

## PERSONAL LAW AND CHILDREN

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### ABSTRACT

India is a country of multi-religions and multi languages. Number of people is governed by their personal laws. It leads to different treatment meted out to different classes of people in their personal laws. The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs, i.e., marriage, divorce, succession, guardianship, custody, maintenance, inheritance, acknowledgment (legitimacy /illegitimacy) , adoption , change of religion etc. India's history, its people and the phenomenon of various personal laws make it an ideal legal system. There is a generally applicable Indian law that applies to all Indians irrespective of their religion. In the personal law sphere, we find a system of concurrent personal laws that applies to members of the various communities in India. As part of this personal law system, is an optional secular system of personal law. In this contribution the following is investigated: the meaning of 'personal law and children' in India, the variety of personal law systems applicable in India and the circumstances surrounding the so-called need of uniform civil code for welfare of children. The uniform civil code as envisaged in the article 44 of the constitution includes inter alia, entire gambit of family laws. Our country is the second largest populated country in the world and we also have the second largest child population after china and as we see around, we still need to have to take measures to secure child rights for our children. The recommendations of the Indian law reform commission and the constitutional court would be to harmonize or unify the common and customary law of succession, or rather to enact new unique intestate succession laws, applying to all Indian children equally.

## INTRODUCTION

Personal law emerges from the religion as natural law philosopher develop law from the nature and religion. The norms which are derived for children rights from cradle to grave are totally depend upon their personal laws which is religion. There is lack of uniform rule for the well nourishment and upbringing of the children as different religion follow their own principal for cast children in the shadow of their own religion. Personal law is not realm of the religion as custom build up concrete faith in god no religion teaches us unsocial behavior. In modern organization our children are future leader and we have to made them a good citizen with social and religious feedback so that they never do anything against the law and society and protect our basic principal of personal law and morality.

Personal laws are the laws which are applicable to a particular religion in common and those laws which govern the religion. These can be the custom or the legislation that has been followed for a long period of time and these are the laws from where these religions have also derived their basis and the law on these have developed and evolved. The people have been following these laws for a long period of time and these are prevalent to the people of their religion. These laws have been established keeping in mind the various beliefs and sentiments of the people.

The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs and the personal law and main issue regarding children are i.e., marriage, divorce, succession, guardianship, custody, maintenance, inheritance, acknowledgment (legitimacy /illegitimacy), adoption, change of religion, etc. Instead of above issue the most important factor which are deal by all nations are environment, welfare, rehabilitation, abused and violence, disabled child etc.

Definition of child include both male females irrespective of sex under 18 years. Personal law is defined as a law that applies to a certain class or group of people or a particular person, based on the religions, faith, and culture. In India, everyone belongs to different caste, religion and have their own faith and belief. Their belief is decided by the sets of laws and these laws are made by considering different customs followed by that religion.

In India, our judicial system still allows the practice of personal law. This means, that every religious community or group can practice and follow the rules and regulations of their own laws, up to a certain point. In personal cases, courts are required to work with the personal laws when the issue is not being covered by any statutory law.

Hindus personal laws can be found in: The 'Shruti' which contains all the four Vedas<sup>i</sup> and Shmriti. Personal Laws and customs as recognised by the statutory law regulate the Hindus. These are applicable to legal issues related to matters of inheritance, succession, marriage, adoption, co-parenting, the partition of family property, obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable donations. The Main sources of the Hindu law are the customs and legislation, from where the law has been derived.

Sources of Muslim Personal Law, The Holy Quran, Ijma, Qiyas, etc. The sayings and teachings of Prophet Mohammed carefully preserved in tradition and passed down generation to generation by holy men. Personal laws and customs govern the Muslims. It applies to all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre-emption.

