CHAPTER II

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CHAPTER II

Multi-Cultural diversity in Family Laws of India: Consequent Effect of Gender Equality

2.1 Introduction:

The objective of this chapter is to present three facets of family laws of India. The first aspect is to bring out the multi cultural dimension of family laws i.e. differing family laws for different religious communities, sects etc. The second is to identify the provisions which produce gender inequality with males getting a better deal than the females and the third is to identify provisions which have relation with any particular religion such as marriage conditions and ceremonies, manners of divorce, adoption ceremonies etc. This discussion is later useful to give a perspective on the how, why and what of Uniform Civil Code.

Multiculturalism is the basic characteristics of Indian civilization. There are number of ethnic groups living in India. Diversity is its essential quality. Therefore various races are living peacefully. All world religions are living peacefully for number of centuries. Therefore these people are known as Hindu, Indian Muslims, Indian Christians, and Indian Buddhist etc. Every cultural group is allowed to live according to their way of life. Every Cultural group contributed in nation building. Therefore Indian Culture is a composite culture. Known as Indian culture. The spirit of Indian culture is Unity in diversity. The main characteristic of Indian society is that every religion has their own family laws; i.e. The Hindu Law, The Mohammedan Law, The Christian Law, The Parsi Law, etc. After detailed study it has to be noted that every community is having their own personal laws. Tribal communities are also having their own customs. In family laws it has recognized family custom as a law. It means Indian personal laws are really personal in nature. Therefore this subject matter remained neglected in the British rule.

Hindu law; almost 80% population is governed under Hindu law. Hinduism has been, not one religion, but common wealth of religions. Multi-dimensional practices have come into existence. Sects and sub-sects have surfaced from time to time and continue to surface even in our times. The remarkable feature of Hinduism has been that it has been able to absorb all thoughts, ideas,
dissentions, practices, sometimes diametrically opposite to each other, yet retained its basic unity. New reformist movements come into existence and new developments take place\(^1\), for example in ancient India Buddhist and Jain, later on Sikh, Lingayat, during British Period Brahmo, Prarthana or Arya Samaj. After independence Dr. B. R. Ambedkarembraced Buddhism in 1956. The New - Buddhist community came into existence in Maharashtra and all over India. Thus cultural pluralism is basic character of Indian society. It is decided to discuss multi-cultural diversity as regards sources of law, schools, matrimonial matters, succession and so on which form the ambit of family laws and its reflection on gender equality issues.

2.2 Multi Cultural Diversity as to Traditional Sources of Family laws

All world religions have contributed to Indian Culture. It has contributed to multiculturalism as well as Indian Composite Culture. This can be seen by discussing the traditional sources of various family laws.

2.3 Sources of Hindu Law: Element in social cultural Kaleidoscope

Hindu system of law is most ancient; almost 6000 years old. It is having ancient and modern sources. According to Hindu Dharma or law the sources are: (1) the Sruti, (2) The Smriti, and (3) Custom.\(^2\)

2.3.1 The Sruti

‘Sruti’ literally means, that which was heard. The Srutis are believed to contain the very words of the deity, they include the four Vedas, but they contain very little of law.\(^3\)

2.3.2 The Smriti

“Smriti” literally means, that which was remembered. It is the recollection handed down by the Rishis, or sages of antiquity, of the precepts of God. The Smritis constitute the principal source of law. There are number of Smritis. The principal three Smritis are-

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\(^3\) Ibid, p 77.
a) *The Manu Smriti* - it is known as first Hindu Code. It compiled in about 200 B. C.

b) *The Yajnavalkya Smriti* - is liberal than Manu Smriti. It compiled in about 100 A. D.

c) *The Narada Smriti* - It has compiled in 200 A. D. which is more liberal than earlier smritis.\(^4\)

### 2.3.3 Custom.

In Hindu law custom has proprio vigore the efficacy of law. It is not merely an adjunct of ordinary law but a constituent part of it. When there is a conflict of law between texts of the Smritis, the custom overrides the text: Under the Hindu system of law, clear proof of usage will outweigh the written text of the law. There are three kinds of customs namely:

1) Local

2) Class, and

3) Family customs.\(^5\)

### 2.3.4 Commentaries as a source of law

The law of the *Smritis* was empiric and progressive and in course of times several Commentaries and Digests (*Nibandhas*) were written on it. The Authority of several commentators varied in different districts, and thus arose the schools or law which is operative in different parts of India.\(^6\)

The modern sources of Hindu law are: Equity, justice and good conscience, precedent and legislation.

### 2.3.5 Equity, justice and good conscience

It is modern source given by British government. In fact it is a way of British administration of justice. The Charters issued by the English Crown to the various High Courts directed that when the law was silent on a matter they should decide the case in accordance with justice, equity and

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\(^5\) Ibid., p 82.

\(^6\) Ibid, p 82.
good conscience. It means the English law shall apply on analogous matter as modified to suit Indian conditions and circumstances.\textsuperscript{7}

\textbf{2.3.6 Precedent}

It is judge made law. Doctrine of stare decisies and precedent are the gift given by British rule to India. In fact all principles and rules of Hindu law are embodied in case law. Some times laws or rules are modified during interpretations. These interpretations are used as law in subsequent cases.

\textbf{2.3.7 Legislation}

Legislation is a modern source of Hindu Law. As a matter of government policy several laws were passed... After Independence state legislatures and Parliament have passed several laws.

\textbf{2.3.8 Schools of Hindu Law.}

The schools of Hindu law emerged with the emergence of the era of Commentaries and Digests. The Commentators and Digest writers put their own gloss on the ancient texts, and authority of some having been received in one and rejected in another part of India, There are two main schools of Hindu law. 1) \textit{The Mitakshara School}, and 2) \textit{The Dayabhaga School or Bengal School}.

\textit{The Mitakshara School} has the following sub-schools

\begin{itemize}
  \item [a.] \textit{The Benares School}. It extends to the whole of Northern India except rural Punjab.
  \item [b.] \textit{Mithila school}. It prevails in Tirhut and certain districts of Northern Bihar.
  \item [c.] \textit{Bombay school}. It is applicable to western Maharashtra including Maharashtra and Gujarat.
  \item [d.] \textit{Madras School}. It covers southern India including the state of Tamil Nadu, Karnataka, Andhra Pradesh and Kerala.\textsuperscript{8}
\end{itemize}

Thus these schools show the regional diversity of Hindu law.

2.4 Mahommedan Law: Element in socio-cultural Kaleidoscope

Muslim law also contributed to development of multiculturalism in India. In Indian Islam’s local traditions of various regions have continued till today. The sources of Muslim laws are two kind’s namely Primary sources and Secondary sources. In primary sources: 1) the Quran 2) The Sunnat and Hadis, 3) The Isma and 4) The Qiyas are included. The Secondary Sources are: 1) Urf or Custom, 2) Judicial decisions, 3) Legislation, 4) Justice equity and good conscience.

2.4.1 The Quran

The Quran is the Holy book for Muslim. It is the first primary source of Islam. 80 verses are concerned with marriage, dowry, divorce, etc. Today the same provisions are followed by most of the Muslim community as it is or by way of some modifications.

2.4.2 The Sunnat and Ahadiths (traditions)

Sunnat means model behavior of the Prophet; he pronounced his verdicts, did certain things and also allowed to do certain things in Islam. Those practices became primary source of law. The things incorporated in Quarn are technically, the sunnat. These are of three kinds. I) Sunnat-ul Fail, i.e. Traditions about what the Prophet did himself. II) Sunnat-ul Qual, i.e. Traditions about which he enjoined by words. III) Sunnat-ul Tuqrir, i.e. the things done in his presence without his disapproval.

Ahadiths (traditions) means the narration of “what the Prophetsaid, did or tacitly allowed. There are three classes of Ahadith those are i) Ahadith-i-mutwabir i.e., Traditions that are of public and universal propriety are held as absolutely authentic. In such Hadith the chain is complete. ii) Ahadith-e-Mshhoor, i.e. Traditions which though known to majority of people, do not possess the

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character of universal property. iii) *Ahadith-e-wahid* i.e., Traditions which depend on isolated individuals.\(^{10}\)

### 2.4.3. The Ijma (consensus of opinion)

According to sir Abdul Rahim Ijma means “an agreement of the jurists among the followers of the Prophet Mohammad in a particular age on a particular question of law”. Wilson defines it as concurrence, meaning prepositions shown to have been accepted as indisputable under the first “rightly directed,” Caliphs or in the time of the companions and of the generation immediately succeeding them. Classical theory says, failing *Qoran* and Traditions, the consensus of opinion amongst the companions of the Prophet is recognized as the best guide of the law. There are three kinds of Ijma:

- a) *Ijma* of the Companions of the Prophet; b) *Ijma* of the jurists, and c) *Ijma* of the people.

There are some conditions for *Ijma*. I) It shall not come into conflict with *Quran* and *Hadith*: II) once a question is determined by *Isma*, it cannot be reopened by individual jurists; and III) when the jurists of an age have expressed only two views on particular question, a third view is inadmissible. Thus this is third source of Muslim law.\(^ {11}\)

### 2.4.4 The Qiyas (Analogical Deductions)

*The Qiyas* means rising by analogy for the three sources. Namely *the Quran, the Sunnat* and *the Ijma*. *The Quasys* rules are deduced by the exercise of reason. This has been supported by a Hadith of Prophet Mohammad. There are conditions for the validity of *Qiyas*, those are; i) The original source from which *Qiyas* is deduced must be capable of being extended, that is, it should not be of any special nature; ii) The law of the text must not be such that its raison d’être cannot be understood by human intelligence nor must it be in the nature of an exception to some general rule; iii) The original order of the *Quran or Hadith* to which the process of *Qiyas* is applied should not have been repealed; iv) The result of *Qiyas* should not be inconsistent with any

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\(^{10}\) Ibid, P 10 to 12.

