CHAPTER-4
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The prosperity and growth of a nation depends on the status and development of its women as they not only constitute nearly half of its population, but also influence growth of the remaining half. In India too half of the population are women, still they have always been discriminated against and suffered and are suffering discrimination in silence. They have been subjected to all indignities, inequality, inequity and discrimination, but still self-sacrifice and self-denial are their nobility and fortitude.

The law can play a significant role in altering preconceived stereotypes as well as in altering discriminatory practices against women, by the use of sanctions. It may be a tool, however limited, in taking people and communities towards the non-discrimination against women. Although attitudes may be slow to change, but the potential impact of the legal enforcement of this principle should not be minimized. It is not therefore, sufficient merely to strike at laws which are obviously discriminatory. Attention must also be paid to those laws whose terminology seems value neutral, but whose implications may seriously affect the capacity of individuals and the group to which they belong, to participate fully and freely in the life of society. Thus law as an instrument of social change ought to achieve equilibrium by orderly regulating socio-economic relationship and obliterating societal errant. Law ought to adopt, adjust and supplement the needs of the society and it is supposed to generate, activate and accelerate ordered social change.

The status of women in independent India occupies an important role and all efforts were made to establish the significant role that she can play in for the upliftment of her own self and society at large. Therefore the Indian polity more or less has always tried to cope with the contemporary need-based enactments and development of laws for the upliftment of the status of women and establishment of a

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2 Chawla, Monica. ‘Gender Justice: Women and Law in India’, 2006, p. IX.
3 Supra note 1. at p. 2.
4 Id., at p. 1.
just and equitable social order, where nobody can be treated or exploited by another as unequal.\textsuperscript{5} The low status of women in India up to 1940 had mainly stemmed from the traditional patriarchal norms, customs, caste restrictions, illiteracy, economic dependence, religious prohibition and lack of female leadership. With these challenges to meet, framers of the Indian Constitution have added numbers of provisions for the benefit and protection of the women. Keeping in view the constitutional objectives of the concept of equality and non-discrimination against women, government of India have enacted certain laws to improve the condition of women in independent India and has continued the process of enacting legislative measure to raise the legal status of women.\textsuperscript{7} After independence, various legislations have been brought out in order to give equal rights and privileges to women with men, eliminate discrimination against women, abolish inequality between the sexes, and remove external barriers coming in the way of their self-realization and development.\textsuperscript{8} Thus rights and privileges have been made available constitutionally and enabling legislation has been drafted to give the women her due.\textsuperscript{9} In the initial year following independence, the state has attempted to codify existing laws of the majority of Hindu population against traditional and conservative opinions against women. These laws\textsuperscript{10} generally determine the issue of marriage, divorce, guardianship, adoption and property and tend to non-discriminate against women.\textsuperscript{11} However, the presence of personal laws tends to compromise the women’s quest for equality and freedom, as the basically conservative nature of these laws harbours many inequalities and is discriminatory to women. They entrench the women’s subordinate position within community and society by sanctioning personal laws,\textsuperscript{12} the state to all practical purpose, has given up its duty of treating women as equal citizens.\textsuperscript{13} Thus a situation of anomaly exists in the Constitution which prohibits discrimination based on sex, and

\textsuperscript{7} Supra note 5, at p.1.
\textsuperscript{8} Kant, Anjani, ‘Women and the Law’, 2003, p. 16.
\textsuperscript{10} In the space of two year between 1954-1956 the state has passed Hindu Marriage Act 1955, The Hindu Succession Act, 1956, The Hindu Minority & Guardianship Act, 1956, The Hindu Adoption & Maintenance Act, 1956. These Act apply only to Hindu.
\textsuperscript{11} Supra note 9, at p. 58.
\textsuperscript{12} The opposition to reform of personal law is based on the Constitutional right to freedom of religion, guaranteed as fundamental right under Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws. The consequence of this for women of minority communities is that they continued to be governed by the religion based personal laws, which may in some respect be at variance with equality as promised by the Constitution to women as citizens. Quoted in Supra note 9 at p. 65.
\textsuperscript{13} Supra note 9, at p. 64.
yet discriminatory personal laws are permitted. The state has from time to time addressed itself to the examination and review of conditions of women prevailing in the country and has appointed committees and commission for the purpose. The state has also encouraged civil society initiatives in the form of voluntary associations, Non-governmental organization and advocacy groups to intervene in different ways to build women’s awareness, consciousness and education, provide various kinds of support to women against oppression and violence and create a social environment intolerant of exploitation and injustice against women.14

Directed and guided by the Constitution, various revolutionary laws giving equal status to women with men have been enacted in order to remove all disparities, dissimilarities and discrimination against women. For instance, Dowry Prohibition Act 1961, the Family Court Act 1984, Equal Remuneration Act, The Commission of Sati Act 1987, the Indecent Representation of Women Act, The National Commission for Women Act 1990, Domestic Violence Act 2005 etc., all these enactments are intended exclusively for women to uplift the dignity and status in society and live in a violence free environment.15 Furthermore various provisions were inserted in the Criminal law and Indian Evidence Act to protect the women from different types of atrocities. These criminal law reforms held great promise at the time of their enactment. The criminalization of domestic Violence in the form of Section 498A and 304B of Indian Penal Code sought to increase the certainty and severity of legal responses thereby correcting historical, legal and moral disparities in the legal protections afforded to abused women. It sought for the first time to bring the issue of domestic or family violence out of the protected private realm of the family and in to the public domain in India.16

There is no doubt that the contemporaneous legislative enactments apparently accord equal social and economic status for women. But the gulf between the principles and pragmatism transmuted into realities the operational pitfalls and implementation failures.17 Thus the fact remain undeniable that "in spite of the medley of law in favour of woman", women in India still continue to live under the

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14 Supra note 9, at. 58-60.
15 Supra note 2, at p. 3.
17 Supra note 1, at p. 3.
stress and strain of male domination that manifests itself in the form of various kinds of cruelties to them.\textsuperscript{18}

To know the legal response to the violence against women, it is necessary here to examine some of the more important legislation enacted by the central legislature in India to ameliorate certain unhappy condition in which women found themselves and to provide them violence free environment both inside the home and outside the home.\textsuperscript{19}

4.1 Women under the Constitution of India

A Constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of the Government of a state and declares the principles governing the operation of those organs. It is the basic or fundamental document of a society or a country and contains the basic, the fundamental, the first law of the country. All the laws in the country are enacted under this document which is known as the Constitution of the country.\textsuperscript{20} The Constitution of India which was adopted by the constituent Assembly on 26\textsuperscript{th} November, 1949, is a comprehensive document enshrining various principles of Justice, Liberty, Equality and Fraternity. These objectives specified in the preamble and elsewhere form part of the basic structure of the Indian Constitution. The fundamental law of the land assures the dignity of the individuals irrespective of their sex, community or place of birth etc.\textsuperscript{21} The Constitution of India has contains various objectives including “the equality of status and opportunity as well as Justice, Social Economic and Political to all the citizens irrespective of their sex. These objectives have been inserted with the view to give equal status to men and women.\textsuperscript{22}

The framers of the Constitution were well aware of inequal treatment and discrimination meted out to the fair sex from the time immemorial. In India, the history of suppression of women is very old and long which is responsible for including general and special provisions for upliftment and development of the status

\textsuperscript{18} Supra note 8, at p. 16.
\textsuperscript{19} Majumdar, Maya, ‘Encyclopaedia of Gender Equality through Women Empowerment’. Vol. 2. 2005. p. 95.
of women. Certain provisions are specifically designed for the benefit of women. Thus Constitutional law provides the legal foundation for the status of women by providing many negative and positive provisions which go a long way in securing gender justice.\textsuperscript{23}

The ultimate aim of the Indian Constitution is to have a welfare state and an egalitarian society projecting aims and aspirations of the people of India.\textsuperscript{24} The preamble to the Constitution of India promises “to secure to all its citizens Justice-social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the nation”.\textsuperscript{25} The expression “Justice” means the attainment of the common good as distinguished from the good of particular individuals.\textsuperscript{26} Thus an act or conduct of a person is said to be just if it promotes the general well being of the community.\textsuperscript{27} Justice involves the notion of impartiality. People must be treated in the same manner unless there are good or special grounds for treating them differently. Now Justice is required universally as some sort of equality. Justice to men and women is the abiding creed of the Constitution of India.\textsuperscript{28}

The expression social justice mean the abolition of all sorts of inequities which may result from the inequalities of wealth, opportunity, status etc.\textsuperscript{29} The expression “economic justice” means justice from the stand point of economic force. It means equal pay for equal work, that every person should get his just dues for his labour, irrespective of his caste, sex or social status.\textsuperscript{30}

Political justice means the absence of any unreasonable or arbitrary distinction among men in political matters. The Constitution of India has adopted the system of universal adult suffrage. Accordingly to this system every citizen of India, without

\textsuperscript{23} Ibid.
\textsuperscript{24} Mishra, Srikanta. ‘Legal Language and Legal Writing’. 1999, p. 36.
\textsuperscript{26} Supra note 20, at p. 32.
\textsuperscript{28} Supra note 8, at p. 2
\textsuperscript{29} Supra note 20, at p. 32.
\textsuperscript{30} Id., at p. 33.
any distinction of caste, sex, etc., is entitled to the right to vote, to contest elections or
to hold offices under the state.  

The term “Liberty” is used both in negative as well as in positive sense. As a
negative concept liberty means the absence of all undue or arbitrary interference with
individual’s action on the part of the state. In positive sense, it comprises of
‘liberties’ or ‘rights’ which are considered essential for an individual to attain his
potentialities and for the perfection of the national life.  

The Constitution of India guarantees equality of status and opportunity to man
and women. It directs that state will abolish all distinctions or discriminations
between citizens and citizens on the ground of religion, race, sex, caste or place of
birth and secure equality of opportunity in matters relating to employment or
appointment to any office under the state.  

The word “Fraternity” means a spirit of brotherhood, brotherliness, a feeling
that all people are children of the same soil, the same mother land. Furthermore
“Dignity of the individual” is to be maintained for the promotion of fraternity.
Therefore, the Preamble assures the dignity of each and every individual irrespective
of their sex. This dignity is assured by securing to each individual equal fundamental
rights and at the same time, by laying down a number of Directives for the state to
direct its policies towards, inter alia securing to all citizens, men and women equally.
the right to an adequate means of livelihood, just and humane condition of work and a
descent standard of life.  

The Indian state at its inception revealed its commitment towards
understanding patriarchy and working for women’s equality, which is very much clear
from the objective enshrined in the preamble of the constitution. To fulfill these
objective, majority of provisions including fundamental rights and directive principles
of state policy, are added in the Constitution of India, which directly aimed at
furthering the golden goals set out by the preamble of the Constitution. Thus it is

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31 Ibid.  
32 Ibid.  
33 Ibid.  
34 Id., pp 33-34.  
35 Supra note 9, at p. 58.
pertinent here to analyze the various constitutional provisions which protect and promote the basic rights of Indian women.36

4.1.1 Women and Fundamental Rights

Part III of the Constitution of India, titled as “Fundamental Rights”, secures to the people of India certain basic natural and inalienable rights. These rights have been essential rights in order that “human liberty may be preserved, human personality developed and an effective social and democratic life promoted”.37 The provisions regarding fundamental rights have been enshrined in Article 12 to 35 which are applicable to all citizens irrespective of sex. The Constitution of India guarantees all these rights to women which are given to men. However, certain special provisions are inserted to protect the rights of women.38 The Fundamental Rights, which are secured by the Constitution of India, are grouped under the following six heads:39

(a) Right to Equality (Articles 14 to 18).
(b) Right to Freedom (Articles 19 to 22).
(c) Right against Exploitation (Articles 23 and 24).
(d) Right to Freedom of Religion (Articles 25 to 28).
(e) Cultural and Educational Rights (Articles 29 to 30).
(f) Right to Constitutional Remedies (Articles 32 to 35).

To understand the importance of Fundamental Rights in the women’s overall development, it is necessary here to make specific mention of those special or general provision which are particularly incorporated for women.

(a) Right to Equality (Articles 14-18)

The concept of equality has been held basic to the rule of law and is regarded as the most fundamental postulate of republicanism.40 Articles 14 to 18 of the Constitution guarantee right to equality to every citizen of India. Articles 14 embody the general principles of equality before law and prohibit unreasonable discrimination

36 Supra note 21, at p. 271
38 Supra note 22, at p. 5.
39 Supra note 25, at p. 57.
40 Supra note 20, at p. 102.
between persons. Article 14 embodies the idea of equality expressed in the preamble. The succeeding Articles 15, 16, 17 and 18 lay down specific application of the general rules laid down in Article 14. Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex, place of birth. Article 16 guarantees equality of opportunity in matter of public employment. Article 17 abolishes ‘untouchability’ and Article 18 abolishes title.41

Article 14 declares that ‘the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.42 The phrase “equality before law” is somewhat a negative concept for it implies absence of any special privilege in favour of any particular individuals, while the expression “equal protection of law” is positive in operation, ensuring equality of treatment to all in equal circumstances.43 Thus both these expression aims at establishing what is called “equality of status” in the preamble of the Constitution.44 However, one dominant idea common to both the expressions is that of equal justice.45 The guardian of the Indian Constitution, the Supreme Court of India has always been the champion in maintaining and elaborating the “concept of equality of status and of equal justice” to all without any discrimination of sex.46 Hostile discrimination against women has always been struck down by the Supreme Court of India in its various landmark judgments.47 The Supreme Court declared that women as a class were different from men as a class. Having in view the object of legislation, women can be treated as a class and special laws can be made in their favour because Article 14 prohibits class legislation but permit reasonable classification. Accordingly various provisions have been declared valid where women have been given special treatment.48

Article 15 of the Constitution provides for a particular application of the general principle embodied in Article 14.49 The first clause of Article 15 directs the state not to discriminate against a citizen on grounds only of religion, race, caste, sex,
or place of birth or any of them. The second clause prohibits citizens as well as the state from making such discrimination with regards to access to shops, hotels, etc. and all places of public entertainment, of public resort, wells, tanks, roads etc.\textsuperscript{50} The third clause of Article 15 is of special importance for women and children because it empowers the state to make special provisions for the protection of women and children.\textsuperscript{51} According to Article 15(3) of the Constitution discrimination on grounds of religion, race, sex or place of birth shall not prevent the state from making any special provision for women and children.\textsuperscript{52} This clause is an exception to the rule against discrimination embodied in clause (1) as well as clause (2) of Article 15 because both these clauses prohibit discrimination on the ground of sex, but clause (3) enables the state to confer special right upon women.\textsuperscript{53} From the reading of clause (1) to clause (3) of Article 15, together it is clear that while discrimination on the ground of sex is impermissible, but special provision for women are permissible.\textsuperscript{54} Thus it is no violation of Article 15 if state positively discriminates in favour of women to make special provisions to ameliorate their social, economic, and political condition and accord them parity.\textsuperscript{55}

While explaining the object for inserting clause (3) to Article 15, the Supreme Court observed “that the insertion of this clause in relation to women is recognition of the fact that for centuries, woman of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women, and to empower them in a manner that would bring about effective equality between men and women that clause (3) is placed in Article 15. Its object is to strengthen and improve the status of women”.\textsuperscript{56}

Clause (3) of Article 15 which permits special provision for women has been widely resorted to by the state and the courts have always upheld the validity of the special measures in legislation or executive orders favouring women. In particular provisions could be seen in the sphere of criminal law, labour industrial laws, Service

\textsuperscript{50} Id., at p. 122.
\textsuperscript{51} Ibid.
\textsuperscript{52} Supra note 22, at p. 5.
\textsuperscript{53} Supra note 20, at p. 153.
\textsuperscript{54} Shukla, V.N.,‘Constitution of India’, 2012, p. 86.
\textsuperscript{55} Supra note 22, pp. 5-6.
Clause (3) of Article 15 of the Constitution, allows legislation providing for discrimination in favour of women. On the strength of this Article 15(3), several statutory provisions in favour of women have been upheld. These include provisions exempting from punishment for adultery under Section 497 of Indian Penal Code, 1860, provisions giving special rights to women in respect of bail under Section 437 of Criminal Procedure Code 1974, provision under Section 125 of Criminal Procedure Code 1974, which requires the husband to maintain his wife and not vice versa, however, in the changed circumstances, where women are ahead of many sphere, if she is earning and husband is not earning and they want to separate, the wife should be liable to pay the maintenance to the husband if he is not earning, provisions under Order 5, Rule 15 of Civil Procedure code, 1908, which makes service of summon on the male members of the family only and provisions for reservation of seats for women in local bodies or in educational institutions. Similarly Section 14 of the Hindu succession Act, 1956, absolutely vesting the inherited property in woman which was earlier held by them as limited estate, has been upheld by the Supreme Court relying upon article 15(3) of the Constitution. The ‘special provision’ which the state may make under Article 15(3) can be in the form of either affirmative action or reservation. Therefore, making special provision for women in respect of employment or posts under the state is an integral part of Article 15(3) and the power conferred under this clause is not whittled down in any manner by Article 16. The following few cases may be helpful in understanding the protective discrimination in favour of women. In Yusuf Abdul Aziz v. State of

60 Mr. Choki v. The State AIR 1957 Raj 10.11 para 4, quoted in supra note 58, at p. 98.
62 Ibid.
63 P. Sagar and Others v. State of Andhra Pradesh. AIR 1968(A.P.) 165.174.. quoted in supra note 58, at p. 98.
65 Supra note 20, at p. 155.
66 Supra note 21, at p. 273.
Bombay, the constitutional validity of Section 497 Indian Penal Code, 1860, which punishes only the male counterpart and exempts the women from punishment, was challenged on the ground that it is violative of Articles 14 and 15(1) of the Constitution. In this case petitioner contended that even though the women may be equally guilty as an abettor, but only the man was punished, which violates the right to equality on the ground of sex. The Supreme Court upheld the validity of the provision on the ground that classification was not based on the ground of sex alone. The Court relied upon the mandate of Article 15(3) of the Constitution and laid down that it was covered by the exception provided in clause 3 of Article 15 to uphold the validity of this provision. The discrimination was therefore deliberate in view of the social position of women in this country.

In Miss C.B. Muthamma v. Union of India rules regarding seniority and promotion affecting women members of India Foreign Service were challenged. The petitioner contended that she had been denied promotion to Grade I on the ground of sex, under Rule 8(2) of the Indian Foreign Service Rules 1961, which requires that an IFS women member should take written permission of the Government before she marriage; after marriage she may be asked any time to resign if it is felt that her family life affects her efficient discharge of duties; and no married woman shall be entitled as of right to be appointed to the service i.e. IFS. The provisions have now been deleted, since the Supreme Court has held that the Rules relating to seniority and promotion in Indian Foreign Service which make discrimination only on ground of sex is not only unconstitutional but also a hangover of the masculine culture of having cuffing the weaker sex. Similarly in its landmark judgement in AIR India v. Nargesh Meerza, the Apex Court has struck down the AIR India Regulations relating to retirement and pregnancy bar on the services of AIR hostesses as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary. The impugned Regulation 45 provided that an air hostess would retire from the service of corporation upon attaining the age of 35 years or on marriage, if it took place within 4 years of service or on first pregnancy whichever occurred earlier. Under Rule 47, the Managing Director was vested with absolute

67 AIR 1954 SC 321.
68 Supra note 58, at p. 105.
69 AIR 1970 SC 1868.
70 AIR 1981 SC 1829.
discretion to extend the age of retirement up to 45 years or by ten years. These provisions were struck down as violative of article 14 of the Constitution of India, which prohibits unreasonableness and arbitrariness.

Thus the above decisions of the Apex Court have greatly elevated the status of working women.71

(i) Women’s Reservation in Panchayats and Municipalities

Since inferior social status of women in the male dominated society makes it difficult for them to contest and get elected in the representative democracy.72 So in 1992, 73rd and 74th amendment to the Constitution of India added Article 243 D and 243 T, making provisions for reservation of not less than one third of the total seats for women in the constitution of the three tiers of Panchayats and Municipalities respectively.73 The reservation of seats may be allotted by rotation to the different constituencies in a Panchayat and in Municipalities. Provided further that not less than one third of the total number of the offices of Chairpersons in the Panchayats at each level and Municipalities shall be reserved for women.74

Thus, the Government on the strength of the Constitutional power made a successful reservation of 33 percent seats for woman in the local bodies which is considered as a pioneer legislative endeavour for the political empowerment of the women in India.75

To improve and strengthen the women’s access to major decision making structures, the Parliament introduced the 81st Constitutional Amendment Bill seeking to reserve one third of seats in Lok Sabha and State Assemblies for women in 1996, though the Bill has been referred to a joint committee of Parliament and is yet to be passed.76 All these provisions would be protected under Article 15 (3). The object of these provisions is to raise the political status of the womenfolk and the removal of imbalances in the participation of men and women in political life.77 Thus in view of these Constitutional provisions, it can be said that India has moved a big step forward

71 Supra note 22. at p. 7.
73 Supra note 20. at p. 154.
74 Articles 243 D and 243 T of Constitution of India.
75 Supra note 22. at p. 11.
76 Ibid.
77 Supra note 20. at p. 154.
in empowering the women to participate in the political process at the policy decision making level.\textsuperscript{78}

In furtherance of the object of preventing discrimination against women, it has been provided in Article 16(1) that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state and Article 16(2) provides that the women shall not be ineligible for, or discriminated against in respect of any employment or office under the state on the ground only of sex.\textsuperscript{79}

(b) Right to Freedom (Article 19-22)

Personal liberty is the most important of all Fundamental Rights. Articles 19 to 22 deal with different aspects of this basic right, which provides the backbone of the part III on Fundamental Rights.\textsuperscript{80} The foremost among these are the six rights in the nature of freedoms which are guaranteed to the Indian citizens irrespective of sex, by Article 19 of the Constitution. These six Fundamental Freedoms are as follows:\textsuperscript{81}

(i) Freedom of Speech and Expression;
(ii) Freedom of Assembly;
(iii) Freedom to form Associations;
(iv) Freedom of Movement;
(v) Freedom of Reside and to settle;
(vi) Freedom of Profession, Occupation, trade or business.