## **CHILD MARRIAGE**

Child marriage in India, according to the Indian law, is a marriage where either the woman is below age 18 or the man is below age 21<sup>ii</sup>. Child marriage was outlawed in 1929, under Indian law. However, in the British colonial times, the legal minimum age of marriage was set at 14 for girls and 18 for boys. Under protests from Muslim organizations in the undivided British India, a personal law Shariat Act was passed in 1937 that allowed child marriages with consent from girl's guardian. After independence and adoption of Indian constitution in 1950, the child marriage act has undergone several revisions. But once a child marriage is done it cannot be challenged in the court of law, though the parents can be held liable for their consent. The child marriage prevention laws have been challenged in Indian courts, with some Muslim Indian organizations seeking no minimum age and that the age matter be left to their personal law. Child marriage is an active political subject as well as a subject of continuing cases under review in the highest courts of India. Jharkhand is the state with highest child marriage rates in India, while Kerala is the only state where child marriage rates have increased in recent years.

Child marriage is complex subject under Indian personal law. Various other High courts in India - including the Gujarat High Court, the Karnataka High Court and the Madras High Court - have ruled that the act prevails over any personal law (including Muslim personal law).

### ***Origin and causes of child marriage***

- The origin of child marriages in India to be the Muslim invasions.
- Invaders raped unmarried Hindu girls or carried them off as booty.
- Hindu communities to marry off their daughters almost from birth to protect them.
- Poverty
- Poor socio-economic conditions
- Dowry

### ***Consequences of child marriage***

- Early maternal deaths
- Infant health
- Fertility outcomes
- Violence

## **LEGITIMACY AND PARENTAGE**

Under almost all the personal laws the right to inheritance of the legitimate children and the illegitimate children are not the similar. Illegitimacy carried a strong social stigma among all religions practised in the world. Premarital sexual relationship and extramarital sexual relationship are considered to be a sin in almost all the societies. So, the resultant child of such offensive relationship is also kept in a state of sin. It is considered illegitimate. Almost all the personal laws in India are religion-based and so even under law, the children born out of such offensive relationship are not given equal status with the children born out of a lawful wedlock.

The courts in India decide a child to be legitimate or illegitimate depending on the following criteria: A child born within lawful wedlock is a legitimate child. At the time of the birth of the child, if the father and mother of the child are legally married to each other, the child is a

legitimate child. A child born outside the lawful wedlock is an illegitimate child. At the time of the birth of the child, if the father and mother of the child are not legally married to each other, the child is an illegitimate child.

Under the Hindu Law, if a marriage fulfils all the conditions laid down in Section 7 and Section 5 of the Hindu Marriage Act, 1955 it is considered to be a valid marriage. Children born of such a valid marriage are alone considered legitimate. If the conditions lay down under Section 5 of the Act, are not satisfied, the resultant marriage may be void or voidable marriage as per Sections 11 and 12 of the Act. The children born of such a marriage are considered to be illegitimate children. Hence, children who will fall under the category of the illegitimate children under Hindu Law may be summed up as follows:

- Children born of void marriage;
- Children born of annulled/voidable marriage;
- Children born of illicit relationship;
- Children born through concubinage; and
- Children born of a marriage which is not valid for want of proper ceremonies.

In essence, under Hindu law the rule of legitimacy is dependent upon the marriage<sup>iii</sup>.

Paternity is the relationship between a child and his paternal figure, i.e. his father. Parentage under Muslim law is not a matter of fact. The only way to establish paternity is by marriage to the mother of the child. So as per Islamic law, maternity is by fact but paternity can only be by marriage.

Hence, if there is no marriage between the mother and the father of the child, then such a child is illegitimate. And as per Sunni Law, such child has no paternity. And according to Shia Law, such a child has neither paternity nor maternity. By conclusion parentage under Muslim law is only available to a legitimate child.

Under Muslim law, only direct or indirect marriage between the begetter and the bearer of a child can establish the legitimacy of children. If there is not a lawful and direct marriage between the said people, then an indirect marriage can be established if,

- There is cohabitation of the father and the mother



- The father acknowledges the mother as his wife

The father acknowledges the child as his own. So, if the marriage cannot be proven between the father and mother, or there is a doubt as to the paternity of the child, the father can choose to acknowledge the child as his own. This is true for both sons and daughters. It is known as *ikrar-e-nasab*. Also, such acknowledgement need not be expressed, it can also be implied by conduct<sup>iv</sup>.