\(^{11}\) Tanzeem Fatima, Islamic Law and Judiciary, Deep & Deep Publication Pvt. Ltd. New Delhi, 2001. p. 12 to 15
other verse of Quran or any established Sunna; v) Qiyas should be applied to ascertain a point of law and not to determine the meaning of words used; vi) The deduction must not be such as to involve a change in the law embodied in the text. Thus it is last primary source of Muslim law. There are secondary sources which are as follows:

2.4.5 Urj or Custom

In Islamic law, custom has not been recognized as a source of law. It has sometimes referred to as supplementary law. Pre Islamic customary law or rules have been embodied in it by express or implied recognition. Custom which is recognized as having the force of law must be generally prevalent in a country. It should be territorial so it will not affect the other countries’ law of the land. Custom has authority only so long as it prevails, so that the custom of one age has no force in another age. Thus custom this is recognized as having force of law, should be generally prevalent in a country. The necessary conditions of valid customs are: it must be general; territorial; Immemorial; ancient and should not oppose to public policy

2.4.6 Judicial Decisions.

The judicial decisions of Privy Council, the Supreme Court as well as the High Court of India are a source of law. In deciding particular cases the judges enunciate what the law is. These decisions are regarded as precedents for future cases. A precedent is not merely an evidence of law but a source of it and the courts of law are bound to follow the precedents. Thus Judge made law has become source of Muslim law.

2.4.7 Legislation

In India the Muslim family law is also governed by various legislations namely: The Muslim personal law (Shariat) Application Act, 1937. The Dissolution of Muslim Marriage Act, 1939.

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12 Ibid, P 16 to 18.
The Muslim Women (Protection of Rights on Divorce) Act, 1986. Thus this law is also not excluded from codification.\textsuperscript{15}

2.4.8 Justice, Equity and Good Conscience

In Islam Istihan or justice equity is well known. The British rule used it abundantly while deciding family disputes. It is secular in principle. It is based on common sense of the judges. Thus it helps to develop the Muslim law.\textsuperscript{16}

Thus the above sources of Islamic law have developed Muslim Law. Even then there is large scope for development of Islamic according to modern principle of gender justice and Human Rights.

Apart from Hindu and Muslim laws, Christians have also contributed a lot to the development of family laws in India. Their details are as under:

2.5 Christian Personal Law

It is believed that Christianity was first brought into India by a disciple apostle of Jesus Christ, Saint Thomas, soon after the Crucifixion in the first century. As per the oral history, Saint Thomas landed on the Malabar Coast. He built Church in Quilon. Christianity of this period was affiliated to the orthodox traditions of West Asia, i.e. Syria, Armenia, Antiochia and also Constantinople. The erstwhile Christians were mixed with local people. They followed local traditions and customs. The Second Phase of conversion was carried out in the sixteenth century after the Portuguese established the trade routes and conquered a few Indian territories. It was concentrated along the western (Konkan) Cost. They established Roman Catholic Church in India. The third phase of Christianity is the Protestantism and the theology of enlightenment

\textsuperscript{15} \textit{Ibid}, P 20.
\textsuperscript{16} \textit{Ibid}, P 21.
brought in by the missionaries of various European and American Churches during the
nineteenth and twentieth centuries.\textsuperscript{17}

\textbf{2.5.1 Present position of Christianity in India}

1991 census report shows 2.32\% as Christian Community in India. India is having three different traditions: (i) The orthodox Churches of west Asian Traditions: i. e. \textit{Syro Malabar}, \textit{Syro Malankar}, the Mar Thomas Church etc.: (ii) The Roman Catholic Church of Latin rites and (iii) the various reformist Churches of Protestant traditions now consolidated into the Church of South India (CSI) and the Church of North India (CNI). There also exists a large population of Christians among various tribes, particularly in the north east region. These tribes are granted protection under the Constitution in respect of their culture, tradition, customs and laws and hence not governed by the Christian personal Laws.\textsuperscript{18}

\textbf{2.5.2 Christian Law: Another Socio – Cultural Pattern Adding to Diversity}

Several legislations were passed during European rule in India such as: The Caste Disabilities Removal Act (or the Freedom of Religion Act) of 1850; The Native Converts Marriage Dissolution Act of 1866; The Indian Divorce Act (IDA) of 1869; The Indian Christian Marriage Act (ICMA) of 1872.

The Civil Code of Goa\textsuperscript{19} which was applied by Portuguese colonies of Goa, Daman and Diu. This is also known as Uniform Civil Code of Goa but unfortunately there is no uniformity in this code.\textsuperscript{20}

\textbf{2.6 The Parsi Law}

The Parsees originate from Iran. They are a small and well-knit community. Population in the world is around 2,50,800 out of which around a, 1, 10,544 live in India. In A. D. 636, when the

\textsuperscript{17}Flavia Agnes, Law and Gender Inequality Oxford University Press New Delhi 1999. Pp 141, 142
\textsuperscript{18}Ibid P 41
\textsuperscript{19}Family law of Goa was part of Portuguese Civil Code of 1867. Subsequently other laws or decrees were added such as law of Marriage, Law of Divorce of 1910, few areas were covered under Hindu Code of 1880, and Laws recognizing Canonical Marriages, etc.
Arabs invaded *passia* (Persia) and Caliph Omar defeated the Parsi king Yezdezind, to escape persecution, they sailed off in boats in search of new land, carrying with them their sacred fire. After a great ordeal at sea, the boat landed twenty-five miles south of Daman. The head of the group implored the local King, Jadao Rane, to give them refuge with the promise that they would enrich his land. The history of India bears Testimony to the fact that they kept this promise. The king laid down five conditions: (i) The Parses should adopt the local language; (ii) they should translate their holy texts into the local language; (iii) Their women must change their dress and wear the local *saree* (*sari*); (iv) their marriage ceremony should include the local rite of tying of the sacred knot; and (v) they should surrender their arms. They consented to all the five terms and in return the king granted them permission to build their fire temple at Navsari. Later on it had become the learning center for Parsi Community. Due to the rigid caste system of the Hindus, assimilation was not possible and hence they were able to maintain their separate and distinct identity. But they adopted many local customs. Within this integrated community there are two sects *Shensoys* (or *Shuhusaees*) and *Kudmis*.

### 2.6.1 Parsi Codified Laws

In British rule Parsi community got good fortune. They got Government contracts in Bombay. During freedom struggle several parses participated. In 1864, the Parsi Law Commission was appointed and based on its report in February 1865, on this basis two Acts were passed namely: The Parsi Interstate Succession Act, 1865, The Parsi Marriage and Divorce Act of 1865, The Indian Succession Act, 1925. Thus the Parsis are updating their laws according to the changing times. Thus the Parsi community has succeeded in maintaining separate independent personal law in India.

### 2.7 Jewish Law:

India has three types of Jewish communities; Jews from coastal Kerala, Jews from the Bombay region, and Jews from North East. (i) Jews from costal Kerala, known as Cochin Jews and Paradesi Jews or Malabar Yahudan mingled with local communities and adopted local customs

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21 Ibid 128,129
22 Flavia Agnes, *Law and Gender Inequality* Oxford University Press New Delhi 1999, Pp. 132 to 134
and languages. They maintained Jewish identity in speech. They built their synagogues, maintained dietary regulations, and observed Sabbath as a day of rest. However, they did not follow the strict Jewish code, and they did not have a Rabi (priest) for their rituals. (ii) Jews from the Bombay Region. Two distinct communities lived in this region. The Benet Israel (literal meaning- son of Israel) and Baghaddis Jews. (a) The Bene Israel lived primarily in the Bombay region and spoke Marathi. They claimed that their ancestors were oil pressers in Galilee who fled the country to escape from persecution in the second century BC. This was the beginning of the Jewish community in Bombay region. Their assimilation into the local culture was complete. Baghaddi Jews started arriving in the eighteenth century. They were traders, businessmen even Persian Jews were also living in this area. The Bebe Israels also prospered during colonialism as they were termed as ‘Anglo-Indians’ which helped them to get better jobs and trade contracts. (iii) The Jewish Community in North East. The Jews from Manipur and Mizoram view themselves as descendents of the Menashe tribe, which is believed to be one of the ten lost tribes of Jerusalem. They call themselves Beni Menashe (children of Menasseh) and are the latest to reclaim their Jewish identity and trace the history to their persecution. They claim that their forefathers were exiled and enslaved by Assyrians from where they escaped into Chinese-Burmese border and thereafter migrated into India. Their features resemble the Chinese-Mongolian and they hardly observe any Jewish culture or traditions.

2.7.1 Sources of Jewish Law: Biblical Touches added to Family

According to Jews, the law and moral dictates were revealed by God in the wilderness of Sinai, to Moses, who transmitted it to his people. This law is laid down in the five books of the Old Testament (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy), commonly known by the Greek word ‘pentateuch’, meaning the five rolls. The Jews call these five books the Torah (The law or, literally, direction or guidance). In course of time, enormous bodies known as the Talmud (teaching or instruction), which interpreted, modified, expounded, and adapted the original scriptural law to changed times and circumstances. Modern Jewish law is an adaptation of the Mosaic (divine) and Talmudic (evolved) law. Jewish scholar Rev. M. Mieliziner, titled, Jewish Law of Marriage and Divorce in Ancient and Modern Times, the second edition of which was published in 1901, and Jewish code of Jurisprudence by Rabbi Kadushin, Published in 1921. The Indian courts have opined that these two legal texts contain very valuable expositions on Hebrew
law and give a clear and accurate account of the law of marriage and divorce based on the original scriptures. These books are cited in various decisions of Bombay and Calcutta High Court. But the codification of Jewish law did not take place during the pre-Independence period, and the legal discourse, as contained in judicial interpretations, continued to be the main source of law for the Jewish community in India.  

