

Family law in India: overview

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Country Q&A | Law stated as at 01-Nov-2020 | India

A Q&A guide to family law in India.

The Q&A gives a high-level overview of key issues including jurisdiction and conflict of law; pre- and post-nuptial agreements and matrimonial property regimes; divorce, nullity, and judicial separation; children; surrogacy and adoption; cohabitation; family dispute resolution; civil partnership/same-sex marriage; controversial areas and reform; and the effect of COVID-19.

This Q&A is part of the global guide to family law.

This global guide is published in association with the International Academy of Family Lawyers.

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Jurisdiction and conflict of law

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

Marriage and divorce. India is a secular country and a wide number of religions are freely practised. The major religions practised include Hinduism, Islam and Christianity. People solemnise marriages in accordance with

religious rituals and ceremonies, which are mostly codified by statutory personal laws. Therefore, the matrimonial laws in India, including laws on marriage, divorce and other connected issues, are essentially governed by the personal laws of the parties depending on their religion, which are codified by statute in most cases:

- Hindu: Hindu Marriage Act 1955.
- Muslim: Muslim marriage is a contract under Muslim law.
- Christian: Indian Christian Marriage Act 1872 and the Divorce Act 1869.
- Parsi: Parsi Marriage and Divorce Act 1936.

In addition, the Special Marriage Act 1954 applies to all persons of all religions. This is a civil legislation and parties from all religions, caste or community can elect to marry under it. A divorce would then be governed by the Special Marriage Act 1954.

All these laws apply throughout India.

Welfare of children. Personal laws governing marriage contain provisions to ensure the welfare of children born in wedlock. There is a general law, the Guardian and Wards Act 1890, which applies to all communities.

The Guardian and Wards Act 1890 is a complete code defining the rights and liabilities of guardians and wards. It applies to minor children of any caste and creed. However, while approving and declaring a person as a minor's guardian, the court will also consider the minor's personal law. The Guardian and Wards Act 1890 aims to protect the minor child's person and property.

Court system

The Family Court Act 1984 provides for the establishment of Family Courts with a view to promote conciliation, and secure speedy redressal of disputes relating to marriage and family affairs, and for matters connected with them. The Family Courts hear matters relating to marriage, marital breakdown and the welfare of children. These courts are trial courts and are presided over by Additional District Judges who undertake trials and review evidence. The Family Courts follow the Civil Procedure Code. Family proceedings are generally public but can be conducted in private at the request of the parties or if circumstances require (see [Question 37](#)).

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Divorce

All Indian matrimonial statutes contain jurisdictional rules. Two matters are relevant regarding jurisdiction:

- The place in which the petition or suit in a matrimonial cause is filed.
- The court in which the petition or suit in a matrimonial cause should be filed.

Whether a court has jurisdiction depends on the:

- Parties' domicile.
- Place of solemnisation of marriage.
- Marital residence and the residence of the respondent (or, if the respondent resides outside India, where the petitioner resides).

Jurisdictional requirements are the same under the Hindu Marriage Act 1955 and the Special Marriage Act 1954. A divorce petition can be presented to the district court within the local limits of whose original civil jurisdiction the:

- Marriage was solemnised.
- Respondent, at the time of the presentation of the petition, resides.
- Parties to the marriage last resided together.
- Wife resides on the date of presentation of the petition (if she is the petitioner).
- Petitioner resides at the time of the presentation of the petition, in a case where the respondent, at that time, either:
 - resides outside the territories to which the acts extend; or
 - has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him/her if he/she were alive.

The applicability of the Special Marriage Act is not restricted to Indians and foreign nationals can marry under the Act. The parties need not be domiciled in India to solemnise their marriage under the Special Marriage Act.

Under the Indian Divorce Act 1869, a petition in a matrimonial cause can be presented in the court of the district judge within the local limits of whose ordinary jurisdiction either the:

- Husband and wife reside.
- Husband and wife last resided together.

Where a number of courts have jurisdiction, a party can choose one of them. Where a court's jurisdiction is questioned, preference is generally given to factors that support its jurisdiction.

Same-sex spouses and civil partners

Same-sex marriages and civil partnerships are not legally recognised in India.

Property

There is no concept of matrimonial property under Indian law. A woman can ordinarily claim maintenance and not a right over the property/house in which she resides. A woman can claim "right to reside" in her matrimonial home under the Protection of Women from Domestic Violence Act 2005. Cases under this Act can be filed in the court of the place where the aggrieved woman resides.

Children

Disputes over children are adjudicated by the courts with the closest contact with the child. Therefore, the court of the place where the child resides will assume jurisdiction for any disputes over custody and other children-related issues.

Domicile, nationality and habitual residence

3. How do the concepts of domicile, nationality and habitual residence apply in relation to divorce, financial arrangements, and children?

Domicile

There are two types of domicile:

- Domicile by origin. An individual automatically acquires the domicile of the country in which he/she is born. This remains his/her domicile until and unless they acquire a new domicile.
- Domicile by choice. Domicile of choice is that which the individual has elected and chosen for himself to replace his/her domicile of origin.

In relation to domicile by choice, a man's domicile is the place in which he has decided himself and his family will live, with the intention of making it a permanent home. The Apex Court has acknowledged the concept of domicile as established under English law (*Central Bank of India Ltd v Ram Narain AIR 1955 SC 36*). It held that the two constituent elements that are necessary under English law for the existence of domicile are:

- A residence of a particular kind. The residence need not be continuous, but it must be indefinite and not purely fleeting.
- An intention of a particular kind. There must be a present intention to permanently reside in the country where the residence has been taken up.

An intention of permanent residence proves a change of domicile (*Kedar Pandey v Narain Bikram Sah* [1965] 3 SCR 793). The test for establishing change of domicile is that a person acquires a new domicile when he/she settles in a new country with the intention of making it his/her permanent home and continuing to reside there permanently (*Louis De Raedt v UOI and others* (1991) 3 SCC 554).

The Hindu Marriage Act 1955 extends to the whole of India, and also applies to Hindus domiciled in the territories to which the Act extends but who are outside of those territories (*section 1(2), Hindu Marriage Act 1955*). The Hindu Marriage Act 1955 applies to persons who are not residing in India but continue to be domiciled in India.

Residence

The concept of habitual residence is not defined but is recognised by Indian courts. Indian statutes require residence as a ground for jurisdiction. The Supreme Court has held that residence, for the purposes of the application of Indian matrimonial statutes, does not mean a temporary residence but a habitual residence or a residence which is also intended to be permanent (*Smt Satya v Teja Singh* [1975] 2 SCR 1971).

The concept of residence is important in India, as the courts to which a divorce petition under the matrimonial statutes can be presented include place where either the:

- Parties to the petition last resided.
- Respondent (or the petitioner if she is the wife) resides.

Divorce

In the landmark judgment in *Y Narasimha Rao and others v Y Venkata Lakshmi and others* (1991) 3 SCC 451, it was held that marriages that take place in India can only be dissolved under either the customary or statutory law in force in India. Therefore, the only law that can apply to matrimonial disputes is the one under which the parties are married.

However, confusion occurs in relation to parties who are domiciled abroad but came to India for the sole purpose of solemnisation of marriage. When these parties, who are domiciled abroad but were married in India under Indian laws, enter into matrimonial disputes, it is unclear whether the divorce petition is maintainable in India.

The Supreme Court of India has not adjudicated on this issue. The main view emerging from the views of the High Courts is that held by the Bombay High Court that domicile in India is held to be a necessary requirement

for the application of Indian matrimonial statutes (*Ms Kashmira Kale v Mr Kishore Kumar Mohan Kale Writ Petition No 1242 of 2010*). However, this view does not bind other high courts. For the purposes of jurisdiction, Indian domicile of one of the parties is sufficient to confer jurisdiction on the Indian court.

Children

In relation to child custody, the child's interests and welfare is of primary importance. The issues regarding child custody are adjudicated by the courts in whose jurisdiction the child and the person closest with the child resides. Indian courts can decide on the issue of the custody of a child who is a foreign citizen only if the child is within the territorial jurisdiction of the Indian courts.

The Supreme Court of India has held that even where a foreign court has taken a particular view on any aspect concerning the welfare of a minor, the Indian courts should objectively and independently review the matter. In *Ruchi Majoo vs Sanjeev Majoo (2011) 6 SCC 479*, it was held by the Supreme Court of India that the judgment by a foreign court should only be taken as input for its final adjudication. In this case, the Apex Court allowed the trial court in India to hear the mother's application for custody of the child.

Indian courts believe in the comity of law. However, priority is given to the welfare of the child.

See also [Question 29](#).

Conflict of law

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

Procedure

A party can apply for a stay of proceedings in favour of a foreign jurisdiction. This is achieved by making a specific request during the proceeding.

An independent suit to bring an injunction can also be filed under section 39 of the Specific Relief Act (section 41 outlines when an injunction may be refused). A suit for an anti-suit injunction can be filed as an independent case before the court of competent jurisdiction (that is, the Family Court) (*see below, [Anti-suit injunctions](#)*).

Factors

The jurisdiction of more than one court could be invoked where the husband and wife start to reside in different

territories, either nationally or internationally. It must then be decided which court is best suited and therefore competent to exercise jurisdiction. The paramount aim should be to alleviate the human suffering involved in matrimonial disputes. In *Modi Entertainment Network and Anr V WSG Cricket PTE Ltd (2003) 1SCR 480*, the Supreme Court of India laid down the guidelines which should govern the determination of forum issues. These guidelines provide that:

- The defendant, against whom the injunction is sought, is amenable to the court's personal jurisdiction.
- If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated.
- The principle of comity (respect for the court in which the commencement or continuance of an action/proceeding is sought to be restrained) must be borne in mind.

In cases of multiple forums, the court considers the appropriate forum to be *forum conveniens*, having regard to the convenience of the parties and can grant an anti-suit injunction in relation to proceedings that are oppressive or vexatious, or in a *forum non conveniens*.

Anti-suit injunctions

The remedy available for applying for anti-suit is similar to that as applying for an injunction in favour of foreign court. A party can apply for an anti-suit injunction against the other party to prevent him/her from proceeding in any other jurisdiction. This can be applied for under section 39 of the Specific Relief Act (section 41 outlines when an injunction may be refused). A suit for an anti-suit injunction can be filed as an independent case before the court of competent jurisdiction (that is, the Family Court).

Section 7(1)(d) of the Family Courts Act provides that the family Court has jurisdiction over a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship (*Jasmeet Kaur v Navtej Singh (2018) 251 DLT 233*).