In India, the legitimacy of any child no matter his religion is decided by the Indian Evidence Act, 1872. This act states that a child will be legitimate if, Is born in the continuance of a valid marriage between the mother of the child and any other man (need not be the father of the child) Is born after 280 days of the dissolution of the marriage as long as the mother did not remarry in such a time<sup>v</sup>.

## **CHANGE OF RELIGION**

Religious conversion is the adoption of a set of beliefs identified with one particular religious denomination to the exclusion of others. The religion of the father is used to determine the religion of a child. The religion of the mother is irrelevant. People convert to a different religion for various reasons, including active conversion by free choice due to a change in beliefs, conversion for convenience, marital conversion, and forced conversion. When people marry, one spouse may convert to the religion of the other. Many parents assume that raising kids with some measure of religion is the best way to teach children how to behave ethically both when they're young and as they grow into adults. At the same time, in some societies, the role of religion has diminished, and people are becoming increasingly secular<sup>vi</sup>.

Hinduism have their own religious conversion procedure. A Hindu is defined in terms of the Act to include the following category of persons: Hindu by religion which includes a Hindu, Jain, Sikh or Buddhist, including converts and reconverts to these religions. If only one parent is a Hindu, Jain, Sikh or Buddhist it is further required that the child must be brought up in the relevant religion.

There are five pillars, or foundations, of Islam but the primary, and most important is to believe that there is only one God and creator, referred to as Allah and that the Islamic prophet,

Muhammad, is God's final messenger. The time of a person's conversion is counted from the moment they sincerely make this declaration of faith, called the shahadah in front of witnesses.

Conversion to Christianity is the religious conversion of a previously non-Christian person to some form of Christianity. The Christian Marriage Act, the wife can appeal for divorce on the grounds that the husband has converted to another religion or has married another woman<sup>vii</sup>.

## **CUSTODY**

Child custody is a term used in family law courts to define legal guardianship of a child under the age of 18. Family law courts generally base decisions on the best interests of the child or children, not always on the best arguments of each parent. A child's best interests, not personal law, key to custody. Many of the religions practicing in India have their own personal laws and they have their different notion of custody.

Custody Under Hindu Law, Hindus have the Hindu Minority and Guardianship Act 1956 (HMGA). Apart from this, there is the Guardians and Wards Act 1890 (GWA). This is a secular law for appointment and declaration of guardians and allied matters, irrespective of caste, community or religion, though in certain matters, the court will give consideration to the personal law of the parties. The provisions of the HMGA (and other personal laws) and the GWA are complementary and not in derogation to each other, and the courts are obliged to read them together in a harmonious way. In determining the question of custody and guardianship, the paramount consideration is the welfare of the minor. The Hindu Minority and Guardianship Act, 1956 contains a provision which lays down that custody of a child upon the age of five should ordinarily be with the mother.

Custody Under Muslim Law, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct. Mother has the right of custody so long as she is not disqualified. This right is known as right of *hizanat* and it can be enforced against the father or any other person. The mother's right of *hizanat* was solely recognized in the interest of the children and in no sense, it is an absolute right". The Shia law is very categorical and lays down that a person who has ceased to be Muslim is not entitled to the custody of the child.

'Son—"Among the Hanafis, it is an established rule that mother's right of *hizanat* over her son terminates on the latter's completing the age of 7 years.

Daughter- Among the hanafis the mother is entitled to the custody of her daughters till the age of puberty and among the Malilikis, Shafiis and the Hanabalis the mother's right of custody over her daughters continues till they are married.

Christian law per se does not have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all of the religions of the country. The Indian Divorce Act, 1869 contains provisions relating to custody of children.

Custody Under Parsi Law, the issue of custody is dealt with by the Guardians and Wards Act of 1890, under which it is a well-established principle that the welfare of the child is paramount - i.e., the most important thing considered by the Guardian Court when deciding custody."

## **ADOPTION**

Adoption is a process of establishing a parent-child relationship between persons who are not related by birth. It allows parentless and orphan children to have parents, home, name and a good life and on the other hand, it enables childless parents to have a child of their own.

Adoption-by-legal-course ensures irrevocable rights to both adoptive parents as well as adopted child. In India, there are three main existing legislations i.e.