2.8 Tribal Laws

Since Immemorial time tribes are living in India. Today they are 8% of the Indian population. They are spread all over the main land and Islands. They are having their own culture, own religion and own family laws. These peoples are distinct from rest of other non-tribal people. British rulers had passed several legislation for tribal area administration. 1765 Under Divani rule tribal area of Bengal, Bihar and Orissa directly came under Governor of Bengal. Thus the British rule started over Tribal area. 1822 is the foundation of tribal administration. Regulation X was passed, new form of administration was stared which was known as Non-regulated System. The powers of the collectors, Magistrates and Judges were centered in the same hands, and an intensely creolized and all powerful executive was constituted for bringing the administration within the reach of the people through simple personal procedure. Government of India Act, 1853 gives power to legislatelaws to Indian people. 1869 Garo Hills Act was passed. It provided for excluding these areas from the general administration. It was removed from the jurisdiction of the Courts of Criminal and Civil Judicature and from the control of the office of revenue constituted by the revenue rules of Bengal Code. 1870 the Government of India Act was passed and the Governor-General was allowed to legislate separately for backward tract. 1874 the Scheduled Districts Act was enacted. Government of India Act 1915, Section 52A the Governor-General in Council may declare any territory and further direct that any Act of Indian Legislature shall not apply to the territory in British India to be backward tract, it may direct that any Act of Indian Legislature shall not apply to the territories in question or shall subject to such exceptions or modifications as is thought fit.

Montagu-Chelmsford Report of 1918 contended that there were certain backward areas to which the reforms could not apply and that these tracts should be administered by the Governor. Indian Statutory Commission, 1930 commonly known as Simon Commission made suggestions: “the stage of development reached by the inhabitants of these areas prevents the possibility of applying to the methods of representation adopted elsewhere. They do not ask for self-determination but for security of land tenure, freedom in the pursuit of the tradition methods of livelihood and the reasonable exercise of their ancestral customs”. The Government of India Act, 1935 gave up to terminology of the backward tracts and instead described the areas either as excluded area or partially excluded areas. This area was directly under the control of Governor. Government of India Act 1947 also gives same guarantee.  

2. 8. 1. Sixth Schedule to the Constitution

During discussion on Sixth Schedule Dr. Ambedkar cleared the position: According to Dr. Ambedkar the tribal people of Assam differed from the tribes of other areas. As for the latter they were more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they lived. As for the former, their roots were still in their own civilization and their own culture. They had not adopted either the modes or the manners of the Hindus who surrounded them. Their laws of inheritance, their laws of marriage, custom, etc. were quite different from that of Hindus. He felt that the position of the Tribal’s of Assam was somewhat analogous to that of the Red Indians in the United States who are a Republic by themselves in that country, and were regarded as a separate and independent people. He agreed that Regional and District Councils have been created to some extent on the lines which was adopted by the United Stated for the purpose of the Red Indians. Under Sixth schedule the district councils and Regional Councils have given power to make rule under paragraph 3. Paragraph 3 (vii) inheritance of property; (i) marriage and divorce; (j) social customs. Thus schedule six gives wide power to the governor and President of India to protect the rights of the tribal people of the states of Assam, Meghalaya, Tripura and Mizoram. As per rest of the tribal


people of India they are going to govern under Fifth Schedule of Constitution. Protecting cultural rights of the tribal people constitution has taken abundant care. Thus multiculturalism was protected under personal laws. These community rights have failed to protect the woman’s rights and give gender justice.

Hence it is observed that family laws of India have a multicultural basis and hence may need to be analyses from the point of view of gender equality issue.

2.9. Position of Family Law with reference to gender equality issues

Here are discussed different provisions of various family laws as regards Marriage, Divorce, Maintenance, Custody of child, Adoption, Succession, Domestic Violence, Family Court etc. which appear to be in conflict with gender justice.

2.9.1. Marriage

Marriage is a pre-historic institution. It is a relation between husband and wife. They are ready to spend the rest of their lives together. It is found in every strata of the society and in all cultures though in different forms. It exists mainly in two forms: known as Monogamy and Polygamy. Polygamy is divided into two forms namely polygamy and polyandry. Polygamy is closely related to the institution of slavery. Polygamy; marriage between one man and several women. Polyandry: marriage between one woman and several men. Today the most prevalent form of marriage is monogamy of a heterosexual nature. Today the new issue of same sex marriages has become debatable.

2.9.2. Hindu Marriage

Vivaha Samskarais considered as the most important as other Samskaras. It is unbreakable and permanent bond up to seven lives. It is belief of old Hindu law. The Hindu Marriage Act, 1955, has changed the basic structure of Hindu law. It has became contract and divorce is provided. The Hindu Marriage Act, 1955 under Section 2, gives applicability if this Act. Section 5 given conditions of marriage:

i) Monogamy,

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ii) Soundmind,

iii) The bridegroom is 21 years and bride 18 years

iv) The parties to marriage should not be within prohibited degrees of relationship, as well as not sapindas to each other.

Section 7 of gives condition of ceremonies like customary form or saptapad. Section 8 provides for registration. Subsequently the courts have developed a lot of jurisprudence and the whole process is reformatory step toward Article 44 of Indian constitution.

2.9.3. Muslim Marriage

Muslim law considers marriage to be a contract which has for its object the procreation and legalizing of children. There is no formality nor any religious ceremony required for a marriage. The essential of valid marriage are capacity to contract marriage, proposal and acceptance and absence of any impediment to the marriage.29

Muslim law of marriage is patriarchal. Several discriminatory provisions are made against women: 1) A married woman cannot contract another marriage while her husband is alive and the marriage is subsisting, such marriage is void. It is offence under section 494 of Indian Penal Code. But same restrictions are not applicable to the Muslim husband. At least the section 494 which is applicable to the Muslim woman is not applicable to the Muslim man. Hence it does not meet the requirements of gender just law. In the law of marriage and divorce there are several provisions which are male centered and the female is not held at par. As regards Talak the male has several options of pronouncing it. Sometimes without assigning any reasons and not subject to any sort of judicial process. There is a possibility that the women in the near future may agitate before the courts and it will be very difficult to wriggle of the charge of discrimination and for courts to provide a solution within the law.

Another harsh and repugnant provision is for remarriage of husband who has given talak to his wife. If the husband has given valid talak he is not allowed to remarry the talak wife until she has been married to another man by a valid and operative contract, with whom she has cohabited and

28 Kusum, Family law Lectures, Family law I Lexis Nexis, Student serious Second Edition 2008 p 6 to 8
29 Ibid, p 343
been either divorced from him or become his widow by his death. (This second husband is called a legalizer). This provision is utter violation of woman’s right; moreover it is utter violation of human rights.

Muslim husband has right of polygamy but Muslim wife has no right of Polyandry. Thus provisions on marriage, divorce, muta marriages affect dignity of women as she is not at par with her counterpart.

Age of marriage is also on puberty. The Indian girls attain puberty from the age of nine to thirteen years. If marriage is contract then contracting parties’ age is fixed eighteen years. Therefore the present condition of age of puberty is violation of provision of Prohibition of Child Marriage Act, 2006, which is secular Act. Article 15(3) of the Constitution gives power to the state to pass law in the interest of the women and children. Thus the parliament of India and State Legislatures and the Supreme Court of India and various High Court should take serious note of this provisions against the Indian daughters and women.

**Muta Marriage**

Shia school is having the practice of *Muta* marriage. Essentials of *muta* marriage: Proper contract, declaration and acceptance. Man can contract a muta marriage with Muslim woman or Christian or Jewish or even fire worshipper. *Shia* woman cannot contract a muta with a non-Muslim. Period of marriage is fixed for a certain day/month or a year or years. Man may contract with any number of women but is bound with payment of dower. A *muta* wife is not entitled to maintenance under *Shia* law. Thus in *muta* marriage *Shia* woman cannot contract a muta with a non-Muslim. This is restriction on the woman.

**2.9.4. Christian Marriage**

Indian Christian Marriage Act, 1872, sets conditions of marriage i.e.:

I) Man must be 21 years of age and woman must be 18 years of age;

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II) Neither party has a spouse living
III) It requires at least 2 credible witnesses

IV) They cannot marry within prohibited degrees, and
V) Marriage must be solemnized in the presence of a person licensed to celebrate such marriage.

Thus in Christian Marriage male and female is having equal right to marry. It is contract. It is gender just law.

2.9.5. Parsi Marriage

The Parsi Marriage and Divorce Act, 1936, under section 3, sets the requisites of a Parsi marriage i.e.

i) That parties are not within prohibited degrees of consanguinity or affinity;

ii) Marriage has to be solemnized according to the Parsi form of ceremony called “Ashirvad” by a priest in the presence of two Parsi witnesses;

iii) Male must be of 21 years and female must be 18 years of age.

Section 5 has prohibited bigamy and Section 7 has made the provision of registration of marriage. Thus in Parsi marriage there is equal rights given to male and female. Parsi marriages are allowed within their community only.

