but permits classification. Religion, Race, caste, sex or place could be reasonable basis of classification under Article 14. But Article 15(1) forbids the state from making any classification on the basis of only one of these. Clause (3) and (4) provide two exceptions: special provisions can be made for women and children under the former, and for socially and educationally backward classes under the latter.

A rule which discriminated women was struck down by Supreme Court in *Miss C.B. Muthamma vs. Union of India*¹. The Indian Foreign Service (Conduct and Discipline) Rules 1961 laid down that "no married woman shall be entitled as of right to be appointed to the service", and "a woman member of the Service shall obtain the permission of the Government in writing before her marriage is solemnized. At any time after the marriage a woman member may be required to resign from service. If the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service." Krishna Iyer, J., condemned this rule in strong words saying:

At the first blush this is a defiance of Article 16. If a married man has a right a married woman, other things being equal, stands on no worse footing. This disogynous posture is a hangover of

the masculine culture of menacing the weaker sex for getting how our struggle against woman's thraldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored Vis-a-vis half of India's humanity, Viz., our women is a sad reflection on the distance between constitution as the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the path of part III, especially when high political office, than diplomatic assignment has been filled by women, an inference of die-hard allergy to gender parity is inevitable.

However the Supreme Court Judge Krishna Iyer, observed that it was not meant to be universalized or dogmatized that men and women are equal in all occupations and all situations and did not exclude the need to pragmatise where requirements of particular employment, sensitivities of sex might compel selectivity.

19.3. PROTECTIVE DISCRIMINATION :

The Supreme Court upheld the validity of a rule which provided for protective discrimination in favour of women. The A.P. Government subordinate service rule 22 A(2) provided for preference to be given to women to the extent of 30 per cent of posts. The court held that the state is competent under Article 15(3), 16(2) and 16(4) of the constitution to give preference to women in Government jobs where they are equally meritorious but more suited than men. Supreme Court made it clear that giving preference is only an affirmative action and not a reservation which normally implies a separate quota which is reserved for a special category of persons who are less meritorious. (Govt. of A.P. vs. P.B. Vijay Kumar AIR 1995 SC 1648).

19.4. RESERVATIONS FOR WOMEN :

The State can even provide reservations for women in various fields. The 73rd and 74th Amendments to the Indian Constitution during 1992 provided for reservation of seats to the women in Elections to the panchayat and Municipal bodies. According to Article 243 D of the Constitution not less than one third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for woman. Not less than one third of total number of offices of the Chairpersons in the panchayat at each level shall be reserved for women. Similar reservations were made for women in Municipal bodies under Article 243 T.²

In order to provide for gender justice by bringing up the percentage of women's representation in legislative bodies, 33 per cent mandatory reservation for women is thrice attempted by United Front Government. Though it is part of the common minimum programme of the Front, and it was accepted in principle by all the constituents in steering committee, the women reservation bill i running through the rough weather due to the internal contradictions of the coalition government.

The Bill is undoubtedly constitutional as Article 15(3) empowers the State to make special provisions for woman and children. Preference of women to the extent of 30% in the State services by A.P. Government was held valid by Supreme Court.³

The equality as a right has been dealt even under the directive principles of state policy. Article 39(a) directs the State to direct its policy towards securing that the citizen, men and women, equally have the right to an adequate means of livelihood. Article 39(d) directs

the State to secure equal pay for equal work for both men and women. While Article 39(e) specifically directs the State not to abuse the health and strength of the workers, men and women. Article 42 asks the State to make provisions for securing just and humane conditions of work and for maternity relief. Even the direction to make all efforts to introduce Uniform Civil Code in India under Article 44 is directed towards achievement of the goal of gender justice only.