- The Hindu Adoption and Maintenance Act of 1956 which is applicable on Hindus, Buddhists, Jains and Sikhs.
- The Guardian and Wards Act of 1890 assist other religions i.e. Muslim, Parsi, Christian and Jews in adoption as there are no concrete provisions under their personal laws.
- The Juvenile Justice (Care and Protection) Act of 2000, amended in 2010 covers the rehabilitation and social reintegration for orphan children<sup>viii</sup>.

Hindu Adoption and Maintenance Act, 1956 changed the years long restrictions in adopting the child by eradicating various gender based prejudiced provisions. The law is applicable on Hindus, Buddhists, Jains, Sikhs and other religions that fall under the governance of Hindu



Law. Adoption has always been a sacred act performed by the humans. Adoption can be legal as well as illegal. Under Indian law adoption is legal coalition between the party willing for adoption and a child, it forms the subject matter of 'personal law' where Hindu, Buddhist, Jains or Sikh by religion can make a legal adoption. In India there is no separate adoption laws for Muslims, Christians and Parsis, so they have to approach court under the Guardians and Wards Act, 1890 for legal adoption.

Personal laws of Muslim, Christian, Parsis and Jews do not recognise complete adoption so if a person belonging to such religion has a desire to adopt a child can take the guardianship of a child under section 8 of the Guardians and Wards Act, 1890. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption.

However, an adoption can take place from an orphanage by obtaining permission from the court under Guardians and Wards Act. Christians can take a child in adoption under the Guardians and Wards Act, 1890 only under foster care. Once a child under foster care becomes major, he is free to break away all his connections from his adoptive parents. Guardians and Wards Act, 1890 remains silent about the adoption of orphans, abandoned and surrendered children<sup>ix</sup>.

In India, as per the Supreme Court Guidelines for intercountry adoption<sup>x</sup> a foreign parent can adopt an Indian child. In India, an Indian whether he is married or single, Non-Resident Indian (NRI), or a person belonging to any nationality (foreigner) may adopt a child.

## **GUARDIANSHIP**

The concept of the natural guardian, testamentary guardian and guardians appointed by the court and also covers the concept of custody in terms of de facto, custody and guardianship.

The Hindu law of guardianship of minor children has been reformed, codified, and defined by the Hindu Minority and Guardianship Act, 1956<sup>xi</sup>. Section 6-9 deals with the concept of various guardians under the Hindu law and what are the rights and restrictions. There are certain ways in which the guardianship of the child is given to either of the parents:

- If the couple has either a boy or an unmarried girl (legitimate), then the first guardian would be the father and after the father the mother will be considered for guardianship; but in case of a child who is less than 5 years of age, the custody of the child would always be with the mother unless the father after his death has appointed someone else as the guardian of the minor child.
- If the couple has an illegitimate boy or girl, then the first guardian of the child is the mother and after mother, the guardian is the father unless the mother after her death has appointed a person to be the natural guardian of the minor child.
- If the couple have a daughter and she is married then the guardian of the married daughter will be his husband.

Muslim Law tell us about the guardianship of the property of the minor, as guardianship is just an interference. Since, these authorities of Muslim law emphatically speak about the guardianship of the property of the minor, the guardianship of the person is a mere inference and since the Muslim personal law is not codified like the other laws there are certain concepts and terms that we study under this.

A de facto guardian is a concept under which past act results in present status and a de facto guardian is a self-appointed guardian. A de facto guardian has no power of alienation of a minor's property and that such an alienation is void. He has no power to convey any right of interest in immovable property which the transfer can enforce against the minor. A partition of property effected by the de facto guardian is void and not binding on the minor.

### ***Rights of the guardian***

- Power of alienation,
- Power to grant the lease,
- Power to carry on business on behalf of the minor child,
- Power to conduct partition,
- Power to incur debts and enter into contracts.

## SUCCESSION

The Hindu law is one of the most ancient and primitive laws that are still prevalent in today's era and also known to the world at large. It is governed by the Hindu Succession Act of 1956, it is a codified law passed by the Parliament of India related to the Intestate (unwilled property), to amend and regulate the Intestate and Testamentary Succession under the Hindu law but in some cases, the Indian succession act plays a major role. Section 5-29 talks about the intestate succession related with the concept of women as a coparcener (a person who shares the inherited land equally) (Sections 6 & 7), male intestate and their order of succession.

