Abstract and Keywords

This chapter introduces the material and historical basis of ‘marriage’ as an indissoluble and sacrosanct unit and its gradual progression towards divorce. It also demonstrates the connection between economic developments and the changing nature of marriage. The grounds for the annulment include bigamy, force/coercion, fraud/misrepresentation, impotency, insanity/mental disorder, pre-marriage pregnancy and marriage of minors. The basic premise of the breakdown theory is that if a marriage has broken down without any possibility of repair (or irretrievably), it should be dissolved without determining the ‘fault’ of either party. Some examples of economic settlements are discussed. The Special Marriage Act and the Indian Christian Marriage Act were the first enactments which provided for the registration of marriages. The humiliation and violence within marriage has been a major concern for Indian women down the ages. It is shown that traditional personal laws, customary laws as well as statutory law function from a patriarchal base.

Keywords: marriage, divorce, annulment, breakdown theory, Special Marriage Act, Indian Christian
Section A: Marriage And Matrimonial Reliefs
This chapter deals with the institution of marriage, as defined by legal codes and statutes and as determined within formal court structures through contentious litigation. It traces the transition of marriage from a sacrament to a contract and, within this framework of a contractual union, the ingredients of a valid marriage and various matrimonial relief such as annulment, judicial separation, restitution of conjugal rights, and dissolution of marriage are examined. Further, the progression from ‘contest’ to ‘consent’, and ‘fault’ to ‘no fault’ are also discussed. The chapter provides insight into the contemporary trends in family law. Structured around reported cases, the chapter examines the theories of (doctrinal) law in the context of their impact in practical situations wherein individual women stake their claims for justice. The legal provisions are assessed through the prism of women’s rights. The application of a theory of ‘gender neutrality’ in family law located within a gendered society which stipulates clearly defined gender roles within the family is also a concern of this chapter.

Marriage: A Social Institution

Evolution of the Institution of Marriage
The existence of the institution of marriage, irrespective of the form it may take, has been a universal constant of human society after the primitive stage. The most common form of marriage in contemporary society is monogamy (albeit serial monogamy in many societies) between individual members of opposite sexes. However, anthropological studies indicate that group pairings pre-date the system of monogamous marriages and even today, a range of marriage practices prevail among various tribes, sects, social groupings, and religious denominations, such as polygamy among some Hindu and Muslim communities, polyandry among the Todas of Nilgiri Hills and some Himalayan tribes, fraternal polyandry among the Tibetan groups, levirate unions among the Jats of Haryana and informal alliances (sambandham) among Nair women and upper caste men, etc. These diverse forms of marriage evolved to meet the needs of a particular society or geographical region and indicate that marriage is not merely a bond between two (or more individuals), but has wider social ramifications because it affects issues fundamental to the survival of a society, such as the legitimacy and nurturing of children and inheritance of private property. Thus marriage is connected not merely to the way in which a society views relations between the sexes, but more fundamentally to how it views itself and the norms and mores it uses to perpetuate itself.

In an agricultural, feudal economy society like India, the primary social need was the protection and preservation of agricultural land. Large joint family households and male progeny were important to continue the family/clan lineage and fulfill the social needs of this agrarian economy. Within this social and economic structure, while male polygamy was accepted, there was strict control on women’s sexuality in order to maintain caste purity. But there were several non-agrarian communities—food gathering and nomadic tribes as well as tribes practicing shifting agriculture—width evolved other forms of social organization where there were fewer restrictions on women and marriages did not have
the same rigidity or sanctimony as marriages among the upper caste Hindus of feudal India (Karve 1953; Srinivas 1998; Uberoi 1993; Gough: 1989). While acknowledging these social organizations, the scope of this chapter does not permit elaboration of this theme, which is the subject of social anthropology and sociology.

Material Basis for the Notion of Sacramental Indissolubility

Since European/English legal principles have a bearing upon our legal system, this section provides a brief sketch of the institution of marriage under the Judeo-Christian legal regimes of Europe (continental) and England (common law) and attempts to draw comparisons with the Indian legal system of the corresponding period.

Historically, within most feudal societies, marriage was viewed as an essential social institution and its stability as a desirable social objective which could be ensured by prohibiting its dissolution. This was done by prescribing marriage as an indissoluble sacrament and by merging women's identities with their husbands. Under Judaic and medieval European legal systems, women were considered as the property (chattel) of their husbands. The church had the power to restore to the husband an estranged wife who escaped from his custody. The right of exclusive sexual union was so highly regarded that any man who had sexual relations with the wife of another could be punished under the criminal law of adultery. 3 The husband could even seek compensation from the adulterer for violating his property rights. Remnants of this concept can be found in the Christian matrimonial law, the Indian Divorce Act, until it was amended in 2001. 4 In addition, the property of an adulterous wife could be (p.3) settled in favour of her children. 5 A similar stipulation is found in the Parsi Marriage and Divorce Act, 1936 even after the amendment in 1988. 6

Since inheritance depended upon the legitimacy of the male child, a very high premium was placed on a woman's virginity at the time of marriage and her chastity thereafter. Only through strict sexual control of women could the legitimacy of children be ensured. Under Christian law, the principle of monogamy applied to both men and women but under Muslim and Hindu law, it applied only to women. In addition, under Hindu law, other sexual relations with women of the lower caste were also awarded legitimacy under the institution of concubinage. But for upper caste Hindu women, the sacred bond of marriage could not be dissolved even after the death of the husband. Institutions such as child marriage, restraint upon widow remarriage, and the practice of sati evolved to ensure the chastity of women not only during the subsistence of marriage but even after the death of the husband. 7

Yet another way to ensure the stability of marriage was by denying women property rights. 8 Under Roman, Continental (European), and English common law, upon marriage, a woman lost all rights over her individual property, which became the property of her husband. The Roman law of marriage and property, which derived its roots from Judaic law, was based on the notion of a patriarchal family consisting of wives, sons, and slaves. Hence, the suppression of women's rights after marriage was effected to a greater extent under Roman jurisprudence. Under the concept of paterfamilias and patrias

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3. The husband could even seek compensation from the adulterer for violating his property rights.
4. In addition, the property of an adulterous wife could be settled in favour of her children.
5. A similar stipulation is found in the Parsi Marriage and Divorce Act, 1936 even after the amendment in 1988.
6. Since inheritance depended upon the legitimacy of the male child, a very high premium was placed on a woman's virginity at the time of marriage and her chastity thereafter.
7. Yet another way to ensure the stability of marriage was by denying women property rights.
8. Under Roman, Continental (European), and English common law, upon marriage, a woman lost all rights over her individual property, which became the property of her husband.
potestas,⁹ the head of the family acquired total control over the person, property, and labour of all members of his household. The wife was treated as the ward of the husband and she had no independent identity.¹⁰

Divorce was not recognised in Europe (including England) till the advent of the industrial era. In pre-industrial Europe, economic wealth and power were regulated through concepts of status. Marriage became a crucial link in determining the status of both the spouses and their children. This system facilitated the accumulation of property and power within recognized groups and enabled the landed families of England, Europe, and colonial America to retain and increase their possessions. The Christian concept of a holy union bestowed a sacramental character on these unions. Divorce would have disrupted production, undermined security of land tenure, brought families into conflict and created acute problems over the succession of land (Sachs and Wilson 1978). Merging the husband and wife into a single legal identity was appropriate for a feudal society in which the home and the land around it formed the centre of production. This principle was first enunciated by the Roman Catholic Church in the twelfth century. In 1769, the English jurist William Blackstone explained the concept as follows:

By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything. Her husband is her baron or lord. (Bromley 1976: 107)

Under the principle laid down by Blackstone, the woman lost her legal existence upon marriage, which signified legal death. The woman could not contract, sue, or be sued. All her individual property belonged to her husband and he could not only use it but even alienate it without her consent. Upon the death of her husband, the property devolved upon the husband’s heirs and she lost all access to it. Only the woman’s clothing (apparel) and jewellery reverted to her, but if the husband was insolvent, his creditors could claim even this (Bromley 1976: 425–35).

From seventeenth century onwards, the demands of emerging capitalism rendered it necessary to redeem the land of its inalienable characteristics. So, a gradual change in the nature of land tenures is discernible, culminating in the enactment of several legislations in nineteenth century. The object of these legislations was to facilitate the alienation of feudal manors and agricultural land tenures for the construction of factories, mines, and townships. It is only during this period that women in England could wage a sustained struggle for their right of divorce and for the right to own separate property.

The status of women under Muslim law was slightly better as women did not lose their identity upon marriage and the legal system offered some economic safeguards to married women through the system of mehr. It also acknowledged the inheritance rights of women. But even here, women’s rights were not equal to that of men. Ironically, in the early stages of colonial administration, the British jurists looked down on the Islamic notion of contractual marriage, viewing it as a loose sexual alliance which could easily be
dissolved on the whim of the husband. Through such interpretations, the protection awarded to women under Islamic law was eroded. With the onset of modernity, European, later the British, and finally the Hindu legal system adopted the principle of contractual and dissoluble marriages, consent divorces, and even the concept of irretrievable breakdown of marriage as acceptable principles of matrimonial law. But since both sacramental and contractual marriages were based on patriarchal premises, the position of women was subordinate to that of men under all legal systems (Diwan and Diwan 1997: x).

**The Journey from Sacrament to Contract**

The decree of the Council of Trent (1563) rejected the opinion propounded by Martin Luther and other reformers that marriage should be brought under the jurisdiction of civil courts. But the Reformation and the emerging ideology of Protestantism, which challenged the supremacy of the Roman Catholic Church, resulted in bringing about significant changes in public life. Important among them were the separation of church and state and a transformation of marriage from a status to a contract. In respect of the right to dissolve marriages, there was a sharp divide within the Christian world. The struggle was to wrest temporal issues, such as the regulation of marriage, divorce, and property, out of the authority and control of the church. Protestant-dominated countries introduced the notion that marriages are dissolvable contracts and awarded the power of dissolving the marriages to civil courts (Diwan and Diwan 1997: 24).

Protestant ideology was rooted in a new economic order of capitalism and industrialization that was sweeping through Europe. As mentioned earlier, a feudal system based on agrarian land holdings considered land inalienable and marriage indissoluble.

The dissolubility of marriage is also the manifestation of an individualistic philosophy. Industrial revolution’s claims of liberty, equality, and pursuit of happiness gave impetus to the liberation of marriage from the fetters of the church. A new dogma now began gaining acceptance—one who has the liberty to enter matrimony should also have the liberty to opt out of it. Once marriage was accepted as a contract, the next logical step was to consider it a dissoluble union. Marriage came to be recognized as a human institution, based on the free volition of men and women who were not infallible and hence, should be awarded the right and liberty to dissolve a marriage that had become burdensome.

The proponents of this philosophy advocated that though marriage is a bond and a civil contract, it is not bondage or slavery in the garb of a super-imposed sacramentality and indissolubility. While the Catholics continued to uphold and follow the ecclesiastical doctrinaire view of sacramentality and indissolubility of marriage, Protestants adopted the notion of a contractual and dissolvable marriage. Since the colonial rulers were Protestants belonging to the Anglican Church, these concepts entered the Indian legal system and influenced the Indian matrimonial statutes.
The term ‘divorce’ owes its origins to the French term, ‘diverter’ and the Latin term ‘divortium’, which mean ‘to divert’. The French Civil Code of 1800 (also called the Napoleonic Code) was the first to recognize marriage as a civil contract. Marriages thus ceased to be controlled by church dictates and became dissolvable civil contracts. Later, in 1857, the Matrimonial Causes Act provided similar remedies to English women. In 1865, the Parsi Marriage and Divorce Act and in 1869, the Indian Divorce Act also recognized the right of a judicial divorce. In comparison, the Hindu women did not get the right of divorce until 1955.

Under Muslim law, since its origin, marriages have been recognized as contractual and dissoluble and the right to dissolve the marriage is a Quranic right. The word *talaq* derives its origins from the root word ‘talaqqa’, which means to release, and signifies the repudiation of the marriage by the husband alone (Fyzee 1974: 150). While *talaq* denotes the husband’s right to divorce the wife, the term *khul* (or *khoola*) denotes divorce by consent. The literal meaning of the word *khul* is to ‘untie’ or ‘disrobe’ and in the context of marriage, the word denotes ‘to lay down one’s authority over one’s wife’ (Fyzee 1974: 163). Though under the uncodified Muslim law women could dissolve their marriages under certain conditions, in 1939, the Dissolution of Muslim Marriages Act (DMMA) granted Muslim women the right to judicial divorce.

**Hindu Women and Right to Divorce**

A common misconception prevails that marriage amongst all castes and sections of Hindus is an indissoluble institution. However, within a pluralistic society, there were many castes and tribes which awarded a customary right of divorce to women, as well as the right of remarriage. (p.6) But these were regarded as the customs of the sub-stratum of society by colonial rulers and were not acknowledged as the custom of Hindu society. The legal machinery introduced by the British was contextualized within the concerns of the upper castes and relied upon scriptures while adjudicating over disputes between native Hindus. Though the scriptures also recognized the right of divorce in certain situations, the philosophy of marriage as a holy union was paramount and this notion coincided with the notion then prevailing in England of a sacramental bond.

Over time, many practices of the upper castes, including the notion of an indissoluble and sacramental marital union spread to the lower castes through Sanskritization and a woman’s right to divorce and remarriage was curtailed (Srinivas: 1998). Even after the death of the husband, a widow could not marry. It was only during the mid-nineteenth century, after a sustained struggle, that a statute was enacted granting widows the right to remarry.13

The problem of indissolubility of marriage did not affect the husband since he had the option to discard an earlier wife and remarry. There were many cases of elderly men marrying child brides. Hindu husbands did not suffer from any restraint regarding the number of times they could remarry. But the rights of women were severely constrained due to the denial of divorce and remarriage. Social reformers had to wage a sustained struggle during the first half of the twentieth century to secure Hindu women’s right to
Marriage and its Dissolution

divorce. The campaign met with resistance as there was an overwhelming fear that awarding women the right to divorce would loosen the grip of strict sexual control enforced upon them through the notion of indissoluble sacramental marriages.

But towards the mid-twentieth century, changes that were taking place in England influenced some nationalist leaders and social reformers who campaigned for introducing similar changes in Hindu matrimonial law. At the forefront of this struggle for change was Dr G.V. Deshmukh, who had also campaigned for the Hindu woman’s right to property. He drafted a bill, which was introduced on 20 September 1938 in the legislative assembly and was later circulated to gauge public opinion. During discussions on the bill which commenced on 11 April 1939, Deshmukh argued that the Bill was not meant to offer an avenue by which women could manipulate the system. It was merely a mechanism through which they would be empowered. He submitted that the Bill took into account the essence of Hinduism and had the approval of stalwarts like C. Rajagopalachari and V. D. Savarkar, whose opinion carried weight among the orthodox section of the Hindu community.

However the Bill faced strong opposition from conservative elements who perceived it as a measure by the colonial government to interfere with the Hindu philosophy and way of life. It was also suggested that it was futile to introduce these provisions since proving some of these grounds in a court of law would be an impossible task. For instance, it would be impossible for a wife to prove her husband’s bigamy if the husband projected the second wife as a mere concubine. Impotency, which is an intimate matter between a husband and wife, could not be determined by a court of law. Bhulabhai Desai, a nationalist leader and member of the Assembly, felt that the scope of the Bill was too wide and hence it did not serve the purpose. He strongly objected to the phrase ‘right to divorce’, suggesting that such an interpretation would prove fatal to the sacred relationship between a man and woman (Basu 2001: 102).

Bhai Parmanand of the Congress party criticized the provision of the Bill concerning divorce on the ground that it was an attempt to bring into India, a system that had already wreaked havoc in the families of the Western world. Ironically, some leaders felt that it was far too one sided, favouring women alone. These men conveniently overlooked the advantages a Hindu husband enjoyed under the prevailing marriage system of the upper castes. The greatest opposition came from orthodox Hindus, who tried to establish the sacramental nature of the Hindu marriage. On the other hand, the Bill was also opposed by some women who believed that it would create unnecessary hardships in their marital lives as they would have to live under the constant threat of divorce from their husbands. The Bill received support from some social thinkers who were ready to adopt an alternative view to the problem. Sir Yamin Khan of the Muslim League supported the Bill and pointed out that this principle was accepted by Islam several generations ago (Basu 2001: 104).

Overall, there was strong opposition to changing the status of a Hindu marriage from a holy and indissoluble union to a dissoluble contract. On 15 September 1939, the Legislative Assembly rejected the Bill stating that the country was not ready to accept
such a radical change in its beliefs and practices. But Deshmukh remained undaunted and pursued his campaign by re-introducing the Bill again in December 1940 (Basu 2001: 104). The reformulated bill explicitly offered remedies along the lines of English matrimonial statutes and suggested separate residence and maintenance for wives, in addition to remedies such as annulment of marriage, judicial separation, and divorce. It was supported by Akhil Chandra Datta, Deputy President of the Assembly, and was adopted in the legislature. The Government of India appointed a committee on 25 January 1941, under the Chairmanship of Sir B.N. Rau, a judge of the Calcutta High Court. The committee aimed to codify all laws related to Hindu marriage and succession. In June 1941, a report was published by the committee which recommended the preparation of a complete code of Hindu law on marriage and property.

Following this, a second Hindu Law Committee was constituted in 1944. After soliciting the opinions of jurists and the public, the committee submitted its report to the Federal Parliament in April 1947. The recommendations were debated in the Provincial Parliament between 1948 and 1951 and again from 1951 to 1954. On 20 December 1952, a motion was adopted in the Council of States to introduce the Hindu Marriage and Divorce Bill of 1952. This was again circulated to solicit public opinion. Finally, the right to divorce was granted to Hindu women by the enactment of the Hindu Marriage Act on 18 May 1955.

The Act severed the sacred tie of Hindu conjugality by rendering Hindu marriages contractual. But though the contractual element was introduced, the sacramental and ritualistic features were retained. Hence in judicial discourse, Hindu marriage is deemed both as a sacrament and as a contract. Looking back, one can find several faults in this enactment and question its claim of protecting the rights of Hindu women. But its passing is considered a major milestone in the history of the Indian women’s struggle for empowerment and legal equality.

Matrimonial Remedies
Statutory law or codified law revolves around four basic arenas of matrimonial relief—annulment of marriage, restitution of conjugal rights, judicial separation, and divorce. The first three were well established principals of matrimonial law even prior to the introduction of the right to divorce. Initially, these concepts were introduced to the Indian legal system through judge decreed laws. After codification, these became stipulated rights under personal law.

In the following and subsequent tables which appear in this chapter, the various legal provisions under five different matrimonial statutes/legal systems, i.e., the Hindu Marriage Act, 1955 (HMA), the Special Marriage Act, 1954 (SMA), uncodified Muslim law (ML), the Dissolution of Muslim Marriages Act, 1939 (DMMA), the Indian Divorce Act, 1869 (DA), and the Parsi Marriage and Divorce Act, 1939 (PMDA) are tabulated for easy reference (see Table 1.1).

Table 1.1 Matrimonial Remedies Under Various Personal Laws

<table>
<thead>
<tr>
<th>Matrimonial Remedies</th>
<th>HMA</th>
<th>SMA</th>
<th>ML</th>
<th>DA</th>
<th>PMDA</th>
</tr>
</thead>
</table>

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Annulment

Restitution of Conjugal Rights

Judicial Separation

Divorce

Note: *Muslim law provides for a separation agreement

These remedies are discussed in detail later in this chapter, but following is a concise meaning of these legal terms.

The term ‘annulment’ refers to the process of declaring a marriage which suffers from a legal defect as ‘null and void’. The legal defects are of two categories—void and voidable. A void marriage does not confer any status, rights, or obligations upon the spouses. While a marriage can be declared ‘null and void’ through a judicial decree, even without such a declaration, the marriage is deemed to be void and the parties cannot claim any rights against each other. It is in this context that the validity of marriage becomes a highly contested issue while claiming maintenance. A voidable marriage remains valid until it is declared as null and void through a judicial decree.

Restitution of conjugal rights refers to the right of one spouse to the sexual companionship of the other. Initially only husbands could avail of this remedy. Though this was not an accepted remedy under Hindu and Muslim law, it was introduced into Indian family law through the intervention of the courts. Later, it was incorporated into various personal laws and both the husband and the wife were awarded the right to enforce conjugality upon the other.

A decree of judicial separation awards the spouse claiming relief the right to live separately from the other spouse, while keeping the marital bond intact. When the provisions for obtaining a divorce were stringent, a decree of judicial separation entitled spouses to live separately without the fear of facing litigation for restitution of conjugal rights. This was more relevant for women as they could leave their husband’s home and live separately and also claim maintenance from their husbands. But the decree did not give them the right to remarry.

A decree of divorce dissolves the matrimonial tie and the spouses cease to be husband and wife and hence can not claim conjugality from each other. Since the bond of marriage is severed, the divorced spouses are entitled to remarry. After divorce, the parties do not have the right to succeed to each other’s property.

Ancillary reliefs such as alimony, maintenance, and custody of children can be claimed along with any of the four matrimonial remedies mentioned above. Under the scheme of
current matrimonial litigation, filing a suit for restitution of conjugal rights as well as judicial separation enables wives who do not wish to obtain a decree of divorce, gain an entry into the litigation arena for claiming ancillary and interim reliefs.

**Nullity of Marriage**

Marriage confers the status of ‘husband’ and ‘wife’ upon a man and woman, thereby providing legitimacy to the sexual relationship (in legal terms, conjugality) between them. As a consequence of this relationship, certain mutual rights and obligations accrue. However, the creation of these rights presupposes the capacity of the parties to enter into a valid marriage. The concept of the nullity is linked to the capacity of an individual to enter a valid marriage. If the person lacks the capacity to contract marriage, the marriage is void or voidable.

**Essential Conditions of a Valid Marriage**

Every community/legal system lays down certain requirements or conditions for a valid marriage. A marriage solemnized or contracted in violation of any of these conditions is deemed to be an invalid marriage. The stipulated conditions for the performance of a valid marriage and the consequences of a marriage contracted in violation of these conditions, differs under various personal laws. Some conditions are treated as absolute, while others are less so. The violation of absolute conditions renders the marriage void, while the violation of other renders the marriage voidable.

Section 5 of the Hindu Marriage Act, 1955 addresses the essential conditions of a valid Hindu marriage and states that a marriage may be solemnized between ‘any two Hindus’, if the stipulated conditions are fulfilled. These wordings indicate that a Hindu marriage can be solemnized only between two Hindus. Essential conditions include that neither party has a spouse living at the time of marriage, that the marriage was solemnized with the free consent of the parties, that they are not suffering from a serious mental disorder, they are not below the stipulated minimum age of marriage, and they are not within prohibited degrees of relationship. The prohibited degrees of relationship are enumerated in Section 2 of the Act. Section 7 of the Act stipulates the necessary ceremonies for a valid Hindu marriage.

The Special Marriage Act, 1954 permits marriages in keeping with the conditions enumerated in Section 4 of the Act. Monogamy, free consent, mental capacity, stipulated minimum age, and prohibited degrees of relationship are its important features. Since it is a secular civil law, religion of the parties is not a significant factor and a marriage between persons of different religions is valid.

The manner of solemnizing a Muslim marriage is simple. Religious ceremonies are not mandatory for a Muslim marriage. The marriage (or nikah) constitutes a declaration or offer (ijab) from one side and acceptance (qabul) by the other (or by the guardians, as the case may be) (Fyzee 1974: 91). The conditions for a Muslim marriage include restraint on marriage on the (p.10) grounds of consanguinity, affinity, fosterage, unlawful conjugation, bar against inter-religious marriages, and free consent.
Section 60 of the Indian Christian Marriage Act, 1872 lays down the conditions of marriage, stating that the parties must be above the minimum stipulated age, that neither party should have a living spouse at the time of marriage, that consent should be free, and they should not be suffering from any mental disorder of a serious kind. An inter-religious marriage is not invalid under this law.

The conditions of marriage with reference to Parsi law are enumerated in Section 3 of the Parsi Marriage and Divorce Act, 1936. The parties must not be among the prohibited degrees of relationship, a ceremony called ‘Ashirvad’ must be performed and the parties must be above the prescribed minimum age, there should be free consent and the parties should not be suffering from a serious mental disorder.

The following table provides a comparative listing of essential conditions of a valid marriage under the five statutes/codes.

Customary law also prescribes certain customs of the community as necessary conditions for entering marriage. They may vary from one community to the other or from one tribe to the next, but they are binding upon the community governed by the particular customary law.20

A marriage contracted in violation of essential conditions and valid ceremonies may be rendered void or voidable. The main difference (p.11) between void and voidable marriages is that of legal status. A void marriage does not confer the status of husband and wife on the parties and hence it does not give rise to mutual obligations and rights.

### Table 1.2 Essential Ingredients of a Valid Marriage

<table>
<thead>
<tr>
<th>Essential Ingredients</th>
<th>HMA</th>
<th>SMA</th>
<th>ML</th>
<th>PMDA</th>
<th>ICMA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bar on inter-religious marriage</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Stipulation of prohibited degrees of relationship</td>
<td>Yes</td>
<td>Yes# SECTION 4(d)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Ceremonies of marriage</td>
<td>Yes</td>
<td>No</td>
<td>Yes – Nikah</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Parties to be majors</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Bigamous marriages prohibited</td>
<td>Yes</td>
<td>Yes</td>
<td>Bigamy permitted for men</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>consent of the parties mandatory</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
The spouses should not be of unsound mind or suffering from mental disorder

<table>
<thead>
<tr>
<th>Reason</th>
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<tr>
<td>Yes SECTION 5(ii)(a), (b), (c)</td>
<td>Yes SECTION 4(b)(i) (ii)</td>
</tr>
<tr>
<td></td>
<td>Yes SECTION 19(3)</td>
</tr>
</tbody>
</table>

Marriage should not be solemnized during Iddat period

Notes: *In the Parsi ceremony, this includes the ceremony of Ashirvad, and the presence of two Parsi witnesses.

**for Christians the essential ceremony is either church nuptials or a civil ceremony before the Registrar of Marriages.

#Except where custom permits.

### Void and Voidable Marriages

A void marriage, in the eyes of the law, is one which is deemed to have never taken place. Its very existence is negated and hence the term used for describing such marriages is void *ab initio*. Even when the parties have not obtained a court decree invalidating the marriage, the marriage cannot be deemed as valid. A formal decree permits the court to make a judicial declaration of the fact that the marriage is void. The premise most often used for the plea of declaring the marriage void is bigamy. The issue of validity (p. 12) of marriage surfaces most often when women claim their right to maintenance.²¹

A voidable marriage is one which will be considered valid until a decree annulling it has been pronounced by a court of competent jurisdiction. The invalidation is only at the instance of one of the parties. Until such a declaration, the marriage is deemed valid and the parties are bound by mutual rights and obligations.

Muslim law does not recognize any distinction between void and voidable marriages. Marriages may be either classified as valid (*sahih*), void (*batil*), and irregular (*fasid*). A void marriage is one which is performed in violation of any of the rules laid down by the respective laws governing Sunni and Shia sects. No legal action is necessary. However, it is possible to file a declaratory suit under the Specific Relief Act, 1963. A *fasid* marriage is a term specific to Muslim law. Here the irregularity can be remedied by removing the impediment.

### Grounds of Annulment of Marriage

In England, until the introduction of the *Matrimonial Causes Act*, the power to annul a marriage vested with the ecclesiastical court.

Under the scriptural law, marriage was deemed a sacrament and once performed, it could not be invalidated. Consent of the parties or even the incapacity to perform marital or sexual obligations were not considered as grounds on which a marriage could be annulled or dissolved. But after the enactment of the Hindu Marriage Act in 1955, the
position changed substantially and lack of consent and capacity became grounds of annulment as Table 1.3 indicates.

<table>
<thead>
<tr>
<th></th>
<th>HMA</th>
<th>SMA</th>
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</thead>
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<td>S.11/12</td>
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**Table 1.3 Grounds for Annulment of Marriage**

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<td>Bigamy</td>
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<td>S.4 (a) / S.24 (i)</td>
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<td>Prohibited degrees of relationship / Sapinda</td>
<td>S.5 (iv)/S.11</td>
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<td>misrepresentation</td>
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<td>Repudiation of marriage</td>
<td>S.13 (2) (iv)****</td>
<td></td>
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**Notes:** * Unless permitted by custom.

** Though not a ground for annulment under HMA, a minor girl who is married before the age of 15 can repudiate the marriage (whether it was consummated or not) between the age of 15 to 18 and obtain divorce on this ground.

*** PMDA stipulates a minimum age of marriage (18 for the bride and 21 for the bridegroom) but does not specifically provide for annulment of marriage on this ground.

