CHAPTER IV

LEGISLATIVE ENACTMENTS
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In jurisprudence, customs, legislations and judicial precedents are regarded as the sources of law. Rights, powers, interest, privileges, obligations, duties, liabilities and disabilities of persons are the product of the above said sources. In course of time, customs followed in a society crystallizes to become social practices and they are legalized and legitimized. Before Indian independence, India witnessed invasion after invasion. Of all the invasions India faced, British invasion and corresponding rule had certain distinct characteristic traits. Pre-British rulers whether the Mughals, the Sultanates or other earlier invaders had similar socio-cultural background with reference to exclusionary practices levelled against women. In fact the rule of the Delhi Sultans and Mughals have added some more social exclusionary practices like purdah, seclusion of women, and wide practice of polygamy including concubinage into the Hindu social system. Girl’s education took a back seat, child marriage became the norm, female infanticide and sati were encouraged. Early Indian society around the Rig Vedic times was relatively women friendly. But from the post-vedic period their position deteriorated slowly but steadily, and at the time of the British rule, women were bound by many debilitating social customs and traditions.

The British being conservative and like any other European culture did not accord equal status to women. Yet, comparatively, in the context of treating women, they were quite liberal and progressive. The western cultural diffusion ignited the Indian minds and enabled them to start several socio-religious reform movements like Brahmo Samaj, Arya Samaj, Prarthana Samaj and other organizations besides the Indian National Congress in the political sphere. The Brahmo Samaj supported the British when it introduced several social reforms in India like the abolition of sati,¹

¹ The Bengal Sati Regulation, or Regulation XVII, A. D. 1829 of the Bengal Code was a legal Act promulgated in British India under East India Company rule, by the then Governor-General Lord William Bentinck, which made the practice of sati or suttee—or the immolation of a Hindu widow on the funeral pyre of her deceased husband—illegal in all jurisdictions of British India and subject to prosecution.
"sati" means the burning or burying alive of – (i) any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or (ii) any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the women or other-wise.
the spread of western liberal education, etc.\textsuperscript{2} Arya Samaj, despite being a reactionary movement against the British, consistently endeavored to liberalize the social taboos and other exclusionary practices hurting and stalling women’s development. The Prarthana Samaj, similar to other movements made serious attempts in liberating Hindu women more particularly in the lower rungs of the society.

In the political arena, the Indian National Conference, analogous to Indian National Congress, endeavored in the last quarter of the 19\textsuperscript{th} century to give primacy to socio-religious reforms rather than political reforms. The Indian National Congress encouraged the participation of women in the freedom struggle.\textsuperscript{3} The success of Gandhi lay predominantly in involving women in the political activities especially in the non co-operation and civil disobedience movement.\textsuperscript{4}

The cultural and religious traditions of the British and their liberal political ideologies which were entirely different from the socio-cultural, religious and political ideologies of the pre-British rulers were conducive for liberating women. Several discriminatory social exclusionary practices against women were abolished and they facilitated social transformation to happen gradually, through legislative enactments like Abolition of Sati Act, 1829, Widow-Remarriage Act, 1856, Indian Penal Code, 1860, The Code of Criminal Procedure, 1973, The Indian Evidence Act, 1872, Sarda Act, 1929, Inams to Devadasis in Madras Presidency, 1929, etc. The implications of these pre-constitutional legislations in mitigating the exclusionary practices of women is analysed in this part.

\textsuperscript{2} A liberal education is a system or course of education suitable for the cultivation of a free human being. It is based on the medieval concept of the liberal arts or, more commonly now, the liberalism of the Age of Enlightenment. It has been described as “a philosophy of education that empowers individuals with broad knowledge and transferable skills, and a stronger sense of values, ethics, and civic engagement ... characterized by challenging encounters with important issues, and more a way of studying than a specific course or field of study” by the Association of American Colleges and Universities. Usually global and pluralistic in scope, it can include a general education curriculum which provides broad exposure to multiple disciplines and learning strategies in addition to in-depth study in at least one academic area. Liberal education was advocated in the 19th century by thinkers such as John Henry Newman, Thomas Huxley, and F. D. Maurice. Sir Wilfred Griffin Eady defined liberal education as being education for its own sake and personal enrichment, with the teaching of values.


1. PRE-CONSTITUTIONAL LEGISLATIONS

I. ABOLITION OF SATI, 1929

The Bengal Regulation of 1829 abolished sati. The Madras Presidency enacted similar legislation in 1830, though the practice of sati was not as widely prevalent and as rigidly practiced as in the case of Bengal. Sati, which is the burning of the wife on the funeral pyre of her husband was the inhuman socio-religious practice perpetrated against Hindu women. Widows’ irrespective of their age were burnt alive along with their husband’s corpse. Consent was immaterial. In a polygamous marriage, there will be as many pyres as the number of wives lying along with the deceased husband for being burnt alive. Society hails those women as sati and reveres them. It is a cruel, barbarous and inhuman social practice against Hindu women. Even a century after passing the Regulation making Sati illegal, a situation arose in Rajasthan, when the Rajasthan Sati (Prevention) Act, 1987 had to be passed. The embers of a deeply rooted social custom, was still burning. The practice of Sati is now deemed as an offence and is considered as a murder or culpable homicide. Those who encourage such practice are said to be abettors of the crime and hence punished accordingly. The widows who make any such attempt are punished since it is considered as an attempt to commit suicide. Abolition of Sati is considered as a radical reformatory measure taken by Lord William Bentinck, who was strongly backed and supported by Raja Ram Mohan Roy and the Brahmo Samaj. Lord Macaulay, Chairman of the First Law Commission, 1833, in the process of codification of the criminal laws also explicitly listed sati as an offence punishable equally like murder.

Utilitarian ideology is inherently British in nature. Bentham, James Mill and John Stuart Mill propounded this ideology. It reiterates legislation as a vital source in regulating the society. Macaulay, an ardent follower of Bentham and his utilitarian ideology translated its basic tenets into the Indian criminal jurisprudence. It manifested in the form of Indian Penal Code and Code of Criminal Procedure. For the

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The implementation of these codes, criminal justice system was also established. Indian Penal Code and Code of Criminal Procedure have been put into implementation by the hierarchy of the criminal courts.

The British Indian criminal laws are uniform laws and are applicable to all the people irrespective of caste, religion, region and sex. This uniform treatment to all the people in criminal jurisprudence is antithetical to the then existing criminal laws. The Code of Criminal Procedure and the Indian Penal Code removes all disabilities attached to women in general and Hindu women in particular. It facilitates all Hindu women to have equal capacity in enforcing rights which are violated. Every Hindu woman as a person is entitled to all the rights and criminal liabilities on par with Hindu men. It removes all negative social exclusionary practices. These are radical criminal legislations that go a long way in the capacity building of Hindu women on par with Hindu men. Silently it revolutionized the criminal justice system by completely removing and restructuring all the existing patriarchal friendly criminal laws.

II. INDIAN PENAL CODE

The enactment of this Code was a revolutionary enactment under which various offences have been codified and punishments for those offences are prescribed. It came into force in 1861. Prior to this Code, the definition of crimes and punishments varied from Presidency to Presidency. Ever since the Cornwallis Code of 1793, progressive attempts were made to consolidate the Code. Before the British Criminal law, Muslim Criminal law and Hindu Criminal law were in practice. In the criminal justice system, maintenance of law and order and administering criminal justice are the sovereign functions of the rulers. The political uncertainty and consequent instability left the local leaders and other persons in the helm of affairs like Jagirdars, Mirasdars and Zamindars to apply criminal laws according to their own whims and fancies. There was neither a uniform judicial system nor was there a common criminal law throughout India.

Women were the worst affected victims of all sections of the society in such ambiguous and uncertain political vacuum. All types of discriminations, disabilities,

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6 Indian Penal Code was enacted on 6th October 1860, Act No. 45 of 1860
incapacities and liabilities which were prevalent were fostered and strengthened in the name of socio-religious customs. The patriarchal social setup was maintained. In this backdrop, the introduction of uniform criminal law applicable to all irrespective of gender, caste, class and religion enabled women to have equal entitlements and capacity building in protecting their interests.

Prior to the British rule in India, a particular act or omission could not be universally considered as constituting a crime. There were different yardsticks and different punishments for such crimes. Punishments varied depending on hierarchy. Lower a person’s caste, heavier the punishment and higher the caste, lower the punishment. Likewise, while dealing with crimes by women, differential treatment was followed. What was a crime for women need not be a crime for men. Secondly, lower a women’s caste, heavier the punishment and higher the women’s caste, lower the punishment.

The Indian Penal Code of 1860, removed all such hierarchical distinctions, discriminations and exclusions. It introduced a uniform definition for crime. However, barring the exceptions enumerated from Sections 76 to 106, all others are liable to be punished irrespective of gender. This Code removes at one stroke the discriminatory socio-religious exclusionary treatment meted out to women. Therefore, this Act is a very important pre-constitutional inclusive Act snuffing out exclusionary practices adopted against women in criminal jurisprudence. It is relevant to mention that it has many positive exclusionary measures to protect women in several offences.

Indian Penal Code rests on the basic principle of *mens rea*, that runs throughout the Code. It is predominantly gender neutral, except in certain areas like offences against body and reputation of women like rape, unnatural offences and acts that outrage the modesty of women. It is relevant to note that offences are broadly divided into two categories, namely 1) offences against the State and 2) offences against persons. With reference to offences against persons, it is further divided into a) offences against the body of the person; b) property of the person; and c) offences related to marriage and defamation.

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8 Actus non-facit reum, nisi mens sit rea – Nothing is guilty until done with a guilty intention.
As far as offences affecting the human body, there are several offences like culpable homicide, murder, causing miscarriage, hurt, grievous hurt, wrongful restraintment, wrongful confinement, criminal force, assault, kidnapping, abduction, slavery, forced labour, sexual offences including unnatural offences. The implications of these offences pertaining to women have wide ramifications. In a traditional Hindu social system which considered women as inferior and subordinate, if the husband or the other members of the family committed any one or more of the offences listed above on the wife, it was not treated as an offence earlier. The holistic principle of subserving the individual’s interest to the common betterment of the family, caste and community was strictly enforced against women. They were the most affected victims of such holistic tendencies. Any act against the social norm or any crime committed by a daughter, or a wife or a widow was viewed seriously as tarnishing the reputation of the family. The family members treated them shoddily for such transgressions and misdemeanours and meted stringent punishment to them.

This Code is gender and religion neutral and provides a uniform criminal code. The term ‘person’ is used throughout the Code to denote any person including members of the same family like father, brother, husband or son. Whoever does any act forbidden by the Code shall be considered as an offender and the said act being an offence is punishable. Accordingly, all the offences, whether against the body or property of Hindu women, even if it is committed by their own family members is punishable according to the Code.

Any practice of sati and abetment to sati are punishable as they would amount to murder, or culpable homicide. Therefore the abolition of sati prescribed by the regulation of 1829, has better enforceability under this Code. Accordingly, the worst form of social exclusion and cruelty done to women in the name of Sati and abetment to it was removed by law and made an offence, despite the religious connotation.

The practice of female infanticide was widely prevalent in the traditional Hindu society. The unwanted girl children were killed in their infancy. As per the definition of culpable homicide and murder, such exclusionary practice of female infanticide also amounts to culpable homicide or murder.\(^9\) Not providing adequate

\(^9\) *Section 299 of The Indian Penal Code, 1860:* Culpable homicide —Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury
nutrition, food and care leading to a girl child’s death due to starvation, also amounts to culpable homicide and are not considered as murder or it may be treated as abetting to commit suicide.¹⁰

As far as offences against the body of the person is concerned, definitions to ‘hurt’,¹¹ ‘grievous hurt’,¹² ‘wrongful restraint’,¹³ ‘wrongful confinement’,¹⁴ ‘criminal force’,¹⁵ ‘assault’,¹⁶ ‘kidnapping’,¹⁷ ‘abduction’,¹⁸ ‘slavery’,¹⁹ and ‘forced labour’,²⁰ are equally applicable to all those persons including the relatives of the women if they commit against them. In this traditional Hindu society, all Hindu females as daughter, wife, mother and widow are always under the control of some male heads of their families. Besides the head of the family, all senior male members are vested with the power to control and chastise members of the family including all the women. If the women commit any act that amounts to hurting the reputation of the family, the first to punish and chastise them would be the family members. If such punishments in the

¹⁰ Section 306 of the Indian Penal Code, 1860: Abetment of suicide – k “If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

¹¹ Section 319 of the Indian Penal Code, 1860: Hurt – “Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.”

¹² Section 320 of the Indian Penal Code, 1860: Grievous Hurt.

¹³ Section 339 of the Indian Penal Code, 1860: Wrongful restraint – “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.”

¹⁴ Section 340 of the Indian Penal Code, 1860: Wrongful confinement – “Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said ‘wrongfully to confine’ that person.”

¹⁵ Section 350 of the Indian Penal Code, 1860: Criminal force – “Whoever intentionally uses force to any person, without that person’s consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.”

¹⁶ Section 351 of the Indian Penal Code, 1860: Assault – “Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.”

¹⁷ Sections 359, 360 and 361 of the Indian Penal Code, 1860.

