

## 1 RIGHTS AND REMEDIES

### 1 Constitutional Scheme

#### Introduction

The Constitution is the basic document which governs our rights and lays down the structure by which we are governed Dr BR Ambedkar is referred to as the Father of the Indian Constitution as he headed the Constituent Assembly and played an important part in including individual and political rights against the state as well as group rights socio cultural rights of the marginalized section

Our constitution is the largest and most detailed in the world It reflects the Democratic set up of Government

The Preamble is the soul of the Constitution It includes the purpose objectives and policies underlying provisions in the Constitution Important words include Sovereign Socialist Secular Democratic Republic and Justice Equality and Fraternity

The Constitution contains a set of fundamental principles by which our nation is governed Every law enacted by the government has to be in conformity with the Constitution It spells out the Fundamental Rights and Duties of citizens

Directive Principles of State Policy and Universal Adult Franchise are two important parts of the Constitution

The Constitution creates checks and balances through Separation of Powers and the power of Judicial Review It stipulates a combination of Federal and Unitary style of government It provides for an independent Judiciary and Election Machinery The Constitution offers Single Citizenship to citizens Emergency Provisions are detailed for extraordinary situations

Article 14 Equality before law and equal protection of the law

Exceptions Doctrine of Classification

Article 15 No discrimination against any citizen on grounds of religion race caste  
sex place of birth

Exceptions 15 3 The State can make special provision for women and  
children

Article 16 Equality of opportunity of all citizens in matters relating to employment to  
any office under the State

Article 17 Untouchability is abolished and its practice in any form is forbidden

Article 18 Abolition of Titles

Article 19 Freedom 1a freedom of speech 1b Assemble without arms 1c form  
association 1d freedom of movement 1e to reside or settle in any part of  
India 1g practice any profession or carry on any occupation

Article 20 Protection on arrest and detention

Article 21 Right to Life and Personal Liberty It includes right to clean and  
wholesome environment

Article 22 Rights of arrested Person

Article 23 Right against exploitation Traffic in human and forced labour

Article 24 Prohibition of employment of children in factories

Directive Principles of State Policy

Article 38 Promotion of welfare of the people

Article 39 and 39A Equal Justice and free Legal Aid

Article 40 Village Panchayat

Article 41 Right to Work Educate and Public Assistance

Article 42 Just and human condition of work and maternity

Article 43 Wages of worker and participation in management

Article 44 Uniform Civil Code

Article 45 Free compulsory education for children

Article 46 Education economic interest of SC ST and weaker sections

Article 47 Level of nutrition standard of living public health

Article 48 Agriculture and Animal Husbandry

Article 48A Improve our environment and safeguard forest

Article 49 Monuments Places and Objects of National Importance

Article 50 Separation of Judiciary from Executive

Article 51 International Peace and Security

What is the Difference between Fundamental Rights and Directive Principles

If a fundamental right is violated a citizen who is affected or anyone else in public interest can approach a higher court and get it struck down. The Directive Principles are not binding on the state but these principles must reflect in all state policies. However if these are violated there is no right to go to court and get it strike down.

Which are the important provisions which protect dignity of women

Article 21 which deals with right to life has been expanded to include the right to Life with Dignity This provision has been invoked to safeguard the rights of women such as right to divorce to live a life free from violence and the right to safe abortions

Article 51A of the Constitution lays down fundamental duties of all citizens It stipulates that all citizens have a duty to promote harmony and to renounce practices which are derogatory to the dignity of women

#### Formal Equality and Substantive Equality

One of the main pillars of the Indian Constitution is the principle of equality Article 14 guarantees equality before law and equal protection of law to all its citizens Articles 15 1 and 16 2 expand this principle further and prohibit discrimination on the basis of religion race caste sex or place of birth This ensures that there is no discrimination between men and women upper castes and lower castes rich and 4

poor and all will be treated as equals before the law and will be provided equal protection of law

Hence if any law is passed or any action is taken to prevent women from taking up employment in government or public sector undertaking such law or action by the concerned authority can be struck down by the Supreme Court or a High Court as being against the Constitutional provisions Similarly paying women lower salaries for doing the same work even when they are qualified for it is discriminatory and against the Constitutional guarantee of equality Similarly not employing dalits or

Muslims in certain categories of government jobs would also amount to discrimination

But most important of all within the scheme of equality are Articles 15(3) and 16(3) which help to further strengthen the concept of equality by permitting the state to make special provisions for securing the rights of the marginalized sections women children schedule castes and schedule tribes in order to help them to overcome the discrimination they have suffered for many centuries and to help them to become equal to others. This is called positive discrimination.

This has helped the state to enact special laws for women and children such as the provisions for maintenance of women and children protection against domestic and sexual violence the Maternity Benefits Act special protection for women under all labour laws a special law to prevent sexual harassment at workplace or reservations for women scheduled castes or scheduled tribes for jobs and in elected bodies. Similarly a law to prevent atrocities against scheduled castes and scheduled tribes does not violate the provision of equality as it is meant to give additional protection to certain backward sections. These are all beneficial legislations meant to improve the status of marginalized people.

Therefore while discrimination against women has been prohibited there is nothing to prevent the state from making laws to provide them with extra facilities or for taking precautions to prevent their exploitation or abuse.

## Separation of Powers

1 Legislative The Parliament of India is the supreme legislative body Composed of the President of India and the houses the Rajya Sabha Council of States and the Lok Sabha House of the People

2 Executive The Prime Minister of India as addressed in the Constitution of India is the chief of the government chief adviser to the President of India head of the Council of Ministers and the leader of the majority party in the parliament and leads the executive branch of the Government of India

3 Judiciary There are various levels of judiciary in India different types of courts The Supreme Court of India at the top followed by High Courts of respective states with district judges sitting in District Courts and Magistrates of Second Class and Civil Judge Junior Division at the bottom

## Checks and Balances

The three bodies mentioned in the Constitution act in harmony with one and other The Legislature has the power to create and change the law the Judiciary has the power to interpret the law and to ensure that it is within the Constitutional framework and the Executive has the power to put the law into action

## Power of Judicial Review

The judiciary has the power to interpret the Constitution and to review any law passed by the legislature and executive order and to declare it void if it finds that the same is in conflict with the Constitution

This power is given by Article 32 to the Supreme Court and by Articles 226 and 227 to the High Courts

## Public Interest Litigation and Habeas Corpus 6

What is Public Interest Litigation PIL How can it be used to protect the rights of marginalized people

Our constitution gives all citizens the right to approach the court when their fundamental rights are violated But in many instances the person or class of people whose rights are violated due to their poverty illiteracy and socially disadvantaged position cannot approach the court to explain their plight as they lack the knowledge and resources to do so Many a times social organizations a local NGO etc or a journalist may take the case and write a letter to the Supreme Court or file a petition in the Supreme Court on behalf of the person whose rights are violated This procedure of allowing any other person or organization to bring the fact of gross violation of rights of a disadvantaged group of persons or an individual is called Public Interest Litigation The court verifies if it is done for personal gains or to advance a genuine cause Sometimes the courts have also acted on the basis of a newspaper report and have asked the government to explain the situation If any violations are noticed by the superior court strict action will be taken

What is Habeas Corpus How does this remedy protect the rights of people

Many a times when a person is arrested by police the family gets no further news about the person and sometimes the person dies in police custody due to torture So when details of a person who is arrested by police are not known the relatives or friends can approach the High Court or the Supreme Court seeking the intervention of the court to direct the police to produce the missing person in court The exact meaning of these Latin words is produce the body and the actual meaning is to produce the person physically in court or his body if he has been killed in police

custody This is a very powerful weapon in the hands of the people against police atrocities

## 2 Hierarchy of Courts

How are rights enforced 7

The rights located in the Constitution and in various laws are enforced by our courts. The courts interpret the laws and apply them to the facts of each case. The Constitution lays down the hierarchy of courts and also the role and functions of each court. The lower courts are divided into civil and criminal. Appeal from a lower court lies with court immediately above it. Most states have a High Court. Appeal from High Courts lie with the Supreme Court which is the highest court in India.

What is the hierarchy of our courts? The following diagram shows the hierarchy of the courts in our country.

Supreme Court

New Delhi

High Courts

Highest Court at State and UT Level

There are total 24 High Courts In India

Calcutta High

Court Gujarat High

Court Bombay High

Court Madras High

Court Uttar Pradesh



High Court

Bench In Bombay Bench In

Aurangabad Bench In Goa Bench In Nagpur

At District Level

Civil Courts Criminal Courts

District Court

Or

City Civil Court in Mumbai Court Of Sessions

Civil Judge Sr Division Judicial Magistrate First Class

JMFC

Metropolitan Magistrate MM

In Metropolitan Cities

Civil Judge Jr Division Judicial Magistrate Second Class

Executive Magistrate

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3 Explanation of some Legal Terms in Criminal

Law

The criminal proceedings start with the filing of a complaint. The power of the police officer to investigate the crime is based on whether the offence is of a serious type or a lesser serious type. Accordingly, the offences are categorized as bailable and non-bailable, cognizable and non-cognizable, and compoundable and non-compoundable.

**Difference between a bailable and a non-bailable offence** If a person is arrested for a bailable offence, the police can immediately release him on personal surety. He/she does not have to be produced in court. Non-bailable offences are of a more serious type which invoke higher punishment, imprisonment for a period of three or more years. In such cases, the police does not have the power to grant bail. Serious crimes such as rape, murder, dowry death, cruelty to wives etc. come within its purview. However, even in these cases, when the accused person is produced before the magistrate, he/she has a right to file an application for bail, and the magistrate has the power to grant him/her bail. If he/she does not have a lawyer, the person is entitled to legal aid for the purpose of making this application.

If the person is apprehensive that he will be arrested for a criminal offence, he/she can file an application for anticipatory bail in advance and avoid the arrest for a limited period of time. If anticipatory bail is granted, even if an FIR is registered, the police will investigate the matter without arresting the accused.

**Difference between Cognizable and Non-cognizable**

Offences are also further categorized as cognizable and non-cognizable. The following table provides the difference between these two types of offences.

Category	Cognizable	Non-cognizable
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Seriousness of		
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offence	When it is a serious offence	When it is a less serious
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offence

Police

Investigation Police will investigation Police can investigate only by  
the order of a Magistrate 9

Register for

Recording FIR Register NC Register

Document copy

you will get FIR First Information

Report NC complaint

Arrest Accused accomplice will be

arrested without a warrant

They can then apply for bail

Bail will be granted at the

discretion of the magistrate

judge depending upon the

gravity of the crime the

chances of intimidating the

witnesses or the type of

influence the accused person

has in the area Accused accomplice will not

be arrested Police may call

the accused and warn him

Outcome The Police will investigate

and collect evidence If there

is sufficient evidence they  
will file Charge Sheet and  
trial will commence. It creates evidence of the  
harassment the woman is  
facing.

**Jurisdiction.** In a cognizable offence the  
jurisdiction of the police  
station is immaterial to get a  
complaint registered under  
the FIR register. In order to get a non  
cognizable offence registered  
it is essential to ensure that the  
crime has taken within the  
jurisdiction of the police  
station.

