

# Guardianship

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## Who is a 'guardian'?



Guardian means the person, who is having the care of the person of a minor or his property or both person and property. A father is the 'natural guardian' of the minor or an unmarried girl and in the absence of the father, the mother shall be the natural guardian. The husband becomes the natural guardian of a minor girl on marriage and the mother alone shall act as such if the child is illegitimate. A step father or step mother is not a natural guardian. A guardian could be so named through a will, who will be called the testamentary guardian. In situations when a court appoints a person to take care of person or property of a minor or conduct litigation on behalf of the minor, he or she will be a court guardian. A court requiring the protection of minor may appoint or declare even a person other than a parent as a guardian. Apart from a minor to whom guardian may be appointed, in conditions of persons who due to mental illness cannot take care of themselves, guardians may be appointed by courts. A welfare institution which has custody of a minor or a mentally challenged person or an abandoned child could also be a guardian or be appointed as guardian. In inter-country adoption cases, even a foreign national seeking adoption may be appointed as a guardian initially with directions to adopt as per the law of the country to which the foreign national may belong. A 'local guardian' is a loose, non-technical term employed by educational institutions to have a local contact where the institution is established and where the minor is lodged, when the parents reside elsewhere.

## Laws that govern guardianship issues

The principal enactment that deals with appointment, care, custody and administration of property of a ward who is a minor is Guardian and Wards Act. The Hindu Minority and Guardianship Act deals with rights of natural guardians relating to custody of a minor and also details the powers of dealing with the property of a Hindu minor. The Muslim law of guardianship is governed by custom. The Mental Health Act and the National Trust for Welfare of Persons with Autism, cerebral Palsy, Mental Retardation and Multiple Disabilities Act provide for appointment of guardians for persons who have some physical and mental disabilities and for their care and protection. Medical Termination of Pregnancy Act contains

provisions for taking decision on behalf of a minor girl for terminating pregnancy in certain types of situations. The Civil Procedure Code empowers the court to appoint a guardian for prosecuting and defending the rights of a minor involved in litigation

### **Guardianship and custody**

A guardian is usually a person who also has custody of the minor or a disabled person. In conflict situations such as in matrimonial disputes, the issue relating to custody comes to the fore when a natural guardian who may be a father may not still be granted custody but a mother may be allowed to retain the custody. The Hindu law of guardianship treats the mother to be 'entitled' to custody of a male child up to the age of 5 and for a girl child up to 7 years. Muslim law gives the mother a right to custody of minor boy up to the age of 7 and of a minor girl up to the age of puberty. This rule is not inflexible and the welfare consideration of the minor may allow the court to pass orders relating to custody, irrespective of the age of the minor or the relationship of the person to be appointed with the minor. A mother's right to custody is invariably paramount. The right to custody could be secured by orders of court before a competent district court where the minor normally resides or in pending matrimonial proceedings before any other court of competent jurisdiction.

### **Powers of a guardian**

Guardian substitutes the decision making of a child for its welfare. The right is crucial in matters of residence, education and general upbringing. A minor's property cannot be sold, gifted or encumbered without the permission of the court. If it is done by a natural guardian, it will be voidable/ invalid, but void if it is done by a person other than a natural guardian. The difference is that in the latter situation the assertion by challenge to the alienation shall be exercised through a positive act by resort to court or otherwise, within a certain period from the date of attaining majority, while in the former, the minor could simply ignore the transaction as not binding. A karta in a Hindu Undivided Family normally enjoys a larger right to deal with the property of a junior member including a minor, but the test of validity shall be driven by considerations of legal necessity or family benefit. Both situations will have to be established by the person who wants to defend the transaction affecting the minor's property rights. The care and custody of mentally challenged person and protection of property address similar considerations and the guardian shall wield all powers to effectively take all decisions relating to such a person regarding residence, type of medical treatment, managing property, etc.

