

CASES AND MATERIALS  
FAMILY LAW – I  
LL.B. 1<sup>st</sup> TERM

2004-2005

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FAMILY LAW – I  
COURSE CONTENTS AND MATERIALS  
2004-05

Persons related to each other by marriage, blood or adoption, are considered as family. The rights and obligations of family members are recognised and enforced by state when a family comes into being according to the law regulating these aspects. In India, the religion of a person determines which law will govern matters relating to his or her marriage, divorce, maintenance, guardianship, inheritance, etc. and is referred to as the personal law of a person. For example, Hindu law governs Hindus and the Muslim law governs the Muslims and so on. The personal law is contained in the religious texts, customs or in a statute as codified or modified by the state. In case of an inter-religious marriage, a different set of laws called the secular law govern these matters. This course is limited to the study of laws governing marriage, divorce, adoption, maintenance, and guardianship among Hindus and Muslims in India.

**Objectives of the course**

This course is aimed at teaching not only the black letter of law governing family relationships but also to critically examine the nature of family and the familial values underlying those provisions. In particular it aims to:

- Encourage students to think critically
- Develop new ideas for legal reform
- Focus on the role of law in creating and reinforcing social values
- Highlight the foundational inequities and inequalities in the various family concepts across different personal laws
- Generate an understanding that the law may lead to just or unjust consequences and empowering or disempowering of people governed by it by their social and economic status

**Prescribed Legislation**

1. The Hindu Marriage Act, 1955 (HMA)
2. The Hindu Minority and Guardianship Act, 1956 (HMGA)
3. The Hindu Adoption and Maintenance Act, 1956 (HAMA)
4. The Muslim Personal Law (Shariat) Application Act, 1937 (Shariat Act)
5. The Dissolution of Muslim Marriage Act, 1939 (DMMA)
6. The Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA)

**Prescribed Books**

1. Paras Diwan, *Law of Marriage and Divorce* (3<sup>rd</sup> Ed. 2002)
2. Paras Diwan, *Modern Hindu Law* ( )
3. Kusum, *Family Law-I* (2002)
4. Satyajeet Desai ed. *Mulla Principles of Hindu Law* (18<sup>th</sup> Ed. 2001)
5. Derrett, *Critique of Modern Hindu Law* ( )
6. M. Hidayatulla and Arshad Hidayatulla ed. *Mulla's Principles of Mohammedan Law* (19<sup>th</sup> ed. 1990)
7. Faizee, *Principles of Mohammedan Law*( )

## CONTENTS (12 Weeks Course)

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1. **Introduction:** General concepts of family, law's claim to universality, uniformity and equality and personal laws. Schools and sources of Hindu and Muslim law (4 classes)

Reading:

- i) Archana Parashar, "Just Family Law: A Basic Right of All Indian Woman", 24 *Delhi Law Review*, 1 (2002)
- ii) Poonam P. Saxena, "Matrimonial Laws and Gender Justice", 45 (3&4) *JILI* 335 (2003)

2. **Conditions for a valid marriage** Ss. 5, 7, 17 and 18 of the HMA and Muslim Law including Dower (6 classes)

Reading:

- i) S. G. Bhat, "Laws of Marriage from Sastras to Statutes: Inequality to Equality", 45 (3&4) *JILI* 400 (2003)

Cases:

- i) *Dr. Surajmani Stella Kujur v. Durga Charan Hansdah*, AIR 1965 SC 1564
- ii) *S. Nagalingam v. Sivagami*, (2001) 7 SCC 487
- iii) *B.Shankar Lokhande v. State of Maharashtra*, AIR 1965 SC 1564
- iv) *Basanti Mohanti Alias Raut v. Parikhit Raut*, AIR 2003 Ori 20
- v) *Lily Thomas v. Union of India*, AIR 2000 SC 1650
- vi) *Mt. Ghulam Kubra Bibi v. Mohd. Shafi Mohd. Din*, AIR 1940 Pesh 2

3. **Void and voidable marriages** Ss. 11 and 12 of HMA and Muslim Law (4 classes)

Reading:

- i) Kusum, "How 'Void' is Void Marriage", 42 (2-4) *JILI* 443 (2000)