Offences such as rape, sexual harassment of women or violating their modesty,  
dowry death, abetment to suicide, cruelty to wives causing grievous hurt etc. are all  
cognizable offences where the police are bound to register the FIR and start the  
investigations.

If an offence is non cognizable then the police cannot start the investigations. The  
person would have to approach the magistrate court and seek directions for the  
police to start the investigation. Simple assault, abuse etc. come within this  
category. 10

The main reason why an NC complaint is filed is to create a record proof of violence which will help the person in case the person has to file a criminal complaint later. For instance, if the husband is abusive or threatens to throw the wife out of the house, she can approach the police station and register an NC complaint. Later, if she wants to file for divorce on the ground of cruelty, the NC complaint will provide the proof that the woman was also subjected to cruelty and abuse earlier.

#### Compoundable and Non compoundable Offences

The criminal law permits some minor offences to be compromised or settled between the parties. A detailed list of these is provided under Section 320 of CrPC. These are termed as compoundable offences. However, major offences such as rape, murder, decoity, dowry death, cruelty to wives, etc., cannot be compromised between the parties. Only the higher courts, i.e., the concerned High Court or the Supreme Court, has the authority to compound these offences. Hence, these are termed as non compoundable offences.

## 4 Matrimonial Rights of Women

### Introduction

In India upon marriage women leave their parental homes and live in the home provided by the husband or by his family members. This home is called her matrimonial home. In fact traditionally it is believed that after marriage a woman has rights only in her husband's home and not in her parental home though legally the position is now changed and today women have a right of residence in both parental as well as the matrimonial home.

The contract of marriage creates a legal obligation upon the husband and his family members to provide a shelter and maintenance to the wife. In our society a woman is perceived as a home maker in addition to all other roles she may be required to perform. So while women have the burden of managing the house, cooking for the family, raising the children and tending to the sick, their chances of earning an adequate income to support themselves or even the chances of retaining their pre-marriage jobs are constrained. Hence when economic support is withdrawn due to a matrimonial conflict, most women are rendered destitute. The situation becomes dismal when they have the additional burden of caring for their children. Women's right to shelter and maintenance is located within this conceptual framework.

There are various legal provisions which are meant to safeguard the rights of the wife in her husband's home and to ensure that she can live there with dignity and safety. The husband and his family cannot deprive her of these rights. They cannot harass a wife for dowry and inflict violence upon her. If a situation of domestic or sexual violence arises, the wife can avail of legal remedies under criminal as well as civil laws. The wife also has a right to file for divorce and opt out of the marriage. She also has a right to custody of her children.

National Insurance Co Ltd vs Minor Deepika 2009 6 MLJ 1005 Madras

High Court

The UNICEF in 2000 noted that unpaid care work is the foundation of human experience. The care work is that which is done by a woman as a mother. The woman herself will be the last person to give this role an economic value. But when we are evaluating the loss suffered by the child because her mother died in an accident, we must give a monetary value to the 12

work of a caregiver for after all the home is the basic unit on which our civilized society rests.

Note: All women across religions and regions are entitled to the rights discussed below unless specifically mentioned otherwise.

a Right to live in the Matrimonial Home

What is a matrimonial home?

When a woman is married, she acquires the right to live in her husband's home. This home becomes the woman's matrimonial home. Even if it is not owned by her husband and is in the name of his parents or siblings, she still has a right to reside in this house and she cannot be thrown out of this house. A widow cannot be thrown out from the house in which she was living with her husband after her husband's death. It does not matter if the house was not owned by her husband.

The term used in the Protection of Women from Domestic Violence Act, Domestic Violence Act or DV Act for short is shared household.

A shared household is where the woman resides or has resided ie has left or has been thrown out with the man in a domestic relationship S 2s of the DV Act

It does not matter that the shared household is not owned by either the woman or the man ie the house is on lease license or joint family property This right is protected under S 17 of the Domestic Violence Act If she is thrown out the court can pass an order to put her back in the home The court can also ask the respondent to provide alternative accommodation if the woman does not want to return to a violent home

How can a woman protect this right

In order to protect this right a woman must first believe that by virtue of her marriage she has acquired a right to reside in her husband's home and she cannot be dispossessed from this home Most often women lose their right to their matrimonial home because they themselves do not believe that they have a right to reside there Even when they are asked to leave the home they must believe that they have a right 13

to reside in the home and this right can be protected by law This is the first step

Only when women believe this the right can be protected by law

If there is an apprehension that she will be thrown out of this house she must approach a magistrate's court under the provisions of the Domestic Violence Act and obtain an order of injunction to restrain her husband or his family members from dispossessing her throwing her out from her matrimonial home Ss 17 19 of DV Act This will secure her right of residence in this house In the event that the husband or his family members violate this order they will be liable for punishment



under the Domestic Violence Act S31 of DV Act

A woman will be deprived of this right only when an alternate accommodation of a permanent nature is provided for her. Until such time her right to reside in the matrimonial home will be protected by the court.

Caution: The term right of residence cannot be construed to mean ownership rights or right to a share in the property. Women's right to property is discussed under a separate section. In India we do not have a right to matrimonial property which is owned by the husband or his family members. However, despite this limitation, the right of residence is an important right for most women and this right is protected under the Domestic Violence Act.

b Right to claim Maintenance for self and children

What is Maintenance?

The law imposes a legal obligation on the husband to provide maintenance to his wife. If he fails to provide for her, the wife can approach the court for an order of maintenance.

The term maintenance is the amount required for a decent living including cost of food, shelter, if the same is not provided by the husband, travel requirements, health care, educational, extra-curricular and recreational expenses of children and other sundry expenses.

Who can claim maintenance?

Under our law, the wife, minor children, major children who suffer from physical or mental disabilities, unmarried major daughters and aged parents are entitled to maintenance as they are unable to maintain themselves.

Can the wife claim maintenance for her children along with herself? 14

Yes the wife can claim maintenance for herself and her children. If the children are living separately along with their mother they also have an independent right to claim maintenance from their father.

If a woman is working can she still claim maintenance?

Even if a woman is working she can claim maintenance if her husband's income is substantially more than her income and she is unable to maintain herself or her children from that income. If the husband and wife are earning the same amount she cannot claim maintenance from him. But in such a situation women can claim maintenance for their children.

Can a woman who is living with her husband claim maintenance?

Yes if her husband is not providing her maintenance while she is living in the same house with him she has a right to claim maintenance.

Can women claim maintenance during divorce?

Yes. If a woman files for divorce in the same petition she can also claim interim and permanent maintenance for herself and for her children. Along with this she also needs to make a separate application for interim maintenance which can be taken up at the initial stage and decided so she will start getting some maintenance while her petition for divorce is pending in the court.

If her husband has filed for divorce as soon as she received the papers she can immediately file an application for interim maintenance which will be heard and decided first as a preliminary issue.

Is a woman entitled to claim maintenance after her divorce?

Yes. Even after divorce if she has not received a lump sum amount as alimony which is adequate to meet her expenses she can claim maintenance from her husband until she remarries.

If during litigation the husband agrees to take the wife back will she still be entitled to maintenance

Usually in order to prevent an order of maintenance being passed against him the husband may volunteer to take the wife back or may even file proceedings for restitution of conjugal rights. If a woman is keen to reconcile with her husband she may accept this offer but if there is a history of violence then she must exercise 15

caution before accepting it because once an order is passed dismissing the petition on the ground that the parties have reconciled it will be difficult for the woman to start the proceedings all over again as it would be deemed that she has condoned or forgiven the husband his earlier acts of cruelty.

Hence it is advisable to stipulate certain conditions or even keep the proceedings pending in the court for a few months to ensure that the husband is sincere in his offer of reconciliation and is not doing so only to avoid payment of maintenance before the earlier petition is withdrawn.

What is the criterion to decide the amount of maintenance?

The amount of maintenance awarded should be sufficient to meet the regular household expenses, children's education, medical, recreational expenses, to pay the rent of the dwelling house etc. It should be sufficient to meet the basic needs of a person. Here the standard of life that a person is used to is also taken into consideration. For instance, if the husband is very rich and the wife is used to that life style she will be given a higher amount than a person earning a modest income where the wife is used to a modest life. Hence it is important to collect evidence to prove the husband's lifestyle and income such as type of house, area of the house, type of car or two wheeler, property details, trips to foreign countries etc.

The exact amount is decided as per the income of the husband and the needs of the wife and children

Tips Many a times husbands try to show that their earnings are far less than their actual income by showing old salary slips or by hiding their additional income So it is necessary for the wife to get all the information before approaching the court and collect the necessary details recent salary record bank statements income from business or from family property income tax returns etc

Is it necessary to file for divorce while filing for maintenance

No If the woman does not wish to file for divorce she can make an application only for maintenance This can be done under the provisions of S125 CrPC or under the Domestic Violence Act without filing for divorce

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## 5 Rights of Mothers to Custody of Children

### Introduction

Right of custody of their children is a very important concern for women facing domestic abuse Due to the fear of losing custody of their children many women continue to live in violent relationships and are afraid of taking legal recourse to end the violence Since earlier the father was considered as the natural guardian there is a belief prevalent in society that the children belong to the husband and his family and the woman has no claim over them and that her role is confined to only taking care of them When women leave their matrimonial home they are often warned

that they will not be able to get custody of their children and further they will not be even able to meet them. But over years due to sustained struggle from the women's movement the law is changed and today the woman is considered as the joint natural guardian of her children and also considered as the primary care taker of her children. The courts also consider that she will be the best suited person to take care of her children. In this section women's right to custody and the ways in which this right can be secured is explained.

a Situations where custody of children becomes contentious and precautions which women must take

What right do women as mothers have over their children

A wife along with her husband has the right of custody and guardianship over her children. As the primary care taker of her children she is responsible for their care and protection. Hence she is entitled to their custody and guardianship.

When does the issue of custody of children arise

The issue of custody of children arises if due to a dispute between the spouses if either of the parties or both wish to live separately from each other.

When she is separating from her husband how can the woman retain the custody of her children

If she is separating from her husband the best way to retain custody of the children is for the wife to take the children along with her when she is leaving her matrimonial home. If the children are already residing with the mother usually interim custody will be retained with the mother even if the husband approaches the court for custody of the children. 17

It is important for any one advising the woman eg lawyer NGO member counselor etc to give women accurate advice regarding this to avoid unwarranted anxiety about the issue of securing the legal custody of their children later during court proceedings

Why don't women usually take the children along with them

This is because women think that if they take their children with them the husband may file a police complaint against them that they have kidnapped the children. However, the police have no right to do this as she is the mother and hence she is also the natural guardian of her children. A case of kidnapping cannot be filed against a natural guardian.

Is it possible for the woman to take custody of her child after she has left the home

If a woman has not taken her children with her when she is leaving the house, it is possible to take the custody later. This can be done with the help of a member of a local Mahila Mandal, NGO, a social worker, or the local police soon after she has left the home. If the child left behind is very young and cannot live without the love and care of the mother, or if the woman is breast feeding her child, this must be done at the earliest. If there is a long gap after the woman has left the home, it will not be possible to take custody in this manner as the child may get used to living with the father and his family and may not wish to come with the mother. In such a situation, it is advisable to approach the court for appropriate orders.