4.9.6. Jewish Law of Marriage

The basis of marriage is Biblical injunction and has religious basis. Modern Jewish marriage is monogamous and dissoluble Contract. There are three essential requirements for a valid marriage:

i) free consent of the parties;

ii) Mental capacity; and

iii) Legal age.

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33 Ibid, p 9
The minimum legal age was thirteen for boys and twelve for girls. The groom was required to give the bride money (*Kaseph*) and some traditional rituals were performed.  

The Jewish law is not codified. Therefore court has interpreted as and when cases came before the court. Several people following local customs as a way of their life. This law is age old law therefore it requires to be amended according to changing time.  

**2.9.7. Tribal Marriages**

There are about 300 groups which are officially identified, as tribal by Government of India. They are speaking various tribal languages. They are designated as hill Tribes Adivasis etc. Marriages among tribals are endogamous, exogamous and consanguineous. Cross cousin marriages are very common and favorable to women because of low bride price. Child marriages are not allowed and the status of tribal women is appreciable with widow remarriage and divorce not being looked down upon. The marriage ceremonies also differ from one tribe to another. Since the origin of different tribes in not the same and social conditions have greatly differed, it is felt that it would be difficult to have a single body of customary or Tribal law.  

It is very essential to codify the tribal family law at least in the long run.  

**2.9.8. Marriage under Special Marriage Act.**

Special Marriage Act, 1954, is a secular Act. Chapter II deals with Solemnization of Special Marriages. Section 4 of the Special Marriage Act 1954 lays down conditions for solemnization of special marriage. It states: 4. Conditions relating to solemnization of special marriages.- A marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely; (a) neither party has a spouse living; (b) neither party is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (ii) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (iii) has been subject to recurrent attacks of insanity; (c) the male has completed the age of twenty-one years and the female the age of eighteen years; (d) the parties are not within the

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degrees of prohibited relationship; (e) Where the marriage is solemnized in the state of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.\textsuperscript{36}

This Act is de facto uniform as regards marriage. It is applicable to all citizens of India whether they are living in India or abroad. This law is having extra territorial application. Anybody can register their marriage under this Act. Matters of Private International Law are going to be resolved under this Act. Conflicts of Personal laws are also resolved under this law. People are raising objection about its name means instead of Special Marriage Act, this Act should be renamed Indian Marriage Act. This law gives equal rights to the husband and wife. Thus it is gender just law.

Thus the marriage form is going to change according to the cultural groups. Codified laws generally are substantially gender just laws. The uncodified laws are customary laws; they are generally gender biased and violating principle of equality, equity and justice. These are required to codify on modern principle of law. No law is prohibiting inter-caste marriages. Now marriages are performing on the basis of status to contract. The incidents of honour killing are happening. State should give special protection to the inter-caste marriages.

2.10. Void, Voidable, Irregular Marriage

A marriage, which is not valid, may be void or voidable. A void marriage is one which has no legal status. A voidable marriage on the other hand, is a marriage which is binding and valid, and continues to subsist for all purposes until a decree is passed by the court annulling the same. The distinction between void and voidable marriage are:

a) A void marriage has no legal status right from the beginning, whereas avoidable marriage has all the rights and obligations of matrimony until it is annulled by a court;

b) A void marriage may be declared a nullity at the instance of either party, whereas, in a voidable marriage, the court can pass a decree of annulment at the instance of the aggrieved party.\(^{37}\)

It is decided to discuss now void, voidable and irregular marriage under different laws.

### 2.10.1. Hindu law

Section 11 and some provisions of section 5 of Hindu Marriage Act, 1955, deal with void marriage. These are:

i) Either party had a spouse living at the time of marriage;

ii) Parties are within the degrees of prohibited relationship, unless custom or usage governing them permits such marriage;

iii) The parties are not sapindas of each other, unless custom or usage permits such marriage.

Section 12 of Hindu Marriage Act, 1955, gives grounds of voidable marriages. They are:

i) The marriage has not been consummated owing to the impotence of the respondent; or

ii) Any of the parties is incapable of giving a valid consent because of unsoundness of mind, or though capable of giving consent, has been subject to recurrent attacks of insanity;

iii) The consent to the marriage has been obtained by force or fraud;

iv) The respondent was pregnant at the time of marriage by some person other than the petitioner.\(^{38}\)

In Hindu law both spouses are (have) equal rights available to sue or be sued. It is gender just law.

### 2.10.2. Muslim Law

Under the Muslim law, a marriage, which is not *sahih*, i.e., valid, may be either, *batil*, i.e., void, or *fasid*, i.e., irregular.

*Batil:* A marriage will be void if it is with a *mooharin*, i.e. prohibited by reason of:

a) Consanguinity,

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b) Affinity,
c) Fosterage, or
d) Polyandry.

The void marriage is illegal it does not create any civil rights. The wife has no right of dower against husband, no right of inheritance.

*Fasid:* - It means invalid or irregular marriage. It can be validated to remove the impediments. It is irregular marriages in the following cases:

i) Without witnesses;

ii) A marriage with fifth wife;

iii) With a woman undergoing Iddat;

iv) Prohibited by reason of difference of religion;

v) Marriage with a non-scriptural woman.

In above conditions of irregular marriage restriction or disqualifications are of patriarchal. It discriminates against woman; for example emarriage with fifth wife then the husband can divorce any one of the four wives; or the non-Islamic woman, she should convert to Islam.  

### 2.10.3. Christian Law

Section 18 and 19 of Divorce Act, 1869, deal with void marriage. The grounds of divorce are given in section 19 as follows:

i) the respondent was impotent at the time of marriage and at the time of institution of the suit;

ii) the parties are within prohibited degree of consanguinity or affinity;

iii) either party was a lunatic or idiot at the time of marriage;

iv) the former husband or wife of either party was living at the time of the marriage and the earlier marriage was subsisting.

Either of the spouses can obtain decree from District Court. This is gender just law.

### 2.10.4. Parsilaw

Section 4 and 30 under Parsi Marriage Divorce Act, 1869, are dealing with void marriages. Section 4 - Says that a second marriage without divorce in case of earlier marriage is void.

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Section 30 says a marriage where consummation of the marriage is impossible from natural causes, may, at the instance of either party to the marriage, be declared null and void.\textsuperscript{41}

2.10.5. Tribal law and Jewish law

Tribal law and Jewish law are uncodified laws; therefore, the record of void and voidable marriage is not available. .

2.10.6. Special Marriage Act, 1954

Section 24 deals with void marriage. The grounds are as follows:

i) At the time of marriage either party has another spouse living;
ii) at the time of marriage one party was incapable of giving a valid consent because of unsoundness of mind or though capable of giving a valid consent, has been suffering for procreation of children or has been subject to recurrent attacks of insanity or epilepsy;
iii) At the time of marriage male has not completed the age of 21 years and the female the age of 18 years;
iv) At the time of marriage parties are in the prohibited relationship;
v) Either party was impotent at the time of marriage and of the institution of suit.\textsuperscript{42}

Section 25 of Special Marriage Act 1954. The grounds of voidable marriage is as follows:

i) Marriage has not to been consummated owing to the willful refusal of either party;

ii) Wife was pregnant at the time of marriage by another person than husband. Provided that the husband was ignorant of the fact. The suit shall be instituted within one year after discovery of the fact and the petitioner has not had marital intercourse with the respondent;

iii) Consent of either party to the marriage was obtained by fraud or coercion provided that suit is instituted within one year after discovery of the fact.

\textsuperscript{41} Ibid, p 14.
It is secular law. It gives equal right to male and female in void and voidable marriage; either party can approach the court and file case for declaration of void or voidable marriage.

2.11. Divorce

Divorce is important subject matter of family law. Divorce is honourable way to finish the marital relation between husband and wife. Personal laws provide this remedy to the spouses. Grounds of divorce under various laws areas follows: adultery, cruelty, desertion, disappearance for a continuous period of time, conversion to another religion, unsoundness of mind, imprisonment for commission of a serious offence, non-consummation of marriage, failure to maintain the wife, failure to perform marital obligations, impotency, pregnancy of the time of marriage, a spouse suffering from a communicable venereal disease, renunciation of material life (sanyasa), leprosy, husband being found guilty of rape, sodomy or bestiality, child marriage, consent obtained by force or fraud, polygamy, prohibited degrees of relationship, essential ceremonies to the marriage not performed (through) mutual consent.  

Divorces under various personal laws are given as under.

2.11.1. Hindu law

In classical Hindu law there was no provision for divorce. But customary law provides Divorce. Section 13 of Hindu Marriage Act, 1955 laid down grounds for divorce namely: Adultery, cruelty, conversion of the husband to other religion, incurable unsound mind, suffering incurable leprosy, venereal disease, renounce the world (Saunas), missing more than seven years, Party not having co-habitation for more than one year. Additionally wife has also given right to get divorce on following grounds: bigamy, guilty of rape, sodomy, marriage before 15 years of age of bride. Thus Hindu law provides just grounds for divorce. According to changing circumstances Hindu law also became modern. It gives right to get divorce to wife under certain cases. But

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generally husband and wife have got equal right to get divorce. It is gender just law. It has become humanitarian as compared to other personal laws.

2.11.2. Muslim Law

Divorce in pre-Islamic time was no formula to, and there was no check on the irresponsible power of the husband, a simple intimation from him to the effect that the tie was dissolved was considered sufficient.

Talak—when the dissolution of the marriage ties proceeds from the husband, it is called talak. The power of husband to give talak is absolute.

Khula—When it takes place at the instance of the wife, it is called khula.

Mubarat—When it is by mutual consent, it is called mubarat.