Though, the great and basic freedoms enumerated in Article 19(1) have been recognized as the natural rights, inherent in the status of a citizen,\textsuperscript{82} but none of these rights is absolute or uncontrolled.\textsuperscript{83} Absolute individual rights cannot be guaranteed by any state because if people were given complete and absolute freedoms without any social control the result would be ruin. Furthermore any right which is injurious to the community as a whole cannot be protected. This is based on the principal that for liberty of one must not offend the liberty of others. Therefore, guarantee of each

\textsuperscript{78} Supra note 22. at p. 11.
\textsuperscript{79} Supra note 58. at p. 192.
\textsuperscript{80} Supra note 25. at p. 165.
\textsuperscript{81} Ibid.
\textsuperscript{83} Ibid.
of the above rights is restricted by the Constitution itself by conferring upon the state a power to impose by law reasonable restriction as may be necessary in the larger interest of the community.\(^{84}\)

(c) Right to Life and Personal Liberty

Article 21 of the Constitution provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. This Article, though couched in negative language, confers on every individual irrespective of sex, the fundamental right to life and personal liberty, which has become an inexhaustible source of many other basic rights.\(^{85}\) This article is also of special importance for women because this right is a fundamental right enforceable against state and the apex court by widest possible judicial interpretations have imposed, on the state several positive obligations in favour of women.\(^{86}\) Resorting to judicial activism the Supreme Court and High Courts in India have expanded the scope of ‘right to life’ to new horizons by reading many more rights into it as integral and essential part thereof.\(^{87}\) Thus, it is also the fundamental right of women, to live with human dignity and all that goes along with it i.e. the bare necessaries of life,\(^{88}\) to healthy environment,\(^{89}\) to free legal aid,\(^{90}\) to reputation,\(^{91}\) to livelihood,\(^{92}\) to education\(^{93}\) et.al, are included within the sweep of right to life guaranteed under Article 21. In addition to this Supreme Court has also awarded compensation to the victim of rape\(^{94}\) and laid down many guidelines for prevention of sexual harassment of working women,\(^{95}\) under the Article 21 of the Constitution.

(d) Right to Education

Education is the most important tool for the socio-economic development of women. So keeping in view the importance of education a new Article 21-A added by

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\(^{84}\) Supra note 25, at p. 165.

\(^{85}\) Supra note 54, at p. 191.

\(^{86}\) Supra note 6, at p. 8.

\(^{87}\) Supra note 21, at p. 277.


\(^{89}\) India Council For Enviro-Legal Action v. Union of India (1996) 3, SCC, 212 see also State of Maharashtra v. Mudhukar Narain, AIR 1991 SC 207.


the 86th Constitutional Amendment Act in 2002, which provides, that “The state shall provide free and compulsory education to all children of the age of six to fourteen years”. 96

(e) Right against Exploitation

Article 23 of the Constitution prohibits traffic in human beings and beggar and other similar forms of forced labour. ‘Traffic in human beings’ means selling and buying men and women like goods, such as to sell or let or otherwise dispose them off. It would also include traffic in women and children for immoral or other purposes. 97 The term ‘beggar’ means involuntary work without payment, thus it commonly connotes to forced labour for which no wages are paid or if some payment is made, it is grossly inadequate. 98 Slavery is not expressly mentioned but there is no doubt that the expression “traffic in human being” would cover it. 99 Article 23 protects the individual (irrespective of sex) not against the state but also private citizens. It imposes a positive obligation on the state to take steps to abolish evils of “traffic in human beings” and beggar and other similar form of forced labour wherever they are found. 100 In the context of Article 23 traffic in human beings also includes “Devadasi System”. 101 Evils like the practice of devadasi, jogan and other similar practices specifically in the southern, western part of the country and some of the temple in Orissa particularly bordering Andhra Pradesh were rampant and are still existing. According to these practices women or girls were either sold or dedicated to the temples in the names of Gods, where they could become an object of lust and instrument of sexual exploitation so long as their youth existed. 102

The ideal of human dignity which though pervades the entire Constitution has been expressed in explicit terms in the form of this Article. 103 The trafficking in women and girls has been prevalent in India for a long time in the form of selling and

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96 Supra note 54. at p. 211.
98 Supra note 54. pp. 233-234.
99 Supra note 25. at p. 293.
100 Dubar v. U.O.I. AIR 1952 Cal. 496 quoted in Supra note 25. at p. 293.
101 Supra note 22. at p. 10.
103 Ibid.
purchasing human beings for prostitution for a price just like that vegetables. To
counter this evil practice, on the strength of Article 23(1) of the Constitution, the
Parliament has passed the Immoral Traffic (Prevention) Act, 1956\textsuperscript{104} which aims at
abolishing the practice of prostitution and other forms of trafficking including
“devadasi system”. This Act was enacted by the Parliament in pursuance of the
rectification by India of the international convention signed at New York on 9\textsuperscript{th} May,
1950 for the prevention of immoral traffic.\textsuperscript{105}

(f) Right to Freedom of Religion

Article 25 (1) of the Constitution guarantees to every person, the freedom of
conscience and the right to freely profess, practice and propagate religion. The right is
subject in every case to public order, morality and health and other provisions of part
III of the Constitution. Thus this right is also not absolute. Further exceptions are
engrafted upon this right by clause (2) of this Article, which under sub-clause (a)
allows the state to regulate or restrict the economic, financial, political or other
secular activity which may be associated with religious practice and sub clause (b)
empowers the state to make laws providing for social welfare and social reform even
though they might interfere with religious practices.\textsuperscript{106} It therefore, explains that
where there is a conflict between a social welfare and reform and a religious practice,
religion must yield.\textsuperscript{107} Validity of this provision under Article 25(2) (b) has also been
upheld by the High Courts in India. It has been held by the Bombay High Court that
an Act to prevent bigamous marriage was not violative of religious freedom since it
fell under sub clause (b) of Article 25 clause (2) of the Constitution.\textsuperscript{108} The likewise
provisions of the Hindu Marriage Act, 1956, are also protected under this provision.
Prohibition of evil practices such as sati or the system of devdasi could be justified
under this clause.\textsuperscript{109}

Therefore, a law which falls within Article 25(2)(b) will be constitutionally
valid, even if it is found to be inconsistent with the right guaranteed by Article 25
(1).\textsuperscript{110}

\textsuperscript{104} Formerly known as the Suppression of Immoral Traffic in Women and Girls Act, 1956.
\textsuperscript{105} Vishal Jeet v. Union of India AIR 1990 SC 1412.
\textsuperscript{106} Supra note 54, at p. 239.
\textsuperscript{107} Supra note 20, at p. 377.
\textsuperscript{109} Supra note 54, at p. 245.
\textsuperscript{110} Supra note 20, at p. 376.
(g) Cultural and Educational Rights

Under Article 29 and Article 30, certain cultural and educational rights are guaranteed.\(^{111}\) Clause 2 of Article 29 is a special one which provides that “No Citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion race, caste, language or any of them”. Thus this Article provides a controlling provision when the question relates to admission to any educational institution. After the comparison of Article 15 and Article 29 it is clear that sex is a prohibited ground of discrimination under Article 15 but not under Article 29. It means that admission can be denied to any citizen into any educational institution maintained or aided by state on the ground of sex.\(^{112}\) In this regard High Court of Madras had held that the effect of omitting the word “Sex” from Article 29(2) is that the right of women to admission in educational institutions is a matter within the regulations of college authorities.\(^{113}\) If read with Article 15(3), Article 29(2) may not be availed of by males for seeking admission in an exclusively female institution but its protection cannot be denied to female students in all men’s institution.\(^{114}\)

(h) Right to Constitutional Remedies

It is true that a declaration of Fundamental Rights is meaningless unless there is an effective machinery for the enforcement of these rights, it was, therefore that our Constitution makers have provided an effective remedy for the enforcement of these rights under Article 32 of the Constitution.\(^{115}\) Right to Constitutional remedies as described by Dr. Ambedkar “is the most important-an article without which this constitution would be a nullity” and “is the very soul if the Constitution and the very heart of it”.\(^{116}\)

Article 32 has been described as the corner stone of the democratic edifice raised by the Constitution\(^{117}\) because it confers one of the highly cherished right to

\(^{111}\) Supra note 54. pp. 257-258.
\(^{112}\) Id., at p. 259.
\(^{113}\) University of Madras v. Shatha Bai AIR 1954 Mad 67.
\(^{114}\) Supra note 54. at p. 259.
\(^{115}\) Supra note 25. at p. 343.
\(^{116}\) Ibid.
\(^{117}\) Prem Chand Garg v. Excise Commissioner. AIR 1963 SC 996.
move the Supreme Court for the enforcement of the Fundamental Rights.\textsuperscript{118} It is because of this Article that the Supreme Court should be declared as the protector and guarantor of fundamental rights.\textsuperscript{119} Clause (1) of Article 32 guarantees the right to move the Supreme Court by appropriate proceeding for the enforcement of the rights conferred by Part III of the Constitution. Clause (2) of the Article empowers the Supreme Court to issue directions or orders or writs, including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari whichever may be appropriate for the enforcement of any of the rights conferred by Part III of the Constitution. Thus whenever there is violation of Fundamental Rights, any person can move to the court for an appropriate remedy. This right is also not absolute and can be restricted and also abrogated in certain situations as mentioned in Articles 33 and 34.\textsuperscript{120}

### 4.1.2 Directives Principles of State Policy and Women

The incorporation of the Directive Principles of state policy in Part IV of the Constitution was one of the pioneering efforts to protect and improve the socio-economic status of Indian women.\textsuperscript{121} Directive Principles enshrined in the constitution shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.\textsuperscript{122}

In the Directive Principles of State Policy, some of the provision concern women indirectly or by necessary implication. But there are also a few provisions which are specific to women. The ones which concern women directly and have a special bearing on their status and development are Article 39(a) (e) (d), Article 42, and Article44.\textsuperscript{123} According to Article 39(a) the state should direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood. Article 39 (d) directs the state to secure equal pay for equal work for both men and women. Pursuant to Article 39(d), Parliament has enacted the Equal Remuneration Act, 1976. The directive contained in Article 39(d) and the Act passed

\begin{footnotesize}
\begin{enumerate}
\item Supra note 20, at p. 421.
\item Ramesh Thapper v. State of Madras, AIR 1950 SC 124.
\item Supra note 21, at p. 280.
\item Shukla, Anil Kumar, ‘Political Status of Women’, 2007, p. 11.
\item Article 37, The Constitution of India.
\item Supra note 58, at p. 88.
\end{enumerate}
\end{footnotesize}
there to can be judicially enforceable by the court.\textsuperscript{124} The Supreme Court has held that the principle of “equal pay for equal work though not a fundamental right” is certainly a constitutional goal and, therefore, capable of enforcement through constitutional remedies under Article 32 of the Constitution.\textsuperscript{125}

Article 39(e) direct the state that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength.

Article 42 directs the state to make provisions for securing just and humane conditions of work and for maternity relief. The laws such as the Industrial Dispute Act, the Maternity Relief Act, the Workmen Compensation Act, etc., implement the provisions laid down in Article 42 of the Constitution.\textsuperscript{126}

Article 44 of the Constitution requires that state shall endeavour to secure for the citizen a uniform civil code throughout the territory of India. The founding father of the Constitution were well aware of the gender injustice and sexual inequality of women, so they incorporaied Article 44 particularly with the object towards the achievement of gender justice.\textsuperscript{127} Even though state has not yet made any serious endeavour to fulfill this constitutional obligation, but the judiciary, has recognized the necessity of the uniformity in application of civil laws like, law of marriage, succession, adoption and maintenance etc.\textsuperscript{128} in various cases.\textsuperscript{129}

The absence of a Uniform Civil code and the “Continuance of various personal laws which accept discrimination between men and women, violate the fundamental rights and objectives of the preamble of the Constitution which promises to secure to all citizens ‘equality of status’, and is against the spirit of national integration and secularism. The continuance of different personal laws having different provision in relation to women’s right leads to inequalities against women vis-à-vis men as well as women vis-à-vis women. There is, therefore, an urgent need

\textsuperscript{124} Supra note 25. at p. 382.
\textsuperscript{125} Randhir Singh v. Union of India AIR 1982 SC 879.
\textsuperscript{126} Supra note 54. at p. 352.
\textsuperscript{127} Supra note 22. at p. 15.
\textsuperscript{128} Supra note 2. at p. 27.
to have a Uniform Civil Code which guarantees equal rights to all Indian women and men. Apart from these specific provisions for women, all the other provisions in the Directive Principles of State Policy are equally applicable to the man and women. Incorporation of these specific provisions clearly establishes the intention of the framers of the Constitution to improve the social, economic, educational and political status of the women so that they can be treated with men on equal terms.

4.1.3 Fundamental Duties and Women

Part IV-A of the Constitution which contains the Fundamental Duties of the citizens of India was added by the Constitutional 42nd Amendment in 1976. Rights and duties are correlative and no right can exist without a co-relative duty. The Fundamental duties are therefore, intended to serve as a constant reminder to every citizen that while the Constitution specifically conferred on them certain Fundamental Rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour. In the context of the status of women clause (e) of Article 51A is of special importance which provides that it shall be the duty of every citizen to renounce practices derogatory to the dignity of women. Thus it can be said with a considerable degree of certainty that the architects of the Indian Constitution have provided equal opportunities and avenues of development to both men and women through Constitutional measures.

4.2 Women under Personal Laws

While the Constitution of India contains articles mandating equality and non-discrimination on the ground of sex, several laws that clearly violate these principles continue to exist, especially in the area of personal laws or family laws. Family relation in India is governed by the Personal Laws. These laws are often referred to as Civil Laws, but in India they are more correctly termed as religious personal laws. In case of Civil laws particularly in the personal laws, there is no uniformity

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130 Supra note 58, at p. 161.
131 Supra note 128, at p. 27.
132 Supra note 25, at p. 399.
133 Supra note 121, at p. 12.
135 Supra note 9, at p. 60.
though the Indian Constitution in its Part IV by Article 44 directed the state to provide Uniform Civil Code throughout the territory of India.\textsuperscript{136}

Personal laws in India generally deal with marriage, divorce, maintenance, guardianship, adoption, succession, joint family property and partition etc., and can broadly be characterized as “Family Law”. These laws are basically divided along religious lines, whether or not they are based on religion.\textsuperscript{137} In India there are four major religious communities: Hindus, Muslims, Christian and Parsi, and each have their separate personal laws, by which they are governed in matter of marriage, divorce etc.\textsuperscript{138} Thus Hindus in India are governed by the Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; the Hindu Minority & Guardianship Act, 1956; The Hindu Adoption and Maintenance Act, 1956. Indian Muslims are governed by the Shariat Act of 1937; the Muslim Women’s Dissolution of Marriage Act of 1939; The Muslim Women (Protection of Rights on Divorce) Act, 1986 and uncodified Muslim laws. Similarly Christians in India are governed by their own Christians Marriage Act, The Indian Divorce Act, 1869 and the Indian Succession Act, while Parsis, too have codified laws of marriage, and divorce and of succession.\textsuperscript{139}

Most of these personal laws which contains provisions that are highly discriminatory against women, have either remained static or have changed in retrogressive way.\textsuperscript{140} The Indian state has made a little effort to change these laws or introduce new legislation in conformity with constitutional principles.\textsuperscript{141} The only justification put forward by the state however, has been that it does not want to interfere in the personal laws of the minority community.\textsuperscript{142} Furthermore, it is ironic that while all Indian women suffer from the same or similar discrimination at home or within their families, the family or personal laws applicable to them are different and subject them to varying degrees of discrimination.\textsuperscript{143}

To know the impact of various provisions of the personal laws on the status of women, it is necessary to analyze different provisions conferring different rights on

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\textsuperscript{136} Supra note 2. at p. 32.
\textsuperscript{137} Supra note 134. at p. 378.
\textsuperscript{138} Supra note 9. at p. 60.
\textsuperscript{139} Supra note 134. pp. 378-379.
\textsuperscript{140} Id., at p. 375.
\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid.
\textsuperscript{143} Id., at p. 378.
the women, relating to marriage, divorce, maintenance guardianship and succession that are contained in the personal laws.

4.2.1 Provisions for Marriage

Marriage is regarded as a social obligation for both men and women, and both sexes are expected to marry. While there is much variation between different religious groups in the customs and beliefs regarding marriage but still the institution of marriage itself is common to all.

(a) The Hindu Marriage Act, 1955

The only personal laws in India that have been reformed to some extent have been the Hindu personal laws. The Hindu Marriage Act 1955 is one of the most important Acts of the branches of Hindu Personal Laws, which generally deals with the provision regarding marriage and other related issues. This Act has reformed Hindu law of marriage specifically in favour of women by establishing firmly the rule of monogamy amongst the Hindus. Section 5 of the Act deals with the conditions of marriage. Clause (1) of the section introduce the monogamous form of marriage by laying down the provision that neither party has a spouse living at the time of the marriage clause (ii) of the section deals with mental capacity of the both parties to the marriage. Clause (iii) prescribed the minimum age for the bridegroom and the bride at 21 and 18 years respectively. These conditions of marriage are generally in more favour of women in comparison to men. Section 7 of the Act deals with the ceremonies for a Hindu Marriage. It laid downs that a Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Thus in accordance with Section 7 there is no discrimination between bridegroom and bride with regard to performance of ceremonies.

Under Section 8 of the Hindu Marriage Act, there is a provision for registration of marriage for the purpose of facilitating the proof of Hindu marriages. It is women who are affected the most by non-registration of marriage. In the absence

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144 Supra note 134, at p. 375.
145 This Act applies to any person who is a Hindu by religion in any of its form or development, including Virashaiva, a Lingayat or a Follower of the Brahma, Prarthana or Arya Samaj, to any person who is Buddhist, Jain or Sikh by religion and to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parse or Jew by religion.
of registration of marriage women become victims of bigamy and property disputes. They face enormous hardship as they have no proof of their marriage. It is worse in cases of bigamous marriage as women can lose their cases because of their failure to prove the first or second marriage of their husbands. Furthermore another serious national problem that can be tackled through the compulsory registration of marriage is that of child marriage. Thus this is a welcoming step in the process of marriage which will both strengthen and regulate the institution of marriage.

(b) Muslim Law

Muslims in India are governed by the Muslim Personal Laws. There is no codified law to deal with the marriages in Muslims; in fact Muslim marriages are governed by various schools. According to Muslim Law, marriage is a contract between a Muslim man and women for the purpose of legalizing sexual intercourse and the procreation and legitimation of children and the regulation of social life in the interest of society by creating the rights and duties between the parties themselves, and between each of them and the children born from the union. Under Muslim Law marriage is a religious duty as well as a civil contract; Marriage under Muslim Law is solemnized generally with recitation of certain verses from the holy Quran.

Muslim Law too prescribe certain necessary condition for valid marriage as there must be an offer and acceptance, the parties must be of sound mind, the bridegroom and bride must have attain the age of majority i.e. puberty. If either party to marriage is minor, the marriage guardian can give the minor in marriage. In Muslim marriage the dower is one of the essential ingredients other than offer and acceptance. It is a fundamental feature of the Muslim marriage which is in favour of women. Dower is sum that becomes payable by the husband to the wife on marriage either by agreement between the parties or by operation of law. A Muslim wife has a right to dower. The object of dower is three fold, firstly to impose an obligation on

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149 Ibid.
150 Ibid., at p. 436.
152 Supra note 22, at p. 223.
153 Id., at p. 234.
154 Puberty means the age at which a person becomes capable of performing sexual intercourse and procreating children, quoted in supra note 151 at p. 117.
155 Supra note 22, at p. 225.
156 Id., at p. 234.
the husband as a mark of respect of the wife, secondly to place a check on the capricious use of divorce on the part of the husband; and thirdly to provide for her subsistence after the dissolution of her marriage so that she may not become helpless after the death of the husband or termination of marriage by divorce.\(^{157}\) It not only protects from his unbridled power to divorce but also from his extravagance in having more than one wife. A stipulation to charge a huge dower on the occasion of his another marriage is enough to deter husband from enjoying the luxury of having two, three or four wives. Thus this system of dower is generally in favour of Muslim Women.\(^{158}\) Muslim laws generally provide equal rights to men and women and gives respectable status to Muslim women but it does not provide sound security in respect of marriage as a Muslim male is allowed to have four wives at a time. On the other hand, a Muslim woman is not allowed to have more than one husband and if she practices polyandry, she will be guilty of offence for bigamy under Section 494 of the Indian Penal Code.\(^{159}\) Thus it is a gender inequality in respect of Muslim women which is against the principle of gender justice.\(^{160}\)

As to the registration of marriage there is no uniform rule under the Muslim law. According to Muslim Law, a marriage is regarded as a civil contract and the Qazi or officiating priest records the terms of the marriage in ‘Nikahnama’ which is handed over to marriage couple. ‘Nikahnama’ is worked as a proof of their marriage under Muslim Law.\(^{161}\) Although Muslim Law does not require that the Muslim marriage should be registered but if there is any custom of registering the marriage then it should be registered.\(^{162}\)

(c) Christian Law

Matters related to marriage of Christians in India are governed by the Indian Christian Marriage Act, 1872. Section 4 of the Act laid down that all marriages between persons “one or both of whom is/are a Christian/Christians” have to be solemnized in accordance with the rules and formalities prescribed by the Indian Christian Marriage Act, 1872. Any marriage which does not conform to provision of

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\(^{157}\) Supra note 151, at p. 153.
\(^{158}\) Id., at p. 152.
\(^{159}\) Supra note 22, at p. 230.
\(^{160}\) Id., pp. 230-231.
\(^{161}\) Supra note 149, at p. 434.
\(^{162}\) Supra note 151, at p. 146.
the Act will be a void marriage. Section 70 of the Act prescribes the following conditions which must be fulfilled:

1. The man shall not be under 18 years and the woman shall not be under 15 years;
2. Neither party has a spouse living; and
3. There should be two witnesses besides the licensed person.

Further each of the parties should say to the other that he or she has taken the other to be his or her lawfully wedded wife or husband.

Thus this Act provides the monogamous form of marriage. Registration of marriage is compulsory under the Indian Christian Marriage Act, 1982.

(d) Parsi Law

Parsis in India are governed by the Parsi Marriage and Divorce Act, 1936, regarding marriage and other related issues. According to Section 3 of the Act marriage between Parsis shall be valid if such marriage is solemnized according to the Parsi form of ceremony called “Ashirvad” by a priest in the presence of two Parsis witnesses other than such priest. Further the bride groom has completed the age of twenty one years and bride, the age of 18 years. Section 4 of the Act provides that no Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the life time of his or her wife or husband, whether a Parsi or not except after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully declared null and void or dissolved. Thus this Act prohibits the bigamous marriage. If any party to marriage violates this condition then he or she shall be subject to the penalties provided under Sections 494 and 495 of the Indian Penal Code. This Act makes registration of marriage necessary under Section 6 of the Act.