19.5. PROVISIONS OF CRIMINAL LAW : PROTECTIVE DISCRIMINATION :

Serval provisions of Criminal law in favour of women and procedural law discriminating women were upheld by the Supreme Court. The validity of Section 497, IPC which punishes the male counterpart only for the offence of adultery and exempts woman was held to be not in violation of Art. 14 and 15(1)⁴. This section was again challenged as a flagrant instance of 'gender discrimination' and male chauvenism as it recognises only the husband of the adulteress as aggrieved party and not the wife of the adulterer. Supreme Court upheld Sec. 497 IPC again on the ground that the offence would be only by a man.⁵

The woman was accorded a special treatment to ensure a dignified life and to allow her to exercise human rights. Special provisions in criminal law regarding dowry deaths (Section 304 B IPC), outraging the modesty of woman (Section 354 IPC), custodial Rape, 376A, 376 B, 376 C, 376 D IPC), insulting the modesty of woman (Section 509 IPC), Presumptive provisions in Evidence Act (Section 114 A), procedural rules providing trial of rape cases in camera (Section 327 (2) Cr.P.C.), and presenting punishment for disclosure of the name of rape victim (Section 228-A IPC) are some of the examples.

19.6. COMPENSATION TO RAPE VICTIM :

Supreme court, whenever it was asked to intervene tried to uphold the human rights of woman. For instance Supreme Court suggested a scheme for awarding compensation to rape victim while punishing the culprit.⁶ It suggested the constitution of criminal injuries Compensation Board, or in alternative asked the courts to award compensation to rape victims. The Supreme Court also awarded interim compensation to another rape victim of Rs. 1,000 per month during the pendency of case.⁷

19.7. PERSONAL LAWS & DISCRIMINATION OF WOMEN :

The framers of the Constitution devised certain specific safeguards to make concept of "equality" a living reality as they were well aware of the glaring inequality between the sexes in our male dominated society. These safeguards find explicit expression in the preamble of the Constitution, the chapters on the Fundamental Rights and Directive Principles of State Policy, Ironically, despite the constitutional guarantee of equality before law, divorce, inheritance, property, ownership, adoption and custody of the child, is still prevalent. A woman cannot claim the maintenance from her natal family if she is deserted by her husband. Once married, a woman (Hindu) cannot adopt a child under her own name. She does not have a real guardianship right of her child, if over age five, as the father is considered the natural guardian of a legitimate child. The Hindu Marriage Act and the Special Marriage Act continue to treat the husband as the favoured beneficiary of most forms of statutory protection. These two laws do not give an iota of legal protection to women whose husbands bring home concubines. In such cases a

woman is given the right of divorce and the right of maintenance, but not the right of the partner, Divorce is forced on these women by the law, there is little choice. There is no remedy against husbands who indulge in adulterous relationships and no remedy against being thrown out of the home.

Under Mitakshara Law no female can be a member of the joint family property. The wife of a Hindu cannot be her husband's coparcener. Though entitled to maintenance out of her husband's property. Similarly a mother cannot be a coparcener with her sons. Section 23 of the Hindu Succession Act., debar the female heirs of a Hindu dying intestate, from laying any claim in a partition of the dwelling unit left behind by the deceased, unless the male heirs choose to partition it. This residence gives a right to residence to a deserted, separated and widowed daughter, but not a divorcee.

Under Muslim law, the women's position is not better. While monogomy is the rule for a Muslim wife, the husband is entitled to have four wives at a time. Moreover, while the husband can dissolve the marriage at will, the wife can only do so with the permission of the husband. Nor she is entitled to be the guardian of her property or her minor child. Law of inheritance discriminates against woman in many ways. Even the Christian law was having archaic principles. Section 10 of the Indian Divorce Act 1869, provides for a male to ask for divorce on the ground of adultery alone. Strangely, the wife has to prove more than a single ground if she is to succeed in her case for divorce. If she is able to prove only a single charge like adultery or cruelty, the court can grant her only judicial separation. This inequality was struck down by the two High Courts making it inoperative only in those two states while allowing the section to survive till the supreme Court gets an opportunity to strike it down.

Such discriminatory personal, religious and other laws should be declared invalid under Article 13 of the Constitution as being inconsistent with Article 14, 15 and 16.

Three Ahmedabad based women organisations, The Ahmedabad women's Action Group, the Lok Sevak Sangh and the YMCA filed a petition before the Supreme Court to declare certain provisions of the existing Hindu, Muslim and Christian personal laws as discriminatory against women and therefore unconstitutional. They pleaded that the equality clauses of Article 14 and 15 should be enforced within the ambit of personal laws. "These provisions contained within all three personal laws make gross distinctions against vast majority of the females of India simply because they happen to be females" - the petition pleaded.