Section 39 of the Specific Relief Act provides that “when ordering mandatory injunctions, in order to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

Injunction applications must satisfy the conditions provided in section 41 of the Specific Relief Act. Section 41 provides that an injunction cannot be granted in the following situations:

- Where the injunction is to restrain any person from prosecuting a judicial proceeding that is pending at the institution of the suit in which the injunction is sought, unless the restraint is necessary to prevent a multiplicity of proceedings.
- Where the injunction is to restrain any person from instituting or prosecuting any proceeding in a court that is not subordinate to that from which the injunction is sought.
- Where the injunction is to restrain any person from applying to any legislative body.
- Where the injunction is to restrain any person from instituting or prosecuting any proceeding in a criminal

matter.

- Where the injunction is to prevent the breach of a contract the performance of which would not be specifically enforced.
- Where the injunction is to prevent, on the grounds of nuisance, an act of which it is not reasonably clear that it will be a nuisance.
- Where the injunction is to prevent a continuing breach in which the plaintiff has acquiesced.
- When equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.
- When the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court.
- When the plaintiff has a no personal interest in the matter.

Applicable law

When seeking an anti-suit injunction, an independent case for mandatory injunction can be filed under section 39 of the Specific Relief Act. The applicant must satisfy the conditions set out in section 41 (*see above, [Anti-suit injunctions](#)*).

In *Dinesh Singh Thakur vs Sonal Thakur (2018) 17 SCC 12*, the Supreme Court held that a foreign court cannot be presumed to be incorrectly exercising its jurisdiction even where one party can prove that the parties in the present case continue to be governed by Indian (Hindu) laws in the matter being disputed.

In *Vivek Rai Gupta vs Niyati Gupta, (2018) 17 SCC 21*, a wife sought to execute the final decree of divorce and other reliefs passed by a court in Ohio in the US against any other movable/immovable property in India. The Supreme Court held that it was open to the husband to resist the execution petition on any grounds available to him in law when taking the position that such a decree is not executable.

These decisions are in line with the landmark 2003 judgment in *Modi Entertainment Network v WSG Cricket Pte Ltd, (2003) 4 SCC 341*, where the Supreme Court held that the courts in India, like courts in England, are courts of law and equity. Therefore, anti-suit injunctions are governed by the principles of equitable relief: Indian courts can issue an anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case. This is because the courts of equity exercise jurisdiction *in personam*. However, such power must be exercised sparingly where injunctions are sought.

The principles laid down by the Supreme Court in *Modi Entertainment Network* have been applied in the following cases:

- *Harmeeta Singh v Rajat Taneja 102 (2003) DLT 822*.
- *Nimitt Rai Tiwari v Nishma Ramesh Karia, CS (OS) 304/2010*.

- *Magotteaux Industries Pvt Ltd and others v AIA Engineering Ltd* 2008 SCC OnLine Del 1232/ 155 (2008) DLT 73.
- *Padmini Hindupur v Abhijit S Bellur* 2015 (220) DLT (CN) 14.

5. Are foreign nationals treated differently on divorce?

The Indian courts are competent to adjudicate and grant divorce only under the Indian statutes. The Indian courts cannot pass orders on cases which require the applicability of foreign law. However, if a foreign national, who resides in India, marries under the Special Marriage Act, then such person would not be treated any differently than an Indian national when seeking divorce. (However, there is no specific precedent to support this.)

Service of proceedings

6. What are the requirements for service of divorce, financial and children proceedings in your jurisdiction?

Requirements of service are set out in section 27 and Order V of the Code of Civil Procedure. The primary method of serving summons is by personal service (that is, where someone must physically deliver the summons document to the other person).

The alternative method of service is to affix a copy of the summons on the outer door (or some other conspicuous part) at the defendant's or respondent's house or place in which he/she ordinarily resides. If after due diligence the serving officer unable to locate or trace the person, the serving officer can serve where the defendant/respondent ordinarily works or carries on his/her business.

In addition to personal service, the court may direct the summons to be served by registered post at the place where the defendant or his/her agent, where he/she voluntarily resides, works or carries on his/her business. Furthermore, the Code of Civil Procedure 1908 was amended in 2002 to include electronic means of service at Rule 9 and Rule 9A. Electronic means may therefore encompass summons via:

- Email. In *Central Electricity Regulatory Commission v National Hydroelectric Power Corporation Ltd*

(2010) 10 SCC 280], the Supreme Court of India permitted the service of notice by email along with the ordinary mode of serving notice. In *Ksl and Industries Ltd v Mannalal Khandelwal and the State of Maharashtra*, (Criminal Writ Petition No 1228 of 2004), the Mumbai High Court held that in order to avoid the delay in legal proceedings, unserved summons must be interrupted by using all the practical methods and services available, including emails. Summons through email was also permitted in *In Indian Bank Association & Ors vs Union Of India & Anr* (2014) 5 SCC 590.

- Whatsapp. In *Tata Sons Limited & Ors vs John Does*, CS(COMM) 1601/2016, the High Court of Delhi allowed for summons to be served on the defendant/respondent via Whatsapp texts in addition to emails. In another case, the High Court of Delhi allowed a woman to serve a summons on her estranged husband who was living in Australia, via Whatsapp. Moreover, the court considered the Whatsapp “double-tick” to be a valid delivery of summons.

However, use of Whatsapp or email cannot be claimed by the applicant as a matter of right. It therefore remains at the discretion of the court to grant permission for service to be allowed via such means.

The following rules apply to service outside of the jurisdiction:

- Order V, Rule 25 of the Civil Procedure Code deals with service where the defendant resides out of India and has no agent.
- Order V, Rule 26 provides the procedure of service in a foreign territory through a political agent or court.
- Order V, Rule 26-A provides for summons to be sent to officers of foreign countries.

In reality, when serving a notice or summons, practically, one would need to plan for about four to five months for effecting service of summons in a foreign country. In civil or commercial matters, some countries (such as Canada or Australia) charge a fee for serving summons.

India is a signatory to HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention). The formal method for service in India, effective from 1 August 2007, is pursuant to the Hague Service Convention. India has tasked the Ministry of Law and Justice, Department of Legal Affairs as the Central Authority with receiving requests for service that come from other contracting states.

Under the Convention, India has made certain declarations, such as the following:

- The requirement for the authority or competent judicial officer under the law of the state of origin to forward to the Indian Ministry of Law and Justice both:
 - the request, in the prescribed format; and
 - the document to be served (or a copy of the document to be served).
- If the request is in the prescribed format, the Ministry of Law will itself serve the document or will arrange for the document to be served by an appropriate agency (either using the method prescribed by internal law or using a particular method requested by the applicant, unless this is incompatible with Indian

domestic law).

- The requirement for all requests for service of documents in India to be made in the English language or accompanied by an English translation.
- The part of the request containing the summary of the document to be served will also be served by the Ministry of Law along with the document.
- The applicant will be required to pay or reimburse the costs of employing a judicial officer or competent person by law, or the costs arising from the particular method of service.
- Upon completion of the service by the Ministry of Law, a certificate annexed to the Convention, will be forwarded to the applicant stating that the document has been served (containing the method, place and date of service and the person to whom the document was delivered). (If service cannot be completed, the certificate must set out the reasons for service being prevented.)

Pre- and post-nuptial agreements and matrimonial property regimes

Validity of pre- and post-nuptial agreements

7. To what extent are pre- and post-nuptial agreements binding?

The law concerning pre- and post-nuptial agreements is still controversial and not fully evolved. Marriages are considered to be a sacred alliance that cannot be broken or dissolved as a civil contract, except with regard to the strict provisions of the personal laws and civil law.

The concept of a pre- or post-nuptial agreement is not defined in any of the personal laws. In India, a pre- and post-nuptial agreement is considered to fall into the category of a contract. Therefore, a legally binding pre-nuptial or post-nuptial agreement must satisfy the conditions of a valid contract under the Indian Contract Act 1872 (including that it must not be against public policy).

A prenuptial agreement may be an agreement which sets out terms of settlement outlining the distribution of assets, liabilities and issues relating to the custody of children, in the event that the marriage breaks down, which can maybe be relied upon to put an end to the dispute and for the parties so that they can part ways amicably. Other matters that are addressed could include:

- Permanent alimony and maintenance to be provided to wife or husband in case the marriage fails.
- The issue of custody of the children, including the care and maintenance by both parties and the

proportional distribution of responsibility, and the liabilities of both for any children born to them out of wedlock.

- The terms and conditions relating to the financial contribution of self as well the other partner in marriage.

However, pre-nuptial agreements in India are not binding or executable in a court of law. The courts may take a prenuptial agreement into consideration for understanding the intention of the couple and this may help the courts in reaching a proper settlement in cases for divorce.

Courts uphold such agreements where the parties enter into an agreement post-breakdown of marriage, in order to amicably settle family issues.

However, the above view is only applicable for marriages under Hindu law. Muslim marriages are in the form of legal contract and *mahr*, which is offered as consideration to the bride at the time of marriage can be viewed in the same light as a pre-nuptial agreement.

8. Do matrimonial regimes exist in your jurisdiction and is there a default matrimonial property regime?

Matrimonial regimes do not exist and are not recognised by the Indian judicial system.

Default regime

Not applicable.

Procedure

Not applicable.

9. How are foreign separation of property agreements and pre- and post-nuptial agreements treated by the courts in your jurisdiction?

Although there is no precedent to this, a foreign separation of property agreement and pre- and post-nuptial agreement can be construed as legally binding between parties. In the event that a dispute arises from such an

agreement, a remedy can be sought under contract law, provided all the necessary conditions for a valid contract were fulfilled.

However, no remedy for such an agreement is available under India's matrimonial laws.

Divorce, nullity and judicial separation

Recognition of foreign marriages/divorces

10. Are foreign marriages/divorces/civil partnerships recognised?

Marriages

Indian courts recognise foreign marriages conducted under and in compliance with the laws of a foreign jurisdiction. Couples, residing in India as civil partners, irrespective of their nationality, can seek a legal remedy under some statutes which provide protection to women against domestic violence or address custody related issues. However, they cannot divorce in India, as divorce is available under the personal matrimonial laws in India which are not applicable to foreigners.

Divorces/annulment

Indian courts recognise divorce/annulment decrees granted by foreign courts. These decrees by foreign courts are considered to be valid and binding for all purposes, if they satisfy the conditions provided in section 13 of the Civil Procedure Code. Divorces granted by a foreign court are recognised in India if they satisfy the provisions of section 13 of the Civil Procedure Code. A foreign judgment is conclusive on any matter that has been directly decided on between the same parties or between parties who are litigating under the same title except where:

- It has not been pronounced by a court of competent jurisdiction.
- It has not been given on the merits of the case.
- It appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which that law is applicable.
- The proceedings in which the judgment was obtained are opposed to natural justice.
- It has been obtained by fraud.
- It sustains a claim founded on a breach of any law in force in India.