**Caution** If the child is attached to the husband or his mother and does not wish to come with the mother, it will not be possible to take the custody of the child. Always remember that the child's wishes and wellbeing are the most important factors in

matters of custody

Can the husband file a police complaint against her for kidnapping the child

No if the child wants to be with the mother and the mother wishes to have the child with her the husband cannot file a case of kidnapping against her as she is the natural guardian of the child. However only the mother alone has a right to take custody of her child. No one else can do it on her behalf but a support person or a social worker can help her or accompany her. At times the police may refuse to help the woman and may insist on a court order.

The Principle the best interest of the child is paramount 18

What is the main principle which the courts rely upon while deciding the matter of the custody of children

The only principle which is applied while deciding the custody of children the best interest of the child is important. This principle enshrined in the United Nations Declaration of the Rights of the Child is relied upon by Indian Courts while determining the parental rights for custody of children. This means the custody must be given to the person who is best suited to take care of the child or to the parent who is the primary caretaker of the child. In the Indian setting usually this person is the mother.

What factors are considered by the court while deciding the best interests of the child

The love and care given to the child is the most important factor. The general growth of the child, the child's well being, progress in school, child's own preference, the atmosphere in the home, these are some of the factors which are considered while deciding the best interests of the child.

Generally whoever has physical custody of the child at the point of approaching the court usually gets to retain the custody. However, this rule is not rigid and if the situation so demands, custody can be changed from one parent to the other as per the court order. Usually if the child is older, while changing the custody, the court will ascertain the views of the child.

**Caution** If a woman is facing domestic violence and she is desirous of leaving her matrimonial home to escape from violence, she must be given correct advice that she has a right to take her children along with her and that she does not require a court order to do this.

Is it true that the law considers the father as the natural guardian of the children and hence his right over the children as superior to that of the mother?

No, this is not true. This was the belief earlier. Within the patriarchal family system, the father was considered as the head of the family and the natural guardian of the children. Both the wife and the children belonged to the husband, but gradually this belief changed. Now our law considers both father and mother as equal partners in marriage and also considers them as equal guardians of their children. The father's rights over the child are not superior to that of the mother. However, traditional values still prevail and many people still endorse this anti-women view and legally incorrect view. 19

Is it true that the mother's rights over the custody of a child under five years is superior to that of the father?

Yes, this is true. This is because a young child needs the love and care of the mother and hence the law considers that the mother is better equipped to look after a child of tender age. The child may also be breast-fed by the mother. Depriving the child of



the mother's love and care may cause great trauma and anxiety to the child. In such cases, if the mother is thrown out, the police can help the mother to get immediate custody of the child to save the child from being subjected to such trauma.

If the mother is employed, will she still be given custody of the child?

This is a general misconception that prevails in society. People feel that if the woman is employed, she will not get custody of the child as she has no time to look after the child, and the father's mother may be more suitable to look after the child.

But this is not true. The right of the mother is superior to that of the husband's mother. A woman will not be deprived of the custody of the child just because she is working or has a demanding job.

If the father is very affluent and if the mother does not have sufficient means to bring up the child, will she lose custody of the child?

Even if the father is very affluent, a mother will not be deprived of the custody of her child only on this ground. It is usual in our society that the father has better financial resources in most cases, and the woman may have been a housewife all her life. She may not even have the requisite qualifications to earn an adequate income. But this factor alone cannot be taken into consideration while deciding the issue of custody of the child. The one who is able to provide the best love and care for the child will be the only deciding factor. At times, people feel that if the mother is unemployed, she may not get custody as she does not have the financial resources to bring up the child. However, since the legal obligation to provide for the child is primarily with the father, the fact that the mother does not have sufficient means to provide for the child will not be considered as a major obstacle while awarding her the custody of her child.

So the bottom line is that it does not matter if the woman is employed or

unemployed

If the husband accuses the wife of committing adultery will she be entitled to claim custody of her children

Accusing the wife of adultery or of loose moral character is the usual ploy adopted by the husband or his lawyer to deprive the wife of her right to custody of children 20

because they are under a misconception that a woman who has committed adultery will not be entitled to custody of her children But the factual position is that the issue of custody of child will be decided only on who is the main care taker of the child what kind of environment the mother is able to provide for the well being of the child and not on whether she has committed any matrimonial fault Since this ploy is used routinely by lawyers courts do not give it serious consideration However many women get traumatized when they find that such baseless allegations are leveled against the m It is best to ignore these allegations and focus on the core issues regarding custody

If the mother remarries after her divorce will she lose the custody of her child

No if she has been looking after the child well she will not lose custody when she remarries When the court decides on the matter of custody the court will look only at the best interests of the child The child's wishes will be taken into consideration

If the child is happy with the mother the mother will not be deprived of the custody of her child upon her remarriage Even the local or caste panchayat or the jamaat cannot force the mother to give up the custody of her child upon her remarriage If this happens she must not comply with the order and instead immediately must file an application for custody under the Domestic Violence Act and protect her rights

Rights of a non custodial Parent

If custody of the child is given to one parent what right does the non custodial parent have

It is important that the child has the love and care of both the parents. It is necessary for the healthy upbringing of a child. Hence if one parent is given custody the other parent will be given the right of access. This means if the child is living with the mother the child may meet the father on a regular basis ie once a week on a Sunday or once a fortnight during the weekend etc. Similarly during the holidays the father will be given some days to spend with the child. Sometimes the holidays are divided equally between the parents. Usually the court issues strict guidelines regarding the timings for access which both parties must strictly comply with. What care should the parents take so that the child grows up in a healthy environment

The parent who has custody of the child must look after the child's physical and emotional needs well so that the child's personality develops well. The educational needs of the child are also an important factor and the parent who has custody must ensure that all educational needs of the child are met according to the standard of life enjoyed by the parents. 21

## 6 Protection under the Domestic Violence Act

What is domestic violence under the Protection of Women from Domestic Violence Act

The term domestic violence under Domestic Violence Act includes physical, emotional, sexual and economic violence. 53 The following is an explanation of these terms

Physical violence beating kicking slapping etc

Emotional violence abusing using derogative words demanding dowry

humiliating her because she does not have children or has only girl children or

because she is not good looking or she has not brought enough dowry etc or

threatening to throw her out of the house or threatening that she will not be provided

any money for her or her childrens maintenance etc

Sexual violence forcing the wife to have sex when she is not in a position to have

sex eg during menstruation or soon after delivery abortion forcing her to watch

pornography filming her nude and then circulating these video clips threatening to

bring other women into the house to have sex with them in her presence forcing the

wife to have sex with other men etc

Economic abuse means neglecting to maintain the wife not giving her money for

her maintenance throwing her out of the house and not providing any shelter or

maintenance not returning her dowry stridhan or jewellery etc

The husband has to pay for the womans regular household expenses and for the

childrens expenses If he does not pay her regular maintenance or abandons the

wife it would amount to domestic violence under this Act

What rights does this Act give women

The Act gives women the right to live a life free from violence It protects the right

to shelter in the following ways

Right to an order of protection If there is a threat of violence the woman can get

an order of protection restraining the husband and his family members from

committing violence on her Even if she is living in her own fathers house and if

she is afraid that the husband may assault her or come to her place of work and 22

humiliate her she can ask for a stop order injunction to restrain him from coming anywhere near her S18

Right to live in the same house The husband father inlaw or even the father of a woman girl cannot throw her out from the house where she is living or has lived S19

Right to claim Maintenance As explained above the woman has a right to claim maintenance under this Act S20

Right to custody No one can take away the children from the mother not even the father If such a threat is there she can go to court and get an order to protect her right If her child is taken away forcibly from her custody she can approach the police or the court to get her child back S21

Right to claim compensation If the woman has suffered any harm or injury due to domestic violence she has a right to claim compensation for it under the Act S22

Note The woman has the right to take with her all her belongings ie clothes jewelry valuables money etc This is her stridhan She can take help to retrieve her belongings from a local NGO the police or the court The remedy is also available under S19 8 of the DVAct

If her husband or in laws do not return her belongings stridhan at the time of leaving the home she can also file a police complaint under section 406 of the IPC Against whom can the woman get the orders under this Act

A woman can get orders under this Act against her husband father inlaw brother in law etc She can also get orders against the female relatives of the husband such as mother inlaw or sister inlaw if they have contributed to causing domestic violence to the woman Every woman can claim relief under this Act irrespective of their religion including Muslims as the Act stipulates that any woman can claim

reliefs under this Act

The Act defines the Aggrieved Person in very broad terms as Any woman child facing domestic violence from an adult male with whom she shares a domestic relationship and is living has lived within a shared household S2a

Who should a woman approach to file a complaint

The woman can approach the Protection Officer a private lawyer a legal aid lawyer or a local NGO to help her in approaching the court to protect her rights She can 23

also go to a police station and the police will refer her to the Protection Officer in the area If she is injured she can go to a hospital and the hospital will help her to reach the police or the protection officer of the area

What advice should be given to the woman before she files her complaint

The woman must be advised that when she is leaving the house where she has lived with her husband or in laws she must take with her her belongings and valuables her children her documents such as her educational certificates copy of other documents such as birth or marriage certificate caste certificate husbands bank pass book or bank statement contract of employment etc

Caution The woman must collect evidence before leaving or filing the complaint to support her statements This could include medical reports of injuries earlier complaints to police etc

Also documents such as house papers to prove ownership of house ration card 712 extract as proof of land ownership or income from the land any other proof to show husbands income etc are important to prove the husbands income

Who is a Protection Officer under the Act

A Protection Officer PO is a government officer designated or appointed by the Ministry of Women and Child Development who is entrusted with the duty of providing all kinds of support to the woman including helping her to approach the court taking her to a shelter home if she needs shelter taking her to a hospital if she needs medical help or helping her to access other government schemes to help women

The total number of Protection Officers in Maharashtra are around 670 This number includes the officers who are designated as Protection Officers as well as those specially appointed as Protection Officers

How to approach a court for an order

Each time a woman is beaten and she approaches the Protection Officer a Domestic Incident Report DIRForm I is prepared This provides a proof of domestic violence

If the woman has gone directly to a private lawyer then the lawyer will prepare a detailed application and also an application for interim reliefs In such case there is no need to approach a protection officer and obtain a DIR 24

If she has any evidence then that can also be mentioned for instance if earlier a police complaint was filed by her or if she has gone to the hospital when she was injured due to the beating etc All proofs of husband's income can be attached if the woman is seeking an order of maintenance under the DV Act

In the end it must be clearly stated as to what type of remedies she is seeking eg protection maintenance residence custody of child etc

How long will it take to obtain an Order

This Act is supposed to provide quick reliefs The court dates are given at short

intervals It is possible to get an interim order within a month of filing the proceedings Though the final orders are supposed to be given within 60 days due to technical difficulties and workload of the court this does not usually happen But the final order can be expected within one year of filing and an interim order can be expected at least within two months

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### III Violence Against Women Children

#### 7 Dowry Harassment and Cruelty Against Wives

What is the meaning of Dowry

Section 2 of the Dowry Prohibition Act DPA 1961 defines dowry as any cash

jewelry valuables or property which the husband or his family members demand



from the bride's parents at the time of marriage as a consideration of marriage. This term also includes demands made subsequent to the marriage from the bride or her parents.

