Part- IV:

SELECTED ACTS EMPOWERING WOMEN IN
POST-INDEPENDENT INDIA: CRITICAL ANALYSIS
1.1 THE SPECIAL MARRIAGE ACT, 1954

The Special Marriage Act, provides for a civil marriage without any religious significance.

According to Section 4 of the Act, two persons of any religious persuasion, provided they are not within the degrees of prohibited relationship or are not married to any other person under any other religious ceremony, and have both reached the age of majority may be married under the Act.

According to Sec. 5 of the Special Marriage Act, for a marriage to be solemnized, the parties must give notice in writing to the Marriage Officer of the District in which at least one of the parties has been living for not less than thirty days. This notice is displayed in some prominent place in the Marriage Registry Office. The marriage is to be performed and registered not before thirty days, but within three months of this. The marriage is registered by the Marriage Officer in the presence of three witnesses, and recorded. A certificate of marriage is then issued to the couple.

Section 7 of the Act provides that any person may object to the marriage being performed during the thirty days period of notification on grounds that the marriage would be illegal on grounds covered by the Act, and only upon receipt and verification of such objection the
Marriage Officer may refuse to perform the marriage. In verifying this objection, the officer has full powers, equivalent to a court, to demand evidence and witnesses and make suitable enquiries.

In addition to all other grounds for separation or divorce, mutual consent is accepted as valid. In case the spouses are living apart for a period of one year, a joint petition may be filed. After six months they have to again make the same petition and then the divorce is final. The six months period is to give them the time to change their minds.

In case a marriage between a member of Hindu Joint Family and non-Hindu occurs, the first party ceases to be member of the said joint family. Where both parties to the marriage solemnized under this Act, are Hindus they shall continue to be members of their respective Hindu Joint Families. This was added by 1976 Amendment to the Act. It is a non-secular and a step backward from the uniformity which had been achieved by those marrying under this Act.

Under the Act as now amended (Section 10(1)) the grounds on which a decree for judicial separation may be passed are identical to that required in respect of a decree for divorce. It may be noticed that cruelty and desertion which were not PER-SE grounds for divorce under this section are now made grounds for divorce.

1.2 THE MARRIAGE LAWS (AMENDMENT) ACT, 1976

This Amendment Act has been passed with a view\(^1\) to make further improvements upon the provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

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\(^1\) Find the reasons for the Amendment in the speech of the Minister of State for Law, Dr. V.A. Sayid Mohd. “The Pioneer” dated 25.5.1976.
Chapter II of the Amendment Act contains amendments to the Hindu Marriage Act, 1955. And on a cursory look to it, one can find that several provisions\(^2\) of Hindu Marriage Act, 1955 have been completely mauled with further amendments. The new law possesses a very progressive and dynamic character and it is hoped that it will bring much needed relief to the Hindus in matters of marriage and divorce. The amendment, it is observed, is bound to make the divorce among the Hindu community not only quick and easy, but expeditious too.\(^3\) It has the effect of making up to date the marriage and divorce laws of the Hindus to a great extent and bringing it at par with the other community. The following are the changes introduced in the Hindu Marriage Act, 1955 by the Marriage Laws (Amendment) Act, 1976, viz:

(1) All grounds available for a judicial separation have now been made available to a Hindu for divorce too.\(^4\) A Hindu can claim a decree of divorce on the grounds of either desertion\(^5\) or cruelty\(^6\) now.

The meaning of "desertion" has been statutorily widened so as to include "willful neglect" in its definition.\(^7\) Thus an uncared for or a neglected wife can claim a decree of divorce on the ground of her husband's desertion.

(2) A single or isolated act of adultery of infidelity has also been

\(^2\) Sections 5 clause (ii), 9 to 16, 19 to 23, 25 and 28 of the Hindu Marriage Act, 1955 have been amended in 1976 
\(^3\) See sections 13, 14, 19 and 21B of the Amendment Act. 
\(^4\) See section 10 and section 13 sub-section (1) sub-clauses (i), (ia), (ib), (ii) and (iii), (iv) and (v) sub section (i) cl. (iii) Expl of sec. 13 fully elaborated the term “unsoundness of mind”. 
\(^5\) Section 13 sub-sec (1) cl. (ib) 
\(^6\) Section 13 sub-sec. (1) cl.(ia) 
\(^7\) Section 13 sub-section (1) cl. (vii) explanation
made a ground for divorce now and the old concept of "is living in adultery" has lost that significance, which it once possessed. One lapse in virtue is sufficient now to call for divorce.

(3) Now divorce can also be granted to wife, who is successful in obtaining an order of maintenance under any other law, under the altered Act. This clause obviously benefits the women folk substantially.

(4) A provisions for "Divorce by mutual consent" too find a decent place in the Act. This is a new provision and needs cautious study. For obtaining a divorce on this ground, the parties are required to wait for only six months after filing the petition, though they are obliged to obtain it within 18 months.

(5) In relation to a petition for nullity of marriage, recurring attacks of insanity and epilepsy or mental disorders of a nature rendering a party unfit for marriage or procreation of children, too have been made a ground for nullifying a marriage and further, if these ailments occur later on, these will be an instant ground for divorce too. "A misrepresentation regarding any material fact or circumstance concerning the respondent" is thus a new ground for nullifying a marriage. Thus, the Amendment has thus widened the meaning, scope and the purpose of the term "unsoundness of mind" or insanity.

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5 Sec. 13 sub-sec (i) cl. (i)
6 Sec. 13 Sub-sec. (2) cl. (iii)
7 Sec. 13B.
8 Sec. 5 cl. (ii) widens the definition of the term "Insanity".
9 The words "for a period of not less than 3 years ..... "have been deleted in Sec. 13 sub-sec (1) cl.(iv) and (v)
10 Sec. 12 cl. (c) – (The term “fraud” has been specified)
(6) A minor girl is now entitled to repudiate her marriage; provided she does this after attaining the age of fifteen years, but before attaining the age of eighteen years.\textsuperscript{14} This provision possesses close resemblance with the concept of \textit{option of puberty} of the Muslim law.

(7) The Act confers jurisdiction to the court of the area where the petitioner resides, to deal with a matrimonial petition, in cases where the respondent either resides outside India or is not heard of for seven years.\textsuperscript{15}

(8) With a view to expedite the disposal of a matrimonial petition a provision has been made in the Amendment Act that the trial should conclude within a period of six months and the appeal within three months.\textsuperscript{16}

(9) Now, divorcee can remarry immediately.\textsuperscript{17} The waiting period of one year, as was provided in section 15 is now taken away by the amendment.

(10) The interim period between judicial separation and divorce has been reduced to one year\textsuperscript{18} (instead of two years) now and appeals from interim orders stand abolished.\textsuperscript{19}

(11) Under the Amendment Act, 1976, a spouse can file a petition for divorce after one year of his or her marriage now.\textsuperscript{20} Formerly, it was three years. This provision has the obvious merit of

\begin{footnotesize}
\begin{enumerate}
\item[14] Sec. 13 sub-sec (2) cl. (iv)
\item[15] Sec. 19 cl. (iv)
\item[16] Sec. 21B clss. (2) and (3)
\item[17] Sec. 15 (one year bar is taken away)
\item[18] See section 13 sub-sec. (iA) (For the words ‘two years’, “one year” has been substituted)
\item[19] Section 28 clause (2)
\item[20] See Section 14(the words “three years” has been replaced by “one year”)
\end{enumerate}
\end{footnotesize}
reducing the hardships of those couples, who fail to pull on their matrimonial happiness too long. The torturous marital sorrows and displeasures can be cut off or mitigated in a shorter span of time under the altered law.

