

**FAMILY LAW**

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**FAMILY LAW – MARRIAGE, DIVORCE AND GUARDIANSHIP IN INDIA:  
OVERVIEW.**

**PART- I**

**1. INTRODUCTION**

With the 42<sup>nd</sup> Amendment of the Constitution of India enacted in 1976, the Preamble to the Constitution asserted that India is a secular nation. Thus, wide number of religions is freely practised in India. Unlike Western notions of secularism, India's secularism does not separate religion and state. Major religions practised in India include Hinduism, Islam and Christianity who have their own separate family laws. Other religions like Parsi and Jews, whose number, in the context of the population of India, is insignificant, too have their own separate family laws. India does partially separate religion and state. For example, it does not have an official state religion and state-owned educational institutions cannot impart religious instructions. In matters of law in modern India, however, the applicable code of law is unequal, and India's personal laws – on matters such as marriage, divorce, inheritance, alimony – varies with an individual's religion. Therefore, the matrimonial laws in India, including laws on marriage, divorce and other connected issues, are

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essentially governed by the personal laws of the parties depending on their religion:

- 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.

Under the Constitution of India all aspects of personal law are in the concurrent list (entry 5). Both Parliament and the state legislatures have power to legislate in respect of them. Apart from legislation relating to Muslim wakfs and Hindu endowments, state legislatures have not exercised this power to any appreciable extent. The entire codified Hindu law has been enacted by the Union Parliament, though some state legislature have made some modifications; for instance, the Uttar Pradesh enactment, the Hindu Marriage (the Uttar Pradesh Sanshodhan) Adhinyam, 1962 has made, inter alia, cruelty a ground of divorce. This may be deemed to be superseded by the Marriage Laws (Amendment) Act 1976, which made cruelty a ground of divorce. The Shariat Act, 1937 and the Dissolution of Muslim Marriage Act, 1939; were passed by

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central legislature. So were the Parsi Marriage and Divorce Act, 1936; the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869 and several Hindu personal law reform enactments before independence.

Indian communities which have their separate family law are generally religious communities; however, their law is not necessarily religious law. Most importantly the members or individual member need not be an ardent believer or follower of that faith. In most cases, being a member of the community by birth or conversion, will suffice, though in actual persuasion he may be atheistic or non-religious or even anti-religious; and though he may even decry the religion so long as he does not leave it (mere renunciation of faith may not be sufficient) he will continue to be governed by that law. Community cannot expel the said person since ex-communication or outcasting is unconstitutional.

In addition to the personal laws, in India we have another aspect of family law viz. The Special Marriage Act 1954. The Parliament of India enacted the said Act to provide a special form of marriage for the people of India and all Indian nationals in foreign countries, irrespective of the religion or faith followed by either party. Individuals opting to marry under the said Act would then cease to be governed by any

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personal laws and would squarely be governed by the Special Marriage Act 1954.

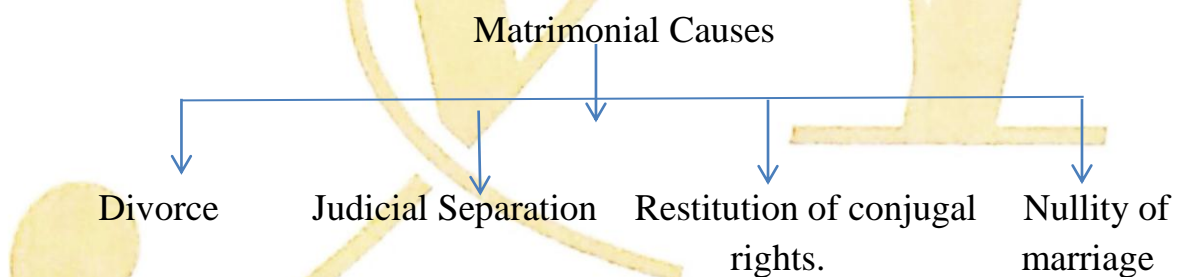
All these laws apply throughout India (except for in Jammu and Kashmir, and Goa).



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## 2. Matrimonial Causes

- i. Initially, the old Hindu law did not provide for settlement of matrimonial causes and divorce was not recognised by the Muslim law from very early days, but then it has always been the private affair of the parties, and in the sense in which we use the term in modern law, it could hardly come within the ambit of matrimonial causes.
- ii. In a limited sense judicial divorce was first introduced in India under the Converts' Marriage Dissolution Act, 1866. This was followed by the Indian Divorce Act, 1869, which introduced all the four matrimonial causes known to English law viz.



- iii. Initially, the said Act was made applicable only to Christians. Subsequently, it was made applicable to persons who performed their marriage under the Special Marriage Act, 1872.

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iv. The Special Marriage Act, 1954 introduced civil marriages and matrimonial causes. The Hindu Marriage Act, 1955 made matrimonial causes available to Hindus. The Parsi Marriage and Divorce Act made them available to Parsis.

v. The Indian Divorce Act, the Parsi Marriage and Divorce Act, the Special Marriage Act and the Hindu Marriage Act recognize all the four matrimonial causes, viz., Divorce, Judicial separation, and Restitution of conjugal rights and Nullity of marriage.

#### 2.1. Nullity of Marriage:

Section 11 of the Hindu Marriage Act, 1955, deals with Nullity of Marriage and divorce. A marriage may be annulled on the grounds:

- that it has not been consummated owing to the impotence of the respondent;
  
- that the respondent was incapable of giving valid consent to it in consequence of unsoundness of mind, or though

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capable of giving valid consent was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or was subject to recurrent attacks of insanity;

- that the respondent was at the time of the marriage pregnant by some person other than the petitioner . *(In this case, it is necessary that the marital intercourse with the consent of the petitioner did not take place since the discovery of the ground by the petitioner and the petition was presented within one year of the marriage),*
- that the consent of the petitioner or of the guardian, as the case may be, was obtained by fraud or force, provided that the petitioner did not live with his or her full consent with the respondent after the discovery of fraud or cessation of force and the petition was presented within one year of the discovery of fraud or cessation of force.

## 2.2. Restitution of conjugal rights

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- The provision relating to restitution of conjugal rights has been enacted in section 9 of the Hindu Marriage Act. The said Section lays down that a petition for restitution may be made on the ground that the respondent has without reasonable excuse withdrawn from his or her society and the court may pronounce the decree for restitution 'on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted'.
- The provision of restitution of conjugal rights in section 22 of the Special Marriage Act, 1954, is substantially the same as found in Section 9 of the Hindu Marriage Act, 1955. Likewise, is the provision for Restitution of conjugal rights viz. section 36 of the Parsi Marriage and Divorce Act, 1936 though it has been worded slightly differently.