Following sections and provisions of personal laws were challenged as unconstitutional :

Hindu Personal law :

1. Section 6, and explanation to section 30 of the Hindu Succession Act that grant males the sole right to be inheritors of the Hindu United Family.
2. Section 2(2) that exempts Scheduled Tribes from the purview of the Succession Act. The customary traditions of many tribal society does not give many rights to women.
3. Section 6 and 9 of the Act that do not include women Hindu Adoptions and Maintenance Act do not include women as natural guardians.
4. The inalienable right of a Hindu male to make a will and through this, deprive and disinherit his wife children from property.

Muslim Personal Laws :

1. The right of a Muslim male to polygamy.
2. The right of a Muslim male to unilaterally divorce his wife.
3. That the Muslim women's (Protection of Rights on) Divorce Act 1986 to be declared void.
4. Those section of Muslim personal Law under which a Muslim woman is not considered a guardian of her minor's property.
5. Those sections of Muslim Personal Law that discriminate against her right to equal inheritance.

Christian Personal Laws :

Those Sections of Christian divorce and succession laws that discriminate against women.

The State has a duty to bring the equality among men and women in application of civil laws like law of marriage, succession and the maintenance etc.

19.8. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) :

The Convention on the Elimination of All forms of Discrimination against women (CEDAW) was adopted by the United Nations General Assembly on 18th December, 1979. Later it became an International treaty on 3rd September 1981. More than hundred nations signed this treaty and thus, they are bound by the obligation to remove the discrimination against women. This Convention brought the female half of humanity into the focus of human rights concerns. In its effort to spell out the means of achieving the much talked objective of gender equality, the CEDAW not only established an international standard by which women's rights can be assessed but also presented an agenda of action to the countries to generate the enjoyment of those rights to women. CEDAW primarily defines what amounts to discrimination and what the state should work towards elimination. India ratified CEDAW on August 8, 1993.

Following are the Articles of CEDAW

Definition :-Article 1 of the CEDAW defined the term "discrimination against women"

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

Articles 2 to 5 lists out various means to be pursued by the state parties to eliminate the discrimination

Article 2 States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and to this end, undertake:

(a) to embody the principle of equality of men and women in .. constitutions... and to ensure through law and other appropriate means, the practical realisation of this principle ;

(b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women ;

(c) to establish legal protection of the rights of women.. and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination ;

(d) to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity...;

(e) to take all appropriate measures to eliminate discrimination against women by any person organization or enterprise ;

(f) to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women ;

(g) to repeal all national penal provisions which constitute discrimination against women.

Article 3 States Parties shall take in all fields,.. all particular measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4: Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards...

Article 5: States Parties shall take all appropriate

Measures: to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices.. based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women which discriminate ;

to ensure that family education includes of maternity as a social function, and common responsibility of both parents.

Article 6 asks the member states to suppress all forms of traffic in women and exploitation of prostitution in women.

Article 7 deals with the political and public life of women on equal terms with men the right ;

(a) to vote.. and be eligible for election to all publicly elected bodies

(b) to participate in the formulation of government policy and its implementation, and to hold public office and perform all public functions at all levels of government.

(c) to participate in non-governmental organisations and associations concerned with the public and political life of the country.

Article 8 Suggested states to ensure to women... the opportunity to represent their Government at the international level and to participate in the work of international organisations.

Article 9 deals with equal rights.. to act, ire, change or retain nationality ... and with respect to the nationality of their children.

Article 10 asked States to undertake.. to eliminate discrimination against women... in the field of education.. and to ensure...

(a) the same conditions for career and vocational guidance, for access to studies...; this equality shall be ensured in pre-school, general, technical, professional and higher technical education...;

- (b) access to the same curricula...;
- (c) the elimination of any stereotyped concepts of the roles of men and women at all levels and in all forms of education...;
- (d) the same opportunities to benefit from scholarships and other study grants ;
- (e) the same opportunities for access to programmes of continuing education...;
- (f) the reduction of female drop-out rates..;
- (g) the same opportunities to participate actively in sports and physical education ; educational information ;
- (h) access to specific educational information to help to ensure the health and well-being of families...

