



# UNIT V

## FAMILY JUSTICE SYSTEM

LEGAL

STUDIES





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## UNIT 05:

# FAMILY JUSTICE SYSTEM

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## I. Introduction

### Objectives:

1. To gain knowledge about laws pertaining to family / personal matters
2. To gain knowledge about the evolution of family laws in India
3. To understand the relevance of family laws
4. To understand their application
5. To apply the laws appropriately (case-studies)
6. To analyze the significance of these laws in the context of modern society
7. To speak and write fluently and coherently while expressing a point of view and justifying

### A. Nature of Family Law in India

Family law or personal law consists of family or personal matters like marriage, dowry, dissolution of marriage, guardianship, adoption, maintenance, gifts, wills, inheritance, succession, and so on. In India, religion and personal law are largely interlinked. So Hindus, Sikhs, Jains and Buddhists follow Hindu family law (Sikhs have their own marriage law but are covered under Hindu law for other family matters); Muslims, Christians, and Parsees have their own laws; and other traditional communities, like the tribal groups, follow their own customary practices or customary laws. The Hindu law, the Sikh marriage law, the Parsee law, and the Christian law are codified or passed by the Indian Parliament as acts or laws. The Muslim law is uncoded and is based on the Sharia, which is the moral and religious law primarily grounded on the principles of the Islamic religious text the holy Quran and examples laid down in the Sunnah by the Islamic prophet Muhammad.





A Bunt joint family in the early 1900s

The customary laws of the traditional communities are based on their customs and practices and are uncoded.

To this extent, India follows a peculiar conception of a secular state; although these varied communities are one nation, they co-exist as independent and distinct communities in the matters of family laws. As described herein, unlike other laws in force in India, such as criminal and civil laws, family laws are not uniform. However, the Constitution of India, in Article 44, provides for a goal or aspiration for achieving a uniform civil code in family and personal matters. This provision is merely a directive or aspirational and is not enforceable by a court of law.

## B. Medieval Period

As has been described in the previous chapter, the Hindu legal system was based on the *smriti* literature and the *Dharmashastra* as well other later digests. Since the medieval period, starting from the 8<sup>th</sup> century, two major schools of personal laws have been followed. First, the eleventh century digest *Mitakshara* by Vijnaneshvara, an authority on issues of family law, was widely followed both in south and north India. It had further sub-schools in four areas, Dravida (south India), Mithila, Bombay, and Benaras. Second, in the region of Bengal, personal law of *Dayabhaga* was used. *Dayabhaga* was the personal law, a part of the thirteenth or fourteenth-century digest *Dharmaratna* written by Jimutavahana.

The Muslims largely followed the Sunni (sectarian sect) and the Hanafite type of laws. Hanafite type of laws were based on the founder and Persian scholar Abu



Hanifa. For both Hindu and Muslim legal systems, there were other variances based on sectarian divisions (like the Sunni and Shi'a among Muslims), regional specifics, and the local customs and practices. The Hindu law and the Muslim *Shari'at* covered all aspects of life and did not differentiate much between moral, custom, and law. Even during the Mughal Empire in the Indian subcontinent, between the 16th and 18th centuries, Hindus and Muslims were ruled largely by their own sets of local customs and personal laws.

### C. British-India

The British came to the Indian subcontinent in the early 17<sup>th</sup> century. In the initial years, they were not concerned with the various regional and local laws practiced in the subcontinent. In 1772, when the East India Company established themselves as the civil administrators, Warren Hastings, the first Governor-General of Bengal, introduced the uniform criminal law with the idea of equality before the law for both Hindus and Muslims. However, in matters of personal law, he established that the laws of the holy Quran would be applicable to the Muslims, and the Shastras for the Hindus. As the British had no knowledge of the personal laws, they appointed the Hindu pandits and the Muslim jurists as consultants in their courts, and this led to the administration and development of the Anglo-Hindu and the Anglo-Islamic personal laws. After 1864, the system of 'court Hindu pandits' and Muslim jurists was abolished due to dissimilar interpretations and some suspicions of corruption; and the court judges interpreted the personal laws themselves. For the Bengal region, they largely used the *Dayabhaga* digest, while the *Mitakshara* digest with its four sub-categories was used for the other parts of India, along with other customs and usages. For the Anglo-Islamic personal law, the British judges used the sectarian Sunni and Shi'a, interpretations of the *Shari'at* as well as other sectarian traditions along with some local customs and usages. During the British rule, both the Anglo-Hindu personal law and the Anglo-Islamic personal law continued to develop through reforms, law commissions, and mainly through case laws.



Warren Hastings himself compiled a code known as the *Vivadarnava Setu* which consisted of assorted texts on various aspects of Hindu law. He seriously intended to make it a statutory source of law for Hindus until before its defects were discovered.



#### D. Post-Independence

After India's independence in 1947, efforts were made to develop a uniform civil code for dealing with matters of personal law. It started with the uniform Hindu Code Bill, which attempted to combine the varied regional customs and usages. In 1951, it was shelved due to much opposition. Since the Indian Constitution had adopted the word 'secular' as an important feature of the Indian republic, the uniform family law was seen as biased in favor of the Hindu majority community and unsecular. In a similar manner, in 1955-56, the parliament adopted and codified the four different major legislations governing the family and personal law matters of the Hindu community: Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956). Accordingly, Christians, Parsees, and Sikhs have their own codified Marriage Acts; Muslims are governed by the Sharia; and the traditional communities continue to practice their uncoded customary laws. As mentioned earlier, although the Indian Constitution, in Article 44, provides for a goal or aspiration for achieving a uniform civil code, this has never been taken up seriously for the fear of widespread communal violence.

#### E. Human Rights and Gender Perspectives

There are various provisions in the Constitution of India that are specified for gender equality. The preamble (or the introduction) to the Indian Constitution resolves to secure justice, liberty, equality, and dignity of all. Furthermore, Article 14 provides equal treatment before the law for every person; and Article 15 prohibits discriminations based on religion, race, caste, sex or place of birth. Thus, the idea of equality is strongly emphasized in the Constitution. However, exceptions exist too, for example, Articles 25 and 26 of the Constitution provide for freedom of religion that includes freedom of conscience and free profession, practice and propagation of religion as well as freedom to manage religious affairs. The religious communities have used these provisions to argue that modifying their family laws would be interfering with their freedom of religion.

#### F. Case story 01. Equity in Education :

*My village in Shiyunzu has a high illiteracy level. Only a small number get educated and the most affected is the girl child, The community previously didn't see the importance of educating the girl child, but this has changed since a*





*Women's Association together with a local administrator sent a team to educate us on the importance of education especially for the girl child. I am happy since then my parents don't want to be left behind in the quest of taking the girl child to school. My parents have since seen the importance of education and taking me and my siblings to school, without discrimination of us being girls.*

*Counselors engaged the community with teaching them that a girl will always come back and help her people.*

For those who promote the traditional religious values, the above gender equity provisions are contrary to their customary methods of law. For example, the traditional Hindu religious legal methods found in *The Laws of Manu* provide for unequal treatment of law and punishment based on gender as well as caste. Gender inequalities also exist within the Islamic legal traditions. Such competing gender inequalities of the two communities in particular, also prevented the adoption of a uniform civil code, which has continued to remain an unrealised aspirational provision in the Constitution.

The modern Hindu family laws were adopted by reconfiguring the traditional religious laws and further based on modern constitutional values. However, complete gender equity has not been achieved. The instances of gender inequality existing in the present day Hindu family law include: 1) the Hindu Marriage Act (section 5.iii) prescribes marriageable age for girl as eighteen and boy as twenty-one; 2) the Hindu Succession Act provides different methods of intestate (without a will) succession of property for male and female intestates; 3) the Hindu Minority and Guardianship Act (section 6) prohibits a mother to act as a child's natural guardian unless the father is dead or otherwise disqualified; and 4) the Hindu Adoptions and Maintenance Act (section 6) prohibits a mother to give her child in adoption unless the father is dead or otherwise disqualified.

Some examples believed to promote gender inequities in the Islamic family laws include: 1) the practice of polygamy is permitted in Islamic law; 2) the common view that a husband can divorce his wife by the triple *talaq*, which is the pronouncement of divorce three times in one breath; and 3) a Muslim husband is required to pay maintenance to a divorced wife only during the *iddat* period of three months.



There are other practical challenges in achieving gender equity in the realm of family laws, one of the foremost being the lack of information about family laws that are applicable to respective communities. Most residents of rural India, know neither the minimum age of marriage nor that dowry is prohibited. Also, they are unaware of legal grounds of divorce and prohibition of the practice of bigamy or polygamy.

## G. Questions and Exercises

### 1. Based on your reading, answer the following:

- i. What is the peculiarity about India's secularism with respect to its family laws?
- ii. What kinds of family laws did the Hindus and Muslims in the medieval India practice?
- iii. How were the Anglo-Hindu and the Anglo-Muslim personal laws administered and developed in British-India?
- iv. What is the uniform civil code as provided in the Constitution? Why has it not been adopted by Parliament?
- v. What kinds of gender equality are prescribed for in the Constitution of India?
- vi. Give examples of gender inequality in the present day Hindu and Muslim family laws.

### 2. Work in groups of 4. Discuss and share your ideas with the class.

How could the Women's Association convince the village head to accept their proposal to address the villagers? Give your ideas.

How may Counselors persuade the villagers about the law of the land in this case? Share your thoughts.

### 3. You are a counselor. Design a pamphlet that can be easily understood by the village people about gender equity. Display your pamphlet in class.

## II. Institutional Framework

### A. Family Courts

In 1984, the Family Courts Act was enacted by the Indian parliament to lay down



procedures for the creation and functioning of family courts with expertise to deal with matrimonial and family law matters. The Act is procedural and does not override the substantive family laws, and accordingly, the rights and obligations of parties to disputes are based on the family, personal or matrimonial laws. During the late 1980s and 1990s, many family courts were established in most major cities in India and the matrimonial and family law cases were shifted from the district civil and criminal courts to the newly created special courts. Family courts were created with many distinct features and goals including: 1) Reduction in formality and intimidation in litigation process was made less formal and intimidating; 2) Speed in justice delivery; and 3) Facilitation in conciliation and settlements. The personal or family law subject matters that fall within the jurisdiction of family courts include: nullity of marriage; restitution of conjugal rights; judicial separation; validity of marriage; matrimonial status; disputes regarding property of either of the parties or joint property; injunction arising out of marital relations; legitimacy of any person; maintenance; and guardianship, custody and access to any minor.