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164 The States Government may grant license to any Christian to solemnize a marriage under the Christian Marriage Act, 1872, quoted in Gangrade, K.D. Social Legislation in India, p. 60.
165 Ibid.
166 Supra note 149, at p. 434.
Thus these are the general provision regarding marriage in four major personal laws applicable in India.

4.2.2 Provision for Divorce or Judicial Separation

Divorce put the marriage tie to an end, whereas Judicial separation either lead to reconciliation or to divorce. The basic object of the remedy of Judicial separation is to keep open the door for reconciliation. Various matrimonial laws lay down different grounds for divorce and judicial separations which are as under: 168

(a) Hindu Marriage Act 1955

Originally when this Act was passed in 1955 the ground of judicial separation and divorce were different. But the Marriage Laws (Amendment) Act, 1976 makes the ground of Judicial separation and Divorce common. Now all the grounds of divorce available to a spouse under Section 13(1) and available to wife under Section 13(2) are the ground of judicial separation under Section 10 of the Act. 169

In context of domestic violence adultery, cruelty, desertion without reasonable cause etc are of special importance for women under Section 13(1) of the Act, which are generally more in their favour, because it is the woman who affects the most under these grounds. Besides this Section 13(2) provides special ground available to the woman only for dissolution of her marriage by decree of divorce which are remarriage by husband, husband found guilty of rape, sodomy or bestiality since the solemnization of marriage, and repudiation of the marriage after attaining the age of fifteen but before attaining the age of eighteen years, if her marriage was solemnized before she attained the age of fifteen years. 170 Cruelty under Section 13 as a ground for divorce is the only legal instance of recognition of domestic violence in this Act, which is available in the cases of both Judicial separation and divorce. 171

(b) Muslim Law

In the context of the Muslim law the remedy of judicial separation is not of much significance as the Muslim husband has unfettered powers of divorce against

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169 Id., at p. X.
171 Supra note 21, at p. 286.
his wife and the Quran enjoins the husband, ‘to retain his wife with kindness or separate her with kindness’. The Muslim wife cannot separate herself from him except under the agreement called Khula, which is made upon term to which both are assenting parties and operate in law as divorce of the wife by husband.\(^{172}\)

Under Muslim Law divorce by Muslim men is uncodified, unreformed and based on the traditional principals where marriage is dissolved by the talaq i.e. divorce. In other words it means an act of repudiation of marriage by the husband in exercise of his power which has been conferred on him.\(^{173}\) A husband has absolute power to terminate his marriage at his own pleasure with or without cause. A Muslim husband can make pronouncement of talaq at any time without the prior approval of the wife. Thus it can be said that Muslim Personal Laws are biased against women in matter of divorce i.e. talaq.\(^{174}\)

(c) **Dissolution of Muslim Marriage Act, 1939**

Before the passing of Dissolution of Muslim Marriage Act, 1939, there were conflicting provisions in the various schools of Muslim law in respect of divorce by wife through judicial intervention. In order to remove confusion and give right to women regarding divorce this Act was enacted.\(^{175}\) Section 2 of this Act provides cruelty and desertion as independent grounds for divorce among several others. Significantly before the introduction of this Act, there was no provision allowing Muslim women to get a divorce on the failure of her husband to maintain her or his deserting or ill-treating her.\(^{176}\) Further this Act is the only statute which clearly defines the cruelty against wife.\(^{177}\)

(d) **The Indian Divorce Act, 1869 (as Amended by Amendment Act, 2011)**

The provisions of the Indian Divorce Acts are applied on Christians of all denominations. Under Section 10 of this Act both parties to a marriage may file a petition to dissolve the marriage on the ground mention therein like, adultery, desertion, non-consummation of marriage, cruelty etc. Clause (xi) of Section 10

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\(^{173}\) Supra note 151. at p. 166.

\(^{174}\) Supra note 22. at p. 233.


\(^{176}\) Gupta, Nathulala. ‘Women Education through the Ages’. 2000, p. 75.

\(^{177}\) Section 2(viii). Clauses (a) to (f). The Dissolution of Muslim Marriage Act. 1939.
provides additional ground to wife for dissolution of her marriage i.e. husband’s guilty of rape, sodomy or bestiality since the demonization of marriage. The Act also provides for judicial separation obtainable by husband or wife on the ground of adultery or cruelty or desertion without reasonable excuse for two years or upward.

(e) The Parsi Marriage and Divorce Act, 1936 (as amended by the Act of 1988)

Under Section 32 of the Parsi Marriage and Divorce Act, 1936, any married person may sue for divorce on any one or more of the grounds mentioned therein, like adultery, bigamy, cruelty, mental illness, etc. Section 32 (dd), of the Act mentions ‘cruelty’ as a ground for divorce and the section expressly mentions that it shall be the discretion of the court whether it should grant a decree for divorce or for judicial separation only. Section 32(e) of the Act is of special importance for women which sets out grievous hurt as a ground for divorce. Furthermore this section provides that compelling of wife to submit herself to prostitution by the husband is a ground for divorce under this Act. Section 34 of the Act lay down grounds for judicial separation which are same as for the divorce.

(f) Special Marriage Act, 1954 (as amended by Amendment Act, 2000)

Section 27 of the Special Marriage Act, 1954 specifies the ground on which the Court can dissolve a marriage, whether originally solemnized under its own provisions or contracted under any of the provision of personal laws but later register under the Special Marriage Act. The law of divorce contained in this act thus furnishes in alternative to each of the personal law of divorce. Under this Act divorce can be obtained by either party for adultery, desertion for two years, unsound mind, cruelty etc. In addition, the wife can obtain divorce on the ground of rape, sodomy, or bestiality by husband since the solemnization of marriage. Under the Special Marriage Act, 1954, the grounds of judicial separation and divorce are identical.

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178 Section 10, The India Divorce Act, 1869.
179 Id., Section 22.
180 The Parsi Marriage and Divorce Act, 1936.
181 Supra note 168, at p. 211.
182 Section 27, The Special Marriage Act, 1954.
183 Id., Clause (1-A) of Section 27.
184 Id., Section 23.
4.2.3 Provision for Maintenance of Wife

The liability to maintain arises out of the nature of relationship with certain category of persons and under certain circumstances which has got nothing to do with owning or not owning property or other means. The right of maintenance is the offspring of the concept of joint family system in which it is the duty of the head of such family to maintain all the members of family. This right is a result of legal relationship. The right of maintenance generally includes all the reasonable necessaries of life such as, food, clothes and shelter.\textsuperscript{185}

A wife has a right to be maintained by her husband not only during the subsistence of marriage but also when marital ties are broken subject to the fulfillment of certain conditions. There are different provisions in different personal laws regarding maintenance of wife which are as follows:\textsuperscript{186}

(a) Hindu Law

Under Hindu Law provisions for maintenance are found under two enactments: The Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956.

(i) The Hindu Marriage Act, 1955

The right to claim maintenance under section 24 and 25 is an independent right available to the parties in ancillary proceedings in any petition for any matrimonial relief i.e. divorce, judicial separation under the Hindu Marriage Act, 1955.\textsuperscript{187} The provisions relating to maintenance under this Act, are not preferential in nature in favour of women because both the parties to the marriage can claim maintenance and other expenses from each other. Thus both husband and wife are entitled to claim maintenance from each other under this Act.\textsuperscript{188}

(ii) Hindu Adoption and Maintenance Act 1956

This Act is of special importance for Hindu women as it lays down elaborate provisions regarding maintenance of women, which also include right to residence as

\textsuperscript{185} Supra note 22, pp. 185-186.
\textsuperscript{186} Supra note 21, at p. 288.
defined in Section 3(b) of the Act. Under this Act, there are different categories of
women who are entitled to claim maintenance such as wife, widowed daughter in law,
daughters, illegitimate daughters, mother etc. Maintenance under this Act can only be
claimed by the wife against the husband. Section 18(1) of the Act is of mandatory
nature and imposes a duty on the husband to maintain his wife in case of desertion,
cruelty etc. Section 19 of the Act creates a duty on the part of father-in-law to
maintain her widowed daughter-in-law in certain conditions. Section 20 imposes a
duty on every Hindu to provide maintenance to his/her unmarried daughter, if she is
unable to maintain herself out of her own earning or other property. In addition to
this a mother, who is unable to maintain herself is also entitled to claim maintenance.
Furthermore Section 23 of the Act lays down certain consideration which the Court
will take into account in fixing the amount of maintenance like, position and status of
parties, reasonable wants of the claimant, number of person entitled to be maintained
e tc.189

(b) Muslim Law

Under Muslim Law, the husband is bound to maintain his wife, irrespective of
being a Muslim, non Muslim, poor or rich, young or old, if not too young to be unfit
for matrimonial intercourse. Her right remains unprejudiced even if she has property
or income of her own and the husband is poor. In addition to the legal obligation to
maintain, there may be stipulations in the marriage contract which may render the
husband liable to make a special allowance to the wife such as Kharch-i-pandan,
guzara, etc. A wife is entitled to receive maintenance provided she is obedient to her
husband and permits him free access to her at all times and obey all his lawful
commands.190 The wife’s right to maintenance ceases on death of her husband, for
her right of inheritance supervenes.191 As regard to maintenance of Muslim women,
the whole law is based on the Quranic verses. These verses give clear cut picture that
a divorce woman is entitled for maintenance till the expiry of iddat period. In case
she is pregnant this period extents up to the delivery.192 Thus it can be said that
Muslim law of maintenance is generally not in favour of wife or divorced women
because they are not in position to get maintenance after iddat period.

189 Section 18 to 23 of the Hindu Adoption and Maintenance Act. 1956.
190 Supra note 151. at p. 235.
191 Id. at p. 236.
192 Ibid.
(c) Muslim Women (Protection of Rights on Divorce) Act, 1986

This Act was enacted to protect the rights of Muslim divorced women by providing procedure for a divorced wife to claim maintenance. Section 3 of the Act imposes liability on the husband to pay a fair and reasonable provision and pay maintenance which is confined to the duration of iddat period only. Further, for divorced women maintenance should be provided on a reasonable scale.

Section 4 of the Act is of special importance for divorced women as it imposes liability to maintain her on, firstly her children, both male or female, married or unmarried if any, secondly her parents, thirdly other relatives entitled to inherit her property on her death. Furthermore Clause (2) of section 4 provides that magistrate can direct the State Wakf Board established under section 9 of the Wakf Act, 1954 or under any law for the time being in force in a state to pay such maintenance as determined by him under clause (1) of Section 4 of the Act if the divorced woman is unable to maintain herself after the iddat period or does not get maintenance from her children parents or relatives. Section 5 of the Act cannot be said in favour of women as it provides for option to be governed by the provision of Sections 125 to 128 of the code of Criminal Procedure Code 1973 subject to a declaration made by the divorced women and her former husband to be governed by the said provision of Criminal Procedure Code, which is generally not possible in most of the cases of maintenance.193

(d) The Divorce Act, 1869

Section 36 and 37 of the Christian Law i.e. Indian Divorce Act, 1869, provides provisions for alimony *pendente lite* and permanent alimony respectively in any suit under this Act. This Act provides the provision for maintenance only for the female spouse.

A deserted wife may also apply to the court for protecting order with respect to her property against her husband or his creditors or any person claiming under him, under Section 27 of the Act.

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193 Muslim Women (Protection of Right on Divorce) Act 1986.
(e) Parsi Law

The Parsi Marriage and Divorce Act, 1936 also provides for maintenance *pendente lite* and for permanent alimony and maintenance. Prior to amendment of the Act in 1988, only a wife was entitled to maintenance under the provisions of this Act. After amendment the provision has been brought at par with the Hindu marriage Act, 1955, and now even a husband can seek maintenance.

(f) Special Marriage Act, 1954

The provision of this Act are applicable to all those who are married under this Act irrespective of their religion. Sections 36 and 37 of the Special Marriage Act, 1954, provide for alimony *pendente lite* and permanent alimony and maintenance for the wife, respectively. Unlike the Hindu Marriage Act, 1955, there is no provision for maintenance for the husband. Under Section 36 wife would be entitled to maintenance if she has no independent income sufficient for her support and the necessary expenses of the proceeding.

It is very important to mention here that no personal law except the Hindu Adoption and maintenance Act, 1956 include the right to residence in the maintenance provisions.

A review of the foregoing discussion about different standards in diverse personal law in regard to eligibility to get maintenance by the spouses of the marriage makes it amply clear that majority of the laws favoured wives against their husband on the issue of eligibility to get maintenance. No doubt, the wives require much care in our traditional society and for them more protective laws should be made so they might be rescued in Indian legal system effectively. However, husband and wife both should be made eligible to get maintenance against each other according to the circumstances and fact of the case.

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194 Sections 39 and 40 of the Parsi Marriage and Divorce Act, 1988.
196 Ibid.
197 Supra note 172, at p. 246.
4.2.4 Provision for maintenance of Children

The obligation to maintain one’s children is personal obligation and arises out of the personal relationship of parent and child. Generally in most of the early systems of law, the obligation to maintain children was imposed on the father alone and only in respect of legitimate children. Ordinarily the obligation extends during the minority of children. There are different provisions in different personal laws regarding maintenance of children. It is pertinent to mention all those provisions because in the family where domestic violence or other matrimonial causes occurs, it is the children, who are the worst sufferers.\(^{198}\)

(a) **Hindu Marriage Act, 1955**

Section 26 of the Act provides that in any proceeding under this Act, the court may from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes wherever possible.

The court is invested with a very wide discretion and broad powers in matter of maintenance etc. of children. It is well established rule that in any proceeding in respect of the children, the welfare of the children is of paramount consideration.\(^{199}\)

(b) **Hindu Adoption and Maintenance Act, 1956**

Section 20(1) of the Hindu Adoption and Maintenance Act, lay down that a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children. Under clause (2) of Section 20 a minor child is given the right to claim maintenance from his or her father or mother so long as the child is minor i.e. under the age of 18 years.\(^{200}\) Section 20(3) of the Act gives an unmarried daughter, whether major or minor the right to maintenance from the father or mother if she is unable to maintain herself out of her own earnings or other property.

In context of Hindu Adoption and Maintenance Act the term ‘maintenance’ includes provision for food, clothing, residence, education and medical attendance

\(^{198}\) Supra note 187, at p. 388.

\(^{199}\) Id., at p. 182.

\(^{200}\) Section 3(c) of the Hindu Adoption and Maintenance Act, 1956.
and treatment. Further in the case of an unmarried daughter it also includes reasonable expenses of an incident of her marriage.\textsuperscript{201}

(c) **Muslim Law**

Under Muslim law father’s liability to maintain his children is absolute and is not affected by his indigence so long as he can earn. He is under an obligation to maintain them, even if they are in their mother’s custody. A father is liable to provide maintenance to all his children including minor children of either sex, unmarried daughter, married daughter if she is poor and adult son if he is indigent.

The married daughter has no unrestricted right to live as and where she likes, and claim separate maintenance from the father. It is only in special circumstances that she would be entitled to separate maintenance.\textsuperscript{202}

When the father has no means and is indigent the mother is liable to maintain her children, but she is entitled to recover the expenses from the father, when circumstances permit.\textsuperscript{203}

If both father and mother fail to maintain their children, then it is the duty of the grandparents, maternal or paternal to provide for their maintenance.\textsuperscript{204}

(d) **The Muslim Women (Protection of Right on Divorce) Act, 1986**

Section 3(1) (b) of the Act contemplates the divorcee wife’s right to claim maintenance in respect of her children born to her before or after her divorce, to be made and paid by her former husband for a period of two years from the respective dates of birth of children.

Section 3(1) (b) of the Act does not take away the independent rights of the children to be maintained by the father under the Muslim Personal Law and under Section 125 of the Criminal Procedure Code 1973 because these rights of the children are separate and independent of the divorce wife’s right to claim maintenance.

\textsuperscript{201} Id., Section 3(b).

\textsuperscript{202} Supra note 151, at p. 233.

\textsuperscript{203} Id., at p. 234.

\textsuperscript{204} Ibid.
(e) Indian Divorce Act, 1869

Sections 40 to 44 of the Indian Divorce Act deals with the provisions regarding maintenance of minor children of the Christians, these sections provides that in any matrimonial proceeding between parents regarding judicial separation, divorce or nullity of marriages, the concerned court may make such provision in the orders, or decrees, as it deems proper with respect to the maintenance and education of the minor children, the marriage of whose parent is the subject of the suit or decree.

(f) Parsi Marriage and Divorce Act, 1936

Section 49 of the Act provides that in any suit under this Act, the Court may from time to time pass such interim orders and make such provisions in the final decrees as it may deem just and proper with respect to the maintenance and education of the children under the age of eighteen years i.e. minor children only.

Thus these are the various provisions regarding maintenance of children under different personal laws, irrespective of these provisions children can also avail the benefit of Section 125 of the Criminal Procedure Code 1973, to claim the maintenance which will be discussed in later part of this chapter.

4.2.5 Provision Regarding Guardianship

All matrimonial disputes between the parents put question mark on the well being of the minor children as they are more likely to suffer from such disputes, particularly when parents decides to live apart from each other’s company. If a woman decides to leave her husband due to unrelenting domestic violence, she is very much concerned regarding the welfare of her children as they are the worst sufferers of domestic violence. Further situations become more worst when women are denied or threaten to deny custody as well as access to her children. Under such situations she is left only with one option that is to start legal proceeding for ‘guardianship’.

Guardianship includes the care of the person of a minor or of his property or of both his person and property.

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205 Supra note 21. at p. 292.
206 Section 4 of the Guardian and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956.
All personal laws in India contain the provisions of guardianship for ensuring the welfare of children. Besides these personal laws, there is a general law called the Guardian and wards Act 1890 which is applicable to all Indians irrespective of religion and personal laws.

(a) Hindu Law

The Hindu Law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956. Under Section 6(a) of the Act, father is the natural guardian of a boy or of an unmarried girl, and after him, the mother is natural guardian of the person and property of such minors, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mothers. Clause (b) of Section 6 provides that in case of an illegitimate boy or an illegitimate unmarried girl, mother shall be the natural guardian, and after her the father. Section 6(c) lays down that in the case of a married girl the husband would be the natural guardian of her person and property.

The effect of this provision regarding guardianship right has now been considerably whittled down by judicial decisions and more importantly by Section 13 of the Hindu Minority and Guardianship Act which lays down the welfare of the minor is the prime and paramount consideration while appointing or declaring any person as guardian of minor’s property and person. Thus father’s right or mother’s right of guardianship is subordinate to the welfare of child in the same way husband’s right of guardianship is subordinate to the welfare of married girl. Section 9 of the Act which provides for the appointment of testamentary guardian is of special importance for women. According to clause (3) of this section a Hindu widow and a Hindu mother who are entitled to act as the natural guardian of her minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor’s person or in respect of the minor’s property or in respect of both.

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207 The word ‘after’ need not necessarily mean after the life time of father. In the context in which it appears in section 6 (a) it means ‘in absence of’, which refers to the father’s absence from the care of the minor’s property or person for any reason what so ever. quoted in Githa Harisharam v. R.B.I. AIR 1999 SC1149

208 But if there are grave and weighty consideration which require that the mother should not be permitted to have minor with her, then she can be denied custody. quoted in Desai A.Mulla. The Principal of Hindu Law. Vol. II. 2001. p.483

209 Supra note 187, at p. 219.
Section 26 of the Hindu Marriage Act, 1955 also deals with the provision regarding custody of the minor children. This Section lays down that in any proceeding under this Act, the court may from time to time pass such interim or permanent orders as it may deem just and proper with respect to the custody of minor children, consistently with their wishes wherever possible. Thus the mother can apply under Section 26 for the custody of minor children.

(b) Muslim Law

Under the Muslim law the guardianship of minor’s person for custody is known as ‘hizanat’. So far as Muslim women are concerned regarding the custodial rights of minor’s person only, the Muslim law is very clear as it lay down that, the mother is, of all persons, the best entitled to the custody of her infant child during the subsistence of the marriage and after separation from her husband unless she loses this right. Thus she has the right to remove the child from the father’s custody without going to the court. If father prevents her from exercising this right, she can approach the court for enforcing the right in her favour. Under Muslim Law mother will have the custodial right of the person of minor until they reach to a particular age which varies between different school of Muslim law. In Hanfi Law the mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty and in Shia law to the custody of her male child till the age of 2 years and to the custody of her female child till the age of 7 years. In case of minor married girl, her mother is entitled to the custody as against her husband. As regards the guardian of a minor’s property, mother is not entitled as of right to be the legal guardian under Muslim Law.

Muslim laws are biased against the mother’s right to act as guardian in marriage of minors. Under the Muslim Law of all schools the father has the power to give his children of both sexes in marriage without their consent until they reach the

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211 Supra note 21. at p. 216.
212 Supra note 151. at p. 216.
213 Id., at 223.
214 Ibid.
age of majority. The mother is placed much below in the list of persons who can act as guardians in the marriage of a minor.\textsuperscript{215}

(c) \textbf{Indian Divorce Act, 1869}

Under the Indian Divorce Act 1869, a Christian woman can sue for custody of her minor children in the same proceeding in which a suit has been filed for divorce or judicial separation.\textsuperscript{216}

(d) \textbf{Parsi Marriage and Divorce Act, 1936}

Under Section 49 of the Act a woman can apply for interim and/or permanent custody of the children in any suit for divorce or judicial proceeding or in any other matrimonial proceeding at any time while the case is proceeding before the Court.

(e) \textbf{The Guardians and Wards Act, 1890}

The Guardian and Wards Act, 1890, lays down a detailed law relating to the court's power of appointing and declaring guardians of persons and property. This is a uniform code of guardianship which was made applicable to all Indians irrespective of their religion and personal law. However, section 17(1) of the Act, provides that the court shall be guided by what, consistently with the law to which the minor subject appears in the circumstances to be for the welfare of the minor.