**** The scope of this provision has been expanded under the recently enacted Prevention of Child Marriage Act, 2006. Under its provisions, both boys and girls are permitted to annul the marriage contracted when they were minors. The petition has to be filed within two years of attaining the age of marriage i.e. 18 for girls and 21 for boys.
Under HMA and SMA, not every violation of the essential condition listed above renders the marriage void. Violation of some conditions makes the marriage void where as violation of other conditions makes the marriage merely voidable. For instance, while bigamous marriages are void *ab initio*, a marriage of a minor is merely voidable. Similarly, impotency and pre-marriage pregnancy render the marriage voidable and hence such marriages are legal and valid until they are dissolved through a judicial decree.

Grounds of void marriage under the personal laws vary a great deal. For instance, many of the grounds which are stipulated for annulment of marriage under other statutes, such as non consummation of marriage, insanity and pre-marriage pregnancy are grounds for divorce under the Parsi Law.

The grounds for the annulment of marriage are elaborated below.

**Bigamy**

The codification of Hindu law of marriage in 1955 rendered Hindu marriages monogamous. But this legislative change did not reflect in the community practices and Hindu marriages have continued to be bigamous/polygamous. But these marriages are void under the law and the second wife acquires no rights. Since Muslim law permits polygamy, bigamous marriages are not void and women in such marriages have legal rights. Under the Christian, Parsi, and civil marriage under the Special Marriage Act, bigamous marriages are void and hence the women in such relationships acquire no legal rights. However, children from void marriages are deemed legitimate and are entitled to maintenance and succession.22

Since bigamous marriages are void *ab initio*, the woman is not awarded the status of a wife. (p.13) Since these marriages are not valid, there is no requirement to obtain a judicial decree of annulment. But the innocent party may approach the court and obtain a decree of annulment or a declaration that the marriage is void.

Scriptural law mandated taking a second wife if the first wife was childless, in order to fulfil the religious obligation of begetting children. Hence, an erroneous notion still prevails that a childless person can take a second wife with the consent of his first wife. But such a marriage is bigamous and hence void. However, this erroneous notion led a district court in Himachal Pradesh to grant a declaration on the suit filed by the wife that on account of her frail health she was not in a position to beget children and hence her husband be allowed to take a second wife. But the high court of Himachal Pradesh held such declaration to be illegal and against public policy.23

While the Hindu Marriage Act prohibits bigamous marriages, it awards no remedy for the first wife to obtain an injunction against her husband to prevent his second marriage. Her only option under the Act is to obtain a divorce on the ground of bigamy. However, it is possible to obtain a civil injunction restraining the husband from contracting a second marriage, under order xxxix of the Code of Civil Procedure read with Section 39 of the
Upon the husband’s second marriage, the first wife can prosecute him for bigamy under Section 494 of the IPC. But the second marriage has to be strictly proved in order to obtain a conviction. Proof of mere adultery or cohabitation is not sufficient. Even proof of birth of a child from the bigamous relationship is not sufficient to prove bigamy.\(^{25}\)

If a spouse files for annulment of the marriage on the ground of the other spouse’s bigamy and is able to prove that the previous marriage was valid and subsisting at the time when his/her own marriage was performed, the court has no discretion in the matter and is bound to annul the marriage.\(^{26}\) But the allegation of bigamy must be strictly proved.

In *Santosh Kumari v. Harish Kumar*,\(^{27}\) the husband filed a petition for annulment of marriage on the ground that the wife was married to one Subhash prior to her marriage with him. The trial court upheld this contention and annulled the marriage. But on appeal, the high court set aside the decree and held that there is no proof that the wife was married to anyone else on the date when she married the petitioner. The documents which the husband had produced for proving bigamy were concocted and the same could not be relied upon. The man posing to be her husband had committed a fraud on her by falsely declaring that he was married to her. But the woman herself was unaware of this fraud at the time of her marriage. The court also commented that at the relevant time, the woman was just a minor and a student and there was no evidence of any marriage having taken place or of her cohabiting with anyone else prior to her marriage with her husband. In her defense, the wife had alleged that when she was pregnant, she was harassed for dowry and was driven out of the house. Subsequently she gave birth to a child but her husband refused to accept her back and that he had filed these proceedings only in order to get rid of her by making false allegations against her.

An interesting issue regarding annulment of bigamous marriage was decided by the Punjab and Haryana High Court in *Balwinder Kaur v. Gurumukh Singh*.\(^{28}\) The husband obtained a decree of annulment of marriage on the ground of wife’s bigamy. While the appeal against this decree was pending, the wife died. The daughter sought permission to continue the appeal on behalf of her mother. She contended that even though she was not a direct party, the outcome of the matrimonial petition would vitally affect her status. If the marriage was held to be valid she would be a legitimate child and her inheritance and coparcenary rights would be protected. But if the marriage was declared void, she would lose her rights.\(^{29}\) The court upheld her contentions and permitted her to be a party and continue the litigation.

The issue of bigamy gets foregrounded frequently when women claim maintenance. The plea of bigamy is advanced by husbands to deny women their right of maintenance. Within the judicial discourse, there are two parallel streams—while some courts have upheld the second wife’s right to maintenance, others have denied her maintenance on the ground that the marriage is void *ab initio* and hence no rights accrue out of such relationships.\(^{30}\)
Force/Coercion,...Fraud/Misrepresentation

Free consent of the parties was an important ingredient under ecclesiastical law. But in the Indian context, marriages were performed with the consent of the elders of the family. Hence, though under codified Hindu law as well as Muslim law the consent of the parties is essential for contracting a marriage, consent given by the parents to the marriage is deemed as valid. At times, the consent is implied. The husband cannot annul the marriage on the ground that he had not personally consented to the marriage if his father had given his consent to the marriage. Courts have also held that the absence of consent will not render a Hindu marriage invalid if such a marriage was performed in accordance with Section 5 of the HMA and the same cannot be used to deny the wife maintenance. 31

But where women are concerned, the courts have upheld their right to annul the marriage for lack of consent. If the consent of the bride was obtained by force by her parents the marriage can be annulled. For instance, in Rajni Thomas v. Annie Thomas, 32 the parties lived together for barely one week and there was no response from the wife to the husband’s sexual advances. The Delhi High Court, while holding the marriage as null and void, commented that the girl had succumbed under filial force and obedience and that her consent was not free from force or duress. Hence it was not voluntary. 33

If the consent is vitiated on the ground that it was obtained through force, coercion, fraud, or misrepresentation, it is not a valid consent. If a girl is abducted by force and marriage is performed against her wish, it amounts to force or coercion. But the courts have held that mere pressure, strong advice, or persuasion is not force. In fraud, there is an element of deceit. The deceit can be regarding the nature of the ceremony or any material fact or circumstance concerning the respondent. But not every (p.15) misrepresentation or concealment amounts to fraud under matrimonial law. Courts are in tune with the social norm of arranged marriages where exaggerated claims regarding physical attributes, qualifications, and virtue are routinely advanced on behalf of the bride as well as the groom. But such claims do not amount to fraud or misrepresentation.

The petition for annulment of marriage on the ground of fraud within one year of the fraud being discovered or coercion has ceased operate and it becomes time barred thereafter. After the force has ceased or fraud has been detected, no sexual intercourse should take place between the parties.

The Supreme Court, in Gullipilli Sowria Raj v. Bandaru Pavani, 34 has held that since the Hindu Marriage Act applies only to Hindus, a marriage between a Christian and a Hindu performed under as per the Hindu rites by exchanging ‘thali’ in a temple is void as per Section 12 (1) (c) of the Hindu Marriage Act. This was at the instance of the wife as she had alleged fraud and misrepresentation and pleaded that her husband had misrepresented his social status and his religion and projected himself as a Hindu. It appears that this was construed to be a ground of voidable marriage. There are several other judgments which have validated such marriages while granting women the right of maintenance. 35
At times, the ground for fraud is used casually and frivolously by husbands who wish to escape from marital obligations. But the courts have held that mere general statements as to fraud in the pleadings are not sufficient to prove the offence of fraud. The husband is required to prove every item of fraud and how it was practiced upon him. It is also necessary to prove that he was influenced by this fraud or misrepresentation. In *Naba Kumar Mondal v. Lilabati Mondal*, the husband alleged that fraud was committed upon him regarding the age, complexion, and educational qualifications of the bride. The petition was filed after three years of cohabitation. The Calcutta High Court held that the husband miserably failed to prove that any misrepresentation or fraud was practiced upon him. The court also held that the petition was also barred by limitation since a petition for annulment of marriage on the ground of fraud had to be filed within one year of marriage.

In addition, the husband could not cohabit with his wife after the fraud had come to light. The Madhya Pradesh High Court, in *Prakash Singh Thakur v. Bharati*, held that statements regarding the earlier marriage or divorce of the wife are untrustworthy and that it is inconceivable that the husband would not know about the earlier marriage or divorce of the wife and that he came to know of it on the very next day of their marriage. The court held that the husband’s statements were untrustworthy. In *Perminder Charan Singh v. Harjit Kaur*, the matrimonial advertisement given by the wife’s father prior to marriage mentioned her status as ‘legally divorced’. Later, the husband filed for annulment on grounds of fraud and misrepresentation that she was married earlier or alternatively, for a decree of divorce on the ground of cruelty and desertion. The trial court rejected the contentions and dismissed the petition. In appeal, the Punjab and Haryana High Court and the Supreme Court upheld the dismissal and held that there was no fraud or misrepresentation on the part of the wife. The courts also held that the allegations of cruelty and desertion were untrue. It was held that the evidence disclosed that the wife had to take shelter in an orphanage along with her child, which proved that she was driven out of house by her husband. In *Amritpal Singh v. Satwinder Kaur*, it was alleged that the wife was suffering from cancer prior to her marriage and this fact was concealed by her. But the court rejected the husband’s application for the wife to be examined by the Cancer Institute. In appeal, the high court held that it is for the husband to prove his case and the wife cannot be compelled to submit herself for medical examination, especially when evidence led by the husband was not credible.

In *Anju Kundu v. Shyamal Kumar Kundu*, where the husband alleged that wife had a tumour in her breast which was not disclosed to him prior to the marriage and there she had falsely staged that she is a graduate while she had yet to clear one subject, does not amount to fraud. The husband had filed a petition after the tumour was removed and one year after the alleged fraud was discovered. Setting aside the decree of annulment granted to the husband, the Calcutta High Court held that the same does not amount to fraud. The tumour in the breast also does not render the wife impotent.

Concealment of certain illnesses amounts to fraud. However, concealment of every disease cannot be construed as fraud which would entitle the other party to obtain a decree of annulment. In *Tiveni Singh v. State of UP*, the father-in-law had filed a petition before the family court at Agra for a declaration that the marriage between his son and daughter-in-law should be declared void. The husband and wife were both HIV positive.
positive and the husband had died. But it was not recorded that he had died of AIDS. The contention of the father-in-law was that the wife was HIV positive before marriage and she had concealed this fact and had communicated the disease to his son. In the proceedings for quashing these proceedings, the high court held that there is nothing in Section 5 of the HMA which would empower the courts to annul a marriage on the ground of HIV infection or any other disease. The court commented that a marriage cannot be declared null and void on the ground of any disease, except mental illness as provided under Section 5 read with Section 12 of the HMA. The court also held that there was no evidence to indicate that the wife was HIV positive before marriage and hence there is no question of concealment of an illness. The proceedings filed by the father-in-law were held to be abuse of process of law and were quashed.

**Impotency**

Historically, exclusive sexual access for the purpose of procreation was the primary objective of marriage. The physical and mental capacity to consummate the marriage therefore became an essential condition for a valid marriage. If one of the spouses lacks this capacity, the marriage can be annulled. Impotency may arise on account of a physical defect or mental condition, such as total repugnance to the sexual act. The legal requirement of this medical condition is that it should be incurable.

The exact wordings of the legal provision under Section 12 (1) (a) of the Hindu Marriage Act are—‘that the marriage has not been consummated owing to the impotency of the respondent’. Under Section 24 (1) (ii) of the Special Marriage Act the wordings are—‘that the respondent was impotent at the time of the marriage and at the time of the institution of the suit’. The wordings under Section 19 (1) of the (Indian) Divorce Act. These wordings make it clear that only the non-impotent spouse is entitled to file the petition (or suit, as the case may be). But under the Parsi Marriage and Divorce Act, 1936 the impotent spouse can file for nullity, as the relevant provision under Section 30 of the Act says ‘at the instance of either party’. Allegations of impotency have to be strictly proved. The courts are cautious while entertaining a husband’s petition for annulment of marriage on the ground of the wife’s impotency, as the following cases reveal.

In Sunil Mirchandani v. Reena Mirchandani, the Bombay High Court held that it is the duty of the party pleading impotency to lead corroborative evidence and the evidence should be trustworthy. In this case, the husband had written a letter five months after marriage indicating satisfactory sexual relations with his wife. Hence his plea of non-consummation could not be proved. In Ajay Kumar Samal v. Jotsnamayee Samal, the husband did not examine any doctor to prove impotency and hence it was held that he failed to prove the allegations and discharge the burden of proof. In Uppu Lakshmi v. Uppu Narayan, the Andhra Pradesh High Court set aside the ex parte decree granted by the trial court and held that there is no evidence to believe the case of the husband that the wife persisted in her attitude of exhibiting repulsion to the sexual act. The court further held that the trial court had committed legal infirmities in passing a decree which cannot be sustained in law. In E.G. Ravi v. Jayshree, the husband, in his cross-examination, had admitted that he had not informed anybody about the sexual aversion of
his wife. The wife categorically stated that the marriage was consummated on the day of marriage itself. The medical certificate indicated that she was used to sexual intercourse. The psychiatrist testified that she was fit for married life. Hence the Madras High Court held that the husband could not prove his case.

Impotency does not signify sterility but incapacity to have normal sexual intercourse. In *Beena v. Varghese*, the Kerala High Court rejected the husband’s plea of the wife’s impotency and explained that incapacity to conceive is not impotency and is not a ground for annulment of marriage. Similarly, in *P Devraj v. V. Geetha*, it was held that removal of the uterus does not render the wife unfit for sexual intercourse. Hence it cannot be a ground for annulling the marriage.

The courts will not easily concede to the husband’s demand for the wife to undergo a virginity test to prove his case of non-consummation of marriage. In *Zahida Begum v. Mushtaque Ahmed*, the wife had made out a case that the marriage could not be consummated as the husband was impotent and he was unable to perform his matrimonial obligation. The husband alleged that the wife is impotent and sought a direction for her to undergo a virginity test. While setting aside this direction, the Karnataka High Court held that the question whether the wife is a virgin is irrelevant and that the trial court could not have directed her to undergo a virginity test. But the order directing the husband to undergo a medical test regarding his impotency was sustained.

A petition for annulment of marriage on the ground of impotency can be filed even after several years of marriage and the one year bar which operates for cases under force, fraud, coercion and misrepresentation does not operate for the ground of impotency.

**Insanity/Mental Disorder**

Under Section 5 (ii) of the HMA, an essential condition of marriage is a sane mind. Hence, if at the time of marriage either party is incapable of giving a valid consent due to unsoundness of mind, or has been suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, or has been suffering from recurrent attacks of insanity, it becomes a ground for annulment of marriage under Section 12 (1) (b). Since the marriage is voidable, it remains valid until it is annulled through a court decree and the parties are bound by mutual rights and obligations.

Under the Special Marriage Act, violation of the condition of sound mind renders the marriage void under Section 24 (i). Under S.19 (3) of the Indian Divorce Act, the ground is narrow and the marriage is voidable if it can be proved that the spouse was a lunatic or an idiot at the time of marriage. Under Section 32 (b) and (bb) of the Parsi Marriage and Divorce Act unsoundness of mind and mental disorder are grounds for divorce.

For obtaining a decree of nullity, it should be proved that due to the mental disorder, the respondent was unable to know the nature and consequences of his/her act at the time of
contracting the marriage and was incapable of understanding the normal responsibilities of marriage. The essential condition of ‘free consent’ gets vitiated if the mental illness of one of the parties was concealed at the time of the marriage. This would amount to consent obtained by misrepresentation or fraud and due to the lack of valid consent and the marriage may be annulled.

In *Ajitrai Shivprasad Mehta v. Bai Vasumati*, the Gujarat High Court differentiated between mental illness and insanity and observed:

A person whose mental defect does not reach the state of insanity known as idiocy or lunacy can enter into a valid marriage tie and it would be absurd to nullify the marriage based on a wide interpretation of ‘unsoundness of mind’. Feeble-minded persons or persons of dull intellect where mental infirmity is not serious enough to make them incapable of knowing the nature and consequences of marriage cannot be considered as a person of ‘unsound mind’ in the legal sense.

In *Pramatha Kumar Maity v. Ashima Maity*, where the husband had alleged unsoundness of the mind of his wife, the Calcutta High Court commented:

The legislature has not made unsoundness of mind or a mental disorder in itself, a matrimonial fault. Unless the unsoundness is incurable and the disorder disables the person from becoming a reasonably tolerable matrimonial partner, it cannot be a ground for annulment of marriage.

It was also held that in such cases the court would keep in mind the needs of the wife who is the weaker party.

The courts have maintained that not every case of mental illness or every type of schizophrenia entitles the other spouse to obtain a decree of annulment. The illness has to be of a serious nature and incurable. A medical report and the doctor’s evidence will be considered in determining the extent of mental illness. In *Vidyadhar Chodankar v. Malini Chodankar*, the wife was suffering from schizophrenia, but from the evidence of the doctor it was not found to be incurable. Hence the husband’s plea of annulment was rejected. The Bombay High Court clarified that not every type of mental illness or schizophrenia is covered by the expression ‘incurable disease’. In *Nandakishore Agarwala v. Meena Agrawal*, the husband’s plea for annulment of marriage on the ground that the wife is suffering from a mental disorder of such a kind that makes her unfit for protection of children was rejected. The Chhattisgarh High Court held that this plea carries with it a heavy burden which must be effectively discharged. Merely stating that the wife was undergoing treatment of some kind from a doctor for some mental disorder is not sufficient. This is more so in the absence of any judicial notice of an indication of any serious mental disorder of the wife.

In cases of this nature, the opinion of a medical expert is usually sought. Where the mental condition of a spouse is a controversial issue, the court has the authority to issue directions for a medical examination. The question whether the right to privacy is invaded
in a matrimonial case where the parties are subjected to a medical test has been authoritatively decided by the Supreme Court in *Sharada v. Dharampal*,\(^{56}\) where it was held that privacy is not an absolute right. Hence in matrimonial litigation, directing a spouse to undergo a medical test does not violate the provision of Article 21 of the Constitution (right to life and liberty). But the court cautioned that this power has to be exercised only if a strong *prima facie* case is made out by the party seeking such a direction.

The court will also examine other circumstances while examining the issue of insanity. If the individual has been cured of a previous illness or does not suffer from a mental disorder which is harmful to one’s own self or to others, the court may not annul the marriage. When allegations are made against the wife, the court may adopt a sympathetic approach towards her, as she is the weaker party, and take measures for her protection by granting permanent alimony in certain special circumstances. Rather than attributing guilt to a wife suffering from an incurable mental illness, the approach of the courts ought to be one of compassion. In *Hirdaya Narain v. Ratanjay Pradhan*,\(^{57}\) the plea of mental illness was upheld and the marriage was annulled. But the court commented sympathetically that due to her condition, the wife deserves proper alimony. But since the husband was not in a position to pay more, the court awarded her Rs 50,000. On a compassionate note, the court commented that if some government funds were available, the same should be made available for treatment of women in this condition.

The husband cannot take advantage of the illness and continue to cohabit with the wife after he has come to know about her illness. In *Prakash Kumar Bachlaus v. Chanchal*,\(^{58}\) despite the allegation that the wife was suffering from paranoid schizophrenia, the husband continued to cohabit with her. Hence, it was held that he was not entitled to a decree of annulment.

### Pre-marriage Pregnancy

This ground is often used, either to end a conflict marriage or to deny the wife and the child maintenance. But it cannot be used lightly or frivolously. This ground, contained in Section 12 (1)(d) of the HMA and Section 25 (ii) of the SMA, has certain stringent riders. The stipulation is with reference to pre-marriage pregnancy (**p.20**) and not pre-marriage promiscuity.\(^{59}\) Thus the delivery of an illegitimate child or an abortion prior to marriage does not come under the scope of these provisions. It applies only to specific instances in which the wife has attempted to conceal the pre-marriage pregnancy from another man by falsely projecting it as the offspring of her husband. The burden of proof lies upon the petitioner-husband and proof beyond reasonable doubt is required.\(^{60}\) The essential requirements of this ground of voidable marriage are:

- The respondent was pregnant at the time of the marriage
- She was pregnant from a person other than the petitioner
- The petitioner was unaware of the respondent’s pregnancy at the time of the marriage
• The petitioner did not have marital intercourse with his pregnant wife after the discovery of her pregnancy. If the petitioner has had intercourse with his pregnant wife after he had knowledge of her pregnancy, then his petition would not succeed as it would amount to condonation of the offence.

• The petition must be presented within one year of the marriage

The Supreme Court ruling, delivered by M.B. Shah J. and Arun Kumar J., in Amina v. Hassn Koya provides an elaborate discussion on the issue. When the wife filed for maintenance under Section 125, Cr.PC, the husband pleaded for annulment on the ground of the wife’s pre-marriage pregnancy. Rejecting this contention, the magistrate’s court awarded maintenance of Rs 150 per month for the wife and Rs 125 per month for the daughter. But in appeal, the sessions court as well as the Kerala High Court upheld the husband’s plea and denied the wife maintenance. Against this ruling, the wife approached the Supreme Court. While considering the husband’s plea that he was not aware of the fact that the wife was pregnant at the time of marriage, as this fact was concealed by her, the Supreme Court held that such reasoning could not be accepted. It was very difficult to believe that a woman who is five months pregnant would be able to conceal the pregnancy from her husband. If he was aware of this fact and thereafter cohabited with her, the marriage can not be held void. The husband was present at the time of the delivery of the child and gave his name as the father of the child for official records. Even thereafter, for nearly four years he continued with the marriage and brought up the child. Only when the wife claimed maintenance did he challenge the validity of the marriage. The court ruled that a reasonable person would have immediately turned the wife out of the house on learning about the pregnancy. After considering the facts of the case, the Apex Court held that the husband was aware of the pregnancy at the time of the marriage and, therefore, he could not later plead that it was invalid on that ground. The judgments of the sessions court and the high court were set aside, and the judicial magistrate’s ruling awarding the wife maintenance was restored.

In Devendra Sharma v. Sandhya, the husband sought annulment alleging that the wife was pregnant by a person other than him at the time of marriage, without his knowledge. It was held that the husband is required to prove not only such pregnancy but also that he refrained from cohabitation since its discovery. His failure to prove either would disentitle him to a remedy. Though the husband succeeded in proving pre-marital pregnancy, he was not awarded a decree as he failed to establish that he had not voluntarily lived with her after the discovery of this fraud. But in Maya Ram v. Kamla Devi, a child was born within six months of marriage. The Himachal Pradesh High Court held that the husband led cogent, reliable, and convincing evidence to prove beyond reasonable doubt that he had no access to the wife at the time when the child was begotten. In B. Vandana Kumari v. P. Praveen Kumar, the high court upheld the order of the trial court for conducting a DNA test to prove paternity in a case filed by the husband on the ground of pre-marriage pregnancy.

Marriage of Minors
Though Section 5 (iii) of the Hindu Marriage Act, 1955, prescribes a minimum statutory age of 21 for boys and 18 for girls, a marriage performed between a couple where either or both parties are below the statutory age does not render the marriage void. The marriage is deemed valid until one of the parties obtains a judicial decree of annulment of the marriage. But the spouses performing such a marriage may be liable to be sentenced to a term of simple imprisonment which may extend to 15 days or with a fine which may extend to Rs 1,000, or with both. A husband cannot use this provision to wriggle out of the obligation to pay maintenance to the wife merely on the ground that the wife was a minor at the time of marriage. Courts are extremely cautious while declaring a minor’s marriage as void and have refrained from invalidating such marriages as it would cause untold misery to young girls who were married before the stipulated age of marriage and also deprive them of their legal rights.

**Legitimacy of Children of Void and Voidable Marriages**

A significant difference between void and voidable marriages is the effect it has upon the legitimacy of children. Initially, English law deemed children of void marriages illegitimate and conferred no legal rights on them. Most legal systems distinguished between children born into a legally recognized marriage and those born outside it, i.e., within a void marriage or through illicit or casual unions. In common law, an illegitimate child had no legal relationship with its father. But as a result of successive Acts of the Parliament, the harshness of this position was significantly mitigated and certain rights were awarded to illegitimate children. As a result of these developments, the question whether a child is legitimate or illegitimate has lost its significance in legal discourse regarding the right of the child to maintenance.

When the Indian Divorce Act was enacted in 1869, the statute did not render the children illegitimate only in two instances of void marriages: (i) if the person had contracted a bigamous marriage in good faith that the former spouse was dead and (ii) when the marriage was annulled on the ground of insanity. This was based on the then prevailing philosophy of English law. Similarly, the Special Marriage Act and the Hindu Marriage Act enacted in the 1950s did not bestow legitimacy upon children born of marriages which were void *ab initio*, but children of voidable marriages were deemed legitimate.

Subsequently, under English law, the distinction between legitimate and illegitimate children was extinguished and illegitimate children have been conferred rights similar to those of legitimate children. This development, in turn, influenced the Indian legal system and the children of both void and voidable marriages were deemed legitimate children and the right of maintenance and succession were bestowed upon them (Diwan and Diwan 1997: 295). Incorporating these changes, initially the children of void marriages were granted rights only if the marriage was declared void by a judicial decree. However, after the Marriage Law (Amendment) Act of 1976, and under Section 16 of the Hindu Marriage Act and Section 26 of the Special Marriage Act, children of both void and voidable marriages are deemed legitimate and the requirement of obtaining a judicial declaration of annulment has been dispensed with. Some discrepancy with respect
to children of valid marriages and those of void marriages prevail—the latter can inherit the property of their own parents but not of other relatives of their parents.⁶⁷

The right to maintenance and inheritance extends not only to children of void marriages but even to illegitimate children, i.e., children whose parents have never been married.⁶⁸

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<tr>
<th>HMA</th>
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Restitution of Conjugal Rights

This remedy emerged in an extremely anti-woman context in medieval Europe where the Roman Catholic Church had the power to physically restore to the husband, wives who had escaped from their custody. Later, it was incorporated into English law. Though neither Hindu nor Muslim law recognized this concept, it was used by English lawyers who were practicing in the newly set up courts both in Presidency and moffusil towns. Two important cases within the newly set up anglicised judicial system where this remedy was contested and awarded are Moonshee Buzloor Ruheem v. Shumsoonnissa Begum⁶⁹ and Dadaji Bhikaji v. Rukhmabai.⁷⁰ In the first case, the Privy Council, in 1876, applied the principle to Mohammedan law and held:

On authority as well as principle, there is no doubt that a Mussalman husband may institute a suit in the Civil Court of India for a declaration of his right to the possession of his wife and for a sentence that she return to cohabitation.

In the second case, a single judge, Pinhey J., who had initially heard the case in 1885 had refused to grant the husband the remedy based on the following two grounds: Firstly, the remedy can only be applied to situations when a couple has cohabited. It would be barbarous, cruel, and revolting thing to compel a young lady to go to a man whom she dislikes, in order that he may cohabit with her against her will. Secondly, that the remedy was transplanted from England and it has no foundation in Hindu law.⁷¹ This historical judgment succeeded in drawing attention to the vexed question of the relationship between morality and law and in embedding the case within a broader legal-humanitarian framework. The verdict made the case inseparable from the women’s cause. But within six months, in (p.23) appeal, a Division Bench of the Bombay High Court, comprising two senior most judges, Sargent C.J. and Sir Bayley J., set it aside and awarded the husband a decree of restitution of conjugal rights. This case, of historical significance, has been discussed in detail in Chapter 1 of the first volume of this book.⁷²

This remedy, often viewed as anachronistic, has been at the centre of several controversies regarding its constitutionality. It has also surfaced in reference to the husbands’ authority and control over their wives who had refused to give up their jobs.⁷³

Though initially only husbands availed of this remedy, later it was also used by deserted
wives to restore their marriages. It has been incorporated into all matrimonial statutes. It has also been introduced into the Muslim law through judge-made laws. However, since the Muslim law recognizes the husband’s right to unilateral talaq, a wife’s claim is usually defeated by pronouncement of talaq. Hence this remedy tends to be used more by husbands than wives.\textsuperscript{74}

The most important legal requisite for seeking the remedy of restitution of conjugal rights is to prove the withdrawal of one spouse from the society of the other. As has already been mentioned, there are certain rights and obligations which arise as a consequence of the contract of marriage. The phrase ‘withdrawal from society’ has been taken to mean the refusal of one spouse to continue with these obligations. There is a great deal of confusion surrounding the accurate interpretation of what constitutes withdrawal from one’s society. Whether ‘cohabitation’ implies only sexual intercourse has also been the subject matter of debate within this controversy. It has been held that prior consummation of marriage is not a precondition for enforcing this remedy. Further, ‘withdrawal from society’ may take place even when the parties are living under the same roof. When the husband himself is instrumental in driving the wife out of her matrimonial home, it cannot be construed that the wife has ‘withdrawn’ from the society of her husband.