The relevant statutes that come within the purview of **Family Courts Act** include the following:

- a. **The Hindu Marriage Act, 1955:** This act codifies the marriage law of the Hindus and primarily deals with the validity and conditions for invalidity and applicability of marriage.
- b. **Special Marriage Act, 1954:** The act affords a special method of civil contractual marriage (and divorce) for all Indian nationals regardless of religion or faith followed by the parties. This act does not require the customary or religious rites or ceremonies of marriage to be observed.
- c. **Dissolution of Muslim Marriage Act, 1939:** This act explains the dissolution of marriage by women married under Muslim law and the effects of the renunciation of Islam by a married Muslim woman.
- d. **Foreign Marriages Act, 1969:** This statute deals with marriages of citizens of India living outside India.
- e. **The Indian Divorce Act, 1869:** The law relates to the divorce of persons professing the Christian religion.
- f. **The Parsi Marriage and Divorce Act, 1936:** This law deals with marriage and divorce among the Parsis.





- g. **Muslim Women (Protection of Rights & Divorce) Act, 1986:** The act deals with the matters of the divorced Muslim women and restricts their right to maintenance from their former husband.
- h. **Muslim Personal Law/Application of Shariat Act, 1937:** This act requires the application of the Islamic Law Code of Shariat to Muslims in India in their family or personal matters.
- i. **Hindu Adoption and Maintenance Act, 1956:** The law codifies the legal process of adopting children by a Hindu adult and the legal obligations to provide maintenance to the various family members.
- j. **The Indian Christian Marriage Act, 1872:** This law regulates the formalization of marriages among Indian Christians.
- k. **Hindu Minority and Guardianship Act, 1956:** The statute explains the guardianship relationships of Hindus involving the adults and minors as well as between people of all ages and their respective property.
- l. **Guardian and Wards Act, 1890:** This is a non-religious and universally applicable law regarding the issues relating to guardianship of a child in India.
- m. **Chapter IX of the Criminal Procedure Code, 1973:** This deals with the issues of maintenance of wives, children and parents.
- n. **Protection of Women from Domestic Violence Act, 2005:** This statute provides safeguards to the wife or female live-in partner against domestic violence by husband or male live-in partner or his relatives. This law also provides protection to other women living in a household including sisters, widows, or mothers.

The Family Courts Act provides mandatory powers to the state governments to set up family courts in cities and towns with population over one million, and discretionary powers for areas with less than one million. However, some states have failed to create family courts; the reasons cited range from financial and space constraints to lawyers blocking any such move.

## B. Role of Women in the Creation of Family Courts

Women associations and organizations have played critical role in the creation of family courts. In the 1980s, the women's rights movement groups were vocal about legislative reforms, such as the creation of special courts to deal with family matters to curb violence against women including rape, dowry harassment, and



wife murder. These issues of gender justice were an important motivating factor for the creation of family courts. Accordingly, family courts aimed at creating women-friendly court procedures that were less formal and more accessible to women, especially those from the marginalized section. For this the family courts intended to rely less on the traditional lawyers and to depend more on counselors to help the parties to the dispute to reach at mutually amicable solutions. The conciliators were to increase the power of negotiation of women in reconciliations and settlements in issues such as quantum of maintenance upon divorce, custody and access of children, protection against domestic violence, and right of residence in the matrimonial home.



The need to establish the Family Courts was first emphasized by late Smt Durga Bai Deshmukh after her visit to China in the year 1953, where she had the opportunity to study the working of Family Courts. She discussed the subject with Hon'ble Mr Justice M.C. Chagla of Bombay High Court and also Hon'ble Mr Justice P.B. Gajendragadkar, then the Judge, Bombay High Court. She also discussed the matter of setting up of the Family Courts with the then Prime Minister Pandit Jawahar Lal Nehru. Several women associations, welfare organizations and individuals also mounted pressure for setting-up of the Family Courts to provide a forum for speedy settlement of family related disputes. The emphasis was on a non- adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of dispute relating to marriage and family affairs.

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non- adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of dispute relating to marriage and family affairs.

### C. Role of Lawyers and Counselors in Family Courts

The Family Courts Act restricts the role of lawyers and enhances the use of counselors in the dispute resolution to encourage mutually amicable settlements. This is peculiar as well as contrary to the practices of other courts, which commonly employ the English legal method of practice called the adversarial system of adjudication. In the adversarial system of adjudication, the judge plays the role of a neutral arbiter and decides based on the merits of the case presented to him/her by the lawyers of the opposing parties. The Family Courts Act limits the role of the lawyers as legal experts or 'amicus curiae' who the courts may consult for opinion. The Act does away with lawyers with the hope to prevent excessive litigation costs, corruption, manipulative and subversive tactics, extended and bitter court battles and refusal to settle or compromise, and so on. However, critics have argued that lawyers are necessary to help clients with complex cases and court procedures in which the counselors may not have that kind of expertise. Moreover, there has been no mechanism created to ensure the availability of 'amicus curiae' or 'legal experts' for the constant needs of courts. Accordingly, family courts have routinely allowed lawyers to represent clients.

As described earlier, the Family Courts Act has given the counselors high preference over lawyers in the family courts in order to promote efforts for settlement between the parties. However, in practice the role of counselors is mere superficial. Majority of the states do not adequately integrate the requirement of counselors with the legal practice of family courts; the role of the counselors is limited to the task of ascertaining if the dispute can be reconciled, and even this not beyond the preliminary stage and not in the actual trial of the case. The situation of counselors in court practice is a new idea and neither the judges nor the lawyers are oriented to this concept. There exists a wide disparity among states with respect to the process adopted to appoint the counselors, their qualifications and remunerations, their role, and the counseling techniques employed. While some states have used non-governmental organizations as counselors, others have used trained personnel, individual volunteers, as well as lawyers.

### D. Role of Counselors and Gender Issues

There are a few states such as Maharashtra, where counselors play a considerable





role in promoting negotiations and settlements. Women groups contend that counselors should be trained with gender-sensitivity as the neutral stands of counselors usually ends up being anti-women, influenced by long standing patriarchal biases against women. The women groups have demanded clearly defined frameworks for gender justice in the practice of the family courts, especially with respect to the roles of counselors in order, to avoid gender biases in the process of fulfilling the statute mandate of 'speedy settlement' and 'protect and preserve' the family. For example, in order to accomplish the mandate of 'reconciliation', some counselors coerce women to reconcile and return to the spousal home disregarding women's human dignity, physical safety and economic rights. In other instances, where women have been physically abused and thrown out of their matrimonial homes and have demanded maintenance (under section 125 of the Criminal Procedure Code), the counselors and lawyers have regularly and successfully sought reconciliation, which is argued to be a legal trick that undermines women's claim to maintenance. Section 125 of the Criminal Procedure Code is a safeguard that makes maintenance mandatory for neglected children and women. Likewise, family issues are nuanced and have legal complexities; gender-sensitivity may help counselors to not merely take neutral positions but consider the unequal power relationships between men and women in reconciliation and settlement processes. One of the major criticisms by the women groups, about the Family Courts Act and the family justice system as a whole, is that the conceptual basis of 'gender justice', the prime objective of the women's movement, is left out. Instead, the Family Courts Act focuses on 'preservation of the family' through conciliation and in a speedy manner. Women's groups have always maintained that 'preservation of family' is not synonymous with 'gender justice' or 'rights of women'.

## E. Questions

1. Answer the following in about 150 words , based on your reading:

- i. What are the distinct features of family courts?
- ii. Give examples of subject-matters as well as statutes that fall within the jurisdiction of the family courts.
- iii. Why did the women's rights groups campaign for the creation of family courts?
- iv. What are the challenges in implementing the concept of counselors in family courts?



- v. How does training on gender-sensitivity for counselors in family courts bring about gender justice?
- vi. Why have women's human rights groups criticized the idea of '*preservation of family*' as advocated by the Family Courts Act of 1984?

### III. Marriage and Divorce

#### A. Marriage

Marriage is defined as a social and legal union between a man and a woman; through this institution the spouses create kinship. Kinship is a system of social organization between people who are related by blood, marriage, or adoption. Marriage is a social union because both the spouses are entitled to each other's company and conjugal rights, which are mutual rights and privileges between two individuals that arise from the state of being married. These rights and privileges include affection, companionship, co-habitation, joint property rights, and sexual relations. If either of the spouses detaches herself or himself from the social and emotional companionship of her/his spouse without reasonable cause (i.e., sound judgment, which is just, fair and rational) then the aggrieved party can approach court for relief. In such cases, the court may direct the accused spouse to return with the other spouse their matrimonial home, which is called as the restitution of conjugal rights. Marriage is also a legal union as certain legal consequences follow after marriage; for example: parties get the status of husband and wife; legitimacy is conferred on children who are born after marriage; and it confers rights of maintenance and inheritance of property on husband and wife.

The majority of marriages are based on monogamy, i.e. a union between one woman and one man. Some societies have also allowed polygamous marriages, which is generally referred to multiple spouses or multiple marriages that include either multiple husbands or multiple wives. Whether monogamous or polygamous, the marriage system does not emerge in vacuum. These different forms of marriage serve a purpose. The practice of polygyny (or multiple wives) was often a strategy for increasing the population size. It also ensured that all women in the society were taken care of when men were in short numbers. Similarly, polyandry (or multiple husbands) is associated with a shortage of women (sometimes due to female infanticide and poverty).





Most societies also define marriage rules with respect to endogamy and exogamy. Endogamy is about marriage to a person within one's own group. Such group may be based on caste (a Brahmin will marry a Brahmin; a Kshatriya will marry a Kshatriya and so on), class (social categories based on economic and educational status), ethnic group (socially defined category based on common culture or nationality), or a religious group or even a village. Exogamy is a rule that requires an individual to marry outside the tribe, family, clan, or other social unit. It is especially with regard to descent groups on the basis of descent from a common ancestor or ancestress. The group can consist of children of the same father/mother, of grandchildren of the same grandmother/father, great-grandchildren of the same great-grandparent etc., or of the descendants of these persons. Accordingly, in exogamy, certain degree of social or relationship distance must exist; else exogamic taboo is attached to such marriages that take place within close social or relationship proximity.