(Section 8-13), female intestate and their order of succession (Section 14-16), other relationships and rights (half-blood, full-blood, Child in a womb etc) has been dealt under (Section 17-29) of the Hindu succession act. Part VI of the Indian Succession Act, 1925, starting from Section 57, expressly recognizes the right of a Hindu to dispose of his property according to the will made by him (Testamentary Succession). Schedule III provides for sections which are applicable to wills and codicils under Hindu law subject to restrictions. Women are treated as equal and possess the same right as the males since 2005<sup>xii</sup>.

The Muslim law is governed by its own law known as the Shariyat. The Muslim law does not recognize the concept of separate property. There is only one property with same general rules (such as rule of representation, rule of exclusion, rule of primogeniture, rule of vested inheritance and of spec successions) for both male and female succession, if a Muslim individual dies without making a will then, after the death of an individual as per the laws, the property under his ambit of ownership would be distributed among the legal heirs after deducting some expenses and liabilities from the remaining property which is also known as the Heritable Property<sup>xiii</sup>.

The Indian Succession Act was enacted in 1925. Laws governing succession to Muslims and Hindus were excluded from the purview of the Act. While consolidating the law in respect of succession, two schemes, one relating to succession to property of persons like Indian Christians, Jews and persons married under the Special Marriage Act, 1954 and the other relating to succession rights or Parsis, were adopted.

## MAINTENANCE

In India, beneficial provisions for maintenance of children is provided under various Acts. Objective of such provisions is to achieve a social purpose and to prevent vagrancy and destitution and to provide simple, inexpensive and speedy mechanism for providing support and maintenance to children. The obligation to maintain children is a personal obligation and arises out of blood relationship as well as a moral duty, which is backed up by statutory provisions.

There are two personal law statues amongst the Hindus, which create an obligation to maintain children –

1. *Hindu Marriage Act, 1955*, Section 26 – During the proceedings under the Act, the court may pass orders with respect to the custody, maintenance, and education of minor children. Under this Act, *both parents* (father as well as mother or either of them) are liable to maintain the children as ordered by the court. While making such orders, the court takes into account wishes of the children, as far as possible. Such orders and provisions may be altered from time to time. Under Section 24 of HMA a wife's application for maintenance includes her maintenance as well as that of her children.
2. *Hindu Adoption and Maintenance Act, 1956*, Section 20 – A Hindu male or female is bound to maintain his or her legitimate/illegitimate minor children and unmarried daughter have to be maintained if they are unable to maintain themselves. Dependents include deceased person's minor son, unmarried daughter, widowed daughter, minor illegitimate son, minor illegitimate daughter [Section 21]. S. 3(b)(i) of Hindu Adoption and Maintenance Act, 1956(HAMA) defines maintenance as "provision for food, clothing, residence, education, and medical attendance and treatment." In the case of unmarried daughter, it also includes her marriage expenses.

*Criminal Procedure Code, 1973*, Section 125 – Magistrate may order a person to make monthly allowance for maintenance in a case where any person who despite having sufficient means neglects or refuses to maintain – (i) his legitimate or illegitimate minor child who is unable to maintain itself; or (ii) legitimate or illegitimate major child (not being a married daughter) unable to maintain itself due to any physical or mental abnormality/injury; or (iii) married

daughter till she attains majority if her husband is not able to maintain her; or (iv) his/her father or mother who are unable to maintain themselves.. The order of maintenance passed under this section may be altered by the Magistrate on proof of change in circumstances<sup>xiv</sup> .

A divorced Muslim woman is entitled to a reasonable and fair provision and maintenance for children born to her for a period of two years from the respective dates of birth of such children. It does not matter if the children were born before or after the divorce, the former husband is liable to pay maintenance<sup>xv</sup>.

Under the Parsi and the Christian Laws also there are provisions for the custody, maintenance, education etc of the minor children, which are similar to the Hindu law, even though there is no specific provision for maintenance unlike HAMA .However, it is important to note that under these personal laws, the maintenance of the minor child can be awarded only during the matrimonial proceeding and not otherwise.