In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. Further if minor is old enough to form an intelligent preference; the court may consider that preference and shall not appoint or declare any person to be guardian against his will.\textsuperscript{217} This Act does not discriminate between men and women regarding their guardianship right over the minor's person or property or both, because this Act provides that welfare of the minor is paramount consideration before the court while appointing any person as guardian. Thus if a woman is desirous of

\textsuperscript{215} Id., at 214.
\textsuperscript{216} Sections 41 to 44 of the Indian Divorce Act, 1869.
\textsuperscript{217} Section 17 Clause (2) to (5). The Guardian and Ward Act 1890.
4.2.6 Provision regarding Restitution of Conjugal Rights

Marriage under all matrimonial laws is a union between husband and wife, which imposes upon each of the spouse certain marital duties and gives to each of them certain legal rights. The necessary implication of marriage is that parties will live in each other’s company. Each spouse is entitled to comfort consortium of the other. So after the solemnization of the marriage if either of the spouses without reasonable excuse withdraws himself or herself from the society of other, then the aggrieve party has a right to file a petition in the matrimonial court for restitution of conjugal rights.220

A decree of restitution of conjugal rights implies that the guilty party is ordered to live with the aggrieved party. Restitution of conjugal rights is the only remedy which could be used by the deserted spouse against the other.221 The non-compliance of the issued decree result to constructive desertion on the erring spouse and the aggrieved party on the expiry of the statutory period, could obtained the divorce.222 The decree of restitution of conjugal rights can be executed by the attachment of property of the respondent under order 21 Rule 32 of the Code of Civil Procedure 1908. But under no circumstances the court can force the erring spouse to consummate marriage. This decree of restitution of conjugal rights could be passed in case of valid marriage only223. In India the remedy of restitution of conjugal right is available to members of all communities either under the person law or under the general law.

218 Id., Clause (a) of Section 8.
219 Supra note 21. at p. 293.
221 Ibid.
222 Supra note 187. at p. 156.
223 Supra note 220.
(a) Hindu Laws

Section 9 of the Hindu Marriage Act, 1955 provides for the remedy of restitution of conjugal right. One of the most important implications of Section 9 of the Act is that it provides an opportunity to an aggrieved party to apply for maintenance under Section 25 of the Act. Maintenance can also be obtained during the pendency of proceeding under section 25 of the Act. So a wife who does not want a judicial separation or dissolution of marriage can obtain maintenance from her husband without filing a suit for the same under other laws.

(b) Muslim Laws

Under Muslim personal law where either the husband or wife has, without lawful ground withdrawn from the society of the other, or neglected to perform the obligation imposed by law or by the contract of marriage, may apply for restitution of conjugal rights. Thus wife can apply for this remedy subject to the fulfillment of these conditions. Even the husband can also bring suit for restitution of conjugal rights which can be contested by the wife on the grounds of cruelty by the husband or in-laws, on non-payment of prompt dower by the husband, validity of marriage, and false charge of adultery etc.

Under the Muslim law marriage is essentially a contract and a suit for restitution of conjugal rights would be a suit for specific performance of the terms of the marriage contract.

(c) India Divorce Act 1869 (Christian Law)

Under Section 32 of the Indian Divorce Act 1869 a Christian husband and wife can apply for an order of restitution of conjugal rights.

(d) Parsi Law

Section 36 of the Parsi and Marriage Act, 1936 provides that where a husband/wife shall have deserted or without lawful cause ceased to cohabit with

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225 Supra note 151, pp 137-138.
226 Ibid.
his/her spouse, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of conjugal rights in court.

(e) **Special Marriage Act 1954**

Section 22 of the Act, lays down the provisions for restitution of conjugal rights, which are same as in Section 9 of the Hindu Marriage Act, 1955. Under Section 37 of the Act court may also award maintenance to the wife in proceeding under Section 22 of the Act.

**4.2.7 Provisions of Inheritance of Property**

Women were always subjected to restrictions in the matter of enjoyment of proprietary right.\(^227\) Theoretically women are entitled to basic property rights, but in practice customary and personal laws limit women’s property related rights.\(^228\) Women’s right to inherit property are directly affected by personal laws. Personal Laws have undergone piecemeal reforms through judicial and legislative intervention. Such reforms have, however, been largely limited to the laws of the majority community. There is different provision in personal laws regarding women’s property related rights which are as follows:\(^229\)

(a) **Hindu Laws**

Under Hindu jurisprudence the law of inheritance comprises rules which govern devolution of property on the death of a person, upon other persons solely on account of their relationship to the former.\(^230\) In this context the position of women was not much satisfactory in the pre 1956 period, as various schools of Hindu laws laid down different order of succession with regard to the Hindu women’s position in the joint family property and her rights therein.\(^231\) The Hindu Succession Act, 1956 has introduced fundamental changes in the Hindu Law of woman’s property. This Act has removed the distinction between the ‘Mitakshara’ and ‘Dayabhaga’ rules of inheritance which were discriminatory against the women’s property right.

\(^228\) Bhagat, Pamela. ‘India’. 2004, p. 60.
\(^229\) Supra note 134, at p. 476.
\(^231\) Supra note 227, at p. 525.
Section 14 of the Hindu Succession Act, 1956 is of special importance for women as it lays down that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. In relation to this section ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance as devised or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person whether a relative or not before or after her marriages or by her own skill or exertion and also any such property held by her as ‘stridhan’ immediately before the commencement of the Act. Furthermore amendment in Sections 6 and 23 of the Hindu succession Act in 2005 has brought radical changes in the women’s property right. Now, a daughter whether married or unmarried has been provided with the right of succession as a coparcener in the joint Hindu family property, if the joint Hindu family is governed by the Mitakshara law. Simultaneously section 23 of the Act, which disentitles the female heirs to ask for partition in respect of dwelling house wholly occupied by a joint family until male heirs choose to divide their respective shares therein, was omitted by this Amending Act. As a result the disabilities of female’s heirs were removed. Now there is no difference between sons and daughters regarding any matter related with right of ownership to property under the law of succession.

Thus the Hindu Succession Act, explicitly overcomes the traditional exclusion of Hindu women from inheriting ancestral property.

(b) Muslim Law

Muslim are govern by their personal law i.e. Shariat in all matter regarding intestate succession, special property of females including personal property inherited or obtained under any provision of personal law. Position of Muslim women under the law of inheritance is not equal to man. The main reformed introduced by Islam may be stated as under:

- Husband or wife was made an heir

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232 Ibid.
233 Supra note 22, at p. 200.
236 Section 2. The Muslim Personal Law (Shariat) Application Act, 1937.
- Female such as daughter as well as cognates were made competent to inherit.
- Parent and ascendants were given the right to inherit even when there are male descendants.
- As a general rule, a female was given one half the share of the corresponding male relation’s share.

The newly created heirs were mostly females, but where a female was equal to the customary heir in proximity to the deceased the Islamic law gave her half the share of the male, viz. if daughter co-exist with the son or a sister with a brother, the female obtain one share and the male two. But in Islamic law males and female have equal right over property, when daughter will obtain her share, she does not by reason of her sex suffer from any disability to deal with her share of the property. She is the absolute master of her inheritance. The same rule apply to a widow/or a mother.

Thus it can be said that Muslim law, while recognizing the rights of women to inherit, discriminates between male and female heirs of the same degree, the shares of the latter being half of the former.

(c) Christians and Parsees

The Christians and Parsees in India are governed generally by the Indian succession Act 1925 regarding matters of intestate succession. Sections 32 to 49 and Sections 50 to 56 deals with various provisions of intestate succession, which applies on Christians and Parsees respectively. Provisions contains in these Act, does not discriminate between men and women in matter of inheritance. Thus these Act treats the women on the same footings and terms as men.

4.3 Women under General Civil Laws

4.3.1 Civil Procedure Code and Specific Relief Act

There are only few provisions in the Civil Procedure Code 1908 and Specific Relief Act, 1963, under which women can seek remedy from the courts in matters
pertaining to marriage. If a husband is about to take a second wife, the first wife can
ask for injunction from the court. A suit for perpetual injection by the wife against
the husband can be filed under Section 9 of Civil Procedure Code read with Section
38 of the Specific Relief Act, 1963. Furthermore, the peculiar feature is that the
first wife of bigamous marriage has no right to file a petition for nullity under the
Hindu Marriage Act, since Section 12 of the Act clearly lays down that a petition for
declaration of the nullity of marriage can be filed only by either party to marriage.
But the first wife can file a suit in a Civil Court for a declaration under Section 9 Civil
Procedure Code read with Section 34 of the Specific Relief Act that the second
marriage of her husband is null and void.

Sections 38 of the Specific Relief Act provide another remedy in way of
injunction to the women, whereby she intends to obtain an injunction order against the
husband, who in future may commit an act of violence against her. The advantage of
applying for an injunction is a lot of flexibility regarding the kind of orders a women
can obtain from the court. For instance, if husband is harassing at work, woman can
ask for order restraining him from coming within a certain distance of her place of
work; if she lives apart from him, she can ask for restraining order preventing him
from coming within the vicinity of her home. Section 40 of the Specific Relief Act
provides that the plaintiff in addition to a prayer for injunction can claim damages
under the provisions of this Act.

There is another provision in Section 13 of Civil Procedure Code under
which court can grant relief to women in matrimonial disputes. While confirming the

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240 Section 9 of Civil Procedure Code 1908, lay down that court shall have jurisdiction to try all suit of
a civil nature excepting suit of which their cognizance is either expressly or impliedly barred.
241 According to Section 37 (2) of Specific Relief Act, 1963. A perpetual injunction can only be granted
by the decree made at the hearing and upon the merits of the suit; the defendant is thereby
perpetually enjoined from the assertion of a right, or from the commission of an act, which would
be contrary to the rights of the plaintiff. Section 38 of the Act lay down that the perpetual
injunction may be granted to the plaintiff to prevent the breach of an obligation in his favour.
242 Mehta, Rama. ‘Socio Legal Status of Women in India’, 1987, p. 94.
243 Section 34 of Specific Relief Act, 1963 lay down that any person entitled to any legal character, or
to any right as to any property, may institute a suit against any person denying or interested to deny,
his title to such character or right, and the court may in its discretion made there in a declaration that
he is so entitled.
244 Supra note 242. at p. 94.
245 Supra note 21. pp.302-303
246 Section 13 of Civil Procedure Code provides that a foreign judgement shall be a conclusive as to
to any matter thereby directly adjudicated upon between the same parties or between the same parties
application of Section 13 of the Civil Procedure Code, the Supreme Court has laid down specific guidelines for recognition of foreign matrimonial judgments as well as for adaptation of Section 13 for dealing with conduciveness of foreign judgment in India, so as to bring in its fold of matrimonial disputes.

In *Y. Narashimha Rao v. Y. Venkatalakshmi* the court laid down that the jurisdiction assumed by the foreign court as well as the grounds on which relief is granted must be in accordance with the matrimonial law under which the parties are married. But there are exceptions to this rule such as where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provision of the matrimonial law of the parties. Thus on the basis of these guidelines laid down by Supreme Court, the courts refuse to recognize the foreign divorce decree, if not found in accordance with the law under which they married. Generally courts in India have been reluctant in recognizing foreign divorce or annulment decrees, if in their view it brings injustice to one of the parties to marriage. In the wake of the increasing number of marriages between Indian Women and non-resident Indian and resulting injustice to the Indian women as a decrees of divorce or annulment by these non-resident Indians in Foreign countries, the Supreme court of India in the case of *Neerja Saraph v. Jayant Saraph* suggested that (a) no marriage between a NRI and an Indian woman that has taken place in India may be annulled by a foreign court, (b) provision may be made for adequate alimony to the wife in the property of the husband in India and abroad, (c) a decree granted by Indian courts may be executable in foreign courts both on the principal of comity and by entering into reciprocal agreements such as Section 44-A of the Civil Procedure Code 1908, which makes a foreign decree executable as it would have been a decree had been passed by the court.

Rule 32 of order 21 of the Civil Procedure Code contains one of the important provision which is generally in favour of women. This rule provides that where the

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249 Ibid.
250 (1994) 6 SCC 461.
251 Supra note 248, pp. 200-201.
party against whom a decree for the restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced by attachment of his property, in case the decree is for restitution for conjugal right, or by detention in the civil prison, or by the attachment of his property, or by both in the case of a decree for an injunction.

4.3.2 Women and Law of Tort

Tort belongs to the category of Civil Wrong. The law of tort deal with a wrong or injury which has certain characteristics, the most important of which is that, it is redressable in an action for damages at the instance of the person wronged or injured. An action for damages lies for causing bodily harm which includes battery, assault, false imprisonment, physical injury as well as mental. If a husband or relatives of husband of a women subjects her to any wrong or injury i.e. assault, battery, false imprisonment, then she can file a civil suit for damages in addition to other available remedies in criminal law.

The battery and false imprisonment are wider expression which include every kind of violation of human rights and entitled the victim to recover damages, even from the state, as the defence of sovereign immunity is giving way to sovereign accountability. It is in this context that the Protection of Human Right Act, 1993 creates a different forum for agitating for torts cum crime like battery and false imprisonment.

Judiciary in India with ‘Judicial activism’ has contributed much to the development of the law of tort. Evolution of tort of sexual harassment grant of

253 Battery consists in intentional application of force to another person without any lawful justification, and corresponds to the offence known as the ‘use of criminal force’ in the Indian Penal Code, 1860 in section 350. Battery need not be accompanied by any bodily harm; least touching of another in anger is battery. In an action for battery the plaintiff must prove, the use of force to him or her. Slapping or pushing, spitting on a person’s face, taking a person by clothes, causing another to be medically examined against her will are held to amounts to battery, quoted in Iyer Ramaswamy- The Law of Torts, 2006 p.41
254 Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant. Thus this word here means as in the Section 351 of the Indian Penal Code, 1860. Quoted in Iyer Ramaswamy- The Law of Torts, 2006 p. 43.
255 False imprisonment means the total restraint of a person’s liberty without lawful justification as wrongful confinement in Section 340 of the Indian Penal Code, 1860. Quoted in Iyer Ramaswamy- The Law of Torts, 2006 p. 44.
256 Supra note 252. at p. 29.
257 Id., at p. 28.
interim compensation to a rape victim and award of damages for violation of human rights of women are very significant changes in the tort law of India.

The enactment of the Protection of Human Rights Act, 1993, Pre-natal Diagnostics Techniques Regulation and Prevention of Misuse Act, 1994 are some of the new laws which embody the principle of tortious liability.259

4.4 Women under Criminal Laws

There are innumerable crimes that are committed against women in different forms varying from wife beating, simple harassment, physical as well as mental torture, sexual abuse, to even denying them the very right to exist. The places where these crimes are committed and the persons by whom they are committed are endless. There are crimes that are committed within the four walls of house; those that are committed outside the house in lonely places and those that are committed in public places right in front of the public. In spite of the plethora of protective provisions in the criminal and special protective laws, the index of these crimes is touching dizzying heights.260

Crime against women is not limited to a particular class of people.261 It is a universal feature of our society, where there is no escape even for those who are educated. Crimes against women are neither culture specific nor region specific. But few form of crimes such as infanticide, dowry death, honour killing, devadasi system, etc are culture specific.262

Crime against women has existed over the ages in the form of criminal violence, domestic violence and social violence. It is a reality which has to be recognized and tackled with sincerity.263

Criminal justice system has an important role to play in preventing and challenging criminal violence as well as domestic violence both symbolically and practically. As a guardian of law and order, the most important function of the state is

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260 Supra note 252, at p. 29.
263 Id., at p. 216.
264 Ibid.
to protect its subjects from all types of injuries and to punish those who violate the laid down rules meant for common welfare. The branch of law which contains such rules is accordingly described as ‘criminal law’. The criminal laws of India have been codified in the Indian Penal Code 1860 and Criminal Procedure Code, 1973. Further these two Acts are supplemented by the Indian Evidence Act, which is part and parcel of Indian Criminal justice system.²⁶⁴

The Indian Penal Code is a substantive law, which define the offences and provides for quantum of punishments, whereas the Criminal Procedure Code is a adjective law which provide the procedure to put in force the provision of Indian Penal Code. Further Indian Evidence Act, supplement these laws by providing rule regarding admissibility or relevancy of facts. Thus these three Acts form base of Indian Criminal Justice System.

Irrespective of the various provisions contained in these Acts to protect the women from violence’s, advances and assault by men against women are often ignored and go unreported as the women fear that they may be further victimize by the long drawn process of accessing justice.²⁶⁵ To overcome these inadequacies in the criminal law, legislature has time to time amended the existing criminal law and inserted various stringent provisions to prevent the crime against women. Recently Criminal Law Amendment Act, 2013 has brought drastic changes in the existing criminal laws and now women are more secure in India subject to the proper implementation of these laws.

To understand the importance of criminal law in prevention of crime against women it is necessary to analyze all pro-women provisions contained in the Indian Penal Code, Criminal Procedure Code, including Indian Evidence Act.

### 4.4.1 Indian Penal Code

The Indian Penal Code, 1860 in general does not make any distinction on the basis of sex. It is uniformly applicable to all. Looking to the social conditions and norms prevailing in the Indian society, the Penal Code has provided various provisions which afford protection to women, who could be a victim of the crime. Whilst there is no specific offence of domestic violence in this code but still many

²⁶⁵ Supra note 260, at p. 16.
definitions of crimes also covers the incident of domestic violence such as causing hurt, or grievous hurt, dowry death, wrongful confinement, matrimonial cruelty, assault, misappropriation of the wife’s property etc. To stop violence against women, inside the home or outside, various special provisions were also added in due course of time, in this code. Thus this code contains general as well as special provisions for the protection of women which are enumerated in the table as below:

**Offences under the Indian Penal Code**

<table>
<thead>
<tr>
<th>Sr. No</th>
<th>Name of offence</th>
<th>Section</th>
<th>Minimum punishment</th>
<th>Maximum punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Public servant disobeying direction under law i.e. fails to record information</td>
<td>166A</td>
<td>Rigorous imprisonment for six months and fine</td>
<td>Rigorous imprisonment for two years and fined</td>
</tr>
<tr>
<td></td>
<td>relating to cognizable offence under section 154 (1) Cr.P.C.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>326A,326B,354,354B,370,370A,376,376A to 376 E and 509 of IPC.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Punishment for non-treatment of victim as provided under section 357 of Cr.P.C.</td>
<td>166B</td>
<td>-</td>
<td>One year or fine</td>
</tr>
<tr>
<td>3</td>
<td>Disclosure of the identity of the victim of certain offences etc.</td>
<td>228 A</td>
<td>-</td>
<td>2 years and fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Obscene acts and songs in public place</td>
<td>294</td>
<td>-</td>
<td>3 months or fine or both</td>
</tr>
<tr>
<td>5</td>
<td>Dowry death</td>
<td>304B</td>
<td>7 years</td>
<td>Life imprisonment</td>
</tr>
<tr>
<td>6</td>
<td>Abetment of suicide</td>
<td>306</td>
<td>-</td>
<td>Up to ten years and fine</td>
</tr>
<tr>
<td>7</td>
<td>Causing miscarriage without woman’s consent</td>
<td>313</td>
<td>-</td>
<td>Life imprisonment or 10 years and fine</td>
</tr>
<tr>
<td>8</td>
<td>Death caused by act done with intent to cause miscarriage</td>
<td>314</td>
<td>-</td>
<td>10 years and fine</td>
</tr>
<tr>
<td>9</td>
<td>Death caused by act done with intent to cause miscarriage, if without woman’s</td>
<td>314</td>
<td>-</td>
<td>Life imprisonment or 10 years and fine</td>
</tr>
<tr>
<td></td>
<td>consent</td>
<td></td>
<td></td>
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266 Supra note 8, pp. 192-193.
267 Inserted by the Criminal Law (Amendment) Act 2013
268 Ibid.
269 Substituted by the Criminal Law (Amendment) Act 2013, Sec. 4 (w.e.f. 3-2-2013).
<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Section</th>
<th>Sentence</th>
<th>Sentence</th>
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</thead>
<tbody>
<tr>
<td>10</td>
<td>Act done with intent to prevent child being born alive or to cause it to die after birth.</td>
<td>315</td>
<td>10 years or with fine or both</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Causing death of quick unborn child by an act amounting to culpable homicide</td>
<td>316</td>
<td>Up to 10 years and fine</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Exposure and abandonment of child under twelve years by parent or person having care of it</td>
<td>317</td>
<td>Up to 7 years or with fine or both</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Voluntary causing hurt (wife beating)</td>
<td>321 &amp;323</td>
<td>Up to one year or fine up to 1000/- or both</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Causing grievous hurt</td>
<td>322 &amp;325</td>
<td>Up to 7 years and fine</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Voluntary causing grievous hurt by use of acid etc.</td>
<td>326 A</td>
<td>Life imprisonment and fine</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Voluntarily throwing or attempting to throw acid</td>
<td>326 B</td>
<td>7 years and fine</td>
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</tr>
<tr>
<td>17</td>
<td>Voluntary causing hurt to extort property or to constrain to an illegal act</td>
<td>327</td>
<td>10 years and fine</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Wrongful restraint</td>
<td>339 and 341</td>
<td>1 month or fine upto Rs. 500/- or both</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Wrongful confinement</td>
<td>340 &amp; 342</td>
<td>One year or fine upto Rs. 1000/- or both</td>
<td></td>
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<tr>
<td>20</td>
<td>Assault or criminal force to woman with intent to outrage her modesty</td>
<td>354</td>
<td>5 years and fine</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Sexual harassment and punishment for sexual harassment &amp; Making sexually colored remarks.</td>
<td>354 A</td>
<td>Rigorous imprisonment up to 3 years or fine or both</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>354 A (iv)</td>
<td>Up to one years or fine or both</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Assault or use of criminal force to woman with intent to disrobe</td>
<td>354 B</td>
<td>7 years and fine</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Voyeurism i.e. being happy or deriving pleasure simply by seeing a scene such as captures the images of a</td>
<td>354 C</td>
<td>3 years and fine. On a second or subsequent conviction</td>
<td></td>
</tr>
</tbody>
</table>