(12) An explanation has been added to Section 9 of the Act now, the effect of which is to fix the responsibility\(^{21}\) of proving "reasonable excuse" for withdrawal from society on that spouse, who withdraws from it.

(13) A new shape has been given to Section 16 of the Act. It states as follows:

(i) "Notwithstanding that a marriage is null and void under Section 11, any child of such marriage, who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

Provisions regarding children of a voidable marriage have also been made in the Act on Similar lines.

(14) The Act further provides that every matrimonial proceeding should be conducted in Camera from now onwards.\(^{22}\)

(15) Section 19 of the Act too gets an elaborate look and its scope appears to be widened. It provides that a matrimonial petition can be presented to the District Court within the local limits of whose original jurisdiction-

\(^{21}\) Section 9 sub-sec (1) Explanation
\(^{22}\) Section 22 cl. (i)
(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition resides, or

(iii) the parties to the marriage last resided together, or

(iv) the petitioner is residing at the time of the presentation of the petition, in those cases where the respondent was residing outside the territories to which the Act extends or has not been heard of as being alive for a period of 7 years or more by those persons who would naturally have heard of him, if he was alive.

(16) Sections 21 A, 21B and 21C have been newly added to Sec. 21 of the Act, which regulate the transfer and disposal of matrimonial petitions, when presented in different courts by the parties to a marriage. That court has been conferred the jurisdiction to deal with the case, to which the petition was made at an earlier date by either spouse.23 These sections also make it incumbent on the court to decide the case within six months and in case of appeal, within three months.

(17) In cases, where a move for re-conciliation is made, the court at the instance of the parties or on Jis own grant adjournment for a reasonable period, but which does not exceed for more than 15 days. This matter of reconciliation can also be referred to a third person. But this discretion has to be exercised by the court in just and proper cases.24

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23 See sec. 21-A
24 Section 23 sub-sec (3)
(18) Section 23A is also a new section which allows a respondent to make a counter-claim for a decree of judicial separation or divorce, in all those cases, in which he or she can prove the petitioner's fault in relation to adultery, cruelty or desertion.

The Amendment Act, 1976 is a progressive piece of legislation which inducts a new sense of self-respect and confidence in the hearts of the Hindu females. It is revolutionary in character and is bound to confer substantial benefits on the Hindu community in marriage and divorce matters in course of time, inspite of its few drawbacks.\(^{25}\)

**Drawbacks of the Amendment Act, 1976**

1. Amendment Act, 1976 does not provide for the compulsory registration of marriage yet.\(^{26}\)

2. The matters relating to the custody and protection of the children stand neglected at present.

3. It is said that the doctrine of "collusion and connivance" still finds a respectable place in a statute, which claims to be founded upon "breakdown or Empty shell" theory of divorce or "No fault" doctrine. The maxim that, "He who comes in equity must come with clean hands" which is incorporated in Section 23 of the Act is left undisturbed, when it deserved moderation or deletion. This is a view which needs further study.

4. The Amendment Act, 1976 does not provide any kind of

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\(^{25}\) See the views in the following articles, viz. Sujata Manohar's "Making Divorce Easy" published in "the Illustrated Weekly of India" of 23.5.76; Ram Sahai Pande's "Naya Vivah Kanoon" (Hindi) published in Dharmayuga (Hindi) of July 17th, 1976.

\(^{26}\) Compulsory Registration was one of the important recommendations of the committee on the status of women. this matter has been left to States at present.
economic stability to a divorced wife, if she happens to be an illiterate or unemployed or unprovided for.

5. The age of marriage has not been increased by the Amendment Act, when the national policy required it the most, though there is a likelihood of it being increased in the near future.

But whatever may be its lacunae, no one can deny the vast merit and utility of it.\(^{27}\)

1.3 **THE DOWRY PROHIBITION ACT, 1961**

Under this Act, both the giving and receiving of dowry is prohibited. Dowry has been defined as any valuable asset, property or gift that is given or received by either party of the marriage, or the parents of either party of the marriage, to either each other or to any other person, in connection with or consideration of the marriage. These assets or gifts may have been given before, at or after the marriage,\(^{28}\) but they must be in connection with it, to qualify as dowry. The exceptions to this is the dower or *Mehr* that is the right of Muslim Women, under Shariat law are also accepted as presents made to either the bride or the groom, provided that lists of such presents are maintained and the gift remains the exclusive property of the receiver, and provided that the value of the gift is not excessive considering the financial status of the giver. Such gifts must also be voluntary.

Any person either giving or receiving dowry, or abetting the giving or receipt of it is punishable under the Act. Offence under this Act is

\(^{27}\) Find a statement of Dr. V.A. Sayid Mohd Minister of State for Law in this regard “The Government would not hesitate to come forward with further liberalization, if it was found necessary” published in “The Pioneer” dated 25.5.76.

punishable with imprisonment for 5 years, and a fine of Rs.15,000 or the amount of the value of the dowry, whichever is more. The court must impose sentences of both imprisonment and of fine, upon conviction of the accused.

Any demand or request for dowry from one party to the other or to the relatives of the second party in the marriage, is similarly punishable with imprisonment of between six months to two years and a fine of up to ten thousand rupees.

In either of the above instances, however, the Court may impose a lesser term of imprisonment than statutory, in case the Court considers it advisable. According to Dowry Prohibition Act, both the giver and taker of the dowry are punishable. As a result, complaints for dowry extortion are not being lodged. Hence the persons giving dowry should be excluded from liability.

All and any contractual agreements, transactions of property and agreements in respect of dowry are void in law. That is they have no legal validity.

The legitimate owner of any assets of property given to her as dowry or given in connection with her marriage is the woman. In the event that such assets have been received by any other person, they are to be handed over to the woman within three months of receipt or of the marriage or of the attainment of majority of the woman, in case she received the dowry as a minor. In case this is not done, a complaint must be made within one year from the date of expiry of the three months. The penalty for contravening this law is minimum term of six months imprisonment, up to two years, or a fine up to ten thousand
rupees or both. The Court has no discretion to award a prison term of less than six months.

In case a woman dies before receiving back her dowry, her legal heirs, according to the appropriate personal law, are entitled to claim it from the holders of the dowry.

Even though dowry received or given before this Act is not covered by the Act, complaints in respect of retrieving such dowry are covered by the legislation.

The Dowry Prohibition Amendment Act, 1986 has placed a ban on advertisement by any person, of any share in his property or of any money as considerations for the marriage of his son or daughter or any other relative. Such offence is punishable with imprisonment for a term of minimum 6 months which can be extended to 5 years or with fine which may extend to Rs. 15,000.

It is also to note that the anticipatory bail should not be granted in such cases. According to Geeta Luthra & Pinky Anand:

"It is in this context that anticipatory bail plays a significant role. Crime against women is not only limited to the individual, but is also a crime against society unless there are strong compelling reasons. If bail in anticipation of arrest is granted to an accused the entire purpose of bringing criminals to book is lost.