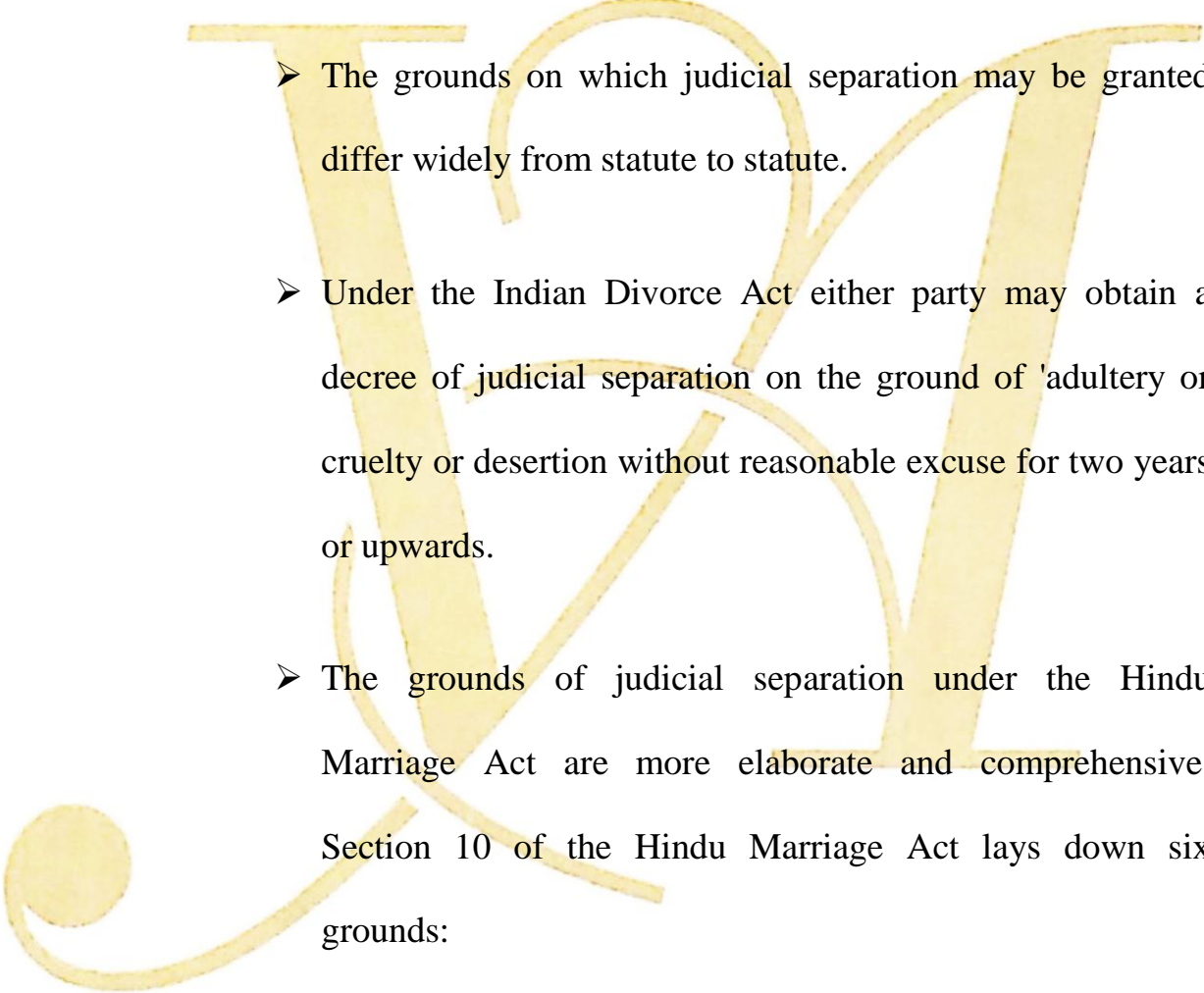
### 2.3. Judicial Separation

- The statutory law of Hindus, Parsis and Christians recognizes the matrimonial relief of judicial separation. It is

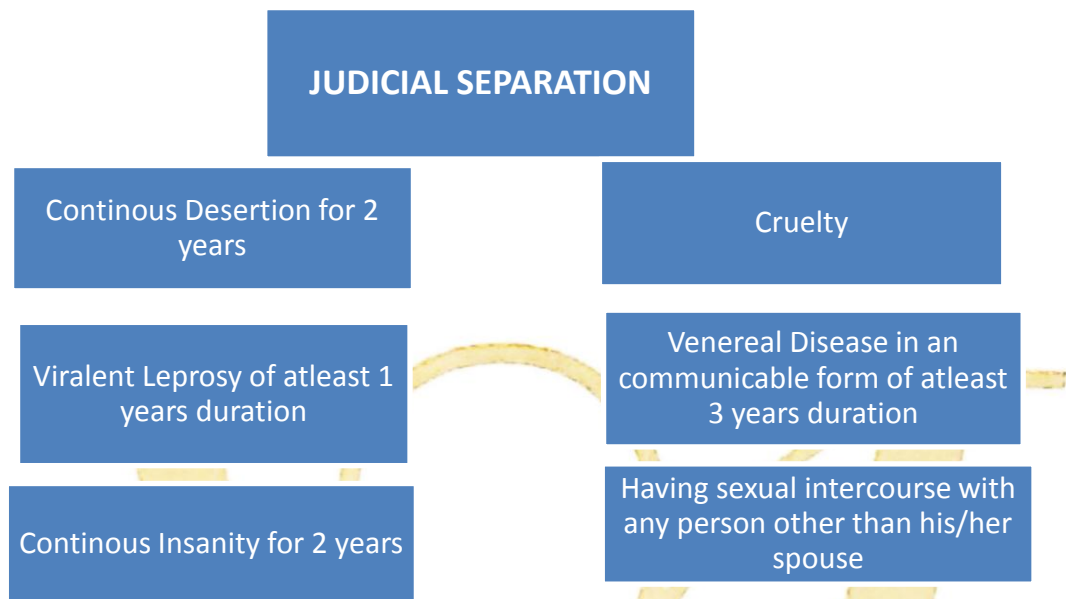
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also recognized by the Special Marriage Act, 1954 as well. Muslim law does not recognize anything like it. Probably in the case of non-Hindus and non-Muslims, the High Courts have inherent jurisdiction to provide the relief.