## Court's powers



In all types of situations of conflict, the court is the ultimate arbiter relating to the affairs of the minor or a disabled person due to mental illness or retardation. The court will always be guided by 'welfare' of the person and it is a flexible concept that the court will examine on a case to case basis. The best interests of the minor, if in the opinion of the court shall be different from the substituted decision of the guardian, the court may over run the latter's decision and declare and guide what shall be done. Even a compromise in respect of a minor's property will be valid only after a sanction is given by the court. The court's decisions relating to sanction to sell minor's property are crucial and so too, are the court's decision to retain or abort the foetus of a minor girl who is pregnant.

## Spirituality and Law

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### Object of law

Object of law is to regulate relations between individuals or individuals and society. Norms recognized as law are intended to protect the victim of injustice and to check unfair conduct of an individual or body of individuals. The need for law arises when reasonableness and fairness are lacking in the conduct of persons, the State or its functionaries. Law is expected to be objective, uniform and certain. Machinery for enforcing the law is also expected to be fair, just and reasonable. Absence of law or its enforcement leads to chaos and injustice and hampers growth of the individual and the society.

### **Absence of truth, fundamental cause to a conflict situation**



It is well acknowledged that there is large scale violation of law which leads aggrieved parties to rush to the Court. Courts are inundated with litigation of over 3 crore pending cases, not to leave out of reckoning the cases that are pending in Tribunals or quasi-judicial authorities. Causes for inability of the system to cope with grievances of large scale violation of law include lesser allocation of funds for necessary infrastructure, such as

the number of Judges being disproportionate to the need. Sometimes, comparison is made with other countries where Judge - population ratio is higher. One of the fundamental causes contributing to delay in disposal and addition to litigation is lack of truthfulness in the stand of one of the parties that makes the effort even to discover truth a daunting task in the course of litigation. Lack of probity and honesty of administrators or other decision makers give rise to grievances of arbitrariness in State actions. There could be no two views that truthfulness and fairness on the part of individuals and administrators could do enormously to reduce litigation.

### **Falling ethical standards in legal system**

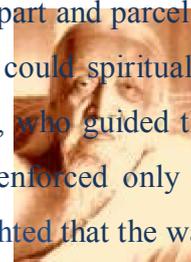
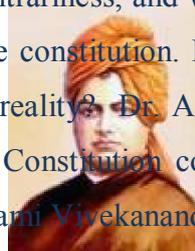
As regards quality of justice, there is all-round debate and concern on method of appointment of judges, qualification for judges, conduct of judges, ethics of bar and bench. Apart from professional competence, there is debate of unethical conduct and it is generally believed that if ethical conduct is ensured, quality of justice will improve and litigants will have more satisfaction. Ethical conduct includes discipline, dedication, honesty and impartiality of the Judge and the Advocate. Is law alone enough to bring about honesty, integrity, dedication, truthfulness, fairness, courtesy and good behaviour which are fundamental in achieving orderliness, peace and development in the society? If not, what else could help achieve these qualities? According to some thinkers, it is spiritual development that holds the key to find answers to some of the knotty questions.

### **The spiritual underpinnings of the Indian Constitution**



The Constitution of India incorporates ideals of equality, liberty and fraternity. Etching them in print is not enough unless they can be translated into action. By judicial review, constitutional courts have

been empowered to test the validity of every executive and legislative action on the anvil of reasonableness which is antithesis to arbitrariness, and which is part and parcel of the golden triad under articles 14, 19 and 21 of the constitution. How far could spiritual development help making the constitutional values a reality? Dr. Ambedkar, who guided the drafting of the Constitution, was of the view that Constitution could be enforced only with spirit to accept the values laid down therein. Swami Vivekanand highlighted that the way to progress was not mere enactment of a law but spirit for right action. Fundamental duties underline significance of being inspired by the spirit which inspired the freedom fighters. That spirit was fairness and justice even at the cost of supreme sacrifice. Truth is high, but truthful living



is still higher, said Sri Guru Nanak. Sri Aurobindo emphasized the development of spirit which could lead to realization of the goal of human life for greatest happiness. He said that spiritual development could lead to realization of all in one and one in all.