Talak-i- tafweez—It is divorce by wife in pursuance of an agreement giving her such power, where an agreement is made before or after the marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified conditions. It would be valid if the conditions are of a reasonable nature and not opposed to the policy of Mahommedan law.

Kinds of talak; i) oral talak and ii) talakanamaby written document.

Oral Talak are: i) Talak-us-sunnat; the Ahsan form,

   ii) Hasan form,

   iii) Talak-ul-bidaat,

   iv) Talak-ul-bain.

1). Talak- us- Sunnat : The Ahsan from- or hasan- The husband is required to submit to the following conditions: a) he must pronounce the formula of divorce once in a single sense; b) he must do so when the woman is in a state of purity (tahir) and there is no bar to connubial intercourse, nor has there been any during the state; and c) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three tahrirs. This latter clause is intended to demonstrate that the resolve, or the husband’s part to separate from the wife, is not a

passing whim, but is the result of a settled determination on the lapse of the term of three tahirs, the separati
takes effect as an irrevocable.

2). *Hasan form*—In the *hasan* from, the Husband is required to pronounce the formula three times during three successive tahirs, namely, three periods of purity of the wife. When the last formula is pronounced, the talak or divorce becomes irrevocable.

3). *Talak-ul-bidaat*—In the *talak-ul-bidaat*, the husband may pronounce the three formula at one time, whether the wife is in a state of tahir or not. The separation then takes effect definitely after the woman has fulfilled her iddat or period of probation.

4). *Talak – ul – bain*—When a definite and complete separation (*talak –ul-bain*) has taken place, the parties so separated cannot re-marry without the formality of the woman marring another man and the marriage consummated thereafter being divorced from him. 47

Capacity to *talakin Shia* doctrines—There are conditions essential to the capacity of pronouncing a valid talak.

a) Husband should have attained majority;
b) He should be of sound understanding;
c) He should act according to his own free will; there should be a testing intention to dissolve the marriage-tie.

Thus under *Shia* school *talak* by a minor is invalid. A repudiation obtained by fraud, or given under undue influence is also invalid. A talak pronounced under the influence of Intoxication or by one laboring under a temporary stupor from the use of some narcotic or any other course is invalid. 48

Capacity of talak under *Hanafi* Law—Among the Hanafis, the power of repudiation belongs in principle to every husband who is adult and sane. This power is certainly greater in the Hanafi than in any other *Sunni* school. According to *Hanafi* doctrines a *Talak* actually pronounced under the compulsion is valid. “A talak”, say the Alamgiri” pronounced by any husband who is of mature age (*baligh*) and of understanding (*aakil*) is effective, whether he be free or a slave, willing

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48 Ibid, pp 1558 & 1559.
or acting under compulsion, and even though it were uttered in sport or jest, or inadvertently by
a mere slip of the tongue. But he must be awake at the time when he pronounces the talk.”

Talak: difference between the Sunni and Shi'ah laws

i. The power of talak under the Sunni law is larger than that under the Shi'ah law.

ii. The conditions which surround the power to talak under the Shi'ah law, and limit its
    exercise, are accordingly stricter and far more rigid than under the Sunni law.

iii. According to the Sunni doctrines, talak may be affected by express terms (Sarih), which
    leave no doubt as to the intention of the repudiator, or by the use of ambiguous or
    implicative expression.

iv. Shi'ah doctrine – According to the Shi'ahs repudiation pronounced ‘implicatively’ or in
    ambiguous terms, does not take effect, whether there be intention on the part of the
    repudiator or not, or does it take effect if it be made dependent upon or subjected to any
    condition.

Besides the divergence existing between the Shi'ahs and the Hanifis regarding express and
implied talaks, there is marked difference between the two schools in respect of the capacity for
repudiation. The shi'ahs hold that, in order to pronounce valid talak, the repudiator must not only
be “adult” but must act of his own free will, and with the knowledge and comprehension of the
nature of what he is doing. The Sunnis, generally speaking, regard a repudiation pronounced by a
person who is Sui Juris as valid in law, without requiring him to fulfill any other condition.

Thus in Shi'ah and Sunni law and their other schools are also different practices of giving talak.
There is no uniform practice of giving talak.

Divorce under the Dissolution of Muslim Marriages Act, 1939.

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49Ibid. p 15

50S. H. A. Raza, Ameer Alis Commentaries on Mahommedan Law, Hind Publishing House Allahabad, 5th
This Act was passed to consolidate and clarify the provisions of Muslim law relating to suit for
dissolution of marriage by woman married under Muslim law and to remove doubts as to the
effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

Section 2 grounds for decree for dissolution of marriage – A woman married under Muslim law
shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the
following grounds, namely:

i) Husband not known for a period of four years;
ii) Husband has failed to provide her maintenance for a period of two years:
iii) Husband has been sentenced to imprisonment for seven or more years;
iv) Husband has failed to perform marital obligation without any reasonable cause for a period of
three years;
v) That the husband was impotent at the time of marriage and continues to be so;
vi) That the husband has been insane for a period of two years or is suffering from leprosy or a
virulent venereal disease;
vii) That wife married before fifteen years of age it can repudiated before attaining the age of
eighteen years; provided that the marriage has not been consummated;
viii) That the husband treats her with cruelty, that is to say,-
   a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct
does not amount to physical ill-treatment, or
b) Associates with women of evil repute or leads an infamous life or
   c) Attempts to force her to lead an immoral life or
d) Disposes of her property or prevents her exercising her legal rights over it, or
e) Obstructs her in the observance of her religious profession or practice, or
f) If he has more wives than one, does not treat her equally in accordance with the injunctions of
   the Qoran.
ix) Any other valid ground under Muslim law.

Thus under Muslim law unilateral talak is power given to the husband to divorce women at any
point of time without hearing the wife’s contention. Even wife has no say in this case.
In Muslim law women are given right to get divorce as follows;

i) *Mubarat*- Divorce by mutual consent.

ii) *Talak – i – tafweez*: Talak by wife according to agreement. In this form the husband delegate power of *talak* to wife or third person, also contingent divorce also recognized.

iii) Judicial Divorce- This is granted to woman under the Dissolution of Muslim Marriage Act, 1939. Under this Act Muslim women can get divorce through Court, by way of filing case against the husband.

In short it is patriarchal law. It has used principles of contracts in favour of male. The law is biased, against woman. Man can give divorce at his whims and fancies but a wife can get divorce from Court on specific grounds.

**2.11.3. Christian Law**

The Indian Divorce Act, 1869, has been substantially amended in 2001. Section 10 of The Divorce Act, 1869, gives grounds on which divorce may be granted. Those are:

i) Adultery,  
ii) Conversion to another religion,  
iii) Unsound mind,  
iv) Incurable leprosy,  
v) Incurable/ venereal disease,  
vi) Willful refusal to consummate the marriage,  
vii) Fail to comply the degree of restitution of conjugal right for a period of 2 years,  
viii) Deserted for two years,  
ix) Cruelty.

Section 10 (2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage been guilty of rape, sodomy or bestiality.  

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51 Kusum, Family law Lectures, Family law I Lexis Nexis, Butterworth Wadhwa Nagpur, Student serious Third Edition 2011 p 30
Section 10 (1) is equally applicable to male and female. Clause (2) of section 10 is given right to woman to file divorce petition for divorce against her husband. This Act is gender neutral as it gives equal right to male and female in divorce cases.

2.11.4. Parsi Law

The Parsi marriage and divorce Act, 1936, divorce can be sought under section 32 on the following grounds:

i. defendant willful refusal to consummate marriage;
ii. defendant is of unsound mind;
iii. it is incurable unsound mind, mental disorder, psychopathic disorder;
iv. the defendant at the time of marriage was pregnant by some person other than the plaintiff;
v. cruelty;
vi. cause grievous heart;
vii. sentence of imprisonment for seven years;
viii. desertion for two years;
ix. The defendant has ceased to be a Parsi by conversion to another religion.

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after plaintiff came to know of the fact. Thus period of limitation is of two years.

The Parsi Marriage and Divorce Act, 1939, have developed according to changing times. Now it has gender justice law.

2.11.5. Jewish Law

Under the modern Jewish law, the husband is entitled to petition the court for divorce on the following fault grounds:

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i. Wife’s adultery even on strong suspicion of her having committed this crime,
ii. Public violation of moral decency,
iii. Change of religion,
iv. Obstinate refusal of connubial rights during a whole year,
v. unjustified refusal to follow him to another domicile,
vi. insulting her father-in-law in the presence of her husband or insulting the husband himself,

vii. Certain incurable diseases.

In Jewish law, adultery by the wife is not only a matrimonial offence but also a criminal offence, the punishment for which was earlier death by stoning.

The wife could also obtain divorce from her husband under the modified Jewish law on the following fault grounds:-

i. loathsome chronic diseases,
ii. a disgusting trade in which the husband engages after marriage,
iii. Repeated ill treatment,
iv. change of religion by husband,
v. notorious dissoluteness of morals,
vi. wasting his property and refusing to support her,
vii. Having committed a crime, compelling him to flee the country,
viii. Impotency or persistent refusal of matrimonial intercourse.\(^5^3\)

Jewish law of divorce is gender biased - it has declared adultery as one of the ground for divorce. The ground of adultery for divorce is available to the husband and same is not allowed to wife. Insulting is one of the grounds available to the husband but same is not available to wife. Noticeable thing is male and female are having different grounds for divorce.

**2.11.6. Tribal law**

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\(^5^3\) Flavia Agnes, Family Law Volume IFamily Laws and Constitutional Claims, Oxford University press, New Delhi, 2011. P 90
Tribal laws are not codified; therefore, their customary laws are going to apply for divorce.