(Section 13, Civil Procedure Code.)

Case law

The Supreme Court has held that Indian courts will not recognise a foreign divorce decree if the divorce petition is not based on the substantive and jurisdictional grounds provided for divorce under the Hindu Marriage Act 1955 and one of the nine grounds of divorce which must be satisfied (*Y Narasimha Rao and others v Y Venkata Lakshmi and others* (1991) 3 SCC 451).

The Supreme Court held that a foreign divorce decree will not be recognised by the Indian courts where all of the following apply (*Y Narasimha Rao and others v Y Venkata Lakshmi and others* (1991) 3 SCC 451):

- A party only technically satisfies the requirement of residence in a foreign country with only the purpose of obtaining the divorce.
- That party is neither domiciled in that state nor has an intention to make it their home.
- There is no substantial connection with the forum.

In *Smt Satya v Teja Singh* [1975] 2 SCR 1971, the Supreme Court derecognised the decree of divorce of the foreign country on the ground that one party obtained the divorce decree by fraud on the foreign court by representing incorrect jurisdictional facts. The Apex Court held that the concept of residence does not include temporary residence for the purpose of obtaining a divorce.

It is held that marriages which take place in India can only be dissolved under either the customary or statutory law in force in India. Therefore, when a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is in defiance of the law and is unenforceable in India. For the same reason, such a judgment is also unenforceable under clause (f) of section 13 of the Civil Procedure Code, since such a judgment is in breach of the matrimonial law in force in India.

The Supreme Court has also held that “the jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted, must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be:

- Where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides, and the relief is granted on a ground available in the matrimonial law under which the parties are married.
- Where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim, which is based on a ground available under the matrimonial law under which the parties are married.
- Where the respondent consents to the granting of relief, although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the “parties”.

Civil partnerships

Civil partnerships are not legally recognised in India.

Divorce

11. What are the grounds for divorce?

Divorce

In India, divorce can be obtained by alleging fault of the other party and/or by mutual consent.

Fault. Dissolution of marriage under all Indian personal laws is based on guilt or fault theory of divorce (although divorce by mutual consent is also available under some personal laws (*see below, Mutual consent*)).

Section 13 of the Hindu Marriage Act 1955 recognises nine fault grounds of divorce with a further four additional fault grounds available to the wife alone under the Hindu Marriage Act 1955 (*section 13(2)*).

Section 2 of the Dissolution of Muslim Marriages Act 1939 contains nine fault grounds on which the wife alone can sue.

For Christians, subsection 10 of the Indian Divorce Act 1869 contains grounds of divorce.

The Parsi Marriage and Divorce Act 1936 contains ten fault grounds of divorce on which either spouse may seek divorce.

Section 27(1) of the Special Marriage Act 1954 contains ten fault grounds of divorce on which either spouse can seek divorce. Section 27(1A) contains two fault grounds on which the wife alone can seek dissolution of marriage.

Mutual consent. Under the Indian personal laws, divorce by mutual consent is recognised under the Hindu Marriage Act 1955, the Special Marriage Act 1954, the Parsi Marriage and Divorce Act 1939, the Dissolution of Muslim Marriage Act 1939, and now also under the Divorce Act 1869.

The only requirement for divorce by mutual consent is that the parties should have been living separately for a period of one year or more.

Section 13B of the Hindu Marriage Act 1955 provides for divorce by mutual consent where the parties have been separated for a period of one year. Thereafter, the first motion for mutual divorce must be filed and presented. After a period of between six months and 18 months, the parties must present the second motion.

The court will record the parties' statements to ensure that the divorce is being obtained of free will and only then will it grant the decree of divorce.

Divorce under Islamic law

Under Islamic law, divorce is classified into three categories:

- *Talaq*. This is divorce at the instance of the husband.
- *Khula*. This is divorce at the instance of the wife.
- *Mubaraat*. This is divorce by mutual consent.

Under Islamic law, only the husband can pronounce *talak* on his wife, not vice versa. However, the husband can delegate this power to the wife or any third person by an agreement. This is known as divorce by delegation (*talak-e-tafweez*).

Divorce by the husband. There are three types of *Talaq*:

- *Talaq-e-ahsan*. This is a single pronouncement of *talaq* by the husband, followed by a period of abstinence (*iddat*). The duration of the *iddat* is 90 days or three menstrual cycles (where the wife is menstruating). Alternatively, the period of *iddat* is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of *iddat*, the pronouncement of divorce is treated as having been revoked. Therefore, *talaq-e-ahsan* is revocable. Conversely, if there is no resumption of cohabitation or intimacy, during the period of *iddat*, the divorce becomes final and irrevocable after the expiry of the *iddat* period. It is considered irrevocable because the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh *nikah* (marriage) with a fresh *mahr* (that is, a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property). However, on the third pronouncement of the *talaq*, the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through *talaq* (divorce) or death) can the couple remarry. Among Muslims, *talaq-e-ahsan* is regarded as the most "proper" form of divorce.
- *Talaq-e-hasan*. This is pronounced in the same manner as *talaq-e-ahsan* (see above). However, instead of a single pronouncement there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure must be followed after the expiry of the first month (during which marital ties have not been resumed). *Talaq* is then pronounced again: after the second pronouncement of *talaq*, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is important to note that the first and the second pronouncements can only be revoked by the husband. If he does so (either expressly or by resuming conjugal relations) the *talaq* pronounced by the husband becomes ineffective, as if no *talaq* had been expressed. However, if a third *talaq* is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third *tuhr* (period of purity), as soon as the third declaration is made, the *talaq*

becomes irrevocable, and the marriage stands dissolved, after which the wife must observe the required *iddat* (the period after divorce, during which a woman cannot remarry: its purpose is to ensure that the male parent of any offspring can be clearly identified). After the third *iddat*, the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry.

- The distinction between *talaq-e-ashan* and *talaq-e-hasan* is that, in the former, there is a single pronouncement of *talaq* followed by abstinence during the period of *iddat*, whereas, in the latter there are three pronouncements of *talaq*, interspersed with abstinence.
- *Talaq-e-biddat*. The third type of *talaq* is *talaq-e-biddat*. This is effected by one definitive pronouncement of *talaq* (such as, “I *talaq* you irrevocably” or three simultaneous pronouncements, like “*talaq, talaq, talaq*”, uttered at the same time, simultaneously. In *talaq-e-biddat*, divorce is then effective from this point onwards. Unlike the other two categories of *talaq*, the instant *talaq* is irrevocable the very moment it is pronounced. The Supreme Court in a recent landmark decision by five judges in the case of *Shayara Bano vs Union of India* (2017) 9SCC 1 (with a majority of 3:2) held that the act of divorce by a Muslim man by way of uttering the words *talak* three times is unconstitutional and illegal. It was held that triple *talaq* “is not integral to religious practice and violates constitutional morality”.

Divorce by the wife. The Dissolution of Muslim Marriages Act 1939 sets out the grounds on which a Muslim woman can seek dissolution of marriage. Section 2 of the Act provides for grounds for decree for dissolution of marriage, namely that the:

- Whereabouts of the husband has not been known for a period of four years. (However, any decree passed based on this ground cannot take effect until six months have passed since making the decree, and if the husband appears (either in person or through an authorised agent) within this period, and satisfies the court that he is prepared to perform his conjugal duties, the court will aside the decree.)
- Husband has neglected or has failed to provide for her maintenance for a period of two years.
- Husband has been sentenced to imprisonment for a period of seven years or upwards. (However, no decree can be passed until the sentence has become final.)
- Husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.
- Husband was impotent at the time of the marriage and continues to be so. (However, before passing a decree on this ground, the court will, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the court within such period, no decree will be passed based on this ground.)
- Husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease.
- Wife, having been given in marriage by her father or other guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of 18 years.

- Marriage has not been consummated.
- Husband treats the wife with cruelty, for example, the husband:
 - habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;
 - associates with women of evil repute or leads an infamous life;
 - attempts to force her to lead an immoral life;
 - disposes of her property or prevents her exercising her legal rights over it;
 - obstructs her in the observance of her religious profession or practice;
 - if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran; or
 - carries out any other ground recognised as valid for the dissolution of marriages under Muslim law:

Nullity

A marriage can only be solemnised between any two Hindus if the following conditions are fulfilled:

- Neither party has a spouse living at the time of the marriage.
- Neither party is mentally impaired or insane at the time of the marriage.
- The bridegroom is 18 years or over and the bride 15 years or over at the time of the marriage.
- The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two.
- The parties are not *sapindas* (that is, lineal ascendants of each other or have a common lineal ascendant as far as third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, unless the custom or use governing each of them permits a marriage between the two).
- Where the bride is under the age of 18 years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

(Section 5, *Hindu Marriage Act 1955*.)

Only the violation of the prohibition of bigamy and marriage within a prohibited relationship renders the marriage void. Being underage does not render the marriage void or voidable. Insanity renders a marriage voidable.

Under the Special Marriage Act 1954 and the Hindu Marriage Act 1955, there is a distinction between a void and voidable marriage. The Indian Divorce Act 1869 only provides grounds on which marriages are void, but

provides no grounds on which a marriage is voidable. This is the same under the Parsi Marriage and Divorce Act 1936, although some of the traditional grounds on which a marriage is voidable have been made grounds of divorce.

Muslim law recognises only void marriages known as *batil* marriages (that is, a marriage that does not exist from the outset). There is no concept of voidable marriage. No court decree is necessary. Even when the court passes a decree, it merely declares the marriage null and void. Muslim law has a unique concept of irregular marriage called *fasid* marriage.

A voidable marriage is a valid marriage if it is not avoided. A voidable marriage can be avoided only on the petition of one of the parties to the marriage.

Judicial separation

All matrimonial statutes, apart from those under Muslim law, contain a provision for judicial separation.

Hindu law. A wife or husband can file for judicial separation on any of the fault grounds for divorce stated in section 13(1) of the Hindu Marriage Act 1955, and a wife can sue for judicial separation on any one of the additional fault grounds in section 13(2) (*section 10, Hindu Marriage Act 1955*).

Special Marriage Act 1954. A husband or wife can file for judicial separation on any of the grounds specified in section 27 (other than the grounds specified in clause (I) and (j) of section 27 on which a petition for divorce might have been presented or on the ground of failure to comply with a decree for restitution of conjugal rights) (*section 23, Special Marriage Act 1954*).

