



 **ELSA**
Lady Shri Ram College Alumni Association



**ELSA LEGAL
RESOURCE PLATFORM**

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Continuing legal education is an integral part of our organization, wherein we keep our clients and professional friends in India and

abroad updated with all changes and legal developments in India.

DGS is happy to be associated with ELSA – Lady Shri Ram College Alumni Association in its initiative to create the ELSA Legal Resource Platform with a focus on creating legal awareness for women and their rights under the various women centric legislation in India. We trust that this Platform will be helpful for the Alumna and the society at large. DGS applauds the ELSA initiative for awareness, which is indeed the first step towards change.

DGS also endeavours to increase awareness of laws among the public. In furtherance of this objective, DGS Founding Partner, Niti Sudhakar and Advocate Aditi Warriar have compiled this legal resource of laws relating to women.

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CONTENTS

INTRODUCTION8

I. WOMEN AND EMPLOYMENT9

WOMEN CENTRIC LAWS..9

1. Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.9

2. Equal Remuneration Act, 1976.18

3. Maternity Benefit Act, 1961
23

GENERAL LEGISLATION WITH BENEFICIAL PROVISIONS FOR WOMEN27

1. Factories Act, 1948.....27

2. Contract Labour (Regulation & Abolition) Act, 197027

3. The Employees' Provident Funds & Miscellaneous Provisions Act, 1952.....28

4. Employees' State Insurance Act, 1948.....28

5. Plantation Labour Act, 195129

6. Delhi Shops and Establishments Act, 195429

II. CRIME AGAINST WOMEN32

GENERAL CRIMINAL LEGISLATION WITH BENEFICIAL PROVISIONS FOR WOMEN 32

1. The Indian Penal Code, 1860 (IPC/Code) 32

2. Criminal Procedure Code, 1973 37

WOMEN CENTRIC LAWS39

1. The Dowry Prohibition Act, 1961..... 39

2. Protection of Women from Domestic Violence Act, 2005
40

3. Indecent Representation of Women (Prohibition) Act, 1986 42

4. Immoral Traffic (Prevention) Act, 1956 42

5. Commission of Sati (Prevention) Act, 1987 44

III. WOMEN AND MARRIAGE, DIVORCE AND MAINTENANCE..... 47

HINDU LAWS 47

1. The Hindu Marriage Act, 1956 47

2. Hindu Adoptions and Maintenance Act, 1956..... 50

MUSLIM LAWS 51

CHRISTIAN LAWS57

1. Christian Marriage Act,
1872.....57
2. Indian Divorce Act, 1986 58

PARSI LAWS60

1. Parsi Marriage and Divorce
Act, 1936.....60

GENERAL LAWS.....62

1. Special Marriage Act, 1954
62
2. Foreign Marriages Act,
196964

INTRODUCTION

The world has witnessed leaps and strides towards gender equality in opportunities and quality of life. However, gender bias is still deeply embedded in our culture. For generations, women in India have been subjected to discrimination on various fronts, owing to the regressive society and lack of awareness of their legal rights. These rights are available to women at home, at their workplace and in the society at large. The lack of awareness is spread across all strata of society, irrespective of the level of education. This is evident with the existence of the poisonous perception of women and their role in a family and society, resulting in increasing frequency of rapes and sexual assaults, domestic violence, discrimination at work place and religion being used as a cover for discrimination.

The Constitution of India has embedded the importance of gender equality in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. Constitutional provisions that empower women include fundamental rights available to

both men and women, such as Equality before law (Article 14); Right to freedoms, including freedom to practise any profession, or to carry on any occupation, trade or business, subject to reasonable restrictions (Article 19) and Right to life and personal liberty (Article 21).

Women- specific empowerment provisions are also present, including Prohibition of discrimination on grounds of sex (Article 15); Right against exploitation of women, including by trafficking, begar, etc (Article 23); Equal pay for equal work for both men and women (Article 39(d)) and Provision for maternity relief (Article 42).

In consideration of this, our endeavour is to spread legal awareness among all and create a convenient legal resource for women, providing an overview of laws encompassing 3 major areas, namely, (I) Women and Employment; (II) Crimes against Women and (III) Women and Marriage, Divorce & Maintenance.

I. WOMEN AND EMPLOYMENT

Greater participation of women in the workforce can only be promoted by ensuring a women-conducive environment and non-discrimination at the workplace. Therefore, this has been the focus of legislative advancements and judicial pronouncements.

In pursuance of this, the following section is divided into two parts- the Women Centric Laws and General Legislation with Provisions Beneficial for Women.

WOMEN CENTRIC LAWS

1. Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

The depravity that results from sexual harassment of a woman in her workplace was first recognized and regulated by the Supreme Court of India, in the guidelines laid down in Vishaka and Others v. State of Rajasthan and Others¹ (**Vishaka Guidelines**) in 1997, while simultaneously observing a void

in legislative measures to prevent such atrocious acts.

Over the years, it was observed that employers failed to comply with the Vishaka Guidelines. Following this, almost 15 years later, the legislature passed the Prohibition of Sexual Harassment of Women at the Workplace Act, 2013 (**SHW Act**), crystalizing the Vishaka Guidelines into a legislative mandate. Alongside, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (**SHW Rules**) was also enacted.

Violation of fundamental rights of the Woman under the Constitution of India

The SHW Act recognizes that sexual harassment is violative of the fundamental rights guaranteed under the Constitution and international Agreements ratified by India. These rights include right to equality before law and equal protection under law,² right to protection of life and personal liberty,³ right of prohibition of discrimination on grounds of religion, race, caste, sex or place of birth,⁴ right to equality of

¹ AIR 1997 SC 3011- followed in Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625.

² Articles 14, Constitution of India, 1950.

³ Article 21, Constitution of India, 1950.

⁴ Article 15, Constitution of India, 1950.

opportunity in matters of public employment⁵ and the right to practice any profession or to carry out any occupation, trade or business,⁶ which includes a right to a safe environment free from sexual harassment. The International Convention ratified on the 25th June, 1993 that brings about the obligations under SHW Act is the Convention on the Elimination of all Forms of Discrimination against Women.

Objectives of the SHW Act

The SHW Act is enacted with the objective of ensuring that no woman should be subjected to sexual harassment at any workplace.⁷ The Government monitors the implementation of the SHW Act and maintains data on the number of cases filed and disposed off basis reports it receives annually under the SHW Act.⁸

Protected Women

In relation to a workplace, any woman who alleges to have been subjected to any act of sexual

harassment is protected under the SHW Act. This is irrespective of age or whether she is an employee or not.

With respect to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house is protected. This includes women who are paid in cash or kind, who are employed either directly or through any agency on a temporary, permanent, part time or full time basis.⁹

Sexual Harassment

Sexual harassment includes any one or more of the following acts or behaviour (whether directly or by implication) namely-

- i. physical contact and advances; or
- ii. a demand or request for sexual favours; or
- iii. making sexually coloured remarks; or
- iv. showing pornography; or
- v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.¹⁰

⁵ Article 16, Constitution of India, 1950.

⁶ Article 19(1)(g), Constitution of India, 1950.

⁷ Section 3, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

⁸ Section 23, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

⁹ Section 2(a), Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

¹⁰ Section 2(n), Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

Further the circumstances, which may amount to sexual harassment include-

- i. implied or expressed promise to preferential treatment in her employment;
- ii. implied or explicit threat of detrimental treatment in her employment;
- iii. implied or explicit threat about her present or future employment;
- iv. interference with work or creating an intimidating or offensive or hostile work environment;
- v. humiliating treatment likely to affect health or safety of a woman.¹¹

Workplace

Workplace under the SHW Act has an expansive scope and includes the following public and private enterprises-

- i. Any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the

local authority or a Government company or a corporation or a co-operative society;

- ii. Any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;

iii. Hospitals or nursing homes;

iv. Any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

- v. Any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

¹¹ Section 3, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

vi. A dwelling place or a house.¹²

Respondent

A respondent is the person against whom the aggrieved woman has made a complaint

Employer

The definition of employer for the purposes of the SHW Act is dependent on the type of organization. This has been summarized in the table below.

S no	Organization	Employer
i.	any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority	<ul style="list-style-type: none"> • the head of that department, organization, undertaking, establishment, enterprise, institution, office, branch or unit; or • such other officer as the appropriate Government or the local authority may by an order specify in this behalf; • the person discharging contractual obligations with respect to his or her employees.
ii.	in any workplace not covered above	<ul style="list-style-type: none"> • any person responsible for the management, supervision and control of the workplace, including the person or board or committee responsible for formulation and administration of policies for such organization; • the person discharging contractual obligations with

¹² Section 2(o), Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

		respect to his or her employees.
ii.	a dwelling place or house	<ul style="list-style-type: none"> • a person or a household who employs or benefits from the employment of domestic worker.

This is irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.¹³

District Officer. This District Officer is a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector appointed by the Government under the SHW Act.¹⁵

Complaints Committees

The SHW Act provides for two types of Complaints Committees where an aggrieved woman may file her complaint: the Internal Complaints Committee (**ICC**) and the Local Complaints Committee (**LCC**). An ICC will be constituted by its employers in every workplace with more than 10 employees.¹⁴

An LCC will be constituted in every district for sexual harassment complaints from other workplaces with less than 10 employees and without an ICC. This will be constituted by a

Who will constitute ICC?

The members of ICC are to be nominated by the employer. However, the SHW Act provides that ICC should consist of the following people-

- i. a Presiding Officer;
- ii. not less than two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge; and
- iii. one member from amongst non-governmental organizations or associations committed to the cause of

¹³ Section 2(g), Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

¹⁴ Section 4, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

¹⁵ Section 6, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

women or a person familiar with the issues relating to sexual harassment.

In order to ensure participation of women employees in ICC proceedings, at least one-half of the members of ICC must be women.¹⁶

Who will constitute LCC?

The SHW Act provides that LCC should consist of the following-

- i. a Chairperson to be nominated from amongst the eminent women in the field of social work and committed to the cause of women;
- ii. one Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district;
- iii. two Members, of whom at least one must be a woman, to be nominated from amongst the following
 - non-governmental organisations or associations committed to the cause of women
 - a person familiar with the issues relating to sexual harassment.