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270 Inserted by the Criminal Law (Amendment) Act, 2013, Sec 5 (w.e.f 13-02-2013)
271 ibid.
272 Inserted by the Criminal Law (Amendment) Act, 2013, Sec 7.
273 ibid.
<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Code</th>
<th>Punishment</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>Stalking i.e. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitors the use by a women of the internet, email etc.</td>
<td>354 D</td>
<td>On first conviction three years and fine On second or subsequent conviction 5 years and fine</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Kidnapping from India and from lawful guardianship</td>
<td>360, 361 and 363</td>
<td>Up to 7 years and fine</td>
<td>Up to 7 years and fine</td>
</tr>
<tr>
<td>26</td>
<td>Kidnapping, abducting or inducing woman to compel her marriage etc</td>
<td>366</td>
<td>Up to 10 years and fine</td>
<td>Up to 10 years and fine</td>
</tr>
<tr>
<td>27</td>
<td>Procuraiton of minor girl.</td>
<td>366 A</td>
<td>Up to 10 years and fine</td>
<td>Up to 10 years and fine</td>
</tr>
<tr>
<td>28</td>
<td>Importation of girl from foreign country (under twenty one years)</td>
<td>366 B</td>
<td>Up to 10 years and fine</td>
<td>Up to 10 years and fine</td>
</tr>
<tr>
<td>29</td>
<td>Kidnapping or abducting in order to subject person to grievous hurt, slavery etc.</td>
<td>367</td>
<td>Up to 10 years and fine</td>
<td>Up to 10 years and fine</td>
</tr>
<tr>
<td>30</td>
<td>Kidnapping or adducting child under ten years with intent to steal from its person</td>
<td>369</td>
<td>Up to 7 years and fine</td>
<td>Up to 7 years and fine</td>
</tr>
<tr>
<td>31</td>
<td>Trafficking of person Or Trafficking of a minor Or Trafficking of minor on more than one occasion Or When a public servant or a police officer involved in</td>
<td>370 (4)</td>
<td>Rigorous imprisonment for 10 years and fine Rigorous imprisonment for 14 years and fine Rigorous imprisonment for life and fine Rigorous imprisonment for life which shall</td>
<td>Rigorous imprisonment for 10 years and fine Rigorous imprisonment for 14 years and fine Rigorous imprisonment for life and fine Rigorous imprisonment for life which shall</td>
</tr>
</tbody>
</table>

24 Ibid.
25 Ibid.
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<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>276</td>
<td>the trafficking of any person.</td>
<td>mean for the remainder of that person is natural life and fine.</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Exploitation of a trafficked person</td>
<td>Rigorous imprisonment for 7 years and fine</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>Selling minor for purposes of prostitution etc.</td>
<td>Up to ten years and fine</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Buying minor for purposes of prostitution etc</td>
<td>Same as above</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Unlawful compulsory labour</td>
<td>1 year and fine</td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Rape</td>
<td>Rigorous imprisonment for life and fine</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Punishment for causing death or resulting in persistent vegetative state of victim.</td>
<td>Life imprisonment i.e. for the remainder of that person’s natural life or with death and fine</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Sexual intercourse by husband upon his wife during separation.</td>
<td>7 years and fine</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>Sexual intercourse by a person in authority</td>
<td>Rigorous imprisonment for 10 years and fine</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Gang rape</td>
<td>Life imprisonment i.e. for remainder of that person natural life and fine</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Punishment for repeat offenders</td>
<td>Same as above</td>
<td></td>
</tr>
</tbody>
</table>

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276 Substituted by the Criminal Law (Amendment) Act, 2013, Sec 8.
277 Inserted by the Criminal Law (Amendment) Act, 2013, Sec 8.
278 Substituted by the Criminal Law (Amendment) Act, 2013, Sec 9.
279 Ibid.
280 Ibid.
281 Ibid.
282 Ibid.
<table>
<thead>
<tr>
<th>No.</th>
<th>Offence</th>
<th>Section</th>
<th>Cognizable/Non-Cognizable</th>
<th>Bailable/Non-Bailable</th>
<th>Compoundable/Non-Compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>42</td>
<td>Unnatural offences</td>
<td>377</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>Criminal breach of trust</td>
<td>405 &amp; 406</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>Cohabitation caused by a man deceitfully inducing a belief of lawful marriage</td>
<td>493</td>
<td>-</td>
<td></td>
<td>10 years and fine</td>
</tr>
<tr>
<td>45</td>
<td>Marrying again during lifetime of husband and wife.</td>
<td>494</td>
<td>-</td>
<td></td>
<td>7 years and fine</td>
</tr>
<tr>
<td>46</td>
<td>Same offence i.e. above mentioned, with concealment of former marriage from person with whom subsequent marriage is contracted.</td>
<td>495</td>
<td>-</td>
<td></td>
<td>10 years and fine</td>
</tr>
<tr>
<td>47</td>
<td>Marriage ceremony fraudulently gone through without lawful marriage</td>
<td>496</td>
<td>-</td>
<td></td>
<td>7 years and fine</td>
</tr>
<tr>
<td>48</td>
<td>Enticing or taking away or detaining with criminal intent a married woman</td>
<td>498</td>
<td>-</td>
<td></td>
<td>2 years and fine or both</td>
</tr>
<tr>
<td>49</td>
<td>Husband or relatives of husband of a woman subjecting her to cruelty</td>
<td>498A</td>
<td>-</td>
<td></td>
<td>3 years and fine</td>
</tr>
<tr>
<td>50</td>
<td>Word, gesture or act intended to insult the modesty of a woman</td>
<td>509</td>
<td>-</td>
<td></td>
<td>Simple imprisonment for 3 years and fine.</td>
</tr>
<tr>
<td>51</td>
<td>Attempt to commit offences with imprisonment for life or imprisonment e.g. attempt to rape</td>
<td>511</td>
<td>-</td>
<td></td>
<td>Imprisonment for life or not exceeding ½ of the longest term provided for the offence and fine.</td>
</tr>
</tbody>
</table>

Each of these offences are classified into cognizable/non-cognizable, bailable/non-bailable and compoundable/non-compoundable categories. But most of the offences against women are cognizable and non-bailable. Thus after the Criminal Law Amendment Act, 2013, there are plenty of pro-woman provisions in the Indian Penal Code, 1860 for the protection of woman from crime. These various provisions cover almost all the crime which could be committed against women. But still crime against women is on rise due to implementation failure of these provisions. So it is necessary that these laws be implemented properly with full sense of sincerity and responsibility by the law enforcement agencies and by those concerned with administration of justice. Keeping in view all these provisions it can be said with
certainty that these provisions will low the profile of crime against women. There are certain provisions under the Indian Penal Code, 1860 which deal with offences in the form of domestic violence against women. These are as under.283

(a) Dowry Death

It is worst form of the Domestic Violence where in many married women have been killed at their matrimonial home by her husband and his relatives out of greed for dowry. There are various offences that are committed against women along with dowry death which are related to dowry. These offences starts taking its shape prior to marriage i.e. demand for dowry articles, during marriage and even after marriage. The lust and greed for dowry is increased to such height that the husband and in-laws of bride harassed and treated her with mental as well as physical cruelty. In extreme cases, they end up in killing their daughter-in-law for dowry. In order to get rid of her, they may even instigate her to commit suicide.284 For curtailing and combating the increasing menace of dowry death Section 304 B was inserted by the Criminal Law Amendment Act, 1986. Earlier there was no specific provision in the criminal law to deal with this gravest social evil. This new provision defines the offence of dowry death and prescribes stringent punishment.285 It connotes that, where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with, any demand for dowry such death shall be called “dowry death” and such husband or relative shall be deemed to have caused her death. Further, whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but may extend to imprisonment for life.286 Under Section 304 B dowry shall have the same meaning as assigned to it under Section 2 of the Dowry Prohibition Act, 1961.287

283 Supra note 22, at p. 29.
286 Section 304 B Indian Penal Code, 1860.
287 Section 2 of the Act define “dowry” as any property or valuable security given or agreed to be given by either directly or indirectly (a) by one party to a marriage to the other party to the marriage, or (b) by the parent of either party to a marriage or by any other person, at or before or any time after the
(b) **Presumption as to Dowry Death**

Section 113-B of the Indian Evidence Act, 1872 is of special importance in cases relating to dowry death. This Section provides that when the question is whether a person had committed dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death. Thus this Section gives scope for presumption against the accused and shifts the burden of proof on him if other essential conditions, as required under Section 304B exist.

For the purposes of this section, dowry death shall have the same meaning as in Section 304B of the Indian Penal Code.

(c) **Abetment to commit Suicide**

There are various incidents where women are driven to commit suicide due to domestic violence. In such cases, perpetrator is responsible for the death under section 306 of the Indian Penal Code, 1860. This section provides that “If any person commits suicide, whoever, abets the commission of such suicide, shall be punished with imprisonment up to ten years and shall also be liable to fine." The word ‘abetment’ as used in Section 306 of the Code has to be read in the sense in which it is defined and used under Sections 107 and 108 of the Indian Penal Code. Abetment can take place in any of the three form viz. (i) by instigation; (ii) by conspiracy; and (iii) by intentional aiding. Thus in any of these three ways a person can be held liable for an offence under Section 306 of the Code.

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288 Section 107 of Indian Penal Code lays down: - Abetment of a thing. A person abets the doing of a thing who 1stly-instigates any person to do that thing; 2ndly engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or 3rdly intentionally aids, by any act or illegal omission, the doing of that thing.

289 Section 108 of Indian Penal Code defines abettor as "A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of abettor."
The offence of 'abetment of suicide' as enacted in the Indian Penal Code under Section 306 also covers abetment of suicide by married woman. Though section 306 does not exclusively deal with the crimes against women yet in large number of the cases under this section married women have been found to be the victim.

In large number of cases registered under Section 306 of the Code, wife committed suicide due to harassment in her matrimonial home. In most of such cases the husband or his relatives or in-laws were allegedly guilty of ill-treating and harassing the wife or daughter-in-laws on the grounds of dowry or other grounds. When the harassment or cruelty meted out to the wife or daughter-in-law, her life became unbearable and she took the extreme step of committing suicide. Many of the cases under Section 306 would have come in the category of dowry death and attracted Section 304B if there was no requirement of the essential ingredients of Section 304B. Therefore, a case, which would have otherwise been tried under Section 304B but for the condition of death occurring within seven years of her marriage, comes under Section 306 of the Indian Penal Code 1860.

(d) Presumption as to abetment of suicide by married women

As Section 113B of the Indian Evidence Act give the scope for presumption of a dowry death under Section 304B of Indian Penal Code, Section 113A of the Evidence Act in similar manner deals with the presumption in cases of abetment of suicide under Section 306 Indian Penal Code, if the deceased is a married woman. Section 113A of the Evidence Act provides that when the question is whether the commission of suicide by a woman had been abetted by her husband or relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case that such suicide had been abetted by her husband or by such relatives of her husband.

292 Supra not 290, at p. 86.
293 Ibid.
For the purposes of this section 'cruelty' shall have the same meaning as in Section 498A of the Indian Penal Code.

(e) Matrimonial cruelty

In India, certain forms of domestic violence have been made offence under the Indian Penal Code. Section 498A of the Code is one of the sections which deal with domestic violence in the form of matrimonial cruelty, whether it is physical or mental. This section makes matrimonial cruelty an offence. This section was enacted to meet out the cases of dowry related violence including dowry deaths against the married women. This section was inserted in the year 1983 by the Criminal Law (Amendment) Act with the objective to protect the woman who is being harassed by her husband or relatives of husband. 294

Section 498A provides that whoever, being the husband or the relative of the husband of a woman, subjects such women to cruelty shall be punished with imprisonment up to three years and shall also be liable to fine. For the purposes of this section the word “cruelty” means (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the women, or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demands.

Thus the term ‘cruelty’ under this section has wide scope to include various kinds of cruelty including the incidents of domestic violence against women.

The offences under section 498A is cognizable295 if information relating to the commission of the offence is given to an officer in-charge of a police station by the person aggrieved by the offence or by any person related to her by blood, marriage or adoption or if there is no such relative, by any public servant. 296

295 Cognizable offence means any offence for which, a police officer may, in accordance with the First schedule of Criminal Procedure Code 1973 and under any other law for the time being in force, arrest without warrant.
296 Section 498A, Chapter XXA, Cruelty by husband or relatives of husband, in the First Schedule Criminal Procedure Code, 1973.
The provision of Section 498A was enacted to meet the social challenge to save married women from being ill-treated by husband or his relatives\textsuperscript{297} and ventilate the grievances about atrocities of newly married brides due to dowry or other such similar demands from their husband or in-law.\textsuperscript{298} Another important feature of this section is that it does not provide any period within which cruelty will be punishable after the marriage. Thus any married women can seek protection under this section. Furthermore this section makes cruelty in itself an offence irrespective of its causes.

(f) Hurt and Grievous Hurt

Criminal law recognises two type of physical hurt i.e. simple hurt and grievous hurt. Causing hurt and grievous hurt against women is a common form of domestic violence as simple injury or serious injury is one of the forms of domestic violence. Section 319 of the Indian Penal Code defines the expression ‘hurt’ as causing bodily pain, diseases or infirmity to any person. The expression ‘hurt’ connotes simple injury; however, ‘grievous hurt’ relates to serious injury/injuries. Under Section 320 of the Indian Penal Code grievous hurt include eight categories of serious hurt, which are:-

- Emasculation;
- Permanent privation of the sight of either eye;
- Permanent privation of the hearing of either ear;
- Privation of any member or joint;
- Destruction or permanent impairing of the powers of any member or joint.
- Permanent disfiguration of the head or face;
- Fracture or dislocation of a bone or tooth;
- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

These are the general provisions under the criminal law where any person can be punished for causing voluntarily hurt or grievous hurt. Thus if hurt or grievous hurt is caused voluntarily to a married woman/woman in the matrimonial relationship, she can seek the protection under these provisions too in addition to other available

\textsuperscript{297} Supra note 6. at p. 4.
\textsuperscript{298} Supra note 22. at p. 35.
provisions in the Penal Code or other laws. Sections 319, 321, 323 and section 324 deals with the cases of hurt whereas Sections 320, 322, 325 and section 326 of Indian Penal Code provides the relevant provision for the offence of grievous hurt.

Thus if the act of hurt or grievous hurt was done with the intention to hurt or to cause grievous hurt it is punishable under the aforesaid provisions of the Indian Penal Code, 1860.399

(g) Forceful termination of pregnancy amounts to violence against women

In the view of Sections 313 to 316 of Indian Penal Code female infanticide or forcing the wife to terminate her pregnancy are also varieties of domestic violence which is recognized as an offence under the Indian Penal Code, 1860.300

(h) Wrongful Restraint and Wrongful confinement

Another common form of domestic violence is in the form of wrongful restraint and wrongful confinement of women within her own home. Section 339 and Section 340 of the Indian Penal Code deals with the offence of wrongful restraint and wrongful confinement respectively. Section 339 lays down that whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person. Thus if a woman has a right to proceed in any direction, but still she is stopped from going out of the house or her husband or relative of her husband does not let her enter a particular area or place of work then in these situations, all persons who put wrongful restraint on her will be liable under Section 339 read with Section 341 for simple imprisonment up to one month or fine up to five hundred rupees.

Section 340 of Indian Penal Code defines wrongful confinement. It lays down that whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits is said “wrongfully to confine that person.

Thus if a woman is locked up or is threatened that she will be subjected to violence if she leaves her house, then husband or any relative of the husband can be

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299 Supra note 22, at p. 36.
300 Ibid.
punished for wrongful confinement.\footnote{Supra note 21. at p. 32.} This is a common form of domestic violence which is meted out to women to give them a lesson after family dispute. In many of such cases women are locked in rooms and not allowed food or other necessary things of life. Under Section 342 maximum punishment for wrongful confinement is one year and fine which may extend to Rs. 1000/-\footnote{Section 343 of the Indian Penal Code, 1860 provides that whoever confines any person for three days or more shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both.} The time period for which a woman is confined is not relevant but if a person wrongfully confined a woman for three days or more, he/she will be liable for a greater punishment\footnote{Section 344 of the Indian Penal Code, 1860—provides that whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.} and if a person wrongfully confines a women for ten days or more, he/she will be liable for even greater punishment.\footnote{Section 375 exception 2 of Indian Penal Code as substitute by the Criminal Law (Amendment) Act 2013 lay down that "sexual intercourse or sexual acts by a man with his own wife, the wife not being 15 years of age, is not rape."} 

(i) Marital Rape

Marital rape, which can also be called as spousal rape is non-consensual sex in which the perpetrator is the victim’s spouse. It is a form of domestic violence committed against the wife. Indian law recognizes marital rape in cases where the girl is below the age of 15 years. Thus a man is not liable to be punished for raping his wife if she is above the age of 15 years.\footnote{Superseded by the Criminal Law (Amendment) Act, 2013. Sec 9, brought into force 3-2-2013.} However there was a provision in the Indian Penal Code under Section 376 before the Criminal Law (Amendment) Act 2013, which provides the milder punishment only up to two years in case a man raped his own wife and she is not under twelve years of age. But now that provision has been repealed by the Criminal Law (Amendment) Act 2013. Thus now husband will be liable for rape of his own wife if she is under age of 15 years. Furthermore sexual intercourse by husband upon his wife, who is living separately, whether under a decree of separation or otherwise, without her consent is an offence under section 376B of Indian Penal Code, punishable with imprisonment, which shall not be less than two year but which may extend to seven years.\footnote{Substituted by the Criminal Law (Amendment) Act, 2013. Sec 9, brought into force 3-2-2013.}
(j) Sexual abuse of women

The incidence of sexual abuse of females in their own home by their own relatives is greater in society. But such cases of sexual abuse are the least reported crimes in India, because of the so called reputation of the family. These crimes can be committed against the females of any age, even a small baby of little age can be the victim of this abuse. Generally in India female children are more vulnerable to abuse in their own home. Section 354\textsuperscript{306} of the Indian Penal Code deals with the case of sexual abuse of the female and makes the use of assault or criminal force against woman with intent to outrage her modesty as a cognizable offence. This is a general section which covers all types of sexual abuses, whether outside the home or inside the home. The word ‘modesty’ has not been defined in the Indian Penal code. Modesty in Section 354 Indian Penal Code is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.\textsuperscript{307}

The test to determine whether modesty of a woman has been outraged is whether action of offender is such as could be perceived as one which is capable of shocking sense of decency of a woman.\textsuperscript{308}

Thus sexual abuse of woman in her own home is the worst form of domestic violence committed against her by her own near and dear.

(k) Misappropriation of the Wife’s Property/Criminal Breach of Trust

Dishonest misappropriation or conversion of wife’s property i.e. \textit{stridhan}, for his “own use by the husband or relatives of the husband” is a common form of domestic violence. \textit{Stridhan} means any property which is gifted to a woman by her parents, siblings, in-laws or any other relative before the marriage, at the time of marriage or after the marriage. Over this property she alone has the absolute right of ownership and can deal with any way she desires.\textsuperscript{309}

\textsuperscript{306} Section 354 Indian Penal Code read as follows: whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which shall not be less than five years, and shall also be liable to fine.

\textsuperscript{307} Supra note 290, at p. 623.

\textsuperscript{308} Ram Kripal S o Shyam Lal Charmakar v. State of Madhya Pradesh 2007 Cri.L.J. 2302 SC.

\textsuperscript{309} Supra note 284, at p. 71.
The mere factum of the husband and wife living together does not entitle either of them to commit a breach of criminal law and if one does then he/she will be liable for all the consequence of such breach. In the case of stridhan property, the title of which always remains with the wife though possession of the same may sometimes be with the husband or other member of his family, if the husband or any other member of his family commits such an offence they will be liable to punishment for the offence of criminal breach of trust under Section 405 and 406 of Indian Penal Code. If the stridhan property of a married woman is placed in the custody of her husband or in-laws they would be deemed to be trustees and bound to return the same if and when demanded by her. If the husband or his relative dishonestly misappropriated or sold that property or failed to return that property on demand, they will be liable for punishment under criminal law.

These sections of the Indian Penal Code are very important in a situation when a woman decides to leave her matrimonial home due to unbearable domestic violence and want to take her stridhan or other property with her. If husband or his relative refuse to return that property or dishonestly misappropriate, she can use the provisions dealing with criminal breach of trust.

(l) Bigamy

If a husband remarries during the subsistence of first marriage, which must be valid and is not null or void, he shall be guilty of an offence known as ‘bigamy’ under English law. By the nature, bigamy is considered to be one of the kinds of domestic violence against women. Section 494 and 495 of the Indian Penal Code deals

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510 Section 405 lay down that whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust.”

511 Section 406 lays down that whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three year or with fine or both.


513 Ibid.

514 Section 494 of Indian Penal Code lays down that “whoever having a husband or wife living, marries in any case, in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

515 Section 495 lays down whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former
with the bigamous marriage. These sections apply to all Hindus, Christians and Parsis whether male or female. But in case of Muslim it applies only to females and not to males because under Muslim personal law a male can have four wives at a time but a female is not permitted to have more than one husband at a time. Thus whether a husband is guilty under this section or not depends on the religion he belongs.\(^{316}\)

Under Sections 494 and 495 of the Indian Penal Code husband will be guilty of the offence of bigamy if:-

- He has a wife who is alive.
- He has married again.
- His second marriage is ‘void’ on the ground that he is already married, and
- First marriage is valid i.e. not pronounced ‘void’ by the court having jurisdiction.
- First marriage must be subsisting i.e. not dissolves by divorce.

These sections further state that husband shall not be liable if the whereabouts of the first wife have not been known for a continuous period of seven years or more and shall not have been heard of by such person as being alive within that time, provided further that he inform the woman with whom such subsequent marriage is contracted of, the real state of facts so far as the same are within his knowledge.\(^{317}\)

It is to be noted that conversion to Islam only for the purpose to marry a second time is an offence of bigamy. The Apex Court in *Sarla Mudgal v. Union of India*\(^{318}\) has held that if a husband has converted to Islam only, so that he can get married again. he will be guilty of bigamy in his second marriage itself.\(^{319}\)

**(m) Adultery**

When a man is having sexual relationship with another married woman, without the consent or connivance of her husband, he shall be liable for punishment for the offence of adultery under section 497 of the Indian Penal Code, 1860. This is...
an offence which is committed by a third person against a husband in respect of his wife. The main feature of this offence is that the male offender alone has been made punishable.

Under Section 497 a woman’s husband is guilty of adultery if:

- He has sexual intercourse with a woman whom he knows or has reason to believe to be the wife of another man.
- Such sexual intercourse must be without the consent or connivance of the husband.
- Such sexual intercourse must not amount to rape.

The law relating to adultery is not fair because it does not give right to a woman to prosecute her husband who commits adultery. Thus, a woman has no right to prosecute her husband if he is committing extra-marital offences and thereby causing mental cruelty against woman. This offence also becomes the cause of domestic violence against women.