The defence available to the remedy of restitution is one reasonable excuse or reasonable cause. If the cause or excuse for withdrawal is reasonable, courts will not award a decree of restitution of conjugal rights to the petitioner. A ‘reasonable excuse’ may often seem to be under the ambit of subjectivity; however there has been a consistent opinion held by the courts, that the following constitutes a ‘reasonable cause’:

- An act on the part of the petitioner which can constitute a ground for relief to the respondent for obtaining any other matrimonial relief
- A matrimonial misconduct that is grave, but cannot be considered a ground for matrimonial relief
- An act, an omission, or conduct, which makes it impossible for the respondent to live with the petitioner

An act which can be construed as a ground for divorce, judicial separation, or nullity of marriage is a complete defense to the respondent in a petition for restitution of conjugal rights. A reasonable cause or excuse has been considered to include behaviour such as the husband’s insistence that the wife live with his parents, wife’s apprehension that it is unsafe to continue living with her husband, the husband having another wife or bringing another woman into the house, false accusation of adultery or immorality against the wife, etc. In case the husband himself is responsible for the wife’s desertion or in other words, if he is guilty of constructive desertion, he is not entitled to a decree of restitution of conjugal rights. On the contrary, a wife who has been deserted is entitled to such a decree.

Though technically both husband and wife are able to use this remedy, studies reveal
that far more husbands file for this remedy than wives.\textsuperscript{75} When a wife files for maintenance, as a retaliatory measure, husbands are advised to file a petition for restitution of conjugal rights. Very often, this remedy is used as a legal ploy to defeat the wife’s claim, rather than a genuine intention of reconciliation.

In \textit{Dalbir Singh v. Simar Kaur},\textsuperscript{76} the husband filed a petition for restitution of conjugal rights on the ground that the wife had withdrawn from his company without reasonable cause. In reply, the wife contested the petition stating that the husband had filed this petition to avoid maintenance proceedings. She pleaded that she was thrown out of the matrimonial home by her husband, who used to beat her. She also pleaded that the children from the previous marriage of the husband were adults and they terrorised her to such an extent that she apprehended that it would not be safe for her to return to the matrimonial home. The trial court found that the wife’s apprehension was genuine. Hence the petition filed by the husband for restitution of conjugal rights was dismissed. In appeal, the high court confirmed that the wife’s apprehension of being unsafe in the husband’s house was not ill-founded and that in such circumstances a decree of restitution of conjugal rights could not be granted to the husband.

In \textit{Vijaykumar Bhate v. Neela Bhate},\textsuperscript{77} the wife had filed for divorce on the ground of cruelty. In his written statement, the husband made baseless and derogatory allegations of sexual immorality against the wife, which were ordered to be deleted by way of an amendment. The wife’s petition was decreed and she was awarded a decree of divorce on the ground of mental cruelty. In retaliation, the husband filed a petition for restitution of conjugal rights, which was dismissed. The Bombay High Court dismissed the appeal filed by the husband, so he approached the Supreme Court. The Supreme Court held that the fact that the husband treated the wife with cruelty was established the day the allegations were made in his written statement, which caused indelible impact upon her and which cannot be said to have been dissolved by carrying out the amendments which were ordered. Allegations and counter allegations exchanged are indicative of strong hatred and rancour between the parties. Once the decree of divorce is granted, the relief sought for by the husband for restitution of conjugal rights, merely out of despair and not with any genuine purpose, must inevitably fail. The court held:

\begin{quote}
The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife in the written statement constitutes mental cruelty for sustaining the claim for divorce. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, warranting the claim of the wife being allowed. Such allegations made in the written statement or in cross-examination, (p.25) satisfy the requirement of law. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the family court as well as the high court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering, amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting
\end{quote}
disruption of matrimonial life. The wife’s apprehension that it would be dangerous for her to live with a husband who was taunting her in this manner is reasonable.

In Puspa Kumari v. Parichhit Pandey, the wife had filed criminal cases against the husband and in-laws on grounds of cruelty and demand of dowry. In retaliation, the husband filed for restitution of conjugal rights. The trial court passed a decree in his favour. While setting aside the decree awarded by the trial court, the high court held:

In the present society, it is very difficult to force any person to live according to the desire of the other and, therefore, the S. 9 of the Hindu Marriage Act for restitution of conjugal rights is losing its force because even if the prayer for restitution of conjugal rights is allowed, this decree cannot be enforced against the desire of the wife who does not want to live with her husband. The cases filed by the wife under Section 498(A) of IPC and the Dowry Prohibition Act are pending against husband and in-laws. In these circumstances if the prayer for restitution of conjugal rights is allowed, it would amount to demolishing the cases filed by her. When this fact had come on record, prayer for restitution of conjugal rights cannot be allowed at all because there is always the danger that the wife may be put to further trouble in some other form.

In a petition filed by the husband for divorce on the ground of cruelty or desertion, the wife can plead restitution of conjugal rights. In C.R. Chenthilkumar v. K. Sutha, it was held that there is no hard and fast rule that to express the intention to resume cohabitation, there should be an application for restitution of conjugal rights.

Restitution of conjugal rights is a mere paper decree as it cannot be enforced. But it helps to secure ancillary relief such as maintenance, custody of children, etc., in case the wife is not willing to file for divorce and wants retain her marital tie or is hoping for reconciliation with her husband. While moving the court on this ground, one needs to be cautious that the decree serves as a backdoor entry towards divorce on the ground of irretrievable breakdown of marriage.

In Ram Niwas Singh Rathore v. Sumitra Singh Rathore, the Madhya Pradesh High Court upheld the decree of restitution of conjugal rights granted to the wife by the trial court on the ground that the husband denied the wife her right to lead marital life without any reasonable cause. The husband was held guilty of matrimonial misconduct for making reckless and unfounded allegations against the wife that she was leading an unchaste life and had an illegitimate daughter. He also ill-treated her and turned her out of the matrimonial home. Hence, it was held that he was not entitled to a decree of divorce on the ground of desertion. His plea was that the wife is living away from him since 1991 and had not cohabited with him even after a decree of restitution of conjugal rights. The court held that the husband cannot take advantage of his own wrong. Since the husband, without any reasonable cause or excuse, had denied the wife marital company, it was held that the decree of restitution of conjugal rights was rightly passed against the husband by the trial court.
The Supreme Court, in *Saroj Rani v. Sudarshan Kumar Chhadha*, held contrary to the above ruling. In this case, the wife filed a petition for restitution of conjugal rights. On 28 March 1978, the husband appeared and made a statement that the wife may be granted a decree in her favour. A year later, on 19 April 1979, the husband filed for divorce under Section 13 (1-A) on the ground that one year had passed since the passing of the decree and no actual cohabitation had taken place between the parties. The wife alleged that when she had gone to the husband’s house to enforce the decree, she was turned out within two days. The wife also alleged that she had approached the lower court for enforcement of the decree. The trial court dismissed the husband’s petition for divorce. In an appeal, the husband was granted a decree of divorce. The wife approached the Supreme Court for setting aside the high court decree on the ground that the husband cannot be permitted to take advantage of his own wrong. It was argued in her favour that Indian wives should not be made to suffer at the hands of cunning and dishonest husbands. But the Supreme Court ruled that non-compliance of the decree of restitution of conjugal rights does not amount to ‘taking advantage of his or her own wrong’ as stipulated under Section 23(1) of the Hindu Marriage Act. The court held that whatever be the reasons, the marriage had broken down irretrievably and the parties could no longer live together as husband and wife and in such a situation it was better to close the chapter. If such conduct of the husband is intended to be treated as wrong, then it required legislation to that effect. The court commented:

> We cannot rule out the possibility of a party obtaining a decree of restitution of conjugal rights and in not enforcing the same with the sole purpose of getting a divorce after the lapse of statutory period, but such abuse can be prevented only by bringing necessary legislation to plug the loophole. It is certainly a matter which requires the serious consideration of the Parliament. But as the law stands now, the court is helpless in the matter and can only grant relief as one naturally flowing from compliance of statutory requirement.

In the same ruling, the Apex Court also upheld the constitutional validity of this provision on the ground that it is a benevolent provision which would facilitate reconciliation and save the marriage.

When the husband himself obstructs the execution of the decree of restitution of conjugal rights, the wife is entitled to claim divorce. In *Prabhat Kumar Chakraborty v. Papiya Chakraborty*, it was held that a husband cannot be allowed to take advantage of his own wrong. Since the husband himself had obstructed the compliance of the decree, it was held that it can not be construed as the wife was ‘taking advantage of her own wrong’. Hence the wife was granted a decree of divorce. The Calcutta High Court held:

> Mere non-compliance with the decree for restitution of conjugal rights cannot be taken as a ‘wrong’ within the meaning of S.23(1)(a) of the Act as to deny the right of the wife to seek a divorce under S. 13(1A) (ii) of the Act. But the situation may be different where the party consciously by force prevents the decree to be complied with and in such cases the party should not be allowed to take advantage...
of his/her own wrong. From the evidence on record we find that there was no sincere attempt by the husband to take back his wife. In his cross-examination the husband stated that he never wrote any letter to his wife after the disposal of the earlier suit for restitution of conjugal rights, expressing his intention to accept her back. On the contrary, he initiated different proceedings, both civil and criminal, against his wife, her parents and her brother. These incidents clearly suggest that there was no attempt by the husband to take back his wife.

In the context of the judgments discussed above, it appears that the more recent trend is a clear departure from the position adopted by \( \text{Saroj Rani v. Sudarshan Kumar Chhadha (discussed earlier).} \) Courts have refused to award a decree to a husband who is guilty of taking advantage of his own wrong. But if either of the parties, through their conduct prevent the decree from being executed, the aggrieved spouse would be entitled to a decree of divorce on the ground of non-compliance of the decree of restitution of conjugal rights.

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<td>Uncodified</td>
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<td>S.32/S.34</td>
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**Judicial Separation**

The relief of judicial separation flows in the reverse direction from the remedy of restitution of conjugal rights. While the latter is intended to enjoin the estranged couple, the former entitles one spouse to sever conjugal relations with the other, without breaking the matrimonial tie. The remedy was widely used when the stipulation for obtaining divorce were stringent. While adultery had to be proved to obtain divorce, judicial separation could be obtained on the grounds of desertion or cruelty. So for women who were subjected to cruelty, the right to judicial separation became an important remedy to obtain the right of separate residence, maintenance, and custody of children.

Later, this remedy was viewed as an intermediary measure for spouses who were facing matrimonial conflict but were not yet ready for a divorce and still harboured hopes of reconciliation. Since the parties continued to be husband and wife in law, they are not entitled to remarry after obtaining a decree of judicial separation. In the event of one party’s death, the other will succeed to his or her property. Matters related to alimony and custody may be agitated even after a decree of judicial separation has been obtained.

In 1946, when Hindu women had not yet been granted the right to statutory divorce, the Hindu Married Women’s Separate Residence and Maintenance Act came to their rescue. The Act recognized the right of Hindu wives to live separately and secure orders of maintenance for themselves under certain situations such as cruelty, desertion, bigamy, apostasy, contagious disease, etc. Later, the same remedy was incorporated into the Hindu Marriage Act, 1955 as ‘judicial separation’. After the enactment of the HMA,
both the husband and the wife were granted the right to approach the courts for a decree of judicial separation on any one of the fault grounds specified in Section 13(1). The husband and wife are also entitled to file for judicial separation on failure of compliance with an order of restitution of conjugal rights.

With the exception of Muslim law, all other Indian matrimonial statutes contain a provision for judicial separation. Unlike in the remedy of restitution of conjugal rights, provisions relating to judicial separation are not identical across statutes.

Section 23 of the Special Marriage Act and Section 34 of the Parsi Marriage and Divorce Act provide for the remedy of judicial separation. Sections 22 and 23 of the Indian Divorce Act stipulates that a decree of judicial separation may be obtained on grounds of adultery, cruelty, and desertion of more than two years.

The court has the power to grant a decree for judicial separation in cases where the petitioner has not been able to establish a ground of divorce or has opted for judicial separation, instead of divorce. While the parties can reconcile after obtaining a decree of judicial separation and resume cohabitation, this is not mandatory. After one year of judicial separation, if the parties have not resumed cohabitation, either party becomes eligible for a decree of divorce merely on the ground that they have not been able to resume cohabitation. They need not prove any other fault ground. This, in effect, becomes a ground of ‘irretrievable breakdown of marriage’.86

At times when the parties are old and have been married for many years, the court may decline to dissolve the marriage and instead award a decree of judicial separation. In Leeladevi v. Hari Rao,87 the Karnataka High Court held that the spouses had already entered the evening of their lives and it would be unlikely that either of them would find another life partner. Since they had been living separately for 15 years, it was held that continued separation sanctioned by a court decree would meet the ends of justice. The court awarded the wife Rs 7,500 per month as maintenance during the period of judicial separation.

Separation Agreements: These agreements are not part of matrimonial law but form part of the law of contract. This was viewed as an alternative to the remedy of judicial separation. Through private agreements, parties can free themselves from the duties and obligations of matrimonial cohabitation. Such agreements were prevalent in England. They came into vogue at a time when obtaining a decree of divorce or even judicial separation was extremely difficult. Parties began to enter into private agreements of separation so they could not be faulted for abdicating from their matrimonial responsibilities. Once entered into, neither party could accuse the other of desertion. Initially, when marriages were sacramental and indissoluble, such agreements were deemed to be against public policy under English law. After many conflicting opinions, a consensus was reached in the nineteenth century, whereby it was declared that such agreements were not against public policy (Diwan and Diwan, 1997: 393). But it was stipulated that such agreements should be entered into only when separation was inevitable or had already taken place.
While separation agreements may stipulate some consideration, the wife’s claim of maintenance is not forfeited. Since the general law of contracts regulates the separation agreement, the general principles of a contract, such as consent, apply. An agreement may become voidable on the grounds of fraud, misrepresentation, coercion, and undue influence. Stipulations regarding maintenance, custody, and education of the children are enforceable. Hence in case of default, the aggrieved party can approach the courts for specific performance of the terms of agreement. The covenant granting maintenance must be payable under all circumstances even when the wife becomes unchaste, gets a divorce, judicial separation or annulment.

Muslim law provides for an agreement to live separately and the wife can exercise her right to separate residence and maintenance. Since the general law of contracts regulates the separation agreement, the general principles of a contract, such as consent, apply. An agreement may become voidable on the grounds of fraud, misrepresentation, coercion, and undue influence. Stipulations regarding maintenance, custody, and education of the children are enforceable. Hence in case of default, the aggrieved party can approach the courts for specific performance of the terms of agreement. The covenant granting maintenance must be payable under all circumstances even when the wife becomes unchaste, gets a divorce, judicial separation or annulment.

The right of a spouse to sue for divorce, judicial separation, or nullity is not lost even if there is such a clause in the agreement to this effect. These are statutory rights which cannot be defeated by private agreements between the parties. Similarly, a clause in the agreement which bars the wife or children from claiming future maintenance is not binding as this is a statutory obligation of a husband/father.

The most important requisite of a separation agreement is the occurrence of actual separation or de facto separation. But primarily, separation under an agreement or a court decree is a separation from bed and board, which entitles the parties not to cohabit with each other. The woman is released from the covenant of a sexual contract with her husband which she had entered into at the time of her marriage. So even if the parties live under the same roof, the wife (or the husband, as the case may be) will be entitled to exercise the freedom to refuse sexual intimacy. This principle was laid out by English courts in 1965 in Montgomery v. Montgomery.

Section B: Divorce: Divorce on Fault Grounds

Fault Theory of Divorce
The central concern while transforming marriages from a status to contracts was to obtain the right to dissolve the marriage through a judicial decree, which would entitle the spouses to enter into a subsequent marriage. Once the sacred tie of marriage was severed, the bondage of marital servitude ended. This was a significant step for both Christians and Hindus.

While today there are several ways through which a marriage can be dissolved, the ‘fault theory’ was the first step in this direction. Fault divorce forms the core of matrimonial litigation. When the right to divorce or the right to dissolve the marital bond was first introduced into matrimonial law, it was based on the ‘guilt’ theory. Only if a spouse was guilty of a matrimonial misconduct or, in other words, had violated the terms or conditions of the marriage contract, did the other spouse have the right to dissolve the marriage. It was assumed that the purpose of the right to dissolve the marriage and set free the innocent spouse was to punish the party that had committed a matrimonial offence by depriving him or her of conjugal access of the other. Hence a marriage could
not be dissolved on the ground of mutual incompatibility.

The basic ingredients of a fault ground divorce are:

i) There must exist a guilty party or a party who is responsible for having committed one of the specified matrimonial offences.
ii) There must also exist an innocent party who has suffered due to the misconduct of the guilty party.
iii) The innocent party should have no role in the cause of the misconduct i.e. there must be no collusion.

Initially, under English law as it evolved through the Matrimonial Causes Act of 1857, (p.30) adultery alone was a ground for divorce. Since Christian marriages were monogamous, a violation of the principle of monogamy through an act of adultery was deemed sufficient cause to dissolve the marriage. For women, it was made even more stringent as they had to prove incest, bigamy, cruelty, or desertion in addition to adultery. In 1923, the grounds for divorce for men and women were made equal and women could obtain a divorce on the ground of adultery simpliciter. In 1937, cruelty and desertion were included as grounds for divorce, along with incurable insanity.

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<th>Grounds</th>
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<td>S.2(viii)(b)</td>
<td>S.10(1)(i)</td>
<td>S.31/32</td>
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<td>Cruelty–physical or mental</td>
<td>S.13(i)(i-a)</td>
<td>S.27(1)(d)</td>
<td>S.2(viii)(a)</td>
<td>S.10(x)</td>
<td>S.32(dd)</td>
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<td>Desertion–actual or constructive</td>
<td>S.13(i)(i-b)</td>
<td>S.27(1)(b)</td>
<td>S.2(ii)</td>
<td>S.10(ix)</td>
<td>S.32(g)</td>
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<td>Unsoundness of Mind</td>
<td>S.13(iii)</td>
<td>S.27(i)(e)</td>
<td>S.2(vi)</td>
<td>S.10(1)(iii)</td>
<td>S.32(b)</td>
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<td>Suffering from Venereal Disease</td>
<td>S.13(v)</td>
<td>S.27(1)(f)</td>
<td>S.2(vi)</td>
<td>S.10(1)(v)</td>
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<td>Unheard of for 7/4 years</td>
<td>S.13(vii)</td>
<td>S.27(1)(h)</td>
<td>S.2(i)</td>
<td>S.10(1)(vi)</td>
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Subsequently, the scope was widened to include certain physical inadequacies or diseases like impotency, mental disorder, epilepsy, contagious venereal diseases, and contagious diseases like leprosy. At this stage, the ‘guilt’ theory was replaced with a ‘fault’ theory since impotency, insanity, leprosy, epilepsy, etc., could not be termed as ‘matrimonial misconduct’. They were more in the nature of an illness than a wilful
misconduct. These were included as grounds of divorce since it was considered that healthy bodies are a necessary pre-condition for procreation and a disease in itself construed a matrimonial fault. Since marriage was deemed a sacrament, change of religion (apostasy) or relinquishing his or her religion (taking sanyasa under Hindu law) was also included as a matrimonial fault. By the time the Hindu Marriage Act was enacted in 1955, most of these had already been included as matrimonial faults under English family law. Hence, they were incorporated as grounds for divorce under the Hindu Marriage Act

As can be seen from the above table, there are six common grounds of divorce which are common to all personal laws. Apart from this, there are a range of other grounds which are stipulated under various personal laws. Some stipulations which appear as grounds for divorce under one personal law may be a ground for annulling the marriage under another law. For instance, pre-marriage pregnancy is accepted as a ground of divorce under Parsi law, but it is a ground for the annulment of marriage under the HMA and the SMA. Similarly, non-consummation of marriage is a ground for divorce under the Indian Divorce Act after the 2001 amendment. But it is a ground for annulment under Section 25 of the SMA. Under Muslim law, the wording is slightly different as non-fulfilment of matrimonial obligation which can easily be construed as the obligation to provide sexual access to the spouse. The HMA does not recognize this ground either for divorce or for annulment. But recently, the Supreme Court has ruled that refusal to have sexual intercourse amounts to mental cruelty.91

The Table 1.5 provides a listing of the grounds of divorce which are available under different personal laws.

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<th>Grounds</th>
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<td>S.32 (d)</td>
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<td>Disposes Wife’s Property</td>
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Obstructs perf of rel. Obligations | S.2 (viii)  
---|---
Unequal Treatment between Wives | S.2 (viii)  
Pre-marriage Pregnancy | S.32 (c)  
Minor girl - Option of Puberty | S.13 (2)  
Non-payment of Maintenance | S.13 (2)  
No cohabitation after JS decree | S.131-A  
No cohabitation after RCR decree | S.131-A  

The wording of a particular enactment reflects societal or community concern at the time the statute was enacted or the code was evolved. Any of these grounds can be relied upon to obtain a divorce depending upon the facts and circumstances of a particular case or the needs of the parties. Usually a lawyer will guide a litigant through the options which are available and choose the best one which can be applied. While only one ground will suffice, some lawyers prefer to opt for two or three grounds if the situation so warrants.

Some Commonly Used Fault Grounds

Regarding the substantive law of divorce, Lowe and Douglas (1998: 225) comment in the context of English law that the history of divorce law and its reform is marked by two features. First, there has always been a gap between the letter of law and the means by which spouses and their legal advisers use or sidestep its terms (p.31) to achieve their objective of ending the marriage tie. The second and related feature of divorce law is the extent to which it is the procedures, rather than the substance of the law which determine the grant of the divorce.92 This comment brings to the fore the role of legal advise and litigation strategies which play an important role in divorce litigation. Though substantive law does play an important role in our matrimonial litigation, procedures and strategies also play an important role. Hence it would be useful to keep this in view as we go through this section.

The range of grounds stipulated under various personal laws is more a matter of academic interest and has very little bearing on legal practice. This is because litigation under matrimonial law revolves primarily around three grounds, adultery, cruelty, and desertion, which are of common application under various personal laws. Hence, they are discussed at length in this section. The wide scope awarded to cruelty through various judicial pronouncements renders even desertion and adultery redundant as these can also be construed as causing mental cruelty and can be brought under the rubric of cruelty. When multiple grounds such as adultery, cruelty, and desertion overlap in a judgment, it is difficult to segregate the decisions under the different subheads. So at
times, a decree on the ground of cruelty may also have a reference to either adultery or desertion. But an attempt is made to categorize the judgments based on their primary focus.

**Adultery**

As previously mentioned, adultery was the first matrimonial fault introduced as a ground for divorce. All matrimonial statutes have incorporated this ground, but under Muslim law, which awards men the right to polygamous marriages, the wording by which a wife can dissolve her marriage is slightly different. Instead of ‘adultery’ in general, Section 2 (viii)(b) of the Dissolution of Muslim Marriages Act stipulates ‘association of women with ill-repute or leading infamous (immoral) life.

Adultery is both a matrimonial as well as a criminal offence (Section 497, IPC). In both instances, it is essential to prove a wilful act of sexual intercourse outside wedlock. It is not necessary to prove that the adulterer had the knowledge or reason to believe that the person concerned was the wife (or husband, as the case may be) of the petitioner. Though the words used in both the provisions is the same, there is a difference between the criminal and matrimonial law regarding ‘adultery’. While under matrimonial law, both husband and wife can avail of this provision against the spouse who has committed an act of sexual intercourse outside marriage, in criminal law, the provision can be used only by the husband against the adulterer who has committed adultery with his wife. This is an archaic provision which views the wife as the property of the husband and an act of adultery as a violation of the proprietary rights. Under matrimonial law, the action is aimed at the erring spouse. The adulterer or the adulteress is merely a co-respondent.

Since ‘sexual intercourse’ contemplated by the matrimonial offence of adultery refers to consensual intercourse outside the wedlock, intercourse with the former or later wife of a polygamous marriage is not adultery. The mere attempt at sexual intercourse does not qualify for adultery. Further, the courts are emphatic on the point that rape is not adultery. A husband cannot obtain divorce on the ground of adultery merely because the wife was a victim of rape as the following case reveals:

(p.32) In *Rajesh Kumar Singh v. Rekha Singh*, the petition filed by the husband for divorce on the ground of the wife’s adultery was dismissed by the trial court. In appeal, while affirming the order of the trial court, the Allahabad High Court held that the allegations against the wife were frivolous. The court clarified that the wife did not have any illicit relationship and that on the contrary, she was gang-raped.

There is a fundamental difference between the two: one is with consent and the other is without consent”, the court clarified. Regarding her refusal to disclose this fact to the husband, the court further commented: “Rape leaves physical as well as emotional scars on the victim. Her physical wounds may have healed but the emotional scars, though less visible, are more difficult to treat. The wife was not disclosing the entire picture, as it was natural for any woman to be hesitant to talk about such a gruesome crime against her.
The primary requirement of the ground for adultery is that the erring spouse should have consented to the act of adultery. Without consent, sexual relations outside wedlock do not constitute adultery. Similarly, if the party lacks the mental capacity to give consent on account of being a minor or a person of unsound mind, the presumption is that intercourse was not voluntary. Hence, the act cannot be used as a ground for divorce.

While even a single act of adultery, if proven, is sufficient ground to dissolve the marriage, courts are more inclined to grant divorce on an act of ‘living in adultery’ or a long-term adulterous relationship or cohabitation. The difference between ‘living in adultery’ and ‘adultery’ is that the former denotes a situation where there is a continuous adulterous relationship while the latter phrase refers to isolated acts of adultery.

In a petition for adultery, it is mandatory to add the adulterer as a co-respondent. In Soya v. A.K. Mohanan, the husband made allegations of adultery against his wife with his own brother but did not implead him as a co-respondent. In an appeal filed by the wife against the order of the trial court, the Kerala High Court set aside the decree of divorce on the ground that exemption granted to the husband against impleading his own brother as co-respondent in the proceedings was incorrect and hence the allegation of adultery was not proven. But if the allegations are that the spouse has had multiple sexual relationships or where the husband is specifically accused of visiting brothels, the requirement is dispensed with. Making the adulterer a party to the litigation makes the process cumbersome and time consuming. At times, there is collusion between the person named as adulterer and the husband which further complicates matters for the wife against whom the allegation of adultery is made. If the husband is able to obtain an affidavit from the adulterer, admitting the relationship, the courts will grant the husband a decree of divorce on the ground of adultery.

To be relied upon as a ground for divorce, the act of adultery should essentially be after the marriage has been solemnized. Pre-marital sexual intercourse or even pre-marriage pregnancy does not constitute ‘adultery’ under the provisions of matrimonial statutes and cannot be invoked as a ground for divorce. However, as discussed earlier, pre-marriage pregnancy is a ground of annulment of marriage. But this ground has to be strictly proved as per the stipulation under Section 12 (1) (d) of the Hindu Marriage Act.

In Santoshi Devi @ Madhuri Devi v. Sadanand Das Goswami, the husband filed a petition on the ground of adultery and alleged that the wife was pregnant at the time of marriage and gave birth to a female child within six months of marriage. But there was no averment that after the said discovery, the husband had no marital intercourse with his wife. Hence it was held that he was not entitled to any relief under Section 12 (1) (d) of HMA (pre-marriage pregnancy). He also did not specify any incident of adultery after marriage. It was held that in order to avail of the ground of adultery under Section 13 (1) (i), it is mandatory that the act of sexual intercourse with a person other than the spouse should occur after the solemnization of marriage and during the subsistence of marriage. Despite the fact that the wife had delivered a child within six months of her marriage, this incident by itself could not be brought within the ambit of Section 13 (1) (i)
of HMA.\textsuperscript{96}

If the husband is able to prove that he had no access to the wife at the time when the child was conceived, it will be conclusive proof of adultery. Though there is a presumption of paternity under Section 112 of the Indian Evidence Act, it is a rebuttable and if the husband is able to make out a prima facie case of non access, the courts may grant permission for DNA testing to disprove paternity.\textsuperscript{97} In Jyothi Ammal v. K. Anjan,\textsuperscript{98} the husband’s plea of adultery was upheld on the basis of the report of DNA test excluded the husband as the father of the child and he was awarded a decree of divorce on the grounds of adultery.

The courts need to exercise great caution while deciding cases which contain flippant allegations against the moral character of women by their husbands. In Meera v. Vijay Shankar Talchidia,\textsuperscript{99} the trial court had awarded a decree of divorce to the husband on the ground of adultery and cruelty. In appeal, the Rajasthan High Court set aside the decree and commented:

The statement of the husband that he saw his wife sitting with a young boy who was indulging in undesirable and unjustified activities did not establish that the wife had any sexual relationship with that boy. It was also held that consuming three to four Crocin tablets, in an attempt to commit suicide, did not amount to cruelty to the husband for granting him a decree of divorce.