- 
- The grounds on which judicial separation may be granted differ widely from statute to statute.
  - Under the Indian Divorce Act either party may obtain a decree of judicial separation on the ground of 'adultery or cruelty or desertion without reasonable excuse for two years or upwards.
  - The grounds of judicial separation under the Hindu Marriage Act are more elaborate and comprehensive. Section 10 of the Hindu Marriage Act lays down six grounds:

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#### 2.4. 1. Divorce (Section 13 of Hindu Marriage Act, 1955):

- Divorce means putting an end to the marriage by dissolution of marital relations. The parties can no longer be husband and wife.

2.4.1.1. Section 13 of the Hindu Marriage Act, 1955 recognises 9 nine grounds of divorce. On petition presented by either the husband or the wife, the marriage be dissolved by a decree of Divorce on the grounds that the other party:

- is living in adultery;
- has ceased to be a Hindu by conversion to another religion;

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- iii. has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition;
- iv. has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy;
- v. had, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form;
- vi. has renounced the world by entering any religious order;
- vii. 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 them, had that party been alive;
- viii. has not resumed cohabitation for a period of two years or more after the passing of a decree for judicial separation against that party; or
- ix. has failed to comply with a decree for restitution of conjugal rights for a period of two years or more after the passing of the decree.

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2.4.1.2. Adultery - Besides being available as a ground for divorce, adultery was once punishable as a criminal offence (section 497, Indian Penal Code. However, it was only the male illicit lover who was punishable for the offence of adultery. The woman, who is pari delicto (at equal fault) with the adulterous male, was not liable to any punishment, even as an "abettor". However, the said position was changed vide judgment passed by A five-Judge bench of the Hon'ble Apex Court in the matter of *Joseph Shine v UOI (2019) 3 SCC 39*, vide which Section 497 of the IPC was struck off being of the view that the same violates Articles 14, 15 and 21 of the Constitution.

2.4.1.3. Section 2 of the Dissolution of Muslim Marriages Act 1939 provides that, a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following ground namely:

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- i. that the whereabouts of the husband have not been known for a period of four years;
- ii. that the husband has neglected or has failed to provide for her maintenance for a period of two years. However, a decree passed on this ground shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree;
- iii. that the husband has been sentenced to imprisonment for a period of seven years or upwards. However, no decree shall be passed on ground until the sentence has become final;
- iv. that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- v. that the husband was impotent at the time of the marriage and continues to be so. However, before passing a decree on this ground the Court shall, on

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application by the husband, pass 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 shall be passed on the said ground;

- vi. that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- vii. that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated;
- viii. that the husband treats her with cruelty, that is to say,
  - a. habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

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- b. associates with women of evil repute or leads an infamous life, or
- c. attempts to force her to lead an immoral life, or
- d. disposes of her property or prevents her exercising her legal rights over it, or
- e. obstructs her in the observance of her religious profession or practice, or
- f. if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;
- g. on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

2.4.1.4. For Christians, sub section 10 of the Indian Divorce Act 1869 contains grounds of divorce.

- i. Adultery;
- ii. Party ceases to be Christian;
- iii. If a party has been suffering from leprosy or a venereal disease for two years;

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- iv. In case of a party wilfully refusing to consummate the marriage;
- v. When a party has deserted the spouse for two years or more;
- vi. In case of a party treating the spouse with cruelty.

2.4.1.5. Section 32 of the Parsi Marriage and Divorce Act 1936 states that Any married person may sue for divorce on any one or more of the following grounds, namely:-

- i. that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it;
- ii. that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit:

*Provided that* divorce shall not be granted on this ground, unless the plaintiff was ignorant of the fact at the time of the marriage, and has filed the suit within *three years* form the date of the marriage;

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- iii. that the defendant was at the time of marriage pregnant by some person other than the plaintiff:

*Provided that* divorce shall not be granted on this ground, unless the plaintiff was at the time of the marriage ignorant of the fact alleged, the suit has been filed within two years of the date of marriage, and marital intercourse has not taken place after the plaintiff came to know of the fact;

- iv. that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:

*Provided that* divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

- v. that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court

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improper to compel the plaintiff to live with the defendant:

*Provided that* in every suit for divorce on this ground it shall be the discretion of the Court whether it should grant a decree for divorce or for judicial separation only;

- vi. that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution;

*Provided that* divorce shall not be granted on this ground, if the suit has been filed more than two years after the infliction of the grievous hurt, or after the plaintiff came to know of the infection, or after the last act of compulsory prostitution.

- vii. that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code:

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*Provided that* divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;

- viii. that the defendant has deserted the plaintiff for at least 2[two years;
- ix. that an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had Marital intercourse for one year or more since such decree or order;
- x. that the defendant has ceased to be a Parsi;

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

2.4.1.6. Section 27(1) of the Special Marriage Act 1954 contains eight 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 of marriage.

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- i. Adultery
- ii. Two years desertion
- iii. Respondent undergoing a sentence of imprisonment for seven years or more for an offence under IPC, 1860
- iv. Cruelty, unsound mind or has been suffering from continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent;
- v. Venereal diseases in a communicable form
- vi. Leprosy
- vii. Incurable insanity or continuous or intermittent mental disorder, and
- viii. Presumption of death

**Section 27 (1) (A) - A wife may also present a petition for divorce to the district court on the ground:**

- ix. husband is guilty of rape, sodomy or bestiality;
- x. Cohabitation has not been resumed for one year or more after an order of maintenance has been passed under section 125 of the Criminal Procedure Code.

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A marriage may be dissolved on the petition of either party viz. husband/wife seeking Divorce when one of the parties arrives at a conclusion that their marriage has hit the rock bottom and there are no chances of reconciliation whatsoever.

2.4.2. Divorce By Mutual Consent (Section 13(B) of the Hindu Marriage Act, 1955:

- i. This Section was inserted under the Amendment Act of 1976. **Divorce by Mutual Consent** means both the parties (husband and wife) agree to dissolve their marriage mutually. In simple words, both wife and husband are willing to get separated by **divorce**.
- ii. The only requirement for divorce by mutual consent is that the parties should be living separately for a period of one year or more.
- iii. The decree of divorce may be passed on the motion of both the parties made no earlier than *six months* and not later than *eighteen months* after the date of the presentation of the petition, provided the court is satisfied particularly as to the fact that consent has not been obtained by force, fraud or undue influence.