Article 11 asked states to try

1. To eliminate discrimination against women in the field of employment.... and to ensure...
 - (a) the right to work as an inalienable right of all human beings ;
 - (b) the right to the same employment opportunities...;
 - (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service...;
 - (d) the right to equal remuneration.. as well as equality of treatment in the evaluation of the quality of work;
 - (e) the right to social security, particularly cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave ;
 - (f) the right to protection of health and safety in working conditions including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work...
 - (a) to prohibit... dismissal on the grounds of pregnancy or of maternity leave...
 - (b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances ;
 - (c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities,... in particular through promoting the establishment and development of a network of child care facilities ;
 - (d) to provide special protection to women during pregnancy in types of work proved to be harmful to them....

Article 12 deals with required efforts to

1. eliminate discrimination against women in the field of health care....
2. to ensure to women appropriate services in connection with pregnancy, confinement and post-natal period....

Article 13 deals with efforts...to eliminate discrimination against women in other areas of

economic and social life,....and in particular

- (a) the right to family benefits ;
- (b) the right to bank loans,....
- (c) the right to participation in recreational activities, sports and all aspects of cultural life.

Article 14 suggest that states

1. .. shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families including their work in the non-monetised sectors of the economy....
2. ... eliminate discrimination against women in rural areas ... and ensure to such women the right.
 - (a) to participate in... development planning.....;
 - (b) to have access to adequate health care families.....;
 - (c) to benefit directly from social security programmes ;
 - (d) to obtain all types of training and education.... and benefit of all community and extensionservices in order to increase their technical proficiency ;
 - (e) to organise self-help groups and cooperatives....;
 - (f) to participate in all community activities ;
 - (g) to have access to agricultural credit and loans, marketing facilities, appropriate technology,and equal treatment in land agrarian reform as well as in land resettlement schemes;
 - (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 15 says:

1. States parties shall accord to women equally with men before the law.
2. .. to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. ..agree that all contracts.. restricting the legal capacity of women shall be deemed null and void..

Article 16 deals with personal laws. It advised states to undertake

1. .. to eliminate discrimination against women in all matters relating to marriage and family relations,.... and to ensure....
 - (a) the same right to enter into marriage ;
 - (b) the same right to freely choose a spouse and to enter into marriage only with their free and full consent ;
 - (c) the same rights and responsibilities during marriage and at its dissolution ;

- (d) the same rights and responsibilities as parents...
 - (e) the same right to decide freely and responsibly on the number and spacing of their children....
 - (f) the same right and responsibilities with regard to guardianship, warship, trusteeship and adoption of children...
 - (g) the same personal right as husband and wife, including the right to choose a family name, a profession and an occupation ;
 - (h) the same rights for both spouses in respect of the ownership, acquisition, ..of property...;
2. The betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage, and to make the registration of marriages in an official registry compulsory.

Article 17 deals with various committees and process of implementation.

19.9 SUMMARY :

Right to equality is fundamental of all fundamental rights that woman can claim. Discrimination based on caste, gender and religion is prohibited by the constitution.

Article 14 envisages equality before the law and equal protection of the law. Article 15(1) provides a shield against discrimination. 15(3) provides positive protective cover for special treatment for women. Article 16 prohibits discrimination on the ground of sex alone. Hence protective discrimination favouring women is permitted while discrimination against women is prohibited.

It not reservation, the preference to women candidates can be given as per the A.P. Government Subordinate Service Rule 22 A(2). This was upheld in Govt. of A.P. vs P.B. Vijayakumar (AIR 1995 SC 1648) case. The state can provide reservation for women in various fields. The 73rd and 74th Amendments to the Indian Constitution during 1992 provided for reservation of seats to the women in elections to panchayat and Municipal bodies. There is a proposal to provide 33 percent reservation for women in legislative bodies, which is yet to take a shape of Bill in Parliament.

Article 39 (a) directs the state to aim its policy towards securing that the citizen - men and women, equally have the right to an adequate livelihood. Article 39(d) directs the state to secure equal pay for equal work for both men and women. Article 44 directs the state to make all efforts to introduce uniform Civil Code in our country, which is a direction towards achieving the gender justice.