As stated in the Introduction of this section, different laws of marriage govern people belonging to different religions. For example, the Hindu Marriage Act, 1955, governs a Hindu marriage; the Parsi Marriage and Divorce Act of 1936 govern the marriage between Parsis; and the Christian Marriage Act, 1872, governs the Christian marriage. Muslims do not have any codified law for marriage; they are governed by their religious texts.

### 1. Conditions of a Valid Marriage

For a valid marriage, certain conditions are to be fulfilled by the parties to the marriage. These conditions may vary from religion to religion. *Firstly, there is a rule of monogamy among Hindus, Parsis, and Christians;* in that, they can marry only once. Their first marriage must be dissolved if they want to marry again. The dissolution of marriage can take place either by divorce (i.e., dissolution of marriage by the court) or by death of other spouse. However, Muslim law permits having introduced the term 'polygamy' in the text, it is not a disable to use the two terms interchangeably especially while dealing in the legal use where a Muslim man can have four wives. *Secondly, no religious ceremony is required to constitute a valid marriage under the Muslim law.* The offer and acceptance to marry is often required of a Muslim couple. But this is not so among the other religious groups like, Hindus, Parsis, or Christians. If any Hindu marriage has been solemnized without the performance of customary rites or ceremonies prevailing in the community of either of the parties, such





marriage is legally void. Hindus follow the ceremony of 'Saptapadi' or taking of seven steps before a sacred fire. Sikhs solemnize their marriage by 'Anandkaraj' ceremony where Lavan or the four hymns of Laav are performed during the four nuptial rounds. Parsi marriage must be solemnized in accordance with a ceremony called "Ashirwad"; this ceremony binds the couple in matrimony spiritually. Both the bride and the groom promise to remain faithful to each other and to not be led astray by any external temptations. For Christians in India, certain people are recognized as authorities under the Christian law who can perform the marriage; else the marriage is void. These include persons who have received episcopal ordination (consecration or installation by authority); any Clergyman of the Church of Scotland; any Minister (or priest) of Religion licensed under this Act to solemnize marriages. Such persons grant certificates of marriage to the Christian couples. *Thirdly, different religions prescribe different age for marriage.* For example, Hindu, Christian and Parsi law prescribe age of 18 years for girls and 21 years for boys; Muslim law mentions age of puberty, which is generally attained at 15 years of age. *Fourthly, a person cannot marry anyone who belongs to his or her close relations.* All the religions recognize that parties should not be within the prohibited degrees of consanguinity (prohibition of marrying certain blood relations) or affinity (prohibition of marrying certain persons with whom relationship has arisen by marriage). For example, a person cannot marry his or her brother or sister. *Lastly, a person must be of sound mind at the time of marriage.* The sound mind refers to the ability of individuals to understand the nature of marriage, and responsibilities towards their spouses once they get married.



Essential ceremonies observed in different religions. Ashirwad in Parsi marriages; Saptapadi or seven steps in Hindu marriages; Anandkaraj ceremony of Sikhs (left to right)

## 2. Concept of Void and Voidable Marriage

When all the conditions prescribed by the personal laws, as discussed above, are fulfilled and there is no legal impediment, the marriage is considered as



valid. A party may contravene any of the above-mentioned conditions. In such case, different status would be ascribed to the marriage i.e. void or voidable marriage. Such status of void or voidable marriage is dependent upon the nature of conditions so violated. A voidable marriage is a perfectly valid marriage as long as it is not annulled (set aside) by any court of law. Only the aggrieved party to the marriage can file the petition for annulment. The court can annul the voidable marriage by passing a decree of nullity. A void marriage is no marriage. The word 'marriage' describes that the two persons have undergone the ceremonies of marriage; the ceremonies being a pre-requisite to a valid marriage. Under Muslim law, void marriage is known as “Batil” marriage. The term 'nullity' (non-existence) is applicable to void marriage as marriage does not exist from the very beginning and court merely passes a declaration as to its nullity.

The Hindu Marriage Act, 1955 makes the distinction between void and voidable marriage. It provides *three grounds for void marriage*. First, marriage with any person falling within sapinda relationship (one cannot marry within five degrees from father's side and three degrees from the mother's side) is void. Blood relations are covered under it; for example, a person cannot marry his maternal or paternal uncle's daughter. *Second*, one cannot marry with any person falling within the ambit of prohibited relationship (one cannot marry persons with whom relationship has arisen by marriage). For example, there cannot be marriage between uncle and niece or aunt and nephew. The concept of prohibited relationship is wider than sapinda relationship as it covers relationship by blood as well as by marriage. *Lastly*, if any Hindu re-marries during the lifetime of his or her spouse then the second marriage is void.

The Hindu Marriage Act also provides *four grounds for voidable marriages*. *Firstly*, if marriage cannot be consummated due to impotency of one spouse, then, other spouse can get it annulled. Here, impotency does not mean barrenness or sterility (inability to have child) rather it is failure to have sexual intercourse. *Secondly*, when the consent for marriage is obtained by force or fraud, then the aggrieved party can get the marriage annulled. *Thirdly*, the pre-marriage pregnancy of wife (when the wife is pregnant before marriage by some person other than the husband) is another ground for voidable marriage. But husband must be ignorant of this fact at the time of marriage. *Lastly*, unsoundness of mind is also a ground for voidable marriage.



*There is no concept of voidable marriage under Muslim law rather they recognize concept of irregular (Fasid) marriages. Irregular marriage is that, which can become valid if the defect is cured. For example, marriage with fifth wife is irregular and can be regularized if any of the earlier four wives either dies or obtains divorce from the husband. Irregular marriages are recognized only by the Sunnis and not by the Shia sect among the Muslims. The concept of void marriage is also recognized under the Muslim family law. Marriage is void on grounds of polyandry, consanguinity, affinity and fosterage. Polyandry means that a married woman cannot contract a second marriage during the subsistence of the first marriage. Consanguinity means prohibition of marrying certain blood relations. For example, a Muslim cannot marry his mother, grandmother, daughter, granddaughter, paternal and maternal uncles and aunts etc. Affinity means prohibition of marrying certain persons with whom relationship has arisen by marriage. For example, a Muslim cannot marry wife's mother or grandmother, wife's daughter (from another husband) or granddaughter if his marriage with wife is consummated. Fosterage means when a woman, other than the mother of the child, has suckled a child under the age of two years, the woman becomes the foster mother of the child. A man cannot marry his foster-mother or her daughter, or his foster sister.*

The Indian Divorce Act, 1869, governs Christians. It also provides for nullity of marriage. But *the Act does not distinguish between void and voidable marriage*. It only states that marriage may be declared as null and void on certain grounds. First, aggrieved party can get the decree of nullity on ground of impotency of other spouse at the time of marriage. Secondly, decree of nullity can be obtained if parties are within the prohibited degrees of consanguinity or affinity. Thirdly, marriage may be revoked if the former husband or wife of either party was living at the time of marriage. Lastly, it may be annulled if either party was idiot or lunatic at the time of marriage. Even Parsis do not recognize this distinction between void and voidable. Under the Parsi Marriage and Divorce Act, 1936, declaration as to nullity of the marriage can be obtained in one situation where consummation of marriage is impossible due to natural causes.

#### A.1

**Based on your reading, fill in the blanks by supplying suitable words/phrases:**

1. Marriage is defined as a \_\_\_\_\_ and \_\_\_\_\_ union between man and woman.





2. A union between one woman and one man is called \_\_\_\_\_
3. \_\_\_\_\_ is associated with a shortage of women.
4. Socially defined category based on common culture or nationality is called \_\_\_\_\_
5. Muslims do not have any \_\_\_\_\_ law for marriage
6. Different \_\_\_\_\_ prescribe different age of marriage.
7. A person cannot marry anyone who belongs to his or her close \_\_\_\_\_.
8. There is no concept of \_\_\_\_\_ marriage under Muslim law.
9. The Indian Divorce act 1869 governs Christians and also provides for \_\_\_\_\_ of marriage.
10. Marriage may be \_\_\_\_\_ if either party was idiot or lunatic at the time of marriage.

#### A 1.2

Answer in a sentence or two.

1. What is a valid marriage?
2. Which are the three grounds for void marriage?
3. Who is called foster mother?
4. Under which act declaration as to nullity to Parsi marriage can be obtained.
5. Define 'Consanguinity'

## B. Divorce

### 1. Theories of Divorce

Marriage is a social institution. There is a social interest in its protection and preservation. But sometimes it is not possible for the parties to continue with their marriage. As a consequence, concept of divorce came into being.