### **The basic questions**

According to 14<sup>th</sup> Report of the Law Commission, while discussing judicial reforms, it was noted that it is the persons operating the law who are most important. The law maker, the law interpreter, the law enforcer as well as the citizen need to be spiritually oriented. Legal education and continuous education of judicial officers have been emphasized. Quality institutes have been set up. Standard of knowledge imparted is sought to match international levels. It is no doubt good development but, perhaps, it is not enough. Best brains have been attracted towards institutes of excellence which have helped career advancement to the elite youngsters. How far have these institutes helped in advancing quality and quantity of justice delivery? Have these institutes, while providing knowledge of use of computers and latest laws also been successful in creating a team of dedicated persons who will help giving justice to individual victims of injustice wallowing in the effects of pollution, poverty, unemployment, malnutrition, hygiene, health, shelter, corruption, exploitation and natural calamities? What is the most significant factor for achievement of millennium development goals which have been identified by United Nations for removing suffering from the earth? How far have these institutions helped in spiritual upliftment, the transcendent quality that inspired freedom fighters to make supreme sacrifices?

### **Spirituality, panacea for the present malady**

Spirituality is a development of inner-self of a person through contemplation by withdrawing from matter and focusing on spirit. It is now established that apart from development of body, mind and intellect, development of spirit is integral to development of a person. Spiritual development leads to development of ethics, brings inner peace and harmony and not only leads to improvement in the quality of life but also makes him better suited for doing his social and official duties. Absence of spiritual development, on the other hand, leads to a tendency to be allured by material gains and to be overpowered by senses and desires which in turn lead to unjust and unfair behavior. The success of system of administration of justice is possible only with best persons manning the system. Undoubtedly, the quality of education will equip them better but beyond that is the imperative to inculcate and imbibe a mission for service and not for career only. This is possible only by spiritual

development. Enactment of laws against corruption, adulteration, pollution or other evils are necessary. Mere enactments are not enough. There is an impending need to direct the focus to adopt ethical ways in all walks of human activity. It has become necessary to institutionalise spiritual development at every level, particularly for all those implementing laws.

## Social Justice & Law

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### Equality, the touchstone for reservation



As poignant as economic impoverishment and marginalization, are social ostracisation and disabilities arising on the basis of religion, race, caste, sex or place of birth. The Constitution of India envisions an egalitarian society and assures in its preamble social, economic and political justice and equality of status and of opportunity. The most potent fundamental right to equality is the fountain head from which principles of reservation for the underprivileged and the backward classes spring. The constitution therefore expressly provides that special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled castes and the Scheduled tribes shall not be considered as offending the equality principle. It is a reminder of the social and economic inequalities that fester our society and the conscious efforts needed to eradicate the scourge. The principles of state policy set out an agenda to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

### Permanent Commissions at the Centre and the States



The Constitution abolishes untouchability and gives the power to the President (read, the Executive), after consultation with the Governor, to specify the castes, races or tribes who shall be deemed to scheduled castes in relation to each state. A National Commission for Scheduled Castes as well as for Scheduled Tribes are set up to investigate and monitor all matters relating to the safeguards, to inquire into specific complaints with respect to deprivation of rights and safeguards, to participate and advise on the planning process of socio-economic development, to make recommendations as to the measure to be taken by the Union and the States for effective implementation of the safeguards, etc. Commission for Backward classes are also set up at the national and the state levels to investigate, and identify the difficulties

faced socially and economically deprived section and make recommendations for their amelioration.

### **Political empowerment**

Political empowerment is guaranteed by reserving seats to persons belonging to the scheduled caste a right of representation in the parliament and the state assemblies to an extent that will have a bearing on their presence out of the total population in the respective states. Proportional representation through reservation of seats for scheduled castes and scheduled tribes in the elections to Panchyats and Municipalities with a further reservation of one-third out of the total number of seats to be filled up by direct election for women have been the significant additions through the 74<sup>th</sup> amendment to the constitution in 1992. it is a commonplace experience of how this change of law has impacted at grass root level a better distribution of political power to hitherto backward classes and women.