2.11.7. The Special Marriage Act, 1954

Section 27. Divorce—(I) subject to the provisions of this Act and to the rules made there under, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent—

a) Committed adultery,

b) Has deserted her for not less than two years,

c) Sentenced for more than seven years under Indian penal code,

d) Cruelty,

e) Unsound mind,

f) Venereal disease,

g) Leprosy,

h) Has not been heard of as being alive for a period of seven years.

Section 28. Divorce by mutual consent also provided. This provision inserted by way of amendment in 1970. In 1976 again two more grounds were added for getting divorce for wife., namely; i) husband is guilty of rape, sodomy or bestiality, ii) cohabitation between the parties has not been resumed for one year or upwards.\(^{54}\)

The Special Marriage Act, 1872, was passed during British period. It was repealed and new act was passed in the year 1954. Again it has been amended according to changing times. Under this Act male and female have got same right for filing petition for divorce in the court of law. It is gender just and secular law. It is useful to resolve dispute of conflict of law.

2.12. Judicial Separation

Judicial separation is one of the matrimonial reliefs provided under the personal law statutes. In judicial separation the legal relationship of the husband and wife subsists and the door for reapprochement are open. The large number of applications are filed for judicial separation for getting divorce after lapse of one year.

2.12.1 Hindu Law

Section 10 of Hindu Marriage Act, 1955, deals with Judicial Separation. Whatever grounds are available for divorce; those are also available to judicial separation. Prior to 1976, the grounds for judicial separation were: i) desertion for not less than two years, ii) cruelty, iii) leprosy, iv) venereal disease, v) unsoundness of mind, vi) adultery.  

2.12.2 Muslim Law

The relief of judicial separation does not exist under Muslim Law.

2.12.3 Christian Law

Chapter V of Divorce Act, 1869, deals with judicial separation. Section 22 has given power to the husband or wife to obtain a decree for judicial separation on the grounds of adultery or cruelty or desertion for two years or upwards. Thus the grounds for judicial separation are very limited.

2.12.4 Parsi Law

Under the Parsi Marriage and Divorce Act, 1936, Section 34 provide remedy for judicial separation. The grounds for divorce and judicial separation are common.

2.12.5 Special Marriage Act, 1954

The position under the Special Marriage Act, 1954 is the same as under the Hindu Marriage Act, 1955, and the grounds for separation and divorce are common.

2.13 Restitution of Conjugal Rights

Restitution of conjugal right is one of the reliefs available to spouses. The idea of providing restitution of conjugal right is to provide tie as far as possible.

56 Ibid, p 34.

Section 9:- Restitution of Conjugal Rights- when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Where a question arises whether there has been reasonable excuse shall be on the person who has withdrawn from the society. 57

2.13.2. Muslim Law

Restitution of conjugal Rights. Where a wife without lawful cause refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights and similarly the wife has the right to demand the fulfillment by the husband of his marital duties. 58

2.13.3. Christian Law

The Divorce Act, 1869, Chapter VII – Restitution of Conjugal Rights have been granted to wife and husband equally. Either party can approach the district court under section 32, for said relief.

2.13.4. Parsi Law

Section 36 of Parsi Marriage and Divorce Act, 1936, provided remedy for restitution of conjugal rights. The husband and wife have been given equal rights to get restitution of conjugal rights.

2.13.5. Special Marriage Act, 1954

Section 22 of the Special Marriage Act, 1954, has provided remedy of restitution of conjugal rights. The husband and wife have been given equal rights. Thus the remedies under restitution

of Conjugal rights have given equal rights to both spouses. There is criticism against this provision. It is violating human right of the person.

2.14. Maintenance

Maintenance refers to payments which a husband is under an obligation to make to a wife either during the subsistence of the marriage or upon separation or divorce, under certain circumstances. This liability of the husband flows from the bond of matrimony. A wife is entitled to claim maintenance under the personal laws as well as under the provision of the Code of Criminal Procedure, 1973. 59

2.14.1. Hindu Law

In Hindu law, there are two statutes which provide for maintenance, viz., the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956.


Section 24 of the Act provides maintenance pendente lite and expenses of proceedings. The husband or wife can claim maintenance if either of the party has not sufficient income for maintenance and expenses of proceedings. Section 25 of the Act has provided Permanent alimony and maintenance. The court may grant final order for maintenance in favour of wife or husband. 60

2.14.1.2. Hindu Adoptions and Maintenance Act, 1956

A Hindu wife has the advantage of an additional statute. The claim for separate maintenance under this provision can be made only when there is a subsisting marriage. Under section 18 of this Act a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance, provided her separate living is justified which means that the husband:-

60 Ibid. p 217.
i. is guilty of desertion;
ii. has treated her with cruelty;
iii. suffering from leprosy;
iv. bigamy;
v. keeps a concubine;
vi. conversion to another religion;
vii. Any other justifying cause.

Thus, Hindu law takes very much care of maintenance of wife as well as husband.

2.14.2. Muslim Law

The concept of maintenance to wife in Muslim law is not available except Iddat Period. After divorce only three month husband has responsibility to maintain his divorced wife.

The Divorced wife can claim maintenance under section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986.\textsuperscript{61}

Section 4: Order for payment of maintenance- under this Act the husband shall maintain his wife. If the husband is not in a position to maintain his wife then their relatives, or the relatives who inherit her property. If the relatives of natal or marital family are not in a position to maintain her then the State Wakf Board shall pay maintenance to the divorced woman. Thus the woman who is not getting maintenance from her relatives she can get maintenance from State Wakf Board. This provision is very revolutionary. The poor people can claim maintenance is considered sympathetically in this Act, which is unique provision in all personal laws as well as section 125 of Criminal Procedure Code, 1973.

2.14.3. Christian Law

Section 36 and 37 of the Divorce Act 1869, wife can claim Maintenance from her husband. Husband is not provided relief under this Act.\textsuperscript{62}

\textsuperscript{61}Kusum, Family law Lectures, Family law I Lexis Nexis, Butterworth WadhwaNagpur, Student serious Third Edition 2011p. 220
2.14.4. Parsi Law

Section 39 and 40 of the Parsi Marriage and Divorce Act, 1936, provided maintenance to wife as well as husband. This provision is gender just.  

2.14.5. Special Marriage Act

Section 36 and 37 of the Special Marriage Act, 1954 provided for alimony pendent lite and permanent alimony and maintenance for the wife, respectively. Unlike the Hindu Marriage Act, 1955, there is no provision for maintenance for the husband.

2.14.6 Code of Criminal Procedure, 1973

Section 125. Order for maintenance of wives, children and parents. Wife can claim maintenance under this section from her husband. It is totally secular and humanitarian law. It is applicable to all citizen of India. The proceedings are summary and expeditious.

Thus maintenance has provided under every personal law to the wife. Husband also can get maintenance under Hindu law and Parsi law. Rest of the other laws do not provide maintenance to husband.

2.15. Succession

Religion played a very important role in the formation of succession laws. The succession laws, codified separately to different religions, neglected the women and gave an unequal status to them. Thus in India the succession to property is based on religion of Hindu, Muslim, Christians, and Parsis. In various communities, succession laws are as follows.

2.15.1. Hindu law

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Ibid, p 218.
Ibid, p 218.
Ibid, p 235.
Hindu Succession Act, 1956 governs succession matters. It has brought certain changes in the traditional law relating to interstate succession among the Hindus. Some of them are as follows:

It is applicable to Mitaksara and Dayabhga schools. It is comprehensive uniform system of inheritance. II) Section 4 of the Act abrogates all the rules of the law of succession hitherto applicable to the Hindus either by any text of Hindu law or by custom having the force of law. III) Section 8-13 of the Act lay down a set of general rules for succession to the property of a male Hindu dying intestate. IV) Section 8 of the Act provides for abolition of separate or self acquired property of the male intestate for the purpose of succession. V) The Hindu women’s limited estate has been abolished and any property held by a female Hindu is now regarded as her absolute property.  

Section 8. General rules of succession in the case of males- The property of a male Hindu dying intestate shall devolve according to these provisions : a) firstly, upon the heirs, being the relatives specified in class I of the Schedule; b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased ; and d) lastly, if there is no agnate, then upon the cognates of the deceased.

Section 9. Order of succession among heirs in the Schedule. Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

Section 10. Distribution of property among heirs in class I of the Schedule-In accordance with the following rules: -

Rule 1.- The intestate’s widow, or if there are more widows than one, all the widows together, shall take one share.
Rule 2. - The surviving sons and daughters and the mother of the intestate shall each take one share.

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66 H. K. Saharay, Family Law in India, Eastern Law House,Kolkata,2011 p 150.s
Rule 3. - The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4. - The distribution of the share referred to in rule 3:-

i) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

ii) Among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equally.

Section 14. Property of a female Hindu to be her absolute property.- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Section 15. General rules of succession in the case of female Hindus.- (1) The property of a female Hindu dying shall devolve according to the rules set out in Section 16 -(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;(b) secondly, upon the heirs of the husband;(c) thirdly, upon the mother and father;(d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother.

Section 17. Special provisions respecting persons governed by Marumakattayam and aliyasantana laws.

Thus the Hindu Succession Act, 1956, is modern gender just law. There is no major discrimination between male and female as well as son and daughter. It has done injustice to the father. In the case of Father and mother Father has been kept in a class II heir and mother has keep in class I heir.