In Rekhabai v. Gangaram,\textsuperscript{100} the trial court had granted a decree of divorce to the husband on the ground of the wife’s adultery. The Madhya Pradesh High Court set aside the decree on the ground that the parties had lived happily together for about 8–10 years of marriage and had four children. The court commented:

There was no examination of witnesses of the locality and no clinching evidence. It is a case of oath against oath. From the statement of the wife it is clear that charges of adultery against her have not been proved. The trial court erred in awarding a decree of divorce to the husband.

In Madhu v. Mukesh Naiyar,\textsuperscript{101} while setting aside the decree of divorce awarded by the family court at Jaipur, the Rajasthan High Court held that the evidence led by the husband was unworthy of credence. The court commented that it is highly unlikely that a woman, who sacrificed her youthful 24 years and lived as a ‘pativrata’, would suddenly turn towards infidelity. The charge of adultery was levelled against a respectable woman, a mother of three children, implicating her maternal uncle and brother-in-law. The court commented that petty quibbles, trifling differences and quarrels that happen in day-to-day married life of spouses, do not amount to cruelty. Despite the quarrelsome conduct of the wife, the husband tolerated her (p.34) and both led a normal sexual life, as a result of which the wife gave birth to three children. The husband failed to explain circumstances in which he came to lead a normal sexual life with his wife even after acts of alleged adultery and cruelty. The court further commented:
Despite all odds, the wife did not file even a single criminal complaint against the husband. On the contrary she devoted her life to serve her deaf, dumb and handicapped daughter. She still wants to live with her husband. The attention of the husband towards his invalid daughter is also required. In view of this, the marital ties cannot be snapped.

The high court also commented that the approach of the family court was too technical and hyper sensitive.

Since it is difficult to prove adultery through direct evidence of sexual intercourse in matrimonial cases, the courts usually rely on circumstantial evidence based on the theory of preponderance of possibilities. The court would rely upon trustworthy evidence which is coherent, consistent, and credible.\(^{102}\) If the evidence is untrustworthy, the same will be disbelieved by the court. For instance, in *Gurbalwinder Singh v. Baljit Kaur*,\(^{103}\) the husband alleged that he had witnessed his wife indulging in adultery but was not able to produce any evidence to corroborate it. Hence his petition was dismissed. But in *Rashmi v. Vijay Singh Negi*\(^{104}\) the two sons deposed regarding their mother’s adultery, including the son who was living with the mother. Hence it was held that the husband was successful in proving adultery.

In a rare case, *Swapna Ghosh v. Sadanand Ghosh*,\(^{105}\) the wife found her husband in bed with the adulteress. Hence she was able to obtain divorce on the ground of adultery though the requirement for proving adultery was as stringent under the Indian Divorce Act as under the criminal law.\(^{106}\) However, this is an extremely rare incident. Evidence of cohabitation, evidence of nights spent in hotels through hotel registers, photographs of physical intimacy, evidence of visits to brothels, contracting venereal diseases, confessions by concerned parties, the birth of a child when the husband had no access to the wife at the time of conception, reports of DNA tests in cases of disputed paternity, etc., have been used as evidence to prove adultery.

Adultery by the wife is also a relevant issue while claiming maintenance under Section 125, Cr.PC. Under Section 125 (4), a woman living in adultery is not entitled to maintenance. Hence, in order to wriggle out of the obligation of paying maintenance, husbands routinely make the allegation of adultery. If proven, this becomes a complete defence against the claim of maintenance by the wife. So women have to endure a great deal of humiliation during litigation while claiming maintenance. The proximity in law between sexual morality and right to maintenance has been discussed in detail later in the following chapter under the sub-title, *Right to Maintenance*.\(^{107}\)

**Cruelty**

The notion of ‘cruelty’ as a ground of divorce has gone through substantial expansion over the last four decades. In contemporary legal discourse, a wide range of issues of matrimonial (p.35) conflict can be brought within its purview. This has led to cruelty being the most widely used ground of matrimonial misconduct. Prior to the 1976 amendment to HMA and SMA, cruelty was defined within the narrow confines of conduct which would be harmful or injurious to the petitioner. Hence it was necessary to base the
allegation of cruelty upon acts of physical violence.

In 1975, in the leading case *Dastane v. Dastane*, the Supreme Court held that the standard of proving cruelty is not ‘beyond reasonable doubt’ as per the principles of English law. It was held that behaviour which would cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him or her to live with the respondent would constitute ‘cruelty’. The Supreme Court warned that the courts are not dealing with ‘ideal’ couples but with a particular man and a particular woman before it. Their social context is a relevant factor while determining the extent of cruelty that is inflicted by one spouse upon the other. In the following year, the Marriage Laws (Amendment) Act, 1976 widened the scope of the statutory provision to include conduct due to which it would be impossible for the petitioner to live with the respondent without agony, torture, or distress.

From ‘proof beyond reasonable doubt’, to behaviour which would be ‘harmful or injurious’, the legal concept of cruelty has been diluted to ‘behaviour which would cause agony, torture or distress’.

In the leading case, *V. Bhagat v. D. Bhagat*, the Supreme Court explained the concept of mental cruelty as conduct which inflicts upon the other party such mental pain and suffering as would make it impossible for that party to live with the other. It must be of such a nature that the parties cannot reasonably be expected to live together. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. Expanding further the guidelines laid down in *Dastane*, the court held that while deciding the issue of cruelty, regard must be had to the social status and educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together. What is cruelty in one case may not amount to cruelty in another. It is a matter to be determined on the basis of the facts and circumstances of each case.

Over the years, the term ‘mental cruelty’ was expanded further and incidents such as abusive behaviour, denial of access to sexual intercourse, non-payment of maintenance, denying access to children, denial of food and shelter, taunting and insulting comments about the spouse or family members, refusal to have a child, forced abortion or abortion without consent, false allegations of adultery, filing false criminal complaints, false allegations of sexual intimacy of the spouse with parents, siblings, or close relatives, etc., came to be construed as mental cruelty. The scope of this provision is so vast that even acts of adultery and desertion can be construed as cruelty. But normal wear and tear of married life cannot be construed as cruelty. This Section attempts to trace the changing notion of cruelty in judicial discourse.

The Madras High Court, in *A. Vishwanathan v. G. Lakshmi*, explained that the concept of cruelty is deeply influenced by socio-cultural values and stereotypes regarding the roles of husband and wife in a marriage. As the perception of the parties, their standing in the eyes of the society (p.36) and the emerging compulsions of modern life change, the definition of cruelty also would change. For example, in 1985, the Allahabad High Court,
in *Kalpana Srivastava v. S. N. Srivastava*,\(^{112}\) held that refusal to serve tea to visitors and husband’s friend amounts to cruelty. But in 2007, the Delhi High Court, in *Narinder Singh v. Rekha*,\(^{113}\) ruled that refusal to serve tea to the visitors does not amount to cruelty.

Since it is not possible to explore the vast case law on this subject within the limited scope of this book, an attempt is made to list out some broad categories of recurring themes. This will hopefully provide a glimpse of the nature of contests which occur within the broad realm of ‘cruelty’ in our matrimonial courts.

**Filing Criminal Complaints Against the Husband and his Family**

A recurring theme within the ambit of ‘cruelty’ is whether filing a criminal complaint against the husband and his family amounts to cruelty. There are two aspects to this issue. The first is, whether acquittal of the accused would entitle him to file for divorce on this ground and second, whether the complaint was false and the husband and his family were subjected to undue harassment and mental trauma on account of it.

In the leading case, *Shobha Rani v. Madhukar Reddi*,\(^{114}\) the Supreme Court laid out that acquittal in a criminal case filed by the wife in itself cannot be construed as cruelty to the husband. The court explained the difference between cruelty under criminal law and matrimonial law and held that the degree of proving the offence is not the same under them. While in a criminal case, cruelty has to be proved ‘beyond reasonable doubt’, in matrimonial litigation, allegations have to be proved by ‘preponderance of probabilities’. In this case, the wife had filed for divorce on the ground of cruelty. The trial court and the high court dismissed her plea on the ground that she could not prove the allegations. But the Supreme Court granted her a divorce on the ground that demands for dowry constitutes cruelty.

In *Chiranjeevi v. Lavanya*,\(^{115}\) the Andhra Pradesh High Court held that mere acquittal in a criminal case filed by the wife against her husband and in-laws cannot be treated as an incident in favour of the husband, entitling him to seek divorce on grounds of cruelty. The court explained that cruelty has to be such as to cause reasonable apprehension in the petitioner’s mind that it will be harmful or injurious for him/her to live with the other spouse. It was stated by the wife that harassment meted out at the hands of her husband and his parents became intolerable that it drove her to attempt suicide by pouring kerosene on herself. The court saw no merit in the contention of the husband that it is not safe to continue the marital relationship with a wife who has the tendency to commit suicide. The conduct of the husband in disputing paternity of the child goes against him and he cannot be allowed to take advantage of his own misconduct. The high court upheld the trial court’s order of dismissal of the husband’s petition and held that the husband failed to make out a case of cruelty against his wife.

In *Usha Rani v. Sham Lal*,\(^{116}\) it was held that the criminal complaint filed by the wife under Sections 498A and 406 of the IPC that she was subjected to cruelty due to the demand for dowry by the husband and his family members (p. 37) was true. On the
other hand, the husband’s allegations of cruelty were not proved and the incidents of cruelty mentioned in the petition were minor and could be construed as part of normal ‘wear and tear’ of married life. Hence, the Punjab and Haryana High Court set aside the decree of the trial court granting the husband divorce on the ground of cruelty.

If the criminal complaint filed by the wife against her husband is found to be false, it would amount to cruelty. For instance in *P. Mohan Rao v. Vijayalakshmi*,\(^{117}\) where the wife in her criminal complaint implicated not only her husband but also his parents, brothers, and sister due to which they had to suffer imprisonment for a considerable time, the Andhra Pradesh High Court held that she was guilty of cruelty. In *Alka Dadhich v. Ajay Dadhich*,\(^{118}\) it was held that mere filing of a criminal complaint on the ground of cruelty and demand for dowry would not amount to cruelty unless the complaint is found to be false. However, where the wife not only filed criminal cases against the husband and his family members, as a result of which they were detained in police custody, but she was also guilty of several other acts which amounted to cruelty, the husband’s plea was upheld. The other acts of which she was accused of are—wandering around bare headed in the presence of her in-laws; sitting in the *verandah* only in her petticoat, refusing to serve tea and snacks to husband’s friends when they visited him, defying his directions, etc.

Evidently, the question as to which acts construe cruelty is a matter of interpretations of cultural norms. The stereotypical roles assigned to women within a society and judicial notions regarding women’s position are important factors for determining cruelty.

**Wife’s Refusal to Reside in the Joint Family**

Since the joint family system still prevails among many rural and even urban communities, a woman’s desire to set up a separate nuclear family often leads to matrimonial conflicts leading to divorce. Within a traditional set up, this demand may be construed as cruelty. But there are several judgements which have acknowledged the changing social scenario and the needs of a modern, educated woman to break away from the traditional joint family set up.

In *Rakesh Goyal v. Deepika Goyal*,\(^{119}\) it was held that repeated demands of the wife for a separate residence do not amount to cruelty. The high court commented that the courts cannot be oblivious to present-day trends in society wherein most newly-wed women want their privacy and want to live separately from their in-laws. In *Ratna Banerjee v. Chandra Madhab Banerjee*\(^{120}\) it was held that if the husband is in a transferable job and stays at different places away from the parental house, the demand of the wife to stay with him would not amount to cruelty. In *Arun Chettri v. Madhu Chettri*,\(^{121}\) it was held that reluctance of the wife to live with her husband’s mother and sister does not amount to cruelty.

In *Ramesh Jangid v. Sunita*,\(^{122}\) the Rajasthan High Court took a contrary view and held that the Indian society expects a son to look after his aged parents and casts a duty upon him not only to provide for them financially but also to maintain a joint habitation with them.
so that he can accord them proper care. In such cases, if the wife insists that he should maintain a separate residence, it amounts to cruelty. Since the husband was the sole earning member, it was (p.38) not possible for him to abandon his aged parents. At this point, the wife became abusive and refused to have physical relations with him. There was also a separation of fourteen years. In this context, the husband was awarded a decree of divorce on the ground of wife’s cruelty and desertion.

**Wife’s Refusal to Perform Marital Obligations**

Another recurring concern revolves around ‘marital obligations’ or, in other words, sexual access. The contract of marriage encompasses within it the right of mutual conjugality. Hence denial of sexual relationship to the spouse is construed as cruelty. Non-consummation of marriage, denying sexual access, and incapacity to perform sexual acts are matrimonial offences which will entitle the other spouse to either dissolve or annul the marriage. While the obligation is mutual, more often than not, it is the women who are called upon to fulfil this obligation. Hence withdrawal from sexual contact becomes a ground for divorce. In *Samar Ghosh v. Jaya Ghosh*,\(^{123}\) while examining allegations of mental cruelty on the ground of the wife’s refusal to cohabit with her husband, the Supreme Court ruled that it amounts to mental cruelty and commented as follows:

> Once the wife had accepted the marriage, she had to respect the marital bond and discharge obligations of marital life, which includes cohabitation. The refusal to do so would amount to mental cruelty.

But the court issued a note of caution that mental cruelty cannot be given a comprehensive definition since cruelty in one case might not amount to cruelty in another. There can never be any straightjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. Mental cruelty needs to be evaluated on the basis of facts and circumstances of each case and has to be decided on a case to case basis. Therefore, one can construe that not every case of refusal to fulfill marital obligations of sexual intercourse amounts to cruelty. If non-consummation is not entirely due to the fault of the wife, it cannot be construed as cruelty, as held in *Lakshmi Priya v. K.V. Krishnamurthy*.\(^{124}\)

**Normal Wear and Tear of Married Life is not Cruelty**

A term which is used frequently while determining the extent of cruelty is ‘normal wear and tear of married life’. Courts have held that the normal wear and tear of married life and minor quarrels do not constitute cruelty. To constitute cruelty under matrimonial statutes, the conduct of the other spouse has to be such that the affected spouse cannot reasonably be expected to live with him or her. Allegations of cruelty have to be weighty and not frivolous.

In *Asha Gupta alias Anju Gupta v. Rajiv Kumar Gupta*,\(^{125}\) while setting aside the decree of divorce granted to the husband by the trial court, the high court held minor quarrels cannot be construed as cruelty. The court also commented that irretrievable breakdown
of marriage cannot be invoked for dissolving the marriage. In Nitin Tidke v. Sujata,\textsuperscript{126} it was held that a mismatch of personalities and friction caused thereof is not cruelty. The husband could not prove that he had suffered mental agony to such an extent that it could no longer be possible to continue co-habitation. In Pran Nath v. Pushpa Devi\textsuperscript{127} and Sukhwinder Kaur v. Jatinderbir Singh,\textsuperscript{128} it was held that the wife staying away from the matrimonial home for a few days cannot be construed as cruelty. It was \textit{(p.39)} held that divorce cannot be granted based on general pleadings without citing specific incidents. In C.R. Chenthilkumar v. K. Sutha,\textsuperscript{129} the husband’s allegations that the wife refused to cook food and to have sexual intercourse, that she was mentally abnormal and she deserted the matrimonial home were not supported by appropriate evidence. The court commented that the allegations amount to ordinary wear and tear of matrimonial life and cannot be construed as cruelty. In Jitender Singh v. Yeshwanti,\textsuperscript{130} the parties stayed together as husband and wife even after filing of divorce petition. Hence it was held that the alleged cruelty was condoned and the matrimonial bond was not ruptured beyond repair. The court also commented that a solitary incident of cruelty cannot be a ground for dissolution of marriage. Further, it was held that the ground of irretrievable breakdown of marriage cannot be invoked when one of the spouses is genuinely interested in living with other, forgiving and forgetting existing bitterness.

\textbf{Wife’s Demands for a Better Quality of Life}

The desire to continue one’s education or even for a better quality of cosmetics cannot be construed as cruelty. In Padam Singh v. Anita Bai,\textsuperscript{131} it was held that the wife’s demands for a better quality of face powder and to go shopping or not behaving properly with her husband or mother-in-law are not acts which amount to cruelty. The husband failed to produce reliable evidence that the behaviour of his wife was so cruel as to cause reasonable apprehension that it is not possible to continue married life. The court commented: ‘It is clear that the wife has not deserted the husband but the wife was living separately because the husband refused to keep her in the matrimonial house.’

In Binapani Battacharjee v. Pratap Battacharjee,\textsuperscript{132} the wife came to her parents’ house for the delivery of her child and stayed back to appear in her M.A. examination. Later, when she returned along with her brother to the matrimonial home, the husband misbehaved with her. Subsequently, he filed for divorce using this incident to prove cruelty. Dismissing the allegations of cruelty, the court held that the husband cannot take objection to his wife’s decision to study further. The court commented that appearance in an exam cannot be termed as cruelty under any circumstances.

Filing criminal complaints for return of stridhana under Sections 406 and 498A of the IPC or initiating proceedings for maintenance can not be construed as cruelty which would entitle the husband to a decree of divorce. These are statutory rights which the wife is entitled to enforce against her husband.

\textbf{When the Husband is Guilty of Misconduct}

If the husband himself is guilty of a matrimonial misconduct, he cannot take advantage of
his own wrong and obtain a decree of divorce.

In *S.K. Karg v. Chanchal Kumari*, the Punjab and Haryana High Court held that baseless allegations of cruelty constitute mental cruelty of the gravest kind. Merely a claim that the wife used to beat the children cannot be construed as cruelty against the husband. On the other hand, it was proved that the husband caused injuries to the wife, resulting in a fracture of her arm for which she had to be operated upon. The court commented that it was the husband who had treated the wife with cruelty. In *Vinod Kumar Gupta v. Santosh Gupta*, it was held that if the wife is unable to receive proper treatment for mental stress caused by the husband and this aggravated her mental strain, it cannot be construed as cruel behaviour towards him.

**Allegations of Cruelty by Wife Upheld**

In order to obtain a decree of divorce, the allegations have to be grave and weighty and the husband should be able to prove them. The following instances were held to be sufficiently grave to award the husband a decree of divorce.

In *Susarla Subrahmanya Sastry v. S. Padmakshi*, the allegations made by the wife against the husband that he was unable to perform sexual intercourse could not be proved. Hence it was held that these allegations amount to cruelty. It was further held that because of non co-operation and hostile attitude of the wife, the husband was subjected to serious traumatic experience which can be termed as ‘cruelty’. Further, the court commented that when a marriage has irretrievably broken down, the question whether it was consummated or not loses it importance.

In *Mayadevi v. Jagadish Prasad* it was proved that the wife used to demand money from the husband for her father and would quarrel with him if it was not paid. She would often not provide food to her husband, threaten to kill the children and implicate him in a false dowry case, mercilessly beat up the children and often tie them with ropes. While she was pregnant with the fourth child, she pushed her three children into a well and jumped in after them. She was rescued, but the three children died. A case of murder registered against her was pending. The Supreme Court held that the wife’s conduct amounted to cruelty and confirmed the decree of divorce granted by the lower courts.

In *Suman Kapur v. Sudhir Kapur* it was held that the wife was interested in her career and neglected her matrimonial obligation. She terminated her pregnancy without the consent or knowledge of her husband. She also made allegations against the husband that he was married to another lady and referred to her in-laws as ‘ghosts’. It was held that this behaviour amounts to mental cruelty. But while awarding the husband the decree of divorce, the court directed him to pay Rs 5,00,000 as alimony to the wife.

In *Harish Chandra Singh Chilwal v. Pushpa*, the wife insulting the husband in the presence of others and taunting him that she was earning more than her husband was construed as cruelty. In *Indu Mishra v. Kavid Kumar Gaur*, it was held that baseless allegations of illicit relationship between the husband and his sister-in-law constitute
cruelty. In Neena Malhotra v. Ashok Malhotra\textsuperscript{140} it was held that allegations regarding illicit relationship of the husband with his mother amounts to cruelty of the highest degree as it casts aspersions on the pious relationship of mother and son.

**Allegations of Cruelty by Husband Upheld**

In the following cases, the wife's allegations of cruelty against the husband were upheld and she was granted a decree of divorce.

In *Binod Biswal v. Tikli @ Padmini Biswal*,\textsuperscript{141} the wife alleged cruelty on the part of her husband. She also alleged sexual misbehaviour on the part of her father-in-law but the same could \textbf{(p.41)} not be proved. The family court upheld her plea and granted her divorce. The court also ordered maintenance of Rs 400 per month and return of her stridhan. In an appeal against the order filed by the husband, the high court upheld the decree of divorce.

In *Puran Singh v. Shanty Devi*,\textsuperscript{142} it was held that false charges of adultery levelled against the wife by the husband amounts to cruelty. The decree of divorce granted by the family court and maintenance of Rs 400 per month awarded to her was upheld by the high court. In *Man Mohan Vaid v. Meena Kumari*,\textsuperscript{143} the marriage was inter-caste, contracted by the couple against the wishes of their parents. Thereafter the husband failed to not only protect the wife against humiliation and mental torture caused by his father and sister, but was himself guilty of beating and humiliating her and demanding dowry. It was held that the trial court was justified in holding the husband guilty of cruelty.

In a recent case, *Rayala M Bhuvaneswari v. Nagaphanender Rayala*,\textsuperscript{144} the husband had taped the telephone conversations which the wife had with her parents and her friends while she was residing with him in the USA. In proceedings before the family court at Hyderabad, the wife denied part of the conversation and the husband filed an application for the wife to undergo a voice test. The same was granted by the court. In an appeal filed by the wife against this, it was held that tape recording telephone conversations is violative of the right to privacy under Article 21 of the Constitution and the same is not admissible as evidence in proceedings before the court. It was held that the tapes, even if true, cannot be used as evidence against the wife and hence there was no question of forcing the wife to undergo a voice test and then asking experts to compare portions denied by her with her admitted voice.

**Desertion**

Desertion implies the permanent abandoning of one spouse by the other. It is necessary that desertion should be accompanied without a reasonable cause, and without the consent of the other party. The statutory period for desertion to become a ground for divorce is two years in which there should be complete withdrawal by one spouse from carrying out his or her marital obligations. The essential elements of desertion are:

i) separation or \textit{factum deserendii}
ii) the intention to desert or *animus deserdendi*

The intention to desert does not have to precede the fact of separation. The moment, however, desertion is contemplated, the individual becomes a deserter. Supervening desertion thus refers to a situation where the factual separation already existed, but the intention to desert followed much later.

Desertion may be either actual or constructive. Hence, the spouse who leaves the matrimonial home may not always be the deserter. The spouse who is residing in the matrimonial home and has made it intolerable for the other spouse to continue living under the same roof can be construed as the deserter under the notion of ‘constructive desertion’. This legal premise is particularly relevant to women who are compelled to leave their matrimonial home due to domestic violence or dowry harassment. As per Indian tradition, the bride usually has to leave her natal family and enter the matrimonial home, which is often a joint family. This family may not accept the young bride or subject her to humiliation and ill treatment. When the situation becomes unbearable, the wife will be compelled to leave the matrimonial home. This act of leaving the matrimonial home cannot give rise to a petition for divorce on the ground of her desertion. The Supreme Court and several high courts have explained the notion of constructive desertion and held that the husband, who had caused the wife to leave, is guilty of constructive desertion. Further, he cannot take advantage of his own wrong. *Bipinchandra v. Prabhavati* and *Lachman v. Meena* are two landmark rulings of the Supreme Court which extended the scope of constructive desertion. Both these cases were filed by husbands. The trial court awarded them the decree of divorce on the ground of their wives’ desertion. In appeal, the Bombay High Court set aside the decree of divorce, which the Supreme Court upheld.

*Bipinchandra v. Prabhavati*,145 was a case where the wife left the matrimonial home due to allegations of adultery against her. When she wanted to return home, the husband sent her a telegram: ‘Must not send Prabha’. Thereafter, he filed a petition for divorce on the ground of desertion. The trial court upheld his plea and awarded him a decree of divorce. But in an appeal, the Bombay High Court reversed the trial court decree and held that since the husband had prevented the wife from returning, it was he who was guilty of constructive desertion. The court explained the ingredients of desertion as follows:

> Where the wife is forcibly turned out of her marital home by the husband, he is guilty of “constructive desertion” because the test is not who left the matrimonial home. If one spouse by his words and conduct compels the other spouse to leave the marital home, the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. …The fact that the wife leaves her husband’s place in shame not having the courage to face the husband after the discovery of her reprehensible conduct does not render her in the eyes of the law a deserter.

In *Lachman v. Meena*,146 the husband petitioned for judicial separation on the ground of
the wife’s desertion. In her reply, the wife stated that she was ill treated and constantly taunted by her mother-in-law. The trial court upheld the husband’s plea and awarded a decree in his favour, but the Bombay High Court set aside the decree of divorce. The husband approached the Supreme Court which discussed the issue of desertion in detail and concluded that ‘desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent, and without reasonable cause’. The Court pointed out that there could not be a standard criterion of desertion. The nature of the act is such that it must be seen in the context of specific circumstances and motives.

The next two decades witnessed further expansion of the notion of constructive desertion. Discussed below are some judgments of 1980s and 1990s where high courts have rejected the husband’s plea of desertion and pinned the blame on him for constructive desertion.

In *Om Wati v. Kishan Chand*, the Delhi High Court set aside the trial court decree of divorce awarded to the husband on the ground of wife’s desertion. It was held that the husband’s refusal to attend the funeral of their child amounted to a conscious disregard of his marital duties. The husband had forsaken his family and the wife had no alternative but to separate as she could not continue living with her irate husband. Despite the parties living separately, the court observed that there was no *animus deserendendi* on the part of the wife and that it was the husband who was the deserter and it was a case of constructive desertion.

In *Kamal Kumar v. Kalyani*, the Calcutta High Court observed that physical act of departure by the wife does not make her the deserter. If the husband created a situation in which it was impossible for her to live and she left her matrimonial home as a result of such a situation, it is the husband who is the deserter. The wife is entitled to insist that she should not be exposed to unpleasant situations and that suitable provisions should be made for her to live with her husband in privacy. If the husband fails to provide this and the wife leaves the matrimonial home, indicating that she is willing to join her husband as and when he is able to provide her such a home, it cannot be held as desertion by the wife entitling the husband for a decree of divorce. In *Renganayaki v. Arunagiri*, the husband had an illicit relationship with the maid servant and he beat up the wife when she complained about it. The Madras High Court held that the wife was compelled by these circumstances to leave the home but this does not amount to desertion. In *Teerth Ram v. Parvati Devi*, the wife insisted on a separate home away from husband’s family and left the matrimonial home. The Rajasthan High Court held that the wife was not guilty of desertion as the mere fact of physical separation does not constitute desertion.

This concept was expanded further in the rulings of various high courts after 2000. The courts have clearly and emphatically ruled that if a husband is guilty of a matrimonial misconduct due to which the wife was compelled to leave the matrimonial home, he is not entitled to obtain a decree of divorce on the ground of his wife’s desertion. In *Lovely Thomas v. Tomy Alexander*, it was held that it is not relevant who left the matrimonial
home. If the husband’s words and conduct compel the wife to leave the marital home, he is guilty of desertion, even though it may be the wife who physically separated from the marital home. It is case of constructive desertion. In Kamala Sharma v. Suresh Kumar Sharma,152 the woman’s elder sister-in-law (the wife of her husband’s eldest brother) was burnt to death by her in-laws. Hence the petitioner left the matrimonial home. It was held that the desertion was not without reasonable cause. In Bishwanath Panday v. Anjana Devi,153 where the wife was living separately in a room, provided by the husband under compromise in proceedings for maintenance and the husband had another woman living with him, it was held that the separation does not amount to desertion by the wife. In Bhupinder Kaur v. Budh Singh,154 the husband obtained divorce on the ground that his wife deserted him twenty two years ago. This was decreed in his favour. In appeal, the high court held that the husband had made no effort to take custody of the children, send them money, or resume cohabitation with his wife. The fact that the wife did not attend the cremation of the husband’s parents or the fact that she did not file for restitution of conjugal rights cannot give rise to cruelty or desertion on her part.

In Kishan Chand v. Smt. Munni Devi,155 the husband had an extra marital affair and had driven his wife out of the matrimonial home. After nine and a half years, he filed for divorce (p.44) on the ground of cruelty and desertion. Denying him the decree the high court held:

The conduct of the husband compelled the wife to leave the matrimonial home and prompted her not to withdraw criminal proceedings and to back out from the compromise. The main facts considered by the district judge to conclude that the wife did not desert her husband was the refusal of the husband to transfer one room in his house to his wife’s name, which made her feel insecure. The wife was justified in staying away from her husband as she had reasonable apprehension that she would continue to be ill treated and beaten up.