Serval Criminal law provisions deal with the protective discrimination in favour of women which were upheld as valid by the Supreme Court. Section 497 IPC which punishes the male counter part only for the offence of adultery and exempts woman was held to be valid. There are special provisions in criminal law regarding dowry deaths, out-raging the modesty of woman, custodial rape, insulting modesty of the women etc. Supreme Court recently provided for award of compensation to the victim of rape at the interim stage of trial.

However, there is discrimination against women in the personal laws of Hindus, Muslim and Christians, which has to be set right.

As the Indian State is one of the signatory to the Convention on the Elimination of All Forms of Discrimination Against women (CEDAW) it has an obligation to fulfill that international commitment to remove the inequalities. The CEDAW enumerated in its Articles the meaning, and methods to eliminate the discrimination.

19.10 RECOMMENDED BOOKS :

1. Law Relating to offences against women, V.K. Dewan.
2. Women and The Law, G.B. Reddy.

19.11. MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines each.

1. Critically examine the status of women under Indian Constitution ?
2. Do you agree that there is a need to provide reservations for women ?
3. "Women in every religion are discriminated"- Do you agree ?
4. What are the methods the CEDAW suggested to eliminate the discrimination against women ?

II. Answer the following questions in 15 lines each.

1. Can Hindu woman alone adopt a child ?
2. Can a Muslim woman be the guardian of her property or her minor child ?
3. How many wives a Muslim man can have under the personal law. And what is the rule for women regarding marriage ?
4. What is the new wrong recently created by Supreme Court.?
5. When the convention on the examination of discrimination was held ?

UNIT - 20 : SEXUAL HARASSMENT : A NEW CRIME

Contents :

20.0	Objectives
20.1	Introduction
20.2	Sexual Harassment in England
20.3	A Landmark Judgment
20.4	Beijing Conference on Women
20.5	Sexual Harassment : Definition
20.5.1	Guidelines
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20.0. OBJECTIVES :

After going through this unit, you will be able to

- * Know the problem of working women at their work places and the response of the Apex Court to it ;
- * know how the judicial activism helped the women to get a new safe guard from the sex based discriminatory behaviour which offend their dignity and obstruct their right to work.

20.1. INTRODUCTION :

Equal status and statistical equality may be impossible to achieve, inspite of number of special provisions in the Constitution, Criminal Law and Procedural Law. But weak constitution of women's physique shall not become the cause for heaping on insults or obscene remarks which may even amount to offences of outraging the modesty of the women or any other crime prescribed under Indian Penal Code. Though these offences can be classified under the offences against the body, because of their nature of assaulting women, they infringe the equality rights and right to live with dignity under Article 21 which is equally available for women based on, again, the equality principle. It is under this right to life, the Supreme Court recently laid down certain guidelines for the employers of public and private sector firms to safeguard the dignity of women at working places.⁸ It defined what a sexual harassment was and detailed the methods of dealing with the harassment. In a historic judgement delivered by Chief Justice of Supreme Court J.S. Verma on behalf of two Judges of Supreme Court on August 13, 1997, it directed provision of appropriate penalties against sexual harassment of employed women. The Court was correct when it said that the present civil and criminal laws in India did not adequately provide for specific protection of the fairer sex, which needed the Judiciary to

bridge the gap.

20.2. 'SEXUAL HARASSMENT' IN ENGLAND :

Sexual harassment is a kind of sexual discrimination in employment. According to Selwyn¹ "to subject a person to unpleasant treatment of a sexual nature can amount to treating a person less favourably on grounds of sex and may amount to a detriment. It is an unwanted and uncalled for attention paid to someone². It can happen to either men or women at any place. But women are generally subject to this kind of behaviour at work place. The motive behind this kind of harassment may be to discourage women from working in the institution and to keep other females away from that job or it can be sadism.

This harassment may come in the form of comments on the way a woman dresses up and comments on her looks. It may come as some unwelcome sexual advances.

This kind of a behaviour can be ignored as long as it is in its mildest form, and its impact is only displeasing and a nuisance to the person who is suffering it. One cannot ignore it when it passes beyond a certain level. It can lead to severe emotional and mental problems. Many a time this kind of a behaviour forces a person to resign her job.