***Divorce is the termination of a marital union.*** It results in the cessation of matrimonial tie between husband and wife. The status of husband and wife ceases after divorce. The concept of divorce has evolved in the form of different theories. Situations like adultery (sexual intercourse outside wedlock), cruelty, and desertion (when one spouse leaves the other spouse with the intention of never coming back) affects the very foundation of



marriage. The divorce on these grounds merely enables the other party to put to an end to the form from which substance has already been destroyed. Divorce is regarded as a mode of punishing the guilty party who had rendered him or her unworthy of consortium. This gave rise to the guilt or offence theory of divorce. According to this theory, a marriage can be dissolved only if one of the parties to marriage has, after its solemnization, committed some matrimonial offence. The offence must be one that is recognized as a ground of divorce. ***The guilt theory on the one hand implies that there is a guilty party***, i.e. a party who has committed matrimonial offence ***and on the other an innocent party*** who is a victim. Later on insanity was added as a ground of divorce. Insanity did not fit in within the framework of guilty or matrimonial offence theory, as the party suffering from insanity could hardly be called a guilty party. This led to ***renaming of the guilty theory*** as fault theory. If one of the parties has some fault in him or her, marriage could be dissolved, ***whether that fault is his or her conscious act or providential.***

Another theory is the theory of ***divorce by mutual consent***, which originated due to the loopholes in the fault theory of divorce. The biggest drawback of the fault theory has been the presumption that there is one innocent party and one guilty party. Sometimes, husband and wife are not able to live together and there is no fault of either of them. In that case both of them are left with no remedy. Thus, a new theory had to be evolved where marriage could be dissolved by mutual consent of both the husband and the wife where they are not able to live together. Divorce by mutual consent means that the law recognizes the situation where parties can also obtain divorce by mutual consent. But mutual consent alone will not automatically terminate the relationship. It is essential to obtain a decree of the court. For example, under the Hindu Marriage Act, 1955, parties must live separately for a period of one year or more before filing a joint petition. Then, after filing of petition, there will be a cooling off period for six months during which the court will not examine the petition. Thereafter, the parties have to file a joint motion to initiate the divorce proceedings. Even the Parsi Marriage and Divorce Act, 1936 provides this ground. But there is no requirement of filing of joint petition under it. The concept of divorce by mutual consent is also recognized under Muslim law in the form of *Khula* (redemption) and *Mubarat* (mutual release). In *Mubarat*, both the parties mutually decide to release each other from marital bond. In *Khula*, offer is from the wife's side and she has to pay



consideration (voluntarily giving away something of monetary value in exchange for a promise) to the husband in lieu of acceptance.

The next theory is the theory of *ir-retrievable breakdown of marriage*. Divorce by mutual consent requires the consent of both the parties, and if one of the parties withholds his or her consent, divorce can never be obtained. Therefore, with the passage of time there arose a necessity for another ground that gave birth to this new theory of ir-retrievable breakdown of marriage. The basic postulate of “breakdown theory” is that, if a marriage has broken down without possibility of repair (or irretrievably) then it should be dissolved without looking at the fault of either of the party. In 1964, the Archbishop of Canterbury appointed a Committee under the Chairmanship of Dr. Mortimer Bishop of Exeter to look into the matter. The Mortimer Committee in its report recommended that the breakdown of marriage should be the sole ground of divorce replacing all the fault grounds of divorce. The Committee defined such breakdown of marriage as such failure in the matrimonial relationship, or such circumstances adverse to that relationship that offers no reasonable probability of comfort and support. The Matrimonial Causes Act, 1959 of the Commonwealth of Australia, provides that, if a decree of restitution of conjugal rights is not complied with for a period of one year, then either party may seek divorce. Further, a divorce could also be obtained on the ground that the parties have not resumed cohabitation for a period of one year or more after a decree of judicial separation. The Parsi Marriage and Divorce Act, 1936 also has this ground. In 1960's an agitation started to reform English law of divorce. This agitation produced a rapid response in India, which led to 1964 amendment in the Hindu Marriage Act, 1955. It tried to introduce the “breakdown” principle along the lines of Australian Matrimonial Causes Act, 1959. However, **this ground has not been specifically included in the Hindu Marriage Act, 1955** but Supreme Court has, in the case of *Naveen Kohli v. Neelu Kohli*, 2006, strongly recommended that ir-retrievable breakdown of marriage should be made a ground for divorce. The Indian parliament has introduced Marriage Laws Amendment Bill, 2010 with the aim of making ir-retrievable breakdown of marriage as a ground for divorce in the Hindu Marriage Act, 1955.

## 2. Grounds for Divorce

Different laws of divorce govern people belonging to different religions. The





Hindu Marriage Act, 1955, governs divorce among Hindus. The Parsi Marriage and Divorce Act, 1936 governs the divorce among Parsis. The Indian Divorce Act, 1869, governs divorce among Christians. Muslims do not have a codified law for marriage and divorce; they are governed by their religious texts. Decree of court is required for dissolution of marriage by divorce. But Muslims are an exception to this rule. In Muslim law, husband enjoys special privilege in the area of divorce. He can divorce his wife at his will without citing any reason. Earlier, the Muslim wife had no corresponding right of divorce. It is only after passing of Dissolution of Muslim Marriage Act, 1939 that wife has been conferred right to obtain divorce. The Hindu Marriage Act, 1955 governs Hindus in matters of marriage and divorce. Both husband and wife are entitled to file petition for dissolution of marriage. This petition can be filed on grounds of adultery (sexual intercourse outside wedlock), cruelty (conduct of such a nature that it is not possible for the aggrieved party to live with the spouse who has committed that act), desertion (physical separation as well as intention to leave the matrimonial home permanently on the part of deserter), unsoundness of mind (mental disorder of such a kind that it is not possible for the petitioner to live with the respondent) and so on. Parsis as well as Christians recognize adultery, cruelty, desertion and unsoundness of mind as grounds of divorce. The Indian Divorce Act, 1869 governs Christians in matters of divorce. Under this Act, husband can file petition of divorce only on the ground of adultery on the part of wife, whereas wife can file petition on the above-mentioned grounds. If husband is guilty of rape or sodomy or bestiality, then wife can file petition for divorce. This remedy is available to Hindu, Parsi and Christian wife.

### 3. Matrimonial Rights and Obligations

Marriage confers on husband and wife certain marital rights and obligations like conjugal rights, rights of maintenance and inheritance. These are discussed below.

#### a) *Conjugal Rights*

Marriage confers conjugal rights on the parties. These are the rights and privileges arising from the marital relation, especially the mutual rights of companionship, aid, and sexual relations. The basis of this right is 'consortium', which means an association or alliance, or a legal right of



one spouse to have comradeship and support with the other. Parties get right of cohabitation. Cohabitation means the act or state of dwelling together, or in the same place with one another. The living together of a man and woman is supposed to be the quintessence sexual relationship. It means an emotional and physical intimate relationship, which includes a common living place known as matrimonial home.

#### **b) *Right of Maintenance***

A man, who marries, takes on an obligation to support his wife out of his earnings or other income in a style, commensurate with his total income. This obligation remains in force for the duration of the marriage and sometimes longer, even if the wife has an adequate income of her own. Earlier, there used to be division of work between husband and wife. Husband used to earn livelihood and his duty was to maintain and protect the wife. Wife's duty was to live under roof and protection of the husband.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956. In assessing the amount of maintenance, the Court takes into account various factors, like financial position and liabilities of the husband. There does not exist such parallel right for the husband. But, if any matrimonial dispute is brought before the Court, then the Hindu Marriage Act, 1955 provides that either husband or wife who has insufficient means can claim maintenance pendent lite (maintenance during pendency of the proceedings) as well as permanent alimony (maintenance at the time of final disposal of the case), which is different from litigation expenses. In fixing the quantum of permanent alimony, the Court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Parsi Marriage and Divorce Act, 1936 also recognizes the right of husband as well as of the wife to claim maintenance pendent lite as well as permanent alimony. The parameter for granting the maintenance is same as in the case of Hindus. Under the Muslim Law, the Muslim Women



(Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands. Failure on the part of the husband to pay maintenance to wife entitles her to obtain divorce from the husband. The Indian Divorce Act, 1869 governs maintenance rights of a Christian wife. This Act does not apply to any of the above-mentioned categories i.e. Hindus, Muslims and Parsis. The provisions of this Act are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent alimony.

### c) *Right of Inheritance*

When one person dies without making a will, his property devolves (passes on) under the law of succession. When two persons get married, they get mutual rights of inheritance. Different laws of succession govern persons belonging to different religions. Under the defined Hindu family, if a male or female dies without making a will, then the property is distributed as per rules of succession prescribed in the Hindu Succession Act, 1956. Under the Act, both husband and wife are included in the category of most preferred heirs. Both of them can make a will of his or her separate properties and can give them to anyone. But, the ancestral property has to be disposed off according to the Hindu Succession Act, 1956.

Under Muslim law, in the case of death of wife, the share of husband is  $\frac{1}{4}^{\text{th}}$  of the property when there is a son or child of a son; but when there is no such child then husband is entitled to  $\frac{1}{2}$  of the estate of wife. In case of the death of the husband, the share of the wife is  $\frac{1}{8}^{\text{th}}$  when there are children; but if there are no children, then her share increases to  $\frac{1}{4}^{\text{th}}$ . Under the Muslim law, there is a restriction that a Muslim cannot dispose of by a will more than  $\frac{1}{3}^{\text{rd}}$  of his property.

### d) *Matrimonial Property*

Property and gifts received at or about the time of marriage belongs jointly to the husband and wife. But, there are certain properties belonging exclusively to each one of them. For example, there is a concept of '*stridhan*' in the Hindu law. Any property or gifts given to wife by her parents and in-laws exclusively belongs to her. She can deal with it





the way she likes. Concept of 'dower' under Muslim law is another example of such property, which belongs exclusively to wife. Dower is a sum of money or property that the wife is entitled to receive from the husband in consideration of marriage. In fact, it would be more correct to say that dower is an obligation imposed upon the husband as a mark of respect for the wife.

### C. Minor Custody and Guardianship

Minor is a person who has not completed the age of 18 years under the Indian Majority Act, 1875. With respect to the age of marriage, the Hindu Marriage Act, 1955, the Parsi Marriage and Divorce Act, 1936 and the Christian Marriage Act, 1872 has prescribed the age of 18 years for girls and 21 years for boys. In India, child marriages (marriage which takes place before a girl attains the age of 18 years, and 21 years in case of boys) were prevalent. When the Hindu Marriage Act, 1955 was drafted, it did not affect the validity of child marriages. Only some minor penalties (15 days simple imprisonment or fine which may extend to 1000 rupees) were imposed; else, large number of marriages would fall under category of void or voidable marriages. The Prohibition of Child Marriage Act, 2006 has changed the position in this regard. It has made child marriage voidable. Rigorous imprisonment of 2 years or fine, which may extend up to one lakh rupees, may be imposed in case of contravention of any provision of this Act. But even now, child marriage is valid.

For a minor girl, the aegis of guardian is pre-emptory. Earlier, there used to be a concept of guardianship by affinity i.e. on marriage a woman completely merges into the family of her husband. She ceased to be the member of her father's family in all respects. A wife was under the supervision and control of her husband or his family. If she was a minor, it had been seen that her husband was her natural guardian. But, if her husband died while she was still a minor, her guardianship passed to her husband's sapindas (agnatic relations). In case of failure on part of the husband's sapindas, her guardianship went back to her father or her relations on her father's side. But, now this concept no longer exists, as under the Hindu Minority and Guardianship Act, 1956, the husband is the natural guardian of the person and property of the minor wife.