Once anticipatory bail is given, it is not unusual for the case to drag on for several years, and force the victim to accept defeat because she has run out of energy or resources to continue the battle. Thus, we believe, that no anticipatory bail ought to be granted until all the dowry items are returned".39

39 See an article of Geeta Luthra and Pinky Anand on “Scrap anticipatory bail in Dowry related
Offences under this Act are non cognizable and non-bailable. It is worth mentioning that a Court may take cognizance of offences under this Act upon either its own knowledge, upon a police report or upon a complaint to the magistrate or judge either orally or in writing. Reports with the police or complaints to the judicial authority may be made by the person aggrieved by the offence, the parents of this person, or any recognized welfare institution or social organization. It has also been recognized that in consequence or connection with dowry demands, many women are harassed, brutalized, murdered or induced to commit suicide. Under this Act in the event of death of the woman within seven years of marriage due to unnatural causes, it is now necessary for the husband and his family to prove that the death has not occurred as a consequence of dowry demands. If they are not able to prove their innocence they are liable to punishment under the law as for murder. Indian Evidence Act has also been changed accordingly by insertion of new Section 114-A. In such circumstances all properties of the woman shall:

(a) If she has no children, be transferred to her parents. J (b) If she has children, be transferred to such children and pending .... such transfer be held in trust for such children.

However, despite these provisions, the onus is always upon the complainants in the case of an alleged dowry death to prove the guilt of the husband.\[30\] Circumstantial evidence, the mental state of the women before her death, her obviously and necessarily deteriorating relationship with her husband and his family are frequently used to

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cases" published in "The Pioneer (Lko)" dated 11.2.92.
prove suicide.

1.4 MATERNITY BENEFIT ACT, 1961

The Constitution of India guarantees to women equal opportunities in employment, equal wages for equal work and special consideration on the basis of gender, where legislated. This approach has led to the formulation of several laws to protect the employment remuneration and terms of employment of women.

Under Maternity Benefit Act, 1961, certain benefits accrue to women provided they have been working in an organization for not less than 160 days in the year immediately before their expected date of delivery.

1. Six weeks paid leave at the time of delivery.

2. One month prior to delivery their work may be lightened upon request, in case they are engaged in physically strenuous work.

3. Every woman is entitled to Maternity benefit and is entitled to receive from the employer a Medical bonus of Rs.25 if no prenatal confinement and post-natal care is provided for by the employer free of charge.

4. Nursing Breaks: Every women delivered of a child who returns to duty after such delivery shall in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of 15 months. The "prescribed duration" varies from state to state. For instance Sec. 6 of the Delhi
Maternity Benefit Rules, 1971, provides Nursing Breaks for a period of 15 minutes plus the time taken to reach the place where the child is left. The travel time cannot be less than 5 minutes and more than 15 minutes.

No employer is permitted to discriminate against a woman in case she incapacitated during pregnancy. Her continued employment is protected.

1.5 **EQUAL REMUNERATION ACT, 1976**

Essentially, the Equal Remuneration Act, 1976 provides that:

1. In work of equal value, skill and effort, women are paid as much as men.

2. In opportunity for employment or promotion, women may not be discriminated against on grounds of gender except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force. Contravention of these laws is a punishable offence.

The Equal Remuneration Amendment Act, 1987 provides for no discrimination in any condition of service subsequent to recruitment such as promotions, training or transfer. In addition under various Acts such as Plantation Workers Act, Construction Workers Act, Factories Act, provision has been made for women to have separate rest rooms and toilet facilities.

Recognizing that child care is almost invariably the women's province, all establishments employing more than 20 women in a
non-powered industry or ten women in a powered industry are compelled to provide child care facilities i.e. creches.

1.6 FAMILY COURTS ACT, 1984

Every dispute between a man and a woman, relating either to marriage or the obligation of marriage or to their offspring has been brought under the purview of Family Courts. This court has status equivalent to a District or subordinate Court\textsuperscript{31} and is itself directly subordinate to the appropriate High Court. All cases and disputes relating to issues of marriage or offspring or marital disputes regarding property or assets or maintenance, will automatically be subject to arbitration of Family Courts as soon as one is established in an area. All such disputes that are under any other court in the area will immediately be transferred to the Family Court as soon as it is established in the area.

The judges for these courts are to be those who have at least seven years experience as advocates or as judges\textsuperscript{32} and will preferably be woman. In selecting persons for the appointment of judges every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation or counselling, are selected.\textsuperscript{33}

No lawyers are permitted for either party without the consent of the

\textsuperscript{31} Section 7 of Family Courts Act, 1984
\textsuperscript{32} Section 4(3) of Family Courts Act, 1984
\textsuperscript{33} Section 4(4) of Family Courts Act, 1984
parties if the Court considers it necessary in the interest of justice.\textsuperscript{34} The proceedings are held in camera.\textsuperscript{35} The court's primary responsibility, in case of marital disputes is to intervene so as to arrive at a settlement other than irretrievable breakdown of the marriage. The courts may adjourn the cases for long periods in the event that a solution of reconciliation is being attempted. The services of medical and counseling experts, preferably a woman, where available, may be secured by the court where it believes that such services would be of value.\textsuperscript{36} The court may collector admit whatever evidence it considers material to the cases and also examine any witnesses.

It is observed that there are several drawbacks in these proceedings. Firstly, the bias is in favour of holding the \textit{status quo} of the marriage. I always the woman is pressurized for adjusting or submitting particularly as in most cases she is less educated, less articulate and less assertive. The entire weight of her conditioning and of social values already makes it difficult for her to contemplate the dissolution of a marriage. This bias of the courts then, only serves to reinforce the position of powerlessness of the women.

The long adjournments permitted in order to affect reconciliation also generally tend to make difficulties for the woman whose status is then in suspense and leaves her vulnerable to all kinds of harassment and pressures.

Since no legal representatives are permitted and women are less well informed in legal matters concerning their rights and in fact have

\textsuperscript{34} Section 13 of Family Courts Act, 1984
\textsuperscript{35} Section 11 of Family Courts Act, 1984
\textsuperscript{36} Section 12 of Family Courts Act, 1984
number of misconceptions about their lack of rights, it is easy for the
man in the dispute to escape responsibilities. The provision for in
camera proceedings also acts in a similar manner to deprive the
woman of access of social pressure which could ensure equitable
treatment to her. In fact, because the proceedings are held in camera
the opportunity for such injustices being taken up in a public forum as
a socially relevant evil are prevented. It is also then very simple to
exclude militant organizations from supporting the cause of the
oppressed women. Again, the discretion of a single person, with the
inherent prejudices and personal norms that govern the individual's
decisions, are the criteria for judgment rather than an established and
objective norm.37

1.7 THE INDECENT REPRESENTATION OF WOMAN
(PROHIBITION) ACT, 1986.

Two images of women, in conformance with patriarchal values and
structures, have been propagated and reinforced through the media.
One is that of the virtuous, chaste, submissive girl or "lady" the other
is her antithesis. The vulgar, "sex-object" that is entirely lacking in
dignity and unworthy of human consideration or respect.

The representation of the latter, being easily identifiable with
obscenity is more easily condemned by the establishment, and so in
1986, an Act was passed to prevent the use of this image either in
itself for purposes of pornography or as a selling gimmick for any
kind of products or services.

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37 See also Anjali: "The pathos of family Courts" published in "The Pioneer (Lko), dated 9.4.1996,
p. 10.
Under this Act, indecent representation of women in any form has been prohibited. Indecent representation means the depiction in any manner of the figure, form, body or part of the body in such a way as to denigrate the image of woman or as is likely to deprave or corrupt public morals.\textsuperscript{38} However, no provision has been made to specifically ban material that similarly degrades woman without any explicit representation of her form or body. Sophisticated advertising, techniques permit such representation by insinuation in a far more subtle and damaging manner.