¹⁸ Section 362 of the Indian Penal Code, 1860: Abduction — whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

¹⁹ “A civil relationship in which one person has absolute power over the life, fortune, and liberty of another.”

²⁰ “Forced labour is any work or services which people are forced to do against their will under the threat of some form of punishment. Almost all slavery practices, including trafficking in people and bonded labour, contain some element of forced labour.”
eye of law amounts to any one or more of the said offence, the Indian Penal Code treats them as offence and hence punishable.

The Code indirectly removes many of the discriminatory practices. Giving importance to individuals based on hierarchy of caste, clan, post or sex was eliminated. The introduction of the Indian Penal Code itself was the result of politically radical doctrine of utilitarianism, which is based on the liberal ideology of ‘greatest happiness of the greatest numbers’. Lord Macaulay, an ardent follower and disciple of Jeremy Bentham introduced such revolutionary individualistic ideas into the ethos of hierarchically organized Indian traditional society. This bold step helped to transform the holistic tendency into a liberalistic one.

Stridhana property was the exclusive property of Hindu women in the traditional Hindu society. Such properties were usually movable and rarely immovable properties. Landed properties as per Hindu Sastric laws were not equally inheritable by Hindu female legal heirs. This does not mean that no Hindu female could have immovable properties, but in practice women’s property and more particularly widow’s property was a limited property. It implies that women can enjoy their property during their lifetime. After such a propertied woman’s death, it would revert back to her next legal heir, known as ‘doctrine of reversion’. Hindu women had rights over property including over movable property.


21 Section 378 of The Indian Penal Code, 1860: Theft – “Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

22 Section 383 of The Indian Penal Code, 1860: Extortion – “Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits ‘extortion’.”

23 Section 403 of The Indian Penal Code, 1860: Dishonest misappropriation of property – “Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

24 Section 390 of The Indian Penal Code, 1860: Robbery – “In all robbery there is either theft or extortion. When theft is robbery —Theft is ‘robbery’ if, in order to the committing of the theft, or in committing the theft, or in carving away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. When extortion is robbery —Extortion is ‘robbery’ if the
In all these terms, the gender neutral terms ‘person’ or ‘whoever’ are used, which are relation neutral also. Irrespective of the offender being a stranger or relative, those acts would be treated as offences only. For Hindu women with a gender conditioned upbringing, it is not an easy proposition to bring to the notice of the authorities, any offence or offences committed on them by any of their family members. By this Code, Hindu women are made legally empowered to bring into the books, any offences even against their own family members. Defamation is also gender and relation neutral. Accordingly, if any of the relatives of a woman defame her, they are equally liable to be punished like any other offender who is a close family member.

All the above enumerated offences are gender neutral and most importantly do not differentiate relatives from others. Similarly, it is religion neutral also. Its implication is that it removes all those exclusionary practices perpetrated against offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.”

Section 391 of the Indian Penal Code, 1860: Dacoity – “When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit ‘dacoity’.”

Section 415 of the Indian Penal Code, 1860: Cheating – “Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat’.”

Section 405 of the Indian Penal Code, 1860: Criminal breach of trust – “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 of 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’."

Section 425 of the Indian Penal Code, 1860: Mischief - Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits ‘mischief’.”

Section 441 of the Indian Penal Code, 1860: Criminal trespass – “Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit ‘criminal trespass’.”

Section 499 of the Indian Penal Code, 1860.
women in criminal jurisprudence and thereby prevent the dominance of men with reference to crime. Indian Penal Code is implicitly gender sensitive. At a time when the seeds of feminist movement did not even germinate, this Code did lay the foundation discreetly, but legally for the mother of all revolutions to break the shackles of oppression and secondary status of Hindu women. It positively excludes women legally from committing certain offences like rape and in that section the term ‘man’ is used deliberately to exclude women. Accordingly, “A man is said to commit ‘rape’, who, except in the case hereinafter excepted, has sexual intercourse with a woman.”31 In the offence of adultery, a woman cannot be punished either as an abettor or otherwise.32 In the right to private defence, a woman is vested with the power to cause the death of a person in the process of exercising a right to private defence.

In offences related to marriage there are certain offences enumerated from sections 493 to 498. In these offences, women are positively excluded and protected. In the section dealing with adultery, it is explicitly stated that, “in such case the wife shall not be punishable as an abettor. Even though both are partners of this offence, the woman is excluded from punishment whereas the man is subject to be punished.”33 Similarly, in other offences under this heading the interest of women is attempted to be protected.

Right to private defence from sections 96 to 106 are very important provisions. A general protective blanket explicitly states that, “nothing is an offence which is done in the exercise of private defence.”34 Right to private defence arises on two grounds. First it arises when an offence is about to be committed against the body of human beings and secondly relating to property. The right to private defence appears to be gender neutral, but a careful reading would reveal that this right of private defence of the body extends to causing death.35

In this section, there are three descriptions which are gender sensitive. Accordingly, in the third, fourth and fifth category it is prescribed as follows:

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31 Section 375, Ibid.,
32 Section 497, Ibid.
33 Ibid.,
34 Section 96 of the Indian Penal Code, 1860
35 Section 100, Ibid.,
“Thirdly - an assault with the intention of committing rape’, fourthly – an assault with the intention of gratifying unnatural lust, fifthly – an assault with the intention of undropping or abduction.” According to these provisions, it is obvious that the right of private defence of the body extends to the voluntary causing of death or any other harm to the assailant, if any of these acts are committed against women.

The above enumerated offences and the corresponding punishments undermine the socio-religious exclusionary practices of traditional Hindu society, under the guise of patriarchy. The liberal, utilitarian tenets of Indian Penal Code made serious inroads into the traditional patriarchal criminal jurisprudence of the Hindus. It attempts to protect women by adopting both positive and negative inclusionary policies.

III. WIDOW REMARRIAGE ACT, 1856

Consequent to the abolition of sati, the pitiable condition of widows had to be ameliorated. Hindu marriage was treated by the Hindu laws as sacrament contrary to contract. In a society that practiced polygamy, husbands who lost their wives had no incapacity to marry another woman, but a widow had an incapacity to marry another man. The practice of sati, rampant in certain parts of India was justified as the widows faced exclusions from almost all aspects of social life. Their plight was very pitiable.

Followed by the abolition of sati, the British in India introduced another revolutionary enactment that made Hindu widows capable of entering into marriage. This Act legally enabling remarriage of widows is a positive inclusive legislative measure to enhance the capability of Hindu widows and not relegate them to the background. The Law Commission of India in its 81st report elaborately analysed the implications of this Act. The report is as follows:

“The Act removes all legal obstacles to the marriage of Hindu widows. It removes all incapacities of a Hindu widow entering into a second valid marriage; it makes the offsprings of such widows as legitimate children and removes all incapacities in inheriting property.”

36 Section 100, Ibid.,
The Preamble of the Act aims to “relieve all such Hindus from this legal incapacity and the removal of all legal obstacles to the marriage of Hindu widows.”

The Act validates widow remarriage and declares that,

“no marriage contracted between Hindus shall be invalid and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage.”

Section 3 declares the legitimacy of children of such marriages. Section 3 of the Act imposes certain disabilities relating to maintenance, intestate succession and testamentary succession, wherein the rights of widow in deceased husband’s property would cease on her marriage.

A widow on remarriage was incapacitated in inheriting rights and interests over her deceased husband’s property by way of maintenance. However, this liability was removed by the Hindu Adoption and Maintenance Act, 1956. In the old Hindu

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38 Widow Remarriage Act, 1856, (Act No. XV of 1856).

39 Section 1 of The Hindu Widow’s Remarriage Act, 1856: Marriage of Hindu widows legalized. “No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.”

40 Section 3 of The Hindu Widow’s Remarriage Act, 1856: Guardianship of children of deceased husband on the re-marriage of his widow. “On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.”

41 Section 2 of The Hindu Widow’s Remarriage Act, 1856: Rights of widow in deceased husband’s property to cease on her remarriage. “All rights and interests which any widow may have in her deceased husband’s property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same.”
law, women’s estate was considered as a limited estate. Accordingly, she had only the right of enjoyment, but did not possess the right to alienate them further. After independence, Hindu laws declared a woman’s estate as an absolute estate.

The aim of the Widow Remarriage Act was limited. It conferred the capability of a Hindu widow to contract her second marriage. Thus the social exclusionary practice of preventing her from remarriage was removed by the positive legislative inclusionary policy. Consequently, it also legalized the offsprings of the marriage of a widow. But, it left intact the legal exclusionary practice of excluding the Hindu woman from inheriting the property of her deceased husband, either for maintenance or as an incident for inheritance.

IV. CODE OF CRIMINAL PROCEDURE, 1859

The status and position of women are affected by several factors. Before the advent of the British, the status and position of Hindu women had degenerated to a very low level. Several social exclusionary practices deprived women from realizing their equality of status and opportunity on par with their counterparts. In criminal matters neither systematic codes nor codified laws existed that defined and enumerated crimes. The patriarchal society ensured that men were the natural heads of family, village, village panchayats, caste panchayats, besides leadership in the community. In criminal jurisprudence also women could neither have access to justice nor expect due justice, leave alone equal justice or equal gender justice. This was the socio-legal reality when the British took over the reins of administration of India.

The British being aliens to this country and having only a handful of administrators, endowed with administering a vast country could do their job only by way of a systematically organized criminal justice system. In the first half of the 19th century, the British adopted the principle of centralized administration throughout India. They had a relatively better criminal justice delivery system in their country, and they gradually introduced a hierarchy of criminal courts to administer criminal justice.

In criminal justice system, hierarchy of criminal courts, their powers, functions and codification of criminal laws were also taken up by the British in India. Jurisprudentially, both the procedural criminal laws and the substantive criminal laws
are essential for the proper administration of criminal justice. In fact, the first law commission was constituted with an objective to codify Indian Penal Code. Lord Macaulay undertook this mammoth task and codified the Indian Penal Code, which was enacted as an Act in the year 1860. The Code of Criminal Procedure was enacted in the year 1859.

The procedural laws normally do not confer rights or liabilities. But the enforcement of the substantive law is effectively possible only by procedural laws. The Code of Criminal Procedure declares that maintaining the wife and children is the liability of the husband and father, failing which such omission was considered an offence punishable under law. The Code of Criminal Procedure removes disabilities and discriminations attached to Hindu women due to social exclusionary policies that prevented them from approaching the appropriate courts to seek remedies for offences committed against them either by their family numbers or by outsiders.\(^{42}\)

\*2. CIVIL LAWS*

Corresponding to uniform criminal code, the Governor-General-in-Council enacted several path breaking legislations. The Contract Act, 1872, the Transfer of Property Act, 1882, besides the Indian Evidence Act, 1872 are equally applicable both to civil and criminal matters. Along with the Indian Penal Code, the Indian Contract Act and the Transfer of Property Act, remove most of the disabilities, discriminations, conditions and incapacities attached to Hindu women. These legislations remove the gender barrier and are gender neutral. Adopting this approach to legislations in itself was a radical change liberating women from centuries of oppression. The right to enter into any contract, including contract to alienate their properties legally, like men, was a small step, but a major leap towards women’s emancipation. Such measures started cutting at the root of gender discriminations.

I. THE INDIAN CONTRACT ACT, 1872

This Act treats all persons on an equal footing sans any gender bias. Capacity to enter into a contract, of course, subject to age of majority and soundness of mind are conditions common to both sexes. In this Act, while dealing with the competency

of parties entering into a contract, the gender neutral terminology ‘person’ is used. Centuries of social exclusionary practices adopted by the Hindu social system to exclude women from entering into contracts has been erased by this one word, which ushers in positive policy inclusion. Thus this Act helps Hindu women in their capacity building and enables them to have equal bargaining power in contractual transactions.

The Transfer of Property Act, 1882, also removes many existing discriminations, disabilities, incapacities and conditions imposed on Hindu women. It is on record that prior to the enactment of this Act,

*The transfer of immovable properties in India was governed by the principles of English law and equity. In the absence of any specific statutory provisions, the Courts had to fall back upon English law on real properties, sometimes forcing the Courts to decide the disputes according to their own notions of justice and fair play, resulting in confused and conflicting case laws.*

Therefore the Transfer of Property Act and the Indian Contract Act analogous to the Criminal Codes enabled Hindu women to have an equal footing in the legal arena. All these gender-neutral criminal and civil laws apparently appear as just codifications and enactments. When viewed through the spectrum of the Hindu social system which rests on gender hierarchy placing women as inferior to men in status and imposing ascriptive and inferred characteristics on account of sex, these legal principles silently introduced by the British were revolutionary in nature and were harbingers of positive change in gender equations. Moreover, the establishment of hierarchical civil and criminal courts to enforce such equal rights and liabilities effected in transforming the existing status and position of Hindu women legally. For actual social transformation, women had to undertake an arduous journey, which journey is yet to reach the destination.