Divorce Act 1869. The grounds on which a judicial separation decree can be obtained are adultery, cruelty and two years' desertion.

12. What is the procedure and timeline for divorce?

Divorce

In India, divorce can be sought under any of the available grounds set out in section 13(1) of the Hindu Marriage Act and section 27 of the Special Marriage Act (*see Question 11*). The petition for divorce lodged under any of these provisions can be contested by the other spouse.

The divorce petition must be filed by either spouse in the Family Court and must satisfy the conditions for jurisdiction. Once the petition is successfully lodged has been successfully served on the other side, both parties file their written pleadings. Upon examination of the evidence and oral/written submissions made by the parties, the judge will pronounce his/her judgment granting or rejecting the petition for divorce. The process

from petition to disposal takes about two to three years.

Divorce obtained through mutual consent can be obtained within a minimum of six months. Section 13B of the Hindu Marriage Act 1955 provides for divorce by mutual consent where the parties have been separated for a period of one year. Thereafter, the first motion for mutual divorce must be filed and presented. After a period of six to 18 months, the parties must present the second motion. The court will record the parties' statements to ensure that the divorce is being obtained of free will and only then will it grant the decree of divorce.

Nullity

Nullity of marriage can be sought under section 11 of the Hindu Marriage Act 1955 and section 24 of the Special Marriage Act. The procedure and timeline for the disposal of a nullity is the same as for a divorce petition (*see above*, [Divorce](#)).

Judicial separation

Judicial separation can be sought under section 10 of the Hindu Marriage Act 1955 and Section 23 of the Special Marriage Act 1954. The procedure and timeline for disposal of a judicial separation is the same as for a divorce petition (*see above*, [Divorce](#)).

Religious marriage and divorce

13. Are religious marriages and divorces recognised in your jurisdiction?

In India, most marriages are solemnised under the personal law (that is, the religion of the parties). Personal law based on religion is codified in India and statutes are available which govern the rights of the parties entering into such a union. India is a secular country and a variety of religions are practised and recognised, the majority of which are Hindu, Muslim or Christian.

If the parties choose to marry in accordance with India's secular marriage law, the Special Marriage Act, the parties' rights will be governed by that statute.

With respect to status of divorce, see [Question 11](#).

Finances/capital and property

14. What powers do the courts have to allocate financial resources and property on the breakdown of marriage?

Matrimonial laws are lacking in provisions relating to the settlement of the spouses' properties and the matrimonial home. Section 27 of the Hindu Marriage Act 1955 provides only for the settlement of property presented jointly to the husband and wife at or about the time of marriage. It does not address the issue of settlement of property owned jointly or separately. This is because there is no concept of matrimonial property and therefore there is no division of assets.

Maintenance is available to the wife as well as the husband as a statutory right on the breakdown of marriage. The courts have very widely interpreted the term "maintenance", to allocate financial resources and property to the wife. The courts have powers to award maintenance under the personal laws, as well as under section 125 of the Criminal Procedure Code (CrPC) and section 20 of the Protection of Women from Domestic Violence Act 2005.

Assets from trusts or companies where the legal title to which is not held by one of the parties will also be taken into account as a financial resource. The court will take such assets into account when evaluating the living standards of a party, for the purposes of making an investment in the name of the wife/child or when awarding maintenance.

15. What factors are relevant to the exercise of the court's powers?

A wife or the husband is only entitled to be awarded maintenance, permanent or interim. The quantum of maintenance may vary from case to case and is determined by the spouse's income. It may usually be up to one-third of the husband's net income.

It has been held that while considering a claim for interim maintenance, the court must keep in mind the status of the parties, reasonable wants of the applicant, and the income and property of the applicant. The requirements of the non-applicant, the income and property of the non-applicant and the other family members to be maintained by the non-applicant must also be taken into account. While it is important to ensure that the maintenance awarded to the applicant is sufficient to enable the applicant to live in a similar degree of comfort as in the matrimonial home, it should not be so exorbitant that the non-applicant is unable to pay.

Maintenance awarded cannot be punitive. It should aid the applicant to live in a similar lifestyle that he or she enjoyed in the matrimonial home. It should not expose the non-applicant to unjust contempt or other coercive proceedings. On the other hand, maintenance should not be so low so as to make the order meaningless.

While estimating the spouse's income or to get an idea of the income and lifestyle of the parties, the court can take into consideration, the lifestyle of the spouse, the amount spent at the time of marriage and the manner in which marriage was performed, any property or properties purchased, any rental income, the amount spent on fees and other expenses incurred (and so on).

16. What is the court's current position on the division of assets?

There is no concept of division of assets in India. Upon divorce, the spouse is entitled to claim maintenance. The husband must still, however, provide for/maintain the wife in accordance with the same status that the wife enjoyed during the marriage. However, the concept of "maintenance" has been widely interpreted by the Indian courts.

For details regarding maintenance, see [Question 19](#).

Finances/maintenance (alimony)

17. How does ongoing spousal maintenance operate following marital breakdown?

Maintenance is available as a statutory right by way of independent relief, both under civil and criminal laws, and also as an ancillary relief.

Hindus

Maintenance to Hindus is provided for under:

- Section 24 (maintenance pending suit) and section 25 (permanent alimony and maintenance) of the Hindu Marriage Act 1955.
- Section 18 of the Hindu Adoptions and Maintenance Act 1956.

Muslims

A wife is entitled to maintenance from her husband after the breakdown of the marriage. A divorced woman is entitled to:

- A reasonable and fair provision and maintenance to be made and paid to her within the period of *iddat* by her former husband.
- If she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.
- An amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time after that according to Muslim law.
- All the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

(Section 3, *Muslim Women (Protection of Rights on Divorce) Act 1989*.)

Christians

Alimony pending the suit of divorce can in no case exceed one-fifth of the husband's average net income for the three years preceding the date of the order, and continues until the decree for dissolution of marriage or of nullity of marriage is made absolute or is confirmed (*section 36, Indian Christian Marriage Act 1872*). Section 37, regarding permanent maintenance, states that the court will order the husband to secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, to the satisfaction of the court, after holding in consideration all of the following:

- The wife's fortune (if any).
- The ability of the husband to pay.
- The conduct of the parties.

There is a provision for interim and permanent maintenance. The right to claim maintenance extends until remarriage.

The Muslim Women (Protection of Rights on Divorce) Act 1989 was enacted to codify and regulate the obligations of the Muslim husband to pay maintenance to the divorced wife. However, a controversy arose as to the time period for which a Muslim husband is obliged to pay maintenance to the divorced wife. The Supreme Court in the judgment of *Danial Laitifi v Union of India AIR 2001 SC 3958*, held that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which obviously includes her maintenance. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of section 3(1)(a) of the Muslim Women (Protection of Rights on

Divorce) Act 1989.

The liability of a Muslim husband to his divorced wife arising under section 3(1)(a) of the Act to pay maintenance is not confined to the *iddat* period.

A divorced Muslim woman who has not remarried and who is not able to maintain herself after the *iddat* period can proceed as provided under section 4 of the Muslim Women (Protection of Rights on Divorce) Act 1989 against her relatives, who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, including her children and parents. If any of the relatives are unable to pay maintenance, the magistrate may direct the State Wakf Board, established under the Act, to pay that maintenance.

18. Is it common for maintenance to be awarded on marital breakdown?

Maintenance is commonly awarded in favour of the wife or the husband (as applicable) on marital breakdown.

19. What is the court's current position on maintenance on marital breakdown?

The husband must provide for/maintain the wife in accordance with the same status that the wife enjoyed during the marriage. However, the concept of "maintenance" has been widely interpreted by the Indian courts.

There is no set formula for fixing the amount of maintenance. The award of maintenance will therefore depend on the facts and circumstances of each case. The court is required to consider certain specific factors, however, such as the status of the parties, the parties' respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and to those the husband is to provide (both in relation to payments he is legally obliged to make as well any involuntary payments or deductions) (*Jasbir Kaur Sehgal v District Judge, Dehradun and others* (1997) 7 SCC 7).

The amount of maintenance for the wife should be fixed so she can live in reasonable comfort taking into consideration her status and the standard of living she was accustomed to when she was living with her husband. However, the amount fixed cannot be excessive or extortionate (*Jasbir Kaur Sehgal v Dist Judge, Dehradun* (1997) 7 SCC 7).

In *Sh Bharat Hegde v Smt Saroj Hegde*, 140 (2007) DLT 16 the High Court of Delhi observed that the relevant

considerations to be taken into account at the time of assessing maintenance claims are the:

- Status of the parties.
- Reasonable wants of the claimant.
- Independent income and property of the claimant.
- Number of persons the non-applicant has to maintain.
- Amount that should aid the applicant to live in a similar lifestyle as he or she enjoyed in the matrimonial home.
- Non-applicant's liabilities.
- Provision for food, clothing, shelter, education, medical attendance, treatment and so on of the applicant.
- Payment capacity of the non-applicant.

Equally, as is often the case, some guesswork is used when estimating the income of the non-applicant, if there is undisclosed or incorrect disclosed information.

A wife/aggrieved woman can only claim the right to reside in the matrimonial home. In the recent case of *Aishwarya Atul Pusalkar v Maharashtra Housing & Area Development Authority and Others (Civil Appeal No 7231 of 2012)*, decided on 27 April 2020, the Supreme Court recognised the woman's right to reside in her matrimonial home and held that such right has a legitimate basis. The Supreme Court ruled that, subsequent to her marriage, a married woman has an entitlement to live with the rest of her family members (on the husband's side) when the property is owned on a joint basis. If the wife resides in accommodation as an independent family unit with her husband and children, the matrimonial home would be that residential unit. The Supreme Court ruled this right to reside in matrimonial home is embedded in her right as a wife. Such right is also implicit in section 18 of the Hindu Adoption and Maintenance Act 1956 where such statute is applicable.

The right to residence has also been recognised under the Protection of Women from Domestic Violence Act 2005 and by the Supreme Court in *SR Batra v Taruna Batra (2007) 3 SCC 169*.

In *Shamima Farooqui v Shahid Khan (2015) 5 SCC 705*, the Supreme Court of India held that the husband is under a higher obligation when the question of providing maintenance to the wife and children arises. In the case, it was held that it is the obligation of the husband to maintain his wife. The husband cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

Child support

20. What financial claims are available to parents on behalf of children within

or outside of the marriage?

In India, the obligation of a parent to maintain a child outside the marriage is same as the obligation to maintain the child born within the marriage. The law does not differentiate between a legitimate and an illegitimate child.