The Indecent Representation of Women (Prohibition) Act, 1986 covers all visual forms of media, books, pamphlets, writing, slides, films or objects but makes exception for any materials having religious significance or which have value as objects or art or in the interest of science.\textsuperscript{39} This Act also provides for the use of the figure, form, etc. of a woman where it is necessary as information for the public good. This would presumably include educational material, advertisements for medical remedies where necessary, and similar instances. But the fact is that the Act has been observed in its non-observance.

For a first offence, the penalties may be imprisonment upto two years and a fine of upto Rs. 2000.00. Subsequent offences would merit a fine of above Rs. 10,000 and upto Rs. 1 lakh and with imprisonment of not less than six months but not more than five years.\textsuperscript{40}

Any authorized gazetted officer may inspect and search premises

\textsuperscript{38} Section 2(c) of Indecent Representation of Women (Prohibition) Act, 1986
\textsuperscript{39} Section 4 of Indecent Representation of Women (Prohibition) Act, 1986
\textsuperscript{40} Section 6 of Indecent Representation of Women (Prohibition) Act, 1986
suspected of holding such materials at any reasonable hour, except for dwelling place, for which he may require a search warrant. He may also seize any such material and hold it in custody as evidence until directed by a magistrate as to disposal of the material. In case the material seized forms an integral part of any larger advertisement or object, the whole may be seized.\textsuperscript{41}

Any person or company associated with the production, use or dissemination of this material is liable for prosecution under the Act. Such offences are cognizable and bailable.\textsuperscript{42}

Unfortunately, the responsibility for adjudging the indecency of any material is left entirely to the individual officer who has been authorized in the area. No norms have been laid down except the vague terms used earlier: "indecent representation depiction of the figure, form, body derogatory or denigratory to women....or likely to deprave, corrupt or injure public morals." The interpretation of these descriptions is left entirely to one gazetted officer whose personal morality forms the basis of criteria, rather than a social and legal norm.

1.8 THE COMMISSION OF SATI (PREVENTION) ACT, 1987

Today, the status of women in India can be gauged quite closely from the fact that a practice such as Sati is possible, and publicly supported and glorified.\textsuperscript{43}

The new anti \textit{Sati} Act, substitutes the various legislations that have

\textsuperscript{41} Section 5 of the Indecent Representation of Women (Prohibition) Act, 1986
\textsuperscript{42} Section 8 of the Indecent Representation of Women (Prohibition) Act, 1986
been operative in different parts of the country with a central law that seeks, not only to prevent and punish the commission of the Act itself, but also to make an offence any glorification of the act of Sati.

There are provisions in the Act to take action against the exploitation of such criminal occurrences either for financial or political purposes. Specifically, the Act makes a criminal offence, equivalent to murder, the abetment or encouragement of a Sati or an attempted Sati. Such action is liable to sentence of death or life imprisonment, with an appropriate fine.

The Sati herself is liable to prosecution as suicide, the penalty being a year's imprisonment with fine. The glorification of Sati is defined as the observation of any ceremonies or the taking out of processions in connection with the incidence or practice of Sati; the support, justification or propagation of the practice; or the arrangement of or participation of any function to eulogize a person committing Sati; the creation of a trust or fund or collection of donations for the purpose of a temple or any other structure with a view to perpetuate or honour the memory of a person committing Sati; or the performance of any ceremony for the same purpose.

Under the Act, all temples dedicated to such practice or persons are to be removed.

The penalty for glorification of Sati is imprisonment from 1 to 7 years, a fine of Rs. 5,000 to Rs. 30,000 and the confiscation of all assets collected in the name of Sati.

Special Courts are to be convened for the trial of offences under this
Act, equivalent to sessions courts, with judges of equivalent powers.

All such cases are to be tried without delay, there being required reasons to be furnished if trials are adjourned beyond the next day.

The onus of proof of innocence rests with the accused.

No person who had abetted the commission of Sati may inherit the estate, either whole or even in part, of the deceased woman.

The Act unfortunately does not take into consideration two important facts:

- The first is that the widow is a victim of her social environment and pressures, treating her instead as a criminal.

- The second is that funds for the glorification of Sati are often donated not by individuals but by corporate entities for publicity purposes or tax evasions.

The institutions of Devdasi in its monstrous form could still be seen in the State of Andhra Pradesh, Karnataka and Maharashtra whereas in Orissa, the State administration is struggling to keep the practice alive despite stiff opposition from women activists. In this tradition, the girls are dedicated to temples at a very young age. She lives under the control of the priest & in the name of religion priest & other it is alleged sexually abuse and exploit them. Even in the present century this social evil has ruined the lives of many girls amidst the government apathy to wipe it out. It is a case of a passive condonation of sexual abuse & harassment of young girls by the government and the social agencies, who boast on making efforts for the upliftment of
the women folk. The first annual report of the National Commission for Women paints a rosy picture saying that the devdasis are "revolting" against the system.\textsuperscript{44}

1.9 THE NATIONAL COMMISSION FOR WOMEN ACT, 1990

In 1990, the National Commission for Women Act has been passed. Under Section 3(1) of the Act, the Central Government shall constitute a body to be known as the National Commission for Women to exercise the powers conferred on, and to perform the functions assigned to it under this Act. The Commission shall perform all or any of the function mentioned under Section 10 of the Act, such as, investigating and examining all matters relating to the safeguards provided for women under the Constitution and other laws, reviewing the existing provisions of the Constitution and other laws affecting women and recommendation of amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislation, taking the cases of violation of the provisions of the Constitution and other laws relating to women, looking into complaints and taking \textit{suo motu} notice of matters relating to deprivation of women's rights and non-implementation of laws enacted to provide protection to women, and evaluation of the progress of the development of women under the Union and any State etc. General provisions of law with respect to Indian women are as following:

All personal laws accept the basic idea of women having some rights to support in the event of the dissolution of a marriage. These rights

\textsuperscript{44} See the article of C. Jayanthi on "The devdasi system" published in 'The Pioneer (Lko)' dated 31.1.1996, p. 10.
are circumscribed by various conditions. In a marriage that is void the wife is not permitted to sue for maintenance. She is entitled to maintenance if a voidable marriage is annulled, or if a valid marriage is dissolved. In the event of a judicial separation, she is also entitled to maintenance.\(^{45}\)

Where she is entitled to maintenance, the extent she is entitled to claim varies not only according to the limitations imposed by the laws but also the decision of the judges. In Hindu adoption and maintenance Act, 1956, the court has the discretion to fix the amount of maintenance. The amount varies from case to case and is calculated on the basis of the income and liabilities of the parties. The amount of maintenance can be increased or decreased by the court on altered situations. According to Muslim law, she may be given the agreed amount of *mehr* and as for continued support, she is legally entitled to it only during the period of *iddat*. This point was thoroughly considered in *Mohd. Ahmed Khan v. Shah Bano Begum*.\(^{46}\) It is worth mentioning that the sum settled by way of *mehr* is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal law do not countenance cases in which the wife is unable to maintain herself after the divorce. It is not only incorrect but unjust. Because the Muslim Personal Law, which limits the liability of the husband to provide for the maintenance of the divorced wife during the period of *iddat*, does not contemplate or countenance the situation envisaged by Sec. 125 Cr. P.C., it would be wrong to hold that the Muslim husband,