For the first time the courts in England recognised the seriousness of this kind of a behaviour. One Mrs. Porcelli took this matter to the court⁵. She was a school laboratory technician at a school. She complained that her two male colleagues (Who were also technicians in the laboratory) were sexually harassing her as part of a campaign to make her leave the job. They used to brush against her deliberately and make suggestive remarks of a sexual nature. As she could not bear the harassment, she wanted to apply for a transfer to another school. She complained of unlawful discrimination. The court held that she had been subjected to treatment of a sexual nature to which a man would not have been vulnerable. The court held that this amounted to unlawful discrimination.

While deciding these cases, there must be an assessment of the injury to the woman's feelings. The assessment must be with reference to what an ordinary reasonable woman employee would feel and it should also be examined with reference to the particular individual. One has to assess the impact of the behaviour on this particular woman³.

An assumption that women do not want a career as a pretext to deny her of a job is also a type of sexual harassment⁴.

The Trade Union Congress gave a comprehensive statement as to what constitutes sexual harassment which is as follows:-

"repeated and unwanted verbal or sexual advances, sexually explicit derogatory statements made by someone in the work place which are offensive to the worker involved, which cause the worker to feel threatened, humiliated patronised or harassed or which interfere with the worker's job performance, undermine job security or create a threatening or intimidating work environment".

The woman who is sexually being harassed at work is afraid of making a complaint for many reasons. The harasser may be her boss or supervisor or a powerful Trade Union leader. Giving a complaint against these people may adversely affect her chances of promotion or may cost her the job itself.

In India many women suffer from sexual harassment, but they are not in a position to complain and they suffer in silence. As such we do not have any legal remedy for this kind of a sexual discrimination. However, of late a few women are slowly coming out of the shell, and expressing their displeasure. Recently one female T.V. employee, complained against her superior for making sexual advances and the matter is in the court now.

The Westerners suggest some measures that are to be taken in case of sexual harassment. The first step to be taken is that all incidents of harassment should be put in writing as soon as they happen. Before she takes it to the notice of the appropriate authority, she should ask the harasser politely to stop his behaviour. If this does not materialise, all the incidents (in the written form) should be reported with sufficient evidence.

The enforcement authority in these matters are the representatives from management, trade unions, personnel department, equal opportunities working parties or the harasser's immediate manager/superior. As soon as the complaint is lodged, the employer should take appropriate action against the harasser. If the employer fails to do so, the woman can file a case against the harasser and his employer. For these grievances the guidelines which laid down in equal opportunities can be followed.

20.3. A LANDMARK JUDGEMENT :

A public interest petition was filed by Visakha and other socially active voluntary organisations who were agitated by an incident of gangrape of a social worker in a village in Rajasthan. The Supreme Court took the opportunity to provide safeguards by an alternative mechanism in the absence of legislative measures. Article 32 confers "the right to move the Supreme Court by appropriate proceedings for enforcement of the rights". The petitioners wanted the realisation of "gender equality" and the directions to prevent sexual harassment of working women in all work places. If Article 14 deals with equality before law, Article 19 relates to "personal freedom including right to practice any profession, occupation, trade or business. Article 21 deals with "right to life" which means life with dignity. Each incident of sexual harassment at a work place results in violation of fundamental right of "gender equality" and right to life and liberty besides right under Article 15 of the constitution which deals with prohibition of discrimination on grounds of religion, race, caste, sex, place of birth or any of them, the Supreme Court pointed. Article 19(1) (g) providing right to practise any profession etc., was also violated. While issuing a writ of "mandamus" the Supreme Court said "if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon". The Chief Justice said the incident of gang rape revealed the hazards to which the working woman may be exposed, and the depravity to which sexual harassment can degenerate. It revealed the urgency for safeguards by an alternative mechanism. The primary responsibility for ensuring such safety and dignity through suitable legislation and the creation of mechanism for its enforcement, is of the legislature and executive, the Supreme Court said.