The parent with custody of the child can file for maintenance on behalf of the child in the capacity as legal guardian. Such parent can seek maintenance in the form of monthly allowance, which would cover the child expenditure on education, food, clothing and clothing. Maintenance is usually awarded on a monthly basis. The parent can also seek maintenance in form of a lump sum figure, which is usually deposited in the form of a fixed deposit in the bank for the purposes of the child's higher education or marriage expenses.

To further a claim of maintenance, financial claims in the form of capital (to include transfer of property) can be made. The courts may grant security of property to secure the claim of maintenance.

Indian laws provide the same rights and claims to children whose parents have never married as those available to children born within a marriage.

21. On what basis is child maintenance calculated?

If a person with sufficient means, neglects or refuses to maintain his legitimate or illegitimate minor child (whether married or not) or neglects or refuses to maintain his legitimate or illegitimate child (not being a married daughter) who has attained majority, and the child is, by reason of any physical or mental abnormality or injury, unable to maintain itself, a magistrate can order him to make a monthly allowance for the maintenance of his child (*section 125, CrPC*). Section 125 CrPC can be enforced only against men (obligations for women are provided for in different statutes).

A Hindu father or a Hindu mother is under a statutory obligation to provide maintenance to their children (*Hindu Adoptions and Maintenance Act 1956*). The obligation to maintain the children is shared equally by the mother and father. However, with the social set up in India, the father is called upon to primarily maintain the children as he is still considered to be the primary breadwinner for the family. In a situation where the father has no means or insufficient means, the mother is therefore under an obligation to provide maintenance.

It has been held that, in determining the amount of maintenance to be awarded to children, regard must be had to the position and status of the parties and the reasonable needs of the child.

Section 3(b) of the Hindu Adoptions and Maintenance Act 1956 provides that maintenance includes in all cases the provision for food, clothing, residence, education and medical attendance and treatment (plus where there is an unmarried daughter, all reasonable expenses related to her marriage). Section 3(c) provides that a “minor” is a person who has not reached the age of 18 years (see [Question 22](#)). Under section 20 of the Hindu Adoptions and Maintenance Act 1956, a Hindu is bound, during his/her lifetime, to maintain his/her children. A minor child, provided he/she is a minor, is entitled to claim maintenance from his/her father or mother (see [Question 23](#)). Under section 20, it is as much the father’s obligation to maintain a minor child as it is the mother’s obligation.

22. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

Ordinarily, an order of maintenance would end when the child attains the age of majority (18 years of age) but if the welfare of the child so requires, it may be continued beyond it, particularly when the child is engaged in higher education.

In *Jagdish Jugtawat v Manjulata and others* (2002) 5SCC 422, it was held that a female child has a right to be maintained by her parents even after she attains majority.

Under the Mohammedan law (Islamic law) a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married.

In *Amarendra Kumar Paul v Maya Paul and others* (2009) 8 SCC 359, the Supreme Court held that an application for grant of maintenance under section 125 of the CrPC, can be continued up until the child reaches majority. Therefore, once the child attains majority, section 125 would cease to apply.

23. Can a child (whether of legal maturity or otherwise) make a claim directly against their parents?

A minor, in his/her individual capacity, can make a claim against his/her parents. However, the minor child must approach the court through a legal guardian.

A child who has attained the age of majority (that is, over the age of 18 years) can make a claim directly against

his/her parents. However, a claim for maintenance would only be successful if made for the purposes of higher education or marriage expenses. A child whose has attained the age of majority may, however, seek civil remedy in the form of seeking his/her share in the joint family property (as applicable).

In India, a Hindu child (male or female) acquires a right in the undivided family property, by virtue of birth. The child is entitled to such share in the property by virtue of being a *coparcenar* and can therefore seek his/her share in the undivided family property.

Enforcement of financial orders

24. What are the main methods of enforcement to ensure compliance with financial orders following divorce/dissolution in your jurisdiction?

Part II (sections 36 to 74) and Order XXI of the Civil Procedure Code provide for the execution of decrees and orders. In this context, “execution” is the process by which the court’s judgement is brought into effect, allowing for the implementation or giving effect to the order passed by the court.

Where one party fails to comply with the requirements of the execution following divorce/dissolution, a contempt petition may be filed by the other party. Such person may even be arrested if contempt is proved.

25. What is the legal position on the reciprocal enforcement of financial orders?

Foreign orders/decrees/judgments cannot be directly executed in India unless they are the judgments of courts in “reciprocating territories”. In all other cases, the only mode of giving effect to a foreign judgment is to file a suit on the judgment in an appropriate Indian court, which has to be tested by section 13 of the Civil Procedure Code (CPC).

Decrees passed by courts in a reciprocating territory may be executed in India, subject to the following conditions:

- Where a certified copy of decree of any of the superior courts of any reciprocating territory has been filed in a district court, the decree may be executed in India as if it had been passed by the district court.

“Reciprocating territory” means any country or territory outside India which the central government may, by notification in the official *Gazette*, declare to be a reciprocating territory for the purposes of section 44. “Superior courts”, with reference to any reciprocating territory, means such courts as may be specified in the notification.

- Together with the certified copy of the decree, a certificate shall be filed from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted, and that certificate shall, for the purposes of proceedings under section 44, be conclusive proof of the extent of such satisfaction or adjustment. “Decree”, with reference to a superior court, means any decree or judgment of such court under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty), but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.
- The provisions of section 47 will, as from the filing of the certified copy of the decree, apply to the proceedings of a district court executing a decree under this section, and the district court must refuse execution of any such decree if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

(Section 44A, CPC.)

Financial relief after foreign divorce proceedings

26. What powers are available to the court to make orders following a foreign divorce? If such a power exists, what is the legal basis for making such an application?

There do not appear to be any decision on the subject of rights of an Indian court to make orders following a foreign order of divorce or annulment of marriage. However, in our opinion, where a particular relief is available to a party under a matrimonial statute, and the same has been adjudicated by the foreign court, the party would not have a right to approach the Indian court again on the same issue. However, where the issue of financial orders has not been decided by a foreign court or the order of the foreign court is hit by the provisions of section 13 of the Civil Procedure Code, it may be adjudicated in appropriate proceedings in India.

Independent legal remedies are available to parties seeking financial relief under the Hindu Adoptions and Maintenance Act 1956.

Children

Custody/parental responsibility

27. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

There is no standard formula that is applied in relation to custody/parental responsibility following the breakdown of a relationship or marriage. The most important principle governing the decisions of the courts in relation to children is the best interest and welfare of the child.

Generally speaking, the mother has a preferential right to the custody of an infants below the age of five years and female children. However, where the court upon substantial evidence reaches the conclusion that the mother cannot secure the best interest and welfare of the child, the primary custody of infants can be entrusted to fathers.

28. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

The courts in India are highly favourable in permitting access/contact/visitation, following the breakdown of a relationship or marriage to the parent who does not have custody of the child. It is settled law that a child should not miss out on the love and affection of both the parents as a result of breakdown of marriage. Depending on the facts and circumstances of the case, the courts may permit, weekly, fortnightly or overnight visitation. The court may also permit sharing of the holidays between the parents.

International abduction

29. What is the legal position on international abduction?

India has recently witnessed an alarming number of cases involving cross-border child abduction.

India, not being a signatory to the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention), is not under an obligation to return the child to the country from which the child had been wrongfully removed. However, recently the Supreme Court of India has held that, where children have been wrongfully removed from the jurisdiction of foreign countries to which they belong, the principle of comity of nations would apply and the parties should be sent back to the jurisdiction of the court that had the most intimate contact. The courts in that country should conclusively adjudicate the issue of custody.

Dr V Ravi Chandran v Union of India and others (2010) 1 SCC 174 is a groundbreaking case in which the mother and father lived in the US and litigated in the US court, leading to a consent order regarding their child. Subsequently, the mother came to India with the child in violation of the US court order and was untraceable. In this case, the Supreme Court directed the Central Bureau of Investigation (CBI) to find the child as the mother had been fleeing from the course of justice. The Supreme Court of India held that the US court was the only competent court to adjudicate any disputes relating to the child and, if the mother had any grievance, she could seek modification of the consent order in the US court. The Supreme Court explicitly ordered that if the parties did not return to the jurisdiction of the US courts within the stipulated time to settle their disputes regarding child custody, the child would be handed over to the petitioner father. However, the case continued. The mother sought an extension of time to return to the jurisdiction of the US courts for obtaining her visa, but thereafter was untraceable. The Supreme Court again directed the CBI to trace the child. This time after the child was traced, the Supreme Court directed the CBI to hand over the child to the father. The child was recovered by CBI in Chennai and handed over to the father and they returned to the jurisdiction of US courts.

When dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, it has been held that the court in the country to which child has been removed must first consider the question of whether the court should either:

- Conduct an elaborate enquiry on the question of custody.
- Summarily order a parent to return custody of the child to the country from which the child was removed and that all aspects relating to child's welfare be investigated in a court in their own country.

In *Arathi Bandi V Bandi Jagadrakshaka Rao and others (2013) 15 SCC 790*, the Supreme Court followed its ratio in the judgment of *Dr V Ravi Chandran*. In this case, it was held that no relief could be granted to the parent whose conduct involves removing the child from the foreign country to India in defiance of the orders of the court of competent jurisdiction. The Supreme Court specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of the state which has the most intimate contact with the issues arising in the case.

In *Nithya Anand Raghavan v State of NCT (2017) 8 SCC 454*, the Supreme Court dismissed a petition seeking the child's return to the foreign country. The Court held that Indian courts are not prohibited from declining the relief to return a child to his/her native state merely due to a pre-existing order from a foreign court of competent jurisdiction. However, this should be considered on a case-by-case basis (whether by a summary

inquiry or an elaborate inquiry). The Supreme Court reiterated that the exposition in the case of *Dhanwanti Joshi* is good law and has been quoted with approval by a three-judge bench of this Court in *Dr V Ravi Chandran*. The Court also approved the view taken in the case of *Dhanwanti Joshi*, which was for countries that are not signatory to the Hague Child Abduction Convention, the applicable law will be the law of the country to which the child is removed, while taking into account the welfare of the child as paramount importance. Therefore, the order of the foreign court will only be one factor (among others) to be taken into consideration.

Summary jurisdiction to return the child can only be exercised where the child had been removed from his/her native land and removed to another country where (as applicable):

- The child's native language is not spoken.
- The child gets divorced from the social customs and contacts to which he/she has been accustomed.
- The child's education in his/her native land is interrupted and he/she is being subjected to a foreign system of education.

In addition, summary jurisdiction can only be exercised if the court to which the child has been removed is moved promptly and quickly. The overriding consideration must be the interests and welfare of the child.