Thus these are the various kinds of offences under the Indian Penal Code which are committed against the women in their matrimonial home by the husband or relatives of husband. These offences mostly cover all the incident of domestic violence against women, which they generally face in their day to day life.

4.4.2 Provision under the Criminal Procedure Code, 1973

(As amended by the Criminal Law Amendment Act, 2013)

Criminal Procedure Code provides machinery for the punishment of offences as provided in the substantive Criminal Law i.e. Indian Penal Code. This code supplements the Indian Penal Code by providing rules of procedure with a view to prevent offences being committed and bringing the offenders to justice. This code contain various pro-woman procedural provisions with a view to afford them legal protection while their dealing with various agencies of criminal law administration. Additionally, this code also provides the provisions for maintenance of wife, children and parents. There are various pro woman provisions to ensure justice to women in this code which are as follows:

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320 Id., at p. 38
**Section 26** To provide somewhat comfortable environment in the court room for the victim of rape proviso to Section 26 (1) lays down that any offence under Section 376, 376A, 376B-376C, 376D, 376 E shall be tried as far as practicable by a court presided over by a women.

**Section 41** Clause (b) of this section provides that any police officer may, without an order from a Magistrate and without a warrant, arrest any person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or may extend to seven years whether with or without fine, if the certain condition are satisfied such as where arrest necessary for proper investigation, to prevent such person from causing the evidence disappear or tempering with such evidence, to prevent such person from making inducement, threat to any person acquainted with the facts of the case etc. This section is important for woman because most of the crimes committed against women are cognizable and punished with imprisonment up to seven years.

**Section 46** This section provides special procedure for arrest of a woman, such as arrest of a women only by female police officer or no arrest after sun set and before sun rise etc.

**Section 51** This section makes provision for search of the arrested person. Sub section (2) of this section lays down that whenever it is necessary to cause a female to be searched the search shall be made by another female with strict regard to decency.

**Section 54** This section provides the procedure for medical examination of the arrested person. Sub-section (1) of this section lays downs that medical examination of a female shall be made only by or under the supervision of female medical officer or a female registered medical practitioner.

**Section 64** This section provides that if personal service of summons cannot be effected, the law permits service of summons on some adult male member
of the family. Thus law does not permit service of summons on female member of the family.

**Section 125 to 128** These sections are of utmost importance for women because they provide provisions for maintenance of wives, children and parents.

**Section 149** This section provides that every police officer may interpose for the purpose of preventing and shall, to the best of his ability prevent the commission of any cognizable offence. Thus under this section police officer can prevent any cognizable offence being committed against women.

**Section 151** Under this section a police officer knowing of a design to commit any cognizable offence may arrest without order from a magistrate and without a warrant, the person so designing if it appears to such officer that the commission of the offence cannot be otherwise prevented.

**Section 154** This section provides procedure regarding information in cognizable cases and their registration by officer in charge of police station. Thus if any cognizable offence is committed against women, she can register the case under this section. It is not necessary for this section that case should be registered in the police station having jurisdiction. Such type of case can be registered in any police station if committed against women under certain section of Indian Penal Code e.g. section 370, section 376, etc. and later on can be forwarded to the police station having jurisdiction over the area in which the crime was said to have been committed. This is also known as zero number F.I.R.322

Further provisos are inserted by the Criminal Law Amendment Act, 2013 in sub-section (1) which provided that if information is given by the woman against whom an offence under Sections 326 A, 326 B, 354 A, 354B, 354 C, 354 D, 376, 376 A to 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer:

Provided further that-

a) If person against whom an offence under Sections 354, 354A, to 354D and Sections 376A to 376E or Section 509 of Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person’s choice, in the presence of an interpreter or a special educator, as the case may be;
b) The recording of such information shall be videographed;
c) The police officer shall get the statement of the victim recorded by a Judicial Magistrate as soon as possible.

**Section 157** Proviso inserted in sub-section (1) of this section provides that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents, or guardian or near relatives or social worker of locality.

**Section 160** This section lays down that no police officer shall required attendance of female witness at any place other than the place in which such woman resides.

**Section 161** This section deals with examination of witnesses by police. Proviso inserted by the Criminal Law Amendment Act, 2013 in sub-section (3) of this section lays down that the statement of a woman against whom an offence under Sections 354, 354A to 354D and Sections 376, 376A to 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.

**Section 164** This section deals with the provisions regarding recording of confession and statements by the Judicial Magistrate or Metropolitan Magistrate. Sub-section (5A) of this Section is of special importance for women as it provides that in cases punishable under Sections 354, 354A to 354D.
Sub section (1) or sub-section (2) of section 376, section 376 A to section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5) i.e. such manner as provide for the recording of evidence, as soon as the commission of the offence is brought to the notice of the police.

Provided that if person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement; provided further that if this assistance is taken then it shall be videographed.

Furthermore clause (b) of sub-section (5A) provides that any statement recorded under clause (a) of sub-section (5A) of temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137\(^{323}\) of the Indian Evidence Act, 1872 and maker of the statement can be cross-examined on such statement without the need for recording the same at the time of trial.

**Section 164A** This section lays down procedure for the medical examination of the victim of rape.

**Section 173** Sub-section (1A) provides that investigation in relation to rape of a child may be completed within 3 months from the date on which the information was recorded by the officer in charge of the police station.

**Section 174** This section provides for investigation by the police in cases of unnatural death under suspicious circumstances. Further clause (3) of this section provides that when case involve suicide by a woman within seven years of her marriage, which raise reasonable suspicion or when any relative of the woman has made a request in this behalf or when there is any doubt regarding the cause of death, the police officer can forward the body for medical examination.

\(^{323}\) Section 337 of Evidence Act provides that the examination of a witness by the party who calls him shall be called his examination-in-chief and the examination of a witness by the adverse party shall be called cross-examination.
Section 176 This section provides the procedure for inquiry by Magistrate in cause of unnatural death either instead of, or in addition to, the investigation held by police officer. Clause (b) of Sub-Section (1A) of this section provides that where rape is alleged to have been committed on any woman, while she is in the custody of the police or in any other custody authorized by the court, the Judicial Magistrate shall hold an inquiry.

Section 197 This section lays down that no court shall take cognizance of offence committed by judges or public servant, while acting or purporting to act in the discharge of his official duty except with the previous permission of the Government.

But no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Sections 166A, 166B, 354, 354A to 354D and Sections 376, 376A to 376E or 509 of the Indian Penal Code.

Section 198 This section provides prosecution for offences against marriage. This section lays down that no court shall take cognizance of an offence punishable under chapter XX of the Indian Penal Code except upon a complaint made by some aggrieved by the offence.

But in case of a woman, who according to local customs ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on her behalf.

Provided further that where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father’s or mother’s brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption.

Section 198A This section lays down that court can take cognizance of offence punishable under Section 498A of the Indian Penal Code either on the police report of facts which constitute such offence or upon a complaint

Chapter XX of the Indian Penal Code, 1860 deals with the offences relating to marriage.
made by the person aggrieved by the offence or by her father, mother brother etc. as aforesaid.

**Section 198B** This section provides that no court shall take cognizance of an offence punishable under Section 376B of the Indian Penal Code where the persons are in a marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.

**Section 273** This section provides that all evidence taken in the course of the trial shall be taken in the presence of the accused. But proviso inserted by the Criminal Law Amendment Act, 2013 to this section provides that where the evidence of a woman below the age of eighteen years, who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measure to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

**Section 309** This section provides that in every inquiry or trial the proceeding shall be held as expeditiously as possible. Provided that when inquiry or trial relates to an offence under Sections 376, 376A to 376D of the Indian Penal Code the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.

**Section 327** This section lays down that all offences shall be tried in open court to which general public may have access. But sub section (2) of this section provides that inquiry into or trial of rape or an offence under Sections 376; 376A to 376 E of the Indian Penal Code shall be conducted in camera.

Provided further that camera trial shall be conducted by a woman judges or Magistrate as far as practical. Besides this, it shall not be lawful for any person to print or publish any matter in relation to any such camera proceeding and the aforesaid provision except with the previous permission of the court. But this ban may be lifted subject to maintaining confidentiality and address of parties.
Section 357A This section makes scheme for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Thus women who are victim of crime can obtain compensation under this section.

Section 357B It provides that the compensation payable by the state government under Section 357A shall be in addition to the payment of fine to the victim under Sections 326A or 376D of Indian Penal Code.

Section 357C According to this section all hospitals, public or private, whether run by the Central Government, State Government, local bodies or any other person, shall immediately, provide the first aid or medical treatment, free of cost to the victims of any offence covered under Sections 326A, 376, 376A to 376E of the Indian Penal Code and shall immediately inform the police of such incident.

Section 416 This Section provides for the postponement of capital sentence on pregnant woman and commutation of that sentence into imprisonment for life.

Section 437 This section gives special right of bail for women in non-bailable offences. It provides that a woman may be released on bail even if she is charged with an offence punishable with death or imprisonment for life or has been previously convicted.

Thus these are the various provisions which are specially enacted, inserted or substituted in due course of time for the women in Criminal Procedure Code 1973.

(a) Provision for maintenance of wife under Criminal Procedure Code

It is natural and fundamental duty of every person to maintain his wife, children and parents if they are unable to maintain themselves. Sections 125 to 128 of the Criminal Procedure Code give effect to this natural duty of a person by providing provision for maintenance of wives, children and parents.
Section 125 of the code is a measure of social justice and specially enacted to protect women and children and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39.

Besides personal laws a wife can also claim maintenance under Section 125 of the Criminal Procedure Code if she is unable to maintain herself and her husband neglect or refuse to maintain her despite of having sufficient means. This provision has no relation to liability to maintain under the personal laws of the parties. Thus this section is a uniform piece of legislation for providing maintenance to the wives irrespective of their religion.

For the purpose of this section 'wife' includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried. Under this section a wife can file application for maintenance if she is legally wedded to a person and is abandoned by him.

This section also makes provisions for the maintenance of minor daughter, whether legitimate or illegitimate if she is unable to maintain herself. Further minor female child, who is married can also claim maintenance if her husband is not

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325 Section 125 of Criminal Procedure Code lays down that if any person having sufficient means neglects or refuses to maintain:-
   a) His wife, unable to maintain herself; or
   b) His legitimate or illegitimate minor child, whether married or not unable to maintain itself, or
   c) His legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
   d) His father or mother, unable to maintain himself or herself.

A Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate think fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause(b) to make such allowance, until she attains her majoritty, if Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this subsection, order such person to make a monthly allowance for the interim maintenance of his wife, or such child, father or mother, and the expenses of such proceeding which the magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the aforesaid proviso shall, as far as possible be disposed of within sixty days from the date of the service of notice of the application to such person. Further clause (b) of explanation provides that “wife” includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried.

326 Supra note 321. at p. 130.
possessed of sufficient means. A person’s mother can also claim maintenance under this section if she is unable to maintain herself.

Thus under this section three kinds of relation i.e. wife, daughter or mother can claim maintenance from a person having sufficient means but still neglects or refuse to maintain them.

This section provides a speedy relief, which is available to all, irrespective of whether or not any matrimonial proceeding is going on or pending in any court. Under Sub-section 3 of Section 125, if any person is ordered to pay maintenance, but he fails without sufficient cause to comply with the order then in that situation, Magistrate may, for every breach of order, issue a warrant for levying the amount due in the manner provided for levying fines, and may also sentence such person with imprisonment which may extend to one month or until payment is made.

Under sub-sections 4 and 5 of Section 125 wife shall not be entitled to receive an allowance for maintenance or Magistrate shall cancel the order on proof, if firstly she is living in adultery, secondly she refuses to live with her husband without sufficient reason, thirdly if they are living separately by mutual consent.

Muslim divorced woman is also entitled to maintenance under this section, if she and her former husband make declaration under section 5 of Muslim (Protection of Rights on Divorce) Act, 1986, either jointly or separately that they would prefer to be governed by the provision of Sections 125 to 128 of the code of Criminal Procedure Code, 1973.

Section 126 of the code provides the procedure for disposal of application for maintenance. Sub section 2 of the section is of much importance for women as it provides that where such person is willfully avoiding service or willfully neglecting to attend the court, the Magistrate may pass an ex parte order.

Section 127 of the code empowers the Magistrate to decrease or increase the amount of maintenance or interim maintenance due to change in the circumstance of the person paying or receiving the amount. Further Magistrate can also cancel such order, if he is satisfied that she has remarried or has received the whole of sum under any custom or personal law applicable to parties or she had voluntarily surrendered her right to maintenance or interim maintenance.
Section 128 of the code provides provision for enforcement of the order of maintenance.

Thus it can be said that these provisions under the criminal law provide security to discarded wives in nature of maintenance, which they can claim under these provisions in addition to other available remedies in civil as well as personal law regarding maintenance.

4.5 Women under India Evidence Act

The Law of Evidence occupies a unique position in the field of substantive and procedural laws. The assertion of substantive rights can only be established by evidence which must be relevant and admissible according this law.\(^{327}\) The law of evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries and proceedings. It bears the same relation to a judicial investigation as logic to reasoning.\(^{328}\) The Indian Evidence Act, 1872 contain a set of rules and allied issues governing admissibility of evidence in courts in India. Therefore, this law plays a pivotal role in the effective functioning of judicial system.\(^{329}\)

The law of evidence has groomed itself for facing the emerging development which poses unprecedented problems in the collection of evidence and proof of facts.

There are certain provisions in the Indian Evidence Act 1872, which are specifically inserted to safeguard the women victims of crime and to provide them justice, even in the absence of cogent evidence. These provisions are as follows:

**Section 53A**\(^{331}\) This section lays down that in a prosecution for an offence under section 354, section 354A to section 354D, section 376, Section, 376A to Section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous


\(^{329}\) Supra note 327, See preface

\(^{330}\) Ibid.

\(^{331}\) Inserted by the Criminal Law (Amendment) Act, 2013.
sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

Section 113A

This Section deals with the presumption in the cases of abetment of suicide under section 306 of Indian Penal Code. It lays down that when the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. For the purposes of this section 'cruelty shall have the same meaning as in section 498A of the Indian Penal Code, (45 of 1860).

Section 113B

This section is attracted in cases of dowry deaths falling under section 304B Indian Penal Code. It lays down rules regarding presumption in case of dowry death. This section provides that when the question is whether a person had committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death. For the purpose of this section, dowry death shall have the same meaning as in Section 304B of Indian Penal Code.

Thus both these sections i.e. Section 113A and 113B of the Indian Penal Code gives scope for presumption against the accused and shift the burden of proof to him if other essentials, as required under Section 306 and 304B as the case may be are...

332 Inserted by the Criminal Law(Second Amendment) Act. 1983.
333 According to Section 4 of the Indian Evidence Act.1872 whenever it is provided that court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. Thus court has discretion to presume a fact or not to presume it.
334 Inserted by the Criminal Law (Second Amendment) Act. 1983.
335 Section 4 of the Evidence Act lays down that whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
available. Both these sections were inserted keeping in view the impediments in the pre-existing laws in securing evidence to prove the cases of abetted suicide of the married women and dowry related deaths.\(^{336}\)

**Section 114A**\(^{337}\) This section provide for presumption as to absence of consent in certain prosecution for rape. It lays down that in prosecution for rape under clauses (a) to (n) of sub-section 2 of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such women states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

**Section 146** This section lays down rule regarding questions which are lawful in cross-examination. In its proviso\(^{338}\) it is provided that in a prosecution for an offence under Section 376, Section 376A to Section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put question in the cross-examination of the victim as to the general immoral character or previous sexual experience of such victim with any person for proving such consent or the quality of consent.

Thus these are the specific provisions in the Indian Evidence Act to provide the justice to the women.

**4.6 Woman and Cyber Laws**

Cyber laws such as Information Technology Act, 2000 is that branch of law which deals with cyber crimes. Cyber crimes\(^{339}\) may be defined as any criminal activity in which a computer or network is the source, tool or target or place of crime.

\(^{336}\) Supra note 290, at p. 74.

\(^{337}\) Substituted by the Criminal Law (Amendment) Act, 2013.

\(^{338}\) Substituted by the Criminal Law (Amendment) Act, 2013.

\(^{339}\) The Cambridge English Dictionary defines Cyber Crimes as crimes committed with the use of computer or relating to computer especially through internet quoted in Jeet, Shobhna, Cyber Crimes against Women in India Information Technology Act. 2000 available at http://www.elixipublisher.co. last visited on dated 02-01-2014.
Thus these crimes are committed in a cyber space. Cyber crimes may be committed against person, property or government. The common types of cyber crimes may include hacking, cyber stalking, cyber pornography, phishing, online bullying, online defamation, cyber terrorism. These crimes targets men and women alike. But certain offences such as email/profile hacking, morphing, spoofing obscene publications, cyber stalking, and cyber pornography, internet voyeurism, cyber defamation, cyber bullying, email harassment, cyber black mailing/threatening, emotional cheating by impersonation, intimate partner violence through internet and abetment of such offences may happen more to women than their male counterpart. The phenomenal growth of internet and of information and communication technologies have provided new vista for these cyber crimes.

Cyber crime in context of women may be defined as a crime which is targeted against women with a motive to intentionally harm the victim, using modern telecommunication network such as the internet (chat rooms, emails notice/groups) and mobile phones (sms/mms).

The victim of cybercrime feels brutalized, horrified and even suicidal in some cases, not due to physical torture, but due to cyber assisted emotional torture, which is unique to women alone. Further a woman can also be forced to join pornography sites against her will and even without her knowledge through voyeurism which makes her vulnerable and this victimization can even lead to social isolation. Furthermore cyber bullying and online defamation may lead to cyber sexual attack on women, which are not happen in case of men. Cyber Crimes against women are carried out generally to destroy their personal reputation, create fear for physical safety and also monetary losses. The greatest distinguishing factor between male and female cyber victimization lies in the motive and the ways of victimization and after effect of the offence on the victim.

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340 Cyber space is some sort of place for interaction made available by networks of inter-connected computers. Quoted in Ploug, Thomas, ‘Ethics in Cyberspace: How Cyber space may influence interpersonal interaction’, 2009, p. 70.
344 Supra note 342, at p. 18.
345 Id., at p. 17.
346 Ibid.
347 Ibid.
Cybercrime against women is on at alarming stage and it may pose as a major threat to the security of a person as a whole. In India the “Cybercrime against Women” generally includes sexual crimes and sexual abuses on the internet. India has enacted Information Technology Act, in year 2000 to combat with cyber crimes. The Information Technology Act after the amendment of 2008 gives an extended list of offences and contraventions punishable under the Act.\textsuperscript{348} This Act now provides various provisions to protect the women from cyber crimes, which are enumerated in the table below:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Name of the offence</th>
<th>Section</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Identity theft-fraudently or dishonestly uses any electronic signature, password etc.</td>
<td>66C</td>
<td>Up to 3 years and fine up to 1 lakh</td>
</tr>
<tr>
<td>2</td>
<td>Cheating by personation, using a computer resource or computer device</td>
<td>66D</td>
<td>3 years and fine up to 1 lakh</td>
</tr>
<tr>
<td>3</td>
<td>Violation of privacy-intentionally or knowingly captures, publishes of transmits image of private area of any person</td>
<td>66E</td>
<td>3 years and fine up to 2 lakh or both</td>
</tr>
<tr>
<td>4</td>
<td>Publishes or transmits obscene material in electronic form which is lascivious or appeals to prurient interest.</td>
<td>67</td>
<td>On first conviction 3 years and fine up to 5 lakh</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2\textsuperscript{nd} conviction 5 years and fine up 10 lakh</td>
</tr>
<tr>
<td>5</td>
<td>Publishing, transmitting material containing sexually explicit act etc. in electronic form.</td>
<td>67A</td>
<td>1\textsuperscript{st} conviction 5 years and fine up to 10 lakh</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2\textsuperscript{nd} conviction 7 years and fine up to 10 lakh</td>
</tr>
<tr>
<td>6</td>
<td>Child pornography- publishing transmitting material depicting children in sexually explicit act in electronic form or creating text or digital images or collecting, seeking, advertising, browsing, downloading such image depicting children in sexually explicit acts etc.</td>
<td>67B</td>
<td>1\textsuperscript{st} conviction 5 years and fine up to 10 lakh</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2\textsuperscript{nd} conviction 7 years and fine up to 10 lakh</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7</th>
<th>Any person or an intermediary under a contract secures access to any material containing personal information and for causing wrongful loss or wrongful gain to someone, discloses it to another.</th>
<th>72D</th>
<th>3 years and fine up to 5 lack or both</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Punishment for abetment of offences under the IT Act</td>
<td>84B</td>
<td>If no separate punishment then with the punishment of commission of such offence</td>
</tr>
<tr>
<td>9</td>
<td>Punishment for attempt of offences under the IT Act</td>
<td>84C</td>
<td>If not separately punished for, then with one half of longest imprisonment prescribed for the commission of such offence/or with fine/or with both.</td>
</tr>
</tbody>
</table>

Thus this Information Technology Act as amended in 2008 widely covers the almost all cyber crimes which can be committed against women. The aforesaid section of the Information Technology Act can be applied in the following cyber crimes if committed against women:

### 4.6.1 Cyber Defamation

Cyber defamation occurs when with the help of computers and internet someone publishes derogatory or defamatory information or post defaming stories about the victim. Although this can happen to both genders, but women are more vulnerable. Section 67 of the IT Act, 2000 covers such type of cyber crimes.

### 4.6.2 Cyber Sexual Defamation

Cyber sexual defamation happens between real or virtually known people who out of frustration start publishing defaming stories in obscene languages on various social websites which subsequently turn into cyber pornography. Under Section 67, 67A and Section 72A of the Information Technology Act the accused can be booked for cyber sexual defamation against any women.

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4.6.3 Cyber bullying

It means the use of electronic communication to bully a person typically by sending messages of an intimidating or threatening nature. Sections 67, 70 and 72 of the IT Act cover such type of cybercrime when committed against a woman. Besides this accused can also be punished under the relevant provision of Indian Penal Code.

4.6.4 Cyber Pornography

Women and children are becoming the main victim of this form of cyber crime. Sections 67, 67A and 67B of the IT Act deals with such type of crime.

4.6.5 Cyber Stalking

It can be defined as the repeated acts of harassment or threatening behaviour of the cyber criminals towards the victim by using the internet or tele-communication services. Section 72 of the IT Act covered such type of offences when committed against women.