Constitutional Basis :

The Supreme Court relied on Article 42, 51, 51-A, and 253 of the Constitution in issuing legally binding guidelines and norms for ensuring "safe" working environment for women workers and necessary redressal mechanism. Article 42 deals with provision of just and humane conditions for work and maternity relief by the State. Article 51 says that it shall be the duty of every citizen to promote harmony and spirit to common brotherhood amongst all the people in

India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women. Article 253 deals with legislation for giving effect to international agreements. Supreme Court said "In the absence of domestic laws occupying the field, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1) (g) and 21 and the safeguards against sexual harassment therein".

20.4. BEIJING CONFERENCE ON WOMEN :

At the Fourth World Conference on women in Beijing, the Government of India had also made an official commitment, inter alia. To formulate and operationalise a national policy on women which would continuously guide and inform action at every level and in every sector to set up a commission for women's right to act as a public defender of women's human rights ; to institutionalise a national level mechanism to monitor the implementation of the platform for action. This commitment of our country was rightly interpreted by the Supreme Court as the intention of the State to formulate the guidelines to safeguard the dignity of working women.

20.5. SEXUAL HARASSMENT : DEFINITION IN SUPREME COURT :

The Supreme Court defined and explained the "sexual harassment". "Sexual Harassment includes such unwelcome behaviour (whether directly or by implication) as (a) physical contact or advance ;(b) demand or request for sexual favours ; (c) sexually coloured remarks ; (d) showing pornography ; (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature."

20.6.1 Guidelines :

Following are the guidelines and norms issued by the Court.

It shall be the duty of the employer or other responsible person in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

Where any of the acts of sexual harassment is committed in circumstances where under the victim has a reasonable apprehension that, in relation to the victim's employment or work, whether she is in Government, public or private enterprise, such conduct can be humiliating and may constitute a health and safety problem, it constitutes an act of sexual harassment. An act would be considered discriminatory, for instance, when the woman has reasonable grounds to believe that her objection to such advances would put her at a disadvantage in connection with her employment or work including recruitment or promotion or when it creates a hostile work environment or she has sufficient reason to believe that adverse consequence might follow if she raises any objection to such advances.

All employers or persons in charge of work place, "whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation, they should take the following steps : (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in

appropriate ways ; (b) The rules/regulations of Government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender ; (c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946; (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular it should ensure that victims or witness are not victimised or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek their own transfer or that of the perpetrator.

Where such conduct amounts misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints. The Complaint mechanism should be adequate to provide, where necessary, a complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The committee should be headed by a woman and not less than half of its members should be women. Further to prevent the possibility of any undue pressure or influence from senior levels such a committee should involve a third party either an NGO or another body which is familiar with the issue of sexual harassment.

The complaints committee must make an annual report to the Government department concerned of the complaints and action taken by it.

The Employer and person in charge will also report on the compliance with the aforesaid guidelines including the reports of the complaints committee to the Government Department.

Employees should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate forum and they should be affirmatively discussed in employer-employee meetings.

This Supreme Court Judgement reminds the duty of the legislature and executive to make suitable law incorporating the above guidelines to provide safe working conditions for women. Later the National commission of women made guidelines on the lines of the supreme court judgement.

Growing awareness among women in general and employees in particular should help them to live in dignity and honour with the right help from judiciary. The law made in statute books and laid down in Judicial decisions, remain dry, if not translated into a reality by vigilant women.

In a recent landmark Judgement, Supreme Court created a new law and principle of liability to provide a protective cover to working women from the sexual harassment of the men around them. It provided some guidelines to check this kind of offending behaviour which may not fall under any category of the offence under general criminal law. The Government of India made an official commitment at Beijing world Conference on women to formulate a national policy on women to set up a Commission for women's rights to protect her rights.

The equality of law and equal protection of law for women is still a distant dream, unless the personal laws are amended and new protective cover is provided for women in all fronts allowing her to lead a dignified life on par with men.

20.6 REFERENCES :

1. N.M. Selwyn 'Law of Employment' Seventh Ed. Butterworths.
2. 'Equal opportunities' by Helen Collins Backwell at p. 256
3. Snowball vs. Gardner Merchant Ltd. (1987) ICR 719
4. It is the opinion of Anne E. Morris and Susan M. Nott "working women and the Law" published by Roulledge/Sweet and Maxwell, London & New York.
5. Strathclyde Regional council vs. Porcelli (1986) ICR 564.