**II. THE INDIAN EVIDENCE ACT, 1872**

The East India Company ceased to exist in 1858 and the British Government took over the reins of administration of India from them. After 1858, the British Parliament directly controlled Indian administration. The legislative councils both at the centre and in the provinces evolved gradually and were given power to make laws

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43 The Transfer of Property Act, 1882.
44 The Government of India Act, 1858.
for India. The Governor General in Council enacted the Indian Evidence Act, in 1872. The adoption of this Act was a path breaking measure, which changed the entire system of concepts pertaining to admissibility of evidence in the Indian Courts. Until then, the rules of evidences were based on the traditional legal system which differed from one social group to another and from community to community. They were different for different people, based on caste, religion and social position.\(^{45}\)

The Evidence Act completely removes all disabilities, discriminations and incapacities attached to women in general and Hindu women in particular in giving evidence or in producing documents and appearing before the court to participate in the judicial process of testifying as witnesses. The Act prescribes that,

\[
\text{All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind.}^{46}\]

The term ‘all persons’ used in the beginning of the sentence is inclusive. It includes women along with men and so Hindu women too come within its fold. In the tradition bound Hindu society where there was neither a proper judiciary nor common codified laws, Hindu women were not permitted equally on par with men to participate as witnesses in the justice delivery system. This gender neutral approach throws out the prevailing incapacity of Hindu women and confers capacity on them to be a witness as per law.

This Act has a wider implication in conferring capabilities positively on women. The question of the child’s legitimacy has been dealt in this Act with clarity. Accordingly,

\[
\text{the fact that any person was born during the continuance of valid marriage between his mother and any other man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.}^{47}\]

\(^{45}\) [www.advocatekhug.com/library/India](http://www.advocatekhug.com/library/India), visited on 23/11/2015

\(^{46}\) Section 118 of the Indian Evidence Act.

\(^{47}\) Section 112 of the Indian Evidence Act.
Nature has endowed women with the ability and privilege of giving birth to children. At a time when polygamy was in practice and when concubinage was not abolished in the Hindu society, the insertion of this provision works at removing the stigma and disability attached to women whose children and their legitimacy were in question. When this Act was passed, widow remarriage was legalized, but divorce was still an alien concept, so this provision had no direct application at that time. Subsequently, when Hindus were allowed to go in for divorce, this provision had a serious implication. This section seals the legitimacy of children. Accordingly, if a valid marriage is established and a child is begotten within two hundred and eighty days from the date of dissolution of the marriage, such children are deemed to be legitimate children of the man. Sections 113A and 113B that deal with abetment of suicide by women and death due to dowry have been added after the Constitution came into force.\(^{48}\)

III. WOMEN’S RIGHT TO PROPERTY ACT, 1937

Consequent to the abolition of negative exclusionary social practice of sati and the policy of positive inclusion of enabling Hindu widows to contract remarriage, another revolutionary inclusive provision removes the discrimination and disability of Hindu women inheriting property in case of intestate succession. The Hindu Women’s Right to Property Act, 1937, amended the Hindu law governing Hindu women’s right to property, which explicitly states that, “\textit{whereas it is expedient to amend the Hindu law to give better rights to women in respect of property.}”\(^{49}\) It is therefore obvious that this Act attempted to enhance the status and position of women.

In the traditional Hindu law there are two broad schools namely Dayabhaga and Mitakshara schools. Regarding devolution of property, the Act\(^{50}\) prescribes as follow:

\begin{itemize}
  \item [(1)] When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:
\end{itemize}

\(^{48}\) See chapter III, \textit{Supra.},

\(^{49}\) Preamble of the Women’s Right to Property Act, 1937.

\(^{50}\) Section 3, \textit{Ibid.},
Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Succession Act, 1925, applies.\textsuperscript{51}

In Tamil Nadu, Mitakshara school is in vogue. Under the Dayabhaga school, a Hindu widow is entitled to inherit like her son in any property, in case a Hindu man dies intestate. In Mitakshara, this right of inheritance of a Hindu widow is applicable to the separate property of a Hindu dying intestate. Analogous to a Hindu widow, the widow of a pre-deceased son and the widow of a predeceased son of a predeceased son are entitled to inherit in the separate property of a ‘propitious’.

This Act removed one negative exclusionary practice of depriving Hindu widow inheriting from her husband. But, it allowed to continue another disability and discrimination. Accordingly, the property inherited by a Hindu widow, “shall be the limited interest known as the Hindu woman’s estate.”\textsuperscript{52} This negative exclusionary practice implies that after the death of a widow, the property she inherited would revert back to the legal heirs of her pre-deceased husband and not to her legal heirs.

From the above analysis, it is obvious that sati removed one disability and the surviving Hindu widows were allowed to remarry, removing yet another legal disability for women. Maintaining herself and her children, another difficult task was offset and countered by removing the disability of depriving her from inheriting the

\textsuperscript{51} Section 3, \textit{ibid.}

\textsuperscript{52} Section 3 of the Women’s Right to Property Act, 1937.
property of her deceased husband. The British egged on by Indian social reformers were able to gradually remove one social evil after another and disabilities attached to Hindu women on account of their sex.

3. HINDU WOMEN AND LABOUR LAWS

There is a significant difference between British rule in India and that of the other innumerable dynasties that ruled over India earlier. For the British, India was their colony, and they were just the rulers ruling from England. The other dynasties became Indianized and did not maintain a separate identity. When the British were ruling in India, industrial revolution was going on in Britain, altering the position and status of labourers and their working conditions. It also had an impact on India. The economic policy of the British in India was initially that of the traders who concentrated predominantly in mercantile activity. The industrial revolution transformed India from exporting finished products more particularly agricultural products into exporting raw materials to satisfy British industrial requirements. Subsequently, the finished products of British industries were sent to Indian markets. India known for its fine finished products ended up as an exporter of raw materials. This swift trend resulted in labour regulations.

Hindu women predominantly concentrated in looking after domestic chores. In agricultural families, they worked along with men in the fields. Likewise in cottage industries and traditional occupations, women played a secondary role. In all these jobs, the work rendered by Hindu women were not recognized as productive work since it was unremunerative.

In consequence of industrial revolution and the corresponding introduction of labour legislations, women were also employed in factories as labourers. The labour exerted by women in the factories was recognized. The work of women was remunerated through payment of wages. It facilitated the economic empowerment of women in the labour market contrary to agricultural and other cottage industries. Women’s entry into factories and their entitlement to wages, attached a value to their work. Thus the introduction of labour laws removed the discriminatory practice of ignoring the value of women’s labour and thereby capacitated her to receive wages and entitled her for other protections.
The first labour legislation passed in British India was the Factories Act.\textsuperscript{53} This Act is gender neutral and there is no gender discrimination in differentiating male and female workers. However, in a gender biased Hindu social system, this gender-neutral legislation had a positive impact on the status and position of women. The Indian Factories Act was amended in the year 1891 and it underwent several amendments from time to time. The present Factories Act,\textsuperscript{54} was the culmination of the 1881 Factories Act.

There are quite a large number of legislative provisions protecting the interests of women workers. This Act, besides providing many security and health welfare measures aims to secure the interest of women workers. The 1948 Act provides several positive exclusionary provisions in order to enable Hindu women to be included in the labour mainstream on par with their counterparts. This Act excluded women from working in the factories from 8.00 p.m. till 6.00 a.m. It directed the occupiers of factories to provide protective security measures in order to ensure the safety and interest of women workers in and around dangerous machines. The factory owners were directed to provide the necessary health measures and provide a hygienic working atmosphere. These are in addition to general provisions. Not stopping at being gender neutral, this Act has several positive gender protective measures.

The Factories Act placed women workers on par with men workers. In terms of monetary benefits, the Minimum Wages Act\textsuperscript{55} directs the State to prescribe minimum wages to all workers working in the factories as well as in other industrial establishments. While prescribing minimum wages, there is no discrimination between male and female workers. Analogous to fixation of minimum wages in the Payment of Wages Act, 1936, there are provisions in the 1948 Minimum Wages Act that prescribes uniform payment of wages irrespective of sex. Here it is pertinent to note that what is the Minimum Wages Act to workers, The Equal Remuneration Act, 1976,\textsuperscript{56} is to the other employees of public sector undertakings.

\begin{itemize}
  \item \textsuperscript{53} The Factories Act, 1881
  \item \textsuperscript{54} Enacted in the year 1948
  \item \textsuperscript{55} The Minimum Wages Act, 1948.
  \item \textsuperscript{56} Section 4, Equal Remuneration Act, 1976: Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature. -- (1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid
\end{itemize}
The Employees’ State Insurance Act, 1948, is another labour welfare legislation. This enactment treats all workers irrespective of sex on an equal footing. In Chapter V under the heading “Benefits”, various benefits are listed out.\textsuperscript{57} Prior to this Act, working women were not given so many benefits.

Maternity benefit has been given by this Act to women workers alone. It prescribes that, “the qualification of an insured woman to claim maternity benefit, the condition subject to which such benefits may be given, the rates and period thereof shall be such as may be prescribed by the central government.”\textsuperscript{58} Of the benefits accorded, dependant’s benefit is given in one such measure. Widow of the deceased worker and the children of the deceased worker are entitled to the dependant’s benefit. It is interesting to note that prior to this enactment, maternity benefit was neither available to working women, nor was dependants’ benefit available to the widow of the deceased workers, except the benefits that accrue under the Workmen’s Compensation Act.

The Workmen’s Compensation Act, 1923 is an important social security enactment. It imposes certain liabilities on the employer to compensate for any injury caused to a workman by accidents arising out of and in the course of his employment. In case of death due to such an injury, the employer is liable to compensate the dependants of the worker. The term ‘dependant’ is defined in this Act thus, “dependant” means any of the following relatives of deceased workman, namely:

(i) a widow, a minor [legitimate or adopted] son, an unmarried [legitimate or adopted] daughter or a widowed mother; and

\textsuperscript{57}Sections 46 to 59A of the Employees State Insurance Act.
\textsuperscript{58}Section 50 of the Employees State Insurance Act.
(ii) if wholly dependant on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;

(iii) if wholly or in part dependant on the earnings of the workman at the time of his death,— (a) a widower, (b) a parent other than a widowed mother, (c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter [legitimate or illegitimate or adopted] if married and a minor or if widowed and a minor, (d) a minor brother or an unmarried sister or a widowed sister if a minor, (e) a widowed daughter-in-law, (f) a minor child of a pre-deceased son, (g) a minor child of a pre-deceased daughter where no parent of the child is alive, or (h) a paternal grandparent if no parent of the workman is alive.\(^{59}\)

From the above definition, a widow, and an unmarried daughter among other legal heirs are listed out as dependants. There are positive and protective discriminations, which are due to inclusive policies. Surprisingly, a widow is made as a dependant, but not a widower. A minor son is made a dependant but in the case of daughter, only ‘unmarried daughter’ comes under the dependant’s category. It implies that a daughter is entitled to a share under this Act as long as she is unmarried, whether she is a minor or a major. In the pre-constitutional provision as well as in the post-constitutional provisions, the protective positive discrimination is evident in the usage of the term ‘unmarried daughter’, whereas only minor sons are entitled to get benefits. This is positive discrimination in favour of women.

The Trade Union Act, 1926, is one of the pioneer labour legislations that provides certain immunities to the registered trade unions, like immunity from civil suits in certain cases and immunity from criminal conspiracy in furtherance of trade disputes. This Act is a gender neutral enactment that empowers every workman working in various industries to promote their collective bargaining. Every workman includes every working women also. Till this enactment, formation of trade union was not recognized and it was not given any protective rights. Women working in industries was a rare phenomenon. Nevertheless, it removes the exclusionary practice of restricting women from working in factories or industries.

The Factories Act, 1948, The Trade Union Act, 1926, The Workmen’s Compensation Act, 1923, The Industrial Development Act, 1947, The Employees State Insurance Act, 1948, are some of the major pre-constitutional labour acts that overcome the exclusionary social practices attached to women including Hindu women from getting employed. These provisions improved their economic capability

\(^{59}\) Section 2(1) (d), The Workmen’s Compensation Act, 1923
of earning their wages from factories and industries. It is also relevant to note that generally the terms ‘worker’, ‘employees’ have been used in these legislations to create an impression of being gender neutral and it includes women workers also.

These pre-constitutional enactments attempted to remove several social exclusionary practices barring women in general and Hindu women in particular to take up jobs in factories and industries. Till then, value was not attached to any household work women at homes performed as they were unremunerative. Child bearing, child rearing, cooking and other related housekeeping activities went unrecognized as no economic value was attached to them. In such a back drop, the above discussed industrial legislations are truly revolutionary. They removed many discriminatory practices through inclusive measures. Certain positive exclusionary legal provisions doled out special protective welfare measures for women. Despite the fact that ensuring social justice or gender justice was not the objective of pre-constitutional legislations, yet that was taken care of due to the protective discriminations for women workers. In this context, these legislations enabled women in general and Hindu women in particular to improve their economic capabilities and thereby empower them.

4. POST-CONSTITUTIONAL LEGISLATIVE MEASURES

The Constitution of India has constituted Union Parliament and State legislatures. Under the Seventh Schedule, three categories of lists have been enlisted. The Union List, contains subjects on which the Parliament is vested with the power to make legislations and the State List, contains the subjects on which State legislatures are the competent authorities to make laws. Both the Parliament and State legislatures are vested with the power to make laws for the subjects under the Concurrent List. Most of the laws that affect the status and position of women, come under the State List or Concurrent List. Hence, both the legislatures are competent to introduce inclusive legislative policies for the purpose of removing the social exclusionary practices that are perpetrated by the society.