- A person with a background in law or possess legal knowledge

- a woman belonging to the Scheduled Castes or the Scheduled Tribes or the Other Backward Classes or minority community;

- iv. the concerned officer dealing with the social welfare of women and child development in the district (member ex officio).¹⁷

Duties of an Employer

Every employer must-

- i. provide a safe working environment at the workplace which will include safety from the persons coming into contact at the workplace;
- ii. display at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the ICC;
- iii. organise workshops and awareness programmes at regular intervals for sensitising the employees with the provisions of the SHW Act;

¹⁶ Section 4, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

¹⁷ Section 7, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

- iv. orientation programmes for the members of the ICC; rules and initiate action for such misconduct;
- v. provide necessary facilities to the ICC or LCC for dealing with the complaint and conducting an inquiry; xii. monitor the timely submission of reports by the ICC or LCC.¹⁸
- vi. assist in securing the attendance of respondent and witnesses before the ICC or LCC for the inquiry; There are punitive consequences for non-compliance by the employer with provisions of the SHW Act.¹⁹
- vii. make available such information to the ICC or LCC, as it may require; *Complaint procedure*
- viii. provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law; Under the SHW Act, the woman must make a written complaint of sexual harassment at the workplace to ICC or to LCC, within a period of three months from the date of incident. In case of a series of incidents, within a period of three months from the date of last incident.
- ix. cause to initiate action under the Indian Penal Code or any other law or If the aggrieved woman is unable to make complaint in writing, reasonable assistance must be rendered by the presiding officer or any member of the ICC (or the Chairperson or any member of LCC) for making the complaint in writing.²⁰ As per the SHW Rules, in case the woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed, inter-alia,
- x. cause to initiate action in the workplace at which the incident of sexual harassment took place, if the woman so desires;
- xi. treat sexual harassment as a misconduct under the service

¹⁸ Section 19, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

¹⁹ Section 26, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁰ Section 9, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

on her behalf by any of the following with the written consent of the woman-

- i. her relative
- ii. her friend
- iii. her co-worker
- iv. an officer of the National Commission for Woman or State Women's Commission
- v. any person who has knowledge of the incident.²¹

Inquiry

The inquiry initiated basis the complaint must be completed within a period of ninety days. For the purpose of the inquiry, ICC or LCC can summon and enforce the attendance of any person, examine him on oath, require the discovery and production of documents, etc.²² The inquiry must be culminated with an Inquiry Report, provided to the employer or District Officer and the parties concerned.²³

Dissemination of information

The identity and addresses of the woman, respondent and witnesses, any information

relating to conciliation and inquiry proceedings, recommendations of the ICC or LCC and the action taken by the employer or the District Officer under the provisions of the SHW Act must not be published, communicated or made known to the public, press and media in any manner, unless the dissemination is in furtherance of justice and public interest.²⁴

Opportunity to be heard

Both parties will be given an opportunity of being heard and a copy of the findings will be made available to them to make representation against the findings before the ICC or LCC.²⁵

Special Procedure for Domestic Workers

In case of a domestic worker, the LCC will forward the complaint to the police, within a period of seven days for registering the case under section 509 of the Indian Penal Code.²⁶

²¹ Rule 6, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013.

²² Section 11, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²³ Section 13, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁴ Section 16, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁵ Section 11, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁶ Section 11, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

Settlement of the matter

At the request of the aggrieved woman, the matter may be settled between her and the respondent through conciliation. However, no monetary settlement can be made as a basis of conciliation. Following such settlement, the Inquiry will be dropped, unless the woman informs ICC or LCC that any term or condition of the settlement arrived at has not been complied with.²⁷

Penalty for sexual harassment

Following a positive determination of sexual harassment, the employer would be recommended to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable. This can also include deduction from the salary/wages or payment by the respondent.²⁸

For determining the amount to be paid, the following will be considered-

- the mental trauma, pain, suffering and emotional

distress caused to the aggrieved woman;

- the loss in the career opportunity due to the incident of sexual harassment;
- medical expenses incurred by the victim for physical or psychiatric treatment;
- the income and financial status of the respondent;
- feasibility of such payment in lump sum or in instalments.²⁹

In the event the inquiry reveals that it is a malicious complaint then the ICC may make a recommendation for measures to be taken against the woman making the false complaint.³⁰

Complaint Committees an alternate forum

It must be noted that the Complaints Procedure was only an alternate procedure for redressal of sexual harassment claims.³¹ As illustrated by the Supreme Court in the case of Hira Nath Mishra & Ors. v. The Principal, Rajendra Medical College, the criminal procedure was not always a preferred option. This is because, in many cases, the

²⁷ Section 10, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁸ Section 26, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

²⁹ Section 15, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

³⁰ Section 14, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

³¹ Section 28, Prohibition of Sexual Harassment of Women at the Workplace Act, 2013.

female students would not cooperate due to fright and worry of harm to their body or reputation. It was observed that under such circumstances the authorities had to devise a just and reasonable plan of inquiry which, on one hand, would not expose individuals to harassment and on the other hand secure reasonable opportunity to the students to state their cases.³²

2. Equal Remuneration Act, 1976.

It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a constitutional goal under Directive Principles of State Policy.³³ The Constitution of India provides for the State to secure equal pay for equal work for both men and women.³⁴ This is in furtherance of promoting equality and preventing discrimination on the ground of sex in matters of employment.

Equal pay for equal work is also implicit in the doctrine of

equality³⁵ and equality of opportunity.³⁶ It also means that the concept of reasonable classification evolved with respect to Articles 14 and 16(1) applies.³⁷

India has also ratified the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951. It is in this background that the Equal Remuneration Act, 1976 (**ER Act**) was introduced on February 11, 1976.

Application of the ER Act

The ER Act provides for the payment of equal remuneration to men and women workers for same work or work of similar nature and for the prevention of discrimination on the ground of sex against women in the matter of employment.³⁸

³² AIR 1973 SC 1260.

³³ Randhir Singh v. Union of India and Ors, AIR 1982 SC 879.

³⁴ Article 39 (d), Constitution of India, 1950.

³⁵ Article 14, Constitution of India, 1950.

³⁶ Article 16(1), Constitution of India, 1950.

³⁷ State of Madhya Pradesh and Ors. v. Pramod Bhartiya and Ors, AIR 1993 SC 286

³⁸ Preamble, Equal Remuneration Act, 1976.

Remuneration

Remuneration means the basic wage or salary and any additional emoluments payable to a person employed if the terms of the contract of employment are fulfilled.³⁹

Scope of Same work or work of a similar nature

Same work or work of a similar nature means work in respect of which the skill, effort and responsibility required are the same when performed under similar working conditions.⁴⁰ For example, a woman who works days cannot claim equality with a man on higher basic rate for working nights if in fact there are women working nights on that rate too, and the applicant herself would be entitled to that rate if she changed shifts.⁴¹

The interpretation of same work or work of a similar nature has been done by Courts and can be summarized by the following points.

- Similar work implies differences in detail but these

should not defeat a claim for equality on trivial grounds. It should look at the duties actually performed not those theoretically possible.

- It must be noted that the ER Act also applies where a woman received less pay than a man employed prior to her by the employer for equal work.⁴²
- The ER Act does not suggest that there can be no discrimination at all between men and women in the matter of remuneration. There are some kinds of work which women do not or are prohibited by law from undertaking. In such cases, there would not be any discrimination on the ground of sex.⁴³
- It is relevant to note that the ER Act in no way bars intelligible differentia- for example, different pay basis technical or educational qualification.⁴⁴

³⁹ Section 2(g), Equal Remuneration Act, 1976.

⁴⁰ Section 2(h), Equal Remuneration Act, 1976.

⁴¹ M/s. Mackinnon Mackenzie Co. Ltd. v. Audrey D'costa and another, AIR 1987 SC 1281.

⁴² M/s. Mackinnon Mackenzie Co. Ltd. v. Audrey D'costa and another, AIR 1987 SC 1281.

⁴³ Federation of All India Customs and Excise Stenographers v. Union of India, AIR 1988 SC 1291.

⁴⁴ Sita Devi and others. v. State of Haryana and others, AIR 1996 SC 2764.

- The ER Act is also not applicable for special treatment accorded to women under law or in connection with birth or a child, retirement, marriage or death.⁴⁵

Employer's duties

The employer must-

- pay equal remuneration to men and women for same work or work of a similar nature.⁴⁶
- not make any discrimination against women while making recruitment, or in any condition of service subsequent to recruitment such as promotions, training or transfer, for the same work or work of a similar nature. The only exception to this is if the employment of women in such work is prohibited or restricted by or under any law.⁴⁷
- maintain such registers and other documents in relation to the workers employed by him.⁴⁸

Complaints

Claims arising out of non-payment of equal remuneration or complaints regarding violation of the ER Act can be made to the following

- Authorities appointed under the ER Act;⁴⁹
- Metropolitan Magistrate or a Judicial Magistrate of the First Class.⁵⁰

A Court can only take cognizance upon

- its own knowledge or upon a complaint made by the appropriate Government or an officer authorised by it in this behalf, or
- a complaint made by the person aggrieved by the offence or by any recognised welfare institution or organisation.⁵¹

*Penalties*⁵²

The Penalties under the Act are in accordance with the table below-

⁴⁵ Section 15, Equal Remuneration Act, 1976.

⁴⁶ Section 4, Equal Remuneration Act, 1976.

⁴⁷ Section 5, Equal Remuneration Act, 1976.

⁴⁸ Section 5, Equal Remuneration Act, 1976.

⁴⁹ Section 7, Equal Remuneration Act, 1976.

⁵⁰ Section 12, Equal Remuneration Act, 1976.

⁵¹ Section 12, Equal Remuneration Act, 1976.

⁵² Section 10, Equal Remuneration Act, 1976.

S no	Offence	Penalty
i.	If any employer omits or fails to maintain any register or other document in relation to workers employed by him	simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both
ii.	If any employer omits or fails to produce any register, muster-roll or other document relating to the employment of workers	simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both
ii.	If any employer omits or refuses to give any evidence or prevents his agent, servant, or any other person in charge of the establishment, or any worker, from giving evidence	simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both
v.	If any employer omits or refuses to give any information	simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both
v.	If any employer makes any recruitment in contravention of the provisions of the ER Act	fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall be not less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.
vi.	If any employer makes any payment of remuneration at unequal rates to men and	fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or

	women workers, for the same work or work of a similar nature	with imprisonment for a term which shall be not less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.
ii.	If any employer makes any discrimination between men and women workers in contravention of the provisions of the ER Act	fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall be not less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.
ii.	If any employer omits or fails to carry out any direction made by the appropriate Government	fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall be not less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.
x.	If any person being required so to do, omits or refuses to produce to an Inspector any register or other document or to give any information	fine which may extend to five hundred rupees

3. Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961 (**MB Act**) was enacted to regulate the period of employment of women preceding and subsequent to child birth and provide women with maternity benefits. This is in pursuance to the Constitution of India, which provides that

- i. the health and strength of women workers are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength;⁵³
- ii. Provision for just and humane conditions of work and maternity relief;⁵⁴
- iii. all agricultural, industrial and other workers must be secured a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.⁵⁵

Application

⁵³ Article 39, Constitution of India, 1950.

⁵⁴ Article 42, Constitution of India, 1950.

⁵⁵ Article 43, Constitution of India, 1950.

The MB Act applies to all of the following-

- i. Every factory, mine or plantation (including those belonging to Government),
- ii. Establishments engaged in the exhibition of equestrian, acrobatic and other performances, and
- iii. Every shop or establishment wherein 10 or more persons are employed.⁵⁶
- iv. The MB Act applies to biological mothers and 'commissioning mothers'. A commissioning mother means a biological mother who uses her egg to create an embryo implanted in any other woman.⁵⁷

Obligations of Employer

- i. The obligations upon an employer includes prohibition from knowingly employing a woman during the following specified times-
 - the six weeks immediately following the day of her delivery, miscarriage or

⁵⁶ Section 2, Maternity Benefit Act, 1961.