Is demanding dowry an offence?

Yes, it is a serious offence under the Dowry Prohibition Act, 1961. It is punishable with a minimum of five years imprisonment and a fine of Rs15,000 or equal to the value of the dowry demanded or paid.

Who can register a complaint under this Act?

The woman herself, her parents, the police, Dowry Prohibition Officer appointed under S8-B of the Act, or even a non-governmental organization on behalf of the woman can register a complaint.

Which are the provisions related to dowry-related violence in the Indian Penal Code (IPC)?

After the anti-dowry in early 1980, several women's organisations demanded stringent punishment for husbands and their family members if they caused any dowry-related violence to a newly married bride. If a woman died in her matrimonial home within seven years under unnatural or suspicious circumstances, a special legal provision was incorporated which is termed as S304B Dowry Death. If a 26

woman committed suicide due to harassment for dowry within seven years of her marriage, S306 of IPC Abetment to Suicide can be invoked. If the woman was harassed for dowry or was treated with cruelty, S498A can be invoked. In this case, there is no limitation of seven years after marriage. If her stridhan is not returned to her, S406 can be invoked along with S498A. The following table indicates the punishment that can be awarded under these sections.

IPC

Sections Description of

Offence Maximum

Punishment Minimum

Punishment

S304 B Dowry Death Life

Imprisonment 7 years

S306 Abetment to

Suicide 10 Years

S498 A Cruelty to Wives 3 Years

S406 Criminal

Misappropriation

of Trust 3 Years

Despite widespread campaigns against dowry and the stringent

laws why has the menace grown

In our society the social status awarded to the girls family is much lower than that awarded to the grooms family Since the need to get the daughters married is overwhelming the brides family is not able to refuse the demand for dowry at the time of marriage They fear that if they dont give dowry their daughters wont get married So the parents of the bride prefer to meet the demands of the grooms family in order to get their daughters married as having an unmarried daughter at home is considered a social stigma

What is the remedy

The problem is not with the gifts which are given to the bride from her parents or

from her husband's family. The problem is that the woman does not have control 27

over these items and they are considered as the property of the husband and his family. This attitude must be changed. Girls must be advised that the gifts given at the time of marriage are her exclusive property and if she has been forced to leave the matrimonial home due to domestic violence, she has a right to take these with her.

What precautionary measures must be taken at the time of marriage?

The girl's parents must take the following precautions at the time of their daughter's marriage to secure her future.

The girl and her family members must refuse the marriage proposal from a groom or his family members if they make demands for dowry at the time of marriage negotiations.

The parents are free to give gifts to their daughter at the time of marriage out of love and affection for her. The gifts given by relatives, friends, and even by the husband or his relatives belong exclusively to the bride and constitute her stridhan. A list of these gifts received at the time of marriage must be made and the bride, the groom, and their parents must sign this document and it must be kept safely with the girl's family or a trusted friend so that there is no dispute regarding the gifts received as stridhan later.

If after the marriage is arranged, valuables or cash is demanded as dowry or gifts, the marriage preparations must be stopped and a complaint under the Dowry Prohibition Act must be immediately registered. See the later section regarding property rights of women for a further discussion on this issue.

Rather than cash gifts relatives must be encouraged to give cheques in favour of the girl at the time of marriage and this should be deposited either in her own separate account or in a joint account in the name of the bride and the groom. All valuables and jewelry which belongs to the bride must be kept in a locker which is in her exclusive name or which is in the joint names of herself and the groom which she has the right to operate. 28

If after marriage the girl is harassed for more dowry she must communicate this to her parents through letters or emails. The parents of the girl may meet the groom and his family members to sort out the differences and if they cannot be resolved the girl must be given a choice to return to her parents home.

In the event that the bride is thrown out of her matrimonial home she must take with her all her jewelry and valuables.

In case this is not possible at the time of leaving or soon thereafter she must lodge a complaint to the police mentioning the fact of harassment for dowry and also give the police a list of valuables that are left behind in the husband's home. The police can register a case under the Dowry Prohibition Act as well as under S498A and S406 of IPC and help the girl to immediately retrieve her belongings and valuables from the husband's residence. These IPC provisions are discussed later in this section.

If at this stage no compromise is possible the girl can also initiate proceedings under the Domestic Violence Act for her civil rights such as maintenance, residence, return of belongings etc.

What is Stridhan

The gifts given to the bride out of love and affection by her parents or relatives

constitute her stridhan The gifts given to the bride by her husband and/or his relatives also constitute her stridhan The term Stridhan means a woman's property and she has exclusive control over it Even if it is kept with her husband or his parents when a woman demands it it must be given back to her How can a woman claim her Stridhan if it is in the possession of her husband or in laws

In many families the stridhan property is kept in the custody of the mother-in-law or the husband If they refuse to give it back to her when she demands or when she is leaving the matrimonial home it is an offence under S406 of IPC Criminal Misappropriation of Trust If the woman lodges a complaint with the police the

police will immediately call the husband his family members to the police station and request them to return the jewelry and valuables If they refuse the police will file a case under S406 of IPC and arrest them and also get an order to search and seize the valuables from the premises or bank lockers etc

Criminal complaint against husband and/or in laws for causing cruelty

What is cruelty to a wife under the Criminal Law

Section 498A of IPC defines cruelty as follows If a husband or his relatives harass a woman for dowry or cause any physical or mental harassment which causes harm to her life limb or sanity it amounts to cruelty

Is it a serious offence

Yes It is a serious offence Though the maximum punishment is only three years the offence is cognizable non-bailable and non-compoundable The police have the power of immediate arrest even without a court warrant This causes a great deal of

humiliation to the husband and his family members Once filed the complaint cannot be withdrawn easily It can only be quashed by the High Court Once a complaint under this section is filed it is difficult to reconcile the marriage

Can this section be used to address general physical and mental cruelty inflicted on a married woman

Yes This section can be used for dowry related harassment as well as for any physical or emotional harassment caused to the wife as it can be seen from the definition of this provision

Section 498 A Husband or relatives of husband of a woman subject her to cruelty Whoever being husband or the relative of the husband of a woman 30

subjects such women to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine

Explanation for the purpose of this section Cruelty means

a any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life limb or health whether mental or physical of the woman or

b harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or in on account of failure by her or any person related to her to meet such a demand

What are the problems faced by women to register cases under this Section

Usually the police refuse to register cases under this section unless specific

allegations of dowry demands are included in the complaint But now slowly this misconception is changing But even now the police do not register the case straight away The couple is first sent for counseling and the police only registers the complaint if the dispute is not resolved

How can cruelty be proved

Cruelty can be proved in various ways such as complaints to the police medical records letters written to her parents by the girl phone calls phone messages statements of friends or neighbours etc

Is forced sex in marriage marital rape within the purview of this section 31

Yes forced sex amounts to sexual violence and is included within the term cruelty So forced sex will come within the purview of this section and if there are any such complaints of this nature the police must immediately file the complaint and arrest the husband Though S498A does not specifically define sexual violence as cruelty but uses broader general term as any physical or mental harassment which causes harm to her life limb or sanity rape sexual violence would come within its scope

## 8 Rape Sexual Offences Under I PC

As Amended by the Criminal Law Amendment Act 2013

Mathura the Catalyst of the anti rape campaign in India

Mathura a 16 yearold poor orphan illiterate tribal girl was raped by two policemen within a police compound in Desai Ganj a small village in Chandrapur

District of Maharashtra She was brought to the police station in the evening of 26 March 1972 on a complaint filed by her own brother that she had eloped with her lover At 1000 pm at night while her relatives were waiting outside after the interrogation two policemen on duty Tukaram and Ganpat took her to a toilet within the compound of the police station and raped her When the relatives called out to her she came out in a distorted state with a torn saree and informed them that the policemen had raped her Hearing the commotion people gathered and due to their pressure a case of rape was registered The medical report revealed that there were no marks of injury on her body and that the vagina admitted two fingers easily which implied that she was habituated to sexual intercourse Her age was stated as being between 14 and 16 years

The sessions judge Chandrapur on 1 June 1974 acquitted the policemen on the ground that since there were no marks of injury Mathura must have consented He labeled her a shocking liar whose evidence was filled with falsehood The judge concluded that though sexual intercourse with the policemen was proved there was a world of difference between sexual intercourse and rape

In appeal based on the same evidence the Nagpur Bench of the Bombay High Court reversed the judgment and convicted the accused to rigorous imprisonment for five 32

years and held that passive or helpless surrender induced by threats or fear cannot be equated with free consent However in appeal the Supreme Court in September 1978 reversed this judgment upheld the judgment of the Sessions Court and acquitted the accused on the ground that absence of injuries implies consent The judgment shocked some law teachers who wrote an open letter to the Chief Justice of India condemning it as they felt it would snuff out all hopes of justice for



millions of Mathura s in the country in 1979 This open letter gave birth to the anti rape campaign in India and resulted in amendments to the rape laws in 1983

An important aspect of the amendment was that custodial rape rape in police custody prisons etc was made into an aggravated form of sexual crime warranting severe punishment of a minimum of 10 years The Supreme Court ruling had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent beyond all reasonable doubt as was required under the criminal law The major demand of the campaign was that the onus of proving consent should shift from the prosecution to be accused Accordingly the burden of proof regarding consent was shifted for cases of custodial rape Since then there have also been several changes in criminal procedures police manuals etc which have given strict guidelines that women cannot be arrested at night and that they cannot be retained in police custody at night But the stringent provisions did not have the desired impact of reducing the incidents of rape in the country as the following graph reveals

#### Reported Cases of Rapes in India 1990 2016

1990 1994 1995 1996 1997 1998 2000 2005 2007 2010 2012 2013 2014 2015 2016

9518 12351 13754 14846 15330 15031 16496 18359 20737 22172 24923 33707 36735 34651 38947

## Reported Cases of Rape

In 2013 after the Nirbhaya incident and the widespread protests that followed the criminal law dealing with sexual offences was amended and the definition of rape was widened to include non peno vaginal penetration Also many new offences were included such as stalking Voyeurism etc

Definitions of sexual offence under the Indian Penal Code IPC

### Outraging modesty

S 354 states that if a man assaults or uses criminal force on any woman with the intention of outraging her modesty or knowing that it is likely to outrage her modesty then he shall be punished under this section

### Sexual Harassment

S 354A states that if a man makes physical contact and advances demands or requests for sexual favours shows pornography against the will of a woman or makes sexually coloured remarks then he shall be punished under this section

050001000015000200002500030000350004000045000

1990 1994 1995 1996 1997 1998 2000 2005 2007 2010 2012 2013 2014 2015 201634

### Disrobing

S 354B states that if a man assaults or uses criminal force against a woman with the intention of disrobing her or compels her to be naked he shall be punished under this

section

### Voyeurism

S 354C states that if a man watches or captures the image of a woman in a private act or disseminates such an image he shall be punished under this section A private act includes an act where the victim does not expect to be observed by the man or any other person at his behest