Cases:

- i) *Smt. Shantabai v. Tarachand*, AIR 1966 MP 8
- ii) *Pinninty Venkataramana v. State*, AIR 1977 AP 43
- iii) *Babui Panmato Kuer v. Ram Agya Singh*, AIR 1968 Pat 190
- iv) *P. v. K.*, AIR 1980 Bom 400

4. **Restitution of Conjugal Rights** S. 9 HMA (4 classes)

Cases:

- i) *Kailashwati v. Ayudhia Parkash*, 1977 CLJ 109 (P&H)
- ii) *Swaraj Garg v. K. M. Garg*, AIR 1978 Del 296
- iii) *Saroj Rani v. Sudarshan Kumar*, AIR 1984 SC 1562

5. **Judicial Separation and Divorce** Ss. 13, 13A, 13B, 23 HMA, Muslim Law and S.2 DMMA (9 classes)

- a) By either /both spouse – fault, breakdown, mutual consent
- b) By husband only – triple talaq under Muslim law
- c) By wife only

Reading:

- i) Daljeet Singh, “Desirability of Instant Divorce by the Judiciary: A Critique”, 45 (2&3) JILI 439 (2003)

Cases:

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- i) *G.V.N. Kameswara Rao v. G. Jabilli*, AIR 2002 SC 576 Cruelty  
ii) *Trimbak Narayan Bhagwat v. Kumudini Trimbak Bhagwat*, AIR 1967 Bom 80  
iii) *K.J. v. Smt. K*, AIR 1952 Nag 395  
iv) *Hirachand Srinivas Managaonkar v. Sunanda*, AIR 2001 SC 1285  
v) *Sureshta Devi v. Usha Kumar*, AIR 1977 SC 2213  
vi) *Saiyid Rashid Ahmed v. Anisa Khatoon*, AIR 1932 PC 25  
vii) *Shamim Ara v. State of UP*, 2002 Cri LJ 4726 (SC)  
viii) *Ghulam Sakina v. Falak Sher Alah Baksh*, AIR 1950 PC 25  
ix) *A. Yousuf Rawther v. Sauramma*, AIR 1971 Ker 261  
x) *Itwari v. Asgari*, AIR 1960 All 684

**6. Minority and Guardianship of children** – legitimacy, acknowledgement of paternity (2 classes)

Case:

- i) *Geeta Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228

**7. Maintenance of parents, spouse and children** – Ss. 24, 25 of HMA, S.18 of HAMA, S.125 of Cr PC and the MWA (4 classes)

Reading:

- i) M. Afzal Wani, “Maintenance of Women and Children under Muslim Law: Legislative Trends in Muslim Countries”, 45 (3&4) JILI 409 (2003)

Cases:

- i) *Amar Kanta Sen v. Sovana*, AIR 1960 Cal 438  
ii) *Capt Ramesh Chandra Kaushal v. Veena Kaushal*, AIR 1978 SC 1807  
iii) *Padmaja Sharma v. Ratan Lal Sharma*, AIR 2000 SC 1398  
iv) *Danial Latifi v. Union of India*, (2001) 7 SCC 740  
v) *Noor Saba Khatoon v. Mohd. Quasim*, AIR 1997 SC 3280

**8. Adoption** Ss. 7-12 HAMA, S. 41, Juvenile Justice (Care and Protection of Children) Act, 2000 (2 classes)

Reading:

- i) Excerpts: Archana Parashar, “Welfare of the Child in Family Laws – India and Australia”, 1 (1) *Nalsar Law Review* 49 (2003)

Case:

- i) *Vijayalaxmamma v. B.T. Shankar*, (2000) 4 SCC 538

Appendix 1. The Dissolution of Muslim Marriage Act 1939

Appendix 2. The Muslim Women (Protection on Divorce) Act 1986

Appendix 3. The Code of Criminal Procedure (Amendment) Act 2001

Appendix 4. S. 41 of the Juvenile Justice (Care and Protection of Children) Act 2000

### Critical Questions for Discussion in Each Topic

1. Introduction: General concepts of family, kinship, law's claim to universality, uniformity and equality and personal laws. Sources of Hindu and Muslim law
2. Conditions for a Hindu Marriage: S.2, 5 and 7

Questions for discussion: Why is the age for marriage different for men and women? Is this differentiation a reinforcement of the expectation of roles of men and women in marriage? Should it be uniform for men and women? If so, what should be it? Why?