The democratic republican Constitution of India declares liberty, equality and fraternity as its guiding principles. However, based on social justice, including gender justice, protective discriminations are permissible and thereby reasonable classifications are justified. Similarly reasonable restrictions are also permissible.
Therefore, all those legislations that would adversely affect the equality of status and opportunity of women, equal liberty in freedom of speech and expression and dignity and modesty of women would be ultra vires of the Constitution and can be struck down either by the Supreme Court or by the High Courts. Hence women as per the Constitution are treated as equals to men. The grey area in the Constitution that affect the equality of status and opportunity of women lies in the religious domain.

Entry 5 of List III of the Concurrent List deals with “marriage and divorce; infants and minors; adoption; wills intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to the personal law.” It is obvious that all the personal laws falls under the concurrent domain whereby both Parliament and appropriate State legislatures are competent to enact and regulate personal laws governing Hindus in India. The constitutional implication of legislative powers is that both Parliament and the Tamil Nadu legislature are vested with the legislative power to include policies in order to exclude social practices that have been inherited through tradition and customary practices. If conflicts arise when the Parliament enacts certain provisions affecting the State List or State legislature, the Parliament’s law will prevail. However, after the enactment made by the Union Parliament, if any State Legislatures enact any legislation either to supplement or supplant the union legislation, the Governor of the State is bound to reserve such a bill and refer it to the President for his consent. If the President consents, such legislation of the State legislature will be valid and will prevail over the union legislature.

The Hindu Marriage Act, 1955, the Hindu Adoption and Maintenance Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Succession Act, 1956, were enacted by the Parliament. These enactments have been amended by the Parliament as well as by the Tamil Nadu legislature from time to time and they have substantially transformed the Hindu social system in all the above said areas by various policy inclusions in order to curtail social exclusions.

In addition to the Parliamentary policy inclusions, the Tamil Nadu legislature has also been adding certain amendments as policy inclusions so as to weed out social exclusionary practices through legislative measures that are applicable to Hindu women of Tamil Nadu.
5. PERSONAL LAWS

The personal laws of Hindus regulate the legislative measures relating to marriage and divorce; adoption and maintenance; minority and guardianship and intestate and testamentary succession.

I. MATRIMONIAL RIGHTS:

The Hindu Marriage Act is “an Act to amend and codify the law relating to marriage among Hindus.”\(^{60}\) A distinct feature of this Act is that it introduced a uniform law of marriage and divorce for the people belonging to all castes and denominations of Hindu religion. Prior to that, different norms and practices were followed. This Act introduced substantially uniform laws for all castes and denominations of Hindu religion.

(1) This Act applies,-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression ‘Hindus’ in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person whom this Act applies by virtue of the provisions contained in this section.\(^{61}\)

From this section, it is clear that a uniform law of marriage was introduced for Hindus by removing all the diverse practices that were in existence. However, it recognizes certain customs and usages. Accordingly,

\(^{60}\) Preamble of the Hindu Marriage Act, 1955

\(^{61}\) Section 2, Ibid.,
the expression ‘custom’ and ‘usage’ signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family. 62

The Hindu Marriage Act legally removed the following important social exclusionary practices against Hindu women. First and foremost, it abolished polygynous marriages and recognized monogamous marriages. Secondly, divorce was recognized by law and thirdly, it abolishes the stigma and legal discrimination faced by illegitimate children. These three aspects played an important role in the subjugation of women in the society for centuries. Hence the legal removal of these lifted off from the backs of Hindu women a dead weight they were forced to carry for ages.

Hindu society is predominantly a patriarchal society. Polygamy was widely prevalent and it caused several consequential discriminations, disabilities, incapacities, inabilities, conditions and other deprivations upon Hindu wives and widows. While dealing with the conditions for a Hindu Marriage, the Act stipulates that, “a marriage may be solemnized between any two Hindus, (I) neither party has a spouse living at the time of the marriage.” 63 Any Hindu marriage contravening this condition is termed as a void marriage and the Act prescribes that, “any marriage solemnized after the commencement of this Act shall be null and void... if it contravenes any one of the conditions specified in clause (I)... of section 5.” 64

A combined reading of sections 5 and 11 highlight the fact that hereinafter only monogamous marriages will be considered as valid marriages provided they satisfy other conditions. Section 17 imposes punishment for those who solemnize any marriage contravening the above conditions. They are punishable under sections 494 and 495 of the Indian Penal Code, which remove the legality of the polygamous marriages a Hindu male can contract. It effectively removes the attendant evils of such marriages which Hindu women have to face as wives of those men.

62 Section 3(a), Ibid.,
63 Section 5, Ibid.,
64 Section 11, Ibid.,
The traditional Hindu law considered Hindu marriages as sacrament. The concept of divorce was unknown to the orthodox Hindus. Accordingly, once a Hindu woman entered into a marriage, a permanent and indissolvable bond was created. Some of the social exclusionary practices were also responsible for several consequential disabilities. The Hindu Marriage Act has enumerated several grounds under which a marriage can be dissolved.\(^65\) It is pertinent to note that sub section (2) of section 13 also enumerates additional grounds for Hindu wife to claim for the dissolution of marriage.\(^66\)

The legal heirs listed in clauses I and II under the Schedule of Hindu Succession Act of 1956, do not discriminate between legitimate son and daughter from illegitimate son and daughter. Section 16 of The Hindu Marriage Act deals with legitimacy of children of void and voidable marriages.

The traditional Hindu law had the exclusionary practice of discriminating illegitimate children. But the Hindu Succession Act uses the common nomenclature in the legal heirs’ list as son and daughter without any prefix. As far as the traditional practices are concerned, no Hindu husband was referred to as an illegitimate husband, but a wife was disgraced and stigmatized as illegitimate. In this context, the modern Hindu laws through the inclusive policies removed all such exclusionary practices.

In addition to the above inclusive policies, the Hindu Marriage Act contains certain protective discriminations to take care of the interests of Hindu women. They are prescription of minimum age for a valid marriage, avoiding any prescription of

\(^65\) Section 13 of the Hindu Marriage Act.

\(^66\) Section 13(2) of the Hindu Marriage Act, 1955: (2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground: (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before the commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or (iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.
matrimonial home after the marriage of the newly wedded spouses, provisions for judicial separation, and enlisting additional grounds for divorce.

Earlier Hindu practices relating to marriage did not prescribe any minimum age for marriage. Child marriages were rampant with girl children as young as 5 years being married off resulting in child widows. Child mothers and young children endure the agony of being raped by their husbands. It left many girl children burdened with so many responsibilities at a very tender age. To alleviate the plight of such young girls, the British Government took efforts to stop this evil by increasing the age of marriage and passed the Age of Consent Act in 1929. It was also known as the Child Marriage Restraint Act, 1929 or the Sarda Act.67

As pointed out earlier, Hindu wives are given additional grounds for divorce as well as for judicial separation. Moreover, section 26 of the Act prescribes provisions for custody of children.68 Registration of Hindu marriages was not a practice since they are not treated as contracts, but as sacraments. In a patriarchal society having the practice of polygamous marriages, it was very difficult to establish the existence of marriage, whether valid or invalid. Such a legal position affected the rights, powers, privileges, etc. of the Hindu wives of such polygynous marriages. Provisions for registering Hindu marriages facilitate and create a documentary evidence substantially for the existence of a Hindu marriage. Registration of Hindu marriages is not mandatory till date, but only obligatory.

The Hindu Marriage Act, 1955, does not impose any condition that the newly wedded spouses ought to live in the joint family, under the control of the Karta or other family members. It is the joint family system and the practice of coparcenary

67 Child Marriage Restraint Act 1929, passed on 28 September 1929 in the British India Legislature of India, fixed the age of marriage for girls at 14 years and boys at 18 years which was later amended to 18 for girls and 21 for boys. It is popularly known as the Sarda Act, after its sponsor Harbilas Sarda.

68 Section 26 of the Hindu Marriage Act, 1955: 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, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made.
which perpetuated the patrilocal and patrilineal marriage customs that have become entrenched as the legacies of patriarchy. Coupled with polygynous marriage practices, the patriarchal, patrilocal and patrilineal practices enabled the Hindu social system to maintain, expand and consolidate the social exclusionary practices against women. The enactment of Hindu Marriage Act, introduced monogamous marriages prescribing minimum age for bride and bridegroom and recognized the concept of divorce by enumerating various grounds under which marriages can be dissolved. It made serious inroads into the castle of patriarchy, denting it and facilitating the transformation of social exclusionary practices. For that reason it is considered a path breaking enactment.

Notwithstanding the revolutionary changes made in the Hindu law of marriage and divorce in removing some of the exclusionary practices against women, there are still grey areas unmoved by the winds of change. Hence despite the Constitutional provision of right to equality, still some discriminatory practices continue to exist in Hindu law of Marriage. Marriages between minors cannot be declared as void marriages. However, as per the doctrine of ‘option of puberty’, after attaining the age of majority and within a period of one year the minor is given the option to annul and invalidate the marriage. Rituals are essential aspects of Hindu marriage. Exchanging garlands, tying the sacred thali or mangalsutra around the bride’s neck and circumambulating the sacred fire known as Saptapadi or seven steps are some of the major rituals in a marriage ceremony. In performing these rituals, except in tying the ‘thali’, both are equally obliged to perform. In Tamil Nadu it is either the yellow-turmeric smeared thread or a gold chain that is tied as ‘thali’, which is considered as the most sacred element of Hindu marriage. It is adorned only by married women and is removed after her husband dies, that too after some humiliating rituals. No such procedure is prescribed for the husband.

The subjugation of women through this yellow thread symbolically made the Self-Respect party in Tamil Nadu to strongly agitate for its demystification and deglorification. The Tamil Nadu legislature enacted the Self-Respect Marriages Validation Act, 1967. It introduced several reforms in order to make both parties in a marriage as equal partners. ‘Thali’ is not an essential element in such marriages. The

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69 The Times of India, Chennai, 2nd May 2015.
rituals like going round the fire or saptapadi and the presence of a priest to solemnize the marriages were done away with. Marriage is solemnized in the presence of elders or leaders of their choice where the couple take oath to stay true to each other. It is an attempt to remove the social exclusionary practice of tying the thali as a symbol of gender discrimination.

II. PROPERTY RIGHTS

The right of women to inherit property by way of succession under the personal laws are of two types, namely right under intestate succession and right under testamentary succession. In the traditional Hindu succession laws, Hindu women were entitled to inherit mainly stridhana property. Prior to the introduction of Hindu Succession Act of 1956, there were diverse and conflicting social practices of inheritance of the property of propitious.

Hindus of Tamil Nadu, earlier part of the erstwhile Madras Presidency, belong to the Mitakshara School of Hindu law. This school recognized the institution of joint family as well as co-parcenary property. Accordingly there existed several social exclusionary practices discriminating and disentitling Hindu women from inheriting property of their parents and grandparents.

The Hindu Succession Act is “an Act to amend and codify the law relating to intestate succession among Hindus,” Analogous to the Hindu Marriage Act, 1955, this Act also revolutionized and legally abolished several exclusionary practices that were depriving the rights of Hindu women. This Act has been amended from time to time mainly to legally remove the remaining exclusionary practices related to the incidents of inheriting the property by Hindu women. In this context, the statement of objects and reasons of the Amendment Act 2005 states as follows: “The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession among Hindus.”

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70 Henry Maine was of the view that this institution of Stridhana seems to have developed among the Hindus at a period relatively much earlier than among the Romans. Similarly, Banerjee states “nowhere were the property rights of women recognised so early, as in India, and in very few ancient system of law have these rights been so largely conceded as in our own. The term stridhana, according to Sanskrit-Hindi dictionary consists of the private property of a woman on which she has independent ownership. Henry Maine says that stridhana is the settled property of a married woman incapable of alienation by her husband. The term Stridhana itself developed gradually in our society. Most of the jurists treated stridhana as a special type of property which was quite different from the family property.

71 Person whose property devolve to the legal heirs in case of intestate succession.
succession among the Hindus.” The Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women’s property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies *inter alia* to persons governed by the Mitakshara.

The statement of objects and reasons of the Act states that it also deals with devolution of a male Hindu in a coparcenary property and recognizes the rule of devolution by survivorship among the members of the coparcenary. The retention of the coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughters from participating in the coparcenary ownership not only contributes to their discrimination on the ground of gender, but by such exclusion also leads to oppression and negation of their fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women.

The statement of objects and reasons further states that,

*it is proposed to remove the discrimination as contained in section 6 of the Succession Act, 1956, by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.*

There were several social exclusionary practices that disentitled Hindu women inheriting from their parents and other predecessors in Mitakshara school. The only source of inheritance to property under the traditional Mitakshara school was ‘*stridhana*’ property. Consequent to the conferment of the right to equality as a fundamental right and other protective enabling provisions under Article 15(3), several legislative enactments have been introduced from time to time in order to abolish such exclusionary practices as per law. Earlier, Hindu daughters were not entitled to inherit on par with sons, their counterparts. Hindu wives did not possess equal rights to have control over the family property. There is no corresponding

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72 *Hindu Succession (Amendment) Act, 2005*
terminology to refer to Hindu fathers, who lost their wives unlike Hindu wives who lost their husbands. The term ‘widow’ in most of the vernacular languages in India is a form of abusive language.