In Pradip Kumar Kalita v. Hiran Kalita,156 the husband refused to admit the wife into his official residence and compelled her to live in his home in the village, along with his elder brother. It was held that she had justifiable reason to reside with her parents. It was held that the conduct of the husband in leaving his newly married wife with a minor child in the house of his elder brother would in itself amount to cruelty on his part. In Damayanti Dei v. Pabitra Mohan Srichandan,157 after fourteen years of marriage, the husband filed for annulment of marriage before the family court at Cuttack on the ground of his wife’s epilepsy and also that she was a minor at the time of marriage. After four years of marriage, the husband had remarried. Though the ground of annulment was not proved, the family court upheld her plea of desertion and awarded him a decree of divorce. The high court set it aside and held as follows:

When the second wife is living in the house, the first wife could not have volunteered to join him. Hence her staying separately from her husband cannot be termed as a desertion on her part. Under such circumstances, the family court, Cuttack was wrong in interpreting separation of 14 years as desertion by the wife.
The decree of divorce was set aside and the wife was awarded costs.

In *Chandra Mohan Khurana v. Neeta Khurana*,\(^{158}\) in his cross-examination, the husband had admitted that his wife used to come to meet him from Lucknow, availing of medical leave. He also admitted that twins were born out of the wedlock, but he never visited them for seven years. It was held that with this evidence, the backbone of his case of cruelty and desertion is demolished. On other hand, the wife stated that even when she got a transfer, the husband did not permit her to cohabit with him. Hence it was held that it was the husband who had deserted his wife.

In *Rajesh Kumar Chaudhary v. Sunita Chaudhary*,\(^{159}\) decided by the Himachal Pradesh High Court in 2008, it was held that there was no evidence on record to show that the wife did not make any attempt to join her husband. The husband himself admitted that he was willing to accept the wife but his parents were opposed to it. Being a newly married lady, the husband’s family ought to have been more sensitive to her and ought not to have taunted her as a bad omen in the family and humiliated her by addressing her as *kalo mai*. In these circumstances, even if the wife lived apart from her husband, she would be justified in doing so and it would not amount to desertion.

If the wife is not able to prove that she has a reasonable ground for staying away from the matrimonial home, the courts will uphold the husband’s plea of wife’s desertion and award him the decree of divorce. Some recent rulings where the husbands’ plea of desertion was upheld are discussed below:

In *Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*,\(^{160}\) the husband’s plea of desertion was upheld by the trial court. In appeal, the high court reversed the decree. But the Supreme Court upheld the trial court decree and held that the wife had failed to substantiate a serious allegation of molestation by the father-in-law. She also did not demonstrate her willingness to return to the matrimonial home and fulfill her matrimonial obligations. In *Raj Kumar v. Madhu*,\(^{161}\) the Rajasthan High Court upheld the husband’s plea of desertion by the wife and held that the wife had failed to prove that her husband made it impossible for her to live with him. The court also set aside the order of maintenance awarded to her. However, the maintenance of Rs 3,000 per month awarded to the daughter was upheld and in addition the husband was directed to pay Rs 1,000 per month towards her college expenses.

In *Ramesh Kumar Sharma v. Akash Sharma*,\(^{162}\) decided by the Himachal Pradesh High Court in 2008, the parties were living separately since 1982 and admittedly, there was no cohabitation between them since that time. The wife had alleged that the husband was in an illicit relationship with his sister-in-law (*bhabhi*). The trial court dismissed the petition filed by the husband on the ground that a previous petition filed by him on the same ground had been dismissed by the high court. While setting aside the decree and granting divorce to the husband, the high court commented that the approach of the trial court was not judicious. In *Prakash v. Kavita*,\(^{163}\) when the husband filed for divorce on the ground of desertion, as a counterblast the wife filed a false criminal complaint against the husband and in-laws under Section 498A of IPC (cruelty and dowry harassment) and
tried her best to get them arrested. Thereafter she also filed an application for restitution of conjugal rights. The Rajasthan High Court held that the application cannot be termed as *bona fide* and the husband was entitled to a decree of divorce on the ground of wife’s desertion.

In the following cases filed by the wife on the ground of the husband’s desertion, it was held that the wife could not prove desertion on the part of her husband. In *Darshana Kaur v. Kashmir Singh*, the husband had gone abroad nine years ago. After about three years he stopped sending money to maintain the family. Apart from this no other evidence was brought on record which could establish that he permanently brought an end to cohabitation. It was held that the criteria for establishing desertion was conspicuously absent from the pleadings and desertion was not proved. In *Conceicao Fernandes v. Milagres Fernandes*, the residence of the wife, under Portuguese law which was applicable to the parties, is the place where the husband resides. The matrimonial domicile or matrimonial home is a place where husband and wife, as a married couple, have established their home. The wife’s mother’s home cannot be accepted as their matrimonial home even if parties resided there after marriage. That place was not the permanent abode of the parties. The fact that the husband left that house can not help the wife’s case that he abandoned the matrimonial home.

If the petition for divorce is based on cruelty, the ground of desertion cannot be added as an after thought at the appeal stage. For instance in *Suram Pal Singh v. Savita*, the husband’s petition for divorce was based on the ground of cruelty. Since he was not successful in obtaining divorce at the appeal stage, he sought to include desertion. The Delhi High Court held that the ground of desertion was argued for the first time in the proceedings before the high court whereas the focus of the petition in the trial court was on the ground of cruelty and hence, it cannot be allowed.

Though desertion is not explicitly stated as a ground under Muslim law, the failure to perform one’s marital obligations for a period of three years amounts to constructive desertion under the Dissolution of Muslim Marriages Act. Section 2(ii) of the Act stipulates that the wife can sue her husband for divorce on the ground that he has neglected to maintain her. There is nothing in the wording of Section 2(ii) of the Act to suggest that the failure to maintain wife must be wilful.

In *Najiman Nissa Begum v. Serajuddin Ahmed Khan*, the husband’s failure to pay the dower even after several pleas by the wife was construed by the courts as indicative of the husband’s neglect to maintain her. In *Kochu Mohannad Kunju Ismail v. Mohammad Kadeja Umma*, the Kerala High Court held that the Muslim wife could obtain divorce from her husband if he had failed to maintain her for a period of two years or more, irrespective of whether his failure arose out of wilful neglect or the inability to provide maintenance. In *A. Dastagir Sab v. N. Shariffunnissa*, the wife refused to live with her husband due to non-payment of dower and non-fulfilment of the condition of protection. It was held that the husband could not refuse maintenance to her. His refusal would amount to default on his part and would provide her a ground to dissolve her marriage under Section 2 (ii) of DMMA. In *Yousuf v. Sowramma*, it was held that it is absolutely
immaterial whether the failure to maintain the wife is due to poverty, failing health, loss of work, imprisonment, or to any other cause. In Mehbooz Alam Dastagirsab Killedar v. Shagufa, a divorce petition was filed by the wife on the ground of desertion. It was held that the trial judge was justified in granting relief to her, awarding her a decree of dissolution of marriage under Section 2(ii) of DMMA.

Desertion remains an inchoate offence until an action is brought. The offence may be terminated with the resumption of cohabitation, sexual intercourse, the offer of reconciliation, or a supervening agreement to separate or supervening marital misconduct. Every offer of reconciliation or resumption of cohabitation must contain certain essential features in order to be valid. The offer must be genuine, accompanied by reasonable conditions and the person must not be guilty of any other matrimonial misconduct. In Priyamvada Limaye v. Sharad Limaye, it was held that if the documents brought on record by the wife on the date of filing the petition express her willingness to cohabit with her husband, desertion will come to an end.

Additional Fault Grounds

Other grounds for divorce include conversion or apostasy, insanity or mental disorder, venereal diseases, leprosy, renunciation of the world, presumption of death, conviction and imprisonment for a criminal offence, non-resumption of cohabitation for two years after a decree (p.47), restitution of conjugal rights or judicial separation, non-compliance of an order of maintenance, rape and unnatural offences like homosexuality, sodomy, and bestiality, marriage performed when a person was a minor, etc. Epilepsy also used to be a ground of divorce, but through efforts of health activists this ground has been deleted by the Marriage Laws (Amendment) Act of 1999.

Mental Illness

Mental illness is a ground for annulment for marriage as well as for divorce. For annulment, unsoundness of mind vitiates consent for a valid marriage and the other spouse can file for annulment on this ground. To qualify as a ground for divorce, the person must be unfit to carry on the normal responsibilities of married life. Section 13 (1) (iii) stipulates that to be a ground for divorce, the respondent must be of incurably unsound mind or suffering from mental disorder of such kind and to such an extent that the petitioner cannot be reasonably expected to live with the respondent. Explanation to this section defines mental disorder as a state of arrested or incomplete development of the mind, a psychopathic disorder, or any other disorder or disability of the mind, including schizophrenia. Mental disorder as a ground for divorce has two requirements: (i) the respondent should be suffering from a mental disorder of an incurable nature and (ii) as a result of such a disorder it would be impossible to live with the person.

In a recent case, Vinita Saxena v. Pankaj Pandit, the Supreme Court upheld the wife’s plea that her husband was suffering from schizophrenia. After an elaborate discussion on this mental disorder, the court ruled that the wife had provided ample medical evidence to prove the ground and is required to prove no other ground. The marriage had lasted only five months and was not consummated because the husband
was incapable of performing his matrimonial obligations due to his mental disorder. The lower courts disbelieved the wife’s contentions. But the Supreme Court held that due to the mental disorder of her husband, the wife had suffered cruelty by and at the behest of her husband. The court commented:

Facts and circumstances as well as aspects pertaining to humanity and life give sufficient cogent reasons to allow the appeal and relieve the wife from the shackles and chains of her husband to live her own life.

In all cases of this nature, courts scrutinise evidence and documents before passing judgment. Arguments that are based only on unfounded and reckless allegations which are not supported and substantiated by documentary proof or expert opinion are rejected. For instance, merely alleging that an individual is suffering from a mental disorder by proving some erratic or irrational behaviour is not sufficient evidence to prove a mental disorder. Hence, substantial proof regarding the degree and nature of the mental disorder is required. Prognosis of the disorder, i.e., whether it is curable and controllable is an important aspect which is examined during trial.

Venereal Diseases
Venereal diseases and sexually transmitted diseases like HIV/AIDS, syphilis, and gonorrhea are also grounds for divorce. Venereal disease as a ground is rarely used to file for divorce and hence, there are hardly any reported cases in recent times concerning divorce under this particular ground.

(p.48) Conviction
When a person is convicted of a crime and sentenced to four or seven or more years of imprisonment, the spouse of the convicted person can use this as a ground for divorce.

Conversion/apostasy
The ground of conversion/apostasy was used by Muslim women to dissolve their marriage prior to the enactment of Dissolution of Muslim Marriages Act in 1939. The act of conversion to another religion automatically dissolved the marriage. But after the enactment of DMMA, the conversion of the wife does not in itself dissolve the marriage and it would be necessary to obtain a judicial decree.

The Kerala High Court, in Suresh Babu v. V. P. Leela,175 was called upon to decide whether a wife who had consented to the husband’s conversion is entitled to a decree of divorce on the ground of conversion. The husband who had converted to Islam pleaded that since the wife had given her consent to the conversion, she was prevented from seeking divorce on that ground. But the Kerala High Court rejected his argument and held that despite the fact that the wife may have given her consent, conversion in itself is a matrimonial misconduct and a ground on which the non-converting spouse is entitled to a decree of divorce. The right of the non-converting spouse is indefeasible. Since the statute does not provide for conversion with consent of the other spouse, it was held that the same cannot be pleaded as a defence against the allegation of conversion.
Minority

A marriage performed when a girl was minor can be repudiated when the girl attains majority. This is termed as ‘option of puberty’ under (p.49) Muslim law, which is available to a girl who was married before the age of 15 years and whose marriage is not consummated.\textsuperscript{176} Under the Hindu Marriage Act, marriage of a minor girl can be dissolved if she was married when she was under 15 years of marriage and she repudiates the marriage between the age of 15 and 18 years, irrespective of whether the marriage was consummated or not.\textsuperscript{177} But more recently, under the Prevention of Child Marriage Act, 2006, a minor married prior to the age of 18 can annul the marriage within two years of attaining majority. The option is available to both girls and boys irrespective of the laws under which they were married.\textsuperscript{178}

Grounds such as conversion, apostasy, renunciation of the world, and presumption of death, as also rape, unnatural offences like homosexuality, sodomy, and bestiality are very rarely used in contemporary matrimonial litigation. Hence there are hardly any reported cases on these issues to assess judicial trends. As already mentioned, bulk of the matrimonial litigation revolves around the three main grounds, i.e., adultery, cruelty, and desertion, with cruelty gaining prominence even over the other two. Rather than resorting to quaint and obscure grounds of matrimonial ‘guilt’ or ‘fault’, the current trend is to progress towards a ‘no fault’ divorce on the ground of ‘mutual incompatibility’.

Consent Theory of Divorce

Doctrine of ‘No Fault’ Divorce

The ‘no fault’ theory of divorce is based on the fact that marriages very often fail not because of the fault or guilt of one of the spouses but because the spouses are not compatible in their temperament. Despite their best efforts, they are unable to live together as husband and wife. But the fault theory requires that one of them (and only one of them) should be guilty of some matrimonial offence in order to dissolve the marriage. Before the introduction of the theory of ‘no fault divorce’, the only avenue open to such a couple was to fabricate a fault ground where one spouse accuses the other of a matrimonial fault and the other does not contests it. This is termed as a ‘collusive’ decree and is specifically prohibited under the matrimonial statutes. However, left with no other option, the couple would be forced to collude to secure their release from the matrimonial bondage. To remedy the problem faced by such couples, the notion of a ‘consent divorce’ came to be included in matrimonial laws. The purpose was to enable couples to adopt honest rather than fraudulent or collusive means to achieve legitimate ends.

The consent theory is a sharp departure from the sacramental notion of marriage and brings marriage to the level of a purely consensual contractual partnership. ‘If spouses are free to enter a matrimonial contract, they are equally free to withdraw from the contract of marriage’ is the premise which governs the notion of ‘consent divorce’. Some legal scholars believe that this spelled the virtual death of traditional Hindu law which viewed marriage as a sacrament (Derrett 1978).
Within Muslim law, since its inception in the 7th century, was based on the premise of contractual and dissoluble marriages, there was no difficulty in accepting the notion of a consent divorce. The two forms of divorce by mutual consent accepted under Islamic law are *khula* and *mubaraa*. In *khula*, the desire for divorce comes from the wife while *mubaraa* is mutual. Since these provisions are under uncodified Muslim law, it is not mandatory to obtain a (p.50) judicial decree. It can be done through a divorce agreement, signed by witnesses and the parties concerned. An agreement endorsed by a *qazi* is helpful but not mandatory.

Several centuries later, other legal systems adopted this approach. Soon after the Bolshevik Revolution in 1917, the Soviet Union introduced this theory in family law. The parties were allowed to dissolve their marriage by a private act, without recourse to a court of law. But because of the problems this experiment created, in 1944, marriages could be dissolved only with the intervention of the courts. In 1920, in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the court the discretion to grant a decree of divorce to the parties when they had separated for three years under a decree of judicial separation or separation order by the magistrate or under a deed of separation or even by ‘mutual consent’. Till such amendment, divorce after separation by parties on ‘mutual consent’ was unknown under the common law tradition.⁴⁷⁹ Thereafter, this notion spread to several other countries like the People’s Republic of China, Eastern European countries, Belgium, Norway, Sweden, Japan, Portugal, and Latin America (Diwan 1988: 36). This ground was accepted under the English law in 1963 through an amendment to the Matrimonial Causes Act, 1950 by removing the absolute bar on collusion.

In 1954, the Special Marriage Act (SMA) incorporated this ground, but the Hindu Marriage Act, enacted a year later, did not provide for it. This is because the SMA which provided for a civil marriage between persons belonging to any community, religion, nationality, or domicile was perceived to be for the benefit of the educated, sophisticated, and enlightened urban-based elites, whereas the HMA was meant for the vast Hindu masses who might not accept this form of divorce (Diwan and Diwan 1997:10).

Urging the government to incorporate this provision in Hindu law, KhannaCJ. speaking for the full bench in *Ram Kali v. Gopal Dass*¹⁸⁰ commented on the inadequacy of the existing divorce law in the following words: “It would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.” Accordingly, in 1976, the Hindu Marriage Act was amended and the provision of divorce by mutual consent was included as a ground under Section 13B of the Act. This ground is now incorporated into most marriage laws as a progressive step to end incompatible or acrimonious relationships, without the necessity of having to ‘wash dirty linen in public’ through exaggerated allegations of sexual infidelity, cruelty, or desertion.

Since the Roman Catholic Church was opposed to the notion of divorce, and accepted the sacramental notion of a marriage, there was opposition from the church to introducing this ground into the laws applicable to Christians. But finally, after sustained struggle, this
ground was included in the Indian Divorce Act, 1869 through an amendment in 2001.¹⁸¹

Even after litigation has been initiated on a fault ground and the parties are entangled in a prolonged court battle, it is possible to withdraw allegations and convert the earlier petition into a petition for a mutual consent divorce. Trial court judges, marriage counsellors in family courts, and even high court judges in appeal cases prevail upon litigants to adopt this strategy. This is a (p.51) modern trend which one witnesses in contemporary family law litigation.

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Necessary Ingredients

The petition for obtaining a divorce by mutual consent has to be presented jointly by the husband and wife, adopting a standard format. Apart from the date of marriage and a few basic personal details of the parties, the petition should include the following standard averments:

i. That the husband and wife are living separately for a period of more than one year and they are not be able to live together any longer.¹⁸² The Supreme Court has now defined ‘living separately’ as ‘not living as husband and wife’, or in other words not having a conjugal (sexual) relationship. Hence, a couple residing under the same roof is not prevented from filing for divorce by mutual consent if they affirm that they have ceased to have a conjugal relationship for a period of one year.¹⁸³

ii. A clear declaration that all efforts at reconciliation have failed and there is no possibility of resuming matrimonial cohabitation.

iii. That the spouses are desirous of obtaining a decree of divorce by mutual consent.

In Leela Mahadeo Joshi v. Mahadeo Sitaram Joshi,¹⁸⁴ the Bombay High Court held that if the necessary ingredients are proved, courts do not have the jurisdiction to deny the decree of divorce. In this case, an elderly couple had approached the family court at Mumbai for a decree of divorce by mutual consent, which rejected their petition on the ground that the parties had not proved that they were unable to live together. The trial court concluded that the dissolution of marriage was sought with some ulterior motive such as saving the property from prospective actions of the creditors and that the divorce appeared to be an eye-wash. The high court commented:

It appears to us that the learned trial judge was disinclined to grant divorce to parties who had lived together in matrimony for long years. However, we do not think that personal predilections should be allowed to influence the provisions of a statute. If the necessary ingredients have been proved, there is no other course left open to a trial judge but to comply with the law.
The Bombay High Court, in Miten v. Union of India,\textsuperscript{185} has held that the period of one year of ‘living separately’ is necessary for filing of petition under Section 13B. The court held that its waiver is not permissible as per any settled cannons of interpretation.

Usually, consent terms are filed along with the petition regarding property division, lump sum settlements and alimony to the wife or monthly maintenance, custody of children and terms of access to the non-custodial parent, as well as maintenance to children. The consent terms, which are mutually agreed upon, are binding on the parties and can be enforced by the court. These consent terms are in the nature of a private agreement between the parties, which, after obtaining the official seal of the court, become part of the consent decree. The terms and conditions cannot violate the rights of minors and should not be against public policy.

To prevent avoidable hardships to the parties, the high court or the Supreme Court may quash any pending criminal proceedings under Section 498A of the IPC, which under normal\textsuperscript{186} circumstances are not compoundable. This is done in the interest of justice and in order to finally settle all disputes between the parties. Some criminal courts act on the consent terms filed before a family court or a civil court and bring to an end the criminal prosecution pending before them.

In Harpit Singh Anand v. State of West Bengal,\textsuperscript{186} a compromise deed was signed by both parties in which they agreed to withdraw all the complaints pending before various courts. Relying upon its inherent power under Article 142 of the Constitution, the Supreme Court dissolved the marriage as per Section 13B of the HMA, on the ground of mutual consent, and issued directions to subordinate courts to allow the parties to withdraw proceedings pending before them.

In Swati Verma v. Rajan Verma,\textsuperscript{187} the wife had initiated proceedings under Sections 498A and 406 of the IPC and Sections 3 and 4 of the Dowry Prohibition Act. A compromise deed was filed before the Supreme Court in which the husband agreed to return the wife’s stridhan and also agreed to pay Rs 6,00,000 to her as settlement. Exercising its inherent jurisdiction under Article 142 of the Constitution, the Supreme Court dissolved the marriage under Section 13B on the ground that the marriage between parties has broken down irretrievably and the parties were allowed to withdraw proceedings pending before the lower courts.

In the following cases, high courts have granted permission to withdraw criminal proceedings pending before trial courts after the parties had reached a settlement. The Orissa High Court, in Basanta Samal v. State of Orissa,\textsuperscript{188} held that since the parties have settled all their disputes by opting for a divorce by mutual consent, they should not be dragged to court to face criminal trial. The Punjab and Haryana High Court, in Dharmender Singh v. Raj Bala,\textsuperscript{189} held that the parties had settled their disputes through the intervention of the panchayat and the wife had received a settlement of Rs 4,30,000 as permanent alimony. Hence the wife was permitted to withdraw the complaint filed by her under Section 498A of the IPC, prior to the settlement.
If there is no plea of mutual consent, courts cannot award a decree on this ground. For instance, in *Hina Singh v. Satya Kumar Singh*, the husband had filed a petition for a decree for restitution of conjugal rights. The wife appeared before the court and sought time to file her reply, which was granted. But she failed to do so by the specified date. On the same date, the court passed a decree of divorce by mutual consent. In the appeal filed by the wife, the question before the court was: where the only relief sought was for a decree of restitution of conjugal rights, was the trial court within its power to pass a decree of divorce instead, that too on the ground of mutual consent? The question was answered in the negative and the case was remitted for deciding the issue in accordance with the law.

The law provides for a statutory period of six months after the petition is filed (which can be extended to a maximum of 18 months), for the couple to reconcile their differences and resume cohabitation. This is provided as a last chance to make the marriage work and to prevent hasty and capricious divorce. During this period, spouses can withdraw the petition and resume cohabitation through a joint application. This is provided with the hope that tempers may cool sufficiently to save the marriage. This provision is reflective of the cautious approach of the courts and legislature towards hasty dissolution of marriages. After the expiry of six months, parties have to file an affidavit in court reaffirming their consent to obtain a divorce by mutual consent. Courts also insist on personal attendance of the parties to ascertain this fact and to ensure that the consent was not obtained by force, fraud, undue influence, or misrepresentation. At this stage, the court will also verify whether the woman has been compelled to relinquish her right to maintenance, child custody, etc.

This need has arisen due to several instances of husbands committing fraud while obtaining divorce by mutual consent. At times, the ploy adopted is to take some other woman and project her as the wife. In some cases the wife is taken to court under the false premise of filing an affidavit and is instead made to sign on the petition for divorce, without understanding the document and feels shattered that she has in fact been tricked into giving her consent for the dissolution of her marriage. Recently, matrimonial courts have become extremely cautious and have started insisting that the parties furnish along with a marriage photograph, a recent photograph and identification to ensure that there is no fraud.

Withdrawal of Consent

It is mandatory for the court to ascertain the consent of the parties at the expiry of the six months statutory waiting period and prior to passing the decree of divorce. Within this period, either party can withdraw the consent to the divorce, by filing an application before the court stating that he or she does not wish to give consent for a divorce. When such a declaration is made, the court is bound by it and will not grant a decree of divorce. In such an eventuality, the option open to the other spouse is to file for a contested divorce by relying upon a fault ground such as adultery, desertion, cruelty, or any other ground as stipulated under the relevant matrimonial statute. The legal position regarding withdrawal of consent is reflected in the following judgments:
In Sureshata Devi v. Omprakash, the court held that the significant aspect of this provision is that there should be mutual consent when the parties move the court with a request to pass a decree of divorce. The court should be satisfied about the bona fides and the consent of the parties. Otherwise, the court should make an enquiry. If there is no mutual consent at the time of the enquiry, the court has no jurisdiction to pass a decree of divorce. A decree which is passed at the instance of one of the parties and without the consent of the other cannot be regarded as a decree by mutual consent.

In Pralay Kumar Bose v. Shyama Bose, while setting aside the decree of divorce passed by the trial court, the Calcutta High Court held: The law requires that consent given by either spouse at the time of filing a joint petition on mutual agreement must continue till the decree of divorce is passed. Checks and balances provided under Section 13B, HMA do not permit the parties to act in haste. There was a legal requirement of both spouses to make motion after the statutory period of waiting from the date of filing of the petition so as to ultimately obtain a decree of divorce.

In Manju Kohli v. Desh Deepak Kohli, the Madhya Pradesh High Court held that the waiting period of 6 to 18 months after a petition for divorce by mutual consent is filed, has to be compulsory undergone by the parties. When parties file for a mutual consent divorce they are aware that this petition in itself does not snap their marital ties and that they will be given more time to conclusively decide. Hence, they should also be given the option to withdraw their consent in this transitional phase.

In Rekharani v. Prabhu, the Kerala High Court held that the trial court should satisfy that consent of both the parties persisted during the entire period. If one party has a change of heart or second thoughts in the intervening period, the court has no jurisdiction to grant a decree of divorce. The trial court should be satisfied about the bona fides and consent of both the parties to the petition. If the court is held to have power to make a decree based solely on the initial petition, it negates the entire notion of mutuality.

The Supreme Court in Smruti Pahariya v. Sanjay Pahariya reaffirmed this position and held as follows: “We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act (HMA) can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned family court Judge...” In this case when the husband did not appear before the family court at Mumbai, the presiding judge adjourned the matter to the next date, but upon the request of the wife, the case was preponed prior to the date and passed a decree of divorce on the ground of mutual consent. The husband successfully challenged this decree in the high court. Against this judgment the wife had approached the Supreme Court, which remanded the matter back to the family court for a fresh hearing.

One can discern a cautious approach on the part of the judiciary. The court does not
accept the withdrawal of consent at its face value in every case. The party wishing to withdraw consent has to file a declaration regarding the withdrawal in order to prevent the divorce.

In Suman v. Surendra Kumar, the Rajasthan High Court commented that the total silence of the husband at the time of filing the mandatory second affidavit on the expiry of the statutory waiting period of six months does not amount to a withdrawal of consent. The high court ruled that the consent of the husband for divorce was available and that the family court at Jodhpur ought to have granted a decree of divorce.

The possibility of withdrawal of consent within the statutory period can give rise to a situation where the husband can manipulate circumstances to his advantage. A situation may arise where a wife will withdraw a complaint of dowry harassment or any other criminal complaint, or agree to a less than advantageous maintenance agreement in return for a speedy divorce by mutual consent. After this compromise, if the husband is allowed to withdraw his consent to the divorce, the woman is left without any recourse. The courts have clearly stated that the procedure for withdrawal of consent cannot be resorted to as a means to defeat justice, as the following case decided by the Delhi High Court indicates.

In Rachna Jain v. Neeraj Jain, the husband and wife filed for a mutual consent divorce after the husband had already contracted a second marriage, thereby being guilty of bigamy. The wife agreed to withdraw her criminal complaint against the husband and agreed not to sue for maintenance. During the six-month waiting period between the initial application for divorce and the secondary application, the husband withdrew his consent. The court held that the husband was withdrawing his consent for absolutely no reason other than to cause distress to the wife. ‘It is evident that the withdrawal of consent by the husband is tainted with mala fide, is baseless and unjust, and hence could not be allowed, the court commented further it was observed that the court cannot be a spectator to the duplicity of the husband who not only induced the hapless wife to forgo her maintenance claims for herself and her daughter, but also duped her into agreeing to withdraw the criminal complaints in the hope of starting her life afresh. Thus, the court established that the withdrawal of consent during the six month waiting period could not be arbitrary. It can only be allowed if it is clearly shown by one party that consent was achieved by force, fraud, or undue influence or when there is a possibility of reconciliation.

The ruling of the Andhra Pradesh High Court, in Anita v. R. Rambilas, has negative implications for women’s rights in the context that at times women are fraudulently induced into signing a joint petition for divorce. The judgment held that the wife had filed for withdrawal of consent on the ground of fraud and alleged that she was made to sign a joint petition for divorce under threat. Her plea was rejected by the family court, Secunderabad. In appeal against this order, the high court disbelieved her contentions and held that it was a concocted story and that the wife had failed to prove her husband’s fraud. Curiously, the court ruled that the wife had given up custody of her child and right to maintenance for reasons best known to her (emphasis added).
In a social setting where women are deceived into giving up their claims and coerced into signing joint petitions for divorce, the court cannot brush aside contentions merely by commenting that the woman has given up her claim for ‘reasons best known to her’. Courts, more specifically, family courts are mandated to refer the couple for counselling, where these allegations can be addressed and the root of the problem can be investigated. It is mandatory for the court to explore the reason why a woman has given up her claim to the custody of her children and maintenance as she is the weaker party in the proceedings. Unfortunately, in this case, the family courts in Andhra Pradesh did not have the support of marriage counsellors and even rules for appointment of counsellors had not been framed.