In case of Muslims, there is no codified law for marriage and guardianship. Their marriage can take place at the age of puberty. Marriage of a child below this age can take place only with the consent of Guardian; otherwise the marriage will be void.



The husband is not entitled to custody of minor wife unless she attains puberty or such age that would permit consummation of marriage. However, minority of the husband does not deprive him of his right to guardianship.

### C.1

**Provide suitable details to complete the given statements:**

1. Divorce is the \_\_\_\_\_ of a marital union.
2. The biggest drawback of the this statement is more suitable for guilt theory, not fault theory has been than there is one innocent party and one \_\_\_\_\_.
3. The Indian Divorce Act, 1869 governs divorce among \_\_\_\_\_.
4. Under \_\_\_\_\_ law, the wife has an absolute right to claim maintenance from her husband.
5. When one person dies without making a will his property passes on, under the law of \_\_\_\_\_.
6. In the \_\_\_\_\_.Muslims , both the parties mutually decide to release each other from marital bond in \_\_\_\_\_.
7. \_\_\_\_\_ law states that failure on the part of the husband to pay maintenance to wife entitles her to divorce from the husband.
8. Different laws of divorce govern people belonging to different \_\_\_\_\_.
9. Ir-retrievable breakdown of marriage should be made a ground for \_\_\_\_\_.
10. Mutual consent alone will not automatically terminate \_\_\_\_\_.

### C.2

**Answer the following briefly in a sentence or two.**

1. What do you understand by the guilt or offence theory of divorce?
2. Provide the basic postulate of 'breakdown theory'.
3. State the recommendation of the Mortimer Committee report.
4. Which Muslim law states that the wife has been conferred the right to obtain divorce?
5. What is 'consortium' in the context of conjugal rights.



### C.3

Answer the following in about 150-200 words each:

1. Define marriage. Explain its various forms.
2. What conditions are required to be fulfilled by the parties for a valid marriage?
3. Divorce is the termination of marital union. Enumerate various grounds on which divorce can be obtained.
4. Explain the following: 1) Guilt Theory of Divorce; 2) Theory of Divorce by Mutual Consent; and 3) Irretrievable Breakdown of Marriage.
5. Discuss the meaning of void and voidable marriages.

## IV. Children

### A. Child Rights

Etymologically, the term “child” is derived from the Latin word “*infans*”, which means the one who does not speak. According to the Convention on the Rights of the Child of 1989, *a child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier*. In India, a person is deemed to be a major on attaining the age of 18 years under the Indian Majority Act, 1875. The law, policy, and practice of child welfare has undergone a significant change from a historical perspective. Earlier, there was the concept of authority and control where the father had absolute rights over his children. After this, the welfare principle was reflected in the dominant ideology of the family. The Indian traditional view of welfare is based on *daya*, *dana*, *dakshina*, *bhiksha*, *ahimsa*, and *tyaga*. It was believed that welfare of children depended upon these values. It was only during the twentieth century that the concept of children's right emerged. This shift in focus from the 'welfare' to the 'rights' approach is significant.

The rights approach is primarily concerned with issues of social justice, non-discrimination, equity, and empowerment. The rights perspective is embodied in the United Nations Convention on the Rights of the Child 1989, which is a landmark in international human rights legislation. India ratified the Convention on the Rights of the Child in December 1992. This convention gives all those basic human rights to children that will enable them to achieve their full potential. These include civil, economic, social, cultural, and political rights. The civil rights





include protection from torture and maltreatment. Making of special rules governing the circumstances under which children may be deprived of their liberty also constitutes part of civil rights. The economic rights include the right to ensure proper development and protection from exploitation at work. The social rights include the right to the highest attainable standard of health services, protection from sexual exploitation and the regulation of adoption. Right to education is included in the cultural rights.

## B. Right to Education

Education is the transmission of the values and accumulated knowledge of a society. It helps children in knowing their culture, moulding their behaviour in the ways of adulthood and directing them towards their eventual role in society. Right to education is one of the fundamental




rights in the Indian Constitution (Article 21A inserted by 86<sup>th</sup> constitutional amendment). It provides that the state shall provide free and compulsory education to all children between the age of six to fourteen years (6-14 years). The state also has to promote the educational and economic interests of the weaker sections of the society, and, in particular of the Scheduled Castes and the Scheduled Tribes. The mandatory duty of the state to make effective provisions for securing the right to education is subject to its economic capacity and development. Moreover, a duty has been imposed on the parent or guardian to provide opportunities for education to his child or ward between the age of six to fourteen years (6-14 years).

The Right of Children to Free and Compulsory Education Act was passed by the Parliament in 2009. Some of the salient features of the Act are as given here. The Act ensures that children get education irrespective of their economic condition. It provides for free and compulsory education to all children in the age group of six to fourteen years (6 -14 years). The financial burden for the implementation is to be shared by state and the central government on basis of the Sarva Shiksha Abhiyan program of the central government. It also provides for 25% reservation for economically disadvantaged communities in all private and minority schools. The private schools have to face penalty for violating any provision of this Act.



### C. Right to Health

Health is a state of complete physical, mental, and social well-being. It is not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition. Healthy development of the child is one of the basic needs and the ability to live harmoniously in a changing total environment is essential for such development. The extension to all people of the benefits of medical, psychological and related knowledge is essential for the most comprehensive attainment of health.

RIGHT TO HEALTH - JUDICIAL CONTRIBUTION	The World Health Organization (WHO) is a specialized agency of the United Nations that is concerned with international public health
<p><b>Consumer Education and Research Centre v. Union of India, (1995):</b> Right to health and medical care is a fundamental right under Article 21 read with Articles 39©, 41 and 43 of the Constitution.</p> <p><b>Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996):</b> Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is, thus, of paramount importance.</p>	 <b>World Health Organization</b>

A constitutional duty has been imposed on the state to ensure that the health and strength of workers, men, and women, and the tender age of children are not abused. It has to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. Moreover, their childhood will be protected against exploitation. The health of infant and mother has to be protected by maternity benefit. The primary duty of the state is to improve public health; secure justice and humane conditions for works; extension of sickness, old age, disablement and maternity benefits are also contemplated. Further, the state's duty includes prohibition of consumption of intoxicating drinking and drugs that are injurious to health. A mandatory duty has been imposed on the state to protect and impose a pollution free environment for the good health of its citizens.



#### D. Right to Shelter

Right to shelter includes adequate living space, safe and repeatable structure, clean and hygienic surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads. It is a place where a person has opportunities to grow physically, mentally, intellectually and spiritually. Thus it includes the entire infrastructure necessary to enable an individual to live and develop as a human being. These components are discussed by the Supreme Court in the case of *Chameli Singh v. State of U.P.*, (1996). In *Shantistar Builders v. Narayan Khimalal Totame*, (1990) the Supreme Court held that the right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. There is a difference between the need of an animal and a human being for shelter. For the animal, it is the bare protection of the body whereas for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect i.e. physical, mental and intellectual. Thus, right to shelter has become an integral part of the right to life.

#### E. Family and Adoption

##### E.1

**Work with a partner. Read this case history and share your views with your class**

The mother was not able to take care of her son. Mother left the baby with her stepsister. Stepsister told this to the brother of the mother. He asked his other sister to take care of him. His intention was to pay the cost of taking care of the child. But this sister was not able and willing to do that and then the mother took him. Later she put the child beside outside the gate of her brother's house.

The child was found by a girl just beside the gate of the house. She brought the baby to the house of her parents and there he stayed upto the adoption.

The neighbours warned the family who took the child, because they were afraid, that she would be charged with child kidnapping. So this family went to the hospital and here they were told about adoption. In the hospital they gave him another name. Which family was it the child's mother? Family (the woman) authorised the hospital to give the child in adoption.





1. What made the mother have her child beside the gate of her brother's house?
2. Why it is necessary to adopt a child in an authorized way or legally? Discuss.
3. Does adoption provide an opportunity towards a better life for a family?

***Adoption is the act of establishing a person as parent to one who is not in fact or in law his child.*** It is the means by which a legal relationship is established between the parent and child who are not so related biologically. It is also defined as a process by which people take a child who was not born to them and raises him or her as a member of their family. The earlier object of adoption was mainly to secure performance of funeral rites and to preserve the continuance of one's lineage. The only statute in India governing adoption is the Hindu Adoption and Maintenance Act, 1956. Its ambit is confined only to Hindus. There is no law on adoption for Christians, Parsis, and Muslims. A person belonging to these communities has to get himself appointed as guardian under the Guardians and Wards Act, 1890. This Act applies to all communities and castes. But court will take into consideration the personal law of the minor while appointing or declaring a person as guardian under this Act. Once a person is appointed or declared as a guardian, he has to abide by the provisions of the Guardians and Wards Act, 1890.

#### **INTER COUNTRY ADOPTION**

*In Lakshmi Kant Pandey v. Union of India, the Supreme Court formulating the normative and procedural safeguards to be followed while making inter-country adoption delivered an exhaustive judgment. It makes an attempt to make every party in the adoption process accountable. There are certain regulating agencies recommended in the judgment like the Scrutinizing Agency, the Voluntary Coordinating Agency, the Central Adoption Resource Agency, and the recognized Child Welfare Agency (Placement Agency). The Child Welfare Agency processing the applications of the foreign parent must place sufficient material before the court to satisfy it that the child is legally free for adoption.*

#### **F. Custody and Guardianship**

A Guardian is a person who has rights and duties with respect to the care and control of minor's (a person who has not completed the age of 18 years) person (in relation to body) or property (estate or wealth of minor). These rights include right





to determine the child's upbringing in the regard to religion, education, and other matters such as the disposal of properties and so on. A guardian is vested with the duty to act for the welfare of the minor. The welfare of the child is paramount consideration for the court in matters pertaining to custody and guardianship of the child. During the British period, the Guardians and Wards Act, 1890 was passed. This Act has authorized the court to appoint guardian for a minor child. The child may belong to any community. Guardians appointed by the court are known as certificated guardians. The Hindu Minority and Guardianship Act was enacted in 1956. This Act has codified the law relating to custody and guardianship of children belonging to the Hindu community. In matters of custody and guardianship every community has its own laws.