If the victim consents to the capture of the image but not to dissemination then such dissemination shall be punishable

### Stalking

S 354D states that if a man follows or contacts or attempts a woman despite a clear indication of disinterest by her or monitors the use of internet email or other electronic communication by her then he shall be punished under this section

### Rape

S 375 includes

Penetration of the penis to any extent into the vagina mouth urethra or anus of a woman or if he makes her to do so with him or any other person or

Insertion to any extent any object or a part of the body other than the penis into the vagina the urethra or anus of a woman or if he makes her to do so with him or any other person or

Manipulation of any part of the body of a woman so as to cause penetration into the vagina urethra anus or any body part or if he makes her do so with him or any other person or

If he applies his mouth to her vagina anus urethra or makes her to do so with him or any other person 35

The above acts amount to rape if they are committed without the consent and against the will of the woman

Even if the consent of the woman is given to the above acts it will amount to rape under the following circumstances

When consent has been obtained by putting her or any person in whom she is interested in fear of death or hurt

When the man knows that he is not her husband and she gives consent because she believes him to be her husband

When she is unable to understand the nature and consequence of the act to which consent is given due to intoxication administration of any stupefying or wholesome substance or due to certain mental unsoundness wherein she is unable to understand the act to which she gives her consent

S 376 2 states that under the following circumstances the offence of rape shall also be committed and the punishment prescribed for the same is more stringent

By Police Officers

By Public Servants

By Armed Forces

By Management or staff of a jail remand home women or childrens institute

By Management or staff of hospitals

By a relative guardian or teacher or a person in a position  
of trust and authority

During communal or sectarian violence

Rapes a woman knowing her to be pregnant

Rapes a woman below 16 years

Rapes a woman who is incapable of giving consent

Rapes a woman over whom he is in a position of control or  
dominance 36

Causes grievous bodily harm maims disfigures endangers  
the life of the woman  
Rapes her repeatedly

Injury which causes the death of the woman or causes the woman to be in a  
persistent vegetative state

S376A states that during the commission of the offence of rape if a man inflicts an  
injury which causes the death of the woman or causes the woman to be in a  
persistent vegetative state then such an act shall be punishable with a stringent  
punishment

Sexual Intercourse by husband upon his wife during separation

S 376B states that if a husband living separately with or without a decree of  
separation from his wife has sexual intercourse with his wife without her consent  
shall be punished with a stringent punishment

Sexual Intercourse by a person in authority

S 376C states that if a man who is in a position of authority or fiduciary relationship with a woman or public servant or superintendent manager of a jail remand home or other place of custody or management staff of a hospital abuses his position or seduces a woman under his charge or in his premises to have sexual intercourse with him then he shall be punished for the offence of rape with a stringent punishment

Gang Rape

S 376D states that whenever a woman is raped by two or more persons constituting a group or acting in furtherance of a common intention then each person is said to have committed the offence of rape and shall be liable to be punished with a stringent punishment

Repeat Offenders 37

S 376E states that if a man has been previously convicted for an offence under Ss 376 376A or 376D then such person shall be punished with a stringent punishment

Word gesture or act intended to insult the modesty of a woman

S 509 states that if a man utters any word sound gesture exhibits any object with the intention that it is heard or seen or intrudes the privacy of a woman then he shall be punished under this section

Abetment and Attempt to commit the above offences is also punishable and is covered above

Confidentiality to be maintained by Media

It shall not be lawful for any person to print or publish any matter in relation to proceedings under Ss 376 376A 376B 376C 376D 376E except with the previous permission of the Court S 327 3 CrPC

Addressing Biases Clearing Misconceptions and

Understanding Precautionary Measures

It is not your fault In our society if a woman or child is raped she is treated as an accused and made to suffer She is made to feel that it is her own fault that she got raped Her character conduct the way she dresses her past sexual history etc become suspect and she is blamed for the crime that is committed on her Due to the stigma attached to rape the family is afraid of reporting it to the police There is also the fear that reporting the crime will diminish the chances of the girl getting married and that the entire family will be humiliated and ostracized This is all the more true if the girl is poor or from a backward caste Hence as change agents it is important for us to spread the message that it is not the fault of the victim that she is raped

If we are aware of our rights understand the procedures and take precautions the trauma faced by a victim survivor during investigation and trial of a rape case will be reduced

Preserve all evidence As far as possible the victim should not have a bath or wash herself or wash the clothes that she was wearing at the time of the

offence It is very difficult to do this because the natural instinct after rape is 38

to clean ones self and also wash the clothes to wipe out the feeling of violation that the offence of rape brings about The place where the crime was committed also must not be disturbed This is important to collect the evidence to prove rape

Do not delay filing the FIR Due to the stigma attached to the offence the family takes time to consider whether to report the offence to the police or to hush up the matter There are several levels of consultations take place within the family and even at the community level The social status of the rapists or his connection with authorities also matter If the rapist is wealthy or has high social standing and the victim is from a poor family there will be a great reluctance to report the crime Similarly if he is a relative or a neighbor there will be reluctance Due to this sometimes cases are filed even after many days

Caution Delay in filing the complaint will result in loss of crucial evidence and due to this it may be difficult to prove the case in court later

Go to a hospital directly and start treatment Instead of going to the police station the victim can go directly to the hospital and get immediate medical treatment This will help not only to preserve crucial evidence against the accused but avert any infectious or dangerous disease and avert pregnancy Parents relatives friends social workers etc may accompany the victim for



the medical examination The FIR can be lodged from the hospital itself

Anyone can get raped It can happen anywhere There is a general belief that rape is committed only by strangers in lonely places and dark corners But the statistics for Maharashtra for 2012 reveal that 94 of the reported cases are by known persons Fathers step fathers uncles grandfathers brothers brother inlaw other relatives neighbors teachers doctors police boyfriends his friends etc are known to commit rape Even husbands commit rape but this does not get recorded as rape but it can be filed as an offence under S498 A IPC cruelty to wives discussed later in the next session

All rapes are not violent specially those committed by known persons Many times the fact that a young girl is raped is detected only when she is about 5 6 months pregnant When she approaches the hospital to find out why she has missed her menstrual period the fact that the child is raped is detected So be alert 39

Penetration by Penis into vagina is not important to prove rape After the recent amendment to rape laws it is not important to prove penetration of the penis into the vagina All other sexual activity such as inserting fingers or objects such as rods sticks etc into the vagina anus or inserting penis into anus or mouth oral sex also constitutes rape The legal definitions are discussed in detail later

The Victim need not go to the Police Station to lodge FIR a relative friend or social worker can lodge it The victim may be traumatized after the rape or she may be injured or she may be very scared to go to the police station and narrate the incident to the police

Remember there is no need for a victim to go to a police station personally to lodge the FIR It can be lodged by any person on her behalf This is the law and you must insist that the police will follow this and not force the victim to come to the police station to lodge the FIR if she is reluctant to do so

Her statement can be recorded later at her home or any other place where she is comfortable

Creating Awareness about Sexual Offences The new amendment to rape laws have listed out many types of sexual offences and mentioned different body parts We must also familiarize ourselves with pronouncing the names sexual organs such as ie breasts vagina buttocks thighs anus penis etc

We usually feel embarrassed to utter these words and there is a cultural barrier against naming sexual organs But under the new law it is very important to describe the offence accurately by naming the concerned body part while recording an FIR We cannot use general terms such as izzat loot or galat kaam kiya

We should also teach our children to be aware of their body parts and how to protect themselves against sexual abuse and give confidence to them to report

it to their care takers teachers parents etc when they are sexually abused

Only then will the stigma attached to rape will be reduced

Respect the sexual choices made by young women Many times when a young girl has an affair with a boy and the parents do not approve of it the girl runs away with the boy Although the parents are aware that the girl has gone with her own choice they file a complaint against the boy for kidnapping and rape and get him arrested When the girl is brought back she is 40

pressurized into accepting the wishes of the parents and agrees to marry the boy of her choice Som etimes the girl refuses to accept the choice of their parents and insists on marrying the boy of her own choice and prefers to stay at a shelter home until she becomes major and is able to marry the boy Such cases tend to get categorized as false cases through no fault of the girl and due to this all girls become suspect when they wish to file a case of rape So avoid filing such cases This defeats the purpose for which we are all fighting to protect the dignity of women

A scheme for financial assistance and other support to Rape Victims

Recently the National Legal Services Authority has drafted a comprehensive scheme for compensation to rape survivors All state governments are bound to adopt the scheme drafted by Central Government

Support to Victims during Investigation and Trial After recent amendments a government official can be designated as a support person to help the victim during the procedures of investigation and trial This person

can be a government officer from the department of Women and Child Development or an NGO member working with the government The victim can also have her own lawyer If she has no financial resources she can ask the state to provide her a lawyer from the legal aid panel

## 9 Protection of Children from Sexual Offences Act

2012

POCSO

In 2012 a special law was passed to provide protection to children who are victims of sexual abuse This acts additional safeguard to the child during the criminal trial and provides for protection and rehabilitation of the victim This Act protects both male and female children who are under 18 years of age Similarly any adult male or a female can be the accused person under this Act The Act provides a wide definition of sexual abuse and non vaginal penetration and insertion of objects into the mouth vagina anus or urethra of the child amounts to sexual abuse under the Act This Act does not use the word rape to describe sexual violence

### Penetrative Sexual Assault

S 3 Insertion penetration manipulation with the penis any body part or any object into the vagina mouth urethra or anus of a child

### Aggravated Penetrative Sexual Assault 41

S 5 person in authority and/or if additional harm and injury is committed

## Sexual Assault

S 7 touching a child with sexual intent non penetrative Touching vagina penis  
anus breast or any physical contact with the child with sexual intention

## Aggravated Sexual Assault

S 9 person in authority and/or if additional harm and injury is committed

## Sexual Harassment

S 11 Word sound gesture exhibiting any body part showing pornography with  
sexual intent Making a child exhibit any body part stalking the child threatening  
the use of pornographic media

## Pornography

S 13 use of a child for pornographic purposes

S 15 storing pornographic media of a child for commercial use

## Abetment

S16 instigating a person to commit an offence getting involved in a conspiracy or  
aiding the commission of an offence

## Attempt

S18 attempt to commit any of the above

## Mandatory Reporting

S19 1 any person who has knowledge of sexual offence committed or likely to be committed on a child

S20 management and staff of media hotels lodges hospitals clubs studios and photographic facilities

S21 Failure to report or record is punishable

S21 3 However a child who fails to report not punished

False complaint or False information

S 22 1 3 To humiliate extort threaten defame or victimize

S 22 2 However a child who makes a false complaint or gives false information is not be punished

S19 7 Any person giving information in good faith shall not suffer any civil or criminal liability

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Confidentiality by Media

S23 1 2 Identity of the child includes the familys identity school relatives neighbourhood and other information

Report or comment that may lower the childs reputation and infringe herhis privacy