Waiver of the Statutory Period

While the statutory period of six months waiting from the date of filing till the decree of divorce is pronounced is mandatory, in some instances, where it would cause extreme hardship to the parties, it has been waived by the trial court. This will be done only if the court is convinced that the provisions of the said section have been complied with and that there is no force, undue influence, or coercion exercised by one spouse against the other. But the waiver is on a case to case basis. The courts waive the period of waiting if the parties have been separated for a long period and have been engaged in prolonged litigation. During the litigation, if the parties are able to resolve their differences and arrive at a settlement, the courts waive the period of separation and grant a decree of divorce by mutual consent. A joint affidavit needs to be produced before the court, withdrawing all the allegations made against the other and stating their consent for obtaining a divorce by mutual consent. This helps bring to an end long drawn litigation and saves the time of the court. This also saves the parties further hardship of facing contentious trial to prove their case.

Gracy v. Cleetus provides an example of how Christian women are able to use this provision after the amendment to Christian law. The wife filed a petition to declare her marriage null and void or alternatively for a decree of divorce on the grounds of cruelty, adultery, and fraud. After ascertaining that there was no possibility of reconciliation and that the parties have been residing separately for a period exceeding two years, the court granted a decree for divorce by mutual consent, waiving the statutory period of six months.

In Anjana Kishore and Puneet Kishore a three judge bench of the Supreme Court invoking its extraordinary power under Article 142 of the Constitution directed the courts to do away with the statutory period of six months. In light of the aforesaid judgment a number of high courts and civil courts began to waive trial the six months period under the Act.

The Delhi High Court, in 2005, in Abhay Chauhan v. Rachna Singh, laid out the following guidelines for waiving the statutory period of six months:

i) There was no possibility of reconciliation between the parties;
ii) The decision of the parties was not influenced by any external factors like coercion, intimidation, or undue influence by any person, including the parents;

iii) Both parities are educated and mature and fully comprehend the contemplated parting of ways;

iv) The parties are firm in their resolve to dissolve the marriage and their decision is not made in haste but is well considered.

One concern of the courts has been that young people should not be made to suffer further for the mistake they might have made at an earlier point in life and they should be permitted to move on in life. For instance, in 2008, the Punjab and Haryana High Court, in Vijay Kumar v. Surinder Kaur @ Sunita,\(^{204}\) where the parties have been residing separately for six years, waived the statutory period of six months on the following reasoning:

The parties are young. There is no chance of reconciliation, the marriage has broken down irretrievably. They are also involved in criminal litigation. Hence no purpose is likely to be served, if they are forced to retain the bond of marriage for another six months. Statutory period of six months is dispensed with.

In 2008, the Delhi High Court, in Parshotam Lal v. Surjet\(^ {205}\) and Subhasree Datta v. Nil,\(^ {206}\) reaffirmed that the six months period is not a mandatory requirement but is merely directory in nature and could be easily waived. The court commented that the very purpose of the liberalized concept of divorce by mutual consent would be frustrated if the six months waiting period is considered to be mandatory, especially when parties live separately and there is no chance of re-union.

In 2008, the Bombay High Court in Rakesh Harsukhbhai Parekh v. State of Maharashtra\(^ {207}\) while upholding the judgment of the family court which allowed the parties to obtain a divorce soon after they had converted their pending petition filed on fault ground into a petition for mutual consent divorce, held as follows: The parties, who settle their dispute, are not required to be penalised for settling their disputes. They have gone through the process of divorce in the court for more than six months when the petition remained pending. They have only modified their views upon settlement of the dispute. Hence such a petition has already lived through six months period in the family court. Consequently, the mandatory period of six months, which the law requires the parties to undergo is undergone. Only the acrimonious allegations are withdrawn so that the divorce can be granted amicably to both rather than to one of the spouses.

But the views on this issue are not uniform and a great deal of confusion prevails. For instance, in a reference made by the family court at Nagpur, Swatantra Kumar CJ. and Kanade J. of the Bombay High Court expressed a contrary view. In Principal Judge, family court, Civil Lines, Nagpur v. Nil,\(^ {208}\) it was held that the waiting period of six months is mandatory and cannot be waived. It is not merely directory as the statute does not even impliedly indicate such an intent of the legislature. The rule of plain interpretation is squarely attracted to provisions of Section 13B (2). The court further commented that just because the parties have to wait for a period of six months from the date of
presentation of the petition, it cannot be termed as hardship, much less undue hardship, justifying the avoidance of the rule of plain interpretation. In Anil Kumar Jain v. Maya Jain\textsuperscript{209} held contrary to Anjana Kishore (discussed earlier) and ruled that only the Supreme Court has the power to waive the six months statutory period invoking its extraordinary powers under Article 142 of the Constitution. Such power cannot be exercised by the high courts or trial courts. Subsequently, in Manish Goel v. Rohini Goel,\textsuperscript{210} the Apex Court ruled that even the Supreme Court cannot waive the six months of statutory period. The court opined that in exercise of its extraordinary power under Article 142 the Supreme Court cannot ignore substantive provisions of a statute. In view of these conflicting rulings, the matter has been referred to a larger bench.\textsuperscript{211}

**Varied Customary Practices of Obtaining Consent Divorce**

While the above rulings form one extreme end of the continuum, Lok Adalats can be placed at the other. Here it is possible to file for a mutual consent divorce and obtain a decree on the same day. Lawyers practising in family courts prefer to move the case from a regular court to a Lok Adalat, rather than the couple having to wait for six more months to obtain the decree.

In Mumbai, the marriage bureaus also issues ‘quick divorce’ by invoking custom. An affidavit is prepared by lawyers that the parties are willing for divorce and the terms of divorce are mentioned and this document is notarised. The parties believe that the divorce is valid. After the case of a woman who was deprived of her right to custody of children and maintenance was brought to light by the media and an NGO initiated proceedings, the Bombay High Court (p.58) issued directions that such divorces are not valid and a court decree is essential.\textsuperscript{212} But this created problems for Muslim women contracting a subsequent civil marriage under the Special Marriage Act as they could not produce a court decree of divorce since they were divorced through oral talaq. In a particular case the woman herself had accepted the talaq and there was a written document to prove the talaq. She was constrained to move the high court in the above proceedings pending before the high court and obtain directions to the Registrar of Marriages to register the marriage.\textsuperscript{213}

Various police stations and the Crime Branch at Mumbai which conduct mediation between couples in conflict marriages also ‘dissolve’ the marriage and issue a document to this effect, invoking custom. This practice has been discontinued after the high court’s directions in the case of fraudulent marriages, discussed earlier.

Several caste-based panchayats operating in urban areas also issue decrees of divorce to the parties after mediation has failed. Similarly, the Muslim *jamats* and individual *muftis* also dissolve the marriages by invoking the Muslim principle of *khula* or *mubaraa*. Most Muslim women approach these forums rather than formal courts. Generally there is a fear among the general public regarding courts and lawyers and hence people prefer to explore alternate dispute resolution fora for a quick resolution of the dispute.

These divorces do not usually come for scrutiny before the courts as both parties and their witnesses sign the document. The problem arises only at the time of registering the
next marriage under civil law. Alternatively, when marital disputes arise in the subsequent marriage and when the wife approaches formal courts for her rights, the husband (supported by a lawyer) may invent the ground of invalidity of marriage, which causes immense problems to the wife. There is a chance of the second marriage getting invalidated since the first divorce was not valid in the eyes of law. If it is declared that the first marriage was subsisting, it will render the subsequent marriage bigamous and invalid. Problems also may arise when obtaining travel documents, such as passport and visa, where the parties may be required to produce a decree issued by a formal court. But if the parties do not have to interact with state agencies and approach community organizations like panchayats for rights, they will not face any problems and most rural people live by these community norms.

The Roman Catholic Church also has its own tribunals and here too a decree of annulment is issued and subsequently the parties remarry. The parties are not made aware of the fact that a civil decree is essential. When dispute arises and the courts declare the second marriage as void the women lose their rights.\textsuperscript{214}

As discussed in the concluding section of Chapter 1 \textit{Personal Laws and Women's Rights} of the first volume, while formal and enacted law with its rigid rules functions at one level, there is an entire substratum that functions from the basis of community practices. People find these fora\textsuperscript{(p.59)} more approachable and affordable. As discussed earlier, there are also state organs too which participate and follow these informal practices.

Unless there is some meeting ground between the formal and informal legal norms, there is a possibility that the practices of entire sections of people would be declared as invalid through litigation process. Formal law must meet the requirements of a cross section of people and only then will it be acceptable and followed. Or else, customs evolved by people at the ground level will persist and will be accepted until individual cases are held up for scrutiny by formal courts and declared invalid.

The concern of formal structures should not only be of state control and strict adherence to legal principles. The governing principle for assessing the validity of a particular divorce should be whether the rights of the weaker parties were protected through the document of divorce or were they trampled upon. In some instances customary divorces or divorces conducted by Lok Adalats, marriage bureaus, and the police could lead to loss of rights of women. But in other instances, invalidating the divorce merely to enforce the rigidity of law will also lead to a loss of rights of the vulnerable sections.\textsuperscript{215} It is crucial that state law meets people’s law in this justice venture.

\textbf{Irretrievable Breakdown of Marriage}

\textbf{Breakdown Theory of Divorce}

Having progressed from fault to the consent theory of divorce, arriving at the breakdown theory was a logical step ahead. Gradually, courts began to ponder over whether it is prudent and convenient to grant a divorce when even one of the parties has concluded that the marriage has broken down irretrievably and that it would not be
possible to continue with the relationship. The breakdown theory is based on the fact that irrespective of the fault of either or both parties, a marriage can be terminated if it is shown that nothing survives in the relationship. Borrowing the phrase used by some judges, a marriage which is reduced to ‘dead wood’ can be dissolved. This premise completes the process initiated in English matrimonial law in the nineteenth century that marriages are based on contracts. Hence if a person has the power to enter into a contract voluntarily, a person must also have the power to terminate the contract voluntarily.

The basic premise of the breakdown theory is that if a marriage has broken down without any possibility of repair (or irretrievably), it should be dissolved without ascertaining the ‘fault’ of either party. Where a marriage has for all intents and purposes ceased to exist, except for the legal tie, either party can apply to the court for a decree of divorce. This application can be made notwithstanding that the party applying for a divorce is unable to prove any of the grounds for dissolution/invalidity of the marriage as provided in matrimonial laws and without even obtaining the consent of the other spouse. However, the court must be satisfied that the breakdown of marriage is irretrievable and there is no possibility of saving it.

Irretrievable breakdown of marriage as a basis for divorce has always been recognized under Muslim law. The husband’s unilateral right to divorce is based on this legal premise. The concept has also been extended to a woman’s right to dissolve the marriage. In 1950, the Sind Chief Court held that ‘there was no merit in preserving a marriage, parties to which were not able to live ‘within the limits of Allah’. In a later judgment, Krishna Iyer J. observed that

While Islam recognized the sanctity of family life, there was also a corresponding recognition that incompatibility between spouses is a valid ground for dissolving (p.60) the marriage, for it is intolerable to imprison the couple in a quarrelsome wedlock.216

In another ruling, the learned jurist traced the modern trend of the principle of breakdown of marriage in countries following the common law traditions to the Muslim law.217

The breakdown theory found acceptance in the Soviet family law of 1944. It was left to the discretion of the court to ascertain whether a marriage has broken down irretrievably. In English law, irretrievable breakdown of marriage was introduced by the Divorce Law Reform Act, 1969 after a national debate of more than two decades (Diwan 1988: ix). ‘No fault’ divorce was introduced in the state of California in the USA in 1969, which triggered off a ‘divorce revolution’ in the country.218 By 1977, nine states had enacted provisions for ‘no fault’ divorce and by 1985 almost all the states in the USA had incorporated similar provisions. Many countries have introduced the breakdown principle in the following three forms:

i. If a petition is presented on the ground that the marriage has broken down
irretrievably and the petitioner is able to prove it, then the petitioner would be entitled to a decree of divorce.

i. If the petitioner is able to prove separation for a stipulated period, the petitioner will be entitled to a decree of divorce.

ii. Non-resumption of cohabitation for a certain period after a decree for judicial separation or non-compliance of a decree of restitution of conjugal rights for a certain period entitles either party to seek divorce.

The breakdown theory and simplified procedures brought in a radical change in the notion regarding the sacramental character of Christian marriages. As opposed to the notion of permanency of marriages, marriages are now viewed as contractual and temporary which can easily be dissolved. The earlier notion of Christian monogamy was transformed into a newer concept of serial monogamy. With ‘fault’ theory receding into the background, the laws acquired a new gender neutral language. Under this, the ‘spouses’ are perceived to have equal or similar roles and responsibilities within the marriage. The need to prove allegations was taken out of the purview of matrimonial litigation. It became irrelevant as to who was responsible for the breakdown. The focus shifted from past behaviour to future entitlements. Financial settlements and provisions for welfare of children became the central focus of divorce proceedings. Only if a spouse (more specifically the wife) could establish that the divorce would cause great hardships to her, the divorce could be stalled. If this was not the case, a decree of divorce would be imminent within the framework of ‘no fault’ divorce. Interestingly, the term ‘no fault’ was borrowed from insurance companies who used it in the context of ‘no-fault’ car insurance. Since divorces could be obtained easily, the rate of divorce in these countries spiralled, with one report claiming around one million divorces in USA every year, which works out to be around 3000 divorces per day (Parejko 2009).

The ‘no fault’ theory of divorce led to the introduction of principles of division of property upon divorce in several common law countries. The two principles—divorce without establishing fault and equal division of matrimonial property—became the pillars of the new divorce doctrine. Various guidelines for distribution of property were introduced into family laws, to take into account the non-financial contribution made by the wife during marriage which contributed to the accumulation of family assets.

Introduction of the Concept Through Judge-made Laws

In a convoluted manner, this theory found a place in the matrimonial statutes through an amendment in 1976. Section 13 (I-A) of the Hindu Marriage Act and Section 27(2) of the Special Marriages Act provided that if there is no cohabitation between the couple for a period of one year after obtaining the decree of restitution of conjugal rights or judicial separation, either of the spouses, including the guilty spouse, is empowered to move the court for a decree of divorce merely on this ground, without the necessity of proving a matrimonial fault against the other spouse.

The Law Commission, in its 71st report, had considered this issue and recommended the adoption of this ground into family law in India. Based on the recommendations of the Law
Commission, a bill was introduced in Parliament, but it was withdrawn as it met with a great deal of opposition by several women’s organizations (Diwan and Diwan 1997: xix).

Later, the notion of ‘breakdown of marriage’ came to be introduced in matrimonial litigation through judicial pronouncements, on a case to case basis. The Supreme Court and various high courts have awarded legal recognition to this concept and have granted divorce, usually as a last resort as the following cases illustrate.

In 1993, in Chandrakala Trivedi v. S. P. Trivedi, the Supreme Court did not use the term ‘irretrievable breakdown of marriage’ but stated that the marriage is ‘dead’. In this case, the husband had initiated divorce proceedings on the ground of cruelty and wife’s intimacy with young boys. The wife made similar allegations against the husband. Their only daughter was already married when the high court granted a decree of divorce. In appeal, the Supreme Court upheld the decree of divorce granted by the high court on the ground that it would be futile to decide the allegations and counter-allegations as the marriage was ‘dead’.

The landmark ruling on this issue was delivered by the Supreme Court in the following year, i.e. 1994, in V. Bhagat v. D. Bhagat. The petition for divorce had been filed by the husband on the ground of adultery against the wife. The wife contested and made counter allegations against the husband and his family members of insanity. The husband retaliated by amending his petition and adding mental cruelty as a ground based on the allegations of insanity made by the wife against him. The spouses were highly educated and were well established professionals. The husband was a lawyer practising in the Delhi High Court. After several rounds of contentious litigation from the high court to the Supreme Court and back where allegations and counter allegations were hurled by the parties against each other, finally the Supreme Court dissolved the marriage. It was held that it would be a fit case for invoking the principle of ‘irretrievable breakdown of marriage’ though it is not a ground for divorce under the Hindu Marriage Act. But the Supreme Court issued a note of caution that this ruling could not be construed as a ‘legal precedent’ to be used in a routine manner in trial courts.

In Romesh Chander v. Savitri, in a divorce petition filed by the wife, the allegations made by her about her husband’s cruelty and adultery could not be proved and hence, the trial court dismissed her petition. But the high court upheld the plea and granted her the divorce. The husband challenged the judgment in the Supreme Court and also expressed remorse for his conduct of neglecting his wife. But the wife was not willing to reconcile and the Supreme Court concluded that the marriage had broken down emotionally and practically. The court held: ‘Where the marriage has broken down irretrievably, the apex court has the inherent power under Article 142 of the Constitution, to grant appropriate orders in the interest of justice’.

Later, several high courts also adopted the practice of dissolving marriages invoking the ground of irretrievable breakdown of marriage. In Sanghamitra Singh v. Kailash Singh, the wife who was opposing the husband’s petition for divorce informed the court that the husband had already clandestinely remarried and a criminal case had been...
filed against him. The Orissa High Court, while upholding the decree of divorce granted by the trial court, commented: ‘Whether the husband has married for a second time or not, it is clear that the marriage has irretrievably broken down and both the parties do not want restoration of marital ties’. Accordingly, by applying the doctrine of irretrievable breakdown, the court granted a decree of divorce to the parties after obtaining the consent of both the parties.

More recently, the Calcutta High Court, in *Rajendra Kumar Jajodia v. Puja Jajodia*,225 and the Allahabad High Court, in *Brajesh Kumar v. Anjali*,226 declined to grant divorce on this ground to the husbands stating that high courts do not have such power and the power rests exclusively with the Supreme Court. In *Vishnu Dutt Sharma v. Manju Sharma*,227 the Supreme Court held that even this Court (i.e. the Supreme Court) does not have the power to grant this remedy. Markandey Katju J. and V.S. Sirpurkar J. held that irretrievable breakdown of marriage is not a ground for dissolution of marriage under the Hindu Marriage Act. Since the legislature has not provided for it, courts cannot add this ground as it would amount to amending the Act, which is a function of the legislature. It was for the Parliament and not the courts to enact or amend the law and that the earlier rulings have not taken into account the correct legal position and cannot be held to be precedents. The court commented that a mere direction of the court without considering the legal position is not a precedent.

Law Commission in its 217th report in March, 2009, has once again recommended that irretrievable breakdown of marriage should be introduced as a ground for divorce. Accordingly, the government introduced a bill in the Rajya Sabha in August 2010 to incorporate this provisions in the Hindu Marriage Act and the Special Marriage Act.

**Taking Advantage of One’s Own Wrong**

The breakdown theory contradicts with an earlier prevailing theory that a guilty party should not be allowed to take advantage of one’s own wrong. This principle was incorporated into matrimonial law when divorce was based on the fault theory. As per this principle, only an innocent party was deemed eligible for matrimonial relief. The party committing a matrimonial (p.63) fault was not entitled to any relief and was not permitted to ‘take advantage of one’s own wrong’. This earlier maxim clashes with the newer theory of ‘irretrievable breakdown of marriage’ whereby courts are not bound to ascertain the fault of the party seeking matrimonial relief. Courts have pointed out the dichotomy of these two theories. The Supreme Court, in *Saroj Rani v. Sudarshan Kumar Chhadha*,228 where the guilty spouse was awarded a decree of divorce has met with a great deal of criticism. Whether a guilty spouse can take advantage of one’s own wrong, prevent execution of the decree passed against himself/herself, and obtain a decree merely on the ground of non-compliance, has been a matter of much debate. In order to protect the interest of an innocent wife, some high courts have declined to invoke the breakdown theory in the event that the husband is a guilty partner.

The courts have adopted a cautious approach and have attempted to apply the stipulation under Section 23 of Hindu Marriage Act that a person should not be allowed to take
advantage of one’s own wrong, while examining the breakdown theory of marriage. There are many instances where the judges have attempted to harmoniously reconcile two contradictory legal mandates in the interest of justice to women despite the premise of formal equality written into the matrimonial laws.

In *Chetan Dass v. Kamla Devi*, the husband filed for divorce. The trial court and the Rajasthan High Court rejected his petition. In appeal, the Supreme Court held:

> The husband’s adulterous conduct is proved. The defence of the wife that there was justified reason for her to live away from her husband is found to be correct. Hence it cannot be held that there is desertion on her part without reasonable cause. The behaviour of the husband falls in the category of misconduct and he cannot be allowed to take advantage of his own wrong. The wife is still willing to live with him provided he snaps his relationship with the other woman. But the husband prefers to snap the relationship with his wife rather than with the other woman. The decree of divorce on ground that the marriage has irretrievably broken cannot be granted.

This judgment advances a pro-women view as compared to the Orissa High Court ruling in *Sanghamitra Singh v. Kailash Singh*, (discussed earlier) where despite a criminal case for bigamy filed by the wife against her husband was pending, the court granted divorce to the husband on the ground that marriage had irretrievably broken down.

There are several cases where in the trial court, the husband had obtained a divorce on the ground of the wife’s cruelty but in appeal it was set aside by the concerned high court on the ground that the husband was taking advantage of his own wrong. Some of these cases are summarized below:

In *Swapan Kumar Ganguly v. Smritikana Ganguly*, the Calcutta High Court held that the husband had approached the court for a decree of divorce with unclean hands and that he had been torturing his wife mentally and physically. Further, there was no evidence that the wife tortured the husband mentally or physically. The court observed that under the Hindu Marriage Act, the legislature had, in its wisdom, not provided that a decree for divorce can be granted if the court finds that there has been an irretrievable breaking down of marriage between parties. Divorce can only be given on any of the grounds provided under Section 13. (p. 64) Allowing divorce on any other ground is not permissible as it would amount to an act without the sanction of law.

In *Kamla Devi v. Shivakumarswamy*, the trial court awarded a decree of divorce on the ground of cruelty to the husband. In her appeal against this decree, the wife pleaded that it was her husband who treated her with cruelty. She had been beaten, threatened with death, and dragged out of the house. The wife’s family members tried to persuade the husband to take her back, but he flatly refused. Since then, she had been living in a rented room in the same town and the husband had refused to provide for her. The court upheld her plea and set aside the decree of divorce on the premise that the husband was taking advantage of circumstances he himself had caused.
In *Mst. Butti v. Gulab Chand Pandey*, the husband filed a petition for divorce on the ground of the wife’s cruelty and desertion. The trial court rejected both these grounds. The husband’s second marriage was also proved. Despite this, the court granted the husband divorce on the ground that the marriage had irretrievably broken down. The Madhya Pradesh High Court, while setting aside the decree, observed that the legislature had intentionally not included irretrievable breakdown of marriage as a ground for divorce and therefore the trial court was not justified in granting divorce on that ground.

In *Arunima Bhattacharjee v. Shyama Prosad Bhattacharjee*, while setting aside the decree of divorce awarded to the husband on the ground of the wife’s alleged cruelty, the Calcutta High Court held that it was the husband who was at fault and that he had deliberately chosen to live separately from his wife and daughter. While the wife was maintaining the house, the husband was merrily leading his own life without bearing any responsibility. Hence the plea of irretrievable break down of marriage advanced by the husband and upheld by the District Judge was more ‘a make-believe than a reality’. It was held that trial courts must be cautious that the husband was not taking advantage of his own wrong in breaking the marriage irretrievably to obtain a divorce.

The judgments cited above are only a sample of a long list of cases which were wrongly decided by trial courts, invoking the ‘breakdown theory’ for awarding divorce to guilty husbands. But the high courts have been extremely cautious that the decree of divorce awarded to the husband does not contribute further to the injustice already caused to a destitute wife. This is indicative of a nuanced gender-based approach in matrimonial litigation.

**Economic Settlements to the Wife and Children**

Even when a decree of divorce is awarded to the husband, it is necessary to ensure that due economic settlements are made to the wife to secure her future. Some examples of such economic settlements are discussed below.

In *Laxmi Dora v. Narasingha Dora*, the Orissa High Court rejected the reasons given by the family court for awarding a decree of divorce to the husband. But due to the bitterness in the relationship, the court invoked the doctrine of irretrievable breakdown of marriage and granted divorce, but ordered the husband to pay the wife a sum of Rs 2,00,000 by way of a lump sum settlement to the wife. In *Susmita Acharya v. Dr Rabindra Mishra*, where the couple had been residing separately for nine years, the court granted divorce on the ground (p. 65) of irretrievable breakdown of marriage. But the wife was awarded Rs 5,00,000 towards her maintenance and the educational and marriage expenses of their daughter. In *Sadana Kolvankar v. Sachidanand Kolvankar*, the Bombay High Court dissolved the marriage as there was no possibility of reconciliation. But the husband was ordered to pay the wife Rs 1,500 per month as maintenance in addition to Rs 1.5 lakh as permanent alimony to ensure her financial security. In *Naresh Kumar Gupta v. Jyoti*, where the parties had been living separately for 12 years, the court held that there was no possibility of reconciliation. A decree of
divorce on the ground of irretrievable breakdown of marriage was awarded and the husband was ordered to pay Rs 1.5 lakh to the wife as permanent alimony. In *Ajay Kumar v. Sunita*,240 there was a separation of about 17 years, which rendered the possibility of the parties resuming normal married life remote. The husband underwent mental agony due to absence of normal sexual relation, which was also one of the reasons for the failure of the marriage. While dissolving the marriage, in the interest of justice, the Delhi High Court awarded Rs 2,00,000 as permanent alimony to the wife.

In *Satish Sitole v. Ganga*,241 out of 16 years of marriage, the parties lived separately for 14 years. It was held that the marriage between the parties is dead for all practical purposes and there was no chance of it being retrieved. The wife had filed a criminal complaint against the husband for cruelty and dowry harassment. The court commented that continuation of such a marriage would itself amount to cruelty. But while upholding the decree of divorce awarded by the district court, the Supreme Court directed the husband to pay permanent alimony of Rs 2,00,000. The court also directed the husband to pay costs of appeal to the wife, assessed at Rs 25,000.

While lump sum settlements have been awarded in some cases by way of compensation to the deserted and destitute wife, the amount awarded is often paltry and can barely ensure the security of the woman and her children. So the question that arises is whether the introduction of irretrievable breakdown as a ground for divorce works against the interests of women, given the gender disparities and the large number of women deserted by their husbands. In the context of stark gender inequality and the absence of matrimonial property rights, this principle may prove to be extremely harmful to women’s interests.

Granting the husband a divorce even when he has not proved a fault ground may not be the best option for women. The following ruling of the Bombay High Court, which declined to uphold the premise of long estrangement and breakdown theory, is an example of the way a court can go beyond the ‘breakdown theory’ in order to protect women’s rights.

In *D. Santan Prettto v. Natalina Gomes*,242 the husband sued for divorce on the basis of desertion, stating that his wife had taken their three children and established a separate residence over three years ago. The wife however stated that she had been compelled to reside separately so that her children could attend school near the hospital where she worked as a night nurse since the husband had not provided any maintenance for her and the three children. She further alleged that, in fact, it was the husband who had deserted her. The husband admitted the allegations, but claimed that divorce proceedings had been initiated eleven years ago and that the marriage had irretrievably broken down. The court (p.66) found that the distance between the couple had been caused entirely by the husband and that since the marriage had deteriorated due to his actions, he could not sue for divorce based on the premise that his marriage had irretrievably broken down. When a plea for the breakdown of marriage is advanced, it is pertinent for the trial court to enquire as to who is the cause of the breakdown. As per Section 23 (1) (a) of the HMA, before passing a decree in any matrimonial proceeding, it must be ensured that the petitioner is not in anyway taking advantage of his or her own
disability for the purpose of acquiring relief.

In Romesh Chander v. Savitri, 243 (discussed earlier) where the Supreme Court invoked its inherent powers under Article 142 to apply the principle of irretrievable breakdown of marriage at the instance of the wife is an interesting ruling. Here the husband had filed an appeal in the Supreme Court against the decree of divorce granted to the wife. The Supreme Court not only upheld the decree of divorce granted by the high court but also directed the husband to transfer the house owned by him in the wife’s name within four months of the decree.

The caution given by the Supreme Court in V. Bhagat v. D.V. Bhagat 244 (discussed earlier) is also needs to be taken note of:

Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer, and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile, easily to be broken which may serve the purpose most welcome to the wrongdoer who, by hear, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.

Trial courts, which are burdened with backlogs, may find it appealing to uphold a plea under the breakdown theory and bring an end to the litigation process. But the question which needs to be asked each time is, at whose cost? Is it at the cost of women and children who form the vulnerable section of society? Would such hasty divorces be a reward to a guilty husband who has deprived his wife and children of their basic right to shelter, education, and survival? If the answer is ‘yes’, then the plea of breakdown of marriage cannot be upheld in the interest of justice, unless the wife has been duly compensated for the injury suffered by her.

Section C: Incidental Issues Concerning Marriage: Marriage of Minors

The marriage of minors becomes a crucial question in a discourse on women’s rights within marriage since girls far outnumber boys in respect of child marriages. This is due to the fact that both customary practices and legal dictates sanction that brides should be younger than the bridegrooms. The issue of child marriage impacts both matrimonial and criminal law.