In joint family and in coparcenary property, the ‘Karta’ was usually the eldest male member of the family. A ‘karta’ had every right to control the family as well as the property of the joint family. No such power was vested with Hindu females of any age. In the coparcenary property, Hindu females including Hindu wives and widows did not have any right to inherit such property. Moreover, no female legal heir could legally ask for partition of a joint Hindu family property including coparcenary property. Thus Hindu women did not have property rights to inherit except the stridhana property. Hindu dependant female legal heir lists were at the mercy of the Hindu family for their maintenance.

Hindu women’s dependant and discriminatory status was gradually transformed through legislative enactments into equally entitled persons along with men. Presently, as per law, Hindu female legal heirs have all equal rights to inherit the property of their parents, grandparents, husband or children. A critical analysis would bring forth the fact that in the legal heirs, there are 16 class-I legal heirs, of which 10 are female legal heirs. Interestingly, mother is a class-I legal heir, whereas father is categorized only under class-II legal heirs. Such is the revolutionary legislative enactment which legally removed all disabilities and exclusionary practices followed by the Mitakshara school against Hindu women. The property right granted under the personal laws empower Hindu women and enable her to lead an independent life by maintaining herself through the properties inherited under the laws of succession.

The Hindu Succession Act entitled Hindu female legal heirs to inherit the property from their parents and grandparents. However, the original Hindu Succession Act of 1956 had certain exclusionary practices in the devolution of interest in the coparcenary property. As per the doctrine of survivorship in the Hindu law, only male coparceners were entitled to inherit the property and female legal heirs were deprived of the right. This exclusion was effectively removed by the amendment.

73 The Hindu Succession (Amendment) Act, 2005 (39 of 2005), S. 3, for s. 6 (w.e.f. 9-9-2005). Prior to its substitution, S. 6. Devolution of interest of coparcenary property. – When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a
The 2005 Amendment Act introduced another revolutionary inclusive policy that enables Hindu female legal heirs to have equal entitlement on par with their male counterparts in the coparcenary property. The amended section is inclusive whereby a Hindu daughter is made as a coparcener on par with a Hindu son. A Hindu daughter has the same right in the coparcenary property on par with a Hindu son and is also

Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Section 6 of the Hindu Succession (Amendment) Act, 2005:

Devolution of interest in coparcenary property.- (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,— (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition. (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,— (a) the daughter is allotted the same share as is allotted to a son; (b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter; and (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be. (4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect— (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted. Explanation.—For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.
subject to the same liabilities in respect of the said property. A daughter is also
titled to dispose off the property acquired by her as a coparcener even by way of
testamentary disposition.\textsuperscript{75}

The original Hindu Succession Act explicitly declares the property of a female
Hindu to be her absolute property.\textsuperscript{76} It is another social inclusive policy that removes
a discrimination in the inheritance of property with absolute rights over it by a Hindu
woman. Prior to the introduction of Hindu Succession Act, in Hindu jurisprudence,
the doctrine, \textit{‘women’s property’} was considered as \textit{‘a limited estate’}. Accordingly,
the property inherited by a Hindu female, more particularly a Hindu widow, was not
deemed to be an absolute property. Accordingly, after the death of a Hindu female,
her property reverted back to the earlier legal heirs. This doctrine is known as the
\textit{‘doctrine of reversion’}. But, section 14 removes this exclusionary practice.\textsuperscript{77}

The 2005 Amendment Act declares that, the doctrine of survivorship is not
applicable to Mitakshara school. Hence, a Hindu female is entitled to inherit joint
Hindu family property on the basis of testamentary or intestate succession in case of
coparcenary property also. Accordingly, in partition of coparcenary property, a
daughter is allotted equal share as is allotted to a son. The same principle is applicable
to the pre-deceased son and the pre-deceased daughter equally. The pious obligation
is equally applicable to both male and female legal heirs. As per the original Hindu
law, the doctrine of pious obligation was applicable only to sons and not to daughters.

As this Act is an attempt to codify the law relating to intestate succession
among Hindus, it collected, amended and uniformly introduced general rules of
succession for both males as well as females. The rules and provisions for succession
of males are different from what were prescribed for the females. They were also
given under separate sections. It is obvious that there were different rules for males as
well as for females. Another exclusionary practice that prevailed against Hindu

\textsuperscript{75} \textit{Section 6(2), Ibid.,}
\textsuperscript{76} \textit{Section 14 of the Hindu Succession Act, 1956.}
\textsuperscript{77} \textit{Section 14 of the Hindu Succession Act, 1956: Property of a female Hindu to be her absolute
property (1) 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. (2) Nothing contained in sub-section (1) shall apply to any property acquired by way
of gift or under a will or any other instrument or under a decree or order of a civil court or
under an award where the terms of the gift, will or other instrument or the decree, order or
award prescribe a restricted estate in such property.}
female legal heirs was that they were not vested with a right to ask for partition in the dwelling house of the joint family property. Nevertheless, the female heirs had a right to a share in such dwelling houses at the time of partition. Prior to the omission of section 23 by the Amendment Act of 2005, the following provision was stipulated.

> where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein: provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.\(^{78}\)

After this omission, yet another disability attached to a Hindu female legal heir, that is the right to ask for partition was also removed by this amendment. The traditional Hindu law imposed a disability against Hindu widows by excluding them from inheriting property. Subsequently, Hindu women were allowed to inherit property. However, the property rights of Hindu women including widows was a limited estate. Section 14, amendment to the Hindu Succession Act declared the property of the Hindu female to be her absolute property. Thus the Amendment Act of 2005, removed yet another exclusionary practice imposed upon a Hindu widow in inheriting property. Prior to this amendment, there was a condition that to inherit a property by a Hindu widow, she must remain unmarried on the date of inheritance, thus excluding married Hindu widows from inheriting the property.\(^{79}\)

From the above analysis of the amendment, it is obvious that the traditional Hindu law of succession had several exclusionary practices that discriminated, deprived, disentitled and disabled Hindu women from inheriting property. The traditional patriarchal, patrilineal and patrilocal Hindu laws that imposed several exclusionary practices were removed by inclusive policies, in order to enable Hindu women to inherit substantially, if not completely on par with their counterparts. Right to property including right to inherit property is an important right that empowers Hindu women to enable them to realize their talents, potentialities, abilities and

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\(^{78}\) The Hindu Succession (Amendment) Act, 2005 (39 of 2005).

\(^{79}\) Section 14, ibid.
powers that would help them to realize themselves and their independence. The Indian Constitution, more precisely Articles 14, 15 and 16 has enabled law makers to bring forth such inclusive enactments denting gender inequality.

Section 8 deals with general rules of succession in the case of males. Section 15 deals with general rules of succession in the case of female Hindus. It is pertinent to make a critical analysis of these two sections in order to bring out both exclusive as well as inclusive measures in relation to inheritance of property by a Hindu female either from a Hindu male or female.

Separate provisions for males and females highlight that even after all the amendments and revolutionary changes, distinct and exclusionary provisions have been allowed to continue to this day, despite Articles 14, 15 and 16 of the Constitution. Article 15(3) provides for special provision for the purpose of protecting and promoting the interest of women. But the provisions found in section 15 of the Hindu Succession Act is still discriminatory and they continue to exclude and deprive Hindu female legal heirs. The following analysis would highlight the same.

The Hindu Succession Act prescribes general rules of succession. In the case of males, the property of a male Hindu dying intestate shall devolve

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule; (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and (d) lastly, if there is no agnate, then upon the cognates of the deceased.  

The general rules of succession in the case of female Hindus are “(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother. (2) Notwithstanding anything contained in sub-section (1)- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any

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80 [Section 8 of the Hindu Succession Act, 1956](#).
predeceased son or daughter) not upon the other heirs referred to in sub-
section (1) in the order specified therein, but upon the heirs of the husband.

A combined reading of these two sections brings to light the following facts. In the case of males, the property of a male Hindu will devolve first upon the Class I legal heirs. Accordingly, son, daughter, widow and mother are the legal heirs among other legal heirs. No doubt, of the four legal heirs, three of them are female legal heirs. A careful reading of Class I legal heirs would highlight that the remaining legal heirs are the descendants of either a son or a daughter. In the case of female Hindu, the property will devolve upon the sons and daughters and the husband. It also includes the descendants of sons and daughters. It is saddening to note that in the case of Class I legal heir of a male, the word ‘widow’ is used. But significantly, in the case of a female Hindu, for the legal heir, the term ‘husband’ is used. The semantic difference between these two is the impact of a patriarchal and patrilineal system. In the absence of Class I legal heirs of a male Hindu, the property will devolve on the father.

As per section 15 of the Hindu Succession Act, in the absence of son, daughter and the husband of the female Hindu, the property would devolve upon her mother and father. As far as Hindu male is concerned, his mother was placed on par with his widow. But in the case of female Hindu, her mother is relegated to the next position along with her father. Accordingly, neither her mother not her father would inherit her property in the presence of her husband, subject to certain conditions provided in section 16.  

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81 Section 15 of the Hindu Succession Act, 1956.
82 Section 16 of the Hindu Succession Act, 1956: General rules of succession in the case of female Hindus . – (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16: (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother. (2) Notwithstanding anything contained in sub-section (1): (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.
Another discriminatory exclusionary practice in inheritance is that the cognates\(^{83}\) are listed in the fourth place after the agnates.\(^{84}\) The iron hold of the patriarchal system is evident in this. As per the Hindu Succession Act, it is stated that the property of a female Hindu will devolve “(d) fourthly upon the heirs of the father; and (e) lastly upon heirs of the mother.”\(^{85}\) It reveals that in the case of property, female Hindu legal heirs of the father is preferred over the legal heirs of the mother. The residues of patriarchal hegemony continues to rule.

Section 16 of the Act deals with the order of succession and manner of distribution among heirs of a female Hindu.\(^{86}\) When this section is read with section 15, it is understood that there are two types of property inherited by a Hindu female. The first type of property is inherited by a female Hindu from her father and his relatives. No such differentiation is found under section 8 for Hindu males. It is inferred that the ‘doctrine of reversion’ has been allowed to continue even though the ‘doctrine of limited ownership’ was abolished. Accordingly, when a female inherits her property from her father and his relatives, in case of absence of son or daughter to inherit the property, it will revert back to her father and relatives.

The Hindu Succession Act, 1956, ventured to transform the laws relating to inheritance. This Act removed most of the discriminatory provisions of law of inheritance which exclude women from inheriting property. Originally, women were entitled to inherit stridhana property. This Act entitled women and enabled her to inherit on par with her male counterparts in other property except in coparcenary property. By abolishing the “doctrine of limited ownership, and by making women’s property as an absolute property”, this Act removed a major exclusionary practice related to women’s property rights. Amendments made to this Act from time to time removed some other legal disabilities of Hindu women, like entitling women to claim for partition even to the coparcenary property, allowing Hindu widows to retain the property, even in case of her remarriage etc.

With reference to the order and incidence of right to inherit property in the intestate succession, discriminations still persist. A Hindu woman who is a widow is

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\(^{83}\) Cognates is a person related by blood or descended from a common maternal ancestor.

\(^{84}\) Agnates is a male or female descendant by male links from a common male ancestor.

\(^{85}\) Section 15 (1) (d) of the Hindu Succession Act, 1956.

\(^{86}\) Section 16, ibid.,
discriminated by the use of that term, whereas a Hindu husband, who lost his wife is not termed as a ‘widower’. Language is part of a culture and it also becomes a tool of oppression. Similarly agnates are preferred over cognates. Nevertheless, mother is made as a Class I legal heir, but father is only a Class II legal heir. Similarly, widow is a Class I legal heir.

III. LAW OF ADOPTION AND MAINTENANCE

The traditional Hindu law recognized the practice of adoption. For Hindus, marriage is considered as a sacramental one. The primary objective of marriage is to beget children, more particularly sons. It is believed that son or a ‘puthra’ is the person who is capable of redeeming his father from ‘puth’ or hell. A man is said to be a complete person only after marriage which entitles him to perform rituals along with his consort. The birth of a son makes a married man a complete Hindu. Since marriage, family and begetting a son are having religious connotations, the object of marriage is fulfilled when his spouse begets a son. In case a couple are unable to beget a son, the Hindu law provides an alternative remedy of adopting a male child as son. In the traditional Hindu law, adoption of a male child is more in vogue than the adoption of a female child.