Should 'form' be given precedence over 'substance'? If a person presents to the world that he or she is married, should that person be allowed to change that position in a court of law when faced with prosecution? Is it possible within the language of the relevant laws, to have a different interpretation than the one given by the judges insisting on 'solemnisation' of marriage for successfully prosecuting a person for bigamy? Whether men or women are more likely to marry while having a living spouse? What may be the implications of recognising marriages without essential ceremonies of marriage?

### 3. Void and voidable marriages

Qs. for discussion: Why is infertility not a ground for nullity of marriage while impotency is? What are said to be the purposes of marriage and which purpose has been given precedence over others? Impotency and not infertility as a ground for voidable marriage suggest precedence of pleasure over progeny. Should the same sex marriages be recognised as long as they do not violate other conditions of a valid marriage? The conditions spelt out for a voidable marriage apply equally to men and women but can they be or are likely to be availed by either equally given the differences in their educational, financial and social status as well as the premium on virginity in marriage.

What will be the implications for men and women if marriages in violation of age were declared to be void or voidable?

### 4. Restitution of Conjugal Rights

Qs. for discussion: Letting the bull enter the china shop – is the simile appropriate? Is law a bull or a system of rational principles governing human behaviour? Why does it operate in other spheres? What is the rationale for differential operation of law in public and private sphere? What is the nature of family? Is it egalitarian or hierarchical? What is the status of men and women in a family? How exclusion of law from the family sphere impacts on men and women? Why should law not protect women's interests in the patriarchal family especially if the patriarch becomes oppressive? What remedy or relief can a woman seek who is 'raped' by her husband pursuant to her returning under a decree for restitution of conjugal rights? How does the right of the husband to set up the matrimonial home hinder the wife's right to work? Do the cases on RCR reinforce and encourage women's economic dependency and subordination?

5. Divorce – Adultery- Cruelty – desertion - Insanity – Breakdown Theory - Mutual Consent

Qs. for discussion: Whether the grounds for divorce that are available to both wife and husband can be availed of similarly by husband and wife given the difference in their social, economic, educational, and employment status? Whether grant of a divorce results in similar consequences for men and women? Does a married woman have the right of residence in her husband's home against his wishes? Does she has a right of residence in her natal family? After getting divorce due to misconduct of the other spouse, who should leave the matrimonial home? Who had a right to work during the subsistence of marriage? Who has the custodial and guardianship rights over children? Who is the owner of the property purchased during the subsistence of marriage? Who is capable of earning a livelihood? If a wife is subjected to cruelty and files a divorce on that ground, can she turn her husband out of the house during pendency of the proceedings, get a restraint order, ask the court to ensure that she is not turned out of the matrimonial home, or deprived custody and control of their children?

6. Guardianship

Questions for discussion: Why the natural guardian of a legitimate child is the father and that of an illegitimate child the mother? What is the rationale of differentiating between parents in matters of guardianship? What are the economic and other dimensions of division of custody and guardianship in case of young children? Can a minor husband be the guardian of his minor wife? Whether rules regarding guardianship are for protecting the rights of guardians or for protecting children?

7. Maintenance – Basic provisions in Hindu Marriage Act, S. 125 of Cr. P.C.

Questions for discussion: What principles and purposes lie underneath the concept of providing maintenance to a spouse? Whether same or different principles operate as the rationale for maintenance during subsistence of marriage and after divorce? Are the purposes different for maintenance of children than for maintenance to spouse or ex-spouse? Why chastity of the spouse is a condition for continuing to give maintenance?

8. Adoption

a) Hindu Adoption and Maintenance Act

b) Juvenile Justice (Care and Protection of Children) Act, 2000, S. 41

Questions for discussion:

1. What is paramount condition in adoption of child - religious consideration or welfare of the child?
  2. Is there a possibility of conflict between rights of parents and welfare of child?
  3. Whether adoption of children is linked with status of women?
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