Under matrimonial law, the issue relates to validity of marriages where either one or both spouses were minors at the time of solemnization. This question is often raised in the context of rights and obligations arising out of the marital relationship. More specifically, for deserted women it gets translated into their right to maintenance.

Under the criminal law, the issue is linked to the age of consent to sexual intercourse
under rape law (Section 375, IPC), which is set at 16 years. Consensual sex with a girl less than 16 years amounts to rape. Where the husband is concerned, the bar is lowered to 15 years and warrants a lesser punishment. The issue also surfaces in cases of elopement and voluntary sexual intercourse between a young couple, where either one or both are minors. Within the general societal norm of arranged marriages, the elopement of the girl with a boy/man of her choice is deemed as a challenge to parental authority. In order to pressurize the girl to return (and then marry her off to a boy/man of their choice), the parents of the minor girl resort to filing criminal complaints of kidnap and rape against her lover and charges are pressed based on the minority of the girl since consensual sex with a minor girl below the age of 16 years is deemed as technical rape or statutory rape.

This section addresses these diverse concerns from the perspective of the minor girl and examines statutory provisions as well as the feminist legal discourse around the issue.

Campaigns by Social Reformers during Colonial Period

Law regarding child marriage has developed through sustained public campaigns initiated during the colonial period and carried out into the post-Independence period.

The law givers, such as Manu, Yagnavalkya, Narada, etc., did not mandate child marriage and adult marriages were the norm during the Vedic period. But later, during the post-smriti period, child marriages became the norm for the bride and girls were married between the ages of 8 and 12 among the upper castes (Kuppuswami 1993: 122). But among the lower castes (which followed the custom of bride price, sanctioned divorce, and remarriage for women), consensual marriages between adults were accepted as the norm. Abolition of child marriages was a primary focus of nineteenth century social reform movements, which has already been discussed in Chapter 1, *Personal Laws and Women's Rights* of the first volume. Following is a gist of the discussion, in order to contextualize the issue for the contemporary campaign.

During the nineteenth century reform movements, one of the major concerns for the reformers was to statutorily raise the age for marriage of girls. After the power of administration shifted from the East India Company to the British Crown in 1858, one of the earliest reforms introduced was the Age of Consent Act of 1860, which stipulated a minimum age of 10 years for sexual intercourse. Sexual intercourse with a girl below this age could be construed as rape. But the inadequacy of this legislation was highlighted in the Phulmonee case where a child of 11 years had died due to the injuries caused to her during forcible sexual intercourse by her husband. But the husband could not be convicted for rape since he had a legal right to intercourse with his wife, who was above the age of 10. This incident became the focal point for galvanizing public opinion for the demand of raising the age of consent from 10 to 12 years. The conservative segments, known as *sanathanis*, opposed this demand on the ground that it would violate the religious dictate of pre-puberty marriage, through which the chastity of the bride could be guaranteed. But the public uproar against the verdict in Phulmonee’s case finally led to the enactment of the Age of Consent Act of 1891, which increased the minimum age
of consent from 10 to 12 years.

But even this enactment did not resolve the issue of child marriage and the debate continued well into the twentieth century with social reformers like Rai Saheb Harbilas Gour Sarda spearheading a campaign for the enactment of a legislation restraining child marriages. Several women’s organizations, with their focus on women’s education and health, also campaigned for this enactment as they felt that marriage and child birth at a very young age is detrimental for women’s physical and intellectual development. Finally, after sustained campaign through the 1920s, the Child Marriage Restraint Act (CMRA) was enacted in 1929. The Act imposed a punishment on parents and husbands above the age of 18 years for arranging, contracting, performing, celebrating, and participating in child marriages. A maximum of three months imprisonment and a fine could be imposed on a male above the age of 21. If the male was above 18 and below 21, then the maximum punishment was imprisonment for 15 days or a fine of Rs 1,000, or both. Women and minor children could not be punished under the Act. District courts had the power to issue an injunction to prevent a child marriage from being performed, after giving notice to the parties involved to argue against the injunction.

The age of consent debate also has a resonance in the criminal provisions dealing with rape (Section 375, IPC). As discussed earlier, under the statute, the age of consent for sexual intercourse for girls is laid down as 16 and hence voluntary sexual intercourse with a girl below that age amounts to rape. This is referred to more as ‘statutory rape’ or ‘technical rape’. Under the provisions of rape law, forced sexual intercourse by a man with his wife is not an offence. However, non-consensual sex by a man with his wife who is less than 15 years amounts to rape. So it can be construed that the age of consent to sexual intercourse within marriage is set at 15. Further, Section 376 makes another distinction—if the wife is below 12 years of age, the punishment is severe, while it is milder if she is between 12–15 years.

The law on statutory rape of married female minors by their husbands is anchored in the colonial legal history of the prevention of child marriage and continues to be viewed as a deterrent to child marriage rather than as entailing the protection of married minors from sexual abuse in marriage (Baxi 2009). The law treats the husband with greater laxity. Since marital rape is not an offence under Indian law, forcible sexual intercourse by a husband amounts to rape only when the bride is less than 15 years of age. The control over the sexuality of underage girls is clearly gendered, for while the age of consent for girls is 16, there are no such legal standards set for boys. There is a further distinction between married and unmarried minors. A married female minor is not allowed to withhold consent to sexual relations within marriage when she turns 15, despite the law which prohibits women from marrying until they are legal adults at the age of 18.

The gradual increase in the age of consent for sexual intercourse and for marriage is reflected in the Table 1.6.
<table>
<thead>
<tr>
<th>Year</th>
<th>Age of Consent under Section 375(5) IPC</th>
<th>Age mentioned in the Marital Rape - Exception to Section 375, IPC</th>
<th>Minimum Age of Marriage under the CMRA, 1929</th>
</tr>
</thead>
<tbody>
<tr>
<td>1860</td>
<td>10 years</td>
<td>10 years</td>
<td></td>
</tr>
<tr>
<td>1891 (amendment of IPC)</td>
<td>12 years</td>
<td>12 years</td>
<td></td>
</tr>
<tr>
<td>1925 (after the amendment of IPC)</td>
<td>14 years</td>
<td>13 years</td>
<td>14 years</td>
</tr>
<tr>
<td>1929 (after the passing of the CMRA)</td>
<td>14 years</td>
<td>13 years</td>
<td>14 years</td>
</tr>
<tr>
<td>1949 (after the amendment of the Penal Code and the CMRA)</td>
<td>16 years</td>
<td>15 years</td>
<td>15 years</td>
</tr>
<tr>
<td>1978</td>
<td>16 years</td>
<td>15 years</td>
<td>18 years</td>
</tr>
</tbody>
</table>

Validity of Child Marriages under Personal Law

The Child Marriage Restraint Act did not focus on the status of a child marriage and the rights and obligation which accrue from such a marriage. While child marriages under the Act were illegal and punishable, they were not void. The legal validity of a child marriage has to be ascertained by examining the provisions of matrimonial law.

Section 4 (c) of the Special Marriage Act stipulates that at the time of marriage the male must have completed the age of 21 years and the female, the age of 18 years. A marriage solemnized in contravention of this clause is deemed void and can be so declared under Section 24 of the Act. Section 3 (1) (c) of the Parsi Marriage and Divorce Act declares that a minor’s marriage is invalid but does not specifically provide for its annulment. The Indian Christian Marriage Act of 1869, while defining ‘minor’ as a person below the age of 21 years, does not clearly invalidate a minor’s marriage. Instead, under Section 19, it is mandatory to obtain the consent of the parent/guardian for the marriage of a minor. This provision renders it possible to argue that marriage of a minor is valid.

Under Muslim law, girls can be married after they attain puberty. They can be married even before this age with the consent of the parent/guardian. But the law provides an option of puberty through which the girl can opt for dissolution of her marriage on the ground that the marriage was performed when she was below 15 years of age, that she had repudiated the marriage before she attained the age of 18, and the marriage has not been consummated.²⁴⁹

The Hindu Marriage Act does not render the marriage of a minor void; hence such a marriage is valid. But under Section 18 (a) of the Act, the spouses performing such a marriage may be sentenced to a term of simple imprisonment, which may extend to two years, or with fine, which may extend to Rs 10,000, or with both. In 1955, the Act
stipulated a minimum age of 15 years for girls and 18 for boys. In 1976, the age of marriage was increased to 18 for girls and 21 for boys. At this stage, the Islamic concept of option of puberty was incorporated into the statute. A marriage performed when a girl was below 15 years of age, whether consummated or not, can be dissolved when she attains 18 years, provided that she has repudiated the marriage between the age of 15 and 18 years.\textsuperscript{250}

In \textit{Savitri Bai v. Sitaram},\textsuperscript{251} the wife petitioned for dissolution of her marriage on the ground that she was married when she was below 15 years of age and she repudiated her marriage before she turned eighteen. The high court relied upon the testimony of the girl’s father and the horoscope to conclude that the wife was a minor below 15 years of age at the (p.70) time of her marriage and dissolved the marriage.

While the option of puberty is a ground available only to women, in some instances even the husbands have been able to rely on the ground of non-age marriage to annul the marriage. In \textit{Ram Gopal Choudhary v. Shanti Choudhary},\textsuperscript{252} both the husband and the wife were minors at the time of marriage. The husband filed a petition for dissolution of his marriage on this ground and pleaded that the subsequent ‘gauna’ ceremony, which entitles the husband and wife to consummate their marriage, had not been performed and hence the marriage was not consummated. The trial court rejected his plea, but the high court found it a fit case for granting the relief to the husband and dissolved the marriage.

\textbf{Rights of Married Minors to Maintenance}

Since child marriage \textit{per se} is not void, a husband cannot wriggle out of the obligation to pay maintenance to the wife merely on the ground that the wife was a minor at the time of marriage. Courts have refrained from invalidating such marriages as there would be grave repercussions if marriages of minors are declared as void.\textsuperscript{253}

In \textit{Gajara Naran Bhura v. Kanbi Kunverbai Parbat},\textsuperscript{254} when the wife filed for maintenance, the husband pleaded that the marriage was void since the wife was only 15 years old at the time of the marriage in 1967. The Gujarat High Court held that a marriage solemnized between two Hindus who are of the age which makes one of them punishable under the Child Marriage Restraint Act does not render the marriage itself invalid or void. Therefore, rights and obligations arising from such valid marriage cannot be avoided by not recognizing the marriage at all.

In \textit{V. Mallikarjunaiah v. H.C. Gowramma},\textsuperscript{255} the husband sought a declaration that his marriage was void on the ground that he was under 21 years of age at the time of the marriage. The trial court rejected his contention and dismissed the petition. In an appeal, the high court upheld the validity of marriage and commented that the purpose of the legislation is to prevent social consequences and the serious harm and damage that could occur to the parties if the marriage is declared null and void due to certain legal infirmities. M.F. Saldanahana J. who delivered the judgment held as follows:

\begin{quote}

In the particular social set up of the country, where misguided parents or relations
\end{quote}
may bind a young couple through a marriage, if at a subsequent point of time, merely on the basis of under-age, the marriage is to be declared as void, the consequences particularly to the girl or the young woman are absolutely irreversible. The legislature was conscious of the fact that such a provision should not have the result of rendering a large number of girls or young women virtually unmarried and destitute for life. The only security that a girl or a woman in such a situation was entitled to is within the framework of the marriage and if that marriage can be loosely undone or if it is not recognised by the law, it would result in disastrous social consequences which is the only reason why this section was specifically excluded from Ss. 11 & 12. If children were born it would not only be harsh, but absolutely brutal if a court were to technically void the marriage merely because the parties were under-age. Obviously, then the grave consequences of such a court order could be visited upon the parties virtually for no fault of theirs.

More recently, the Punjab and Haryana High Court, in Mangat Ram v. Anju Bala, relied upon this principle to uphold the wife’s (p.71) right to maintenance in a divorce proceeding filed by the husband.

In Dnyanoba Kamble v. Mukta Kamble, when the wife filed for maintenance, the husband denied the marriage. But the wife pleaded that they were married twelve years ago when they were both minors and that in her community, child marriage is an accepted custom. While upholding the woman’s claim of maintenance, the high court held that the fact that the respective parents had recognized the parties as a married couple and that the husband himself had accepted the woman as his wife, was sufficient to consider the marriage valid.

There have been some reported cases where the wife had approached the courts for declaring her marriage void on the ground of minority. Women have also used this plea as a defense against their husbands’ petition of restitution of conjugal rights. Even in these cases, courts have held that such marriages are valid. This is because a clear framework of women’s rights or gender justice is absent in our matrimonial statutes. In a gender-neutral manner, the judges merely endorsed the traditional and conservative notion regarding the sacramental aspect of Hindu marriage, as prescribed by the Smritis, even after the codification which has rendered Hindu marriages contractual.

These cases were decided before the amendment to Hindu Marriage Act in 1978. After the 1978 amendment, Hindu women have been granted a gender-specific option under Section 13 (2) (iv) to repudiate their marriage, which has mitigated the hurdles faced by young girls who were married in their childhood. Hence, in more recent times, one can observe that the plea of minority is raised more by husbands to defeat the women’s claim of maintenance. The concern of the courts in these cases has been towards protecting the rights of vulnerable women and children, as the consequences of declaring a marriage invalid would be disastrous for them.

Roop Narayan Verma v. Union of India raised an interesting issue. As per the customs of the community, the marriage had taken place when the bride was only four and the...
groom just seven. Later, when the wife filed for maintenance, the husband challenged the constitutional validity of Section 13 (2) (iv) which grants a gender-specific remedy to women who were married when they were minors, of repudiating their marriage. A corresponding right is not awarded to men who were married when they were minors. It was argued that the provision discriminates against men and is violative of the constitutional guarantee of equality under Article 14 of the Constitution. He also pleaded that since the state had failed in its responsibility of preventing child marriage, it should be made responsible to provide maintenance to the child bride. The high court upheld the constitutional validity of the provision on the ground that it was within the scope of Article 15 (3) of the Constitution.

After the enactment of Prohibition of Child Marriages Act, 2006, the grievance raised by the husband in the above case has been rectified and men have been given the option of repudiating a marriage contracted when they were minors. But no respite has been given to men regarding the basic concern raised in this writ petition and a man cannot avoid the responsibility of paying compensation/maintenance to the wife even though the marriage was performed when he was a minor.261

(p.72) ‘Elopement’ Marriages and Judicial Pronouncements

The issue of validity of child marriage has also surfaced in the context of ‘love marriage’ or marriages of choice contracted by a young couple against parental wishes. Usually the couple elopes and is subsequently brought back, under parental pressure and with the aid of the police. In several cases where parents have filed criminal cases against the minor girl and her husband, the courts have upheld the wishes of the minor and have permitted her to accompany her husband, even against the parents’ wishes as the following cases reveal:

In Jiten Bouri v. State of West Bengal,262 the Calcutta High Court, while permitting the minor girl to join her husband, declared as follows:

Although the victim girl has not attained majority yet she has reached age of discretion to understand her own welfare which is paramount consideration for grant of her custody. She may not have attained marriageable age as per the provision of S.5(3) of the Hindu Marriage Act yet marriage in contravention of age limits can neither be void nor voidable though it is punishable under S. 18 of the Hindu Marriage Act. The girl has insisted that she wants to go to her husband’s place and not to her father’s place.

In Makemalla Sailoo v. Superintendent of Police Nalgonda Dist.,263 the Andhra Pradesh High Court held that although child marriage is an offence under the Child Marriage Restraint Act, such marriages are not void as per the provisions of both the relevant statutes—the Child Marriage Restraint Act and the Hindu Marriage Act.

In Manish Singh v. State (NCT Delhi),264 the Delhi High Court reiterated that marriages solemnized in contravention of the age prescribed under Section 5 (iii) of the HMA are neither void nor voidable. The court held that the judgment was based on public policy
and the legislature was conscious of the fact that if such marriages are made void or voidable, it could lead to serious consequences and exploitation of women. This ruling was given in a habeas corpus writ petition filed by the husband of a minor girl and the statement given by another minor girl that she had married on her own will and wanted to live with her husband and not with her parents. The Division Bench, comprising Mannmohan Sarin J. and Manju Goel J., ruled that once a girl or a boy attains the age of discretion and chooses a life partner on her or his own will their marriage cannot be nullified on the ground of being minor. They further held that ‘it is not an offence if a girl of that age elopes with her boyfriend and then marries him against the wishes of her parents.’

In Sunil Kumar v. State (NCT Delhi), Manmohan Sarin J. and S.L. Bhayana J. pronounced the judgment on a habeas corpus petition filed by a minor girl’s brother-in-law alleging and held that her father had confined her illegally and was not allowing her to meet her husband. The court held that

> If a girl of around 17 years runs away from her parents’ house to save herself from their onslaught and joins her lover or runs away with him, it is no offence either on the part of the girl or on the part of the boy.

The girl was not willing to go to her parents, who were not amenable to any reconciliation and wished to sever all relationship with her. The husband was gainfully employed and his family had accepted the girl without making any demand for dowry. The minor girl was permitted to live with her husband.

(p.73) Prohibition of Child Marriage Act, 2006

These judicial pronouncements were criticized by various women’s organizations and the National Commission for Women on the ground that such a lax attitude towards child marriage on the part of the judiciary would be instrumental in increasing the incidents of child marriage in the country. There was a renewed demand to render child marriages void and for compulsory registration of marriages to curb the practice of child marriage.

In response to the demands raised by various women’s organizations and the National Commission for Women, the Central Government introduced the Prevention of Child Marriage Bill, 2004, which was referred to the Parliamentary Standing Committee which proposed a common marriageable age for both the sexes, i.e., 18 years. The Committee recommended that child marriage should be void ab initio and not voidable at the option of either contracting party, keeping in view the inhibitions that parties have against court proceedings. The Committee also recommended initiating social measures such as creation of rehabilitation fund for providing shelter, food, education, health, and security for the victims of child marriages and also recommended active support and coordination of officials of Panchayat, taluka, District, and State levels, NGOs, and social groups and agencies.

However, the Prohibition of Child Marriage Act, which was enacted in 2006, differed from
these suggestions in various material respects. The main provisions in the present statute are discussed below.

The Act stipulates that a child marriage is voidable at the option of a contracting party who was a child at the time of marriage. Such a petition must be filed within two years of attaining majority which is 21 for boys and 18 for girls. If the petitioner is a minor, the petition can be filed through the guardian or next friend with the Child Marriage Prevention Officer (CMPO).

Section 4 of the Act makes a provision for maintenance and residence of minor girls and makes the boy and, in case he is a minor, his parents liable for it. Section 5 also makes provision for custody and maintenance of children born of such unions. Section 6 of this Act declares that every child begotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be legitimate for all purposes.

Section 12 further lays down the few cases in which the marriage of a minor child is to be void, i.e., where the child is taken or enticed out of the keeping of the lawful guardian, or is by force compelled, or by any deceitful means induced, to go from any place, or is sold for the purpose of marriage and made to go through a form of marriage, or if the minor is married after which the minor is sold or trafficked or used for immoral purposes.

The punishment for a male adult marrying a child is rigorous imprisonment up to two years or fine up to rupees one lakh or both. Any person who permits such a marriage or fails to prevent such a marriage, or even attends or participates in such a marriage is also punishable.

Section 13 gives the courts the power to issue injunctions prohibiting child marriages. The Act provides for the appointment of CMPOs across the country, whose role is to prevent child marriages, investigate complaints, and gather evidence to prosecute any violation of the law. The CMPO is in charge of creating awareness on the issue, furnishing statistics on child marriage to the State government, and petitioning the court for orders related to maintenance, custody and injunctions. The State government can ask any person who is an officer of a gram panchayat, a municipality or a public sector undertaking, or an employee of an NGO to assist the CMPO.

Interrogating the Contemporary Feminist Discourse

The social movement against child marriage and the demand for state intervention to curb this malaise was first articulated in the nineteenth century and engagement with this issue continues even in the twenty-first century. But despite the fact that this was one of the earliest legal campaigns which originated in nineteenth century, there is very little incisive analyses as to why legal reform has failed to address the problem. While child marriage continues to be a concern, the solution to a problem rooted within socio-economic structures is sought within the domain of the law. This, despite the ground reality that legal enactments have proved to be highly inadequate in making meaningful interventions in the realm of marriage and family relationships.
The contemporary discourse needs to be located within continuous structural shifts in the economic, cultural, and social frameworks. The concerns of nineteenth century reformers were located within the structure of the new colonial legal order designed to usher in modernity and state control. It posed a challenge to Brahminical patriarchy within which a high premium was placed upon the virginity of brides. The opposition to this movement came from the revivalists who questioned the authority of colonial rulers to interfere in local customs, practices, and religious beliefs.

During the early twentieth century, when women’s organizations entered the political arena, the focus shifted to women’s health, protection from early pregnancies, and concern over women’s education and general well being. To coincide with the reproductive cycle of women, the Child Marriage Restraint Act raised the age of marriage under for girls to 14 years, when biologically the female body would be more receptive to sexual intercourse and pregnancy. In 1949, the age was raised further to 15 years.

This became the basis while enacting the Hindu Marriage Act in the 1950s, which laid down a minimum age of 15 for girls and 18 for boys. But the enactment did not render under-age marriages void. This was due to the continued ideology of Hindu marriages being sacramental (despite the codification) and due to the grave social implication such a move would have upon innocent children born out of such unions. Within this context, the CMRA came to be viewed more as rhetoric or an aspiration than a moral code or a legal mandate. Socially sanctioned community norms and customs prevailed over the legal dictate. Hence, despite the prolonged and highly visible campaign prior to the enactment, the Act was a non-starter with scholars commenting that there were hardly a hundred odd prosecutions under the Act during the first forty years of its enactment, as compared to the millions of child marriages taking place in the country. It was also noted that where the parties have been prosecuted, the motivations have come from family feuds and factional fights rather than from the diligence of the provisions of the Act (Sampath 1969). So even the rare prosecutions under the Act were confined within the patriarchal paradigm and used as community controls (p.75) over the female body rather than as a safeguard against it as is popularly perceived.

In the 1970s, the minimum age of marriage was raised to 18 for girls and 21 for boys, as per the recommendations of the Committee on the Status of Women. But another contributory factor around this time was the belief that it would also serve as a measure of population control.269 Several social factors such as urbanization, increased avenues of education of girls, and loosening of the grip of conservative religious leadership over communities, Westernization among the urban middle class, etc., have contributed to a gradual increase in the mean age of marriage of girls as Table 1.7 indicates:

<table>
<thead>
<tr>
<th>Time Frame</th>
<th>Age of Consent/Marriage</th>
<th>Mean Age at Marriage</th>
<th>Literacy Rate Women (General)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901–71</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 1.7 Mean Age of Women at Marriage 1901–71270
This steady increase in the minimum age of marriage has served to bring an increased number of marriages within the ambit of ‘child marriage’ and has resulted in a skewed statistical profile. Currently the age of marriage in India is set at a higher level than in U.K., where the minimum age of marriage is 16 for girls and 18 for boys. Therefore, while a marriage between a 17-year-old girl and a 20-year-old boy would be valid and legal in the U.K., it would be termed as ‘child marriage’ under the Indian law (Mensky 2003: 371). The raising of the age has resulted in criminalizing a large number of marriages of choice and in greater family, community, and state control over them.

While child marriages still prevail in India, the concerns raised during the nineteenth century reformist movement is no longer valid. Rather than dictates of brahminical patriarchy, the contemporary concern over child marriage needs to be located within socio-economic factors such as extreme poverty among the urban and rural poor, lack of resources and access to education of girl children, and fear of rape and sexual abuse of young unmarried girls. More than the elite and middle class segments of upper castes, it is the backward castes, the Dalits, and Muslims who are burdened with these concerns. Ironically, these communities were not the focus of attention at the time when the debate was first initiated. Among many lower castes, adult marriages of women were the norm.\textsuperscript{271}

Though there has been a consistent demand from urban, middle class, upper caste legal scholars and social activists to declare child marriages as void, there is a legislative reluctance to give-in to these demands even after the recent enactment of 2006. This has been done keeping in view the plurality of cultures and diverse (p.76) socio-economic background of the Indian population. Some rural based social activists have, in the context of Rajasthan, highlighted the class and caste biases of the contemporary campaign against child marriage (Singh et al. 1994: 1377–9). They have also comment that within communities where child marriages are performed, the marriage itself is not a license for sexual intercourse. A further ceremony has to be performed after the girl attains puberty and is fit for sexual intercourse. This ceremony is referred to by various terms such as gauna, gona, gohna, muklava, ana, etc., in different regions. Only after the performance of this ceremony is the girl sent to the marital home for consummation of
marriage. The facts of the Rukhmabai case\textsuperscript{273} who, though married in childhood, was never sent to her husband’s house for consummation of her marriage since the second ceremony had not been performed, validates this point. Many reported cases also contain a reference to this custom.\textsuperscript{274} Hence the official statistics on child marriage may not accurately reflect the instances of minors who cohabit or have cohabited with their husbands.\textsuperscript{275}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Literacy Rate Women (General) & Literacy Rate S.C. Women \\
\hline
1961 & 13\% & 3.3\% \\
1971 & 18.04\% & 6.4\% \\
1981 & 24.8\% & 10.9\% \\
1991 & 39.2\% & 23.8\% \\
\hline
\end{tabular}
\caption{Table 1.8A Literacy Rates for Women}
\label{tab:literacy_rates}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Profile & Age of Marriage 1961–71: Difference in Urban/Rural \\
\hline
Rural & 16.7 \\
Urban & 19.2 \\
Total & 17.2 \\
\hline
\end{tabular}
\caption{Table 1.8B Mean Age of Marriage 1961–71: Difference in Urban/Rural Profile}
\label{tab:marriage_age}
\end{table}

Within the realm of matrimonial law, linked to the issue of validity of marriage, is the concern of maintenance to minor wives and legitimacy of children born of this union. Hence there has been a great hesitancy on the part of the judiciary to declare minor marriages as void. Judges have consistently upheld the legal validity of child marriages by strictly interpreting the provisions of Sections 11 and 12 of the HMA. In fact, the authoritative Supreme Court ruling on this issue, which discussed various high court rulings to validate child marriages, \textit{Lila Gupta v. Lakshmi Narain},\textsuperscript{276} was concerned with the rights of a widow to inherit her deceased husband’s property against the claims of her brother-in-law and nephew who had challenged the validity of her marriage. In this case, the Supreme Court laid down that though Section 5 (iii) of the Act prescribes a minimum age of marriage, a breach of this condition does not render the marriage void. The Bench comprising Y. V. Chandrachud C. J., D.A. Desai J., and R.S. Pathak J. commented that it would be hazardous for marriage laws to treat a marriage in breach of a certain condition as void even though the law does not expressly provide for it.\textsuperscript{277}

\textbf{(p.77)} Rather ironically, some of these judgments invoked criticism from various women’s rights groups despite the fact that the judges were upholding the rights of women through these pronouncements. These groups urged the government to amend relevant statutes in order to declare child marriages void. The demand itself has a long history and the view adopted by these groups was extremely shortsighted.

In 1994, the draft bill prepared by the National Commission for Women, the Indian Marriage Bill,\textsuperscript{278} had also proposed compulsory registration of marriages, stipulating that
a declaration of marriage must be sent to the Registrar of Marriages within three days of its performance. It was recommended that a fine of Rs 100 per day should be levied for default for a period of one month and thereafter, the marriage should be deemed void. Twenty years prior to this, the Report of the Status of Women Committee, *Towards Equality*, had also suggested as follows:

We recommend legislation prohibiting courts from granting any relief in respect of a marriage solemnized in violation of the age requirements prescribed by law unless both the parties have completed the age of 18 years. (1974: 114)

Another proponent of this position, Jaya Sagade, in her book, *Child Marriage in India* (2005), has examined the issue from the perspective of International Human Rights principles, using, according to her, a ‘feminist legal framework’. Advocating that child marriages should be declared void, she argues that though this approach may seem drastic, nothing else is likely to be effective for the protection of young girls against the harsh physical, education, social, and economic consequences of child marriage. She substantiates her argument by stating that the institution of patriarchy operates in the name of culture for justifying child marriage of young girls and one cannot continue to raise twentieth century arguments in the twenty first century for not declaring child marriages void (Sagade 2005: 54).

In direct contrast to this position, Prof Mensky comments,

... an analysis of case law on child marriages clearly shows that the judges had taken up the challenge of developing the legislative foundations into a socially meaningful system of regulation. Their major concern, to prevent certain individuals, who tend to be men, from taking duplicious advantage of the argument that child marriages are against public policy, and thus should be void. Unlike many social reformers and text-book writers, some judges realize the extent of their social responsibility. (Mensky 2003: 367)

Those advocating the declaration of child marriages as void base their arguments on the premise that some women may have to pay a price in order to bring in the necessary social transformation for the greater good of all women. There seems to be hardly any concern among those who advocate this position in the name of ‘women’s rights’ that the women who are called to pay the price are poor, illiterate, teenaged girls on whom marriage may have been thrust upon. As we can see in the next chapter which deals with women’s right to maintenance, the validity of marriage is often contested only when women claim their rights of maintenance. These deserted young girls and their children would be deprived of their basic right of survival if judges adopt the position of declaring these child marriages as void.