20.7 RECOMMENDED BOOKS. :

The Judgement of the Supreme Court reported in 1997 (3) crimes 188 SC.

20.8. MODEL EXAMINATION QUESTIONS :

I. Answer the following questions in 30 lines each.

1. Define Sexual Harassment. When it was made an offence ?
2. What are the remedies prescribed by the Supreme court for the offence of Sexual Harassment ?
3. What are the guidelines to prevent the prime of sexual harassment.

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Course – IV Women's: Rights and Law

Assignment-I

Part - A

Max marks:15
Min marks:6

I. Answer any one question in about 30 lines

- 1) Discuss the various laws relating to family and marriage.
- 2) Discuss the Acts relating to wages.

Part - B

II. Answer any one question in about 15 lines

- 1) Provisions of Indian Penal code relating to women.
- 2) Prison rights of women.

Assignment - II

Part - A

Max marks:15
Min marks:6

I. Answer any one question in about 30 lines

- 1) Discuss the recent changes in Dowry Prohibition Act.
- 2) What is meant by elimination of all types of discrimination against Women

Part -B

II. Answer any one question in about 15 lines

- 1) Sati
- 2) Child marriage restraint act.

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Course –II Women's Rights and law

MODEL EXAMINATION QUESTIONS

Time: 3 Hours

Max Marks:70

Min Marks:28

Section – A: 40 Marks (4x10=40)

I. Answer any four of the following questions in about 30 lines each.

1. Discuss the specific in-the provisions in the constitution of India
2. Explain the grounds for divorce that are common in Hindus, Parsees, and the special marriage acts.
3. Discuss the various provisions under the enactment's for the welfare of labour.
4. Discuss the constitutional provisions that regulate the Law of employment.
5. Discuss the reasons for protective discrimination.
6. Discuss the recent changes in rape law.
7. Write a brief essay about National Commission for Women.
8. Discuss about the Medical Termination of Pregnancy Act.

Section – B 40 Marks (6x5 =30)

II Answer any five of the following in about 15 lines each.

1. Meaning of surrogacy.
2. Cadaver transplantation
3. Functions of regulations of genetic clinics
4. Abatement of Sati
5. Amendments made in 1984 to the Dowry Prohibition Act 1961.
6. Distinguish between kidnapping and abduction
7. Working conditions of Child Labour in factories.
8. Maternity benefits
9. Parsee Women's property rights.
10. Maintenance after divorce among Muslims.

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SYLLABUS

Course IV: Women's: Rights and Law

BLOCK & UNIT

BLOCK - I : WOMEN AND CONSTITUTION

Unit -1 : Constitutional provisions for women

BLOCK - II : WOMEN AND PERSONAL LAW

Unit 2 : Laws relating to family and marriage

Unit 3 : Women's property rights

BLOCK-III : LAWS RELATING TO WORK AND WAGES

Unit - 4 : Law of Employment and the Constitution

Unit 5 : Labour Law Under Different Enactments

Unit 6 : Special Provisions for Women

BLOCK-IV : WOMEN AND CRIMINAL LAW

Unit 7 : Indian Penal Code: Offences Relating to Women

Unit 8 : Indian Penal Code: Rape and Other Offences

Unit 9 : Provisions under the Criminal Procedure Code
Relating to Women

BLOCK-V : RECENT CHANGES IN LAW

Unit 10 : Dowry Prohibition Act

Unit 11 : Prevention of Immoral Traffic Act (PITA)

Unit 12 : Child Marriage Restraint Act

Unit 13 : Sati

Unit 14 : Prohibition of Prenatal sex Determination

Unit 15 : Medical Termination of Pregnancy Act 1971

Unit 16 : Transplantation of Human Organs Act

Unit 17 : Common Civil code

BLOCK - VI WOMEN'S RIGHTS AND HUMAN RIGHTS

Unit 18 : Surrogate Motherhood

Unit 19 : Elimination of all types of Discrimination against Women

Unit 20 : Sexual Harrassment: A New Crime

BRAOU

BRAOU