2.15.2. Muslim Law

There are certain rules of inheritance under the Muslim law namely:-

i. No distinction between ancestral and self acquired property.
ii. Doctrine of representation. The Sunni law does not recognize the doctrine of representation for the purpose of succession. But Shia law recognizes this.

iii. No transfer of the right of succession. A person cannot transfer his right of succession to the property.

iv. Life estate is not recognized.

v. Joint family is not accepted.

vi. Homicide: Sunni law bars succession in case of homicide of the person whom he inherits. Shia law is not a bar to succession unless the murder is caused with mens rea.67

Before discussing further the rules of succession it is worth noting that:
The rules of succession are complicated and mathematically set out and it is observed that the females get less than the male counterparts in a similar condition, i.e., son gets more than daughter and so on. It is keeping up with old tradition that the males had more responsibilities than the females, which is changing today. In spite of the fact that the prophet gave shares to females at very early period of formation of Muslim law, law has remained behind today and gender injustice to females persists.

*Classes of Heirs:* Classes of heirs are: (1) Sharers. (2) Residuaries, and (3) Distant Kindred.

Class 1) Sharers: Sharers are persons who are entitled to prescribed shares under inheritance. The Sharers and their shares under Sunni law are as follows:

1) Father is entitled to one-sixth share when there is a child or a child of a son. But if there is no child or a child of a son, the father takes the rest of the property as a residuary.

2) True grandfather is entitled to one-sixth share when there is a child or a child of a son of the deceased but there is no father. But there is no child or child of a son or father of the deceased, the true grandfather inherits as a residuary.

3) Husband inherits one-fourth share where there is a child or a child of a son. But he inherits one-half share when there is no child or child of a son.

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4) Wife or wives collectively inherit one-eighth share where there is a child or a child of a son of the deceased. But wife or wives collectively take one-half share when there is no child or child of a son.

5) Mother inherit one-sixth share where there is child or child of a son or where there are two or more brothers or sisters or one brother and sister. But mother takes one-third where there is no child or child of a son or brother or sister more than one. If there are wife or husband and the father, mother takes one-third of the remaining estate after satisfaction of the claim of wife or husband.

6) True grandmother or grandmothers jointly inherit one-sixth share when there is no paternal or maternal mother or paternal father or nearer true grandmother, paternal or maternal.

7) Daughter, if one, inherits one-half share; but in case of two or more daughter, they jointly inherit two-thirds share when there is no son. When there is a son, the daughter becomes a residuary.

8) Son’s daughter, if one, inherits one half, in case of two or more, they jointly inherit two-thirds if there is no son, daughter or higher relation than son’s daughter. When there is a daughter will take one-sixth share.

9) Uterine brother or sister, if one, inherits one-sixth and in case of two or more, they jointly inherit one-third when there is no child or child of a son or father or true grandfather.

10) Full sister, if one, inherits one-half share; in case of two or more full sisters, they jointly inherit two-thirds when there is no child, child of a son, father, true grandfather, or full brother. If there is a full brother, she becomes a residuary.

11) Consanguine sister, if one, inherits one-half; and in case of two or more, they jointly inherit two-thirds if there is no child, child of a son, father, true grandfather, full brother, full sister or consanguine brother. If there is a consanguine brother, she becomes a residuary.68

Class 2) Residuaries: residuaries are persons who do not take any prescribed shares but are entitled to succeed to the property of the deceased out of the estate after satisfying the claims of sharers. When there is no sharer, the entire estate is distributed among the residuaries. Even when there are sharers, any residue left after satisfying their claims is distributed among the residuaries. ⁶⁹

Class 3) Distant kindred: distant kindred are persons who fall neither in the category of sharers nor in the category of residuaries. They are blood relations of the deceased. If there is no sharer or residuary, the estate of a deceased is distributed amongst distant kindred. Distant kindred are divided into four classes:

i. Descendants of the deceased other than sharers and residuaries;
ii. Ascendants of the deceased other than sharers and residuaries;
iii. Descendants of parents other than sharers and residuaries; and
iv. Descendants of ascendants other than residuaries.

Rules of preference among distant kindred:

i. The nearer of the kindred of the deceased excludes the more remote kindred.
ii. The children of sharers or residuaries are preferred to other kindred amongst the kindred in the same degree of relationship. ⁷⁰

Shia law of inheritance. The Shias divide heirs into two groups, namely, i) heirs by consanguinity, that is, blood relations, and ii) heirs by marriage, that is, husband and wife.

Three classes of heirs by consanguinity.- each class is sub-divided into two sections. These are as follows:

I) a) Parents; b) Children and other lineal descendants H.L.S.
II) a) Grandparents h.h.s. (true as well as false); b) brothers and sisters and their descendants h.l.s.

⁶⁹Ibid p 206.
⁷⁰Ibid, p 209.
III) a) Paternal, and b) maternal, uncles and aunts, of the deceased, and of his parents and grandparents h.h.s, and their descendants h.l.s. These three classes of heirs, the first excludes the second from inheritance, and the second excludes the third.

But the heirs of the two section of each class succeed together, the nearer degree in each section excluding the more remote in that section. 71

Islamic law does not differentiate between the ancestral and self-acquired property or even movable and immovable property. Islamic laws of inheritance are complex. It is awarded half a share to the woman in the same category. For example son and daughter. 72  These laws of inheritance does not recognize the doctrine of representation. If a Muslim had two sons, one of his son died during the life time of the father, living his son and then the father died then the property goes to the living son and not to the heirs of the deceased son. After marriage the property of the wife does not merge with that of her husband.

Thus in Islam woman is not treated at par with the male in the cases of inheritance. The rule of inheritance of Sunni and Shia are also different. Local customs are also followed by the people. For instance, the Mopillahs of Kerala and Lakshadweep Island did not follow the Sharit. Instead, they adopted the Matrilineal tradition prevalent in this region. 73 Thus, uniform Muslim inheritance law is not applicable in India.

2.15.3. Christian Law

Indian Succession Act, 1925, deals with the intestate succession of Christian community. The main provisions of succession areas follows:

Section 32. Devolution of intestate property- The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules.

73 Ibid. P 45.
Section 33. Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.-Where the intestate has left a widow:

Share of widow - i) If the husband has left lineal descendants i.e. child, children, or remote issue, the widow’s share is one-third and the remaining two-third will go to the lineal descendants of the husband.

ii) Subject to the provisions of Sec.33A, if the husband has left no lineal descendants but has left father, mother, etc., then the widow’s share is one-half and the remaining one-half will go to the kindred.

iii) But if there are no kindred, the widow gets the whole.74

Section 35. Rights of Widower - A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband’s if he dies intestate.

This section says that what rules are applicable to the widow under section 33 and 33A also apply to the widower.

Section 37. Where intestate has left child or children only- Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Section 38. Where intestate has left no child, but grandchild or grandchildren - Where the intestate has not left surviving him any child but has left a grandchild and grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchildren if there is one, or shall be equally divided among all his surviving grandchildren.

Section 39. Where intestate has left only great-grandchildren or remoter lineal descendants - When there are great-grandchildren or other remote lineal descendants all in the same degree only, they share equally, both males and females.

Section 40. Where intestate leaves lineal descendants not all in same degree of kindred to him and those through whom the more remote are descendants are dead.

Shares of lineal descendants; Share of children, grandchildren and great-grandchildren and other lineal descendants, (i.e. lineal descendants who do not all stand in the same degree of kindred). Equal, per stripes, i.e. grandchildren and great-grandchildren take equally between them their deceased parent’s share.  

Distribution of intestate property where there are no lineal descendants. In this case widow gets either half or the whole property. Rule given in Section 42 to 48.

Section 42. Whether intestate’s father living- If father the intestate’s father is living, he shall succeed to the property. The Father’s Share- 1) one-half when the intestate leaves a widow, 2) Whole when the intestate has left no widow.

Section 43. Where intestate’s father dead, but his mother, brother and sisters living - If the intestate’s father is dead, but the intestate’s mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Section 44. Where intestate’s father dead his mother, a brother or sister, and children of any deceased brother or sister, living.- Here the equal share given to the relatives of same degree. The children of the deceased sister or brother will get share as per strips.

Section 45. Where intestate’s father dead and his mother and children of any deceased brother or sister or mother, brother and sister get equal shares, if a deceased brother has more than one child then all children get one share of their father and get distributed equally among them.

75 K. kannan, Paruck The Indian Succession Act, Lexis Nexis Butterworth’s Wadhwa Nagpur, Tenth Edition 2011 p.91
Section 46. Where intestate’s father dead, but his mother living and no brother, sister, nephew or niece. The whole property shall goes to the mother.

Section 47. Where intestate has left neither lineal descendant, nor father, nor mother. The property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate’s death.

Section 48. Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister. In such case the property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Section 34. Where intestate has left no widow, and where he has left no kindred. Then the property goes to the government.

The Indian Succession Act, 1925, is a progressive piece of legislation as it grants equal rights to daughters and sons in parental property. The concept of ancestral property or coparcenary is also not recognized. Hence it provides greater safeguards to women than the Hindu legal system (including the Hindu Succession Act of 1956) as well as the Muslim and Parsi (until it was amended in 1991) legal systems. But this legislation seemed to apply mainly to Europeans and other foreigners than the Indian Christians, as large section of the Christian community, which was governed by customary laws, was excluded from the application of this Act. 76

2.15.4. Parsi Law

The Indian Succession Act, 1925, contains the provisions for Parsi intestate in Sections 50 to 56.

Section 50. General Principles relating to intestate succession.

a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;

b) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or [a widow or widower of any lineal descendant] shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and

c) where a [widow or widower of any relative] of an intestate has married again in the lifetime of the intestate,[such widow or widower]shall not be received any share of the property of which the intestate has died intestate, and [such widow or widower]shall be deemed not to be existing at the intestate’s death.