Reporting of the Offence

First Information Report FIR

Information can be given by any person S 154 CrPC

Shall be recorded in writing S 154 CrPC

Shall be read over to the informant S 154 CrPC

Shall be given a copy free of cost S 154 CrPC

If reported by the victim it shall be recorded by a woman police officer or any woman officer S 154 CrPC

In the presence of an interpreter or translator when required S 154 CrPC

Failure to record an FIR is a cognizable offence S 166 A c IPC Victim

Statement

Shall be recorded by a woman police officer or any woman officer

Shall be recorded at a place where the victim is comfortable

It shall be recorded in the presence of a person whom the victim trusts

Different language an interpreter or translator may be called

List of interpreters and translators are available with DCPU

It may be video recorded

Additional Points under POCSO Act

The police officer shall not be below the rank of sub inspector S 24

The police officer shall not be in uniform S 24 2

The child shall not come in contact with the accused S 24 3

The child shall not be detained in the police station at night S 24 4

The police shall share his name designation address telephone number as well as the details of his supervising officer with the informant Rule 4

1

The statement of the child may also be recorded under S 164 CrPC S 25

It shall be recorded in simple language

## Medical Examination and Treatment

Medical Examination shall be conducted within 24 hours of recording the offence preferably by a woman doctor S 164 A CrPC 43

Non treatment of a victim by a Hospital is an offence punishable with imprisonment for a term which may extend to one year or fine or both under S 166B Cr PC

If the child victim is female then the medical examination shall be conducted by a woman doctor S 27 2

A parent or any person who the child trusts shall be present at the time of medical examination S 27 3

All medical practitioners public or private shall provide medical care and treatment without demanding any legal documentation from the victim Rule 5 3

## Child Welfare Committee and POCSO Act

The Police shall report to the CWC every First Information Report registered under the Act within 24 hours of recording the same S19 6

The Police shall produce a child who is a victim under the Act before the CWC within 24 hours of recording an FIR under the following circumstances Rule 4 3

if an offence is committed or likely to be committed by a person living in the same or shared household with the child or

if the child is living in a child care institution and is without parental support or



if the child is found to be without any home and parental support

### Role of Support Person

Rule 4 7 The CWC on receiving a report under sub section 6 of section 19 of the Act or on the basis of its assessment under sub rule 5 and with the consent of the child and his parent or guardian or other person in whom the child has trust and confidence may provide a support person to render assistance to the child through the process of investigation and trial

Such support person may be a person or organisation working in the field of child rights or child protection or an official of a children's home or shelter home having custody of the child or a person employed by the DCPU

4 12 The information to be provided by the SJPU local police or support person to the child and his parents or guardian or other person in whom the child has trust and confidence includes but is not limited to the following

i the availability of public and private emergency and crisis services

ii the procedural steps involved in a criminal prosecution

iii the availability of victims' compensation benefits 44

iv the status of the investigation of the crime to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation

v the arrest of a suspected offender

vi the filing of charges against a suspected offender

- vii the schedule of court proceedings that the child is either required to attend or is entitled to attend
- viii the bail release or detention status of an offender or suspected offender
- ix the rendering of a verdict after trial and
- x the sentence imposed on an offender

## Special Courts

Cases of offences committed under this Act shall be tried in a Special Court which shall have all the powers of a Court of Sessions S28 1 S 33 9

Every Special Court shall have a Special Public Prosecutor with a minimum experience of 7 years as an advocate S32 1 2

## Examination of the Victim in Special Court

Questions by the Judge S33 2

Aggressive Questioning S33 6

Assistance of Translator or Interpreter S38 1

Children with Special Needs S 38 2

No exposure to the Accused S 36 1 2

Frequent Breaks S33 3

Trial In Camera S37

Presence of Persons who the child trusts S33 4

Child Victim should not be called repeatedly S33 5

#### IV WOMENS HEALTH AND SAFETY

##### 10 MEDICAL TERMINATION OF

##### PREGNANCY ACT

###### Background of the Act

The MTP Act passed by Parliament in 1971 to permit legalized abortions Prior to 1971 abortion was criminalized under Section 312 of the Indian Penal Code 1860 except in cases where the procedure was necessary to save the womans life The Shah Committee appointed by the Government of India carried out a comprehensive review of socio cultural legal and medical aspects of abortion and in 1966 recommended legalizing abortion to protect womens health and lives on both compassionate and medical grounds It was also viewed as a population control measure The term Medical Termination of Pregnancy MTP was used to counter opposition from socio religious groups who were averse to abortion

###### How are womens reproductive rights protected

Womens reproductive rights are protected under the Constitution The right to live under Article 21 include the right to live in dignity which is inclusive of womens reproductive rights ie the right to become pregnant to bear children to decide the number of children the right to have an abortion to use or not use contraceptives to be or not to be sterilized to be or not to be a parent etc A mothers right to preserve her own health is superior to the right of an unborn child

Do women in India have a right to a legal abortion

Yes women in India do have the right to legal abortion. In many countries women had to struggle very hard to get this right. But in India a law was passed in 1971 the Medical Termination of Pregnancy (MTP) Act to secure for women the right to have legal and safe abortions in public hospitals. This was done to curb the practice of illegal abortions which were carried on rampantly by non medical professionals at a great risk to women's health. 46

What is an abortion

Abortion is a medical procedure of removing the foetus from the uterus of a woman who is pregnant if she wishes not to have the child. This procedure must be carried out only by registered medical practitioners who are authorized to do it under the MTP Act, and if not done in a proper condition it poses a risk to the woman's life.

What are the conditions under which a pregnancy can be terminated

Pregnancy can be terminated in the first trimester within 12 weeks if a doctor is of the opinion that it is safe for the woman to undergo an abortion. Beyond 12 weeks and up to 20 weeks the opinion of two doctors is required to perform the abortion. Beyond that a pregnancy cannot be terminated as it is very risky and may cause harm or even death to the pregnant mother. Hence it can be performed only in an extreme situation when it is necessary to abort the foetus to save the life of the mother. S3

2 a and b

While deciding whether or not to perform the abortion the doctors must ascertain the risk of harm to the health of the pregnant mother. The doctor's permission to

perform the abortion must be recorded in writing

Whose consent is required for terminating pregnancy

If the woman is a major i.e. above 18 years she can consent to the abortion herself

If it is a child below 18 years or the person is incapable of giving valid consent if the person is of unsound mind the consent of the guardian is required. The consent of the husband is not required to undergo an abortion.

Can the authorities disclose information about the woman who undergoes abortion under the Act? 47

No, the doctors or the hospital authority cannot disclose to the public any information about the woman who undergoes termination of her pregnancy. This information has to be kept confidential. S7 1 c

## 11 Pre Conception and Pre Natal Diagnostic

Techniques Regulation Act PCPNDT 1994

Why is the female foetus aborted in our society?

Indian society carries within it a tradition of male preference. The great urge to have boys coupled with a high cost of living has led to a rise in sex selective abortions.

Unfortunately provisions of the MTP Act are frequently abused in that many families invoke the Act to help them in carrying out abortions of female fetuses after conducting tests to determine the sex of the child using modern technology such as sonography. The age old preference to have sons received a new boost due to this and gradually resulted in a skewed sex ratio.

This Act was amended in 2002 and even pre conception techniques used advertised to select the sex of the foetus even before conception was banned

What has the government done to curb this trend

In order to curb this trend in 1994 Government passed a new law known as the Pre Conception and Pre Natal Diagnostic Techniques Regulation and Prevention of Misuse Act 1994 PCPNDT Act for short Since these tests are important to detect foetal abnormalities and genetic defects the tests could not be banned they could only be regulated Now the tests can be done only under very strict conditions and they cannot be used for the purpose of identifying and disclosing the sex of the unborn foetus 48

In order to curb the practice it has now become necessary to register all sonography machines and also necessary to display very clearly that the hospital or the clinic does not disclose the sex of the unborn foetus

What is the punishment for misusing the provisions of this Act

Performing such tests is punishable by upto 3 years of imprisonment and a fine of upto Rs10000 for the first offence and upto five years of imprisonment and a fine of upto Rs50000 for the subsequent offence Any doctor doing such a test is also liable to have his license for medical practice suspended for two years for the first offence and permanently after the second offence S23

Monitoring of Genetic Counseling Centres

The PCPNDT Act provides for regulation of genetic counseling centers genetic laboratories and genetic clinics and also regulates pre natal diagnostic procedures

The medical professional running the genetic center has to be registered under the PCPNDT Act

1 It allows the use of prenatal diagnostic techniques for the purpose of specific genetic abnormalities or disorders only and to put down a prohibition on the use of these techniques for determining the sex of the fetus by any such person under the Act

2 The Act also prohibits any kind of advertisements on pre-conception and pre-natal sex determination of fetus or sex selection of fetus is prohibited. The Act provides for three years imprisonment and fine up to ten thousand rupees as punishment in contravention of the Act

3 and representatives of women's welfare organization to exercise the power and performs the functions conferred on the board under the Act

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What is regulation applied on these centers

The regulations applied on these centers are as follows

1 No Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act shall conduct or associate with or help in conducting activities relating to pre-natal diagnostic techniques

2 No Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications

3 No medical geneticist, gynecologist, pediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person any pre-natal

diagnostic techniques at a place other than a place registered under this Act

Is there any provision where this genetic counseling centers need to be registered

Yes all the genetic centers need to be registered under section No person shall open any Genetic Counseling Centre Genetic Laboratory or Genetic Clinic including clinic laboratory or center having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of fetus and sex selection or render services to any of them after the commencement of the Pre natal Diagnostic Techniques Regulation and Prevention of Misuse Amendment Act 2002 unless such Centre Laboratory or Clinic is duly registered under the Act

Is any person given authority to select the sex of the fetus

No person can select the sex of the fetus 3A Prohibition of sex selection No person including a specialist or a team of specialists in the field of infertility shall conduct or cause to be conducted or aid in conducting by himself or by any other 50

person sex selection on a woman or a man or on both or on any tissue embryo conceptus fluid or gametes derived from either or both of them

What are the authorities which control the function of this genetic counseling centers

The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the powers and perform the functions conferred on the Board under this Act



The Board shall have the following functions namely

- i to advise the Central Government on policy matters relating to use of pre natal diagnostic techniques sex selection techniques and against their misuse
- ii to review and monitor implementation of the Act and rules made thereunder and recommend to the Central Government changes in the said Act and rules
- iii to create public awareness against the practice of pre conception sex selection and pre natal determination of sex of foetus leading to female foeticide
- iv to lay down code of conduct to be observed by persons working at Genetic Counselling Centres Genetic Laboratories and Genetic Clinics
- v to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation

Is there any search and seize provision under the Act

Yes there is provision under section 30

1 If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counseling Centre Genetic Laboratory Genetic Clinic or any other place such Authority or any officer authorized in this behalf may subject to such rules as may be 51

prescribed enter and search at all reasonable times with such assistance if any as such Authority or officer considers necessary such Genetic

Counseling Centre Genetic Laboratory Genetic Clinic or any other place  
and examine any record register document book pamphlet advertisement  
or any other material object found therein and seize and seal the same if such  
Authority or officer has reason to believe that it may furnish evidence of the  
commission of an offence punishable under this Act