4.6.6 Hacking-Morphing and Email Spoofing

Hacking mean unauthorized access to computer system or network. It is the most predominant form of cyber crime. It is an invasion into the privacy of data. It mostly happens in a social online community to demean a woman by changing her whole profile into an obscene, derogatory one.

4.6.7 Morphing

When unauthorized user with fake identifies downloads victim’s pictures or reloads them after editing is known as morphing.

4.6.8 Email Spoofing

It is used to describe fraudulent email activity in which the sender’s address and other parts of the email header are altered to appear as though the email originated from a different source.

Hacking, morphing and email spoofing are inter-related and attract section 43 of the IT Act, which provides penalty for damage to computer, computer site etc. and Section 66 which provides hacking of the computer system as an offence.
Thus these are the various forms of cyber crimes against women which are covered by the Information Technology Act in India.

4.7 Women Specific Legislation

Violence against women in any of its form is inconsistent with their dignity and constitutes a major obstacle to the full realization of their human rights and fundamental rights as guaranteed by the Constitution of India. It is the duty of the state to take steps necessary for its eradication and ensure violence free environment to the women inside and outside the home. While the problems associated with gender based violence continue to be treated as criminal problems, but still there is need to redress these incidents of gender based violence against women with specific legislation. Specific legislation can ensure substantial change in the status of women by protecting them from any particular form of violence, such as dowry related violence, female infanticide and foeticide, immoral trafficking of women, sexual harassment of women, and domestic violence against women.

After independence various specific legislations have been enacted in favour of women to address the most serious problem of the society, which they are facing in their day to day life. These specific legislations are as follows:

4.7.1 Immoral Traffic (Prevention) Act, 1956

This Act was enacted in pursuance of the international convention for the suppression of immoral traffic in persons and the exploitation of the prostitution by others, signed by India at New York on the 9th day of May, 1950 and to give effect to the Constitutional mandate under article 23, which prohibits trafficking in human beings. This Act was passed with the object of inhibiting or abolishing trafficking in women and girls, and to stamp out the evil of prostitution, that was rampant in various part of the India. Originally this Act was known as the Suppression of Immoral Traffic in Women and Girls, but by amendment in 1986 this act was renamed as ‘The Immoral Traffic (Prevention) Act, 1956’.

This Act clearly define the terms such as ‘brothel’ ‘prostitution’, ‘Public Place,’ ‘Corrective Institution,’ Protective Home,’ Special Police Officer’ or

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‘Trafficking Police Officer’ etc. so that cases of trafficking and prostitution of women and girl can be dealt with effectively and properly.

This Act in itself is a self contained one, because it replete with all the procedure to conduct search, arrest of accused, removal of the victims from brothel and provision of mandatory presumption clauses pertaining to certain offences. This Act confers wide powers on the concerned authorities in matter of the rescue and rehabilitation of victims and survivors and provides for stringent action against exploiters as well as aggravated punishment when the offences are committed on children. Further this Act declares that offences committed under this Act would be cognizable. Further more special court can also be established for speedy trial of offences committed under this Act.

Thus there is no doubt that it is a draconian law with real teeth to deal with the traffickers of persons and runner of brothel houses. What is needed is a better understanding of the provisions of the Act in its right sense for its earnest and effective implementation by law enforcement agencies.

4.7.2 Dowry Prohibition Act 1961

This Act was enacted on 21st of May 1961 with the objective to prohibit giving or taking of dowry. This Act promises to curb the evil of dowry system, which has been prevalent in our society since ancient time. This Act makes the practice of dowry system punishable and at the same time ensures that any dowry if given does ensure for the benefit of the bride. This Act covered all persons irrespective of their religion. Parliament drastically amended the Dowry Prohibition Act, 1961 vide the Dowry Prohibition (Amendment) Act, 1984 and 1986 and made the offences cognizable, non-compoundable and nonbailable respectively. Further punishment for demanding dowry has been made more stringent and many other significant changes have been provided by these amendments. This Act defines the term ‘dowry’ in a broad sense and make giving and taking of dowry and abetment of the same as an offence under Section 3 of the Act. Section 4 of the Act provides penalty for demanding dowry directly or indirectly from the parents or other relatives or guardian of a bride or bridegroom. Thus mere demand of dowry is forbid under the law. According to

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352 Ibid.
Section 4A any marriage advertisement, which may allure a person for dowry is an offence. Section 5 of the Act declares all agreement for giving or taking dowry to be void. Further section 6 lay down that if any dowry is given then it should be used for the benefit of the wife or her heirs. In addition to this where any dowry is received by any person other than woman to whom it is given, that person shall transfer it to the woman within specified time and hold it in trust for the benefit of the woman until transferred to her, if such person fails to transfer any property within the time limit specified therefore, he shall be liable for punishment under the Act.

Under Section 8 of this Act state government may appoint Dowry Prohibition Officers to see that the provisions of this Act are compiled with and to prevent as far as possible the taking or abetting the taking of or the demanding of dowry.

Thus the main object of this Act is to eradicate the evil of dowry system from the society.

4.7.3 The Indecent Representation of Women (Prohibition) Act, 1986

This Act was enacted in 1986, with an object to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto. Section 3 of the Act prohibits a person from getting involved, directly or indirectly in the publication or exhibition of, any advertisement which contains indecent representation of women in any form. Section 4 prohibits, publication or sending by post of books, pamphlets, paper, film, photograph etc. containing indecent representation of women. Provided that Section 4 shall not apply to any book, pamphlet, writing, etc., the publication of which is proved to be justified, or which is kept or used bonafidely for religious purpose.

Section 6 of the Act provide penalty in case of violation of the provision of Section 3 and Section 4 of the Act. According to this section any person who contravenes these provisions shall be punishable with imprisonment up to two years and fine up to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for term of not less than six months but which may extend to five years and fine not less than ten thousand rupees but which may extend to rupees one lakh.
Section 7 provides punishment in case of offences committed by companies. This section imposed personal liability on persons responsible for the conduct of business of the company as well as the company for contravention of the provisions of the Act.

According to Section 8 of the Act offences under this Act shall be bailable and cognizable.

4.7.4 Maternity Benefit Act, 1961

Under the obligation imposed upon the state under Article 42 of the Constitution of India, to make provision for securing just and humane conditions of work and for maternity relief, the Parliament has passed the Maternity Benefit Act, 1961 to regulate the employment of women in certain establishments including specified organization, institution etc, for certain period before and after the child birth and to provide for maternity benefit and certain other benefits.

This Act is a social welfare oriented law, aimed at empowering women, by providing security i.e. both employment and financial, for women employees working in certain establishment for defined periods before and after the delivery.

Under Section 5 of the Act it is a right of the women to avail maternity benefit and employers are liable to pay the same. The Act also provides for cash and non-cash benefit, including maximum period of leave of 12 weeks, divided equally between pre and post birth periods. Non-cash benefits include a reduced work load, a medical bonus if the employer does not provide pre and post delivery support and two nursing break every working day till the child attain 15 months. Thus this Act provides job security and support to the pregnant women. Besides the aforesaid provisions, there are various welfare measures under this Act for securing the maternity relief to women.

4.7.5 The Commission of Sati (Prevention) Act, 1987

This Act was passed in the wake of the incident of the commission of sati in 1987, by a 18 years old girl, Roop Kanwar in the village Deorala in Rajasthan. This Act was enacted in 1987 with object to provide more effective prevention of the
commission of sati and its glorification and matters connected therewith or incidental thereto.

This Act provides the clear definition of ‘Sati’, which include not only the burning or burying alive of any widow along with the body of the deceased husband but also include such burning or burying of any woman with any relative or with any article, object or thing associated with the husband or such relative irrespective of whether such burning or burying is claimed to be voluntary or otherwise.

Further a definition of glorification in relation ‘Sati’ has been included, which include the observance of any ceremony; participating in any procession connected with the commission of sati or of any function to eulogies the person who had committed sati or the supporting, justifying or propagating the practice of sati in any manner. This definition also include the creation of a trust, or the collection of funds, or the construction of a temple or other structure or the carrying on of any form of worship or the performance of any ceremony thereat.353

Under Section 3 of the Act the offence of attempt to commit Sati will be punishable with the imprisonment for a term which may extend to one year or with fine or both. This is because in most cases the widow or the woman is compelled to commit Sati and invariably she will not be in a fit state of mind or will be laboring under a state of intoxication or stupefaction or other cause impeding the exercise of her free will.

Section 4 of the Act lays down that the abetment of Sati will be punishable with death or imprisonment for life and shall also be liable to fine, while the abetment of any attempt to commits Sati will be punishable with imprisonment for life and fine. Section 5 of the Act makes glorification of Sati an offence punishable with a minimum imprisonment of one year which may extend to seven years and with a minimum fine of five thousand rupees which may extend to thirty thousand.

Under sections 6, 7 and 8 of the Act the Collector or District Magistrate has been given the power to prohibit the doing of any act towards the commission of Sati in any area, if he is of the opinion that Sati is likely to be committed in such area. The state government or the collector or District Magistrate has also been empowered to

353 Sections 2 (b) and (c) of the Commission of Sati (Prevention) Act, 1987.
remove temples or other structures constructed for the glorification of Sati and to seize properties acquired for such purpose.

The offences under this Act will be triable only by a special court constituted under section 9 of the Act.

Section 16 of the Act provides that where any person is prosecuted of an offence under section 4, the burden of proving that he had not committed the offence under the said section shall be on him. Further section 18 provides that a person who is convicted of an offence of abetment of Sati will also be disqualified from inheriting the property in respect of whom Sati has been committed.

Thus this Act provides necessary and more effective measures to prevent the commission of sati and its glorification.

4.7.6 The National Commission for Women Act, 1990

This Act was passed in 1990 with an objective to constitute a National Commission for Women and to provide for matters connected therewith or incidental thereto. The main task of the commission shall be to study and monitor all matters relating to the Constitutional and legal safeguards provided for women, to review the existing legislations and suggest amendments, wherever necessary. Further the commission shall take up the cases of violation of the provision of the Constitution and of other laws relating to women with the appropriate authorities. It will also look into the complaints and take suo-moto notice of the cases involving deprivation of the rights of women in order to provide support legal or otherwise, to helpless women.

The commission may also call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal.

The commission shall monitor the proper implementation of all the legislations made to protect the right of women so as to enable them to achieve equality in all spheres of life and equal participation in the development of the nation.

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355 Section 10 of the National Commission for Women Act, 1990.
356 Supra note 354.
4.7.7 The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (As amended in 2003)

This Act was enacted in 1994 to prevent female foeticides and arrest the declining sex ratio in India. This Act was amended in 2003 to improve the regulations according to the new technology used in sex selection. This Act lays down provisions for:-

- The prohibition of sex selection before or after conception;
- For regulation of prenatal diagnostic techniques only for detection of genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders;
- The prevention of the misuse of the techniques for sex determination leading to female foeticide or matter connected there with or incidental thereto.

Use of these techniques for identifying the sex of the foetus and elimination of the foetus if it is a female is discriminatory against the female sex and affects and dignity and status of women. This Act regulates the use of such techniques and provides deterrent punishment to stop such inhuman act. Under this Act, the diagnostic centre, the specialist and also the machines all have to be registered. No unregistered Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall conduct activities relating to prenatal diagnostic techniques.

Section 3 of the Act provides that no medical geneticists, gynecologists, pediatrician or registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any person, any pre-natal diagnostic techniques at place other than a place registered under this Act. Section 3A lays down that no person including a specialist or a team of specialist in the field of infertility, shall conduct sex selection on any tissue, embryo, conceptus, fluid or gametes derived from woman or from man. Further Section 3B prohibit sale of ultrasound machines or any other equipment capable of detecting sex of foetus to any genetic counseling centre, genetic laboratory or clinic or any other person not registered under the Act.

Section 4 provides provision to regulate the use of pre-natal diagnostic techniques, like ultrasound and amniocentesis by allowing their use only to detect genetic abnormalities, metabolic disorder, chromosomal abnormalities, certain
congenital malformations, haemoglobinopathies, and sex-linked genetic diseases. It is also provided in this section that the person conducting ultra-sonography on a pregnant woman shall keep complete record thereof in the clinic.

Section 5 lays down that no person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

Section 6 of the Act prohibits the determination of sex. It provides that no person, no genetic counseling centre, genetic laboratory or clinic shall conduct pre-natal diagnostic technique including ultrasonography, for the purpose of determining the sex of foetus.

Section 22 of the Act provides that no person, organization, genetic counseling centre, genetic laboratories or genetic clinic capable of doing determination of sex of the foetus shall advertise this specific fact by means of any notice, circular including internet or any electronic media. Any person who contravenes this direction shall be punished with imprisonment up to three years and fine up to ten thousand rupees.

Section 23 lays down that any medical geneticist, gynaecologist, registered medical practitioner or any person who own a genetic laboratory or clinic or is employed in such centre, laboratory or clinic, and who contravenes any of the provisions of this Act or rule made there under shall be punishable with imprisonment up to three years and with fine up to ten thousand and on subsequent conviction imprisonment up to five years and fine up to fifty thousand rupees.

Provided that under section 23 (2) registration of any medical practioner who contravenes any of the provisions of this Act or rule made there under may be suspended or the name may be removed from the register of the state medical concerned for a period of five years or permanently as the case may be, on the report of appropriate authority

Sub section 3 of section 23 provides that any person who seeks the aid of genetic counseling centre, genetic laboratory or clinic or of a geneticist, sonologist etc. or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman, for the purposes which are not allowed in section 250
4 shall be punished with imprisonment up to three years and fine up to fifty thousand rupees for the first offence and for subsequent offence with imprisonment up to five years and with fine up to one lakh rupees. This provision shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection. All offences under this Act shall be cognizable, non-bailable and non-compoundable.

Thus an endeavour has been made by this Act to control sex selection of the foetus even at the pre-conception stage, but female foeticide cannot be checked fully until gender biasness remains in the society.

**4.7.8 The Protection of Women from Domestic Violence Act, 2005**

The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Domestic violence against women is undoubtedly a human right issue and serious deterrent to development. So there is need to protect women from all forms of violence especially that occurring within the family. The Protection of Women from Domestic Violence Act, 2005 is a significant piece of legislation that was enacted specifically to tackle the problem of violence against women within the family. But this does not mean that this issue of violence against women was not addressed earlier by any law. Earlier women victims of domestic violence may seek redressal of their grievances under the relevant provisions of criminal law. The Indian Penal Code 1860 recognizes several offences relating to violence against women, some of which directly addressed the issue of domestic violence. They are in the form of dowry death, female infanticide, abetment to commit suicide, hurt, grievous hurt etc. Another category of offences like wrongful restraint, or wrongful confinement, or use of force or assault etc are also specific offences that could be used to protect women from domestic violence.

In 1983 a new Section 498A was inserted by the Criminal Law (Amendment) Act, to specifically cover the cases of domestic violence against married women. But seeking relief under the relevant provisions of the criminal law may pose a problem especially where the victims were children or women who were dependent on the assailant. In fact, even where the victim was the wife of the assailant and approach

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the court under section 498A of Indian Penal Code, she would presumably have to move out of her matrimonial home to ensure her safety or face further violence as retaliation.\textsuperscript{359} Besides this, various legislations have been providing special protection for women which also indirectly addressed the issue of Domestic Violence as a category by itself.\textsuperscript{360} Provisions are also contained in the personal laws of the respective communities, to provide some relief to the women in cases of domestic violence, but these laws generally provide relief in matrimonial proceedings or regarding maintenance. The civil law too does not address this phenomenon in its entirety.

Before the enactment of Protection of Women from Domestic Violence Act, 2005 violence against women within family was not addressed as a category by itself under any civil or criminal law in India. Moreover there was no measure in place under these laws which allow women victim of domestic violence to continue stay in her matrimonial home in peace and harmony and yet raise her voice against the violence perpetrated against her.\textsuperscript{361}

In addition to the anomalies in the criminal law as well as civil law, in protecting the women from violence within the four walls of their home, women groups campaigns has been another factor that prompted the government to enact this law, since the early eighties women’s groups have been campaigning to bring about effective legislation to counter domestic violence. The women’s groups had to exert pressure on the government to enact a law for half of its citizen who faces a peculiar kind of gender based violence within their own home. All this together prompted the government to enact a specific legislation to protect the women from Domestic Violence.

The Protection of Women from Domestic Violence Act was passed in 2005, with an objective to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. This Act


\textsuperscript{360} Supra note 358, at p. 408.

\textsuperscript{361} Supra note 359, at p. 24.
is in nature of civil law, which is intended to protect the women from being victims of
domestic violence and to prevent the occurrence of domestic violence in the society.

There are various provisions in this Act, in which women can seek redressal of
their grievances and obtain the speedy reliefs.

The term 'domestic violence' under Section 3, has been made wide enough to
encompass every possibility as it covers all forms of physical, sexual, verbal,
emotional and economic abuse that can harm, cause injury to, endanger the health,
safety, life, limb or well-being, whether mental or physical, of the aggrieved person,
including harassment, harm, injury etc. ensuing out of unlawful demand for any
dowry to the women or her relatives. Thus the Act covers the entire gamut of
violence within the household and covers every eventuality. It is necessary to
mention here that while in determining whether any act, omission, commission or
conduct of the respondent constitutes “domestic violence” the overall facts and
circumstances of the case shall be a guiding factor.

Section 2 (a) of the Act provides the definition of ‘aggrieved person’ which is
equally wide and cover not only the wife but any woman who is, or has been, in a
domestic relationship with the respondent and who alleges to have been subjected to
any act of domestic violence by the respondent. Thus the daughter, mother, sister,
widowed relative, in fact, any woman residing in the household who is residing in
some way to the respondent is covered by this definition. Moreover, this Act in the
definition of domestic relationship seeks to cover all those women who are or have
been in a relationship with the abuser, or have lived together in a shared household
and are related by consanguinity, marriage or through a relationship in the nature of
marriage, adoption or are family members living together as a joint family.362 This
Act has broadened the scope of domestic relationship so that all women in domestic
relationship may ask for relief under the Act. Previously, only a woman who proves a
relationship with the respondent either by blood or marriage may avail of relief
against domestic violence. The present Act only requires the proof of a domestic
relationship as the basis for action. This provision goes a long way in recognizing
existing social realties in India, where a vast number of marriages are legally in valid

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362 See Section 2 (f) of the Protection of Women from Domestic Violence Act, 2005.
due to number of reasons. This law now makes it possible for the victims of violence in such relationship to approach the court for redressal of their grievances.\textsuperscript{363}

Section 2(q) of the Act defines the term "respondent" as any adult male person who is or has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under the Act. Further to include females in the category of respondent, it is provided in this definition that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner. Thus the definition also includes female relatives such as mother, sister and other female relatives or a respondent.

Aggrieved or affected woman can complaint to the concerned protection officer,\textsuperscript{364} police officer, service providers\textsuperscript{365} or Magistrate regarding the

\textsuperscript{363}Supra noted 359, at p.30.

\textsuperscript{364}Section 8 of the Act provides that the State Government shall, by notification, appoint such number of Protection Officer in each District as it may consider necessary and shall also notify the area or areas within which a protection officer shall exercise the powers and perform the duties conferred on him by or under the Act. It also provides that Protection Officer shall, as far as possible are women and shall possess such qualifications and experience as may be prescribed. The term and conditions of service of the protection officer and the other officers subordinate to him may also be regulated by rules.

Section 9 of the Act lays down the duties and function of the protection officer. This section provides that It shall be the duty of the protection officer:-

- To assist the Magistrate in the discharge of his function under the Act;
- To make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;
- To make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desire, claiming relief for issuance of a protection order;
- To ensure that the aggrieved person is provided legal aid under the Legal Service Authorities Act, 1987;
- To maintain a list of service providers providing legal aid or counseling, shelter homes, medical facilities in a local area with the jurisdiction of Magistrate;
- To make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;
- To get the aggrieved person medically examined, if she has sustain bodily injuries and forward a copy of the medical report to the police station and the concerned Magistrate;
- To ensure that the order for monetary relief under Section 20 is complied with and executed, in accordance with the procedure prescribed under Criminal Procedure Code, 1973;
- The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.

\textsuperscript{365}Section 10 of the Act provides for the registration of certain entities with the State Government as a service provider for the purpose of this Act. Any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 or under any other law, having the objective of protecting the rights and interests of women by lawful means including providing legal aid, medical, financial or other assistance shall be eligible to be registered.
incident of domestic violence against her. But this does not mean that other
person cannot complain on behalf of the victim. Section 4 of the Act provides
that any person who has reason to believe that an act of domestic violence has
been, or is being or is likely to be committed may inform about it to the
concerned Protection Officer. This Section also provides that the person who
is providing the information in good faith shall be exempt from any civil or
criminal liability for giving such information. It appear from this section that
under the term ‘any person’ neighbours, social workers, relatives, etc. can all
take initiative on behalf of the victim.

Thus in order to facilitate access to judiciary this Act has created auxiliary
services and creates an official cadres called protection officer and recognizes NGOs
as service providers to assist the victim of Domestic Violence.

Further Section 5 of the Act lays down the duties of a Police Officer,
Protection Officer, Service Provider and the Magistrate, who has received a complaint
of domestic violence or is otherwise present at the place of an incident of domestic
violence or when the incident of domestic violence is reported to him, to inform the
aggrieved person of her right to make an application for one or more reliefs under the
Act, the availability of service of service providers and Protection Officers, her right
to avail free legal services under the Legal Service Authorities Act, 1987 and her
right to file a complaint under Section 498A of the Indian Penal Code, wherever
relevant. It is also provided that this section shall not relieve any police officer from
his duty to proceed in accordance with law upon receipt of information as to the
commission of a cognizable offence.

Section 17 of the Act is of special importance for the woman as it provides
that irrespective of any other law, every woman in a domestic relationship 366 shall
have the right to reside in the shared household, 367 whether or not she has any right,

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366 Section 2 (f) of the Act read as- ‘domestic relationship’ means a relationship between two persons
who live or have, at any point of time, lived together in a shared household, when they are related
by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are
family members living together as a joint family.

367 Section 2 (s) of the Domestic Violence Act, 2005 lays down that “Shared household” means a
household where the person aggrieved lives or at any stage has lived in a domestic relationship
either singly or along with the respondent and includes such a household whether owned or tenanted
titled or beneficial interest in the same and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance with the procedure established by law.