A guardian can be de-jure (authority vested by law) or de-facto (exercising power without being legally established). De-jure guardians can be of three types, they are: natural guardians (by birth), testamentary guardians (Guardians appointed by will) and certificated guardians (Guardians appointed by the court under the Guardians and Wards Act, 1890). Generally, father and mother are recognized as natural guardians of the child. But under the Hindu Minority and Guardianship Act, 1956, mother is entitled to guardianship 'after' the father. Here, the term 'after' means 'in the absence of'. Thus, a functional guardian (person who is looking after the welfare of the child and actually taking care of him) will be given responsibility of the guardianship. It is immaterial whether that person is father or mother. The paramount consideration is welfare of the child. This position is different among Muslims. They do not recognize mother as a guardian, whether natural or otherwise. But she has the 'right of hizanat', which is the right of the mother to have custody of child during the early childhood. Even, Hindus recognize this principle. Ordinarily, the custody of child who is below age of five years is given to mother.

A guardian appointed by 'will' is known as testamentary guardian. Under the Hindu Minority and Guardianship Act, 1956, both the parents can appoint testamentary guardian for the child. But it is not so among Muslims. In Muslim law, only father has power to appoint a testamentary guardian. The mother has no such power.

#### G. Child Labour

Child Labour means labour by the child i.e. when the child is made to work. There are a number of factors to determine whether a particular form of "work" can be



called as “child labour” or not. These factors include child's age, nature, hours of work, and the conditions under which such work is performed etc. the Labour that jeopardises the physical, mental or moral well-being of a child is known as “hazardous work”. Such labour deprives children of their childhood, potential and dignity.

The International Labour Organization (ILO) was founded in 1919. It was the first specialized agency of the United Nations to deal with the labour issue. ILO started the International Programme on the Elimination of Child Labour (IPEC) in 1992. Its main objective is progressive elimination of child labour. The Indian constitution has provided the right against exploitation as a fundamental right. A child who is below the age of 14 years cannot be employed in any factory or mine or engage in any other hazardous employment. A duty has been imposed on the state to ensure that tender age of children is not abused. The state has to ensure that these children are not forced by economic necessity to enter into any occupation unsuited to them. The Child Labour (Prohibition and Regulation) Act was enacted in 1986. The objectives of this Act are: banning the employment of children, who have not completed their fourteenth year, in specified occupations and processes; laying down procedures to decide modifications to the schedule of banned occupations or processes; and regulating the conditions of work of children in employment where they are not prohibited from working.

A National Policy on Child Labour was formulated in 1987. This policy provides for strict enforcement of [Child Labour Laws](#). The focus under this policy is on the General Developmental Programs on child labour. It provides for starting of projects in the areas having high concentration of child labour. In pursuance to this policy, the National Child Labour Project (NCLP) scheme was launched in 1988. The Scheme envisages running of special schools for children withdrawn from work.

In 2006, legislature has also taken steps towards the total elimination of child labour; it brought child domestic workers upto 14 years of age working in hotels, *dhabas*, eateries, and in the entertainment industry within the purview of the Child Labour (Prohibition and Regulation) Act, 1986.

#### G.1

**Work with a partner. Study this case history and answer the questions that follow. Share your ideas with the class.**



Case 01: The eldest of six children, Anjana has spent most of her childhood helplessly watching her abusive father push the family deeper and deeper into debt because of his heavy drinking. The young Anjana bravely tried to meet expectations thrust upon her to become the breadwinner of her family, but did so at great costs, emotionally and physically.

Anjana was forced to leave school when she was in the second grade to become a dishwasher in a local hotel for a mere Rs. 500 (\$9.30 USD) a month. Eventually, she was taken to a Kathmandu carpet factory by her aunt. Anjana faced very harsh conditions in the carpet factory. She had been working long, hard hours for two months.

1. *Is child labour a better option than poverty? Discuss the long term effects of child labour on the child and her family.*
2. *First work in group and discuss. Thereafter, write a note in about 150 words on the following:*
  - *Write as Anjana in the story*
  - *Discuss the possible solution to Anjana's problem.*

## G.2

Case 02: After the death of his mother, 10-year-old Rabbani and his two siblings moved in with their grandmother into her two-room hut. One day, Rabbani's neighbor offered him a job. Imagining a wealthy future beyond his village in Bihar, India's poorest state, Rabbani agreed. His neighbour took him 370 miles west to a loom shed in Bhadohi, Uttar Pradesh, where he wove shag carpets for eight hours a day, earning seven cents an hour.

- Q1. *Convert the story into a role play. You may add dialogues based on your interpretation of the situation of Rabbani, her grandmother and her neighbour.*
- Q2. *Discuss if Rabbani was not rescued and not given a chance to get an education and build a future, what would the current situation be like?.*

## H Sexual Abuse:

Child Sexual Abuse involves any sexual activity with a child. It is interaction between a child and an adult or older child in which child is used for the sexual





stimulation (action on nerves, muscles or a sensory organ by which activity is evoked) of the Perpetrator (wrong doer). It involves direct physical contact (state of touching or of immediate proximity), touching, kissing, fondling, rubbing, oral sex (sexual activities involving the stimulation of sex organs by the use of mouth, tongue, teeth, or throat), or penetration into the vagina or anus. Offenders (wrongdoer) often do not use physical force. They use deception, threats or other coercive methods to

engage the child and maintain their silence. A person under the age of 18 years may commit sexual abuse. There is significant disparity in age, development, or size, rendering the victim incapable of giving consent. Child sexual abuse is broad enough to include extra-familial (outside a family) abuse as well as inter-familial (within family) abuse. An Act has been passed by the Parliament in 2012 to deal with this problem: the Protection of Children from Sexual Offences Act, 2012. This Act protects children from offences of penetrative sexual assault (penetration of penis or any object or part of body into the vagina, mouth, urethra or anus of child or makes the child to do so with him or any other person. It also includes manipulation of any part of the body of the child so as to cause such penetration), sexual assault (touching vagina, penis, anus or breast of child with sexual intent or making a child to do so), sexual harassment (uttering words, making sounds or gesture or exhibiting any body part or making a child to do so), and use of child for pornographic purposes (using a child in any form of media for the purposes of sexual gratification).

Education programs for children are created (to create awareness among children). These programs focus on two main goals: primary prevention (preventing the abuse from occurring), and detection (encouraging children to report past and current abuse). The parents play an important role in empowering their children to protect themselves. Accordingly, the prevention of child sexual abuse begins with social awareness, plus the recognition that expertise, energy, and money are needed to alleviate (mitigate) the conditions that produce child sexual abuse. School based sex education for children is appealing because it has the potential to reach large numbers of young people. Parental competency programs target at risk parents (poor, young, single) and at risk children with the goal of providing training and social support before any abuse can occur.







## I Juvenile Justice

The word 'juvenile' has originated from the Latin word 'Juvenilis', which means 'of or belonging to youth'. Juvenile justice is the area of criminal law applicable to persons who are not old (mature) enough to be held responsible for criminal acts. A child is born innocent. The environmental factors that have stirred criminal tendencies in the child should be held responsible. The removal of these factors might turn the juvenile into a person of stature and excellence.

Indian Constitution enables the State to make special provisions for children. The Juvenile Justice (Care and Protection of Children) Act, 2000 is the primary legal framework for juvenile justice in India. It has brought within its ambit '*children in need of care and protection*' and '*children in conflict with law*'. A '**child in need of care and protection**' means a child who is found without any home and ostensible means of subsistence. It includes a child who is mentally or physically challenged or suffering from terminal or incurable diseases with no one to look after him or her. It also embraces those children who are likely to be grossly abused, tortured or exploited for the purpose of sex or other illegal acts. It includes children having parents who are unfit to exercise control over them. It also incorporates children who do not have parents and no one is willing to take care of them. It also includes a child who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or is likely to be abused for unconscionable gains; or a victim of any armed conflict, civil commotion or natural calamity. A child who is found begging or is a child living on the streets or a working child has been included in this category by an amendment in 2006. A '**child in conflict with law**' means a juvenile (person who has not attained the age of 18 years) who is alleged to have committed an offence (violation or breach of law) and has not completed eighteenth year of age as on the date of commission of such offence.

This Act also provides for proper care, protection and treatment to juveniles by catering to their developmental needs. It has adopted a child-friendly approach in the adjudication and disposition of matters in the best interest of children. It also aims at ultimate rehabilitation through various institutions established under this enactment. It has tried to lay down a uniform framework for juvenile justice in the country.

*The Supreme Court in the case of **Sheela Barse v. Secretary, Children's Aid Society** held that children should not be made to stay in the observation homes for*



*too long, and as long as they are there, they should be kept occupied. The occupations should be congenial and intended to bring about adaptability in life, self-confidence, and development of human values.*

*In the case of Sanjay Suri's .Delhi Administration, a news report described the ill treatment meted out to minors in the Tihar Jail in Delhi in connivance with the jail staff. The writers of this report then moved the Supreme Court seeking the relief on behalf of the child prisoners. The Court appointed the district judge to make an inquiry and give report to the court. His report disclosed that adult prisoners subjected children to sexual assault. They feared that if their names were disclosed, they would be victimized. The court passed several orders based on the report. Some juvenile undertrial prisoners were ordered to be released immediately. Some convicted minors were freed on parole (conditional release of a prisoner) for one month. The judgment stressed the need to generate a sense of humanism in jail administration.*

## J. Questions

Answer the following in about 150 words each:

- 1) Discuss the efforts by the Legislature to implement right to education.
- 2) Write short notes on the following:
  - a. Constitutional provisions supporting Right to Health
  - b. Constituents of Shelter
  - c. Concept of Adoption and Juvenile Justice in India
- 3) Define the term 'Guardian' and discuss various types of guardians.
- 4) Explain the efforts by the Government to curb the problem of Child Labour.
- 5) What is Child Sexual Abuse and what are its consequences? Suggest some measures to curb this problem.