⁵⁷ Section 3, Maternity Benefit Act, 1961.

medical termination of pregnancy;⁵⁸

- the period of one month immediately preceding the period of six weeks, before the date of her expected delivery.⁵⁹
- ii. On specific request of the woman, no pregnant woman can be employed during the abovementioned period to undertake any work which is of an arduous nature, which is any way is likely to interfere with her pregnancy or the normal development of the foetus.⁶⁰
- iii. The woman may work from home after availing of the maternity benefit, on conditions that the employer and the woman may mutually agree to.⁶¹
- iv. It is unlawful for her employer to discharge or dismiss her during or on account of her maternity absence.⁶²

The penalty for the violation of the above are imprisonment which is not be less than three

months but which may extend to one year and with fine which is to be more than two thousand rupees but which may extend to five thousand rupees.⁶³ The Supreme Court in the case of *Air India v. Nergeshh Meerza* struck down the provision of retirement of air hostesses on first pregnancy as arbitrary and violative of the Constitution of India.⁶⁴

- v. Every employer shall be liable for the payment of maternity benefit at the rate of the average daily wage for the period of her absence.⁶⁵
- vi. If a woman entitled to maternity benefit dies before receiving such maternity benefit, the employer must pay such benefit to the person nominated by the woman and in case there is no such nominee, to her legal representative.⁶⁶
- vii. The woman will also be entitled to receive from her employer a medical bonus of two thousand five hundred rupees, if no pre-natal

⁵⁸ Section 4(1), Maternity Benefit Act, 1961.

⁵⁹ Section 4(2), Maternity Benefit Act, 1961.

⁶⁰ Section 4(3), Maternity Benefit Act, 1961.

⁶¹ Section 5, Maternity Benefit Act, 1961.

⁶² Section 12, Maternity Benefit Act, 1961.

⁶³ Section 21, Maternity Benefit Act, 1961.

⁶⁴ AIR 1981 SC 1829.

⁶⁵ Section 5, Maternity Benefit Act, 1961.

⁶⁶ Section 7, Maternity Benefit Act, 1961.

confinement and post-natal care is provided for by the employer free of charge.⁶⁷

viii. Every woman who has delivered a child and returns to duty after such delivery will be allowed two breaks for nursing the child until the child attains the age of fifteen months in the course of her daily work, in addition to the interval for rest allowed to her.⁶⁸

ix. With the 2017 Amendment Act, every establishment having fifty or more employees are also mandated to have the facility of crèche either separately or along with common facilities and the woman will be entitled to at least four visits a day.⁶⁹

x. An abstract of the provisions of the MB Act and the MB Rules made thereunder in the local language must be exhibited in a conspicuous place by the employer in every part of the establishment in which women are employed.⁷⁰

xi. Every employer must prepare and maintain such registers, records and muster-rolls.⁷¹

The Delhi High Court has held that an employer, bound by Articles 14 and 16(1) of the Constitution, cannot discriminate between two female employees for the purpose of maternity benefit, on the basis that one of them is a contractual employee and thus entitled to lesser extent of pay, whereas the other, being a permanent employee, could be favoured with a better term. This cannot be treated as a reasonable classification, considering the object of the rule for grant of maternity benefit.⁷²

Maternity Leave Period

i. The maximum period for which any woman will be entitled to maternity benefit will be twenty-six weeks of which not more than eight weeks shall precede the date of her expected delivery.⁷³

ii. For a woman having two or more than two surviving

⁶⁷ Section 8, Maternity Benefit Act, 1961.

⁶⁸ Section 11, Maternity Benefit Act, 1961.

⁶⁹ Section 11A, Maternity Benefit Act, 1961.

⁷⁰ Section 19, Maternity Benefit Act, 1961.

⁷¹ Section 20, Maternity Benefit Act, 1961.

⁷² Government of N.C.T. Delhi v. Shweta Tripathi, O.A. 4212/2012.

⁷³ Section 5 (3), Maternity Benefit Act, 1961.

children, the maximum period maternity benefit will be granted will be twelve weeks.⁷⁴

- iii. A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother.⁷⁵
- iv. In case of miscarriage, or medical termination of pregnancy, a woman will be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage or her medical termination of pregnancy, on production of proof.⁷⁶
- v. In case of tubectomy operation, a woman will be entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of her tubectomy operation, on production of proof.⁷⁷

- vi. A woman suffering from illness arising out of pregnancy, delivery; premature birth of child, miscarriage, medical termination of pregnancy or tubectomy operation will be entitled to leave with wages at the rate of maternity benefit for a maximum period of one month in addition to the leave mentioned hereinabove.⁷⁸

It was held by the Supreme Court in *Shah v. Presiding Officer, Labour Court, Coimbatore and Ors.* that maternity benefits are to be given for all the days including Sunday and other wageless holidays.⁷⁹

Implementation

As per the MB Act, the following may file a complaint regarding the commission of an offence under the MB Act in any court not inferior to that of a metropolitan Magistrate or a Magistrate of the First Class-

- i. Any aggrieved woman;
- ii. an office-bearer of a trade union registered under the Trade Unions Act, 1926 of

⁷⁴ Section 5 (3), Maternity Benefit Act, 1961.

⁷⁵ Section 5 (4), Maternity Benefit Act, 1961.

⁷⁶ Section 9, Maternity Benefit Act, 1961.

⁷⁷ Section 9A, Maternity Benefit Act, 1961.

⁷⁸ Section 10, Maternity Benefit Act, 1961.

⁷⁹ AIR 1978 SC 12.

- which such woman is a member;
- iii. a voluntary organisation registered under the Societies Registration Act, 1860; or
- iv. an Inspector.⁸⁰

No such complaint shall be filed after the expiry of one year from the date on which the offence is alleged to have been committed.⁸¹

GENERAL LEGISLATION WITH BENEFICIAL PROVISIONS FOR WOMEN

The following general laws protect all labour force, and includes specific provisions that benefit women. These include the following-

1. **Factories Act, 1948 (Factories Act)**- The Factories Act, inter-alia, applies to all factories where 10 or more ‘workers’ are employed (or were employed in the preceding 12 months) and a manufacturing process is carried on with the aid of power.
2. **Contract Labour (Regulation & Abolition) Act, 1970 (CLRA Act) and Rules, 1971**- The CLRA Act

and Rules apply to establishments which employ 20 or more ‘workmen’ as contract labour. The expression ‘workman’ is defined to mean any person employed to do any skilled, semi-skilled or unskilled manual, supervisory, technical or clerical work. It excludes persons employed in managerial or administrative capacity, persons employed as supervisors and out-workers to whom materials are given for manufacturing at their own premises. A workman is deemed to be a ‘contract labour’ if he is hired in connection with the work of an establishment by or through a contractor (with or without the knowledge of the principal employer). Establishments employing contract labour must register themselves as principal employers with the appropriate authority by making an application in the prescribed form along with requisite fees. Every contractor who supplies contract labour must also be licensed under the Act.

⁸⁰ Section 23, Maternity Benefit Act, 1961.

⁸¹ Section 23, Maternity Benefit Act, 1961.

3. **The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) and Rules-**

The EPF Act and the Rules framed thereunder apply to every factory, trading and commercial establishments employing 20 or more persons. There are three schemes under the EPF Act, namely-

- i. the Employees Provident Funds Scheme, 1952 where the employer and employee make respective contributions to a fund administered under the Act;
- ii. Employees' Pension Scheme, 1995 where the employer makes his contribution to a pension fund administered under the Act; and
- iii. Employees Deposit Linked Insurance Scheme where an employer makes a contribution to a fund administered under the Act. Under the EPF Act, every employer must contribute in aggregate 13.61% of his salary. The accumulated amounts (with interest thereon) in the Provident Fund can be withdrawn by the employee at the time of retirement, resignation from service etc. as

well as during service under certain circumstances such as transfer to another establishment, for meeting extended hospitalization expenses, education of children, purchase of property etc.

4. **Employees' State Insurance Act, 1948 (ESI Act) and Rules-**

The ESI Act, inter-alia, applies to factories and establishments employing 10 or more persons including contract labourers. The ESI Act, however, does not apply to employees earning Rs. 15,000 per month. The employer of every factory or establishment to which the ESI Act applies, must apply for registration under the ESI Act. It provides for the creation of an insurance fund and eligible employees are entitled to sickness benefit, employment injury, maternity benefit, disablement benefit, funeral benefit etc. from out of the accumulations in the insurance fund. The ESI Act requires the employer and employee to make their respective contributions to the insurance fund constituted under the Act.

5. **Plantation Labour Act, 1951-**

The Act was enacted to provide for the welfare of labour in plantations. The Plantations regulated include-

- i. any land used or intended to be used for growing tea, coffee, rubber, cinchona or cardamom which measures 5 hectares or more and in which fifteen or more persons are employed.
- ii. offices, hospitals, dispensaries, schools, and any other premises used for any purpose connected with such plantation.
- iii. However, it does not include any factory on the premises to which the provisions of the Factories Act, 1948.
- iv. All such plantations must be registered.

6. **Delhi Shops and Establishments Act, 1954**

(DSE Act)- The DSE Act applies in the first instance only to the Municipal Areas, Notified Areas and Cantonment limits of Delhi, New Delhi, Shahadra, Civil Lines, Mehrauli, Red Fort and Delhi Cantonment, but Government may direct that it

shall apply to any other local area.

A 'shop' means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers. It includes an office, a store-room, godown, warehouse or workhouse or work place used in connection with such trade or business. It does not include a factory or commercial establishment.

An 'establishment' means a shop, a commercial establishment; residential hotel, restaurant, eating house, theatre or other places of public amusement or entertainment. Such establishment must be registered with the Chief Inspector, who will maintain a register of establishments.

Beneficial Provisions in the abovementioned Acts.

The above Acts have protective obligations for both men and women such as maximum working hours of adults; intervals for rest; regulation of employment of young persons; weekly off; overtime wages; cleanliness, manner of disposal of wastes and effluents; ventilation and temperature control;

provision made for canteens, drinking water; appointment of welfare officers etc.

The Acts also has women benefitting provisions that include the following-

- i. Prohibition or restriction of the employment of women, adolescents or children in the dangerous processes or with handling of dangerous items, chemicals etc.
- ii. No woman shall be required or allowed to work except between the hours of 6 A.M. and 7 P.M. (This may vary from State to State, depending on the laws, provided no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M.) This is in pursuance to ILO Convention No. 89, which lays down that women shall not be employed during the night except in case of serious emergency where the National Interest demands employment of women during night.⁸²
- iii. In every factory/ establishment/ plantation etc.

wherein more than a prescribed number of women workers are ordinarily employed, there shall be provided and maintained creche services and rooms for the use of children under the age of six years of such women. Such rooms must provide adequate accommodation which is adequately lighted and ventilated, maintained in a clean and sanitary condition and under the charge of women trained in the care of children and infants.

- iv. The dining-hall shall must be partitioned off and reserved for women workers, in proportion to their number. Washing-places for women shall be separate and screened to secure privacy.
- v. Where workers of both sexes are employed, there will be displayed outside each block of latrine and urinal a notice in the language understood by the majority of the workers 'For men only' or 'For Women only'. The notice will also bear the figure of a man or of a woman, as the case may be.