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\(^{46}\) AIR 1985 SC 945; (1985) 2SCC 556; 1985 SCC 9Crim.) 245.
according to his personal law, is not under an obligation to provide maintenance, beyond the period of *iddat*, to his divorced wife who is unable to maintain herself. In fact, if the divorced wife is able to maintain herself, the liability of the husband to provide maintenance for her ceases with the expiration of the period of *iddat*, otherwise she is entitled to take recourse to Sec. 125 of the Criminal Procedure Code. Thus, the conclusion is that there is no conflict between the provisions of Sec. 125 and those of the Muslim Personal Law on the question of the Muslim Husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

In 1986, the Muslim women (Protection of Rights on Divorce) Act was passed. The Act has consolidated and harmonized the different schools of the Muslim law in the matter of payment of maintenance to the wife on divorce. While the orthodox view of the husband's liability to pay maintenance only up to *iddat* period finds prominence in this Act, the modern trend as reflected in Section 125 of the Cr. P.C. has also been included making it optional on the choice of both the parties. In Christian law, it has been observed that "the wife is entitled to 25 per cent to 30 per cent of her husband's income calculated on the basis of his earnings in the three years immediately preceding the decree of divorce". 47

In case maintenance is not paid she has recourse to court for payment of arrears. Refusal to comply with the court order to pay the arrears may be punishable with a fine or with three months imprisonment. It is interesting to note at this point that till date sentence of imprisonment

47 See "The Law and Indian Women": A Study by the YWCA of India (Printed by Madhulika's), p. 20.
has not been passed against any violation of this order. There is no provision for deduction of this payment from source of income. Nor is there any fool proof method of determining the husband's income unless he is a salaried person. In this case his income from salary is determinable and it is on this basis that maintenance is fixed.

A woman may also sue for support under Section 125 of Criminal Procedure Code. Section 125 is a summary and expeditious procedure to get maintenance and is applicable to all Indian women irrespective of religion, caste, creed etc. Pleading destitution, and inability to maintain herself, she is granted relief on grounds of ensuring her virtue and saving her from immoral means of earning for her living.

The maximum amount that may be claimed under this is Rs. 500 per month regardless of the actual income of her husband. If it can be proved that the woman is "unchaste" or if she remarries, her claim to maintenance is set aside.

Sec. 125 applies to all Indian women except Muslim Divorced Wives.

The Act which debar s Muslim women from benefitting under Sec. 125 of the Criminal Procedure Code is the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Generally, the interest of the child is always seen. Although, in every instance, the father is regarded as the natural guardian of the child, and must be proved unable or incompetent or morally undesirable as an influence on the child for the guardianship to devolve on the mother

In the case of the male child under Muslim Law, the mother is permitted to have the child live with her until he is seven, for the
benefit of the child. In the case of female children, this may be extended to puberty. She does not, however, have the right of guardianship over any properties or assets that the child may own. She must depend on her own earnings or on the payment of child support from the father. In case the father does not pay child support regularly, she may have recourse to court to claim arrears. Here too, there is no remedy for ensuring regular payment of this in the future. In case the mother does not live a "chaste" life she is considered a bad moral influence on the child and even the minimal rights she may be rescind by the courts.

Visiting rights are nearly always granted to the mother in case her children are not in residence with her. If her husband does not comply with her the court order and produce the children to be with her at the times specified in the order, she may have recourse to law and he may be compelled to comply, if necessary under the supervision of the police.

The only inalienable right which a woman has, to property at the time of divorce is to the "stridhan" i.e. to the jewellery or other gifts made to her by her in-laws and her parents during the period of marriage and to the dowry she has brought.

If she has a separate bank account or savings or properties either exclusively in her name or in the joint name of herself and her husband, she may lay claim to some portion of these jointly held assets and to the entire assets held by her individually.

She has no claim to the marital home which is assumed to be the husband's, unless otherwise proven. She may, in rare cases be able to
retain right of residence over her husband's, claim if the custody of the
children, has been awarded to her or if sufficient grounds can be shown
to persuade the courts to compel the husband to leave such as extreme
cases of violence towards the wife or the children. However, the court
usually assumes that since the wife has come to her husband's house to
reside as a married woman with him, once she abandons this role, for
whatever cause, however, justified, she will return to her parental
home or fend for herself. In most cases, violence causes the woman to
flee her marital home for self protection, leaving the man in
possession.

For marriage, a woman must, if she is under 18 years

Have the consent of her natural or legal guardian i.e. her father, in his
absence, her mother or in their joint absence, whoever has been
appointed by them or the State as her guardian. In case she suffers
harassment from her natural or legal guardian she may appeal to the
State for relief. It is necessary for her in this instance to file a report
called a First Information Report with the local Police Station. In case
it is possible, she should also consult a lawyer and be represented
through the office of any voluntary organization or major persons who
are willing to espouse her cause.

If she leaves her parental home, it is essential for her to file a statement
with the local police station stating her reasons for leaving, that she has
voluntarily taken refuge with such and such a person or organization.
The organization or individual concerned must also file a statement
with the police informing them that the minor girl has taken refuge
with them and of the address where she is accessible. Failure to do this
may result in a case of kidnap being filed against the concerned organization or individual. Minor girls do not have the freedom of sexual choice. In case sexual intercourse occurs, even with the consent of the girl, the man concerned may be convicted of statutory rape. Any persons aiding such a relationship may be found guilty of assisting and abetting the crime. A minor girl may not be compelled to marriage. In case she is being forced into marriage she may have recourse to the court. In the event that the marriage is solemnized, she may appeal for relief either in the form of annulment or of divorce under every personal law.

In case of a child marriage, the girl may file for annulment between the ages of fifteen and eighteen.

Repudiation of such a marriage is recognized under Hindu law. If, however, she willingly engages with her husband in intercourse after attaining her majority, she may not file for annulment. Under Muslim law a minor wife is entitled to dissolution of her marriage if she proves the following facts:

1. The marriage has not been consummated. (The Option of puberty is lost if the marriage is consummated after puberty but not if consummated before puberty).

2. The marriage took place before she attained the age of 15 years.

3. She has repudiated the marriage before attaining the age of 18 years.

Christian Law does not recognize repudiation of such marriages.
If she has attained her majority, a woman may freely marry any man of her choice. Her guardian may not seek to restrain her by coercion of any sort. Any attempt to do so, either by physical restraint or violence or psychological pressure amounting to cruelty or by refusing to hand over guardianship of her assets or property, is illegal. She has a right of residence in her parental home until she marries, and if she belongs to a Hindu joint family she is entitled to have her marriage expense paid by the family. It is also important to discuss here the provisions of Special Marriage Act, 1954.

The Special Marriage Act, 1954 provides for a civil marriage without any religious significance. According to Section 4 of the Act, two persons of any religious persuasions, provided they are not within the degrees of prohibited relationship or are not married to any other persons under any other religious ceremony, and have both reached the age of majority may be married under the Act.

According to Section 5 of the Special Marriage Act, 1954, for a marriage to be solemnized, the parties must give notice in writing in the form specified in the Second Schedule to the Marriage Officer of the District in which at least one of the parties has been living for not less than 30 days. This notice is displayed in some prominent place in the Marriage Registry Office. The marriage is to be performed and registered within three months but not before thirty days of this. The marriage is registered by the Marriage Officer in the presence of three witnesses, and recorded. A certificate of marriage is then issued to the couple.