### **Reservations in educational institutions**



Right to free and compulsory education to all children of the age of six to fourteen year is itself a fundamental right and the State is also empowered to make special provisions of reservation for admission to educational institutions, including private non-minority educational institutions, whether aided or unaided.

### **Reservation in public employments**



Economic upliftment comes essentially through guaranteeing an adequate share of participation and selection, with relaxation in criteria especially as regards age, educational qualification are important objectives realized through reservations. Significantly, it shall not be merely at the entry level into public employment but also in matters of promotion with consequential seniority to any class or classes of posts, which in the opinion of the State are not adequately represented. Unfilled vacancies in a year which are reserved for being filled up in that year may be filled by in any succeeding year or years without clubbing with the vacancies of the year in which they are being filled up.

### **Some limitations to reservation principle**

An affirmative action for special privileges is always tempered with reasonableness so that merit is never compromised. The judgment of the Supreme Court in *Balaji* placed an outer



limit of 50% as the extent to which reservation may be possible through legislation. *Indra Sawhney* affirmed the principle and approved of even excluding a creamy layer within the backward classification who have attained to a higher economic and social status from the rule of reservation. The State-centric classification of identifying the scheduled caste/ tribe status, may, except in relation to some specified central services, fetter a person, who is a migrant from that state to another state to claim to such status. The scheme of reservation in the matter of employment extends by and large only to public institutions.

## Disability Law

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### The legal framework

Persons with physical or mental disability are differently-abled and they are required to be treated with understanding. The imperatives of equal opportunities, protection of rights and full participation of such persons are spelt through International conventions, Constitutional



guarantees and statutory laws. The Directive Principles of State Policy and the fundamental right to equality ensure opportunities for securing justice through right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement. Statutory enactment of the year 1995 sets up Co-ordination Committee at the Centre and at the State levels comprising of representatives of the government, NGO and persons with disability themselves to review the working of departments of governments, develop a national policy to address issues faced by persons with disabilities, evolve schemes, generate funds, ensure barrier-free environment in public places, workplaces, schools and other institutions and monitor and evaluate the impact of policies and programs. Their enforcement is monitored through Executive committees both at the Centre and the State levels. There is

also an enactment 1999 that provides for a national trust for welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities.

### **Who are persons with disability?**

The definition of the term disability as per the provisions of the Persons with Disability Act 1995 means:-

1. Blindness
2. Low vision
3. Leprosy cured
4. Hearing impairment
5. Loco-motor disability
6. Mental retardation
7. Mental illness

### **Features of the 1995 Act**

The 1995 Act provides for placing mechanisms for prevention and early detection of persons with disabilities. Provisions for education and employment are the most potent tools for their empowerment and the Act addresses the agenda for establishment of special schools and reservation in public employments. The Act declares that the Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from blindness or low vision; hearing impairment; locomotor disability or cerebral palsy, in the posts identified for each disability. Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. All Government educational institutions and other educational institutions receiving aid from the Government shall reserve not less than three per cent seats for persons with disabilities. The appropriate Governments and local authorities shall reserve not less than three per cent in all poverty alleviation schemes for the benefit of persons with disabilities.

The Rules framed under the Act detail the mandate to issuing notifications to the employment exchanges for vacancies and reservation for the persons with disability. Social security measures and affirmative action for preferential allotments of housing and shopping are also contemplated under the Act. The non-discrimination directives underscore the agenda for adaptation of rail compartments, busses, toilets, installation of auditory signals at public roads and ramps in public buildings. Among the most significant provisions is the bar against any establishment from dispensing with, reducing in rank of any employee who acquires a disability during his service and relocating the employee within the same establishment to some other post with the same pay and service benefits.