⁸² Triveni K.S. and Ors. v. Union of India (UOI) and Ors, 2002 (5) ALT 223.

change in employers' contribution.

- vi. Provision of separate restrooms for women, if required.
- vii. Under the ESI Act, Maternity benefit must be provided. The maternity benefit provisions under the ESI Act are the same as under the Maternity Benefit Act. Additionally, the Act provides for Confinement Expenses, which is a lump sum payment made to an insured woman or an insured person in respect of his wife if the confinement occurs at a place where necessary facilities under the ESI Scheme are not available. The Confinement Expenses paid is Rs. 5000/- w.e.f. 1.10.2013 per confinement. It is admissible for two confinements only.
- viii. Under the EPF Act, in 2018, amendments were introduced to incentivise employment of more women in the formal sector and to enable higher take-home wages by reducing women employees' contribution to 8 per cent for first three years of their employment against existing rate of 12 per cent with no

Penalty for non-compliance

The Acts generally provides for the appointment of inspectors to examine and enquire that the provisions of the Act are being followed. Non-compliance with the provisions of the Act entails penal consequences (including fine or imprisonment or both).

II. CRIME AGAINST WOMEN

Although women may be victims of any crime such as ‘murder’, ‘robbery’, ‘cheating’, etc., only the gender specific crimes such as rape, dowry death, cruelty by husband are characterized as ‘Crimes against Women’.⁸³

The regulation of such crimes against women are under (A) general laws- the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 and (B) specific legislation safeguarding women- (1) The Dowry Prohibition Act, 1961 (2) The Protection of Women from Domestic Violence Act, 2005 (3) The Indecent Representation of Women (Prohibition) Act, 1986 (4) The Immoral Traffic (Prevention) Act, 1956 and (5) The Commission of Sati Prevention Act, 1987.

⁸³In 2016, majority of cases under crimes against women were reported under ‘Cruelty by Husband or His Relatives’ (32.6%) followed by ‘Assault on Women with Intent to Outrage her Modesty’ (25.0%), ‘Kidnaping & Abduction of Women’ (19.0%) and ‘Rape’ (11.5%). Delhi ranks first among all states in the crimes against women index published by the National

GENERAL CRIMINAL LEGISLATION WITH BENEFICIAL PROVISIONS FOR WOMEN

1. The Indian Penal Code, 1860

Scope

The Indian Penal Code, 1860 (**IPC/Code**) is a general penal code for India and it applies to all persons guilty of acts or omissions done within India amounting to offences specified in the Code. It applies to citizens of India for offences committed outside India which would be punishable under the Code.

Beneficial Provisions for women

- i. **Rape**⁸⁴- It is the fourth most common crime against women in India.⁸⁵ The definition of Rape was revised through the Criminal Law (Amendment) Act 2013 to include marital rape.

A man is said to commit ‘rape’ who has sexual

Crime Records Bureau under the Ministry of Home Affairs. It reported the highest crime rate (160.4) compared to the national average rate of 55.2. <http://ncrb.gov.in/index.htm>.

⁸⁴ Section 375, Indian Penal Code, 1860.

⁸⁵ <http://ncrb.gov.in/index.htm>.

intercourse with a woman under the following circumstances-

- 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 by him personally or through another of any stupefying or unwholesome substance, 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 is punishable with a minimum sentence of imprisonment for a term of 7 years extendable to imprisonment for life along with fine. If a policeman / public servant / superintendent of jail, remand home / member of management or staff of hospital commits rape on a woman in his custody or in the limits of his workplace, he shall be liable for imprisonment of 10 years extendable to imprisonment for life and also be liable to fine.

Death penalty for the gang rape in the 'Nirbhaya Rape Case' was upheld by the Supreme Court in a review petition in the case of Mukesh v. NCT of Delhi⁸⁶ and the court held it to be 'the rarest of the rare case'. Death sentence was upheld by the Supreme Court in many other cases like Shyam Narain v. State⁸⁷, Bantu v. State of Uttar

⁸⁶ Mukesh v. NCT of Delhi, 2018 (8) SCALE 557.

⁸⁷ Shyam Narain v. State, (2013) 7 SCC 77.

Pradesh⁸⁸, Ankush Maruti Shinde v. State of Maharashtra⁸⁹ etc.

- ii. Sexual intercourse by husband with his wife during separation⁹⁰- Whoever has sexual intercourse with his wife, who is living separately (whether under a decree of separation or otherwise), without her consent is guilty of the offence of marital rape and is liable for punishment for imprisonment of 2 years extendable to 7 years and also fine.
- iii. Dowry Death⁹¹- Where the death of a woman is caused by any burns or bodily injury or where death occurs due to any unusual circumstances within 7 years of her marriage and it is shown that soon before the death she was subjected to cruelty and harassment by her husband or his relative, for or in connection with any dowry demand, then the husband or his relative shall have committed the offence of

dowry death. The offence is punishable with a minimum term of imprisonment for 7 years extendable to imprisonment for life.

- iv. Causing death of woman with intent to cause miscarriage⁹²- Whoever causes death of a woman by an act with the intent to cause her miscarriage shall be liable to imprisonment for a term extendable to 10 years and fine. If such an act is done without the woman's consent then the punishment may extend to imprisonment for life.
- v. Outraging Modesty of Woman⁹³- Whoever assaults or uses criminal force to any woman with intent or knowledge to outrage her modesty commits an offence. Such offence shall be punishable with a term of imprisonment of 2 years or fine or both.
- vi. Sexual harassment and punishment for sexual harassment⁹⁴- A man

⁸⁸ Bantu v. State of Uttar Pradesh, (2008) 11 SCC 113.

⁸⁹ Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667.

⁹⁰ Section 376B, Indian Penal Code, 1860– inserted by Amendment Act 22 of 2018.

⁹¹ Section 304B, Indian Penal Code, 1860– inserted by Amendment Act 43 of 1986.

⁹² Section 314, Indian Penal Code, 1860.

⁹³ Section 354, Indian Penal Code, 1860.

⁹⁴ Section 354A, Indian Penal Code, 1860– inserted by Amendment Act 13 of 2013.

committing any act constituting sexual harassment shall be punishable with a term of imprisonment of 1 year extendable to 3 years or fine or both. Additionally, the Prohibition of Sexual Harassment of Women at the Workplace Act, 2013 provides specific remedies for sexual harassment that might occur at any workplace.

vii. Assault or use of criminal force to woman with an attempt to disrobe⁹⁵- Any man who assaults or uses criminal force to any woman or abets such act with the intent of disrobing or compelling her to be naked shall be punishable with imprisonment of 3 years extendable to 7 years and fine.

viii. Voyeurism⁹⁶- Any man who watches or captures image of a woman engaging in private acts or disseminates such images shall be punished with imprisonment of a term of 1 year extendable to 7 years and fine.

ix. Stalking⁹⁷- Any man who follows a woman and contacts her repeatedly by any means despite her disinterest shall be punished with imprisonment of a term of 3 years extendable to 5 years and fine.

x. Kidnapping, abducting or inducing a woman to compel her marriage⁹⁸- Whoever kidnaps or abducts a woman with intent or knowledge to compel her to marry any person against her will or to have illicit intercourse shall be liable to imprisonment for a term extendable to 10 years and fine.

xi. Procuration of a minor girl⁹⁹- Whoever causes a minor girl (under the age of 18 years) to go from any place or do any act with the intent or knowledge to compel her to illicit intercourse shall be liable to imprisonment for a term extendable to 10 years and fine.

xii. Importation of a girl from a foreign country¹⁰⁰- Whoever imports girl (under the age of

⁹⁵ Section 354B, Indian Penal Code, 1860– inserted by Amendment Act 13 of 2013.

⁹⁶ Section 354C, Indian Penal Code, 1860– inserted by Amendment Act 43 of 1986.

⁹⁷ Section 354D, Indian Penal Code, 1860– inserted by Amendment Act 43 of 1986.

⁹⁸ Section 366, Indian Penal Code, 1860.

⁹⁹ Section 366A, Indian Penal Code, 1860– inserted by Amendment Act 20 of 1923.

¹⁰⁰ Section 366B, Indian Penal Code, 1860– inserted by Amendment Act 20 of 1923.

21 years) from outside India with the intent or knowledge to compel her to illicit intercourse shall be liable to imprisonment for a term extendable to 10 years and fine.

xiii. Selling minor for prostitution¹⁰¹- Whoever sells or lets for hire a minor girl with the intent or knowledge to compel her to illicit intercourse or prostitution shall be liable to imprisonment for a term extendable to 10 years and fine.

xiv. Buying minor for prostitution¹⁰²- Whoever buys or hires a minor girl with the intent or knowledge to compel her to illicit intercourse or prostitution shall be liable to imprisonment for a term extendable to 10 years and fine.

xv. Adultery¹⁰³- Any person who has intercourse with the wife of another man without that man's consent or connivance, and such intercourse not amounting to rape, is guilty of the offence of adultery. The

offence is punishable with a sentence of imprisonment for a term extendable to 5 years or fine or both. The woman is not guilty of any offence.

The constitutionality of Section 497 has been challenged in the case of Joseph Shine v. Union of India,¹⁰⁴ wherein the provision is being examined in the light of Constitution and equal rights terming the provision to be 'prima facie archaic' and 'tantamount to subordination of a woman where the Constitution confers equal rights'.

xvi. Enticing or taking away or detaining with criminal intent a married woman¹⁰⁵- Any person who takes away or entices or detains the wife of another man with the intent of having intercourse with her is guilty of an offence punishable with imprisonment extendable to 2 years or fine or both.

xvii. Husband or relative of husband subjecting woman to cruelty¹⁰⁶- Where the husband or his relatives subject a woman to cruelty, they shall be

¹⁰¹ Section 372, Indian Penal Code, 1860.

¹⁰² Section 373, Indian Penal Code, 1860.

¹⁰³ Section 497, Indian Penal Code, 1860.

¹⁰⁴ Joseph Shine v. Union of India, (2018) 2 SCC 189.

¹⁰⁵ Section 498, Indian Penal Code, 1860.

¹⁰⁶ Section 498A, Indian Penal Code, 1860– inserted by Amendment Act 46 of 1983.

punished with imprisonment of 3 years and be liable to fine.

2. Code of Criminal Procedure, 1973

Scope

The Code of Criminal Procedure, 1973 (**CrPC**) is the main legislation providing procedure for administration of criminal law.

Beneficial Provisions for woman

- i. Procedure regarding arrest- If a woman has to be arrested, her submission to the custody on an oral intimation of arrest shall be assumed and the woman shall not be touched for the purpose of arrest, unless touched by a female police officer.
No woman shall be arrested after sunset and before sunrise except in exceptional circumstances, and in such cases the woman officer has to make a report and obtain the consent of Judicial Magistrate of First Class within whose local jurisdiction the offence is

committed or the arrest is to be made.¹⁰⁷

In *Kavita Mankikar v. Central Bureau of Investigation BS & FC*,¹⁰⁸ it was held that the Code of Criminal Procedure outlines the manner and the extent to which a person can be denuded of his liberty and thus needs a strict compliance. Any deviation from the prescribed procedure in the matter of arrest is therefore illegal.