In *Lahari Sakhamuri v Sobhan Kodali (2019) 7 SCC 311*, the Supreme Court of India reiterated the importance of the best interest and welfare of the child, and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. Further, the court stipulated that this principle could not be overridden by the following:

- Doctrines of comity of courts.
- Intimate connections.
- Orders passed by foreign courts having jurisdiction in matters regarding custody of the minor child.
- Citizenship of the parents and the child.

However, in the facts of this case, the court held that upholding the best interests of the children would be established by their return to the US. This was so that they were able to enjoy their natural environment with the love, care and attention of their parents and grandparents, and to resume their schooling. Both the minor children, from the very inception of their birth, until their removal, were living with their parents in US. Leave to remove/applications to take a child out of the jurisdiction.

In a globalised world where adults marry and shift from one jurisdiction to another, there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases, the jurisdiction may vest in two countries. The issue is important and needs to be dealt with care and sensitivity. Although the best interests of the child are extremely important (in fact, of paramount importance), the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if such court is outside its territory. It is well settled law that, when deciding matters regarding the custody of a child, the primary and paramount consideration must

be the child's welfare. Therefore, if the welfare of the child so demands, objections based on legal technicalities cannot stand in its way. It has been observed that various factors must be taken into consideration when deciding what is best in the interest of the child. No hard and fast rules can be laid down and each case must be decided on its own merits. The court must decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents claiming custody of the child.

Keeping in view the importance of mediation and protecting the best interests of the child, the Ministry of Women and Child Development directed the National Commission for Protection of Child Rights (NCPCR) to establish the Mediation Cell. The purpose of the Mediation Cell is to resolve cases where children have been taken out of the jurisdiction by a spouse without the permission of the other spouse due to marital discord or domestic violence from other jurisdictions or vice versa and to prepare parental plans that take into account the best interests of the child. The Mediation Cell develops the parental plan by contacting the concerned parties in person or via video conferencing, in an attempt to resolve the matter through mutual consent. Following the mediation process, the Mediation Cell provides the report to the Integrated Nodal Agency (INA), which will either refer the case back to the Mediation Cell (in a further attempt to resolve the matter) or will make a final order on the basis of a report from the NCPCR. So far, the Mediation Cell has successfully intervened in 12 disputes relating to international parental child abduction.

In addition, a separate Non-resident Indian (NRI) Cell has also been established to deal with issues relating to marriages of NRIs. The NRI Cell receives and processes all complaints related to Indian women who have been deserted by their overseas Indian husbands and provides assistance (including conciliation and mediation between the parties and advising the complainant on any related issues).

Leave to remove/applications to take a child out of the jurisdiction

30. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

Both parents are assumed to be the natural custodians of their child. Therefore, there is no bar against a parent removing the child from the jurisdiction against the wishes of the other parent. It is only necessary for a parent to seek permission of the court to remove the child from the jurisdiction where either:

- Such action is objected to by the other parent.
- There is a restraining order of the court.
- The matter adjudicating child custody is pending in the court.
- The court has passed an order granting one parent the exclusive custody of the child.

Matters relating to family and custody are considered to be of a civil nature. Therefore, even in a case of child abduction by one parent, the matter is considered to be of a civil nature and, unlike in Western countries, arrest warrants are not issued. In cases of child abduction, the other parent has remedy in the form of filing a writ of *habeas corpus* or by seeking relief of restoration under the Guardians and Wards Act 1890.

Surrogacy and adoption

Surrogacy agreements

31. What is the legal position on surrogacy agreements in your jurisdiction? Is surrogacy available to individuals and cohabiting couples (both heterosexual and same-sex)?

The following types of surrogacy are practised in India:

- Paid surrogacy, which involves a commercial agreement between the commissioning couple and the woman who agrees to bear the child.
- Altruistic surrogacy, where the surrogate receives no financial reward for bearing or relinquishing the child.

In India, surrogacy is permitted for lack of legislation on the subject yet. Although the Indian Council of Medical Research (ICMR) has set “national guidelines” to regulate surrogacy, these are simply guidelines. These guidelines were made in 2005 and regulate assisted reproductive technology (ART) procedures. The 2005 Guidelines are limited in scope and although they provide that surrogate mothers must sign a “contract” with the childless couple, there are no provisions for an event where the “contract” is violated and what the rights of a child born from such arrangement would be.

Case law

The Supreme Court, as seen in its line of judgments, has been pro-surrogacy and also pro-contract.

In the landmark case of *Baby Manji Yamada v Union of India (2008) 13 SCC 518*, the view of the Supreme Court was not only pro-surrogacy, but also extremely pro-contract. Baby Manji was a surrogate child of a Japanese couple who were having legal difficulties getting a visa for the child born in Gujarat. The Supreme Court of India gave custody of the child to the surrogate grandmother. The Supreme Court of India held that commercial surrogacy is permitted in India, and therefore there is manifold increase in international confidence in surrogacy in India.

In another matter of *Jan Balaz v Anand Municipality AIR 2010 GUJ 21*, a German couple entered into a contract with a surrogate mother and two children were born. The question which arose was whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by virtue of birth. This was a momentous question which had no precedent in India. The High Court of Gujarat, keeping in view the findings of the Supreme Court in *Baby Manji's* case, held that this case is primarily concerned with the relationship of the child with the gestational surrogate mother, and with the donor of the ova. In the absence of any legislation to the contrary, the High Court is more inclined to recognise the gestational surrogate who has given birth to the child.

The facts of this case are unusual because the petitioner was a German national and was the biological father of two babies given birth to by a surrogate mother who was an Indian citizen. The petitioner's wife was a German national. The petitioner and his wife were both working in the UK at the time and wanted to stay there. The petitioner and his wife had entered into a surrogacy agreement with the surrogate mother. Further, the surrogate mother had also agreed that she would not take any responsibility for the wellbeing of the child, the biological parents would have a legal obligation to accept the child that the surrogate mother would deliver, and the child would have all inheritance rights of a child of biological parents under the prevailing law. The surrogate mother gave birth to two baby boys.

On birth, an application for passports was made in India. The petitioner's name was shown as the father and the surrogate mother's name was shown as the mother. The Regional Passport Office asked for the passports back and issued a certificate of identification. The father submitted that Germany would never recognise the babies as their citizens, so he filed a writ petition stating that the denial of passports to the children violated Article 21 (right to life) of the Indian Constitution.

The High Court held that this case was primarily concerned with the relationship of the child with the gestational surrogate mother, and with the donor of the ova. In the absence of any legislation to the contrary, the Courts were more inclined to recognise the gestational surrogate who has given birth to the child as the natural mother. She has a right to privacy that forms part of right to life and liberty guaranteed under Article 21 of the Constitution of India. Nobody can compel her to disclose her identity. Babies born are not in a position to know who the egg donor is and they only know their surrogate mother who is real. The wife of the biological father, who has neither donated the ova, nor conceived or delivered the babies, cannot in the absence of legislation be treated as a legal mother and she can never be a natural mother. The Gujarat High Court held that, by providing ova, a woman will not become a natural mother, as life does not take place in her womb, nor does she receive the sperm for fertilisation.

In the present legal framework, the High Court held that the courts have no other option but to hold that the babies born in India to the gestational surrogate are citizens of this country and therefore, are entitled to receive passports. It directed the Passport Authorities to release the passports immediately.

It is clear that in the case of *Jan Balaz*, the contract proved to be insufficient in demarcating the rights of the parties and also brought out residual issues such as citizenship and identity that are matters of vital importance to the children but do not have a place in the surrogacy agreement.

In both the above cases (*Baby Manjhi* and *Jan Balaz*), the Indian courts have taken a very pro-contract stand,

possibly as a way of encouraging commercial surrogacy, which contributes millions of dollars to India's economy. However, it seems from the above that the Indian Contract Act in its current form is not able to quite comprehend the complex questions and requirements that surround surrogacy and surrogacy agreements. Unlike most contracts that deal with the inanimate, which indirectly has an impact on the lives of human beings, the main entity being given for consideration here is a human child. What actually defines breach of a surrogacy agreement is not provided anywhere in the Indian Contract Act, making it easier for certain parties to evade liability and accountability, which will leave the innocent child unprotected and vulnerable. In light of the above-mentioned arguments it becomes clear that more than an issue of contract, commercial surrogacy is an issue of rights, mainly the rights of the intending parents, the rights of the donors, the rights of the surrogate mother and last but definitely not least, the rights of the child. It is also an issue of human rights because of the cramped and heavily controlled living conditions of the surrogate mother.

Issues such as whether the parent country of the commissioning couple recognises and accepts the citizenship of the surrogate child are of great importance, since the Citizenship Act of India does not accord citizenship to a child born out of surrogacy and such matters can leave the child without citizenship where citizenship is denied from both countries. For example, neither Japan nor Germany recognise surrogacy and therefore will not grant citizenship to a surrogate child born in India. This was evidenced in the *Baby Manji Yamada case* and the *Jan Balaz case* (see above).

It should be noted that the judgment in *Jan Balaz* has been appealed to the Supreme Court of India.

Legal instruments for surrogacy

Assisted Reproductive Technology Regulation Bill. In February 2020, the Union Cabinet approved the Assisted Reproductive Technology (ART) Regulation Bill 2020, to monitor the medical procedures used in India that assist in achieving pregnancy. The ART Regulation Bill will regulate India's assisted reproductive technology (ART) services with the aim of helping infertile couples to feel more ensured/confident of the ethical practices in relation to ART services.

ART has made some significant steps forward over the past few years and India has seen some of the highest growth in the number of ART centres and ART cycles performed each year. The select committee that examined [the Surrogacy Regulation Bill 2019](#) has said that it would be prudent to bring the ART Bill before the Surrogacy Bill 2019, to establish a regulatory mechanism for ART clinics. The ART Regulation Bill is intended to be more overarching and a first step in regulating the sector.

Some key features of the Art Regulation Bill include requirements for safe and ethical ART, mandatory pre-genetic implantation testing, and the establishment of a national regulatory board and state level regulatory boards for ART.

Surrogacy (Regulation) Bill 2020. The Surrogacy (Regulation) Bill 2016 was introduced in Lok Sabha on 21 November 2016. It was examined by the Standing Committee on Health and Family Welfare which submitted its report on 10 August 2017. The Committee gave several recommendations with regard to:

- Commercial v altruistic surrogacy.
- The implications of the surrogate being a close relative.

- The inclusion of provisions for gamete donation.
- Regulation of abortion.