### Affirmative Action



Equality of opportunity does not mean making the persons with disability to compete on par with other persons, but suggests a pro-active approach to give special privileges and concessions in various fields. The appropriate Governments and local authorities shall by notification frame schemes in favour of persons with disabilities, for the preferential

allotment of land at concessional rates for house; setting up business; setting up of special recreation centres; establishment of special schools; establishment of research centres; establishment of factories by entrepreneurs with disabilities.

### The State initiatives

It is through education that comes empowerment. Instead of special schools, wherever possible the Act advocates the promotion of the integration of students with disabilities in the normal schools. The Act promotes setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools and equip the special schools for children with disabilities with vocational training facilities. The State of Haryana has announced on December 2, 2009 the launching a scheme called Jawahar Social Infrastructure Mission which would benefit the disable, besides senior citizen and children in the State, making a provision for Rs.150 crores for implementation. It was announced that under the project, the government would set up ten schools for the blind, eight schools for deaf and dumb, six schools for mentally retarded, three state level institutes, two homes for mentally

retarded persons, four senior citizen homes, six children homes, 21 vocational education and training centres.

The Punjab & Haryana High Court had issued to the government certain directions for affirmative action in CWP No. 3199 of 2008 titled as *Handicapped Welfare Group Housing Society Ltd., Panchkula v State of Haryana* in terms of which the Haryana Government has announced that HUDA has already formulated Policy guidelines for reservation of 1% residential plots upto 8 Marla category for Blinds and 1% for Disabled Persons. 10% subsidy is also provided in the rate of allotment of such earmarked plots. As per provisions of EMP-2005, 2% of Industrial Plots up to 500 sq. mts. are reserved for the Entrepreneurs with Disabilities. 10% subsidy is also provided in the rate of allotment to such persons. Further, HUDA is reported to have formulated a policy for leasing out of Creche/School Buildings constructed by HUDA in various Urban Estates and community buildings constructed by HUDA in villages within HUDA sectors to reputed NGOs for running of Creche/School for special children and for undertaking welfare works in villages. It has taken policy decisions to provided that 2% of commercial sites designated as Kiosks and Booths in Shopping Centres shall be reserved for the persons with disabilities. The above reservation of sites shall be done in all the Shopping Centres in all the Urban Estates where more than 50% of total commercial sites designated as Kiosks and Booths are un-sold and are available for allotment. The commercial sites so reserved for persons with disabilities shall be allotted on the reserved price fixed by HUDA.

Milk Booth and Fruit & Vegetable shops are earmarked by HUDA in various Shopping Centres which are offered to Government agencies like Haryana Dairy Development Corporation, Mother Dairy etc. 25% of such sites allotted to above agencies shall be offered to the persons with disabilities and a condition to this effect be incorporated in the allotment letter. The entry of persons with disabilities shall be free in the Auditorium and the parks being developed by HUDA. The persons with disabilities will be given 10% concession in the fee prescribed for membership of Gymkhana Clubs and sports facilities developed by HUDA in Sports Complexes/Stadium. The above mentioned concessions to persons with disabilities shall be allowed to: Only the domiciles of Haryana with 70% or above disability; The allotted sites shall not be transferred by the persons with disabilities for a period of at least 10 years.

# Motor Accidents & Compensation

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## Motor Accidents, the largest cause for injuries and death

There are more persons dying and getting maimed by injuries in motor accidents every year than anyone single factor, other than natural illness and old age contributing to deaths and injuries. The most used mode of transport is also the most abused. The civil response to human tragedies wrought through accidents is to ensure a financial recompense through Motor Accidents Claims Tribunals constituted under the Motor Vehicles Act. To ensure that the accident victim or his family gets what is due, the other important player is the insurance company. The law that provides for various situations that enable the claim for compensation, the mode of determining the quantum, the person liable for payment, the forum for adjudication and the matters to be established at the trial are all set out by the provisions of Motor Vehicles Act.