## V Domestic Violence

The nature of violence against women varies based on the particular socio-cultural as well as political and economic contexts. It also varies based on spaces where it occurs: public spaces as well as private spaces of family and matrimonial relationships. Domestic violence against women happens in the private space. Domestic violence is largely forbidden in the Western countries. However, in many developing countries, domestic violence is either legally recognized or socially



acceptable. For example, the United Arab Emirates' laws allow the man the use of limited physical means to discipline his wife and children. Domestic violence is also a socially acceptable practice, including by women themselves, in many developing countries like Jordan, Guinea, Zambia, Sierra Leone, Laos, and Ethiopia.

#### A. International Legal Framework

The concern for 'violence against women' including violence in intimate relationships, has significantly existed in international discourses and legal frameworks. The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) is a United Nations treaty that defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. CEDAW is often referred to as the international bill of rights for women and has 99 countries, including India, as signatories who have committed themselves to undertake various measures to end discrimination against women in all forms. In 1992, the CEDAW Committee recommended that any form of discrimination or violation of women's rights amounts to violence and that the State is responsible for such violence committed both by state as well as private individuals.

The UN Declaration on Elimination of Violence against Women was adopted in 1993 and defines 'violence against women'. It is defined as *any gender-based violence acts that result in, or are likely to result in, physical, sexual or psychological harm or suffering to women*. The violence acts include threats of such actions as well as coercion or arbitrary deprivation of liberty. These acts may occur either in public or in private life. Such violence might happen within the family and includes battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation. They may also occur outside the family in the general community and such violence may include rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women, and forced prostitution. When violence is committed or overlooked by the state it also amounts to 'violence against women'. India is a party to the Declaration on Elimination of Violence against Women.

In 1996, the UN Commission on Human Rights created the UN Model Legislation on Domestic Violence with the objective of serving as a drafting guide for comprehensive legislation on domestic violence at States levels.





It defines **domestic violence** as: *all acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts.*

## **B. Law in India on Violence against Women**

In 2005, the Indian parliament adopted the Protection of Women from Domestic Violence Act (PWDVA) with the objective of providing effective protection to the women victims of violence occurring within the family or anyway connected with the family sphere. The adoption of PWDVA addresses two important concerns. Firstly, the family law reforms of the 1980s like the Family Courts Act, as discussed previously, focus more on the need to 'preserve the family' at all costs. In that, they do not emphasize on ending violence against women in the private sphere. PWDVA addresses violence occurring in the private sphere. Secondly, before 2005, domestic violence against women was considered 'cruelty' and was punishable under the criminal law and they formed grounds for divorce under the family laws. However, there was no comprehensive law providing civil remedies for domestic violence for women, like, monetary reliefs or compensation as well as other services that aid women who are sufferers of domestic violence.

In the matters of violence against women, international legal standards, discussed in the earlier paragraphs, have played inspirational role for the Indian stakeholders including the judiciary, the lawmakers, as well as the numerous women groups. PWDVA itself has drawn heavily on those international legal standards. However, even prior to the enactment of the PWDVA, the Indian judiciary has relied on the international legal framework to draw inspiration in deciding and providing civil remedies to cases concerning violence against women.

*An example is the case of **Vishakha and others vs. State of Rajasthan and others**, decided by the Supreme Court of India in 1997; this case is a landmark judgment on sexual harassment of women at work place.*

*Many women's rights groups and non-governmental organizations demanding action against sexual harassment towards women at the work place, filed this case*





*in the Supreme Court in the interest of women's protection as a public interest litigation or social action litigation. The origin of this case dates back to 1992. Then, a low-caste woman in her 50s, Bhanwari Devi, who worked as a social or grassroots worker with the Rajasthan Government's women development project, was gang raped by a group of upper-caste men because she tried to stop the devious practice of child marriage. The trial court acquitted (set free of charge of offense) the accused offenders stating also that upper-caste men could not have raped a low-caste woman, and also because all, including the village authorities, doctors, and the police rejected her allegation. Then, in the absence of any Indian law dealing specifically with violence against women, the Supreme Court referred to the UN Convention on the Elimination of All forms of Discrimination against Women and delivered a set of standards, also called the **Vishakha guidelines**, which included the following:*

- a. It is the onus of the employer to include a rule in the company code of conduct for preventing sexual harassment.
- b. Organizations must establish complaint committees that are headed by women.
- c. Initiate disciplinary actions against offenders and safeguard the interests of the victim.
- d. Female employees shall be made aware of their rights.

### **C. Protection of Women from Domestic Violence Act, 2005**

Prior to 2005, the concept of 'domestic violence' was not recognized under the Indian law as a special category. When the Protection of Women from Domestic Violence Act, 2005 (PWDVA) was adopted, the idea of 'domestic violence' was borrowed mostly from the international legal framework; other references included, the regional laws as well as violence against women in the Indian legal practice. As has been stated earlier, India is party to both the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) as well as the UN Declaration on Elimination of Violence against Women, 1993, and the PWDVA conforms with the UN Model Legislation on Domestic Violence.

PWDVA adopts a comprehensive definition of domestic violence and includes physical abuse as well as other forms of violence within the family that is manifested and affects the woman. The definition is provided in Section 3 of the Act



and reads as: *any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it ...*

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

PWDVA recognizes how domestic violence affects women at multiple levels and provides various support services to women to help deal with the situation. They are:

- Mandatory assistance by medical facilities and shelter homes
- Provision for legal aid
- Counseling on the direction of the court
- Protection Officers and Service Providers to maintain a list and facilitate access

The salient features of PWDVA are as follows:

- a. The PWDVA is a civil law. Its primary objective is to provide compensation as well as support to the woman. This is contrary to criminal law, which intends to primarily punish the perpetrators. Enforcing criminal laws depend on the State, the police, and the prosecution lawyer. As a civil law, PWDVA is victim-driven; she has direct access to the court. The rights and reliefs under PWDVA can only be initiated with the consent of the woman.
- b. PWDVA describes 'domestic relationships' broadly to include, wives, mothers, sisters, daughters, and live in partners. All of these all are provided protection by the PWDVA.



- c. The protection under the PWDVA is not limited to the matrimonial home but covers 'shared householder' to include mothers, sisters and daughters as well.
- d. PWDVA provides for 'Stop Violence' orders that offer emergency reliefs to stop violence immediately. PWDVA is an additional law and allows women to enforce other laws, such as the divorce laws as well.
- e. For the effective implementation of this law, PWDVA offers both access to justice as well as access to support systems. It provides for Protection Officers to operate as nexus between the court and the woman to ensure accessibility to the justice system. PWDVA also envisages Service Providers, i.e. non-governmental organizations who voluntarily register under the Act, to deliver her with essential support she might require, such as shelter and medical facilities. Service Providers are crucial, as women often would feel more comfortable approaching an NGO rather than the police or state authorities.
- f. PWDVA stipulates for the 'single window clearance system' to aid women in accessing the justice system. This allows woman to use PWDVA to enforce other civil reliefs under other laws as well, such as the criminal law. For example, she can use one PWDVA suit to enforce her right not be dispossessed when a divorce petition is pending (Section 498 A of the Indian Penal Code). This helps her avoid filing of multiple of suits in various forums.
- g. PWDVA provides that the magistrate may, at any stage of the proceedings of the case, direct either one or both the parties to the suit to undertake counseling with any member of the service provides who holds the required qualification and experience of counseling. Women groups are critical to the counseling provision as it is often seen as a tool for preserving marriage and placing the woman back in the violent situation.
- h. PWDVA puts responsibility on the Central and State Governments for training and sensitization of the general public as well as the state authorities including the judiciary.

#### D. Questions

1. Based on your reading, identify the following statements by choosing [T] or false [F].





No.	Statements	T / F
1.	Limited physical violence in a domestic set up is allowed in some countries in the middle-east.	
2.	An attempt to commit violence against household workers does not constitute domestic violence.	
3.	The Family Courts Act does not provide for legal remedies [compensations] to victims of domestic violence.	
4.	Western legal models have influenced lawmakers regarding matters of violence against women and females in both public and private spheres of life.	
5.	Bhanwari Devi was a social activist against child marriage.	
6.	The Vishaka guidelines, in particular, make reference to domestic violence.	
7.	Assistance provided by medical facilities and shelter homes are subject to the personal choice of the victims.	
8.	Domestic relatives, according to PWDVA, includes sister/s, mother and daughter/s.	
9.	Victims of domestic abuse are provided with the services of counselors without any court intervention.	
10.	Counseling as an option in cases where divorce is pending in the court, may be perceived as being detrimental to women's emotional / physical safety.	

**2. Answer the following in about 150 words each:**

1. How does international law define 'violence against women' and 'domestic violence'?
2. What is *Vishaka* case? What guidelines does the Supreme Court of India provide in the *Vishaka* case?
3. Mention any five advantages / features of the Protection of Women from Domestic Violence Act, 2005?





## VI. Property, Succession and Inheritance:

### A. Concept of Property: Joint Family Property and Separate Property

The term property is derived from the Latin term 'proprietat' and the French equivalent 'proprius' which means a thing owned. There are two kinds of property i.e. joint family property and self-acquired property. Property acquired by joint funds of the family is known as joint family property. All the needs of the family are fulfilled from it. Self-acquired property is acquired by self-exertion or labour. Thus, it includes property by one's own learning. Gains of Learning Act, 1930 defines "learning" as education whether elementary, technical, scientific, and special or general. It defines training as every kind of training, which is usually intended to enable a person to pursue any trade, industry, profession or vocation in life. A person can make a will only of his/her separate property. It is known as *testamentary succession* and is governed by the Indian Succession Act, 1925. The joint family property passes on to the heirs (a person who inherits the property of another following the latter's death). Inheritance means the right of an heir (to succeed to property on the death of an ancestor) by way of succession. Different laws of succession govern persons belonging to different religions. If a Hindu dies intestate i.e. without making a will, then, both separate property as well as joint family property passes on to his heirs in accordance with the Hindu Succession Act, 1956. Muslims do not have any codified law for intestate succession. They are governed by rules contained in religious texts. They do not make any distinction between ancestral and self acquired property. The right of an heir comes into existence on the death of the ancestor. This position is different under Hindu law where a son has a birth right in the property. This right has been conferred on daughters by an amendment in 2005 in the Hindu Succession Act, 1956. The Indian Succession Act, 1925, governs intestate succession of Christians and Parsis.