Section 7 of the Act provides that any person may object to the
marriage being performed during the 30 days period of notification on grounds that the marriage would be illegal on grounds covered by the Act, and only upon receipt and verification of such objection the Marriage Officer may refuse to perform the marriage. In verifying this objection, the officer has full powers, equivalent to a Civil Court, to demand evidence and witnesses and make suitable enquiries.

It has been observed that the Special Marriage Act in reality is an Indian Marriage Act which applies to all Indian Communities irrespective to caste, creed or religion. The concept of this marriage is monogamous, union is for life or dissoluble only by judicial authority.48

A married woman has a right to:

1. Maintenance from her husband according to his status and economic condition, regardless of her income or assets. Failure to provide this is in Hindu and Muslim law sufficient ground for judicial separation or divorce. In Christian law it is ground for separation but for divorce only in conjunction with adultery.

2. Respect for her person and physical well being. She may not be subjected to physical and psychological violence or cruelties, which are grounds for divorce or judicial separation in Hindu and Muslim law but not in Christian law. In the latter, she may obtain a judicial separation but as grounds for divorce, it is necessary that she proves adultery in conjunction with cruelty.

3. In case her husband has incurable and communicable leprosy or sexually transmitted diseases she may be granted divorce or separation, though these are not adequate grounds in Christian law. Coercion to intercourse by the husband is rape only if the wife is below 15 years of age and if there is a judicial separation between the husband and wife. Except under these circumstances, the concept of marital rape has not been recognized in India. In case of continued refusal to engage in intercourse or in case she refuses to cohabit with her husband, he may sue for restitution of conjugal rights under any personal law. In case she fails to comply, these are sufficient grounds for divorce. She has reciprocatory rights in demanding cohabitation. However, in case of dispute of place of residence, in nearly all cases, the place of marital residence is considered to be the husband's place of residence.

4. In case she is engaged in sexual intercourse with a man other than her husband, he may file for divorce on grounds of adultery. The other man is liable to be sued for compensation, in Christian law. Besides under Criminal law, a husband can criminally prosecute him and he is liable to punishment.

5. A wife's consent to adoption by her husband is necessary. She herself is permitted to adopt with the consent of her husband. This applies only to Hindu wives, because in the absence of a Uniform law on Adoption, persons of other religious persuasions are not entitled either to adopt or to be adopted.
6. She is accepted as natural guardian to her children, second to her husband.

**Offences relating to minor girls**

Sections 366-A, 372 and 373 of the Indian Penal Code are significant on this point according to which procuration of a minor girl for purposes of prostitution, selling or letting, to hire a minor girl and buying or obtaining possession of a minor girl for the same purposes are criminal actions conveying a penalty of upto ten years and fine.

**Violence against women**

There are many situations of violence against women, covered by different sections of the Criminal Procedure Code. Apart from violence that is not gender specific, such as murder, there are laws that relate to sexual violence inflicted upon women.

The most extreme form of such violence is rape, which is covered under Section 376 of Indian Penal Code. Under this section, if a woman is-compelled to submit to sexual intercourse, without her consent, she may be entitled to redress from the law. In order for such a complaint to be redressed, however, it is necessary for a woman to prove that she was not a willing party to the intercourse, that intercourse did occur. That she did not, by her manner of dress, or in any other way, invite intercourse, that she is a woman of "good character", and that she resisted rape under consideration of fear or because she was aware that resistance is either useless or would incite the rapist to further violence, and was considered to have co-operated. Similarly, it is not possible, under the law for a prostitute to be raped,
since she is not a woman of good character. The fact that she may have, for valid economic considerations, commoditized her sexual activity, appears to abrogate her rights over her own body. The mere fact that the woman did not bear the best of character may at best only render it likely that she might be a consenting party. It would not necessarily follow that she was a consenting party.⁴⁹

In case a rape is proved, the maximum sentence may vary from ten years with a fine, to life imprisonment.

In situations of rape, there are strong social pressures that affect the outcome and in fact the process of redress. Nearly always, the woman is intimidated by the stigma of "unchastity", and therefore, does not complain and in fact protect the rapist. Should she summon up enough courage to file a complaint, the bias of the social and legal system, right from the police who make the inquiries to the judge, is against her. The onus is on her to prove the rape, despite the heavy social odds. Very rarely is a conviction carried through.

Statutory rape is the commission of intercourse with a minor woman either with or without her consent, but without the consent of her guardian, and outside marriage. There is no difference in the sentence imposable in case the consent of the minor girl to the intercourse was obtained.

It is possible for a husband to rape his wife if he compels her to engage in sexual intercourse without her consent, only if she is below 15 years of age. It is apparently, less of a crime when a woman is raped by a man she is bound to in marriage.

⁴⁹ AIR 1953 Ajmer 12 (Lalu).
In India, it was not until 1983, that the Criminal Law Amendment Act provided that a husband could be lawfully charged with rape. But this exception to the general immunity is very narrowly defined, i.e. where the husband and wife are living separately by a Court Order and he has sexual intercourse with her without her consent.

Since legal separations are rare in India, this category of culpability is insignificant. Instead, within the home and specifically the marital bed, women continue to be sexually assaulted and violated with no redress whatsoever.⁵⁰

However, now, in Indian Evidence Act, 1872 Section 114-A has been inserted, according to which-

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860) 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 she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Prostitution and trafficking

There is no law that directly criminalizes prostitution. However, soliciting in a public place is illegal. So is the trafficking in women i.e. engaging in the buying and selling of women for the purpose of prostitution. The law against soliciting obviously makes it impossible for the woman to obtain clients legally. Those women who fall into the

lower income brackets obtain clients on the street and public places where they are always being picked up by the police and are vulnerable to all kinds of violence. Usually the sentences are restricted to a fine with a short prison term in addition, for those who have been picked up repeatedly.

There is no law at all against the client, who is definitely an equal participant in the offence. This bias works strongly against the position of the woman. Since the client runs no risk, there is no social motivation to protect the right to livelihood of these women. The women are also then vulnerable to all sorts of pressures from those who traffic in them. The threat of arrest, prison term, police or social violence keeps the woman submissive and under control.

There are laws against trafficking in woman, with fines and penalties of three to ten years imprisonment as a maximum depending upon whether the woman is a minor girl or not. However, it is very difficult to pin the charge on pimps or brothel keepers for several reasons. One is that the woman herself protects them. Also these traffickers have excellent relations with the enforcement personnel and can usually ensure that no charges are preferred against them. Prostitution in India, particularly in the cities and commercial and tourist towns is largely syndicated.

In most cases, the brothel owners or pimps stand in court as the legal guardians of the woman and the women are returned to their custody in the course of law.

It is a debatable point as to whether laws on prostitution, (prohibition or control) should at all exist in the present social situation. Due to the
economic and social structures predominant, it appears to be the only avenue for the survival of many unfortunate women. However, the structure of the current laws permits all the perpetrators, such as the client and the procurator to get off scot free while the women, who are merely exploited for their benefit, carry the brunt of social and legal disapproval and penalties. Sex workers of Calcutta demanded the legalization of their trade on the ground that they can survive with this trade only.\footnote{51}

Rights of women when taken into custody

The law provides that a woman may not be arrested or taken into custody without the presence of a police woman. Male police may not attempt to physically restrain or control a woman. If a woman is to be searched, it must be done by a police woman in the presence of at least one other. Bodily search may not be conducted in the presence of male police officers.