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### 3. DIVORCE UNDER MUSLIM LAW/ISLAMIC LAW

Under Islamic law, divorce is classified into three categories:

- i. **Talaq.** This is divorce at the instance of the husband.
- ii. **Khula.** This is divorce at the instance of the wife.
- iii. **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*).

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

3.1.1. **Talaq-e-ahsan.** This is a single pronouncement of *talaq* by the husband, followed by a period of abstinence (*iddat*) for 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. Among

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Muslims, *talaq-e-ahsan* is regarded as the most "proper" form of divorce.

3.1.2. ***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. Pertinently, the first and the second pronouncements can only be revoked by the husband. However, if a third *talaq* is pronounced, it becomes irrevocable and the marriage

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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.

3.1.3. ***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,

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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".

### **3.2.Divorce by the wife-** In 1937, the Muslim Personal Law (Shariat)

Application Act 1937 was passed. Section 5 of the Shariat Act provided that a Muslim woman could seek dissolution of her marriage on grounds recognised under the Muslim "personal law". Section 5 of the Shariat Act was subsequently deleted, and replaced by the Dissolution of Muslim Marriages Act 1939.

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The Supreme Court in the case of [Shayara Bano vs. Union of India](#) (supra) considered the provisions of the Muslim Personal Law, the practice of Talaq-e-Biddat or triple talaq and held that the practice of triple talaq, that is, instant, irrevocable, unilateral divorce by a husband as a formula for pronouncing divorce three times as unconstitutional and cannot be permitted. In the majority judgment, in para-104, the Hon'ble Supreme Court has crystallized the law after detailed deliberations in the following manner:-

“Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid Ahmad (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara (supra). This being the case, it is clear that *this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and*

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*whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.”*

3.3. 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:

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- i. 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.
- ii. Husband has neglected or has failed to provide for her maintenance for a period of two years.
- iii. 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.
- iv. Husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.
- v. 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

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impotent, and if the husband so satisfies the court within such period, no decree will be passed based on this ground.

- vi. Husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease.
- vii. 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.
- viii. Marriage has not been consummated.
- ix. Husband treats the wife with cruelty, for example, the husband:
  - a. habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;
  - b. associates with women of evil repute or leads an infamous life;
  - c. attempts to force her to lead an immoral life;
  - d. disposes of her property or prevents her exercising her legal rights over it;

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e. obstructs her in the observance of her religious profession or practice;

f. if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran; or

g. carries out any other ground recognised as valid for the dissolution of marriages under Muslim law:

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#### 4. COURT SYSTEM

The Family Court Act 1984 provides for the establishment of Family Courts with a view to promote conciliation, and secure speedy settlement 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 which undertake trials and review evidence. The Family Courts follow the Civil Procedure Code.

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## 5. JURISDICTION

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

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

5.2. Whether a court has jurisdiction depends on the following:

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

5.3. 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:

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- i. Marriage was solemnised;
- ii. Respondent, at the time of the presentation of the petition, resides;
- iii. Wife resides on the date of presentation of the petition (if she is the petitioner);
- iv. 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.

5.4. 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:

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

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5.5. 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.



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## 6. CHILD CUSTODY:

After a marriage breaks down or ends up in separation of spouses, the person who gets affected the most is the child who is born out of the marriage. Thus, while keeping in mind the right of parent's to the custody of a child, the Indian Law, holds the child's welfare as the most crucial factor of consideration while deciding upon who gets the custody of a minor child. When it comes to child custody, the interests and welfare of the child is of paramount importance. The Apex Court in *Sheoli Hati v. Somnath Das*, (2019) 7 SCC 490 has categorically observed that:

*“Every child has right to proper health and education and it is the primary duty of the parents to ensure that child gets proper education. The Courts in exercise of parens patriae jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also.”*

Other factors which constitute the welfare of the child are:

- i. Ethical upbringing of the child;
- ii. Safe-keeping of the child;
- iii. Good education to be imparted;

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iv. Economic well-being of the guardian.

#### 6.1. Kinds of custody arrangement in India

A court of competent jurisdiction in India primarily orders the custody of children in the following three forms:

6.1.1. Physical Custody - Physical custody when awarded to a parent implies that the minor will be under the guardianship of that parent with periodical interaction and visitation with the other parent. The target behind such a custody award is to give a better life to the child in a safe and fulfilling environment and also makes sure that the child is not deprived of the affection of the other parent during his or her formative years.

6.1.2. Legal Custody - Legal custody of a child does not necessarily entail having the child with the parents or vice-versa. It basically means that the parents are granted the legal custody and they can take every decision for the child likewise education, medical treatment, etc. until the minor has reached the age of 18 years. In most of the cases, legal custody is granted to

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both the parents together but in certain cases where the divorce is messy and parents do not agree with each other, then in such cases the court grants legal custody to any of the one parent.

6.1.3. Joint Custody - Joint Custody of a child does not imply that both the parents have to live together because of the child despite the fact that Indian courts believe that it is the best for the welfare of a minor. Joint custody actually means that both the parents will take care of the child turn by turn keeping the child in their custody. The rotation of the child among the parents may vary from certain days or a week or even for a month. These benefits the child as on one hand the child gets the attention of both the parents and on the other hand parents get to be a part of their child's life.

## 6.2. Legislations Governing Child Custody Under Different Laws In

India:

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### 6.2.1. The Guardians and Wards Act, 1890

According to GWA, 1890, a minor/child is any person who is generally under the age of 18 physically and intellectually imperfect and immature and hence needing someone's protection. "Guardian" means a person having the care of the person of minor or his property or both; "ward" means a minor for whose property or both there is a guardian. The court must work in the interest of the minor taking into consideration age, sex, religion, the character of the guardian, death of a parent(s), and the relation of the child to the guardian, etc. The minor's preference may be taken into consideration. The welfare of the child is taken as paramount consideration and here welfare must not be measured by money or physical comfort but the word welfare must be taken in its widest sense that the affection cannot be disregarded.

The Law Commission in its 263rd report held that desire to protect children must be based on a true interpretation of their best interest.

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### 6.2.2. Custody under Hindu Law:

Section 26 of Hindu Marriage Act, 1955 deals with Custody of Children - In any proceeding under this Act, the court may, from time-to-time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible and may, after the decree, upon application by petition for the purposes make from time-to-time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending and the court may also from time-to-time revoke, suspend or vary any such orders and provisions previously made:

*Provided that* the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall as far as possible, be disposed of within **sixty days** from the date of service of notice on the respondent.