### B. Inheritances and Succession:

Inheritance is one of the means of acquisition of property. After the death of the owner, all rights belonging to the deceased with regard to the property are divisible into two classes, namely: (1) Inheritable rights, and (2) Uninheritable rights. A right is inheritable if it survives its owner. It remains functional even after the death of the person to whom it belongs and devolves on his legal representative; it is not inheritable if it dies with his person. Generally speaking, proprietary rights (rights attached to property) like debts are inheritable whereas personal rights (rights



associated with the person) are not as they extinguish with the death of the deceased.

There are two ways of devolution i.e. *intestate succession* and *testamentary succession*. In Intestate Succession, the property devolves according to the law or custom by which the deceased is governed. The persons on whom the property devolves are called the heirs of the deceased. In testamentary succession, the law empowers a person to determine, during his lifetime, the disposition of the property that he leaves behind him after his death. The law respects the will of the deceased and secures its enforcement (to compel observance and obedience to that will). A person who determines the disposition of his property in this way is said to have made a will. Different legal systems have adopted this way of determining the disposition of property.

### C. Intestate Succession:

A person who dies without making a will is known as intestate and succession to his property is known as intestate succession. Every religion has its own rules of intestate succession, but there are certain concepts that are common to all the religions. For example, a person who is entitled to inherit property after the death of the intestate is known as heir. These heirs could be of three types, i.e., Ascendants, Descendants, and Collaterals.

#### 1. Heirs - Ascendants, Descendants, and Collaterals

*Ascendants* are the ancestors of a person both on the paternal and maternal side. The immediate ascendants are father and mother. It includes father (F), Mother (M), paternal grandfather (FF), paternal grandmother (FM), maternal grandfather (MF), maternal grandmother (MM), etc. There is no limit to degrees of ascent. *Descendants* mean the offspring of a person. The immediate descendants of a person are his or her sons and daughters. It includes son (S), daughter (D), grandson (SS), granddaughter (SD), great grandson (SSS), great granddaughter (SSD), etc. There is no limit to degree of *descent*. Collaterals are descendants in parallel lines, i.e., from a common ancestor or ancestress. For instance, brothers, sisters, and their children how low so ever, paternal and maternal uncles and aunts and their children how low so ever are all collaterals. These heirs can relate to each other by full blood, half blood or uterine blood.



## 2. Relation by full blood, half blood and uterine blood

Two persons are related to each other by full blood when they have same father and same mother. Two persons are related to each other by half blood when they have the same father but different mothers. Two persons are related to each other by uterine blood when they have same mother but different fathers. Every religion has its own rules of Intestate succession.

### D. Rules Relating To Intestate Succession:

#### 1. Rules of intestate succession among Hindus

Heirs belonging to a Hindu male are classified into four categories i.e. class I, class II, agnates and cognates.

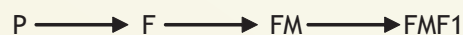
Class I heirs are the most preferred heirs and include mother, wife, son as well as daughter and their descendants upto the third generation.

Class II heirs include father, brother as well as sister and their children, maternal and paternal uncles and aunts, maternal and paternal grandfather and grandmother etc. Class II heirs will inherit property only in absence of Class I heirs.

If there are no heirs belonging to Class I or Class II then property goes to agnates. When two persons are related by blood or adoption wholly through males, they are called agnates. For example, the son of a great grandson (son, grandson, great grandson being dead)



In the above diagram, S is son of P, SS is son of S and grandson of P, SSS is son of SS and great grandson of P, SSSS1 is son of SSS and great great grandson of P. Here, SSSS1 is agnate to P as he is tracing relation wholly through males i.e. **his father (SSS), grandfather (SS), and greatgrandfather (S). No female has intervened in-between.**



In case, all the above-mentioned heirs i.e. Class I, Class II and agnates are absent then property will go to cognates. When two persons are related by blood or adoption but not wholly through males, they are called cognates. For example father of paternal grandmother i.e. FMF1 is a cognate as female (father's mother) has intervened in between.





In the above diagram, F is father of P, FM is mother of F and paternal grandmother of P, FMF1 is father of FM. Here, FMF1 is cognate to P as a female has intervened in between, i.e., father's mother (FM).

If a female Hindu dies interstate then heirs are divided into five categories. The heirs in earlier categories are preferred over the heirs in later categories. The first category includes husband, son, daughter and children of pre-deceased son and daughter. The second category includes heirs of husband. Father and mother falls under third category. Heirs of father and mother are covered under fourth and fifth category respectively.

## 2. Rules of intestate succession among Muslims:

There is no codified law for Muslims in the area of succession. They are governed by their religious texts. Among Sunnis, heirs are divided into three categories i.e. sharers (Quranic heirs), residuaries (agnatic heirs), and distant kindred (uterine heirs). Sharers are the most preferred heirs. First of all, sharers are allotted their Quranic shares. If something is left behind after allotting shares to them, then, it goes to residuaries. If their shares exhaust the entire estate, then sharers exclude residuaries and distant kindred. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which distant kindred will inherit with the sharer: when there is only one sharer i.e. the wife or husband of the deceased and no other sharer or residuary exist. Among Shias, heirs are divided into two categories i.e. heirs by consanguinity and heirs by marriage i.e. husband and wife. Heirs by consanguinity are further sub-divided into three classes. Class I includes parents and children. Class II includes grandparents, brothers and sisters, and their descendants etc. Class III includes paternal and maternal uncles and aunts of the deceased, and of his parents, grandparents etc. Among the heirs by consanguinity, the first group excludes the second and the second group excludes the third. The claimants in both the categories i.e. heirs by consanguinity and heirs by marriage succeed together, if there are heirs of both the categories.

## 3. Rules of intestate succession under the Indian Succession Act, 1925:

The Indian Succession Act, 1925 is a central legislation and is applicable to every person, unless and until anyone is governed by any law particularly



applicable to them. This Act is not applicable to Hindus and Muslims. Christians and Parsis are governed by this Act. Among Christians, the first preference is given to the spouse of the deceased and his lineal descendants i.e. children, grand children, great grand children or their remoter lineal descendants. When there are no lineal descendants then property passes on to the spouse of the deceased and those who are kindred (consanguinity is the connection or relation of persons descended from the same stock or common ancestor) to him. If there are no lineal descendants or one who is kindred to him, then entire property goes to his or her spouse. In the absence of such spouse, property passes on to lineal descendants or to those who are kindred to him. How it has just been established there are such lineal / kindred descendants!

The rules pertaining to interstate succession are more or less same in all the communities. The first preference is given to the husband or wife of the deceased and their lineal descendants. In their absence, the preference is given to collaterals that are close to the deceased. In their absence, property goes to remote agnatic heirs and then to cognatic heirs. A rule of escheat is applicable in all the communities. If no heir is present then property goes to the Government by this Rule.

### E. Testamentary Succession

When a person disposes off his property by making a will, it is known as testamentary succession. An executor under Mohammedan law is called a *wasi*, derived from “wasiyyat”, which means a will. A Muslim who is of sound mind and who is not a minor, may make a valid will. No particular form is required to make a valid will. Any unequivocal expression of a testamentary nature will suffice. It may be made either verbally or in writing. Any property which is capable of being transferred and which exists at the time of the testator's death, may be disposed off by a will. Needless to say, property that belongs to another cannot be bequeathed by a will. A Muslim can dispose off only one third of his property, which is left after the payment of his funeral expenses and his debts. The balance two thirds of the property goes to the heirs of the deceased.

The rules relating to testamentary succession among Hindus, Parsis and Christians are contained in the Indian Succession Act, 1925. This Act does not deal with substantive law, such as what property may be transferred or what estates and



interest may be created. The Act primarily deals with formalities related to the execution (Validation of a legal document by the performance of all necessary formalities), revocation (to recall, withdraw, or reverse the will), revival (restoration to use, acceptance, activity, or vigor after a period of obscurity) and interpretation (an explanation or conceptualization) of wills, the grant of probate (the process of legally establishing the validity of a will before a judicial authority) and other legal representations, powers and duties of the executors (a person who is appointed by a testator to execute the testator's will.) *Testator* is a person who has made a legally valid will before death and *administrators* are persons authorized to manage an estate, especially when the owner has died intestate or without having appointed executors. However, it is a secular law that is applicable to each and every community in matters of testamentary succession.

#### F. Questions

**1. Complete the following statements suitably, based on your reading:**

- i. \_\_\_\_\_ can be willed by an individual as separate property.
- ii. Inheritance of property among Muslims are governed by laws prescribed by \_\_\_\_\_.
- iii. Propriety Rights are those that \_\_\_\_\_ after the death of the Owner.
- iv. When the law empowers a person to determine, during his / her lifetime, the disposition of the property that he/she leaves behind him after his/her death, it results in \_\_\_\_\_ succession.
- v. The legal means adopted by an individual to dispose of his/her property is through \_\_\_\_\_.
- vi. Intestate is when an individual \_\_\_\_\_.
- vii. Cognates in the context of intestate succession refer to \_\_\_\_\_.
- viii. The Indian Succession Act ,1925, is not applicable to \_\_\_\_\_ communities in the case of intestate succession
- ix. The rule of escheat is applicable when \_\_\_\_\_.
- x. The legal process of settling the estate of a deceased person, specifically resolving all claims and distributing the decedent's property under the valid will is \_\_\_\_\_.





**2. Answer the following in about 150 words each:**

- 1) Discuss the concept of joint family property and separate property.
- 2) What do you mean by *succession* and different ways of devolution of property?
- 3) Write short notes on the following:
  - a. Agnates
  - b. Cognates
- 4) Explain the rules relating to *intestate succession*.
- 5) Who has the capacity to make a will under Muslim law? Is there any formality prescribed for it?
- 6) Heirs can be related by *full blood*, *half blood* and *uterine blood*. Explain the difference between the three.
- 7) Explain the terms *ascendants*, *descendants* and *collaterals* with examples.

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