There are several exclusionary practices that impose restrictions on Hindu women from adopting since the Hindu social system which is patriarchal recognizes and accords importance to males. Earlier Hindu females were not allowed to adopt. The Hindu Adoption and Maintenance Act, 1956, amended and codified the law relating to adoption. This Act removed some of the exclusionary practices which discriminated Hindu women. The 2010 Amendment removed some more discriminations attached to women. This Act deals with the capacities of a male Hindu and female Hindu respectively to take in adoption. They run as follows:

\begin{quote}
any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Explanation- “If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.”
\end{quote}

\footnote{Section 7 of the Hindu Adoption and Maintenance Act.}
Section 8 of the Act deals with the capacity of a female Hindu to take in adoption. Accordingly,

Any female Hindu-
(a) who is of sound mind,
(b) who is not a minor, and
(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.\(^8\)

The new section 8 replaced the old section 8, which had prescribed the discriminatory exclusionary practice in the original Hindu Law of Adoption, 1956. The amended section is entitled as “the adoption by unmarried Hindu women.” Those women whose marriage was in sustenance were earlier not entitled to adopt on their own, except in giving their consent to their husbands for such adoption. The 2010 Amendment Act removed this exclusionary practice and entitled a married Hindu woman to adopt on par with her husband subject to the consent of her husband vis-à-vis. Thus the traditional exclusionary practice in adoption was removed enabling Hindu wives equal rights to adopt like their counterparts.

Giving off children for adoption by women was also not permissible under traditional Hindu law of adoption. The Act of 1956 removed this exclusionary practice to some extent by enabling a Hindu mother to give her consent to her husband for giving their child or children in adoption. The 2010 Amendment removed this disability too, thereby enabling a Hindu mother to give her children in adoption subject to the condition of her husband’s assent.

A critical and comprehensive reading of these provisions on adoption, highlight that as far as adoption is concerned, it is a matter to be dealt not by a single person, but by both, namely, the husband and wife in case of taking in adoption and father and mother in case of giving in adoption. The traditional patriarchal system discriminated Hindu women. However, these discriminatory exclusionary practices have been gradually removed by inclusive legislative measures and thereby the spirit of Articles 14 and 15 have been incorporated even in matters related to law and adoption.

\(^8\) Section 8, Ibid.
a. Maintenance

A Hindu woman as per the earlier Hindu laws was always a subordinate to male members of the family. As a daughter, a Hindu girl comes under her father’s control and guardianship, after marriage, she comes under the control of her husband. A widow comes under the control of her son and in his absence, under the eldest male head of the family. Women did not have an independent source of income. It was the responsibility of the family and the male members of the family to maintain the women, irrespective of their age. Except stridhana, women normally did not own property. The doctrine of women’s estate was in practice, which enabled Hindu women only to enjoy the fruits of property, but restrained them from alienating the property like absolute owners. Generally Hindu law deprived Hindu women to have economic power either by a regular income or through obtaining benefits from property on a regular scale. Women were economically kept weak and they remained at the mercy of the male members of the family.

The Hindu Adoption and Maintenance Act, 1956, declares that certain persons are to be maintained. Section 18 prescribes norms for the maintenance of wife. Section 19 regulates the maintenance of widowed daughter-in-law. Section 22 prescribes norms for the maintenance of dependants as listed in section 21. Section 18 entitles a Hindu wife to be maintained by her husband during her lifetime. This section also prescribes conditions under which a Hindu wife is entitled to have the right to live separately from her husband without forfeiting her claim to maintenance. Under section 125 of the Code of Criminal Procedure, a common code for people of all religions, a woman is also eligible to be maintained. That right given under section 125 cannot foreclose a Hindu wife’s right under section 18 of the Hindu Maintenance Act. However, the Act imposes a condition that, “a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste.” This condition is used as a weapon to deny Hindu women, the right to maintenance, since the term ‘unchaste’ has neither been defined nor explained.

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90 Section 18 of the Hindu Adoption and Maintenance Act, 1956
91 Section 18(3), Ibid.,
The duty to maintain a widowed daughter-in-law, who is unable to maintain herself out of her own earnings or through other property, has been enjoined upon the father-in-law.\footnote{Section 19, \textit{Ibid.}} A son is considered as a dependant as long as he is a minor, as per the definition for dependant son. A daughter on the other hand has to be maintained till she is married.\footnote{Section 21, \textit{Ibid.}} An unmarried daughter whatever her age is a dependant, as per this section. It is obvious that it is a discriminatory provision differentiating a daughter from a son for the purpose of maintenance. Such protective discriminations are justified under Article 15(3).

The Hindu Adoption and Maintenance Act, 1956, originally removed some of the exclusionary practices prevailing against Hindu women. However, the patriarchal residues discriminating Hindu wives and Hindu mother in taking and in giving adoption was removed by the Amendment Act, 2010. As far as maintenance is concerned, right to be maintained is made as a legal right both under the Hindu Adoption and Maintenance Act as well as under the Code of Criminal Procedure. No Hindu husband is entitled to be maintained under these Acts. Of course under section 25 of the Hindu Marriage Act of 1955, both parties of the marriage namely husband and wife are liable to be maintained by the other party.\footnote{Section 25 of the Hindu Marriage Act, 1955, \textit{Permanent alimony and maintenance}. (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.}
IV. MINORITY AND GUARDIANSHIP

Prior to the introduction of the Hindu Minority and Guardianship Act, 1956, the Hindus and others were governed by the Indian Majority Act, 1875, for the purpose of marriage and adoption. Before the introduction of this Act, Hindus were governed by the traditional Hindu laws. The Guardians and Wards Act, 1890 was also in existence. It was in addition to the Hindu Minority and Guardianship Act. There are three types of guardians namely (a) Natural guardians; (b) Testamentary guardians and (c) guardians appointed under the Guardians and Wards Act, 1890. The law of guardianship regulates the provisions related to minor’s person as well as minor’s property. The natural guardians of a Hindu minor, in respect of the minor’s person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are- (a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; (b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father; (c) in the case of a married girl-the husband; Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section- (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi) Explanation.- In this section, the expressions 'father' and 'mother' do not include a stepfather and a step-mother.95

From the above section, the existence of the following discriminatory provisions can be observed. The father is the natural guardian for his children, whether a boy or a girl. Mother can be a natural guardian only ‘and after him’. In the case of a married minor girl, her husband is considered as the natural guardian. These are the exclusionary discriminatory practices that prevail to this day. No doubt the Minority and Guardianship Act removed some other discriminatory practices that prevailed in the Hindu society. Nevertheless, the exclusionary discriminatory practices discussed above, the leftovers of a patriarchal tradition are still legally in vogue.

95 The Guardians and Wards Act, 1890.
In the case of an illegitimate boy or an illegitimate unmarried girl, mother is made as a natural guardian.\textsuperscript{96} Father is made as the natural guardian only \textit{and after her}. This is a case of unfavourable inclusion of women and favourable exclusion of men as far as begetting illegitimate children is concerned and being branded as the wayward parent. Mother is given the custody of a child till it completes 5 years. The exclusionary discriminatory provision related to taking in and giving in adoption was removed by the 2010 Amendment to the Adoption and Maintenance Act. Similar provisions ought to have been introduced in the Minority and Guardianship Act also. The patriarchal hegemony still looms large in this domain as neither law nor society has reached a stage of providing absolute equality to Hindu women with reference to the guardianship rights.

The Preamble of the Indian Constitution declares to secure to all citizens justice, liberty, equality and dignity. Part III enumerated certain rights based on these goals like equality, freedom, right against exploitation, right to freedom of religion, cultural and educational rights of minorities and right to constitutional remedies. Superficially seen, it conveys that absolute gender equality and liberty is guaranteed. Consequent to the Preamblary declaration of liberty of \textit{belief, faith and worship}, right to freedom of religion is guaranteed from Articles 25 to 28. Accordingly, \textit{“All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”} The State is conferred with the power to regulate those religious practices which are related to economic, financial and political or other secular activity. Hindu religious traditions have deep rooted matrimonial practices, such as those related to marriage, minority and guardianship, maintenance and succession which are consequent to the matrimonial relations. Hindu marriages are considered as sacraments to this day.\textsuperscript{97}

The rights conferred by Article 25 related to religious practices are guaranteed. Accordingly, this right confers essential religious practices as a fundamental right. Hence, notwithstanding the right to equality and freedom, discriminatory matrimonial laws relating to marriage and divorce, adoption and maintenance, minority and guardianship and succession were allowed to continue. The legislative enactments

\textsuperscript{96} Section 6 of Minority and Guardianship Act, 1956.

discussed earlier revolutionized the traditional Hindu religious practices that are exclusionary and discriminatory against women and attempted to mitigate them. As and when need arose the Parliament and the Tamil Nadu legislature enacted laws to root out the existing discriminatory practices. There are two types of discriminations - one negatively depriving Hindu women and two positively protecting and promoting the interest of women in general and Hindu women in particular. Protective discrimination is guaranteed under Article 15(3). Article 25 of the Constitution on the other hand allows the negative exclusionary practices to be perpetrated in the name of religious freedom. The pattern of socialization and internationalization are the sustaining forces in the exclusions in socio-religious and economic domains.

V. FAMILY COURTS ACT, 1984

The republican Constitution of India and the subsequent legislative enactments introduced both by the Parliament and the Tamil Nadu legislative assembly were amended to include policies that exclude those exclusionary and discriminative social practices depriving women of their rights. More and more powers are conferred on women through legislations. Some discriminations have been removed, yet many more persist due to the patriarchal mindset. When such blatant violations of laws are brought to the regular courts, due to the pendency of a large number of cases, there is inevitable delay in getting justice. So the situation was that exclusionary legal practices were legally removed, but the benefits could not reach women and hence they are redundant.

Matters relating to law of marriage and divorce, adoption and maintenance, minority and guardianship are highly sensitive and time factor plays a vital role in gender justice. The Family Courts Act, 1984 was enacted to secure speedy settlement of disputes relating to marriage and family affairs. These courts have exclusive jurisdiction in the following matters. This Act attempts to resolve the matrimonial

98 1) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;
2) the property of the spouses or of either of them;
3) declaration as to the legitimacy of any person;
4) guardianship of a person or the custody of any person;
5) maintenance, including proceedings under chapter IX of the Code of Criminal Procedure.
issues through conciliation and settlement. Section 7 of the Act\textsuperscript{99} deals with the jurisdiction and section 8\textsuperscript{100} deals with exclusion of jurisdiction and pending proceedings.\textsuperscript{101}

The legislatures both at the centre and the state of Tamil Nadu, are sensitive to the matrimonial rights of Hindu women. Having understood the sanctity of the family and the complexity of matrimonial relations, the Family Courts Act has provisions for in camera proceedings. In matters related to custody of children and maintenance, gender equality is still a long way to go. A positive change in the patriarchal attitude can bring in the change with so many protective laws.

6. PROTECTIVE CRIMINAL ENACTMENTS

The Constitution of India prescribes equality. But due to the secular nature of the Indian Constitution, in civil matters uniform and absolute equality remains an illusive goal. Uniform criminal law has been put into practice\textsuperscript{102} to deal with

\textsuperscript{99} (1) Subject to the other provisions of this Act, a Family Court shall
a. have and exercise all the jurisdiction exercisable by any district Court or any subordinate Civil Court under any law for the time being in force for the nature referred to in the Explanation; and
b. be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

(2) Subject to the other provisions of this Act a Family Court shall also have and exercise;
a. the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
b. such other jurisdiction as may be conferred on it by any other enactment

\textsuperscript{100} Where a Family Court has been established for any area:
a. no district Court or any subordinate Civil Court referred to in sub-section (1) of Sec. 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;
b. no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

\textsuperscript{101} Section 8(c) of The Family Courts Act, 1984: Every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Sec. 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973(2 of 1974)
( i ) which is pending immediately before the establishment or such Family Court before district Court or subordinate Court referred to in that sub-section or, as the case may be, before any Magistrate under the said Code; and
( ii ) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act has come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established;

\textsuperscript{102} 1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters
substantive and procedural criminal laws including preventive detention laws and the corresponding provisions relating to prisoners under preventive detention. Both the Indian Parliament and the State Legislatures are vested with the power to enact laws under these entries.

The Indian Penal Code was enacted under the British rule in India. By virtue of Article 372, all the pre-constitutional legislations are allowed to continue subject to certain conditions. Indian Penal Code continued to be the basic substantive law dealing with the criminal laws. Corresponding to the substantive law, the Code of Criminal Procedure of 1898, also continued to regulate the criminal procedure. To satisfy the needs of the changing times and to be in tune with the constitutional provisions, substantive criminal laws as prescribed in the Indian Penal Code have been amended periodically. The Code of Criminal Procedure of 1898 was repealed by the Code of Criminal Procedure of 1973. This procedural law too has been amended from time to time to fulfill the changing needs.

Both the Indian Penal Code and the Code of Criminal Procedure are uniform codes and treat persons of all religions equally unlike that of matrimonial laws. Nevertheless, these Codes are gender sensitive, wherein while providing equal provisions for persons of all religions, in certain matters they discriminate women positively in order to protect and promote their interest.

Offences related to dowry deaths and rapes are some of the offences dealt exclusively by according special protection. Punishment specifically for dowry death was introduced by way of an amendment in 1986 as section 304B and it runs as follows:

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 specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this list.
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.

In this section, the term ‘dowry’ is defined to have the same meaning as is provided in the Dowry Prohibition Act, 1961. The death of a woman within 7 years of her marriage is deemed to be dowry death, provided such death is due to the causes enumerated in section 304B. A minimum punishment of 7 years is prescribed for this offence.\(^{103}\) Generally an appropriate Judge of the criminal court is vested with the power to award punishment, which is not more than a particular period. But in case of dowry deaths, it is certain that the punishment shall not be less than 7 years. Corresponding to section 304B, section 113B was inserted in the Indian Evidence Act, by way of amendment.\(^{104}\) This section runs as follows:

> when the question is whether a person has 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.