2 The provisions of the Code of Criminal Procedure 1973 2 of 1974 relating  
to searches and seizures shall so far as may be apply to every search or  
seizure made under this Act

The Constitution of India mandates that women must be treated as equals and prohibits any discrimination against women in all areas including education vocational training skill development and employment In order to ensure that women get a fair and adequate opportunity of employment the constitution also mandates reservation for women in educational institutions and in employment in the public sector

Our Constitution also protects the rights of women workers by ensuring that their health and safety is duly protected in the course of employment particularly those of pregnant women and breast feeding mothers The Constitution also safeguards the dignity of women workers and ensures that they are provided a safe working environment free of sexual harassment

In order to fulfill the Constitutional mandate all labour laws contain special provisions regarding the health and safety of women workers by regulating their working hours and by reducing the burden women have to carry In order to ensure equality the law also mandates that both men and women will be paid the same wages for the same or similar type of work Recently a special law has been enacted to protect women against sexual harassment at the workplace The rights of women under different labour laws are discussed in this section

#### a Special Protection to Women under the Labour Laws

What are the special laws which are enacted to provide adequate protection to women workers

The following laws are specially enacted to provide further protection to women workers 53

The Equal Remuneration Act

The Maternity Benefits Act and

The Protection of women from Sexual Harassment Act

Also included is the Minimum Wages Act

They are applicable only to women and have been enacted to provide special protection and safety for the special needs of women

Does enacting special law for women amount to discrimination

No enacting special laws for women does not amount to discrimination

The power to enact special laws for women is given to the legislature under Article 15 3 of the Constitution which stipulates that providing for additional safeguards to women is not discriminatory but will enhance the principle of equality as it will help women to overcome the wrongs they have suffered for centuries

12 Equal Remuneration Act 1976

How does the Equal Remuneration Act safeguard women's Rights

Under the provisions of this Act every employer is under a legal obligation to pay the same wages for men and women if they perform the same work or work of a similar nature Even if it is being performed at different places the salary has to be the same An employer cannot discriminate against women while recruiting unless employment of women is prohibited or restricted by law Thus in matters of recruitment promotions training and transfer the employer is prohibited from discriminating against women

Who is responsible for ensuring that the provisions of the Act are strictly followed

The responsibility of ensuring that the provisions of the Act are strictly followed and also that there is no discrimination between men and women in the sphere of recruitment promotions and training lies with the employer. It is also the responsibility of the employer to maintain proper registers documents or muster rolls etc which can be scrutinized by the labour officer of the district. Any woman who faces discrimination in these aspects can file a complaint before the labour officer of her area.

### 13 Maternity Benefits Act 1961

#### Background of the Act

A maternity benefit Act stipulates that every woman shall be entitled to and her employer shall be liable for the payment of maternity benefit which is the amount payable to her at the daily wage rate for the period of her actual absence. There is need for maternity benefits so that a woman is to be able to give quality time to her child without having to worry about whether she will lose her job and her source of income.

This Act was enacted on 12th December 1961 to regulate the employment of women in certain establishment for certain period before and after child birth and to provide for maternity benefit and certain other benefits.

#### Why maternity leave is important for any women employee

Women's ties with pregnancy and child rearing and the failure of employers and policymakers to deal consistently with this issue exacerbate the difficulties women

face in the economy Women continue to have the primary responsibility for housework and childcare even when they have extremely demanding jobs Few 55

employers provide help with childcare flexible work hours to accommodate childrens needs or paid maternity leaves Women in blue collar work as well as clerical jobs face rigid time schedules low pay and virtually no recognition or help from employers for their family responsibilities

Which all establishments are included by government

All the establishments are included by government which is under government authority or not The benefit of the act is provided to all establishment be it mining plantation and factory This establishment also includes all the persons are employed for the exhibition of equestrian acrobatics and other performances

How are the leave provided under this act

Maternity benefit Act 1961

Leave 26 weeks not more than 8 weeks

Remuneration Average daily wage shall be paid for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day

Additional

Benefits iMedical Bonus 3500 Rupees if no pre natal confinement and post natal care is provided for by the employer free of charge

ii Nursing Breaks Crche Facilities and

iii Four visits a day to the crche including the interval for rest

Does the act apply to miscarriage and mother adopting a child also

In case of miscarriage a woman shall on production of such proof as may be prescribed be entitled to leave with wages at the rate of maternity benefit for a period of six weeks immediately following the day of her miscarriage

In case of the mother adopting child below age of three months shall be provided with leave of 12 weeks

Can any employer dismiss the employ during her leave for pregnancy or deny working from home

Where a woman absents herself from work in accordance with the provisions of this Act it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day th at the notice will expire during such absence or to vary to her disadvantage any of the conditions of her service

Also with latest amendments a women is allowed to work from home if nature of work is such where women and employee agree on her condition w orking from home

## 14 Sexual Harassment at Work Place Prevention

### Prohibition and Redressal Act 2013

The Sexual Harassment at Workplace Act of 2013 is a special Legislation aiming towards providing a safe and hostile free environment at work to women

An effective implementation of the Act will contribute to the realization of their right to gender equality life and liberty equality in working conditions everywhere

The sense of security at the workplace will improve women's participation in work resulting in their economic empowerment and inclusive growth 57

The Act is gender specific to only women

## EVOLUTION

Bhanwari Devi a social worker from Rajasthan During her work she prevented the marriage of a one year girl in the community The issue was reported to the local complaints committee and no action was taken Bhanwari Devi was however subsequently gangraped by those are men Vishaka Judgement and SC Guidelines In the absence of a specific law in India the Supreme Court in the Vishaka Judgment laid down certain guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment

Who is it Applicable to

It Extends to the whole of India It applies to both the Organised and unorganized sectors in India

What constitutes Sexual harassment

As per the POSH Act sexual harassment includes unwelcome sexually tinted behaviour whether directly or by implication such as i physical contact and advances ii demand or request for sexual favours iii making sexually coloured remarks iv showing pornography or v any other unwelcome physical verbal or non verbal conduct of a sexual nature

Dr Punita K Sodhi v Union of India Ors WP C 3672009 CMS

828 114262009



In 2010 the High Court of Delhi upheld the view that sexual harassment is a subjective experience and for that reason held A complete understanding of the complainant's view requires an analysis of the different perspectives of men and women Conduct that many men consider unobjectionable may offend many women Men tend to view some forms of sexual harassment as harmless social interactions to which only overly sensitive women would object The characteristically male view depicts sexual harassment as 58

comparatively harmless amusement Men who are rarely victims of sexual assault may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive

#### How to Identify WORKPLACE

Work place has to be understood in a wider connotation and not looked in a pedantic approach In

Saurabh Kumar Mallick v Comptroller Auditor General of India The

word Work place has been objectively defined The test laid down

includes 1 Proximity from the place of work 2 Control of the management

over such a place residence where the working woman is residing and 3

Such a residence has to be an extension or contiguous part of the working place

#### What are my Reliefs

The Complainant has the option to file a written complaint to ICCLCC

Either she can demand an enquiry into the matter or choose to conciliate In case of the former the Complaints committee has to conduct a detailed investigation within the workplace and declare their judgement along with the recommendations to the employer

The Complaints Committee has the discretion to suggest the penalties after having heard both the parties

Any aggrieved Party also has a right to appeal against the order of the ICCLCC for further reliefs under this Act

Where should the complaint be filed

An important feature of the POSH Act is that it envisages the setting up of a grievance redressal forum

#### INTERNAL COMPLAINTS COMMITTEE ORGANISED SECTOR 59

The POSH Act requires an employer to set up an internal complaints committee ICC at each office or branch of an organization employing 10 or more employees to hear and redress grievances pertaining to sexual harassment

#### LOCAL COMPLAINTS COMMITTEE UNORGANISED SECTOR

At the district level the Government is required to set up a local complaints committee LCC to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer

#### DOS OF COMPLAINT

## COMMITTEE DONTs OF COMPLAINT

### COMMITTEE

1 Use a cheerful comfortable

airy room for meetings

2Ensure that your body

language communicates

complete attention to the

complainant and the accused

3Treat the complainant with

respect

4Discard pre determined

notions of how a victim or

accused s hould look or

behave Beware of

stereotypes

5All sexual crimes are

committed in private so there

may not be any eyewitnesses

6Consult the complainant for 1Do not get aggressive

2Do not insist on a detailed

description of harassment

This could increase the

complainants trauma

3Do not allow interruptions

during deposition

4 Do not try and determine  
the impact of the harassment  
on the complainant Let the  
complainant determine it  
Help the complainant if  
necessary

5 Do not discuss the  
complaint in the presence of  
others

6 Remember this is a human 60

punitive action

7 If the management does not  
accept the recommended  
action it should give three  
valid reasons

8 Help the complainant regain  
his/her self respect rights issue therefore  
a do not give too much  
weight age to intention focus  
on the impact and b proof  
beyond reasonable doubt is  
not required a strong  
probability is sufficient

## 15 Minimum Wages Act 1948

### Background of The Act

The Indian Constitution has defined a living wage that is the level of income for a worker which will ensure a basic standard of living including good health dignity comfort education and provide for any contingency However to keep in mind an industrys capacity to pay the constitution has defined a fair wage<sup>1</sup> Fair wage is that level of wage that not just maintains a level of employment but seeks to increase it keeping in perspective the industrys capacity to pay

What age group people are allowed to work under labor law

The adolescent means a person who has completed hisher fourteenth year of age but has not completed eighteenth year and adult means a person who has completed eighteen years

What minimum wages have to be paid

1 Any minimum rate of wages fixed or revised by the appropriate Government in respect of scheduled employments under section 3 may consist of 61

- i a basic rate of wages and a special allowance at a rate to be adjusted at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers hereinafter referred to as the cost of living allowance or
- ii a basic rate of wages with or without the cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates where so authorized or

iii An all inclusive rate allowing for the basic rate the cost of living allowance and the cash value of the concessions if any

How does government revise the wages and circulate the same detail

The government would revise the wages and circulate in the following manner  
a appoint as many committees and sub committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be or  
b By notification in the Official Gazette publish its proposals for the information of persons likely to be affected thereby and specify a date not less than two months from the date of the notification on which the proposals will be taken into consideration

What punishments can be imposed upon the employer who has not followed the law under the said act

Any employer who a Pays to any employee less than the minimum rates of wages fixed for that employees class of work or less than the amount due to him under the provisions of this Act or b Contravenes any rule or order made under section 13 shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both

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## VI OTHER ACTS

### 16 The Schedule Caste and Scheduled Tribes

#### Prevention of Atrocities Act

What is the objective of this Act

It was enacted to prevent the commission of offences of atrocities against the members of Scheduled Castes and Tribes and to provide for Special Courts for the

trial of such offences and for the relief and rehabilitation of the victims of such offenses

The Act Protects the Marginalized Communities against discrimination and atrocities For example footwear garlands parading them naked dumping garbage at premises owned by SCST Further it also provides rehabilitation to the victims of such offences and discrimination by providing an equal opportunity in the field of education and employment