However, the 2016 Bill lapsed with the dissolution of the 16th Lok Sabha. The Surrogacy (Regulation) Bill 2019 was therefore introduced in Lok Sabha on 15 July 2019 to replace the 2016 Bill. Some key features of the Art Regulation Bill include new regulatory of surrogacy (allowing for altruistic surrogacy and prohibiting commercial surrogacy), an outline of permitted purposes for carrying out surrogacy, specific eligibility criteria for intending couples and surrogate mothers, rules for parentage and abortions of surrogate children, and the establishment of national and state surrogacy regulation boards. The Surrogacy (Regulation) Bill also establishes certain offences related to surrogacy, including the offence of:

- Undertaking or advertising commercial surrogacy.
- Exploiting the surrogate mother.
- Selling or importing human embryo or gametes for surrogacy.
- Abandoning, exploiting or disowning a surrogate child.

These offences are sanctioned with a fine of up to INR1 million and imprisonment of up to ten years.

The 2019 Surrogacy (Regulation) Bill was passed by the Lok Sabha on 5 August 2019, but was referred to a select committee by the Upper House after members raised certain concerns with the proposed legislation in its current form (for example, only allowing altruistic surrogacy with a near relative, rules preventing single woman, and the definition of infertility).

Accepting the recommendations from the parliamentary select committee, on 26 February 2020 the Government of India amended the Bill to allow a “willing woman” and not just a “close relative” to become a surrogate mother and proposed [widows](#) and divorced women to also be eligible to benefit from its provisions in addition to infertile Indian couples. The proposed insurance cover for a surrogate mother was also increased to 36 months (from 16 months previously). However, only Indian couples, with both intending partners of Indian origin, can opt for surrogacy in the country.

The Surrogacy Regulation Bill was likely to be tabled in the second half of the budget session beginning March 2020 but has since been postponed due to the 2019 novel coronavirus disease (COVID-19) pandemic.

Adoption

32. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?



An adopted child, once all the legal formalities are satisfied, acquires the same rights as a biological child.

Since a large number of Indian children are available for adoption, a number of foreign countries started looking at India for adoption. The Guardian and Wards Act 1890 is a statute which protects the rights and interests of children, but this does not provide for adoption. This legislation provides that a person can become a guardian of a child, which for all purposes is akin to adoption, but not a parent. Adoption is also governed by the personal law of the parties.

Adoption of orphaned, abandoned and surrendered children in India is governed by a set of guidelines notified by the Government of India. The Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women & Child Development, Government of India. It functions as the nodal body for the adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the HCCH Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (Hague Adoption Convention), ratified by the Government of India in 2003.

It primarily deals with the adoption of orphaned, abandoned and surrendered children through its associated/recognised adoption agencies.

By means of a progressive judgment by the Supreme Court, judicial guidelines were laid down in *Lakshmi Kant Pandey v Union of India (UOI) 1985 Supp SCC 701*, under which foreign persons could become guardians of Indian children and adopt them in accordance with the laws of their home country.

The Madras High Court also observed that when a prima facie case is made out raising doubts as to genuineness of adoption and documents, the District Social Welfare Officer must refer the matter to the police for investigation.

In *Craig Allen Coates v State and another 2010 (8) SCC 794* it was held that for inter-country adoptions the procedure followed could include a reference to an expert committee on the lines constituted in the present case, to ensure that inter-country adoptions are allowed only after full and proper satisfaction is recorded by all the agencies (including a committee of experts wherever reference to such a committee is considered necessary).

Until very recently, there was a prohibition under the personal laws to adopt two children of the same sex. In addition, the Guardian and Wards Act was badly lacking, particularly in relation to delinquent, juvenile or “juvenile in conflict with law” children. A “juvenile” means a person who has not completed his/her 18th year and “juvenile in conflict with law” means a juvenile who is alleged to have committed an offence (*Juvenile Justice (Care and Protection of Children) Act 2000 (JJ Act)*).

While the Juvenile Justice Act 1986 dealt with the care and protection of juveniles, it did not deal with adoption. This gap was filled by the enactment of the JJ Act, which contains specific provisions for adoption as one of the ways for rehabilitation and social reintegration of juveniles in conflict with the law.

The Juvenile Justice Act, being secular in nature, supersedes the Hindu Adoptions and Maintenance Act 1956, and does not impose restrictions on the number of adopted children from the same gender.

The Bombay High Court in *In Re: Adoption of Payal @ Sharinee Vinay Pathak and his wife Sonika Sahay @ Pathak 2010(1) Bom CR 434* held that when the child to be adopted is orphaned, abandoned or surrendered, or a child in need of care and protection as defined in Juvenile Justice Act, the bar imposed by sections 11(i) and 11(ii) of the Hindu Adoption and Maintenance Act does not bar adopting a child of same gender after having a biological child of that gender.

Adoption is available to individuals (unmarried persons) and both heterosexual and same sex cohabiting couples.

Cohabitation

33. What legislation (if any) governs division of property and financial claims for unmarried couples on the breakdown of the relationship?

There is no legislation which governs the division of property for unmarried couples if the relationship breaks down. However, the Protection of Women from Domestic Violence Act 2005 (Domestic Violence Act) bestows all benefits on a woman living in a cohabitation arrangement as available to a married woman, as she is covered within the term “domestic relationship” under section 2(f).

The Supreme Court of India held in *Savitaben Somabhai Bhatiya v State of Gujarat and others (2005) 3 SCC 636* that a relationship “in the nature of marriage” is akin to a common law marriage. However, the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage.

In *D Velusamy v D Patchaiammal (2010)10 SCC 469*, the Supreme Court observed that a “relationship in the nature of marriage” is akin to a common law marriage. Common law marriages require that although not being formally married, the couple must:

- Hold themselves out to society as being akin to spouses.
- Be of legal age to marry.
- Be otherwise qualified to enter into a legal marriage, including being unmarried.

- Have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

These conditions must be evidenced. Further, the Supreme Court has held that a “relationship in the nature of marriage” under the 2005 Act must also fulfil the above requirements, and in addition the parties must have lived together in a “shared household” as defined in section 2(s) of the Act. Merely spending weekends together would not make it a domestic relationship.

In *Chanmuniya v Chanmuniya Virendra Kumar Singh Kushwaha and another* (2011) 1 SCC 141 the Supreme Court held that where a man has lived with a woman for a long time, despite not being married, he should be made liable to pay the woman maintenance if he leaves her. The man should not be allowed to benefit from legal loopholes by enjoying the advantages of a *de facto* marriage without undertaking the duties and obligations.

Through the judgment in *Chanmuniya*, the Supreme Court has extended relief for maintenance under section 125 of the CrPC to women in live-in relationships. It has been held that as monetary relief and compensation can be awarded in cases of live-in relationships under the Domestic Violence Act, they should also be allowed in proceedings under section 125 of the CrPC. Sections 18 to 23 of the Domestic Violence Act provide a large number of reliefs as legal redress. An aggrieved woman can claim reliefs through the courts in the form of protection orders, residence orders, monetary relief, custody orders for children, compensation orders and interim/ex parte orders.

The benefits available to a woman under the Domestic Violence Act include a woman’s right to reside in the shared household with her husband or a partner. If a husband/partner of the complainant violates protection orders, it will be deemed a punishable offence. Punishment for violation of the rights enumerated above could extend to one year’s imprisonment and/or a maximum fine of INR20,000.

The Supreme Court in *Indra Sarma v VKV Sarma* AIR 2014 SC 309 set out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression “relationship in the nature of marriage” under section 2(f) of the Domestic Violence Act.

The question which arose before the Supreme Court was whether a “live-in relationship” would amount to a “relationship in the nature of marriage” falling within the definition of “domestic relationship” under section 2(f) of the Domestic Violence Act and the disruption of such a relationship by failure to maintain a woman involved in such a relationship amounts to “domestic violence” within the meaning of section 3 of the Domestic Violence Act. The Supreme Court observed that a live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal.

The Supreme Court distinguished between the relationship in the nature of marriage and marital relationship. Relationship of marriage continues, despite the fact that there are differences of opinions, marital unrest and so on, even if they are not sharing a shared household, being based on law. However, a live-in-relationship is purely an arrangement between the parties, unlike a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at

any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression “in the nature of”.

The Supreme Court referred to certain situations, in which the relationship between an aggrieved person referred to in section 2(a) and the respondent referred to in section 2(q) of the Domestic Violence Act, would or would not amount to a relationship in the nature of marriage, would be apposite. The following are some of the categories of cases which are only illustrative:

- Domestic relationship between an unmarried adult woman and an unmarried adult male. A relationship between an unmarried adult woman and an unmarried adult male who lived or, at any point of time lived together in a shared household, will fall under the definition of section 2(f) of the Domestic Violence Act, and in case there is any domestic violence, the same will fall under section 3 of the Domestic Violence Act and the aggrieved person can always seek relief provided under Chapter IV of the Domestic Violence Act.
- Domestic relationship between an unmarried woman and a married adult male. Situations may arise when an unmarried adult woman knowingly enters into a relationship with a married adult male. The question is whether such a relationship is a relationship “in the nature of marriage” so as to fall within the definition of section 2(f) of the Domestic Violence Act.
- Domestic relationship between a married adult woman and an unmarried adult male. Situations may also arise where an adult married woman knowingly enters into a relationship with an unmarried adult male. The question is whether such a relationship would fall within the expression relationship “in the nature of marriage”.
- Domestic relationship between an unmarried woman who unknowingly enters into a relationship with a married adult male. This may, in a given situation, fall within the definition of section 2(f) of the Domestic Violence Act and such a relationship may be a relationship in the “nature of marriage”, so far as the aggrieved person is concerned.
- Domestic relationship between same sex partners (gay and lesbian). The Domestic Violence Act does not recognise such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. Legislatures in some countries, like the Interpretation Act 1984 (Western Australia), the Interpretation Act 1999 (New Zealand), the Domestic Violence Act 1998 (South Africa), and the Domestic Violence, Crime and Victims Act 2004 (UK), have recognised the relationship between same sex couples and have brought these relationships into the definition of domestic relationship. The Supreme Court held that although section 2(f) of the Domestic Violence Act uses the expression “two persons”, the expression “aggrieved person” under section 2(a) takes in only “woman”, therefore the Act does not recognise the relationship of same sex (gay or lesbian), and therefore any act, omission, commission or conduct of any of the parties would not lead to domestic violence entitling any relief under the Domestic Violence Act.