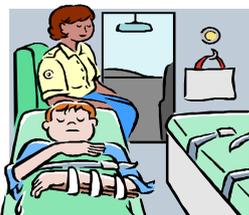


## Basis of claim is normally rash or negligent driving of a motor vehicle

Accidents resulting in injuries or death arise out of use of motor vehicles by rash or negligent driving. They could arise by a speeding vehicle in a hit and run situation, when the identity of the vehicle is not noticed or by collisions between

vehicles in public places, vehicle hitting against a tree when passengers in the vehicle get injured or killed. There is a compulsory system of insuring a vehicle against third party risk, so that the victim or his legal representatives have a solvent insurance company to proceed against for claiming compensation. Vehicles run by State Transport Corporations are obligated to set up their own funds from which amounts of compensation could be defrayed. The respective state governments are also obligated by law to establish funds for meeting the claims of victims of accidents of hit and run cases, where the identity of the owner of the vehicle is not traced.

## Quantum of compensation



A victim of an accident is entitled to compensation for injuries that shall be quantified by the extent of loss that may arise out of it. They shall

include, the hospital expenses for treatment of the injuries, the loss of income or salary during the period of treatment, transport expenses, loss of amenities of life when the injury causes permanent or temporary disablement, damages for pain and suffering, expenses for attendants and every conceivable item of reasonable expenditure that has a proximate bearing for the injuries sustained. In cases of death, the legal representatives, who may include even apart from legal heirs, persons who were dependent on the deceased, shall be compensated in damages to an amount which they would have benefited if he or she had been alive. The quantification of damage is in some sense a technical exercise, when the attempt shall be to assess the extent of loss of dependence on the deceased deducting the sums which the deceased would have spent on personal expenses, hospital expenses, funeral expenses, damages for loss of consortium to a spouse and for loss of love and affection for children.

### **Persons liable to pay compensation**

The owner of the offending vehicle and the insurer are jointly and severally liable for damages for a motor accident in a public place. Even without proof of negligence of the driver, the MV Act makes it possible to claim the amount of damages on a structured formula given under the Act. A person who causes the accident, if he is employed by an owner of the vehicle shall be entitled to claim compensation against his employer and the insurer under the Workmen's Compensation Act but in other situations, the tort-feasor himself shall not be allowed the benefit of traveling along with the goods and compensation. An owner of goods load men up to 6 persons shall be the only class of persons in a goods vehicle who shall have the benefit of insurance cover. Other passengers in a goods vehicle could have remedy only against the owner of the vehicle and not against the insurer. Because, the insurer covers the risk only due to negligence of the driver, the insurer's defence to deny the claim shall be restricted only certain situations and law specifically bars certain types of defences. For example, the insurer shall be allowed to contend that the terms of insurance exclude the use of the vehicle for hire or reward, for organized racing or speed testing, or rely on the permit conditions of a transport vehicle or bar against the use of a side car being attached to a vehicle or that the driver had not a valid driving licence for denying liability. The insurer shall not be permitted to take up defences relating to quantum of compensation or deny rashness or negligence, unless the court specifically grants permission in writing to take such defences, where there is proof of collusion between the claimant and the owner of the vehicle.



## Towards a better compensation regime

The claim for compensation shall be pursued in a tribunal which will have jurisdiction in places where the accident has taken place or where the claimant ordinarily resides. Important changes of law relating to claims for damages in motor accidents have come through judicial pronouncements. Compensation for hit and run cases, unrestricted liability of insurer for a passenger in a transport vehicle, owner of goods traveling in a goods vehicle have all been newer classes of persons benefited by change of law. System of claiming compensation on a strict liability norm, without having to prove rashness or negligence of a driver, is also a new development. The Supreme Court has been rooting for still better changes in law that will enable a claimant to obtain just compensation in cases where the driver did not have a driving licence, provide for annuities to dependents instead of paying lump sum compensation, satisfaction of claims even without having to go to court, besides stricter compliance of existing provisions for police to maintain accident information register that will simultaneously record details of accidents and dispatch details to jurisdictional claims tribunal to address the claims of victims. The Legal Services Authority established at the centre and states have been playing significant roles in organizing lok adalats that make way for large scale disposal of accident cases.