### 6.2.3. Custody under Muslim Law:

- i. In Muslim law, the welfare of the children is given the utmost importance.

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ii. Under Muslim personal law, there is a concept called “**Hizanat**“. In this, the right to a child’s custody is given solely to a mother unless she is seen as an unfit guardian. And this right can be enforced against any person including the father.

iii. But again justifying the welfare of the child, here the mother’s right of child custody is not absolute and exists only if such right is beneficial and in the interest of her children.

#### 6.2.4. Custody under Special Marriage Act, 1954:

Section 38 of the Special Marriage Act, 1954 deals with Custody of Children - In any proceeding under Chapter V or Chapter VI the District Court may, from time-to-time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time-to-time, all such orders and provisions with respect to the custody, maintenance education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still

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pending.

*Provided that* the application with respect to the maintenance and education of the minor children, during the proceeding, under Chapter V or Chapter VI, shall as far as possible, be disposed of within **sixty days** from the date of service of the notice on the respondent.

6.2.5. Custody under Christian law:

As the Christian law has no specific mention of the child custody rights, the Indian Divorce Act, 1869, becomes applicable for all matters pertaining to Christian children and their guardianship. As per Section 41 of this said Act, the courts have the right to pass orders as to the custody, education, and maintenance of Christian children.

6.2.6. Custody under Parsi Law:

The Parsis also do not have any specific laws pertaining to child custody. Hence all such issues are addressed by the Guardians and Wards Act, 1890.

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Under the Parsi Marriage and Divorce Act, 1936, the wife can claim for maintenance to support their minor children. Under this Act, the court has to pass an order within 60 days related to custody of Parsi children and their guardianship.



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## 7. DOMICILE:

### 7.1. Types of Domicile

There are two types of domicile:

- i. Domicile by Origin: An individual automatically acquires the domicile of the country in which he/she is born. Unless and until new domicile is acquired by the said person, the domicile remains the same.
- ii. Domicile by Choice: Domicile by choice is the one whereby the individual willingly acquired new domiciles thereby replacing his/her domicile by origin.

The Apex Court has acknowledged the concept of domicile as established under English law, *Central Bank of India Ltd. v. Ram Narain (AIR 1955 36. it was held that that the two constituent elements that are necessary under English law for existence of domicile are:*

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- *Residence of particular kind. The residence may 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 reside in the country where residence has been taken up.*

- i. The Hindu Marriage Act extends to whole of India except the state of Jammu and Kashmir.
- ii. Section 1(2) of the Hindu Marriage Act states that:  
*“It extends to the whole of India except the State of Jammu and Kashmir<sup>1</sup>, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.”*
- iii. The Act applies to all the individuals who do not reside in India but continue to be domiciled in India.

## 7.2. Divorce:

The Apex Court in the landmark judgment *Y. Narasimha Rao and others v. Venkata Lakshmi and Ors. (1991)3SCC 45*, held that the marriages that takes place in India can only be

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dissolved under either the customary or Statutory law in force in India. therefore, the only law that applies to matrimonial disputes, is the one under which the parties are married

*“From the aforesaid discussion the following rule can*

*be deduced for recognising foreign matrimonial judgment in this country. 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 as follows: (i) 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; (ii) 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;*

*(iii) where the respondent consents to the grant of the*

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*relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.”*

However, the confusion occurs where the parties are domiciled in some other country but were married in India under Indian Matrimonial laws. It is still unclear as to in case of matrimonial dispute, will a divorce petition be maintainable in India? The Supreme Court has not adjudicated on this issue. However, the Hon'ble Bombay High Court in *Ms. Kashmira Kale v. Kishore Kumar Kale*, was of the view that it is necessary for one of the parties to be domiciled in India in order to invoke the jurisdiction of the Indian Matrimonial courts.

*“The order of the learned Judge of the Family Court, Pune, concluding that the parties last resided together in Pune and even though their residence is for a single day it would give the Court jurisdiction based upon the judgments cited in the impugned order suffers from a material irregularity and is required to be interfered with,*

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*since it assumes territorial jurisdiction not vested in it and since the Act itself does not apply to the parties consequent upon their domicile in the US and also because the rights between the parties have been settled by a judgment conclusive between them. The husband may be entitled to challenge the judgment in the Court in which it is pronounced following the due legal process required in that jurisdiction consequent upon his absence, if need be. However, the husband cannot confer jurisdiction on the Court in Pune in which the parties never resided together for any length of time in their own matrimonial home, they having had their matrimonial home in the US.”*

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## 8. ALIMONY/ MAINTENANCE:

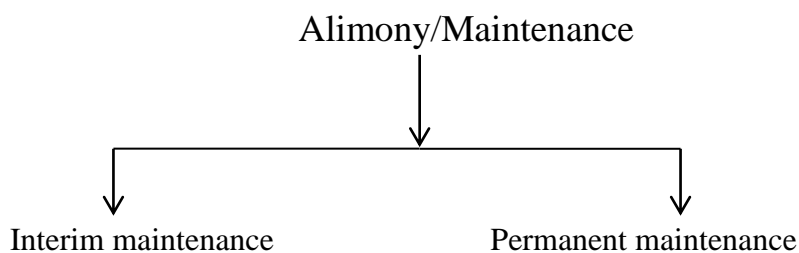
The English concept of alimony has been adopted in the Indian Divorce Act, 1869.

Alimony, in simple terms, is the allowance paid by one spouse to another for their sustenance. Alimony and maintenance are the same, and are used as different names in different places. In some countries and places, 'alimony' is used while in some other regions, 'maintenance' is in vogue. In India, we use the terms interchangeably after divorce, whereas before divorce, the term maintenance is used.

Section 36 of the Hindu Marriage Act, 1955 lays down that the amount of alimony pendente lite in no case can exceed *one-fifth* of the husband's average net income for three years next preceding the date of the order.

8.1. Alimony and maintenance can be divided under two basic heads

viz.:



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- Can be made in all four matrimonial causes
  - Is granted by the court during the pendency of the proceedings i.e. from the date of filing of the proceedings till date of the final order.
- Can be made only in two causes matrimonial causes viz. Judicial Separation and Divorce.
- When a decree of dissolution of marriage or judicial separation obtained by the wife, the court husband shall pay the wife any may order that the particular amount fixed by the court, either periodically, or in lump-sum.