Women prisoners have a right to separate areas for sleeping, washing and toilet facilities. It is not permissible to separate a mother and young child in custody, unless the child is old enough to be independent of care. Women prisoners must be supervised by female wardens.

Upon a charge being made, the accused has a right to read and possess a copy of the complaint. The accused also has a right to legal advice and the services of a lawyer before responding to the complaint in any way. In case the accused does not have the financial resources to hire legal services, the State is compelled to provide the same, free of cost.

\footnote{51 See article of Arvind Kala on “Need to Legalize prostitution”, published in ‘The Pioneer (Lko.)’ dated 20.03.1996, p. 10. Prostitution for instance, is legal in Melbourne, Australia.}
This provision applies also to persons engaged in civil litigation, being based on the constitutional right to legal representation. When the woman is the complainant:

(a) *In a Civil Suit:* She has the right to free legal aid. In matrimonial disputes and maintenance suits, she has the right to interim relief. She has the right to copies of all statements of the defence.

(b) *In a Criminal Case:* She has the right to free legal aid. She has the right to a receipt of copy of her complaint known as F.I.R. or First Information Report duly signed by the authorized police personnel. The F.I.R. is not necessarily a limiting statement and may be subsequently expanded. In a case of physical violence having been inflicted, it is necessary to insist, at the police station, upon examination by a recognized medico-legal person and upon a medical report being filed along with the complaint. If it is possible, statements of witnesses should also be filed. A complete statement should be filed with as many details of circumstances as possible, no matter how long the statement is. It is possible to file a statement of violence apprehended or anticipated by a woman, particularly if similar incidents have occurred, previously. It is also advisable to include in a specific complaint, any history of violence or cruelty that has not been previously reported. It is not necessary to withdraw a report made at the police station in the event that a compromise has been reached, particularly in the case of matrimonial situations. A second statement of the compromise and its conditions is adequate.
Women's problems in the context of marriage are rooted in the image of her as a dependent passing from the custody of her father to that of her husband. As such, her individuality, her rights, her needs, are automatically subject to those of her husband and then to her in-laws, since they are related to her husband.

In the present economic set up, her work in the house, far from being seen as subsidizing her husband's and adding value to market goods is denigrated and in fact not visible in economic terms. The system depends on her for producing, socializing, training and nurturing its future and present work force and then makes this major function she performs degrading or at least unimportant.

Even the marketed function she performs are undermined in status and cost due to the circular logic that since she depends most of her time and effort in "unproductive" labour, the "productive" work is of lesser value.

Being thus stripped of all economic power by such a system and being further impoverished by the patriarchal patterns of inheritance, she is at the mercy of her exploiters. The law, designed for and by men does little to remove the disparity that actually exists since it would upset all established economic and social processes.

In Hindu Law she is seen as merging her identity with her husband and the two are considered one entity, represented by the husband. In Muslim law she is equal to half a man for all legal and social purposes. In Christian law she is subject to her husband as the body is to the head.
Now, in respect of property matters, the husband and the wife are two different persons. They can own separate property; they can even sue each other to settle property dispute. The share of one spouse on the death of the other is now regulated by law.

In respect of criminal matters, husband and wife can not be guilty of conspiring together, or of larceny from each other while living together. Certain matrimonial communications are privileged. One spouse is not normally compellable to give evidence against the other, but may give, in general, evidence on behalf of an accused spouse.

Despite laws that provide for some relief to her in case of marital violence, inspite of the avenues open to her on paper to seek redress of marital grievances in the Courts, in practice she is constantly urged to submit, to adjust, to have patience. She is denied access to information and education, with the result that she is alienated from the economic and social mainstream.

Recognizing the needs of women for legal aid and a place of shelter under conditions of abandonment particularly when the women are minors, the State has attempted to provide legal aid cells and "nari niketans".

Regrettably these institutions, though the intent has been admirable, have not succeeded in alleviating the situation of women at all, being firstly inadequate in their scope and extent and symbol of refuge but one of state instituted oppression and exploitation of women under its care. In order for effective implementation of the laws that do exist and to create changes in the laws themselves, it is important for women to work in and through groups.
Different groups whose work is concerned with the assistance of individuals who need legal aid to affect their rights and/or the empowerment of women are already functioning. There is a need for more. As people become more aware of their rights as individuals, as human beings they will seek to make these rights enforceable, and organization is the only way to make the needs of individuals recognized by what is obviously and exploitative system.

Women's groups have, in the short-term that they have been in existence focused on the problems of women, conducted various studies and assisted in the process of emancipation and change both in the lives of individuals and on the policy and law making levels.

It is important, therefore, that the work started and being carried out by existing organizations is strengthened by increased membership and by the formation of new groups. The state aid is also essential.

It is a healthy trend that more and more women are seeking solutions to the common problems they face, collectively, and one that must be encouraged. However, we see that the disparity of status between men and women, not only in society or in the economy, but in law undermines this idealistic statement.

One major reason for this is the acceptance of the new controversial "personal laws". "Personal law" is no more than the codification of legal customs of different religious communities, governing all aspects of domestic life. It does not cover criminal activity and punishment, which is taken under the purview of a Uniform Criminal Code. All religions in some way or other have a negative bias in the context of women's rights and status. This bias has been ratified and perpetuated
by the adoption of laws based on religious customs. The negative bias in Hindu Law is of minimal degree because of conferment of new status to Hindu women. Any custom which is a conflict of statutory law has lost its validity. In Muslim Law customs still play a dominant role but for this reason emancipation of Muslim women is still a difficult task. The Muslim Law has to provide a better security in a positive form. So that she could emerge with a new identity from the tradition based Islamic law. A very few Acts have been passed to her benefit but one expects more for making her legally, socially and financially independent.

1.10. THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

The Muslim Women (Protection of Rights of Divorce) Act, 1986 undoes the gains of divorced Muslim Woman. It is not correct as a close analysis shows that the Act does nothing like throwing out of window the Shah Bano's verdict or the legislative progress enshrined in the provisions of Criminal Procedure Code, 1973. The main features of this enactment may be summed up as the Act accords relief the divorcee. It does not say that Mahr is a consideration for divorce for is the sum referred to in Section 127(3)(b) Cr. P.C. It does not lay down that no maintenance is to be paid to the divorcee after iddat or that she is to be abandoned for the life after iddat.

The preamble of Act says that it is 'an Act to protect the rights of Muslim Women who have been divorced and further to provide for matters, connected and incidental thereto. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, entitles a divorced woman to (i) reasonable and fair provision, and (ii)
maintenance to her, (iii) provision and maintenance to her children for two years, (iv) Mahr amount and (v) All properties given to her before, at the time and after her marriage. Out of these, the 'provision' and 'maintenance' are to be made and paid to her within the Iddat period by her former husband.