It falls under Chapter VII of Burden of Proof. The basic presumption is that the onus of proof is always on the prosecution. But in the case of dowry death, “The court shall presume that such person had caused the dowry death.”

The practice of dowry has been an exclusionary discriminatory practice prevalent in the Hindu social system. In marriages a pivotal role it plays in fleecing the girl’s family and enriching the boy’s family. The Dowry Prohibition Act, 1961 prohibits the giving or taking of dowry. The term dowry is defined to mean,

> any property or valuable security given or agreed to be given either directly or indirectly- (a) by one party to a marriage to the other party to the marriage; or (b) by the parent of either party of a marriage by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies\(^{105}\)

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\(^{103}\) Section 304B(2), Ibid.,

\(^{104}\) Section 12 of the Dowry Prohibition (Amendment) Act, 1986.

\(^{105}\) Section 2 of Dowry Prohibition Act, 1961.
The Act appears to be gender neutral, but in a patriarchal social background, its implication is profound. Section 4 deals with the penalty for demanding dowry. However, section 6 deals with dowry as an asset benefitting the wife and her heirs. It is analogous to stridhana and is a protective section. It runs as follows:

(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman— (a) if the dowry was received before marriage, within three months after the date of marriage; or (b) if the dowry was received at the time of or after the marriage, within three months after the date of its receipt; or (c) if the dowry was received when the woman was a minor, within three months after she has attained the age of eighteen years, and pending such transfer, shall hold it in trust for the benefit of the woman. (2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefore, or as required by sub-section (3), he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine which shall not be less than five thousand rupees, but which may extend to ten thousand rupees or with both. (3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being: Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall,— (a) if she has no children, be transferred to her parents; or (b) if she has children, be transferred to such children and pending such transfer, be held in trust for such children. (3A) Where a person convicted under sub-section (2) for failure to transfer any property as required by sub-section (1) or sub-section (3) has not, before his conviction under that sub-section, transferred such property to the woman entitled thereto or, as the case may be, her heirs, parents or children the Court shall, in addition to awarding punishment under that sub-section, direct, by order in writing, that such person shall transfer the property to such woman or, as the case may be, her heirs, parents or children within such period as may be specified in the order, and if such person fails to comply with the direction within the period so specified, an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman or, as the case may be, her heirs, parents or children. (4) Nothing contained in this section shall affect the provisions of section 3 or section 4.

Notwithstanding the view in section 6, the exclusionary discriminative social practice of dowry is a problem persisting to this day that could neither be wiped out through criminal legislation, nor by the Dowry Prohibition Act.

Another heinous offence committed against women is the crime of rape, which is defined thus:
A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:— First — Against her will. Secondly — Without her consent. Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly — With or without her consent, when she is under sixteen years of age.\(^{106}\)

The punishment for such an offence was originally stipulated in section 376, which was subsequently replaced by an amendment in the year 1983, which runs as follows:

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, (a) being a police officer commits rape (i) within the limits of the police station to which he is appointed; or (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or (iii) on a woman in his custody or in the custody of a police officer subordinate to him; or (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman’s or children’s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or (e) commits rape on a woman knowing her to be pregnant; or (f) commits rape on a woman when she is under twelve years of age; or (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be

\(^{106}\) Section 375 of the Indian Penal Code, 1860.
mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

It is relevant to note that sections 376A, 376B, 376C and 376 D of the Indian Penal Code were also introduced in 1983 by way of amendment. These sections imposed severe punishment for those public servants and others who committed such heinous offences.

As per the General Principles of Evidence Act, the onus of proof is on the prosecution. But when a heinous crime is committed against women, the burden of proof is shifted from the prosecution to the accused. The vulnerability of women and the gravity of offences committed on them sensitized the legislators. Taking cue from the constitutional safeguards given to women, they enacted strict provisions of law both in its substantive as well as in evidentiary aspects. Corresponding amendments have been made from the procedural aspects too.

The Code of Criminal Procedure was amended in the year 2005 to incorporate section 164 A that deals with medical examination of the victims of rape in these words.

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty four hours from the time of receiving the information relating to commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely-

(i) the name and address of the woman and of the person by whom she was brought;
(ii) the age of the woman;
(iii) the description of material taken from the person of the woman for DNA profiling;
(iv) marks of injury, if any, on the person of the woman;
(v) general mental condition of the woman; and
(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.
(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement of completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section [5] of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

It is an innovative section which stipulates that even a registered medical practitioner of a private hospital or a clinic is liable to conduct medical examination of the victim failing which he is liable to be punished. Thus legislatures have taken effective measures to protect women against this heinous crime.

Yet another gender protective amendment was inserted to the Indian Penal Code in the year 1983.\footnote{\textit{Chapter XXA,} with one provision Section 498 A was introduced.} It deals with husband or relatives of the woman’s husband subjecting her to cruelty and the punishments to be accorded in these words, “Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.”\footnote{\textit{Section 498A of the Indian Penal Code.}}

A woman’s vulnerability is not only in the public domain. She is equally if not more vulnerable in the private domain especially since the perpetrators are known and trusted persons. The four walls of her home can at times imprison her and subject her to untold misery and suffering unknown to the outside world. This exploitation in the private sphere is more dangerous to women. To tackle that menace, this Amendment Act defined the term ‘cruelty’ and included all her relatives including the husband as offenders and made such offences punishable by imposing imprisonment for not more than 3 years.

Notwithstanding the legislative provisions against such heinous crimes, occurrence of events like Nirbhaya’s could not be prevented. One of the rapists
reported that they behaved so cruelly on the victim because instead of begging them to leave her, she defiantly shouted at them.\textsuperscript{109}

The Code of Criminal Procedure was amended once again in 2005 through which provisions for plea bargaining was introduced in Chapter - XXI A. This chapter has sections 265 A to 265 I. In a bid to protect the interest of affected women, the legislators framed it in such a manner that plea bargaining provisions available in this chapter do not “apply where such offence ... has been committed against a woman.” While speedy justice and speedy disposal of cases happen to be the objective and intention of the justice delivery system, legislative enactments do not compromise on the quality of justice contemplated against offences committed on women.

It is obvious from the analysis made that the major criminal laws like Code of Criminal Procedure, Indian Penal Code and the Indian Evidence Act provide strict provisions so as to nullify the effects of the age old gender exclusionary practices existing in the criminal justice system. It is pertinent to observe that some minor criminal legislations have also been enacted to prevent offences against women like Eve Teasing Act 1994,\textsuperscript{110} Prevention of Sexual Harassment Act,\textsuperscript{111} etc.

\textbf{I. THE PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994}

Science and technology has deeply impacted the development of human civilization both positively and negatively. The pre-natal diagnostic test that facilitates the medical fraternity to detect sex of the unborn child inside the mother’s womb while detecting any disorder or complications of the foetus, has proved to be a death trap for the unborn child. In this male chauvinistic patriarchal society, with a deep rooted son preference and daughter abhorrence, this scientific development is used as a safe weapon to terminate the female foetus with the consent of the parents and with the connivance of doctors. The life of the female foetus is snuffed out in its mother’s womb, where it ought to have been protected and nourished. It goes to show that even

\textsuperscript{109} “Death sentence for all four convicts”, \textit{The Times of India}, 13 September 2013.
\textsuperscript{110} “eve-teasing” means any indecent conduct or act by a man which cause intimidation, fear, shame or embarrassment to a woman, including abusing or causing hurt or nuisance to, or assault, use of force on a woman.
\textsuperscript{111} sexual harassment includes such unwelcome sexually determined behaviour (Whether directly or by implication) as : a) Physical contact and advances; b) a demand or request for sexual favours; c) sexually coloured remarks; d) showing pornography; e) any other unwelcome physical, verbal or non - verbal conduct of sexual nature.
the so called safe haven’s can turn out to be dangerous for the females. To protect the unborn girl children from such hazards, this Act has been enacted by the Parliament in 1994.\textsuperscript{112}

The Preamble of the Act declares as follows,

\textit{An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide.}\textsuperscript{113}

The techniques and procedures of conducting the test have been defined in this Act, along with definitions related to pre-diagnostic techniques thus,

\textit{pre-natal diagnostic test} means ultrasonography or any test or analysis of amniotic fluid, chionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.\textsuperscript{114}

Chapter II of the Act regulates Genetic Counselling Centres, Genetic Laboratories and Genetic clinics. Chapter III is on regulation of pre-natal diagnostic techniques. Section 4 of the Act runs as follows,

\textit{(1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic clinic shall be used or caused to be used by any person conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3).}\textsuperscript{115}

Section 4(2) stipulates the conduct of this test for the purpose of finding out certain abnormalities in the foetus.\textsuperscript{116} Section 4(3) also stipulates certain conditions regarding the person conducting the test and reasons for conducting the test.\textsuperscript{117}

The Act also stipulates that the consent of the pregnant women should be taken in writing and sex of the foetus shall not be revealed.

\textit{(1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless-}

\begin{flushleft}
\textsuperscript{112} The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
\textsuperscript{113} Preamble, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
\textsuperscript{114} Section 2(k), Ibid.
\textsuperscript{115} Section 4, Ibid.,
\textsuperscript{116} Section 4(2), Ibid.,
\textsuperscript{117} Section 4(3), Ibid.,
\end{flushleft}
(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;
(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

2. 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.\footnote{Section 5, Ibid.}

The Act prohibits Genetic Centres, clinics or laboratories from conducting tests to determine the sex of the foetus thus;

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;
(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.\footnote{Section 6, Ibid.}

Chapter VII of the Act deals with offences and penalties. It prohibits advertisements relating to pre-conception and pre-natal determination of sex and punishment for contravention in these words:

“\textit{No person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.}”\footnote{Section 22(1), Ibid.}

The Act prescribes penalties for those persons who violate the provisions of the Act in these words-

\textit{Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre,}
Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.\textsuperscript{121}

It is commonly believed that knowledge and scientific advancement would make human beings more humane and law abiding. But when it is related to females, this knowledge and technology adversely affects them by facilitating the perpetration of a ghastly crime in an organized manner. Law has to keep pace with the scientific advancement in order to protect and save the affected persons. This Act is one such legislative enactment that, while aiming at protecting the lives of the unborn female foetus ends in protecting the human civilization.

II. TAMIL NADU PROHIBITION OF EVE TEASING ACT, 1998.

Eve-teasing, is an offence that affects the lives of girls and women. Every girl and every woman would have undergone such an experience in her lifetime. It is quite rampant and also accepted as part of life. But in many places it goes beyond limits and hurts the girls and women who are teased. To protect them, the legislature of Tamil Nadu enacted the prohibition of Eve-Teasing Act in 1998.\textsuperscript{122} Eve-teasing is defined in this Act to mean, any indecent conduct or act by a man which causes or is likely to cause intimidation, fear, shame or embarrassment to a woman, including abusing or causing hurt or nuisance, to or assault or use of force on a woman.\textsuperscript{123}

The scope of this definition is very wide and includes any indecent conduct with a woman including a girl. The jurisdiction of the act is very wide and is applicable to all places whether public or private, including any premises whether public or private. It proclaims that, “Eve teasing at any place is prohibited.”\textsuperscript{124}

The penalty for indulging in Eve-teasing is prescribed as following:

“Whoever commits or participates in or abets eve-teasing in or within the precincts of any educational institution, temple or other place of worship, bus stop, road, railway station, cinema theatre, park, beach, place of festival,
A careful perusal of this section reveals that the word ‘whoever’ is used which implies that whether the person is known or unknown, whether relative or an outsider, he is brought under the ambit of this section. Likewise the usage of terms in this section namely, ‘participates in’, or ‘abets eve-teasing’, implies that even silent member of a group is liable to be punished. Corresponding to section 3 which uses the term ‘any place’, section 4 has a wide connotation regarding the territorial extent of this Act.

Section 5 of the Act fixes responsibility on the management of any precint to take steps to prevent eve-teasing and to act on the complaint of an aggrieved person by informing police. If eve-teasing occurs in public transportation, the Act imposes responsibility on the crew in preventing or in initiating appropriate criminal action against the offender. The driver of the vehicle in which an offence is reported is deemed to have abetted the offence and the vehicle is liable to be confiscated.

Section 8 of the Act stipulates that those provisions are in addition to and not in derogation of any other law for the time being in force. This Act is yet another effective legislative measure of the State of Tamil Nadu, which aims at protecting women from eve-teasing and ensuring the rights and dignity of women. Though this legislation is discriminatory, it accords protective discrimination and has a positive connotation.

III. THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

This Act enacted by the Indian Parliament was the result of a sequence of events at the global as well as at the national level. At the global level, CEDAW was signed by many countries including India. This Convention requires State Parties to take all appropriate measures to eliminate discriminations against women. Consequent to this Convention, the Supreme Court of India in Vishakha v. State of Rajasthan.