Under the Muslim personal law, legitimate (minor as well as major) and illegitimate children are entitled to claim maintenance. The obligation of maintenance of legitimate children is primarily on the father. (Which is different from the other personal laws which provides for an equal obligation on both the parents). A Muslim father is under an obligation to maintain his sons until they attain the age of puberty and the daughter till, she gets married. The Muslim father is not liable to maintain his adult son unless he is disabled by infirmity or disease. However, if the father is poor and incapable of earning, then it is the liability of the mother to maintain the children. If both the parents are poor and incapable of earning then grandfather has to provide for the children. Whereas the obligation of maintenance of the illegitimate children is solely on the mother. The quantum of maintenance can be modified or cancelled on the change in circumstances.

## CONCLUSION

The Indian Society is a metaphysical society and so, it is going through a transformation stage which consists of two broad categories of people with two distinct ideologies. One of the groups believes in the Orthodox methods of personal religion while other group in the society consists of people who are rational and liberal in their outlook. The laws in the society are also



being amended accordingly as the time and the situation demands. There is a need to be more liberal towards the personal law of children and the laws should also be amended in such a way that they have the best interest of all the people at heart. India is a country of multi-religions and multi languages. Number of people is governed by their personal laws. It leads to different treatment meted out to different classes of people in their personal laws. Our country is the second largest populated country in the world and we also have the second largest child population after china and as we see around, we still need to have to take measures to secure child rights for our children. The recommendations of the Indian Law Reform Commission and The Constitutional Court would be to harmonise or unify the common and customary law of marriage, divorce, succession, guardianship ,custody ,maintenance ,inheritance ,acknowledgment (legitimacy /illegitimacy) ,adoption ,change of religion etc. , rather to enact new unique laws, applying to all Indian children equally. The uniform civil code as envisaged in the Article 44 of the Constitution includes inter alia, entire gambit of family laws, what could be better to give a good and standard life to a child who really need it. The plurality of personal laws is also detrimental to the hereditary position of females in India. Apni Beti, Apna Dhan ,which translates to "My daughter, My wealth," is one of India's first conditional cash transfer programmes dedicated to delaying young marriages across the nation. Although it is the responsibility of the judges and the legislature in India to participate more actively in the eradication of personal law.

## REFERENCES

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<sup>i</sup> Rig Veda, Sama Veda, Yajurva Veda, and Atharva Veda.

<sup>ii</sup> Prohibition of Child Marriage Act, 2006.

<sup>iii</sup> Hindu Marriage Act, 1955.

<sup>iv</sup> Paras Diwan, "Law of Marriage and Divorce", Universal Law Publication Co. Pvt. Ltd, 4<sup>th</sup> edition, Delhi, 2002.

<sup>v</sup> Indian Evidence Act, 1872, Section 112.

<sup>vi</sup> Meintel, Deirdre. "When There Is No Conversion: Spiritualists and Personal Religious Change". *Anthropologica*. **49** (1): 149–162.

<sup>vii</sup> The Indian Divorce Act, 1869.

<sup>viii</sup> According to section **2(aa)** of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, "adoption means the process through which the adopted child is permanently separated from his biological parent and becomes the legitimate child of his adoptive parents with all right, privileges and responsibility that are attached to the relationship".

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<sup>ix</sup> Chapter VIII of the Juvenile Justice (Care and Protection of Children) Act, 2015 deals with adoption in such category of the child.

<sup>x</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015.

<sup>xi</sup> Section 4(b) of the act, states that a minor means a person who has not completed the age of eighteen years. He is considered to be a person, who is physically and intellectually imperfect and immature, and hence needs someone's protection.

<sup>xii</sup> The Hindu Succession Act, 1956, Section 6.

<sup>xiii</sup> Paras Diwan, "Family Law", 7<sup>th</sup> edition, Allahabad Law Agency, Haryana, 2005.

<sup>xiv</sup> *Criminal Procedure Code, 1973, Section 127.*

<sup>xv</sup> *Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 3 .*