- ii. Procedure regarding restoration of liberty of women¹⁰⁹- Upon a complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years for any unlawful purpose, the relevant judicial authority has the power to make an order for the restoration of a detained woman to her liberty or of an abducted female child to her parents or husband or guardian.
- iii. Procedure regarding search¹¹⁰- Where a search has to be made for concealing an article, if the person to be searched is a woman, it shall be done by a

¹⁰⁷ Section 46, Code of Criminal Procedure, 1973.

¹⁰⁸ *Kavita Mankikar v. Central Bureau of Investigation BS and FC*, Writ Petition No. 1142/2018 in Bombay High Court.

¹⁰⁹ Section 98, Code of Criminal Procedure, 1973.

¹¹⁰ Section 100(3), Code of Criminal Procedure, 1973.

woman officer with strict regard to decency.

- iv. Procedure for recording evidence¹¹¹- If information is given by a woman for an offence committed under Section 326A and 326B (Voluntarily causing grievous hurt by use of acid, etc.), 354 (Assault or criminal force to woman with intent to outrage her modesty), 354A (Sexual harassment and punishment for sexual harassment), 354B (Assault or use of criminal force to woman with an attempt to disrobe), 354C (Voyeurism), 354D (Stalking), 376(Punishment for Rape), 376A (Punishment for causing death or resulting in persistent vegetative state of victim), 376B (Sexual intercourse by husband on his wife during separation), 376C (Sexual intercourse by a person in authority), 376D (Gang rape) and 376E(Punishment for repeat offenders), then such information is to be recorded by a woman police officer. If the person giving information is mentally or physically disturbed, then the information shall be recorded

by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator and it shall be videographed. The recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice by a woman officer in the presence of her parents or guardian or near relatives or social worker of the locality in case of rape.¹¹²

- v. Procedure for investigation of Rape¹¹³- During the investigation of an offence of rape, examination shall be conducted within 24 hours of receiving the information relating to the offence by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf. The evidence of a woman below 18 years of age has to be

¹¹¹ Section 154, Code of Criminal Procedure, 1973.

¹¹² Section 157, Code of Criminal Procedure, 1973.

¹¹³ Section 164A, Code of Criminal Procedure, 1973.

taken without any confrontation with the accused in the cases of rape or any other sexual offence, however, the right to cross examination of the accused has to be maintained.¹¹⁴

The inquiry or trial of a rape case or of a sexual offence shall be conducted under camera by a woman judge or Magistrate.¹¹⁵

- vi. Procedure for maintenance of women¹¹⁶- If any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself or his legitimate or illegitimate minor child (whether married or not), unable to maintain himself or his legitimate or illegitimate minor child (whether married or not), unable to maintain himself or his father and mother, unable to maintain himself, a Magistrate of the First Class may order the payment of a monthly allowance for the maintenance. Also, if the Magistrate is satisfied that the husband of minor female child does not have sufficient means, he may

order the father of the female child to pay the allowance.

WOMEN CENTRIC LAWS

1. The Dowry Prohibition Act, 1961

Scope

This Act was enacted to prohibit giving or taking of dowry.

Dowry

As per the Act, dowry means¹¹⁷ any property or valuable security in connection with the marriage given or agreed to be given by one party to another or by the parents of either party to any other person at or before or any time after marriage but does not include Mahr as per Muslim Laws.

In *Vemuri Venkateswara Rao v. State of Andhra Pradesh*,¹¹⁸ it was held that the definition of dowry is wide enough to include all sorts of properties, valuable securities etc. given or agreed to be given directly or indirectly.

¹¹⁴ Section 273, Code of Criminal Procedure, 1973.

¹¹⁵ Section 372, Code of Criminal Procedure, 1973.

¹¹⁶ Section 125, Code of Criminal Procedure, 1973.

¹¹⁷ Section 2, the Dowry Prohibition Act, 1961.

¹¹⁸ *Vemuri Venkateswara Rao v. State of Andhra Pradesh*, 1991 (3) ALT 237.

Beneficial Provisions for women

Giving or taking or abetment to take or give dowry is punishable with imprisonment of 5 years and fine of not less than fifteen thousand or the value of dowry, whichever is higher.¹¹⁹

Demanding of dowry, directly or indirectly, from the parents/guardians or other relatives of a bride or bridegroom, shall be punishable with imprisonment of six months extendable to two years along with fine which may extend to ten thousand rupees.¹²⁰

Dowry if received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman—

- i. If the dowry was received before marriage, within 3 months after the date of marriage;
- ii. If the dowry was received at the time of or after the marriage, within 3 months after the date of its receipt;
- iii. If the dowry was received when the woman was a minor, within 3 months after she has

attained the age of eighteen years.

The person shall hold it in trust for the benefit of the woman pending such transfer.¹²¹

2. Protection of Women from Domestic Violence Act, 2005

Scope

This Act was enacted to prevent violence within family and to protect constitutional rights guaranteed to victims.

Who is protected?

A woman who is in or has been in a domestic relationship with a man and who has been subjected to domestic violence by such man has been defined to be the aggrieved person in the Act.¹²² The woman need not be a married woman,¹²³ and includes women in live in relationships.¹²⁴

¹¹⁹ Section 3, the Dowry Prohibition Act, 1961.

¹²⁰ Section 4, the Dowry Prohibition Act, 1961.

¹²¹ Section 6, the Dowry Prohibition Act, 1961.

¹²² Section 2(a), Protection of women from Domestic Violence Act, 2005.

¹²³ Chanmuniya vs Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141.

¹²⁴ Aruna Pramod Shah v. Union of India, WP. Cr. 425/2008, Del. Judgment dated 7 April, 2008.

Domestic Violence

Domestic violence¹²⁵ means any act, conduct or omission of the man -

- i. due to which the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved woman is injured or harmed and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;
- ii. if the aggrieved woman is harmed, harassed or endangered with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security;
- iii. it has the effect of threatening the aggrieved woman or any person related to her by any conduct mentioned in clause (a) or clause (b);
- iv. it injures the aggrieved woman, physically or mentally.

¹²⁵ Section 3, Protection of women from Domestic Violence Act, 2005.

¹²⁶ Section 18, Protection of women from Domestic Violence Act, 2005.

¹²⁷ Section 19, Protection of women from Domestic Violence Act, 2005.

Beneficial Provisions for women

- i. The Magistrate is empowered to pass protection order¹²⁶ on being satisfied that the domestic violence has taken place or is likely to take place.
- ii. Residence orders¹²⁷ can also be passed by the Magistrate to prevent the respondent man from dispossessing the aggrieved woman or for directing the respondent man to remove himself from the shared household or to restrain the respondent man from alienating the shared household or to direct the respondent man to secure same level of shared household or pay for the rent.
- iii. Monetary reliefs¹²⁸ can be asked from the respondent man for the losses and expenses incurred by the aggrieved woman as a result of domestic violence.
- iv. The Magistrate can also pass custody orders¹²⁹ for the temporary custody of the child with the aggrieved woman or

¹²⁸ Section 20, Protection of women from Domestic Violence Act, 2005.

¹²⁹ Section 21, Protection of women from Domestic Violence Act, 2005.

with any one filing the application on her behalf.

- v. Compensation and damages¹³⁰ can also be asked to be paid by the respondent man.

3. Indecent Representation of Women (Prohibition) Act, 1986

Scope

This Act was enacted to prevent indecent representation of women in advertisements, publications, writings, figures or in any other manner.

Indecent Representation

As per the Act, indecent representation of women means the depiction in any manner of the figure of a woman, her form or body (or any part) in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals.¹³¹

Beneficial Provisions for women

¹³⁰ Section 22, Protection of women from Domestic Violence Act, 2005.

¹³¹ Section 2(c), Indecent Representation of Women (Prohibition) Act, 1986.

Publication or arranging or participating in an advertisement which contains indecent representation of a woman in any form is prohibited. Also, production, selling, hiring, circulation or sending of any book, pamphlet, paper, drawing, painting, writing photograph, film, representation containing indecent representation of woman in any form is prohibited.

4. Immoral Traffic (Prevention) Act, 1956

Scope

This Act was enacted to prevent immoral trafficking.

Definitions

As per the Act, ‘ institution of brothel’ means any house, room or place or any of its portions used for the purpose of sexual exploitation or abuse for the gain of another person or for the gain of two or more prostitutes.¹³²

‘Prostitution’ means the sexual exploitation or abuse of persons for commercial purpose.¹³³

¹³² Section 2(a), Immoral Traffic (Prevention) Act, 1956.

¹³³ Section 2(f), Immoral Traffic (Prevention) Act, 1956.

Beneficial Provisions for women

- i. Anyone who procures, attempts to procure, induces, takes or attempts to take a person with or without consent for the purpose of prostitution shall be punishable on conviction with rigorous imprisonment for a term of 3 years extendable to 7 years and with fine extendable to two thousand rupees.
- ii. Keeping, managing or assisting in keeping or managing a brothel shall be punishable on first conviction with rigorous imprisonment for 1 year extendable to 3 years and with fine extendable to 2000 rupees and in the event of a second or subsequent conviction, with rigorous imprisonment of 2 years extendable to 5 years and with fine extendable to 2000 rupees.
- iii. If the tenant, lessee or occupier uses or knowingly allows anyone to use the premises or its part as brothel or if the owner, lessor or landlord or their agent uses or knowingly allows anyone to use the premises or its part as brothel, shall be punishable on first conviction with imprisonment of 2 years and with fine extendable to 2000 rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for of 5 years and also with fine.¹³⁴
- iv. If any person above the age of 18 is living, wholly or partly, on the earnings of a prostitution of any other person, punishment which may extend to two years or fine which may extend to one thousand rupees or both shall be imposed and if it relates to the prostitution of a child or female, punishment with imprisonment of 7 years extendable to 10 years shall be imposed.¹³⁵
- v. In case of a child, the punishment provided shall extend to rigorous imprisonment of 7 years extendable to life.¹³⁶
- vi. If any of the above is done without consent, the punishment of imprisonment of seven years shall extend to imprisonment of fourteen years.

¹³⁴ Section 3, Immoral Traffic (Prevention) Act, 1956.

¹³⁵ Section 4, Immoral Traffic (Prevention) Act, 1956.

¹³⁶ Section 5, Immoral Traffic (Prevention) Act, 1956.

- vii. Detention of a person with or without his consent in any brothel with the intent that such person has sexual intercourse with a person apart from their spouse shall be punishable with imprisonment for 7 years which may be for life extendable to 10 years along with fine. Commission of offence under this section will be presumed when-
 - a) A person is found with a child in a brothel
 - b) On the medical examination of the child in the brothel it is found that he has been sexually abused.
- viii. Detention of a woman is presumed when her jewellery, apparel, money or other property is withheld from her or she is threatened with legal proceedings, if she takes away her any jewellery, wearing apparel, money or other property lent or supplied to her by or by the direction of such person.¹³⁷
- ix. If a person is seduced for the purpose of prostitution by a person having his/her custody or charge, the punishment for the person securing shall be of imprisonment of 7 years but which may be extendable to 10 years along with fine.¹³⁸
- x. Detention in corrective institutions is provided when a woman is found guilty for seduction or prostitution in public places or if the state of health and the mental condition of the offender are conducive to correction.¹³⁹
- xi. Order for rescue of a person from a brothel can be given by the Magistrate to a police officer. The Magistrate also has the power to order closure of brothel and eviction of offenders from the premises.