Section 51. Division of intestate’s property among widow, widower, children and parents.-

1) Subject to the provisions of sub-section (2), the property of which a male parsi dies intestate shall be divided-

   (a) Where such Parsi dies leaving a widow or widower and children, among the widow or widower, and children so that the widow or widower and each child equal shares;

   (b) Where such Parsi dies leaving children, but no widow or widower, among the children in equal shares.

(2) where a parsi dies leaving one or both parents in addition to children or widow or widower and children, the property of which such parsi dies intestate shall be so divided that the parent or each of the parents shall receive a share equal of half the share of each child.

Section 53. Division of share of predeceased child of intestate leaving lineal descendant.

Section 54. Division of property where intestate leaves no lineal descendant but leaves a widow or widower or a widow or widower of any lineal descendant.

Section 55. Division of property where intestate leaves neither lineal descendants nor a widow or widower, nor [a widow or widower of any lineal descendant].-

Section 56. Division of property where there is no relative entitled to succeed under the other provisions of this Chapter.-
In 1991, by amending the succession laws, the discrimination between female and male descendants was abolished. Son-in-law also given share in the property of the in-laws parents. In conclusion, it is obvious that it is only through its political and economic significance during the colonial rule that the Parsi community could negotiate for a separate law, where none existed. The leaders of the community, during each phase of reform, have ensured that the law does not lag behind the dominant social norms, that is, of the British, during colonial rule and of the Hindu, in the post-colonial rule. This is complimentary policy to family reforms; which is healthy for the protection of human right and healthy development of family and social life.

2.15.5. Jewish Law

Personal laws of the Jews are not recognized testamentary and intestate succession. Therefore the Indian succession Act is going to apply to decide the cases of succession. The Jews are very less in number so they might have been going to settle their matters according to local custom.

2.15.6. Triballaws

Tribal laws are not codified therefore their customary laws of succession is going to apply. Whether that tribal belongs to Hindu, Muslim, Christian or Buddhist religion. Religious personal laws are not going to govern to their matter of succession.

2.15.7. Special Marriage Act, 1954

This is also going to govern according to Indian Succession Act, 1925. Even the person belongs to Hindu community in certain circumstances Indian Succession Act is going to apply.

Thus it come across that the personal laws are by and large are gender biased. They are against woman and proman.

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77 Flavia Agnes, Family Law Volume II Family Laws and Constitutional Claims, Oxford University press, New Delhi, 2011. P 84
79 Ibid, p 7
2.16. Testamentary succession

The Indian Succession Act, 1925, is going to use for testamentary succession of Hindu, Christian, Parsi and Jews. Every person of sound mind not a minor may dispose of his property by will. According to Jarman, “will is an instrument by which a person makes a deposition of his property to take effect after his death and which is in its own nature ambulatory and revocable during his life”.

Essential Characters of a will: i) there must be legal declaration. ii) The declaration must be with respect to the property of the testator. iii) The declaration must be to the effect that it is to operate after the death of testator.

The purpose of the will- a will may be made: I) for the disposal of the property of the testator after his death and of appointing an executor; II) for appointing a testamentary guardian; III) for exercising a power of appointment; and IV) for revoking or altering a previous will.

Wills are of two kinds: unprivileged will and privileged will. Hindu can make a will up of his whole property.

Muslim law has its own provision for testamentary succession. Conditions for a valid will; i) every Muslim of sound mind and not a minor may make a will; ii) a will may be made either orally or in writing; iii) A Muslim cannot make will more than one-third of the surplus of his estate after payment of funeral expenses and debts iv) Bequests in excess of the legal third cannot be operative unless the heirs consent thereto after the death of the testator. The limit of one-third is not laid down in the Koran. This limit is imposed by subsequent sanction. But the Koran has provided that a Mahommedan should not dispose of his property by will as to leave his heirs destitute. Thus the limit of one-third of testamentary power is to benefit solely the heirs.

2.17. Guardianship and Custody

Ibid, p 20
Guardianship and custody of children is an important component of matrimonial relationships. The subject assumes great significance when parents fall out and battle in courts over the custody of their children. The distinction between guardianship and custody:
(a) Custody is granted specifically as a matrimonial relief to parent who seek such Custody, whereas guardianship exists at law. (b) A guardian need not be a custodian; or a custodian, a guardian of the child. However, a guardian, even if he does not have custody, may yet, by virtue of his guardianship status, exercise powers regarding marriage or education of the child, and move the court if required, for appropriate orders. All the personal law matrimonial statutes make provisions for dealing with the issue of child custody. The provisions in the matrimonial Acts can however, be invoked only when there are some proceedings pending under the Act.83

2.17.1. Hindu Law

The Hindu Minority and Guardianship Act, 1956, Section 4 (a) “minor” means a person who has not completed the age of eighteen years; (b) “Guardian” means (1) a natural guardian, (2) a Testamentary guardians, (3) a guardian appointed or declared by a court, and (4) a person empowered to act as such by or under any enactment relating to any Court of Wards.

Section 6. Natural guardians of a Hindu minor - The natural guardians of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are-

(a) In the case of a boy or an unmarried girl- the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
(b) In the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;
(c) In the case of a married girl-the husband.

83 Kusum, Family law Lectures, Family law I Lexis Nexis, Butterworth’s Wadhwa Nagpur, Student serious Third Edition 2011 p 303
Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) If he has ceased to be a Hindu, or
(b) If he completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or Sanyasi).

Explanation- In this Section, the expressions “father” and “mother” do not include a step-father and a step-mother.  

Thus farther is considered Natural guardian. After father mother has consider second guardian. It is discriminatory provision against woman.

2.17.2. Muslim law

Hizanat, the guardianship of the person of a minor is only custody for the rearing up of the child and the right of Hizanat of tender age under Sunni Law belongs to the mother of a male child until he has completed the age of seven years and of her female child until she has attained puberty and under Shia Law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the above age, the custody belongs to the father. Thus Sunni and Shia law of guardian and custody of minor is not same. But they are male dominated. Father has considered natural guardian.

2.17.3. The Guardian and Wards Act, 1890

This is a secular legislation for appointment and declaration of guardian. It is applicable to all irrespective of their personal laws. According to the Section 24 of The Guardians and Wards Act, 1890, a guardian of the person of a ward is charged with the custody of the ward and must look for his support, health and education, and such other matters as the law to which the ward is subject requires. As per Section 20 of the Act, a guardian stands in a fiduciary relation to his

84 Kusum, Family law Lectures, Family law I Lexis Nexis, Butterworth’s Wadhwa Nagpur, Student serious Third Edition 2011 p 303
ward, and, saves as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

According to Guardian and Wards Act, 1890, the Court shall consider the following in appointing a guardian: 1) the personal law applicable; 2) the welfare of the child; 3) The wishes of the child if he or she is old enough to form an intelligent preference. It has been held that a child below 6 years of age is not fit to express an intelligent preference, but if the child is above this age, the Court will take its wishes into account. Thus this is gender just law. It shall apply to Christian, Parsi, Jewish, and tribal communities. Thus in present situation in all cases the deciding factor of the guardianship is the welfare of the child.86

2.18. Adoption

In India, adoption has been recognized for centuries, but being a part of personal laws, there is no uniformity among the different communities.

2.18.1. Hindu law

The Hindu law is the only law which recognizes adoption in the true sense of taking of a son as a substitute for a natural born one. The reason for this is partly due to the family, particularly that of the father.87 The comprehensive legislation has passed. The Hindu Adoptions and Maintenance Act, 1956, is the only codified personal law. This law of adoption enables a childless person to make somebody else’s child as his own. Under this Act a female Hindu is capable to take a son or daughter in adoption. Thus it has made gender just law. It has given detail provisions of: Capacity of a male Hindu to take in adoption, Capacity of a female Hindu to take in adoption, Persons capable of giving in adoption, Person who may be adopted, Conditions for a valid adoption and Effect of adoption.

2.18.2. Adoption in Other Personal laws

86Ibid. p 146.
Adoption not recognized by Muslim law. Christian law has no provision for adoption. Parsi and Jewish laws also not having provision for adoption. Tribal laws are having customary practice of adoption but it is not codified. There is demand for uniform adoption law for all communities.

2.19. Conclusion

Following are the concluding remarks

1) Marriage, divorce, custody of children, maintenance, succession, testamentary succession are found in Hindu, Muslim, Parsee, Christian, Jewish and other family laws of India. There are however differences between them arising out of multi cultural diversity.

2) As most of them are based originally on particular religion, and their sources being diverse they do not show total separation of State and Law. Thus marriage ceremonies, conditions for marriage, manners of divorce, adoption ceremonies, have a religious connection. Some laws are more secular than others, the extent varying from law to law.

3) Practically all the laws were patriarchal in nature, though the extent differed from religion to religion. Consequently they suffered from gender bias. Many gender biases have been corrected through amendments or through case law. Under affirmative action a few provisions have been added for benefit of women and children.

4) There is ever increasing demand from the feminist movement to bring change as early as possible and give immediate relief to the women as a whole.

5) There are some advantages of official registration of marriage, such as fact of marriage, evidence of marriage, as to performance of marriage etc. There are some difficulties posed such as its practicability over each and every Indian in the subcontinent. There is a need to move the practice of official registration either before, simultaneously or after or without the religious ceremony. It can be optional at the beginning.

With this background in view it is decided to discuss in Chapter III Approaches to Uniform Civil Code.