Section 17 is merely declaratory of the right of the aggrieved woman to reside in a shared household. The procedure for securing the said right is given in section 19 that sets out the various elements which can be introduced in 'residence order'.

But in case aggrieved person leave her share household due to domestic violence or evicted from the share household by the respondent and aggrieved person has no place to live, then in that situation she can take shelter in shelter home until she obtain any relief under the relevant provisions of the Act, i.e. residence order, under Section 17 of the Act. There is a provision for shelter homes under this Act. Section 6 provides that if an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, such person in charge of the shelter home shall provide shelter to the aggrieved person in the shelter home.

Provided that shelter home shall not refuse shelter to an aggrieved person under the Act, for her not having lodged a domestic incident report, prior to the making of request for shelter in the shelter home.

Sections 12 to Section 29 of the Act deals with the procedural provision for obtaining orders of various reliefs, such as Protection Orders, Residence Orders, Monetary Reliefs, Custody Orders, and Compensation Orders etc. Section 12(1) of the Act, lays down that an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the

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369 Section 2(t) defines shelter home as “any shelter home as may be notified by the State Government to be a shelter home for the purpose of this Act.

370 Section 2(e) of the Act defines ‘domestic incident report’ as a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person. Under Rule 5 of the Protection of Woman from Domestic Violence Rules 2006 Protection Officer and service provider can prepare a domestic incident report as prescribed under the rules.

Magistrate seeking one or more relief under this Act. Such relief may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries sustained in the act of domestic violence committed by the respondent. While disposing of an application under sub-section (1) of Section 12 the Magistrate shall take into consideration any domestic incident report received by him from the protection officer or the service provider. Further, where a decree for any amount as compensation or damages, has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall be executable for the balance amount, if any, left after such set off. Under sub-sections 4 and 5 of this Section it is provided that Magistrate shall fix the first date of hearing of the application ordinarily within three days of its receipt and shall endeavour to dispose of every application within period of sixty days from the date of its first hearing. Section 13 of the Act provides that a notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served on the respondent or any other person within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate. Thus every endeavour has been made by this Act to provide speedy relief to the victim of Domestic Violence.

Section 15 of the Act provides that in any proceeding under this Act, the Magistrate may secure the services of such person, preferably woman whether related to the aggrieved person or not, including a person engaged in promoting family welfare for the purpose of assisting the court in the discharge of its function.

There is also a provision for camera proceeding under this Act. Section 16 provides that if the Magistrate considers that the circumstance of the case so warrant and if either party to the proceedings so desires, he may conduct the proceedings under this Act in camera.

According to Section 2(i) of the Act “Magistrate” means the Judicial Magistrate of the First class, or as the case may be Metropolitan Magistrate exercising jurisdiction under the Criminal Procedure Code, 1973 (2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or a domestic violence alleged to have taken place.
(a) Protection Orders

Section 18 of the Act provides that Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being *prima facie* satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person. A protection order may contain an order prohibiting the respondent from (a) committing any act of domestic violence (b) aiding or abetting in the commission of acts of domestic violence (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person (d) attempting to communicate in any form, whatsoever with the aggrieved person including personal, oral or written or electronic or telephonic contact. (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the aggrieved person, including her *stridhan* or any other property without the leave of the Magistrate. (f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence (g) committing any other act as specified in the protection order.

Thus under this section, a woman can approach the Magistrate for such an order not only upon being subjected to domestic violence but even at a stage when she apprehends domestic violence.

(b) Residence Order

This order secure the right of the women to reside in her marital home irrespective of whether she has a title over household or not. Such order is issued by the Magistrate under section 19. This section provides that while disposing of an application under sub section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place pass a residence order in favour of aggrieved person in following manner: firstly, restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household; secondly directing the respondent to remove himself from the shared household; thirdly restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides; fourthly restraining the
respondent from alienating or disposing off the shared household or encumbering the same; fifthly, restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or, sixthly, directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require.

It is also provided in this section that an order shall not be passed against any women directing her to remove herself from the shared household.

Sub-section (2) of Section 19 empowers the Magistrate to impose additional conditions and pass any other direction in order to protect or to provide for the safety of the aggrieved person or any child of her. Sub-section (3) provides for execution of a bond by the respondent for prevention of the domestic violence. Sub-section (5) empowers the Magistrate to pass an order directing the Officer-in-Charge of the nearest police station to give protection to the aggrieved person or to assist in implementation of the residence order.

It is also provided in this section that the Magistrate may impose on the respondent an obligation to discharge rent and other payment having regard to the financial needs and resources of the parties. Further Magistrate may direct the respondent to return to the aggrieved person her stridhan or any other property or valuable security to which she is entitled.

Thus Section 19 facilitates the enjoyment of the right to reside in the shared household irrespective of the feud relationship between the parties. This order is extremely helpful to the victim of domestic violence as most of the abused women in marital relationship suffer the abuse silently because they face the threat of being rendered homeless and destitute.373

(c) Monetary Relief

Section 20 of the Act lays down that while disposing of an application under Sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved

person and any child of the aggrieved person as a result of the domestic violence. Such relief may include the loss of earnings; the medical expense; the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and the maintenance for the aggrieved person as well as children. Sub-section (2) provides that the monetary relief shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. This section also empowers the Magistrate to order lump sum or monthly payment for maintenance. Sub-section (6) provides that on the failure of the respondent to make payments of the monetary relief, the Magistrate may direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

(d) Custody Orders

Section 21 of the Act lays down that notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief, grant temporary custody of any child or children to the aggrieved person or to the person making an application on her behalf and specify the arrangement for visit of such child by the respondent. However, the Magistrate may refuse to allow such visits if in his opinion such visits may be harmful to the interest of the child.

(e) Compensation Order

Section 22 lays down that in addition to other relief which may be granted under the Act, the Magistrate may, on an application by the aggrieved person, pass an order directing the respondent to pay compensation or damages or both to the aggrieved person for the injuries including for the mental torture and emotional distress, caused to her by the acts of domestic violence committed by the respondent.

374 According to Section 2(b) of the Protection of Women from Domestic Violence Act, 2005 ‘Child’ means any person below the age of eighteen years and includes any adopted, step or foster child.
(f) **Interim and Ex-parte Order**

In order to provide speedy relief to the aggrieved person in cases of domestic violence, provision has been made in this Act for interim, and ex-parte orders. Section 23 provides that the Magistrate may pass such interim order as he deems just and proper in any proceeding before him under this Act. Under Sub-section 2 of this section if the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent may commit an act of domestic violence, he may grant an ex-parte order on the basis of the affidavit filed by the aggrieved person under Section 18 to Section 22 of the Act.

All these orders under this Act can be altered, modified or revoked under Section 25 of the Act. This Section lays down that a protection order made under Section 18 shall be in force till the aggrieved person applies for discharge. In case there is a change in the circumstances, the Magistrate on being satisfied on application made by the aggrieved person or the respondent, may pass an order altering, modifying or revoking any order made under the Act.

To provide more relief and protection to the victim of domestic violence, section 26 of the Act provides additional remedy to the aggrieved person. This Section provides that any relief available under section 18 to 22 of the Act may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent, whether such proceeding was initiated before or after the commencement of this Act. Any relief which may be granted under the Act may be sought for in addition to and along with reliefs sought for in a suit or legal proceeding before a civil or criminal court. This section makes this mandatory for aggrieved person to inform the Magistrate of the reliefs obtained by her in any proceeding other than a proceeding under this Act. All the proceedings under Sections 12, 18, 19, 20, 22 and 23 shall be governed by the provisions of the code of Criminal Procedures. But court may lays down its own procedure for disposal of applications for any relief under Section 12 or for ex-parte order.¹⁷⁵

¹⁷⁵ Section 28 of the Protection of Women from Domestic Violence Act, 2005.
There is also a provision for appeal in this Act if any party to the proceedings is not satisfied with the order of the Magistrate. Section 29 provides that an appeal from the order made by the Magistrate shall lie to the Court of Session within thirty days from the date of service of order on the aggrieved person or the respondent, as the case may be, whichever is later.

**Penalties under the Act**

Section 31 and Section 33 dealt with penalties provisions respectively for breach of protection order by respondent and for not discharging duty by Protection Officer. Section 31 provides that a breach of protection order, or an interim protection order, by the respondent shall be an offence with imprisonment of either description which may extend to one year, or with fine which may extend to twenty thousand rupees, or both. Sub-section (2) provides that the offence of breach of protection order or interim protection order shall be tried as far as practicable by the Magistrate who had passed the order, which is alleged to have been breached. Sub-section (3) provides that the Magistrate, while framing charges regarding breach of orders may also frame charges under section 498A or any other provision of the Indian Penal Code, or the Dowry Prohibition Act, 1961 in case the facts disclose the commission of any offence under those provisions.

Section 32 of the Act lays down that the offence of breach of protection order or interim protection order by the respondent shall be a cognizable and non-bailable offence and the court may draw conclusion on the sole testimony of the aggrieved person that the offence has been committed. Offences of breach of protection order or interim protection order by the respondent shall be governed by the provisions of Code of Criminal Procedure, 1973.\(^{376}\)

Section 33 provides that any Protection Officer who fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause shall be punished, with imprisonment of either description for a term which may extend to one year or with fine which may extend to twenty thousand rupees or both. But as provided in Section 34 no prosecution or other legal proceeding shall lie against Protection Officer except on a complaint filed with the

\(^{376}\) Ibid.
previous sanction of the State Government or an officer authorized by the State Government for the purpose.

(h) **Counselling**

There is also a provision for counselling under Section 14 of the Act to settle the matter of domestic violence at any stage of proceeding under this Act. This section empowers the Magistrate to direct the respondent or the aggrieved person, either singly or jointly, to undergo counselling with any member of a service provider who possess such qualification and experience in counseling as laid down by the Central Government. The counsellor shall work under the general supervision of the court or the Protection Officer or both and shall conduct the counselling proceeding bearing in mind that the counseling shall be in the nature of getting an assurance, that the incidence of domestic violence shall not get repeated.

Thus it can be said with certainty that Domestic Violence Act, 2005 has provided an impressive set of civil law and criminal law provisions to provide justice to the victims of domestic violence.

This Act helps to demolish the private public divide in laws relating to family and gender. It acknowledges a social wrong that has for long been socially endorsed. It acknowledges that the home can be a site of violence against women where the state needs to intervene and shall intervene. The Act definitely provides a better alternative to tackling of domestic violence especially in terms of reliefs to the victim. The various remedial orders under the Act will help in the social and economic empowerment of women. It will provide respite to millions of women who suffer silently acts of domestic violence due to various reasons.

Furthermore, it can be said that this Act is a comprehensive legislation which has to be welcomed for its progressive spirit and content. It helps India in fulfill its international commitments under Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It is a social welfare legislation enacted not only for the sake of women but for the progress of the society as a whole. No society can claim to be developed and civilized which breach the collective culture of

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377 Rule 14(1) of the Protection of Women from Domestic Violence, Rules 2006.
378 Ibid.
379 Supra note 373, at p. 115.
silence and tolerance of domestic violence. Also no society can be just which denies women their basic human rights. Thus if this Act is properly implemented and used by the victimized women, it would definitely arrest the rising graph of domestic violence in India. **

4.7.9 The Protection of Children from Sexual Offences Act, 2012

This Act was enacted in 2012 with an objective to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for matters connected therewith or incidental thereto. This Act was formulated in order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children.

This Act defines a child as any person below eighteen years of age and regards the best interests and well being of the child as being paramount consideration at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child. It defines different form of sexual abuse, including penetrative and non-penetrative assault as well as sexual harassment and pornography, and a sexual assault to be aggravated under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority, like a family member in domestic relationship, police officer, teacher etc. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the Act. This Act prescribes stringent punishment for the offences committed under the Act, with a maximum term of rigorous imprisonment for life and fine. This Act provides provisions for mandatory reporting of sexual offences under the Act and caste a legal duty upon a person or any personnel of the media or hotel or hospital or studio, who has knowledge that a child has been sexually abused, to report the offence. Further, if any person fails to report the commission of an offence or concerned authority fails

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380 Ibid.
382 Id., Section 3.
383 Id., Section 5.
384 Id., Section 16.
385 Id., Section 4, Section 6, Section 8, Section 10, Section 12, Section 14, Section 15, Section 17, Section 18, Section 21 and Section 22.
386 Section 19 and Section 20.
to record such offence, he as the case may be shall be punished with imprisonment up to six months and fine.\footnote{Id., Section 21.}

This Act also provides provision for child protection and care during investigation process. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangement for the care and protection of the child, such as obtaining medical treatment, placing the child in shelter home etc. The police is also required to bring the matter to the attention of the child welfare committee within 24 hours of receiving of the report.\footnote{Id., Section 19(5) & (b).}

There is also a provision for medical examination of the child in respect of whom any offence has been committed under this Act. In case the victim is a girl child, the medical examination shall be conducted by a woman doctor and shall be conducted in the presence of the parents of the child or any other person in whom the child reposes trust or confidence.\footnote{Id., Section 27.}

For the purpose of providing a speedy trial, there is also a provision for special courts to try the offences under this Act.\footnote{Id., Section 19(5) & (b). These courts shall try cases in camera and in the presence of the parents of child or any other person in whom the child reposes trust or confidence\footnote{Id., Section 28.} and ensure that identity of the child is not exposed in any way to the accused at the time of recording of the evidence. Wherever necessary, the court may take assistance of interpreter or expert or a special educator, while recording evidence of child.\footnote{Id., Section 37.} Above all, the Act stipulates that a case of child sexual abuse must be disposed of within one year from the date, the offence is reported.\footnote{Id., Section 38.}

Another important provision in this Act is that it authorizes special courts to determine the amount of compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child’s medical treatment and rehabilitation.\footnote{Id., Section 35 (2).}
This Act recognizes almost every known form of sexual abuse against children as punishable offence and provides a child friendly judicial process so that child victims of sexual abuse seek redress of their suffering, as well as to obtain assistance in overcoming their trauma.

**4.7.10 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**

This Act was passed in 2013 to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. This Act give effect to the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and her right to life and live with dignity under Article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes right to a safe environment free from sexual harassment.

This Act also follow the universally recognized human right by international conventions and instruments such as convention on the Elimination of All Forms of Discrimination Against Women, which has been ratified on the 25th June, 1993 by the Government of India.

Section 2 (n) of the Act lays down that “sexual harassment” includes any unwelcome acts or behaviour whether directly or by implication namely, physical contact and advances; or a demand or request for sexual favours; or making sexually colored remarks; or showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The definition of “aggrieved women” under Section 2 (a) is extremely wide to cover all women, irrespective of her age or employment status, whether in organized or unorganized sector, public or private and covers clients, customers and domestic workers as well.

The Definition of workplace as given in Section 2 (o) of the Act includes all organizations, department, office, branch unit etc in the public sectors, organized and unorganized, hospitals, nursing home, educational institutions, sports institutes.
stadiums, sports complex and visited by the employee during the course of employment including the transportations as well as a dwelling place or a house.

Section 3 of the Act provides that no woman shall be subjected to sexual harassment at any workplace. This section provides that the following circumstances such as, implied or explicit promise of preferential treatment in her employment, or implied or explicit threat of detrimental treatment in her employment, or her present or future employment status; or interference with her work or creating an intimidating or offensive or hostile work for her; humiliating treatment likely to affect her health or safety, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment.

Section 4 of the Act directs every employer of a workplace to constitute an “Internal Complaint Committee” which shall be presided over by a woman employed at senior level at workplace from among the employees at each office and branch with 10 or more employees. Section 6 provides that District Officer as notified by state government under Section 5 shall constitute in the district concerned a “Local Complaint Committee” to receive complaints of sexual harassment from establishment, where the internal complaint committee has not been constituted or if the complaint is against the employer.

Section 9 provides that any aggrieved woman may make, in writing a complaint of sexual harassment at work place to the committees constituted under section 4 and section 6 of the Act, with in a period of three months from the date of incidents, provided further, in sub section 2 that if aggrieved women is unable to make a complaint on account of her physical or mental incapacity or death or otherwise, her legal heir or other person as prescribed may make a complaint under this section.

Section 11 provides for inquiries in to complaint by the internal committee or the local committee as the case may be. For the purpose of inquiry these committees have the power of civil courts under the code of Civil Procedure Code 1908, for gathering evidence. Under Section 13 on completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be; there upon they are mandated to take action on the report within 60 days. Section 14 provides
punishment for false or malicious complaint and false evidence against the respondent.

Section 19 of the Act provides various duties of an employer for securing safe environment free from sexual harassment at workplace for the women. Section 26 prescribes penalties for employers. This section provides that non-compliance with the provisions of the Act shall be punishable with a fine of up to rupees fifty thousand. Repeated violations may lead to higher penalties.

Thus this Act will ensure that women are protected against sexual harassment at all workplaces, be it in public or private. Further sense of security at the workplace will certainly improve women’s participation in work, resulting in their economic empowerment and inclusive growth.

4.8 International Conventions for Protection of the Rights of the Women

Various efforts have been made at the international level under the auspices of the United Nations to eliminate violence against women. The UN charter 1945 affirms the equal rights of women and men. The Universal Declaration of Human Rights Proclaimed in 1948 by the General Assembly of the United Nation states that everyone should enjoy human rights without discrimination. These two basic human rights instruments ensure equality of women with men in variety of ways. Following the Universal Declaration of human Rights, the International Covenant on Civil and Political Rights 1966 and International Covenant on Economic Social and Cultural Rights 1966, explicitly affirmed the obligation of state parties to ensure the equal right of men and women to enjoy all right set forth in these two covenants. In 1970’s the most prominent women’s issue were related only to discrimination against women in the public sphere and on the need to ensure equitable participation of women in the development process.

The Convention on Elimination of All Form of Discrimination Against Women, (hereinafter mentioned as CEDAW) the most extensive women’s right

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397 CEDAW is main foundation of rights in respect of women to which 166 countries including India are members till date.
international instrument, was adopted by the United Nation in 1979, it came into force in 1981. The convention was the first document to address women’s rights in all areas of their lives, including political, economic, social, cultural and family. The CEDAW came out of 1975 First World Conference on women and was the culmination of more than 30 years of work by the United Nation Commission on the status of women. The primary goal of CEDAW is to eliminate discrimination against women and to promote a respect for human rights throughout the world. The convention characterizes the problem of women’s inferior status and their oppression not just as a problem of inequality between men and women, but rather as a function of discrimination against women as such. The convention goes beyond the goal of equal treatment of women and men, as required by the United Nation Charter, the Universal Declaration, and its two covenants, to address specifically the disadvantaged position of women. In contrast to previous human rights treaties, the women’s convention frames the legal norms as the prohibition of all forms of discrimination against women as distinct from sexual non-discrimination.

Thus this women’s convention reaffirmed faith in fundamental human rights and in the equal right of men and women but does not explicit prohibition of violence against women singularly. The third United Nation World Conference on women in Nairobi in 1985, do mention violence against women, but as a side issue to discrimination and development. By 1990, violence against women was on the international agenda, but as a narrowly construed issue of women’s rights and crime prevention only.

In 1991, both the United Nation Economic and Social Council and the Commission on the status of women decided that the problem of violence against women was important enough to warrant the development of further international measures. As a consequence, the CEDAW Committee in 1992 issued General Recommendation No. XIX, which states the gender based violence as an issue of gender discrimination.

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400 Supra note 395, at p. 48.
401 Ibid.
In September 1992, the United Nations Commission on the status of women established a special working group that was given the task of drawing up a draft declaration on violence against women.\(^{402}\)

The issue of the advancement of women’s rights has been of prime importance to the United Nations since its founding; but the global epidemic of violence against woman was not explicitly acknowledged by the organization until December, 1993. In that year, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women, the First International Human Rights Instrument to deal exclusively with violence against women. At that point many states began to view violence against women as a human rights problem requiring state intervention.\(^{403}\) The major turning point however, was the Vienne World Conference on Human Right held in 1993. The Vienna Declaration and Programme of Action declared that the United Nations should work toward eliminating violence against women in public and private life; all forms of sexual harassment, exploitation and trafficking in women; gender bias in the administration of justice and any conflict arising between the rights of women and the harmful effects of certain traditional practices, cultural prejudices, and religious extremism.

The declaration stated that gender-based violence is incompatible with the dignity and worth of the human persons.\(^{404}\) Further, this declaration states that “the human rights of women and of the girls-child as an inalienable, integral and indivisible part of Universal human rights”, and called for the appointment of Special Rapporteur on Violence Against Women by the United Nations Human Rights Commission as well as the adoption of the Declaration on the Elimination of Violence Against Women (hereinafter mentioned as DEVAW). In December, 1993 the United Nations General Assembly adopted the Declaration and in February, 1995 appointed a Special Rapporteur on violence against women. Woman’s rights were recognized as human rights and two United Nations mechanisms were in place to deal specifically with violence against women. DEVAW provides the normative framework for all international action in the field of violence against women. The work of the United Nations Special Rapporteur on violence against women has deepened the international

\(^{402}\) Supra note 398. at p. 81.
\(^{403}\) Ibid.
\(^{404}\) Ibid.
community’s understanding of the causes and manifestations of violence against women throughout the world. Beijing Declaration and Platform for Action, agreed at the Fourth World Conference on Women in 1995 to contain a special section on the violence against women, which draws extensively from DEVAW and is more specific on the steps that need to be taken and on the international norms that are applicable. States therefore have a better understanding of, and are more comfortable with, their obligation concerning violence against women than with women’s human rights obligation in general. The Beijing Declaration shows a strong commitment at the international level to combat violence against women. Further, to ensure that such commitment was maintained, a special session, better known as Beijing+5 was convened by United Nations General Assembly which adopted a Political Declaration and Platform for Action reaffirming the goals of the Beijing Declaration to eradicate the violence against women and pledged to undertake further action to ensure accelerated implementation.405

In response to the Beijing Platform for Action, the International Community has developed ways to respond to domestic violence more effectively and many states have adopted legislation recognizing that domestic violence should be treated in the same way as stranger violence.406 The Government of India has enacted Domestic Violence Act to implement the Beijing Declaration as well as platform for action and CEDAW.

It is revealed in the foregoing study that after independence various legislative initiatives were taken for protecting the women from various types of atrocities and for their welfare. These initiatives were taken to provide equality to women and also to provide improvement in their life.

405 Supra note 395, at p. 49.
406 Supra note 398, at p. 83.