5. Commission of Sati (Prevention) Act, 1987

Scope

This Act was enacted to prevent the commission of practice of Sati.

¹³⁷ Section 6, Immoral Traffic (Prevention) Act, 1956.

¹³⁸ Section 9, Immoral Traffic (Prevention) Act, 1956.

¹³⁹ Section 10A, Immoral Traffic (Prevention) Act, 1956.

Definitions

‘Sati’¹⁴⁰ means the act of burning or burying alive of any widow along with her deceased husband or any other relative irrespective of whether such burying or burning is voluntary.

Prevention and abetment of Sati

Section 3 prohibits Sati¹⁴¹ while Section 4 of the Act prohibits abetment of Sati. It includes-

- i. Inducing a widow or woman to get burnt or buried alive along with the body of her deceased husband, irrespective of whether she is in a fit state of mind or not to exercise her free will;
- ii. Making a widow or woman believe that the commission of Sati would result in some spiritual benefit to her or her deceased husband or to the general well-being of the family;
- iii. Encouraging a widow or woman to remain fixed in her resolve to commit Sati;

- iv. Participating in any procession in connection with the commission of Sati;
- v. Being present at the place where Sati is committed as an active participant;
- vi. Preventing the widow or woman from saving herself from being burnt or buried alive;
- vii. Interfering with the police in the discharge of its duties of taking any steps to prevent the commission of Sati.¹⁴²

Punishment

Under this Act, the commission of Sati is punishable with imprisonment up to a term of 6 months or fine or both.¹⁴³

If anyone abets¹⁴⁴ the commission of Sati, the person will be punishable with death or imprisonment for life along with fine. If anyone abets the commission of Sati leading to an attempt of committing Sati, the person will be liable to imprisonment for life along with fine.

¹⁴⁰ Section 2(c), Commission of Sati (Prevention) Act, 1987.

¹⁴¹ Section 3, Commission of Sati (Prevention) Act, 1987.

¹⁴² Section 4, Commission of Sati (Prevention) Act, 1987.

¹⁴³ Section 3, Commission of Sati (Prevention) Act, 1987.

¹⁴⁴ Section 4, Commission of Sati (Prevention) Act, 1987.

Any glorification of Sati is punishable with an imprisonment for a term of 1 year extendable to 7 years and a fine extendable up to thirty thousand rupees.¹⁴⁵

¹⁴⁵ Section 5, Commission of Sati (Prevention) Act, 1987.

III. WOMEN AND MARRIAGE, DIVORCE AND MAINTENANCE

The Indian Constitution recognises the supremacy and enforceability of 'personal law' of all religions. To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Constitution.¹⁴⁶ Presently, the law relating to marriage, divorce and maintenance is governed by personal laws. This section provides a brief overview of the same.

HINDU LAWS

1. The Hindu Marriage Act, 1956

Scope

The Hindu Marriage Act, 1956 (**HM Act**) codifies the law relating to marriage and divorce amongst Hindus. The HM Act applies to Hindus, Buddhists, Jains and Sikhs in India and also to the territories to which the HM Act extends.

In *Maneka Gandhi v. Indira Gandhi*,¹⁴⁷ it was contended that

Sanjay Gandhi was Parsi and not a Hindu since his father was Parsi. It was held by the Court that since he was brought up as a Hindu by a Hindu mother; the wedding of Indira Gandhi and Firoz Gandhi was famously recorded in history to have been done by Vedic Rites and no Parsi christening ceremony was held (Navjat), thus Sanjay Gandhi would be a Hindu in law.

Marriage

- i. Conditions for a Hindu marriage— A marriage may be solemnized between 2 Hindus if the conditions provided therein are fulfilled. These are that neither party should have a living spouse, soundness of mind, free consent, age requirements and the parties not being in degree of prohibited relationship or sapindas.¹⁴⁸ In *Vinayaka Nair v. Corpn of Kochi*, the refusal of registration of a marriage on the ground that the husband was of Canadian nationality was held to be wrong as all conditions under the HM Act held to be complied with.¹⁴⁹

¹⁴⁶ Article 25, Constitution of India, 1950.

¹⁴⁷ AIR 1984 (Del) 428.

¹⁴⁸ Section 5, Hindu Marriage Act, 1956.

¹⁴⁹ AIR 2006 Ker 275.

- ii. Restitution of conjugal rights-
An equal right exists for both the husband and wife to seek restitution of conjugal rights on grounds specified therein.¹⁵⁰ In *Chitrlekha Shibu Kunju v. Shibu Kunju*, the husband was a Christian while the wife was a Hindu. An application filed for restitution of conjugal rights was held as invalid since the marriage was not under the Hindu Marriage Act.¹⁵¹

Dissolution of Marriage

- i. Grounds for dissolution of marriage-
- either spouse has had voluntary intercourse with any other person;
 - either spouse has treated the aggrieved party with cruelty;
 - either spouse has deserted the aggrieved party;
 - either spouse has ceased to be Hindu by conversion to another religion;
 - either spouse is of incurable unsound mind or suffering continuously or intermittently from mental disorder making it

- unreasonable for the aggrieved spouse to live with;
- either spouse suffers from virulent and incurable form of leprosy;
 - either spouse suffers from venereal disease in a communicable form;
 - either spouse has renounced the world by entering into a religious order;
 - either spouse has not been heard of being alive for a period of 7 years or more;
 - the husband has been guilty of rape, sodomy or bestiality;
 - the marriage was solemnised before the wife attained the age of 15 years, provided she repudiated the marriage prior to being 18 years
 - pursuant to an order passed against husband for maintenance, there being no cohabitation between husband and wife for a period of 1 year from date of the order.

- ii. Judicial Separation- There is an equal right given to both the husband and wife to

¹⁵⁰ Section 9, Hindu Marriage Act, 1956.

¹⁵¹ (1998) II DMC 454 (Bom-DB).

seek Judicial Separation on grounds specified above.¹⁵²

- iii. Divorce- There is an equal right given to both the husband and wife to seek Divorce on grounds specified above.¹⁵³ In *Naveen Kohli v. Neetu Kohli* and *Sanghamitra Ghosh v. Kajal Kumar Ghosh*, divorce was granted since the marriage has been wrecked beyond the hope of salvage. Public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than dissolution of the marriage bond.

Petition for divorce

Either party may present a petition for divorce if there has been no resumption of cohabitation between the parties for a period of 1 year or more from decree of judicial separation

or restitution of conjugal rights. No petition for divorce shall be entertained by any Court before 1 year of marriage has elapsed, except in exceptional circumstances.

Court jurisdiction

The Court in whose jurisdiction the petition for divorce can be presented, namely, where the marriage was solemnised; or where the respondent resides; or where the parties last resided together; or where petitioner resides in case the respondent is outside India or not been heard of for 7 years or more.¹⁵⁴ In addition, benefit is given to the wife in case she is the petitioner, then the petition can be presented to a Court in whose local limits she resides on date of petition.

Alimony and Maintenance

Under the Act, maintenance pendente lite, expenses for proceedings,¹⁵⁵ permanent alimony and maintenance¹⁵⁶ may be granted by the Court taking into consideration the respondent's own income and other property, if any; the income

¹⁵² Section 10, Hindu Marriage Act, 1956.

¹⁵³ Section 13, Hindu Marriage Act, 1956.

¹⁵⁴ Section 19, Hindu Marriage Act, 1956.

¹⁵⁵ Section 24, Hindu Marriage Act, 1956.

¹⁵⁶ Section 25, Hindu Marriage Act, 1956.

and other property of the applicant and the conduct of the parties and other circumstances of the case.

2. Hindu Adoptions and Maintenance Act, 1956

Scope

The Hindu Adoptions and Maintenance Act, 1956 (**HA&M Act**) was enacted to deal specifically with the legal process of adopting children by a Hindu adult, wherein for the first time, women have been given an equal right to adopt. It also includes the legal obligations of a Hindu to provide maintenance to various family members including their wife or wives, parents, and in-laws.¹⁵⁷

Provisions regarding Maintenance under the HA&M Act

- i. Maintenance of wife- A Hindu wife is entitled to maintenance from her husband during her lifetime upon dissolution of the marriage by judicial separation or divorce.¹⁵⁸

However, the wife loses such right to maintenance if she ceases to be a Hindu or is unchaste.¹⁵⁹

- ii. Maintenance of widowed daughter-in-law- A Hindu daughter-in-law is entitled to maintenance from her husband's father (after the husband's death) only to the extent that she is unable to maintain herself out of her own earnings or property or from the estate of her deceased husband, or the estate of her parents or children.¹⁶⁰ Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. Therefore, in a case, the property in the name of the mother-in-law was not allowed to be used for maintenance of the wife.¹⁶¹

- iii. Amount of maintenance- The factors that a Court must take into account for determining the amount of maintenance payable are as follows
 - the position and status of the parties;

¹⁵⁷ Preamble, Hindu Adoptions and Maintenance Act, 1956.

¹⁵⁸ Section 18, Hindu Adoptions and Maintenance Act, 1956.

¹⁵⁹ Section 19, Hindu Adoptions and Maintenance Act, 1956.

¹⁶⁰ Section 19, Hindu Adoptions and Maintenance Act, 1956.

¹⁶¹ Vimalben Ajitbhai Patel and Ors. v. Vatslabehn Ashokbhai Patel and Ors., AIR 2008 SC 2675.

- the reasonable wants of the claimant;
- if the claimant is living separately, whether the claimant is justified in doing so;
- the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
- the number of persons entitled to maintenance under the HA&M Act.
- the net value of the estate of the deceased after providing for the payment of his debts;
- the provision, if any, made under a will of the deceased in respect of the dependant;
- the degree of relationship between the two;
- the reasonable wants of the dependant;
- the past relations between the dependant and the deceased;
- the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;

- the number of dependants entitled to maintenance under the HA&M Act.¹⁶²

MUSLIM LAWS

A Muslim marriage is a contract and not a sacrament.

Nikah

Nikah is the contract of Islamic marriage between a bride and a bridegroom of opposite genders, with the object of intercourse, procreation and legalisation of children. Nikah is of three types- Sahih, Batil and Fasid.

Iddat

An Iddat is the period of seclusion that a Muslim woman observes after the break of a marriage, when she may not enter into another marriage. Generally the period of Iddat observed by a Muslim menstruating woman is 3 lunar months but it may vary.