The Supreme Court held that while determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence”, there should be a common sense/balanced approach, after weighing up the various factors which exist in a particular relationship, and then a conclusion as to whether a particular relationship is a relationship in the “nature of marriage”. The Supreme Court held that to test whether a particular relationship would fall within the expression “relationship in the nature of marriage”, certain guiding

principles have to be evolved since the expression has not been defined in the Act. Section 2(f) of the Domestic Violence Act defines “domestic relationship” to mean, among others, a relationship between two persons who live or have lived together at such point of time in a shared household, through a relationship in the nature of marriage. The expression “relationship in the nature of marriage” is also described as a de facto relationship, a marriage-like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship) and so on.

Section 17 of the Protection of Women from Domestic Violence Act 2005 gives all married women or female partners in a domestic relationship the right to reside in a home that is known in legal terms as the “shared household”. The same provision applies even if the woman does not have any right, title or beneficial interest in the same. The law provides that if an abused woman requires it, she has to be provided with alternate accommodation. The accommodation and her maintenance must be paid by her husband or partner.

Family dispute resolution

Mediation, collaborative law and arbitration

34. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

The Indian judiciary has been proactive over the past few years in having a formal framework for providing mediation and arbitration services to help litigants resolve their disputes in an amicable fashion. Numerous mediation and conciliation centres have opened, which run under the supervision of the High Courts of various states. The Supreme Court of India also has its own mediation and conciliation centre.

In family disputes, the medium for amicable settlement adopted is mediation. There is no legal recognition for “collaborative law” in India, but lawyers do participate in facilitating settlements. In India, family matters are not the subject matter of arbitrations.

The mediation and conciliation centre are governed by the rules formulated by the High Courts of various states from time to time. The agreements reached under the auspices of mediation and collaborative law have the sanctity of law. Parties who do not abide by the term and conditions are liable to be sued for breach of contract and may even be liable for contempt of court.

35. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

An attempt at reconciliation is mandatory under the Hindu Marriage Act 1955 and the Special Marriage Act 1954. Other Indian matrimonial statutes do not provide for it and there is therefore no statutory mandate to attempt settlement in other cases.

Reconciliation is provided for under sections 23(2) and 23(3) of the Hindu Marriage Act. Section 23(2) of the Hindu Marriage Act states that before proceeding to grant any relief under it, the court has a duty in the first instance, in every case, to make every endeavour to bring about reconciliation between the parties where a divorce is sought on most of the fault grounds for divorce specified in section 13 of the Hindu Marriage Act. Section 23(3) of the Hindu Marriage Act makes a provision empowering the court on the request of parties, or if the court thinks it just and proper, to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation. It must be borne in mind that a Hindu marriage is a sacrament and not a contract. Even if divorce is sought by mutual consent, it is the duty of the court to attempt reconciliation in the first instance. Accordingly, Hindu law advocates reconciliation before dissolving a Hindu marriage.

The provisions of sections 34(2) and 34(3) of the Special Marriage Act are *pari materia* to the provisions contained in sections 23(2) and 23(3) of the Hindu Marriage Act. Even though the marriage contracted under the SMA does not have the same sanctity as marriage solemnised under the Hindu Marriage Act, the Indian Parliament retained the provisions for reconciliation of marriages in the same terms as they exist in the Hindu Marriage Act.

The provisions under both the statutes are almost identical and accordingly every endeavour to bring about reconciliation is mandatory.

The mediation and conciliation centres are established under the Rules of the High Courts within whose jurisdiction they are established.

The option of pre-litigation mediation is available to the parties. However, the parties are not required to attempt a family dispute resolution in advance of the institution of proceedings. It is a voluntary and consensual exercise.

Civil partnership/same-sex marriage

36. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

Civil partnership and same-sex marriage are not recognised within the territory of India and there is no legislation which governs civil partnerships or same sex marriage.

In *Navtej Singh Johar v Union of India* (2018) 10 SCC 1, the Supreme Court decriminalised section 377 of the Indian Penal Code. It was held that section 377 insofar as it criminalises voluntary sexual relations between lesbian/gay/bisexual/transsexual (LGBT) persons of the same sex in private, discriminates against them on the basis of their sexual orientation. This is a violation of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution.

Media access and transparency

37. What is the position regarding media access to and press reporting of family law cases?

Section 11 of the Family Court Act 1984 provides that in every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and will be so held if either party so desires. “In camera” proceedings mean that the proceedings are conducted only among the presence of the judge, the parties and their lawyers. Such proceedings are not conducted in open court and therefore have no audience and the proceedings are recorded (on camera). The press has no access to such in camera proceedings. Such proceedings include all proceedings emanating out of the Hindu Marriage Act 1955 and may include divorce, child custody, maintenance proceedings.

In the recent judgment of the Supreme Court in *Santhini v Vijaya Venketesh* (2017) 4 SCC 150, it was held that in view of the scheme of Family Courts Act 1984 and in particular section 11, the hearing of matrimonial disputes may have to be conducted in camera. It was further held that, when settlement fails and when a joint application is filed, or where both the parties file their respective consent memorandum for hearing the case through videoconferencing before the concerned Family Court, the Court can exercise the discretion to allow the request. After the settlement fails, if the Family Court considers it appropriate, having regard to the facts and circumstances of the case, that videoconferencing will sub-serve the cause of justice, it may so direct.

Family cases in India are generally heard in open court. The media has access to proceedings and can report family law cases in the press. However, the parties may move an application before the court and seek the relief in order to have a hearing in private.

Controversial areas and reform

38. What areas of the law (if any) are currently undergoing major change?
Which areas of law are considered to be particularly controversial?

Very recently, two public interest cases came before the High Court of Delhi, seeking legalisation of same-sex marriages (under the Special Marriage Act and the Foreign Marriage Act respectively). The High Court has sought reply from the government and observed that the statutes are gender-neutral and must be interpreted in favour of all citizens. These cases are next listed for hearing on 8 January 2021.

COVID-19

39. What has been the impact of COVID-19 and the resultant social distancing and lockdown measures on the family court system in your jurisdiction?

The functioning of the Indian courts has been severely impacted following the outbreak of the COVID-19 pandemic. During March to May 2020, the functioning of the courts had been restricted to matters pertaining to urgent relief (although matters are now improving). Hearings are conducted virtually (video conferencing) in most matters and deadlines, timescales have been extended.

The Supreme Court of India and the High Courts have adopted measures to reduce the physical presence of lawyers, litigants, court staff, paralegals and representatives of the electronic and print media.

In the state of Delhi, the Family Courts are taking up the following as a matter of priority:

- Cases in which the parties' arguments have been concluded and were reserved for order/judgment.
- Fresh petitions under section 13-B(2) of the Hindu Marriage Act 1955 (that is, petitions for the second motion of a divorce settlement through mutual consent) through e-filing, with hearings conducted through video conferencing.

- Disposal of all matters relating to final arguments, carried out through video conferencing.

The following are then considered secondary to the matters listed above (all to be taken up through video conferencing):

- Urgent applications, whether in pending cases or otherwise, regarding maintenance, custody and/or visitation rights.
- Petitions under section 13-B(1) Hindu Marriage Act (that is, petitions for the first motion of divorce through mutual consent).
- Ex-parte matters.

The Delhi High Court recently made an order for visitation right by video conferencing twice a week to a father living in Dubai. It was directed that the order will remain effective unless further orders are passed by the Court (*Vikas S Gupta v Neha Gupta* CM (M) 445694/ 2020).

In *Anand Vaid v Preety Vaid & Ors* (WPC 3227/ 2020), the petitioner husband filed a petition seeking directions for the recording of evidence via video conferencing (or any such manner feasible) as part of his petition for divorce on the ground of cruelty and adultery, due to the prevalent lockdown during the COVID-19 pandemic. The Delhi High Court issued such directions. On 1 June 2020, the Delhi High Court responded to the husband's request by issuing the Video Conferencing Rules, which provides for the recording of evidence via video conferencing (see http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_ULDC4UVQWZ9.PDF.)

**Natasha Sahrawat and Gauri Goburdhan, Advocates assisted Ms Anand in the compilation of this chapter.*

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of Merit by President of the French Republic, directly at the level of “Officer”

Areas of practice. Constitutional law; food and environmental law; power and electricity matters; human rights issues; arbitration; corporate law; environmental matters; mining matters; property matters; public interest law; private international law; family law; intellectual property rights; information technology and telecom; representing financial institutions; coal companies; builders; governments of France and Belgium; multi-national companies; governments and government companies; insurance companies.

Recent transactions

- Constitutional right of freedom and expression for South Indian Actress Khushboo. Supreme Court upheld the rights in a pathbreaking judgment and quashed 21 cases of defamation.
- Represented the French Government in the famous case of *Clemenceau* ship.
- Introducing common medical examination NEET in the country
- Upheld the Preconception and Prenatal Diagnostic Technique (Prohibition of Sex Selection) Act 1994.
- *Hiral P Harsora and others v Kusum Narottamdas Harsora* laying down the law that men and women can be prosecuted under the Domestic Violence Act irrespective of gender.
- Triple Talaq struck down in *Shayara Banu* (2017).
- Legal battle for BJP Leader Arjun Munda to be made the Chief Minister of Jharkhand.
- *V Ravi Chandran v Union of India and others*, on inter-country parental abduction.
- Landmark case in private international law of Stephanie Becker in re adoption.
- Led the battle for legalising e-rickshaws’ and getting drinking water to Dwarka.
- Landmark case of limited appeal from Armed Forces Tribunal to Supreme Court.
- Amicus in NJAC matter before the Constitution Bench on improving procedure for appointment of judges.
- *SL foundation v Union of India and others*. (Doing away with the evil practise of Devdasi.)
- *Save Life Foundation v Union of India*. (Good Samaritan Case in Motor Accident cases.)
- *Devika Biswas v Union of India and others*. (Against forced Sterilization of women.)
- *Christian Medical College Vellore and others v Union of India and others*. (Famous NEET case.)
- Ban on Dance Bars in Mumbai.
- Ongoing case on the ban of pornography and child pornography in India.

- Constitutional case on definition of “Industry” before the Constitution Bench.
- Represented the government in the Aadhar case before the Constitution Bench.

Languages. English, Hindi, Punjabi

Professional associations/memberships

- Designate Senior Advocate.
- Additional Solicitor General of India.
- Vice President of the Bar Association of India.
- French National Order of Merit by the President of the French Republic.
- Professor at Amity Law School (Honorary).
- Arbitrator of Indian Council of Arbitration.
- Member of IAFL.
- BRICS steering committee member.
- Alternate Country Councillor of LAW ASIA (the Law Association for Asia and the Pacific).
- Recipient of Women Achievers Award from the International Association of Lions Clubs.
- Core Committee Member of National Human Rights Commission.

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