8.2. Our country comprises different communities, and each community has its own personal laws derived from religious scriptures, customs and traditions. Thus, the grounds on which a Hindu woman can seek divorce and alimony may not be the same for every other community. Acts governing the claim for maintenance based on their religion is explained as follows:

Religion	Governing Act
Hindu	Hindu Adoption and Maintenance Act, 1956,
Muslim	Muslim Women (Protection of Rights on Divorce) Act, 1986
Divorced Christian	Indian Divorce Act, 1869
Parsi	Parsi Marriage and Divorce Act, 1936.
Inter-caste Marriages	Special Marriage Act, 1954

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All communities/religion	Section 125 of Code of Criminal Procedure, 1973.
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- i. Although there are different personal laws for each community, the line of difference has started to blur between all the personal laws. For example under the Muslim law, the wife was allowed maintenance only till the iddat period (three months after divorce); however the Supreme Court in *Daniel Latif Vs. Union of India* held that the duty of the husband to pay a fair and reasonable amount to the wife is not limited to the iddat period, bringing it in consistence with other personal laws, where the time to receive maintenance is not limited to a certain period. ***(Danial Latifi & Anr vs Union Of India).***

### 8.3.Factors taken into consideration while awarding permanent maintenance to the wife:

When a couple gets divorced by mutual consent, the decision on whether any alimony/maintenance is to be paid by either party is a matter of agreement between them. However, in matters

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where it is contested, the court decides depending upon the merit of each case.

Following factors are taken into consideration by the court while deciding permanent maintenance for the wife.

8.3.1. Income, property and ability of both husband and wife;

i. One of the considerations of granting permanent maintenance is assessing income and property of the parties. When a wife makes an application for maintenance, the husband is required to give full details and make complete disclosure of his income and properties. The wife can make queries about any alleged omission. A similar disclosure, though, is also required to be made by the wife. The court then exercises its discretion to come to a conclusion on a fixed amount, taking all the information into account.

ii. Generally, courts award 1/4th of the husband's income to the wife as maintenance. In a case last year, the Supreme Court also set the benchmark at 25% of husband's net salary as the amount for maintenance as

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“just and proper”. The court said that the amount of maintenance or permanent alimony must be sufficient to ensure that a woman lived with dignity after separating from her husband.

### 8.3.2. Lifestyle and reasonable want of the parties:

Lifestyle, along with the financial status of the parties, is one of the most important factors while arriving at a conclusion by the court. Reasonable wants does not only include providing the wife food and just keeping her alive. Emphasis is paid on their lifestyle, status, health, age, liabilities and responsibilities. The courts have said that ordinarily the wife is entitled to an amount of maintenance that will enable her to maintain almost the same standard of living to which she was entitled before the marriage broke down. In case of a minor child, his/her necessities are also taken into consideration.

### 8.3.3. When does alimony need not be paid?

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- i. The husband is not required to pay maintenance in case the wife remarries. He can also contest and refuse to pay maintenance on the ground that the wife is gainfully employed. The court can though still award maintenance to be paid for the children.
- ii. However, only the fact that the wife is employed cannot be a ground for not paying maintenance, as the employment of the wife should be in line with the lifestyle of both the spouses. *For example*, if the wife takes tuitions and earns a sum which is just enough for her survival, but the lifestyle of the couple was much higher than the amount the wife earns can give her, the court could still ask the husband to pay a sum to maintain that living standard. However, in cases where the wife earns more than the husband, it is difficult for the wife to get any maintenance.

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**PART – II**

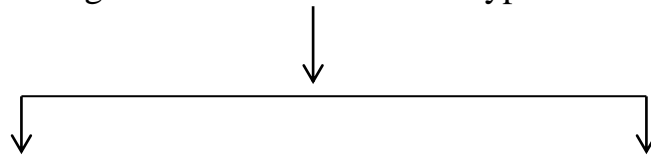
**9. PROCEDURE**

**9.1. Matrimonial Petitions:**

Section 21 of Hindu Marriage Act provides that all proceedings under this Act shall be regulated as far as may be, by Code of Civil Procedure. In case High Court of the concerned State has framed rules pertaining to any matter under the Act, those rules shall come into application for regulating the procedure for disposal of petitions or applications under the Act.

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10. Hindu Marriage Act has laid down two types of Divorce viz.



Contested divorce (S.13)

Mutual Consent Divorce (S. 13 (B))

Contested Divorce	Versus	Mutual Consent divorce
Section 13 of Hindu Marriage Act, 1955	Sections	Section 13 (B) of Hindu Marriage Act, 1955
Filed by either spouse, since the other does not consent to the same.	Filed by	Filed jointly by the husband and the wife.
Cruelty, adultery, desertion, conversion, mental disorder, leprosy, venereal disease, renunciation, no resumption of cohabitation and not heard to be alive.	Grounds	No grounds required
Decided by the judge after considering all the facts and evidence lead by both the parties.	Terms of Divorce	Mutually decided by both the parties
6-18 months	Time taken for disposal	3-5 years
Expensive since involves two separate lawyers	Cost	Cost effective and time efficient since both the parties can be represented by one and the same lawyer.

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11. Contents and Verification:

- High Courts have laid down various rules and guidelines regarding pleadings in petitions under Hindu Marriage Act. Therefore, while drafting petitions it is to be kept in mind that the petition is in consonance with these rules.
- Every petition presented under Hindu Marriage Act must state as distinctly as the nature of the case permits the facts on which the claim to relief is sought and that there is no collusion between the petitioner and the other party to the marriage.
- In addition to the particulars required to be given under Order VII, rule 1, CPC and section 20(1) of the Hindu Marriage Act, all petitions under sections 9 to 13 should contain the following:
  - a. The place and date of marriage;
  - b. Whether the couple was Hindu by religion at the time of marriage;
  - c. Whether the couple continues to be Hindu by religion upto the date of filing of the petition;

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d. The name, status and domicile of the wife and the husband before the marriage and at the time of filing the petition;

e. The address where the parties to the marriage reside at the time of the presentation of petition and where they last resided together;

f. The names of children, if any, from the marriage, their sex and their dates of birth or ages;

g. Full particulars of any litigation, if any, between the parties, prior to the date of filing of petition;

h. Jurisdiction clause;

i. Payment of court fee.

➤ In case of a petition for restitution of conjugal rights, in a situation where the respondent has withdrawn from the society of the spouse, the date and the circumstances under which the respondent withdrew are required to be mentioned in the petition by the petitioner.