Dower - Mahr

Mahr is the consideration, whether as money or property, received from the husband by the

¹⁶² Section 23, Hindu Adoptions and Maintenance Act, 1956.

wife for the contract of marriage between the parties. Although Mahr is a consideration for a marriage, it is not considered dowry, which is prohibited under the Dowry Prohibition Act, 1961.¹⁶³ Though referred to as a ‘consideration’, there is no quid pro quo obligation of the wife and it is thought of as a sign of respect and security for the wife.¹⁶⁴ A woman is entitled to her full Mahr upon consummation of the marriage. A wife out of free consent may do away with the Mahr.¹⁶⁵

Valid marriage (Sahih Nikah) of Muslims

Sahih Nikah is a valid marriage that fulfils all conditions mentioned below. It results in reciprocal rights of inheritance, confers upon the wife the right of Mahr and residence in her husband’s home. It also creates duties of observing Iddat and permits sexual intercourse between the couple.

Essential Condition of Sahih Nikah

A Sahih Nikah is based on few conditions, enlisted below-

- i. A Muslim marriage requires proposal (‘Ijab’) from one party and acceptance (‘Qubul’) from the other side. This must be done in one sitting, though there is no specific form of presenting either.
- ii. The parties must be competent. The two parties must be legally competent; i.e. they must be sane and adult. While under Muslim law, the age for marriage is upon hitting of puberty, the Prohibition of Child Marriage Act has now raised the age to 18 years for girls and 21 years for boys.
- iii. Lunatics and persons of unsound mind can be validly contracted into marriage by their respective guardians upon hitting of adulthood.
- iv. There must be two male or one male & two female witnesses, who must be sane and adult Muslims, present and hearing during the marriage proposal and acceptance.
- v. The marriage contract may be oral, without the presence of a Kazi or any religious ceremony.

¹⁶³ Section 2, Dowry Prohibition Act, 1961.

¹⁶⁴ Mohd Ahmed Khan v. Shah Bano, (1985) 2 SCC 556.

¹⁶⁵ Nurannessa v. Khaje Mahomed, (1920) 47 Cal 537.

- vi. Registration of marriage is not compulsory.
- vii. Marriage with a pregnant woman is valid, provided it is not done when the woman is observing her Iddat and the husband is aware of the pregnancy.¹⁶⁶
- iv. Religion- Marriage to a Fire or Idol Worshipper is prohibited.
- v. Iddat – Marrying a woman observing her Iddat.
- vi. Polyandry- Having more than one husband.
- vii. Muslim woman marrying a non-Muslim man, whether he be Christian, Jew.

Prohibited Marriages (Batil Nikah)

A Batil Nikah is void since its inception. Such marriage has no legal consequences and does not create any legal rights or obligations. The children born from such a marriage are illegitimate.

A marriage is prohibited in the following conditions-

- i. Consanguinity - the parties are related in degrees of consanguinity.
- ii. Affinity - the parties are related in degrees of affinity.
- iii. Fosterage- It is unlawful for a Muslim man to marry a Muslim woman who is connected to him via fosterage when he was smaller than 2 years of age (with exceptions).

Irregular Marriage (Fasid Nikah)

A Fasid Nikah is an irregular marriage that can be regularized by consummation.

Restitution of conjugal rights

Where a party to the marriage, without a lawful cause refuses to cohabit with the other party, a case may be filed for restoration of conjugal rights. Some lawful causes when conjugal rights may not be restored include, cruelty to a degree that it is unsafe for the wife to return to the husband, false accusations of adultery, neglect, gross failure of observing marital obligations, remarriage of husband etc.

¹⁶⁶ Amina v. Hassan Khoja, AIR 2004 SC 1227.

Dissolution of Marriage

The law governing dissolution of marriage in Muslims depends on if it happens with or without interference of the Court. If the Courts are involved (for instance, when divorce is filed for by a woman), it is in accordance with the Dissolution of Muslim Marriage Act, 1939 [discussed later]. If the dissolution happens without the interference of courts, it is of two types- soonee (in accordance with tradition) or budaee (irregular or new).

A divorce may be of three types- Talaaq ahsan, Talaaq hasan or Talaaq ul bidaat.

- i. Talaaq ahsan- It consists of a single pronouncement of divorce made in the period of tuhr (purity, between two menstruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of Iddat. The requirement that the pronouncement be made during a period of tuhr is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time,

or when the marriage has not been consummated.

- ii. Talaaq hasan- The husband is required to pronounce the formula of talaaq three time during three successive tuhrs. If the wife has crossed the age of menstruation, the pronouncement of it may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncement is made, the talaaq, becomes final and irrevocable.
- iii. Talaaq ul bidaat- Introduced in the second century of Islam, it includes the triple declaration of talaaq made in a period of purity, either in one sentence or in three.

A notable advancement in this respect was the setting aside of talaaq-e- biddat as violative of Indian law in the recent case of Shayra Bano v. Union of India¹⁶⁷ rendered by the Supreme Court of India, where the Petitioner wife sought a declaration from the Court, that talaaq-e-biddat pronounced by her husband be

¹⁶⁷ AIR 2017 SC 4609.

declared as void ab initio. It was held by the Court that given the fact that triple talaq is instant and irrevocable, it was obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which was essential to save the marital tie, could not ever take place. Relying upon various judgements such as *Shamim Ara v. State of U.P.*,¹⁶⁸ which held that that the proclamation of talaq must be for a demonstrated reasonable cause, and must proceed by an attempt at reconciliation by two arbiters, it was clear that this form of triple talaq was manifestly arbitrary. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution. The Dissolution of Muslim Marriages Act 1939, insofar as it seeks to recognize and enforce triple talaq, was within the meaning of the expression laws in force in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces triple talaq.

Conditions for a valid dissolution

- i. The party must be of sound mind, who has attained the age of puberty, is competent to pronounce talaq. It is not necessary for him to give any reason for his pronouncement.
- ii. The consent of the husband in pronouncing talaq must be a free consent.
- iii. Talaq pronounced under forced or involuntary intoxication is void.
- iv. While in Sunni law, the talaq may be written or oral, the Shia law mandates that talaq must be pronounced orally, except where the husband is unable to speak and must be pronounced in the presence of two witnesses. Additionally, the intention must not be ambiguous.

Divorce by mutual agreement

Khula and Mubarat- They are two forms of divorce by mutual consent. In Khula, a divorce occurs if a wife agrees to part with a part of her dower or some other property. A Mubarat is when the divorce is sought by both

¹⁶⁸ (2002) 7 SCC 518.

husband and wife, and effects when it is proposed by one and accepted by the other. Thus, the proposal may emanate from either side. Both these forms of divorce are irrevocable and require the observance of Iddat.

Divorce by wife

The divorce by wife can be categorized under three categories-

- i. Talaaq-i-tafweez- In Talaaq-i-tafweez, the power of divorce is delegated by the Muslim husband to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently. This form of delegated divorce is stipulated in the Nikah agreements.
- ii. Li'an- Dissolution can also happen by Li'an wherein, a husband accuses a wife of adultery or bearing a child that is not his. This type of divorce can only happen before a Kazi.
- iii. By Dissolution of Muslim Marriages Act 1939.

Dissolution of Muslim Marriages

Under the Dissolution of Muslim Marriages Act, 1939, a woman can file for divorce under any of the following conditions-

- i. the whereabouts of the husband have not been known for a period of four years. However, if the husband appears either in person or through an authorised agent within 6 months of pronouncement of decree and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree;
- ii. the husband has neglected or has failed to provide for her maintenance for a period of two years;
- iii. the husband has been sentenced to imprisonment for a period of seven years or upwards;
- iv. that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- v. that the husband was impotent at the time of the marriage and

continues to be so. However, the Court may, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground;

- vi. that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;
- vii. that the wife, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years and the marriage has not been consummated;
- viii. that the husband treats her with cruelty;
- ix. on any other ground which is recognised as valid for the dissolution of marriages under Muslim law.¹⁶⁹

However, the renunciation of Islam by a married Muslim

¹⁶⁹ Section 2, Dissolution of Muslim Marriages Act 1939.

woman or her conversion to a faith other than Islam shall not be itself operate to dissolve her marriage.¹⁷⁰

Custody following Divorce

Under the Muslim law, though the father is the natural guardian, the mother is, during the subsistence of marriage, entitled to the custody of the male child up to the age of 7 years and for the female child until she attains puberty. This right of the mother survives after separation or divorce.¹⁷¹

CHRISTIAN LAWS

1. Indian Christian Marriage Act, 1872

Scope

The Christian Marriage Act, 1872 (**CM Act**) was enacted to provide for the provisions relating to solemnization of the marriages of people professing the Christian religion.

¹⁷⁰ Section 4, Dissolution of Muslim Marriages Act 1939.

¹⁷¹ Ulfat Bibi v. Rafati, AIR 1927 All 581.

Definitions

‘Church’ includes any chapel or other building generally used for public Christian worship.

‘Christians’ means persons professing the Christian religion and ‘Indian Christian’ includes the Christian descendants of natives of India converted to Christianity, as well as such converts.

Marriage

Marriage between Indian Christians will be solemnized if neither of the parties has a spouse living and if the conditions of age and 2 witnesses are fulfilled. Solemnization of marriage can take place between six in the morning and seven in the evening.¹⁷²

2. Indian Divorce Act, 1986

Scope

The Indian Divorce Act, 1986 (**ID Act**) governs the divorce of Christians.

i. Grounds of dissolution of marriage-

- adultery;
- conversion to another religion from Christianity;
- unsoundness of mind for a continuous period of not less than two years immediately preceding the presentation of the petition;
- incurable form of leprosy for a continuous period of not less than two years immediately preceding the presentation of the petition;
- a communicable venereal disease for a continuous period of not less than two years immediately preceding the presentation of the petition;
- not been heard of as alive for a period of seven years or more;
- failure to comply with the decree of restitution of conjugal rights for 2 years or more after passing of decree;
- desertion of the petitioner for at least two years immediately preceding the presentation of the petition and cruelty;
- The wife has additional grounds to file a petition if the husband has been guilty

¹⁷² Section 10, Indian Christian Marriage Act, 1872.

of rape, sodomy or bestiality after solemnization of marriage.

ii. Dissolution of marriage by mutual consent- Both the parties are granted equal rights to file a petition for divorce by mutual consent on ground that they have been living separately for more than 2 years.¹⁷³

iii. Status of the woman on judicial separation- On judicial separation, the wife shall be considered unmarried with respect to the property she may acquire and it shall be disposed by her in all respects as an unmarried woman.¹⁷⁴

On the death of the woman intestate, the property will devolve as if her husband had been dead. Also, if the cohabitation again begins, the property that she is entitled to shall be held to be for her separate use, subject to any agreement. The wife shall also be considered unmarried with respect to the contracts, wrongs, injuries, suing and being sued in civil proceedings and the husband shall not be liable.¹⁷⁵

iv. Protection orders- A wife deserted by her husband, can apply for the protection of her property acquired or possessed against her husband or his creditors or any person claiming under him.¹⁷⁶

If the husband or any other person claiming under him violates any order passed, he may be liable to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

v. Alimony and expenses- A wife may present a petition for expenses of the proceedings and alimony pending the suit.¹⁷⁷ The court may also order that the husband shall pay for the maintenance and support of his wife by a charge on his property a gross sum or monthly or periodical payment of money for a term not exceeding her life with regard to their property.¹⁷⁸

¹⁷³ Section 10A, Indian Divorce Act, 1986.