Who can file a complaint

Any scheduled caste or scheduled tribe who is identified accordingly under the law He/She should be aggrieved and experienced physical Mental psychological emotional or monetary harm or harm to his property as a result of the commission of any discrimination or atrocities Any relative legal guardian and legal heirs of the victim are also protected under the law

What reliefs can be sought

He/She can be protected from social disabilities such as denial of access to certain public places to use the customary passage without being boycotted personal atrocities like forceful drinking or eating of inedible food sexual exploitation of SCST 63

Bodily injury etc

One can also be protected from atrocities affecting the properties malicious prosecution political disabilities and economic exploitation

Where can they file a complaint

The SC and ST Act 1989 empowers the state government to set up special courts

and exclusive special courts in every district to dispose off within 2 months or as far as possible from the date of filing chargesheet The Act also provides a right to appeal in case of being aggrieved by the order of the Special court and Exclusive Special Court The State government also is empowered to ensure effective implementation of the Act

Protection of witnesses and victims The SC and ST Act 1989 has laid down all the rights of the victims and witnesses in order to curb such violence It also aims at encouraging its reporting for fair and just implementation of law Crimes Against SC and ST Violence against SCST is very nuanced in nature so it is difficult to separate atrocities against SCST from law and order problems So in many instances the case is registered under IPC or CrPC than PoA

Atrocities are in various forms such as cow vigilantism most dalits are in the occupation of leather making hides of the cow honour killing social boycott Khap Panchayat caste clashes discrimination in Universities Rohit Vemula case Though the SC ST Prevention of Atrocities Act is very stringent most cases end in acquittal due to police lethargy and due to destruction of evidence of the crime Also eye witnesses do not come forward to testify against powerful upper caste men

Examples of Atrocities in Independent India

Kizhavanmani Tamil Nadu 1958 in which 44 SCs were burnt to death in a confined building because SC agricultural labourers sought a little raise in their very low wages The high court acquitted all the accused 64



Karamchedu Andhra Pradesh 1984 Five SCs were massacred The trial court convicted many of the accused The high court acquitted all The Supreme Court upheld the trial court judgment a clear example that acquittals do not mean false cases

Tsundur Andhra Pradesh 1991 Eight SCs were massacred The trial court convicted the accused in 2007 The high court acquitted them in 2014 The Supreme Court has admitted a special leave petition SLP of the surviving victims and survivors of victims

Six cases of Bihar including the Bathani Tola 1996 and Laxmanpur Bathe 1997 In most of these the trial court convicted the accused In all of these the high court acquitted the accused Appeals are pending in the Supreme Court Kambalapalli Karnataka The prime witness in this case who is the sole survivor and head of the family whose other members were massacred turned hostile due to a threat of life resulting in the acquittal of all the accused

#### Sexual Violence on Dalit Women

Rape murder and maiming of dalit women by upper caste men as retaliation for aspirations of the community for economic and social progress still continues in the villages and towns of independent India Lower caste women are raped as part of caste customs and village traditions and are forced to have sex with upper caste landlords and the police Rape is often used as a form of retaliation to suppress movements demanding payment of minimum wages

These are not isolated incidents but routine occurrences One hears of several such examples of maintaining the social hierarchy of gendered citizenship For instance during the period of 1300 days from Dec 7 2003 to June 30 2007 1217 gang rapes

were reported in the Madhya Pradesh as per the State Assembly records. Out of these 362 cases were of women from scheduled castes 310 were of women from scheduled tribes and 381 were of women from other backward castes 65

An example of this social hierarchy of gendered citizenship through which rights get constituted is that while the Constitution empowered women through reservations to local panchayats by enacting the 73rd and 74th amendments to the Constitution newspapers continue to carry reports of dalit women sarpanches panchayat heads being paraded naked and humiliated for holding these positions. Rape of dalit women continues to be a common occurrence with around 1172 dalit women having been raped during the year 2005 as reflected in the statistics compiled by the National Crime Record Bureau

Another report revealed that rape of Dalit women in Gujarat rose by 500 per cent since 2001 over the last 13 years reaching a high point in 2014. While in 2001 only 14 Dalit women reported rape in 2014 there were 74 Dalit women who reported rape and their cases were registered under the provisions of the Indian Penal Code and Scheduled Castes Scheduled Tribes Prevention of Atrocities Act popularly referred to as Atrocities Act

While most of these violations go unchecked the gruesome killing of a dalit woman along with her seventeen year old daughter and two sons in Khairlanji village in Bhandara district of Maharashtra in September 2006 made national headlines when six people were convicted with death penalty and two with a sentence of life imprisonment by the sessions judge at Bhandara in September 2008. This was a major landmark victory for dalit and human rights activists. Despite this it is clear that issues concerning both gender and caste were invisibilised in the judicial

discourse As far as caste issues are concerned the accused were charged with murder under section 302 of the IPC but were acquitted of charges under Atrocities Act The activists felt that this glossed over the atrocities committed upon citizens solely due to their caste positions In August 2010 the Nagpur Bench of Mumbai High Court upheld the Sessions Court ruling which had termed the atrocities as mere criminal acts committed out of human rage leading to a non application of the provisions of Atrocities Act

The invisibilisation of gender occurred when the courts negated the sexual abuse of the women Despite the fact that preliminary investigations revealed that the mother 66

Surekha and the daughter Priyanka were sexually abused prior to their killings the sexual violence inflicted upon the two women did not receive due judicial recognition both at the Sessions Court as well as the High Court This despite the fact that the body of Priyanka was found stripped of all clothes The High Court concluded that since revenge was the motive there was no intention on the part of the accused to insult the deceased women or to dishonour or outrage their modesty While both gender and caste were invisibilised only the crime of murder which comes within the ambit of Section 302 of the IPC was upheld While the Sessions Court declared that it was a rarest of rare case warranting death penalty at the High Court level even the rarest of rare crime was further diluted into an ordinary murder warranting only life imprisonment

As this case highlights while the sexual brutalities committed on dalit and tribal women are on the increase rape and sexual abuse of lower caste and marginalized women are seldom examined within the matrix of the intersectionality of caste and gender The reported cases constitute only the tip of the iceberg as a large number of

cases do not even get recorded Even those reported and charge sheeted seldom result in conviction The Khairlanji verdict is a rare judicial occurrence A combination of factors contributes to this dismal state of affairs Non accessibility of the justice delivery system to marginalised communities due to factors of poverty illiteracy and fear of the police is one contributory factor Institutional bias of state agencies against dalits leading to biased and callous investigation and prosecution is another Retraction by eye witnesses from the higher castes is yet another factor The caste and gender bias in courts of law is a further contributing factor

## 17 NATIONAL COMMISSION FOR WOMEN

The National Commission for Women NCW is a statutory body established in January 1992 under the 1990 National Commission for Women Act Its mandate is to advise the government on all policy matters concerning women to review 67

legislations and to intervene or initiate proceedings in the Supreme Court on matters concerning women

### Functions of the Commission

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 existing 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 nonimplementation of laws enacted to provide protection to women and also to achieve the objective of equality and development

iii noncompliance 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 68

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 the development of women under the Union and any State

k inspect or cause to be inspected a jail remand home women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action if found necessary

l fund litigation involving issues affecting a large body of women

m make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil

n Any other matter which may be referred to it by Central Government

2 The Central Government shall cause all the reports referred to in clause b of subsection 1 to be laid before each House of Parliament along with memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non acceptance if any of any such recommendations

#### Powers of the Commission

While conducting investigations the Commission has the powers of a civil court to summon any person examine the person on oath discovery and production of document to receive evidence on affidavits requisition public record and issue commissions for examination of witnesses and documents

#### Working of the Commission 69

The Commission processes the complaints received verbally or in writing It also takes into account suo moto on its own notice of cases related to women The complaints received relate to various categories of crimes against women such as domestic violence harassment dowry torture murder kidnapping abduction

complaints against NRI marriages desertion bigamy rape police harassment  
brutality cruelty by husband deprivation of rights gender discrimination sexual  
harassment at workplace and so on

The complaints are acted upon in the following manner

Specific cases of police apathy are sent to the police authorities for  
investigation and cases are monitored

Family disputes are resolved or compromises struck through counselling

Disaggregated data are made available to various state authorities to  
facilitate action

In sexual harassment complaints the concerned organizations are urged to  
expedite cases and the disposal is monitored

For serious crimes the Commission constitutes an Inquiry Committee to  
provide immediate relief and justice to the victims of violence and atrocities

Strategies of the Commission

In keeping with its mandate the Commission evolved the following strategies to  
improve upon the status of women and women development

Economic empowerment through building up skills and securing access to  
gainful employment

Political empowerment through awareness training and mobilization for  
equitable representation in all fora

Prevention of violence and discrimination against women inside and outside  
the home through legal reform and sensitive enforcement

Amelioration of conditions of disadvantaged women such as 70

a Physically challenged women including those who are visually disabled or

mentally affected

b Socially challenged women including Muslim women women from Scheduled Caste and Scheduled Tribes widows and prostitutes

c Prevention of indecent representation of women in the media through legal and social sanctions

#### Achievements

Prepared Gender Profiles of all states and UTs except Lakshadweep

Took up women related issues and was proactive in Parivarik Mahila Lok

#### Adalats

Reviewed laws such as Dowry Prohibition Act 1961 PNDT Act 1994

Indian Penal Code 1860 and the National Commission for Women Act 1990 to make them more stringent and effective

Organized workshops consultations etc

#### Parivarik Mahila Lok Adalats

The National Commission of Women has evolved an innovative concept of Parivarik Mahila LokAdalat PMLA which supplements the efforts of the District Legal Service Authority DLSA for redressal and speedy disposal of the matters related to marriage and family affairs pending in various courts The Parivarik Mahila LokAdalat functions on the model of the Lok Adalat The Commission provides financial assistance to NGOs or State Women Commissions or State Legal Service Authority to organize the Parivarik Mahila Lok Adalat The objectives of Parivarik Mahila Lok Adalat are as follows

To provide speedy and cost free dispensation of justice to women

To generate awareness among the public regarding conciliatory mode of dispute settlement 71



To gear up the process of organizing the Lok Adalats and to encourage the public to settle their disputes outside the formal set up

To empower public especially women to participate in justice delivery mechanism

Issues around working of NCW

The Major Issues around working of the National Commission for Women are as follows

NCWs functions are dependent on the grants offered by the central government Financial assistance provided to the Commission is inadequate to meet its needs

NCWs members are appointed by the government and the commission does not have power to select its own members

NCW lacks concrete legislative power It enjoys power only to recommend amendments and submit reports

The recommendations of the NCW are not binding on the Union or state governments

Often it takes action only if the issues are brought to light Unreported cases of suppression and oppression are generally ignored by the Commission

NCWs jurisdiction is not operative in Jammu and Kashmir

Drawbacks

It has no actual legislative powers It only has the powers to suggest amendments and submit reports which are not obligatory on state or Union Governments

It does not have the power to choose its own members The power selecting members is vested with the Union Government and the nature of country's

volatile political scenario tends the commission to be politicized

It is reliant on financial assistance from the Union Government and this could  
compromise the independence of the Commission 72