## Maintenance

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### Meaning & Persons entitled

Certain domestic relationships cast certain legal responsibilities. A right to be maintained that obtains to a spouse, minor child, unmarried daughter, widowed daughter in law, aged parents,



et al is protected by various laws, mostly statutory and also by customary law in the case of Muslims. The term 'maintenance' includes provision for food, clothing, residence, education and medical attendance and treatment; in case of an unmarried daughter, also the reasonable expenses of an incident of her marriage. If the

person who is to maintain is dead, the claimant would become a 'dependent', who could be in

relation to the deceased. a mother, father, widowed daughter in law that does not re-marry, unmarried daughter, widowed daughter to the extent to which she is unable to realize maintenance against the estate of her husband, son or father in law. The claim to maintenance arises through a right to enforcement through law, if there is a breach of duty or neglect by the person who is bound to maintain.

### **Situations that give rise to claim for maintenance**

In a normal economic and social setting in an Indian family, the male member who is the head of the family that earns a living supports the other members of his family, although it is legally possible for husband to be supported by his spouse if he is economically dependent on her and the latter alone is the wage earner or has means of living. Again, the rights work themselves out without even a formal demand in a normal domestic life. The issues of demand and enforcement arise only when, for a wife, for example, the husband is guilty of abandoning her or treating her with cruelty that justifies her separate living. Other circumstances that could justify her separate living without forfeiting her right to maintenance would be when the husband has another wife or concubine with whom the husband is living, if he is suffering from communicable disease, if he converts to another religion. A minor child is entitled to be educated and an unmarried daughter is entitled to reasonable marriage provision.

### **'Other relationships'/divorced wife**

A woman who holds a relationship with a man 'in the nature of marriage', who is in a domestic relationship is also entitled to be maintained by virtue of the provisions of Protection of Women from Domestic Violence Act 2005. The law protects a woman the right to reside in a shared household with the man, whether he owned or rented or held jointly with other members of his family. An illegitimate minor child is entitled to be maintained by his or her mother or father or by both. A divorced wife, who does not remarry shall also be entitled to maintenance. In case of Muslim women, the claim would be normally during the period of iddat. However, in an action for maintenance before a criminal court, a Muslim husband objects to the jurisdiction of the criminal court, the claim would be adjudged and paid by the State Wakf Board. However, by recent decisions of the Supreme Court, in *Danial Latif (2001)* and *Shabana Bano(2009)*, a divorced muslim wife is held to be entitled to maintenance even during the period of iddat, so long as she has not remarried.

## Quantum of maintenance

The quantum of maintenance would depend on the position and status of parties, reasonable wants of the claimant, the justification for separate living, the means of the claimant, the number of persons entitled to be maintained by the person against whom the claim is made. While addressing the claims of a dependent, regard shall also be had to the net value of the estate of the deceased after providing for the payment of his debts, provision, if any made under a will of the deceased, degree of relationship between the two, the reasonable wants of the dependent, etc. Normally, the claim of maintenance approximates to 20-25% of the net salary of the person who is bound to maintain.

## Forum for making the claim

A claim to maintenance is possible by a petition to be filed before a judicial magistrate under



section 125 of the Code of Criminal Procedure. In cases, where family courts are established, the remedy could be pursued before such a court. A civil suit could be also instituted by paying the necessary court fee or by claiming exemption from such payment in case of indigency. A civil action may also make possible a right to obtain a charge

against the property of the person who is bound to maintain. The right could also be enforced against the property in the hands of a purchaser from the person who is bound to maintain, when he has notice of the claim or when the transfer is gratuitous. A claim for interim maintenance could be pursued during matrimonial proceedings for dissolution of marriage or for restitution of conjugal relationships. Provision for permanent alimony could also be made at the time when relief of dissolution of marriage is granted by a court. The relief of maintenance would include the cost of litigation, travel expenses to court and provision for stay for the person as well as to the escort. The right could be enforced, once the amount is determined, by causing the arrest of the person liable to maintain, attachment of salary or bringing to sale the property of the person against whom the relief is granted.