¹⁷⁴ Section 24, Indian Divorce Act, 1986.

¹⁷⁵ Section 25, Indian Divorce Act, 1986.

¹⁷⁶ Section 27, Indian Divorce Act, 1986.

¹⁷⁷ Section 36, Indian Divorce Act, 1986.

¹⁷⁸ Section 37, Indian Divorce Act, 1986.

PARSI LAWS

1. Parsi Marriage and Divorce Act, 1936

Scope

The Parsi Marriage and Divorce Act, 1936 (**PM&D Act**) codifies the law relating to marriage and divorce amongst Parsis and also deals with maintenance and alimony.

Marriage

- i. Requisites for a valid Parsi marriage and remarriage– The requirements¹⁷⁹ of a valid Parsi marriage are the following-
 - the parties must not be related in degrees of consanguinity or affinity;
 - ceremony according to Parsi form by a Priest witnessed by two Parsis;
 - age requirements of bridegroom and bride;
 - both parties must be unmarried or lawfully divorced at the time of marriage.

Any priest who knowingly or wilfully solemnizes any marriage in contravention of

the requirements shall be liable for imprisonment for a term extending to 6 months or fine or both.

- ii. Restitution of conjugal rights – An equal right exists to both the husband and wife to seek restitution of conjugal rights for reasons specified therein, namely, desertion or ceasing to cohabit with the aggrieved spouse without lawful reason.¹⁸⁰

Dissolution of Marriage

- i. Suits for nullity- If a marriage cannot be consummated from natural causes, then the same be declared null and void at either party's instance.¹⁸¹ Additionally, if either spouse is absent for a period of 7 years and has not been heard of being alive, then the marriage can be dissolved at the aggrieved party's instance.¹⁸²
- ii. Grounds for dissolution of marriage-
 - The marriage has not been consummated within 1 year

¹⁷⁹ Sections 3 & 4, Parsi Marriage and Divorce Act, 1936.

¹⁸⁰ Section 36, Parsi Marriage and Divorce Act, 1936.

¹⁸¹ Section 30, Parsi Marriage and Divorce Act, 1936.

¹⁸² Section 31, Parsi Marriage and Divorce Act, 1936.

- at the wilful refusal of the defendant;
- the defendant party at the time of marriage was of unsound mind or is of habitual unsound mind;
- the defendant party is of incurable unsound mind for a period of 2 years preceding the filing of divorce or is habitual or suffers from continuous mental disorder such that the plaintiff party seeking divorce cannot be expected to live;
- the wife at the time of marriage was pregnant by some other person and the husband was ignorant and has not had sex after knowledge;
- either spouse has committed adultery, fornication, bigamy or rape or an unnatural offence;
- the defendant party has treated the plaintiff party with cruelty, or has deserted or caused grievous hurt to plaintiff party or infected them with venereal disease;
- the defendant party is undergoing 7 years of imprisonment;
- either spouse has ceased to be a Parsi by conversion to

another religion;

- non resumption of cohabitation or restitution of conjugal rights within 1 year of decree of restitution of conjugal rights;
- In addition, the wife has been given extra ground for seeking divorce in case the husband has compelled her to prostitution.

Further, it is specified that no divorce shall be granted to the husband plaintiff, if he has failed or neglected to comply with maintenance order passed against him under section 125 CrPC or under the PM&D Act.

- iii. Divorce- An equal right exists to both the husband and wife to seek Divorce on grounds specified above.¹⁸³
- iv. Judicial Separation- An equal right to both the husband and wife to seek Judicial Separation on grounds specified above.¹⁸⁴

Alimony and Maintenance

The PM&D Act provides an equal right to both the husband and wife to-

¹⁸³ Section 32, Parsi Marriage and Divorce Act, 1936.

¹⁸⁴ Section 34, Parsi Marriage and Divorce Act, 1936.

- i. Alimony pendente lite- seek expenses for proceedings;¹⁸⁵
 - ii. Permanent alimony and maintenance.¹⁸⁶
- having regard to-
- i. the defendant's own income and other property, if any,
 - ii. the income and other property of the plaintiff,
 - iii. the conduct of the parties and
 - iv. other circumstances of the case.¹⁸⁷

GENERAL LAWS

1. Special Marriage Act, 1954

Scope

The Special Marriage Act, 1954 (**SM Act**) was enacted to provide for the registration and divorce of special kind of marriages. The SM Act applies to all people in India and to all the Indian nationals in foreign country irrespective of the faith / religion which either party may profess.

¹⁸⁵ Section 39, Parsi Marriage and Divorce Act, 1936.

¹⁸⁶ Section 40, Parsi Marriage and Divorce Act, 1936.

¹⁸⁷ Section 4, Special Marriage Act, 1954.

Marriage

- i. Solemnization of marriage¹⁸⁸- Marriage between two people will be solemnized if neither party has a living spouse and the conditions of valid consent, age and prohibited degrees of relationship are fulfilled. In *Marian Eva v. State of Himachal Pradesh*,¹⁸⁹ it was held that it is not necessary that the two parties should be the citizens of India, marriage under SM Act may be solemnized between 2 citizens of India or 2 foreigners or between a citizen and a foreigner.
- ii. Restitution of conjugal rights and judicial separation- Both the husband and wife are given equal rights to apply for restitution of conjugal rights and judicial separation.

Dissolution of Marriage

- i. Grounds for dissolution of marriage-
 - voluntary sexual intercourse after marriage with any person other than the spouse;

¹⁸⁸ Section 40, Parsi Marriage and Divorce Act, 1936.

¹⁸⁹ *Marian Eva v. State of Himachal Pradesh*, AIR 1993 HPT.

- desertion of petitioner for more than 2 years immediately before the divorce petition;
- undergoing imprisonment for seven years or more;
- cruelty, unsoundness of mind or intermittent mental disorder to the extent that the petitioner cannot reasonably be expected to live with the respondent;
- suffering from venereal disease in a communicable form;
- suffering from leprosy, not contacted from petitioner;
- the respondent not been heard of as being alive for a period of seven years or more;
- irretrievable breakdown of marriage- However, the wife has a right to oppose the grant of such a decree on the ground that the dissolution of marriage will lead to grave financial hardship to her and that it would be wrong to dissolve the marriage.¹⁹⁰ If a decree is passed, the Court may order that the husband shall give to the wife and children, a compensation including a share in his

immovable and movable property by taking into consideration the value of the property;

- The wife is granted additional grounds to file petition for divorce in case her husband has been guilty of rape, sodomy or bestiality since the solemnization of marriage, or a decree has been passed against the husband awarding maintenance to the wife and since the decree, cohabitation between parties has not resumed for a period of one year or more.

ii. Divorce- Both husband and wife can file petition for divorce on the grounds mentioned above.¹⁹¹

iii. Divorce by mutual consent- Both the parties are granted equal rights to file a petition for divorce by mutual consent on ground that they have been living separately for more than 1 year.¹⁹²

Jurisdiction

The place of filing a petition is the district court within the local limits of whose original civil

¹⁹⁰ Section 28B, Special Marriage Act, 1954.

¹⁹¹ Section 27, Special Marriage Act, 1954.

¹⁹² Section 28, Special Marriage Act, 1954.

jurisdiction where the marriage was solemnized; or where the respondent, at the time of the presentation of the petition resides; or where the parties to the marriage last resided together. However, if wife is the petitioner, the petition can be filed where she is residing on the date of presentation of the petition. The place of residence of petitioner, if the respondent resides at a place outside the jurisdiction of the SM Act or has not been heard of as being alive for a period of seven years.¹⁹³

Alimony and expenses

If the wife does not have the sufficient means for her support and for the expenses of the proceedings, the husband may be ordered by the district court on the application of the wife, to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding with regard to his income.¹⁹⁴ The court may order that the husband shall pay for the maintenance and support of his wife by a charge on his property a gross sum or monthly or periodical payment of money for a term not exceeding her life with regard to their

property and the ability including the conduct of the parties.¹⁹⁵

In *Riya K R v. Albin Varghese V*,¹⁹⁶ a marriage without the consent of the parties was annulled by the Court under Section 25 of the SM Act. In *Samir Vidyasagar Bhardwaj v. Nandita Samir Bhardwaj*,¹⁹⁷ the husband was directed to remove himself from the household under a petition of divorce on the basis of cruelty as per the Domestic Violence Act, 2005.

2. Foreign Marriages Act, 1969

Scope

The Foreign Marriages Act, 1969 (**FM Act**) is applicable to marriages that occur when one party is an Indian citizen. It must be noted that the FM Act is not in supersession of, but in addition to the personal laws. The FM Act provides for solemnization of marriages registered under the FM Act or abroad by or before a Marriage Officer in a foreign country for provision of matrimonial reliefs in Indian courts under the FM Act.¹⁹⁸

¹⁹³ Section 31, Special Marriage Act, 1954.

¹⁹⁴ Section 36, Special Marriage Act, 1954.

¹⁹⁵ Section 37, Special Marriage Act, 1954.

¹⁹⁶ 2018 (1) KLT 987.

¹⁹⁷ AIR 2017 SC 2713.

¹⁹⁸ Section 3, Foreign Marriages Act, 1969.

Solemnization of marriage

A marriage between parties one of whom at least is a citizen of India may be solemnized under the FM Act, if, at the time of the marriage, the following conditions are fulfilled, namely-

- i. neither party has a spouse living,
- ii. neither party is an idiot or a lunatic,
- iii. the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage, and
- iv. the parties are not within the degrees of prohibited relationship.¹⁹⁹

Notice and objection to marriage

When a marriage is intended to be solemnized under the FM Act, the parties to the marriage shall give notice thereof in writing in the form specified.²⁰⁰

Matrimonial provisions

The marriage must not be in contravention of local laws²⁰¹ and must not be objected to within 30 days of publication of notice of the intended marriage.²⁰² The matrimonial benefits, rights and

obligations will be those mentioned in the SM Act.²⁰³

Permissible acts with respect to marriages

The FM Act also covers any other marriage solemnized in a foreign country between parties of whom, one at least is a citizen of India.²⁰⁴ However, this does not allow a court to grant any relief under the FM Act in relation to any marriage in a foreign country not solemnized under it.²⁰⁵ However, this also does not preclude a party from applying for reliefs under provisions of other Acts, such as maintenance under section 125 of the Criminal Procedure Code.²⁰⁶

¹⁹⁹ Section 4, Foreign Marriages Act, 1969.

²⁰⁰ Section 5, Foreign Marriages Act, 1969.

²⁰¹ Section 7, Foreign Marriages Act, 1969.

²⁰² Section 8, Foreign Marriages Act, 1969.

²⁰³ Section 18, Foreign Marriages Act, 1969.

²⁰⁴ Joyce Sumathi v. Robert Dickson Brodie, AIR 1982 AP 389.

²⁰⁵ Section 18 (4), Foreign Marriages Act, 1969.

²⁰⁶ Subhais Gupta v. Dr. Sritama Kar, 2014 (12) CHN (Cal) 449..