➤ In case of a petition under section 12(1)(c) and (d) of the Hindu Marriage Act i.e., *for decree of nullity of marriage*, particulars of force or fraud and the circumstances in which force or fraud was

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practiced, with time when the facts relied upon were discovered, and whether or not marital intercourse with the consent of the petitioner took place after the discovery of the said facts, are to be specifically mentioned;

- In every petition under section 10 or section 13 i.e. for judicial separation or decree of divorce, by the husband or wife on the ground that the other party indulged in adultery following details are to be specified:
  - a. specific acts of sexual intercourse;
  - b. the occasion and place where the same were committed;
  - c. name, occupation and place of residence of such person with whom the opposite party had voluntary sexual intercourse, after- the marriage.
- In case of desertion, date and circumstances in which the desertion began are to be specified in the petition;

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- In case of cruelty, the specific acts of cruelty and the occasion when and the place where such acts were committed are to be specified in the petition;
- In case of unsoundness of mind or mental disorder, the time when such unsoundness of mind or mental disorder began to manifest itself and the nature and the period of the curative steps taken;
- If the petition is on the ground that the opposite party has renounced the world by entering any religious order, the date of renunciation and the particulars of the religious order which the respondent has entered into;
- If the petition is on the ground that the opposite party has not been heard of as being alive for a period of seven years or more, the date and place where the opposite party was last seen or heard or alive and the steps, if any, taken to ascertain his or her whereabouts;
- Where the petition is founded on the ground of rape or sodomy, the occasion when, the place where and the names and addresses of

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persons with whom such acts were committed. In case of conviction for committing rape or sodomy the particulars thereof;

- Where the petition is founded on the ground of bestiality, the occasion when, the place where and the particulars of the beast with whom the husband had been guilty of bestiality;
- Where petition for divorce is by the wife on the ground of non-compliance with a decree of maintenance passed under section 18 of Hindu Adoptions and Maintenance Act, 1956 or in proceedings under section 125 Cr.P.C, it is to be alleged and also testified in an affidavit that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or more;
- Where the petition for divorce is by the wife on the ground that her marriage was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years, wife is to allege the date and the place of birth of the wife together with the date and the place of repudiation and its mode;

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- Parties are to specifically allege about property presented, at or about the time of marriage, which belonged jointly to the husband and wife.



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12. Documents to be annexed alongwith the Petition:

- Original Marriage photograph;
- Original Wedding invitation/ marriage certificate;
- Birth certificate of issues if any;
- Passport size photographs of both the parties;
- Other documents as required to prove the ground based on which the case is filed.

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13. Affidavits Required to be filed with the Petition:

- It is significant to note that the petition must be accompanied with the affidavit in support of the petition affirming on oath the facts mentioned in the petition. The statements contained in every petition under this Act are required to be verified by the petitioner or some other competent person in the manner required by law for verification of plaints.

13.1. It stands so provided in the rules framed by various High Courts and are available in High Court Rules and Orders. These affidavits may be on the, following aspects:

Sr. No.	Petition for	Affidavit
1.	Petition for divorce by the wife on the ground of non-compliance with a decree of maintenance passed under section 18 of the Hindu Adoptions and Maintenance Act, 1956 or in proceedings under section 125 Cr.P.C.	Parties have not resumed cohabiting for one year or more since the passing of the decree or order.
2.	Every petition (except petition for nullity of	Petition it is not being presented or prosecuted in

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	marriage)	collusion with the respondent.
3.	Judicial separation or divorce on the ground that the party has, after solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse	Petitioner has not, in any manner, condoned or been accessory to or connived at the act or acts complained of.
4.	Ground of the petition is cruelty	The petitioner has not condoned the act or acts complained- of or has not in any manner condoned the cruelty
5.	Ground being no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties.	Affidavit in support of this averment is to be annexed to the petition.

Every pleading is required to be verified at the foot by the party or by a person acquainted with the facts of the case, as

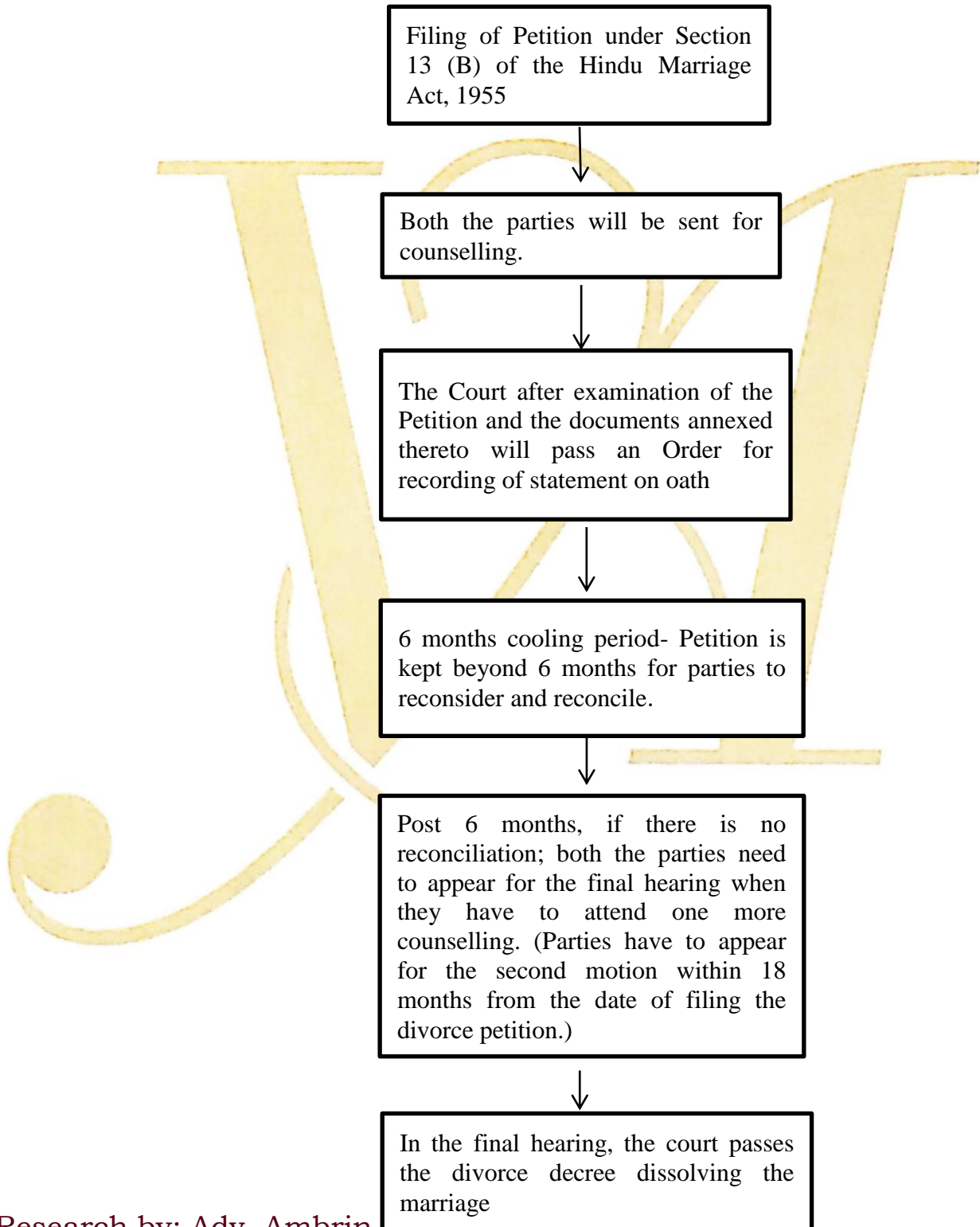
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per satisfaction of the Court. An affidavit in support of the pleadings is also to be furnished.