Does it mean that the maintenance is to be paid to her only during the Iddat period? The original controversy resurrected in Arab A. Abdullah v. Arab Arab Bail Mohmuna Saiyad Bhai. In the instant case, the matter takes into consideration was the validity of an order passed under Section 125 of Cr. P.C. in view of Muslim Women (Protection of Rights on Divorce) Act, 1986. The main questions arose in the instant case for the determinations are: (i) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by the Judicial Magistrate of First Class, under Cr. P.C. ordering the husband to pay the maintenance to the wife are nullified? (ii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, takes away the rights which are conferred upon the Muslim divorced wife under the personal law or under general law. (iii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced Woman is entitled to have maintenance during the iddat Period only. The divorced wife (the respondent) has filed criminal application under Sec. 125 of Cr. P.C. claiming maintenance allowance, the magistrate granted Rs. 250 per month. Additional Session Judge confirmed the order. Against that order, the petitioner husband filed the criminal application in the High Court. The petitioner husband contended that So far as the first issue was concerned they alleged that in view of the provision of Muslim Women

52 AIR 1988 Guj 141
(Protection of Rights on Divorce) Act 1986, the orders passed by the magistrate under Section 125 of Criminal Procedure Code is non-est. They relied on Section 7 of the Muslim Women (Protection of Rights on Divorce) Act 1986 to support their argument. In regard to the second issue they contended according to the Muslim Personal Law, the husband's liability to provide of his divorced wife is limited to iddat period, despite the fact that she is unable to maintain herself. The reason behind that is that the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 is to nullify the interpretation given by the Supreme Court in Shah Bano's Case. He contended that a divorced woman is entitled to get maintenance from her former husband within the iddat period only and that word within should be read as "during" or "for". It was further admitted that if the parliament wanted to provide for future maintenance to the divorced women, then the parliament would not have provided that the said amount should be paid within the iddat period but instead of that the parliament has specified the time. Contentions of the respondent wife were that with regard to the first issue they submitted that Section 7 of Muslim Woman (Protection of Rights on Divorce) Act 1986 clearly indicates that there is no inconsistency between the Muslim Women (Protection of Rights on Divorce) Act 1986 and the provisions of Cr. P.C. 125 to 128. The provisions of Muslim Women (Protection of Rights on Divorce) Act 1986 grant more relief to the divorced women depending upon the financial position of her former husband. So far as the second point is concerned the and alleged that there is a presumption against an implied repeal because there is a presumption that the legislature enacts the laws with complete knowledge of existing laws obtaining on the same subject and to failure to add a repealing clause indicates that
the intention of the legislature was not to repeal the existing laws. As to the third question they submitted that parliament has provided for making fair and reasonable provision and the payment of fair and reasonable provision and the payment of fair and reasonable maintenance to the divorced women after visualizing and contemplating her future need and the same has to be made within the iddat period by her former husband. The Hon'ble Gujrat High Court speaking through M.B. Shah J. reasoned and held as under:

(i) As regards the nullify of an order passed under Section 125 of Cr. P.C. after the enactment of Muslim Women (Protection of Rights on Divorce)Act, 1986, the Court reasoned that there is no Section in the Act which nullifies the order passed by the magistrate under Section 125 of Cr. P.C. Further once the order under Section 125 of Cr P.C. has been passed granting maintenance to the divorced wife then her rights are crystallized. There is no inconsistency between the provisions of the Act and provisions of Section 125-128 of Cr. P.C. On the contrary Act grants more relief to divorced Muslim Women depending upon the financial position of her husband.

(ii) As to the second issue the court relied on the statement of object and reasons as well as preamble of the Act. The Court held that on the plain reading of the Act, it cannot be said that Muslim Women (Protection of Rights on Divorce)Act 1986 in any way adversely affects the personal right of a Muslim divorced woman. Nowhere, it is provided that the rights which are conferred upon a Muslim divorced wife under personal law are abrogated or repealed. It does not provide that it was enacted for taking away same rights
which Muslim woman seeking either under the personal law or general law under Section 125 of Criminal Procedure Code.

(iii) For the third issue, the court held that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for iddat only.

The dictionary meaning of the word 'within' is 'on or before' and 'not later than', 'not beyond' therefore the word 'within' meant that he was bound to make and pay the provision and maintenance before the expiration of iddat period. It seems that the Judgment is not upto the mark as it could not decide successfully the matter whether maintenance of Muslim Women is only for iddat period or beyond Iddat Period.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju v. Patumma Beevi*,53 The question before the Kerala High Court was whether the Muslim Women was entitled to invoke the Section 127 after the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. The Session Judge was of the opinion that she could invoke the Section 127 of Muslim Women (Protection of Rights on Divorce) Act, 1986 as the Act contained no repeal, express or implied of the Code. Hon'ble High Court held that the Section 125 to 128 of the Cr. P.C. are not repealed but excluded or restricted. The well known rule of interpretation is that a special law excludes a general law when a special law namely the Muslim women (Protection of Rights on Divorce) Act, 1986 was passed to govern maintenance to Muslim wives, application to general law i.e. under code was excluded or restricted. On giving the answer to the argument

53 (1989) 1 KLJ 337
that the right under the code is independent of personal law and unaffected., it was the opinion of Kerala High Court that if one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional right. It seems that the Judgment tried to give some clear cut picture regarding the (i)Application of Muslim Woman (Protection of Rights on Divorce)Act, 1986, (ii) Exclusion or restriction of the application of Section 125 to 128 of Cr. P.C. by a well known rule of interpretation that special law exclude the general law; (iii) it tried to reduce the effect of judgment in A. A. Abdullah’s case which says that the Act gives the additional arrangement for the maintenance of women when maintenance by previous husband fell short of her needs. This judgment clarified that the provisions of the Act is not to provide additional right. The view of Gujrat High Court in A.A. Abdullah Case was also not approved by the High Courts of Andhra Pradesh, Guwahati and Calcutta.

In Usmania Khan Bahmani v.Fathimunnissa Begum,\(^\text{54}\) the issues of the case were: (i)Whether a divorced Muslim woman can claim maintenance under Section 125 of Criminal Procedure Code,1973 from her former husband even after the passing of the Act of 1986? (ii) Whether the maintenance contemplated under Section 3(1) (a) of the Act of 1986 is restricted only for the period of \textit{Iddat}? Or (iii) whether a fair and reasonable provision has to be made for future also with in the period of \textit{Iddat}. Here the ratio of Majority judgment was 2:1. The Court held on issue No.1 that Section 3 of the Act of 1986 starts with a non obstante clause as it provides that "not with standing anything contained in any other law for the time being in force......."

\(^{54}\) 1990 Cr. L.J. 1364 APHC
Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of *Iddat*, is devolved upon the relatives and if the relatives are not available on the Waqf Board.

The very concept of the liability of the husband is limited for and during the period of *Iddat*, under Section 5, it is provided that the husband and wife would be governed Section 125 to 128 of the Cr. P.C if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provision of Sections 125 to 125 of the Cr.P.C.

Further, under Section 7 of the Act, the intention of the legislature is clear when it provided that every application by a divorced woman under Section 125 or 127 of the Cr.P.C., pending before the court or magistrate in the commencement of the Act of 1986, shall note with standing contained in that code and subject to the provision of in accordance with the provisions Section 5 of this Act be disposed of in accordance with the provision of the Act of 1986.

A combined and harmonious reading of the provisions of Section 3 to 7 of the Act of 1986 clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. On the Issue No.2, the court held that the liability of the Muslim husband to pay reasonable and fair provision and maintenance is confined only for and during the period *oilddat*. The concept of reasonable and fair provision and maintenance cannot be read as meaning two different things. The word "Mafa" used in Ayat 241 in chapter II of the Holy Quran indicates that the word "Provision" and "maintenance" convey the same meaning.