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125 Section 4, Ibid.,
126 Section 5, Ibid.,
127 Visaka and others v. State of Rajasthan, AIR 1997 SC 3011
held that sexual harassment at workplace is a form of discrimination against women that violates the constitutional rights conferred on women. While deciding that case, the Supreme Court of India issued guidelines to ensure that such sexual harassments are prevented. Based on the provisions of CEDAW Convention as well as the Vishakha Guidelines, the Union Parliament enacted this legislation in 2013. This Act explicitly states that it is applicable to those harassments faced by women in working places. Its objectives are to prevent, prohibit and provide measures for redressal and the objectives of the Act are stated in the Preamble in these words.

“It is an Act 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.”

The Preamble further stipulates as follows:

WHEREAS sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to 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 a right to a safe environment free from sexual harassment;

AND WHEREAS the protection against sexual harassment and the right to work with dignity are universally recognised human rights 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.

In this Act, the terms ‘sexual harassment’, ‘aggrieved woman’, ‘employer’ and ‘workplace’ are some of the important concepts used that require proper understanding.

The term ‘Sexual harassment’ includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:-

(i) physical contact and advances; or
(ii) a demand or request for sexual favours; or
(iii) making sexually coloured remarks; or
(iv) showing pornography; or
(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.\(^\text{128}\)

\(^{128}\) Section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
From this definition it is obvious that any direct or indirect acts which are deemed to be unwelcome acts or behaviour in terms of issues mentioned from (i) to (v) amount to sexual harassment.

The term ‘Workplace’ is defined to include the following:

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

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

(iii) hospitals or nursing homes;

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

(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

(vi) a dwelling place or a house.\textsuperscript{129}

The term workplace is given a wide connotation and is not confined to the four walls of an office rooms. It extends to places as well as dwelling houses even beyond departments.

‘Aggrieved women’ is defined to mean,

(i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;

(ii) in relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house.\textsuperscript{130}

The most important point to be noted is that this definition does not confine only to working women of a particular employment, but extends to any other woman irrespective of the employment if such an incident occurred in the said place of employment. It extends to dwelling houses also.

\textsuperscript{129} Section 2(o), Ibid.,
\textsuperscript{130} Section 2(a), Ibid.,
Moreover, the employer is defined to mean,

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i), any person responsible for the management, supervision and control of the workplace.

(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees;

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker.

Consequent to the term ‘employer’, the term ‘employee’ also has a wide connotation. According to Section 2(f), ‘employee’ means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether, for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name;

Section 3 of the Act prescribes different modes of prevention of sexual harassment and prescribes that, “no woman shall be subjected to sexual harassment at any workplace.” It is widely inclusive to mean that any woman irrespective of her employment anywhere shall not be subjected to this. The term ‘any workplace’ implies that it is not confined to the premises of a particular place of employment. Analogous to the provisions of the Factories Act, ‘Workplace’ implies ‘in the course of employment’. Accordingly, if sexual harassment occurs in transit like in a bus or other mode of transportation provided by the employer, that place also constitutes any workplace. Therefore this provision has a wide connotation.

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131 Section 2(g), Ibid.,
132 Section 3(1), Ibid.,
Section 3(2) provides deemed provisions that constitute sexual harassment. From the provisions discussed above, it is understood that this Act has given a broader meaning to the term sexual harassment and has a wider jurisdiction for the term ‘place of work’.\textsuperscript{133}

Another interesting feature of this Act is the provision for a detailed inquiry into complaints. Chapter V from sections 12 to 18 deal with various provisions in this regard. Chapter VI imposes different duties on the employer to prevent, protect and ensure remedy to the aggrieved women.\textsuperscript{134}

Chapter VII imposes duties and powers on district officers to enforce this Act in all workplaces. Further, it imposes liabilities on the Government to monitor and supervise such places of employment where sexual harassment is reported. The Government is vested with the power to supervise the implementation of this Act. Non-compliance invites penalty.\textsuperscript{135} Every offence under this Act is a non-cognizable offence.\textsuperscript{136} The constitution of internal committee or Local Committee has been made mandatory.\textsuperscript{137}

The objectives of the Act are commendable. But in a situation where top level administrators are mostly men, affected women are still vulnerable. The prospect of losing job and being shamed victimizes the victims further. It seems to be a strong measure, but in a male chauvinistic society, it remains a paper tiger. In the days to come with rapid social transformation, women may be able to use this weapon to protect themselves in workplace.

\textbf{Penalty for non-compliance with the Provisions of this Act}

As per section 27, every offence under this Act is a non-cognizable offence. However, it is prescribed that, \textit{“no court shall take cognizance of any offence punishable under this Act or any rules made there under, save on a complaint made by the aggrieved woman or any person authorized by the Internal committee or Local...”}

\textsuperscript{133} Section 3(2), \textit{Ibid.},
\textsuperscript{134} Section 19, \textit{Ibid.},
\textsuperscript{135} Section 26, \textit{Ibid.},
\textsuperscript{136} Section 27, \textit{Ibid.},
\textsuperscript{137} Section 4(2), \textit{Ibid.},
committee in the behalf.”

Internal committee is to be constituted as per section 4 by the Employer accordingly:

“The Internal Committee shall consist of the following members to be nominated by the employer, namely:

(a) a Presiding officer who shall be a woman employed at a senior level at workplace from amongst the employees:

Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section(1):

Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from other workplace of the same employer or other department or organization;

(b) not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge;

(c) one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment.”

The Local Committee is constituted as per section 6. Its composition, tenure and conditions are prescribed under section 7. The objectives of the Act appear to be good and appropriate. But when it is put into practice, innumerable problems cropped up, which prevented the proper implementation of this Act. In a male chauvinistic world, women are entering into employment only from the recent part. Most of the appointees and top level administrators still happen to be men and in this scenario a woman worker would not normally have the strength, confidence and courage to make a complaint against the male authorities or officials at the cost of affecting her continuance in the same employment and losing her future livelihood. Like any other protective legislation, this legislation though it appears to be strong, is like a toothless tiger unable to bite the wrongdoer. However the process of social transformation is positive and rapid, educated and empowered women in days to come would use this weapon to protect themselves and their feeble sisters.

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138 Section 27(1), Ibid.,
139 Section 4(2), Ibid.,
140 Section 7, Ibid.,
Enacting criminal legislations prohibiting commission of offences against women is one dimension. As far as laws are concerned, there are plenty of them prohibiting the commission of offences against women. Enforceability of such laws is of paramount importance, which remains lacking and woefully inadequate most of the time. This victimizes the victims further and emboldens the offenders. Enforcement machinery has to be strengthened and this work has to be carried out systematically. Women’s organizations have a major role in acting as watchdogs of the enforcement agencies. National Women’s Commission and the State Women’s Commissions are the competent Governmental bodies that also work at ensuring the proper implementation of the enactments. The scope and ambit of some minor protective criminal legislations are discussed in this chapter.

Section 498 A of Indian Penal Code deals with cruelty towards women by husband and relatives. It is a criminal legislation which is narrow in its scope and the onus of proof is on the part of prosecution which requires that such offences are to be proved beyond reasonable doubt “Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.” The Domestic Violence Act contemplates broadly as a civil legislation and attempts to secure the protection of women from domestic violence. This Act gives effect to the rights guaranteed under Articles 14, 15, and 21 of the Constitution to provide for remedy under the civil law which is intended to protect women from domestic violence. At the time of introduction of the bill, the urgency of such an act and the existing international instruments on that issue was pointed out in these words.

“The Vienna accord of 1994 and the Beijing declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations committee on Convention on the Elimination of All Forms of Discrimination Against Women in its general Recommendation has recommended that state parties should act to protect women against violence of any kind, especially that occurring within family.”

The statement of objects and reasons of the Act declares that domestic violence is a human rights issue and a serious deterrent to development. It is widely prevalent, but remains largely invincible in the public domain. The Act defines the expression, ‘domestic violence’ to include, “actual abuse or threat or abuse that is
physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the women or her relatives would also be covered under this definition.\footnote{Section 3 of the Protection of Women from Domestic Violence Act, 2005: Definition of domestic violence.}`

The scope of the term ‘domestic relationship’ has been widened. Accordingly, “it covers those women who have been in a relationship with the abuser whether both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption.” This definition includes all the family members of the joint family system, like widows, mother, single women and others. This Act provides for the rights of women to a secure housing. It also provides for the right of a women to reside in her matrimonial home or shared household, whether or not she has any title, or rights in such home or household.
Protection officers have been created for the enforcement of the provisions of the Act and to ensure that the objectives are carried out. The Domestic Violence Act empowers the magistrate
to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.\textsuperscript{143}

The Domestic Violence Act was introduced in accordance with the norms of CEDAW and is the result of the emergence of human rights movement both at the global as well as at the national level. It is intended to be a protective shield given to women to safeguard them in the private sphere. Human rights are conferred on persons not only against the state or other authorities, but also against persons. As far as this Act is concerned, protective rights are conferred on women even against their close relatives. It is a very important piece of legislation that will be a protective shield for women and will help them to mitigate the hardships endured by them in a patriarchal system. It breaks the invincibility of the sanctity of homes as areas beyond the reach of law. It penetrates through the thick walls of the homes if women are more vulnerable there. It is obvious that the number of litigations seeking remedies and protections under this Act has been increasing tremendously since the Act came into force.

The atrocities and discriminations a woman is subjected to, begin from her mother’s womb. If a woman is carrying a female foetus, which the parents and society consider as unwanted, its life is snuffed out in the same womb that is supposed to protect and nourish it. The birth of a girl child in the land of ‘son worshippers’, is not an occasion to rejoice. That pent up anger of the near and dear including parents on the birth of a girl lead to many discriminations and exclusions. Just like the womb, home is normally a safe haven to its inmates, but for many girls their tryst with hell begins here within the four walls of their homes. That intensifies after marriage.

\textsuperscript{143} The Protection of Women from Domestic Violence Act, 2005.
A married woman is shorn of her individual identity and has to forego whatever little rights, interests and privileges she had in her natal house. Uprooted to a new hostile atmosphere, she is vulnerable to discrimination and violence, both spousal and non-spousal. A woman who begets only girls and no boys is faulted and criticized life long. A woman who is unable to bear children is looked down upon. They are excluded from participating in many social events and considered as inauspicious. Likewise as widows they are ostracized and excluded from many aspects of social life. Their very presence is abhorred. Old women too suffer from a number of social exclusionary practices due to dependence on others including economically.

The Constitution has several provisions for the creation of various national commissions for Scheduled Castes, Scheduled Tribes, Backward Classes and for others. But no such explicit provision is found for the creation of a national commission for women in the Constitution. In the year 1990, the Parliament enacted the National Commission for Women Act and thereby created a statutory commission in order to provide protection to women. This Act envisaged the creation of a National Commission for Women in order to exercise the functions enumerated under Section 10 of the Act.144

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144 Section 10 of the National Commission for Women Act, 1990: 1. The commission shall perform all or any of the following functions, namely:- a. Investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws; b. present to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguard; c. make in such reports recommendations for the effective implementation of those safeguards for the improving the conditions of women by the Union or any state; d. review, from time to time, the exiting provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations; e. take up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities; f. look into complaints and take suo moto notice of matters relating to:- i. deprivation of women's rights; ii. non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development; iii. non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities; g. 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; h. undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity; i. participate and advice on the planning process of socio-economic development of women; j. evaluate the progress of
There is a view that women have never been treated well at home or outside. In order to look into this deplorable state of affairs, the National Commission for Women [NCW] has been vested with the power,

to study and monitor all methods relating to the Constitutional and legal safeguards provided for women, to review the existing legislations and suggest amendments, whenever necessary. It will also look into the complaints and take notice of all the cases involving deprivation of the life of women in order to provide support, legal or otherwise to helpless women. The Commission shall monitor the proper implementation of all the legislations made to protect the rights of women so as to enable them to achieve equality in all spheres of life and equal participation in the development of the nation.

After forty years of introduction of the Constitution, the need was felt to have a statutory national commission for women to investigate, analyse, study and to monitor the implementation of various legislations that attempt to protect the rights of women.

The National Women’s Commission (NWC) has its own structure and function, including the function to act as a quasi judicial authority. It was vested with the power to vigilantly monitor happenings of events that affect the interest of women. It is a competent body to advice the appropriate authorities in recommending either to legislate or implement laws which intend to protect and promote the status of women.
The Commission is also given the power to evaluate the progress on the development of women and to fund the litigation involving issues affecting the status of women. It is a proactive enactment in enabling a statutory organization for the purpose of promoting women’s interest.

Laws can impose punishments and penalty, but unless social and cultural transformation occurs, the situation of women will not change for the better. Post Nirbhaya, the views of some politicians and important persons revealed their insensitive attitude due to inbuilt patriarchal mindset that is still heavily judgemental of women. What women should do and should not do, how they ought to behave and ought not to behave, is all screwed up in the mindset of the people, both men and women due to conditioned upbringing in a patriarchal environment that sustains male chauvinism as the ideal or the norm. All along women were treated as objects to be possessed, enjoyed or abused depending on the attitude of the people around them. The growth of human rights and acceptance of gender rights as human rights makes it clear that women are not to be used or abused according to the whims and fancies of men or other women. Legal inclusions and protections mostly remain as paper tigers, attitudinal change along with laws can bring in the desired change in gender equality.