In the verification clause, it is to be specifically verified by the party as to which fact is being verified on the basis of his own knowledge, and which fact is being verified on the basis of information received or believed to be true. (Order VI rule 15).

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14. STAGES INVOLVED IN DIVROCE BY MUTUAL CONSENT IN INDIA:



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15. STAGES INVOLVED IN CONTESTED DIVROCE IN INDIA:

- Petition for contested divorce can be filed by either spouse based on the grounds mentioned above. Following are the

stages:

This petition categorically stating the grounds and reliefs is filed before a family court having jurisdiction along with affidavits, vakalatnama, and documents relevant to the case.

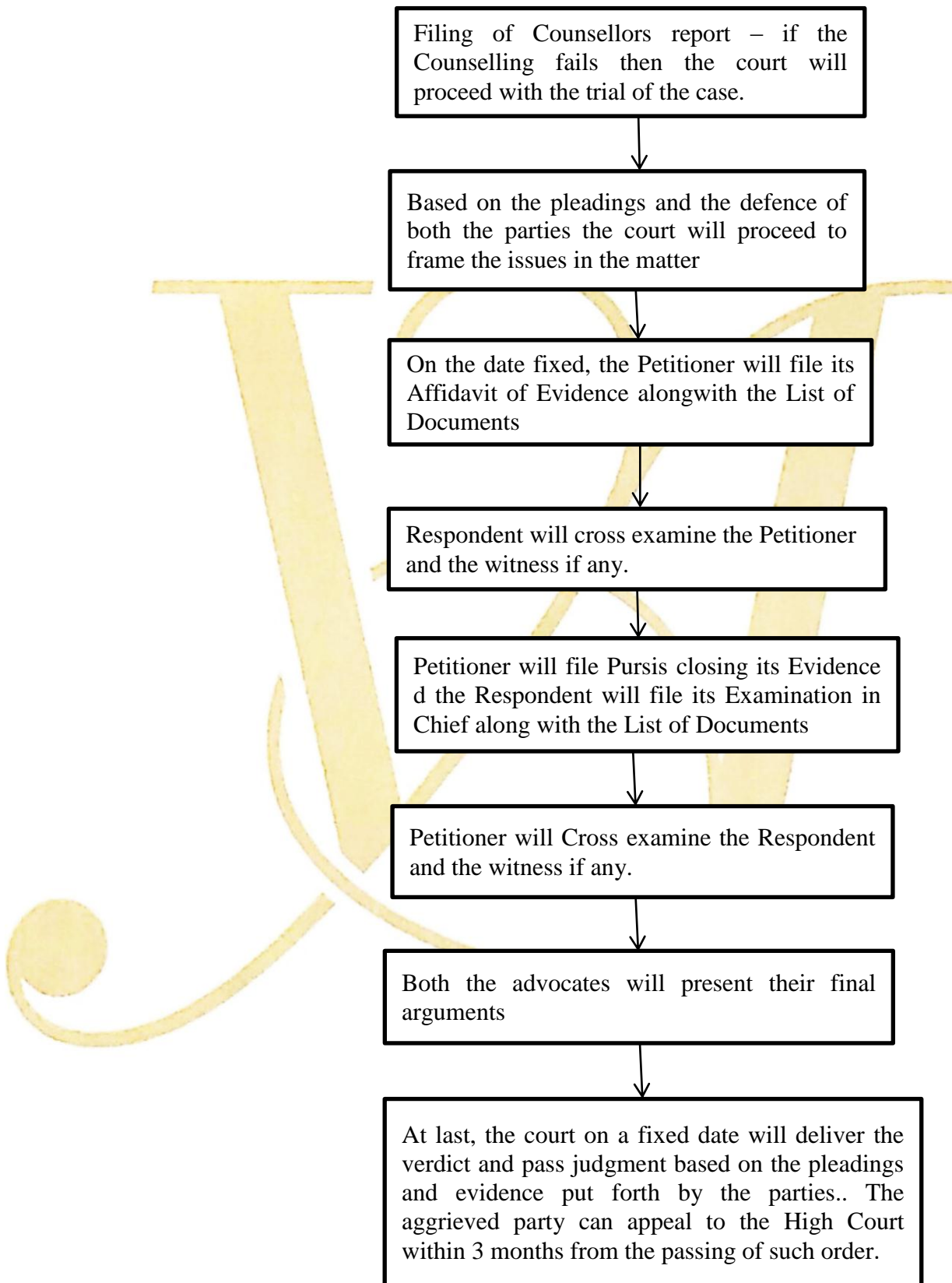
After scrutinizing the petition, the court admits the petition and passes an order of issuance of summons the other party calling upon him/her to appear on a decided date and file its reply.

The parties to the divorce proceedings are directed to appear before the court for mediation. in most of the cases efforts are made by the court to resolve the dispute and arrive at a reconciliation. in case of failure, the matter is posted for further hearing.

The Respondent is required to file its Written Statement within 30 days of receipt of the Summons. failing which ex-parte order will be passed

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**DISCLAIMER:**

This information has been sourced from the following:

1. Family law in India: overview by Pinky Anand available at:  
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<http://14.139.60.114:8080/jspui/bitstream/123456789/738/23/Family%20Law.pdf>.
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