It is within this ground reality, even while bringing in the recent amendment to the Child Marriage Restraint Act, the state administration (p.78) found it extremely difficult to give in to the demand of social activists for declaring child marriages as void. Further, even while declaring the marriage void at the instance of the husband, the state was
compelled to ensure that the rights of women to maintenance, custody of children, and rights of children to legitimacy and maintenance are not defeated. This position is contrary to the recommendation of the Committee on the Status of Women as well as the provision in the draft bill of the National Commission for Women, discussed earlier, and has been criticized by some of women’s organizations.

It appears that the only new provision that the statute enacted, following the campaign by women’s groups and recommendations by the National Commission for Women, has been to provide an easy option for husbands to wriggle out of the marriage contracted when they were minors by declaring such marriages as void without having to prove any other fault ground. Such option provided to husbands may not be in the best interest of the young girls for whom marriage still provides social status and legitimacy, economic security and shelter.

As far as the advantage to women is concerned, there was an ‘option of puberty’ for marriages performed before they were 15 years of age. This option now extends to marriages performed before they had reached the age of 18 years. This could easily have been effected by amending section 13 (2)(iv) of the Hindu Marriage Act and the corresponding provisions in other matrimonial statutes. In any case, if a woman wishes to dissolve her marriage, there are several other grounds which are available to her. As a lawyer concerned primarily with family law and women’s rights, I can safely surmise that rarely does a teenaged girl dissolve her marriage only on the ground of minority. Usually there are other reasons, such as cruelty, dowry harassment, adultery, or desertion, which prompt her to opt for the dissolution of her marriage.

Regarding declaration of marriage as void if the girl was enticed out of the custody of her lawful guardian or compelled, or induced into marriage by deceitful means, this can be construed as lack of valid consent or vitiated consent, which has always been a ground for annulment of marriage under all matrimonial laws.

Articulation of Agency and Feminist Locations

Sagade’s argument that ‘the institution of patriarchy operates in the name of culture for justifying child marriage of young girls’ gets further problematised when we examine the elopement cases. As against the socio-economic constraints of child marriage due to poverty discussed earlier, these cases concern marriages of choice by young girls. Here the legal provision becomes a weapon to control the expression of sexuality and curb voluntary marriages, and is used to augment the patriarchal parental power. Even though the criminal provisions regarding kidnapping and statutory rape appear to be protecting minor girls, these provisions are concerned primarily with securing the rights of parents or guardians over the minor girl against her lover or husband. The young couple who has exercised the choice often gets trapped within family feuds or caste and community hostilities. There are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship or to leave her parental home on grounds of domestic abuse and neglect (Baxi 2009). The use (and abuse) of police power at the instance of parents with regard to marriages of choice, is in direct contrast to women’s autonomy,
agency, and free will.

The situation becomes precarious when an upper caste girl elopes with a lower caste boy or when a Hindu girl falls in love with a Muslim boy, crossing boundaries of Hindu upper caste (p.79) dictates of purity and pollution. In a society ridden with prejudices against lower castes and communal strife, a young couple who dares to cross community dictates is severely punished. At times the price for choosing a partner would be a gruesome murder or public humiliation of the couple or their relatives (Chowdhry 2004; Welchman et al. 2005). The notion of women as sexual property of their communities is deeply internalized, leading to violence not merely by the girls’ families but also the community.

In order to criminalize the choice of marriage by young girls, at times the fathers file complaints of kidnap and rape against the boy or man by falsely projecting even major girls as minors who are devoid of the legal authority to give their consent to marriage or sexual intercourse. Despite being aware of the fact that it is a marriage of choice and voluntary elopement, the police collude with the fathers to protect patriarchal interests and ‘community honour’. Only if the girl is able to provide clear and unequivocal proof of her majority is she allowed to accompany her husband and cohabit with him. Otherwise the father’s word regarding her age is accepted and she is reverted back to his custody, and criminal charges are pressed against the boy.

In rare cases where the girls vehemently refuse to return to the custody of their fathers, they are sent to state protection homes until they are majors. Even thereafter the girls are often not automatically released and the husband would have to initiate legal proceedings for the release of the girl. Judges have commented that many of the habeas corpus petitions filed by either the young husbands or fathers of the girls, for production of the girl in court are in fact cases concerning elopement marriages. This is a serious concern for the courts as the following recent judgments indicate.

In *Ajit Ranjan v. State*, the Delhi High Court advised the state administration to view these types of cases more as a social problem than a criminal offence. In this case, the husband had filed a writ petition under habeas corpus seeking custody of his wife who had been confined by her parents and was not permitted to return to him. The court commented that the changing social scenario in the country was leading to a situation where there were more inter-caste and inter-religion marriages, which meet with societal and familial resistance. The court noted that what was required was not action under criminal law, but counseling of the parties in order to arrive at an amicable understanding. In *Kokkula Suresh v. State of Andhra Pradesh*, the Andhra Pradesh High Court reaffirmed that the marriage of a minor girl below 18 years is not a nullity. The court further held that the husband is the natural guardian in respect of a married minor’s person and property and he is entitled to her custody. Further, the father of the girl cannot claim the custody of the minor girl. In *Ashok Kumar v. State*, the Punjab and Haryana High Court commented that couples performing love marriage are chased by police and relatives, often accompanied by musclemen. Often cases of rape and abduction are registered against the boy. At times the couple faces the threat of being
killed and such killings are termed as ‘honour killings’. Often the state is only a mute spectator. The court directed the state to speedily evolve a compassionate mechanism to redress grievances of young couples and their parents.

These judgments serve as a benchmark for the liberal interpretation of constitutional law on equality and individual freedom and also restrain the police and magisterial administration (p.80) from performing arbitrary actions such as forcing women into ‘protective custody’ of the state. For instance, in Payal Sharma alias Kamla Sharma v. Superintendent, Nari Niketan, Agra,284 the Allahabad High Court rejected the father’s contention that the girl was a minor and instead accepted the woman’s own contention that she was a major and declared that she has a right to go anywhere and live with anyone. The court commented:

In our opinion a man and a woman, even without getting married can live together, if they wish. This can be regarded as immoral by society but it is not illegal. There is a difference between law and morality.’

Since the girl had stated that her life was in danger, the court also ordered the police to ensure her security.

Some women’s organizations such as Association for Advocacy and Legal Initiatives (AALI) have worked consistently over the issue of elopement marriages and have extended support to young girls in their struggle against parental authority. They have also appreciated the role courts have played in strengthening the rights of young women against parental authority.285

While determining whether the choices made by young girls are valid, courts have to counter allegations not just of minority but also of unsoundness of mind. To augment their claim, natal families base their arguments on phrases such as ‘hormonal imbalances’ and ‘flush of youth’, all of which are presumably indicators of her immaturity and inability to make a prudent choice regarding her life partner (Chakravarthy 2005).

The violent manner in which families and the caste panchayats (also known as khap panchayats), exercise their power over a young girl and her lover/husband has already been discussed in the conclusions to Chapter 1 of the first volume. There have been instances where the girl and her lover have been humiliated, ostracized or even killed for defying the community norms.

Right-wing Hindu mobilization in recent years has led to both ideological and organizational moves to counter inter-community marriages of choice. The following incident serves to highlight this point further. On 24 January 2009, members of Ram Sena, a Hindu fundamentalist organization, unleashed violence on girls, in broad day light, in a pub in Mangalore, Karnataka, in the name of protecting Indian culture. This attempt at moral policing attracted the attention of the national and international media. Following this, there were several other incidents where Hindu young girls were dragged out of busses and were humiliated for befriending Muslim boys. The groups also spread terror
among the youth in several cities and warned them against celebrating Valentine’s Day on
the ground that it is an immoral ‘Christian’ festival and was against Indian tradition and
culture. On 10 February 2009, a 17-year-old girl was dragged out of a bus and taken to
the police station. Her parents were informed and the boy was arrested on charges of
rape and kidnapping. Unable to bear the humiliation, the girl committed suicide.286 Right-
wing forces in Gujarat and Maharashtra have also kept a strict vigil over Hindu-Muslim
unions by monitoring the notices displayed outside the office of the Registrar of
Marriages and then threatening the Hindu girls with dire consequences if they refused
to break off the relationship.

The inadequacy of the recent legislation prohibiting child marriage287 was emphasized by
(p.81) another incident reported in the media—a 17-year-old, pregnant girl was
confined to a state-run institution while awaiting the outcome of a complaint filed by her
parents. The question, whether after the amendment, custody of the girl could be
handed over to the husband when the parents of the girl have alleged rape and
kidnapping, were also raised. While the court, burdened with backlogs and delays, took a
long time to decide the issue, the girl was compelled to languish in the protective home
and deliver her child in these adverse surroundings.288

While looking at these recent incidents, one needs to address a complex legal question—
since the girls were minors, were they juridical persons invested with the power to
exercise free choice and would the consent given by them to the marriage be deemed as
‘legally valid’? At times, judges, with a concern for social justice, have resolved the issue
by resorting to basic principles of human rights in order to save the minor girls from the
wrath of their parents and from institutionalization in state-run ‘protective homes’. The
only way they could so was by holding these marriages as valid and by allowing the
girls to cohabit with the husbands of their choice.

Examining these judgments through the prism of women’s rights, could these judicial
interventions in aid of minor girls be termed as regressive and the demand by women’s
groups to declare these marriages as ‘null and void’ be termed progressive? Could the
curbing of the freedom of these minor girls to express their sexual choices, by their natal
families with the aid of the mighty power of the state in a sexually repressive society be
termed as a ‘progressive intervention’ and a ‘challenge to patriarchy’? Even more
disturbing is the realization that the parents, who were determined to break the sexual
alliances that girls had contracted of their own choice, were using the provisions of an
apparently progressive legislation only to marry off the girls (while they were still minors)
to a boy of their own choice within the confines of rigid caste and class hierarchies. It
appears that choice, or desire, as expressed by a woman is somehow intrinsically illicit
when it is against parental diktat and caste or community norms, and therefore needs to
be disrupted (Chakravarthy 2005: 311). The provisions of the Act appear to be invoked
more often to prevent voluntary marriages and augment patriarchal power than to pose a
challenge to it.

Minor girls are not given a choice and marriages are thrust upon them, most often
resulting in marital rape on the nuptial night. The fortified terrain of family, along with the
interface of caste and community structures, works in tandem against them to strengthen traditional institutions and conservative notions. In a rare instance, as part of a governmental programme, when a community worker, Bhanwari Devi, intervened to stop a child marriage in an upper caste family, she was gang raped by upper caste men (Singh et al. 1994: 1377–9). Worse, the District and sessions court, Jaipur acquitted all the five upper caste men accused of raping her. The court commented:

'Indian culture has not fallen to such low depths that someone who is brought up in it, an innocent, rustic man, will turn into a man of evil conduct who disregards caste and age differences—and becomes animal enough to assault a woman. How can persons of 40 and 60 years of age commit rape while someone who is seventy years old watches by...’

(p.82) It is not my aim here to encourage marriages of minors. The point one is trying to advance is simply that the law has not helped in interventions at the community-level to curb child marriages arranged by natal families. Even public interest litigations filed by concerned individuals and groups have not yielded positive results. There is a need for community-level sensitisation, greater security for girls in public spaces, and better resources for education of girls in poverty stricken villages and urban slums. But the point which is being underlined is that the campaign by reformers for stringent laws has only strengthened patriarchal power and weakened the negotiating power of young girls contracting marriages of choice. We need to differentiate between marriages of choice by the girls themselves and marriages contracted at the instance of parents. It is very difficult for women’s rights groups to enter the bastion of caste-based patriarchal strongholds. Law comes into effect only when the parents or the community wishes to act against the interest of the girls. Here the collusion of the state with local patriarchal powers is clearly visible.

The collusion of the police with criminal elements is another factor that has caused insecurity among the poor, particularly, single mothers and has led to an increase in the rate of child marriages. Madhu Kishwar, a feminist scholar, has argued that increasing violence and insecurity is making the lives of women more vulnerable and, therefore, making families feel that bringing up daughters is a high-risk job. This is in large part due to the increasing lawlessness of the police and other arms of the government, as well as the large-scale criminalization of politics. In this context, it is difficult for a community to exercise restraint over anti-social elements because of the police patronage to criminals. Even in villages, families with one or more sons in politics or government jobs, especially in the police, come to acquire tyrannical hold over the lives of others. This power is often reflected in increased sexual assaults against women. Kishwar argues that concern over safety of girl children is pushing families into marrying their minor daughters. Once married, the girl ceases to be the responsibility of her parents and they are no longer burdened with the fear of the girl getting violated and losing her chastity, which would mar her chances of marriage (Kishwar 2008: 19).

Studies conducted in urban centres by the National Institute for Research in Reproductive Health, Mumbai also endorse this view. A report published in a local tabloid...
mentioned that one in every five slum dwellers practices child marriage. One of the reasons attributed to this phenomenon is the lack of safety for girls in the slums.291

Despite the fact that the law has not worked, some women’s groups and legal scholars constantly demand stricter laws which will make minor girls even more vulnerable to state and family dictates. There is a tendency to impose ideologically determined formulas upon people’s lives, without assessing the implication of such imposition on the people whose interest is sought to be served.

At another level, there is an increasing discomfort among certain feminist legal scholars about whether an authoritarian state intervention in a top-down manner is the only way through which social transformation can be brought about. For instance, Nandita Haksar comments that continual recourse to law is ‘a substitute for the other harder option of building a movement for an alternative vision’ (Haksar 1999).

(p.83) A contradiction is generated by the interaction of the language of rights and the law. It arises from the belief of social movements that they are articulating universal values required by legal discourse when they use the language of rights, when in fact rights are constituted differently by the moral perspectives of different discourses. This opposition between the universality and uniformity required by the law on the one hand and the multi-layered formulations of rights on the other, becomes particularly problematic when feminist politics attempts to use the law, through the language of rights, to liberate women’s bodies from the oppression of patriarchal structures and institutions (Menon 2004: 16–7). There is a further problem in treating human rights as universal norms that are to be globally institutionalized by international intervention. We can no longer be innocent of the implications of ‘international consensus and pressure’, in the context of the prevailing global balance of power (Menon 2004).

It is important that contemporary feminist discourse is far more nuanced than what one can observe in the recent campaigns against child marriages. Rather than blindly advocating a ‘universally’ accepted position framed by a First-world feminist discourse, women’s rights groups need to advance a position which is rooted within Third-world realities, is contextualized within the urban-rural divide, and is etched by other social realities such as caste prejudices and communal conflicts. In final analysis, a feminist voice must lend credence to the claims of the weak against the might of status quo-ist institutional authorities. The agency exercised by a young teenaged girl and her voice of protest against the dictates of patriarchy would need articulation and support. It is within this complex tapestry that the claims of feminist jurisprudence must essentially lie.

Marriages with Expatriate Indians

Jurisdictional Concerns

An emerging concern on the horizon of Indian matrimonial law is regarding jurisdiction. It has arisen in the context of Indians who migrate to other countries but continue to retain dynamic ties with the country of their origin. While migrating they carry with them their tradition, culture, value system, and personal laws.292 Some NRIs seek Indian brides
from their own communities in India. These marriages are celebrated in traditional, customary manner but some also register their marriages under the civil law. After marriage, despite the fact that either one or both the parties to the marriage are residing in a foreign country, Indian courts have the authority to adjudicate over disputes which arise between the couple. The nomenclature commonly used to describe such marriages is ‘NRI marriages’. The term ‘Non-Resident Indian’ (NRI) is often used as an omnibus phrase to include any Indian citizen or person of Indian origin who ordinarily resides outside the territory of India. For taxation and other official purposes, the Government of India has defined NRI as an Indian national who resides away from India for more than 183 days in a calendar year. But under matrimonial law, the term is often used in a wider sense and includes persons of Indian origin (PIO), overseas citizens of India (OCI), and other expatriate Indians. The question of jurisdiction of Indian courts with respect to NRI marriage will arise only when at least one of the parties to the marriage is an Indian citizen. Thus, matrimonial courts will have jurisdiction in any marriage of an NRI, as defined by the Government of India, and in any marriage of an Indian citizen, whether with an overseas citizen of India, person of Indian origin, or expatriate Indian.

Conflict of Laws

In India, the Foreign Marriages Act of 1969 is a specific legislation which is applicable to a marriage of an Indian citizen to a non-Indian, solemnized abroad. This Act stipulates that marriages, where one of the parties is an Indian citizen and the other is a non-Indian, would be governed by the provisions of the Special Marriage Act, 1954. However, this Act is highly inadequate while addressing the wide range of issues which arise during matrimonial litigation. There is a great deal of uncertainty about the manner in which jurisdictional issues have to be resolved in marriages involving NRIs, which are solemnized or dissolved in a foreign country.

The laws of a country are generally based on its religious, social, economic, and political beliefs, ideologies, and traditions. These would essentially vary from one society to another as well as from one country to another. This usually gives rise to conflict of laws as the laws of one country may not be in consonance with the laws of another. This conflict between different legal regimes is generally resolved through rules and regulations of ‘Private International Law’ which provide certain guidelines which determine when the jurisdiction of a foreign court must be recognized and such decrees must be enforced by domestic courts.

In Vishwanath v. Abdul Wajid, the Supreme Court explained the notion of Private International Law in the following words:

What is called Private International Law is not law governing relationship between two independent States. Private International Law, or as it is sometimes called, ‘Conflict of Laws’ is simply a branch of the civil law evolved to do justice between two litigating parties in respect of transactions or personal status involving a foreign element. The rules of Private International Law must therefore, in the very nature of things, differ, but by the comity of nations certain rules are recognized as
common to civilized jurisdictions. Through part of the judicial system of each State, these common rules have been adopted to adjudicate upon disputes involving foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of International Conventions.

In India, the rules of private international law are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act, etc. Section 13 of the Civil Procedure Code (CPC) contains the underlying principles for awarding recognition to a judgment of a foreign court and provides that where reciprocity exists between India and a foreign country, judgments of such foreign country may be enforced through execution proceedings initiated in India. Foreign judgments are conclusive in Indian courts regarding any matter directly adjudicated between the same parties. It must also be noted that a decree of divorce obtained from a foreign country is not required to be confirmed by the courts in India.\(^2\)

In this context, in Vishwanath v. Abdul Wajid\(^2\) the Supreme Court held that the courts in India will not inquire whether the conclusions recorded in the foreign judgment are supported by evidence or are otherwise correct, because the binding character of such a judgment may be displaced only by establishing that the case falls within one or more of the six clauses of Section 13 and not otherwise.

Section 13 of CPC contains certain exceptions to the general rule that foreign judgment is conclusive and binding, by providing certain safeguards and mandates. Following are the six situations in which the judgments of a foreign court will not be recognized by Indian courts:

1. Where the foreign judgment has not been pronounced by a court of competent jurisdiction.
2. Where the foreign judgment has not been given on the merits of the case.
3. Where it appears on the face of the proceedings that the foreign judgment has been founded on an incorrect view of international law or refused to recognize the applicable law of India.
4. Where proceedings in the foreign court on which the foreign judgment is based were contrary to natural justice.
5. Where the foreign judgment was obtained by fraud.
6. Where the foreign judgment sustains claims founded on the breach of any law enforced in India.

Protection of Women through Judicial Pronouncements

Women who are married to men residing in a foreign country are placed in a vulnerable situation as marriages registered in India can be dissolved by a court in the country where the husband resides without the wife ever having submitted herself to the jurisdiction of the court in that country. An outdated, patriarchal legal premise that the domicile of the wife follows that of her husband is often used to deny women their rights. This is rather ironic since the dependent visa to enter the foreign country is issued only
upon an application made by the husband on behalf of his wife and the wife does not have an independent right to enter or reside in the country despite the legal premise that the domicile of the wife follows that of her husband. This places women at a disadvantage as they are unable to contest divorce proceedings in a foreign country, even when the petition is served upon them. In their absence, such cases are decided *ex parte*.

In this context, it should be noted that Article 10 of the Hague Convention of 1968 on the Recognition of Divorce and Legal Separations\(^{296}\) expressly provides that the contracting states may refuse to recognise a decree of that country, if such recognition is manifestly incompatible with the public policy of the host country.

Several landmark decisions of our Supreme Court have attempted to provide certain safeguards to women who are placed in this precarious situation for no fault of theirs. Some of these leading cases are discussed in detail here.

A leading case, *Satya v. Teja Singh*,\(^ {297}\) was decided by the Supreme Court in 1975. The facts of the case are as follows: The couple, both Indian citizens, married each other in 1955 and had two children. In 1959 the husband left for USA for higher studies and thereafter secured a job in Utah, USA. The wife continued to reside in India and when the husband refused to support her, she filed for maintenance of Rs 1000. While these proceedings were pending, the husband obtained a decree of divorce from the Nevada State Court in USA by making a false representation that he was a bona fide resident and was domiciled in Nevada. The court in USA dissolved the marriage despite the fact that the wife had not submitted to the jurisdiction of the court. Thereafter, in proceedings for maintenance initiated by the wife, the husband pleaded that he is not bound to maintain his divorced wife. The trial court rejected the contentions of the husband on the ground that the court in the state of Nevada had no jurisdiction to grant the decree of divorce and granted Rs 300 as maintenance to the wife and an additional Rs 100 for each of the minor children. This order was confirmed by sessions court. But the high court set aside the order on the ground that since the domicile of the wife follows that of her husband, the court in Nevada where the husband resided had jurisdiction. Though the appeal before the Supreme Court was in the context of the wife’s right to maintenance, the court held that the appeal raises issues far beyond the normal ambit of a summary maintenance proceeding and addressed the core of the controversy—whether Indian courts are bound by divorce decrees granted by foreign courts. While upholding the wife’s right to maintenance, and setting aside the high court order, the Supreme Court provided a framework regarding principles governing private international law as applicable to Indian courts and held as follows:

> It is a well recognized principle that Private International Law is not the same in all countries. There is no system of Private International Law which can claim universal recognition. Hence, the question whether a decree of divorce passed by a foreign court (in this case Nevada State Court in USA) is entitled to recognition in India must depend principally on the rules of Private International Law as recognized in India. It is no doubt true that whether it is a problem of municipal law or of Conflict
of Laws, every case which comes before an Indian court must be decided in accordance with Indian law. It is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such a recognition is accorded not as an act of courtesy but on considerations of justice. It is implicit in that process that the foreign law must not offend against our public policy.

Principles of Private International Law governing matters within the divorce jurisdiction are so conflicting in the different countries that not often a man and a woman are husband and wife in one jurisdiction but treated as divorced in another jurisdiction.

The principles of the American or English conflict of law are not to be adopted blindly by Indian Courts. Our notion of a genuine divorce and substantial rights and our distinctive principles of our public policy must determine the rules of our private international law. But an awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining these rules.

A foreign decree of divorce obtained by the husband from the Nevada State Court in USA in absentum of the wife without her submitting to its jurisdiction will not be valid and binding on a criminal court in proceedings for maintenance, when it is found from the facts on record that the decree of divorce was obtained by fraud or by making a false representation as to a jurisdictional fact that the husband was a bona fide resident and was domiciled in Nevada. The decree being open to collateral attack on the jurisdictional fact, the recital in the judgment of the Nevada court that the respondent was a bona fide resident of and was domiciled in Nevada is not conclusive and can be contracted by satisfactory proof.

Until the enactment of a suitable legislation in accordance with the Hague Convention of 1970, the courts shall have to exercise a residual discretion to avoid flagrant injustice, for, no rule of Private International Law could compel a wife to submit to a decree procured by the husband by trickery. Such decrees offend against our notions of substantial justice.

Another landmark ruling, Y. Narasimha Rao v. Y. Venkata Lakshmi,298 dealt with recognition by an Indian court of a divorce decree granted by a USA court, in respect of a marriage solemnized (p.87) by two Hindus in India. The husband had married in India and obtained a divorce in USA and subsequently contracted another marriage. The first wife filed a criminal case under Section 494 of IPC for bigamy. The divorce decree was granted on the ground that marriage had broken down irretrievably and that the husband had been a resident of the State of Missouri for 90 days, immediately prior to the filing of the petition for divorce. The Supreme Court, while relying upon Satya v. Teja Singh (discussed earlier), laid down the following rule for awarding recognition to judgments of foreign courts in matrimonial matters in our country.

The jurisdiction assumed by the foreign court as well as the ground 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 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 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 relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence - permanent or temporary or ad hoc forum, proper law etc., and ensuring certainly in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife’s domicile follows that of her husband and that it is the husband’s domiciliary law which determines the jurisdiction and judges the merits of the case.

In Shiv Mirchandani v. Natasha Advani, this concept was expanded further. While discussing in detail the relevance of foreign decrees, the judgment laid down the following principles:

i. Where in a matrimonial dispute judgment is passed by a foreign court, its jurisdictional competency is ordinarily dependent upon the domicile of the parties;

ii. the domicile of the wife follows the domicile of her husband. Therefore, ordinarily it is the court of that country where the husband has his domicile, which has the jurisdiction to pass a judgment in the matrimonial dispute;

iii. the above rule of common law operates very harshly against the wife who has for one reason or the other, to reside habitually or permanently in a country other than the county of her husband’s domicile. The stringency of this rule is done away with by the modern theory, which acknowledges the right of a wife to file a matrimonial proceeding in that country to which she has real and substantial connection by her habitual or permanent residence. This theory now finds place in the statutory law of England and has also been acknowledged by the Hague
Convention on Private International Law, 1970. In the absence of any legislation to the contrary, the rules of International Convention can be followed in India. The said theory is accepted and followed by the Supreme Court in Narasimha Rao’s case (discussed earlier); iv. the question of grant or rejection or matrimonial relief must however, be decided with reference to the law under which the parties got married; v. the present case falls under the third exception of the rule laid down in Narasimha Rao’s case, since (p.88) the husband and the wife had voluntarily submitted to the jurisdiction of the Swedish court and consented to the relief of divorce. Hence, the judgment of the Swedish court has to be regarded as a judgment of the court of competent jurisdiction within the meaning of S.13 (a) of the CPC; vi. the said judgment does not violate the other conditions stated in S.13 of CPC. Hence, for all purposes it has to be regarded as a conclusive judgment.

Anubha v. Vikas Aggarwal is yet another highly contested case where the husband had challenged the decree of maintenance on the ground that he had obtained a divorce from a court in the USA on the ground of wife’s desertion. Refuting this allegation, the Delhi High Court held as follows:

The marriage was solemnized in India according to Hindu rites. Hence the matrimonial dispute is governable by provisions of the Hindu Marriage Act. Since the wife did not submit to jurisdiction of USA Court nor did she consent for grant of divorce in a US Court, decree obtained by the husband from Connecticut Court of USA is neither recognisable nor enforceable in India.

Dismissing the allegation that the wife had deserted the husband, the court further commented:

The wife was subjected to not only physical but mental cruelty of an extreme nature. The wife had every reason to leave her matrimonial home. The spouse who physically leaves home is not necessarily the deserter. It is the husband who is guilty of desertion. The wife has proved cruelty and desertion and is entitled to live separately and claim maintenance from her husband.

Earlier, the high court had directed the husband to appear in person. But on one pretext or the other, he failed to do so. Hence his defense was struck down. The husband was also restrained by the high court from further proceeding in the divorce case filed by him. This order was challenged by the husband in the Supreme Court, which upheld the order of the high court.

While courts have refused to validate the divorce decrees against women, granted by foreign courts, which contain elements of fraud and misrepresentation, they have also validated decrees which protect women’s rights as the following two cases indicate.

In Deva Reddy v. Kamini Reddy, the parties were Christians. After a few years of
marriage, when the wife was pregnant, the husband deserted her, converted to Islam and started living with another woman. When the wife approached the court for a declaration of validity of her marriage, the husband pleaded that the marriage was not valid and challenged the validity of a divorce decree obtained by the wife in respect of her previous marriage by a court in the USA. But the court declined to accept this argument and, while upholding the validity of the decree of divorce granted by American court, held as follows:

The husband contracted marriage, fully conscious of fact that the wife was earlier married and was divorced. He lived with her as husband and they had a child out of the wedlock. It is not permissible for him to argue that the marriage between the two was non est for any reason. Before contracting marriage with her, he did not bring action either in a court in the USA or in India that the decree of divorce between his wife and her former husband was invalid for want of jurisdiction.

(p.89) In another case, Paul Tushar Biswas v. Addl. Dist. Judge, the court upheld a decree of maintenance granted by a court in the USA. The husband and wife were permanent residents of the state of California, USA. When the husband failed to provide maintenance to the wife and child, the wife initiated proceedings in California. The husband submitted to the proceedings by being represented by his lawyer and contested the claim of the wife, but the court upheld the wife’s plea and granted her maintenance. Later the husband challenged this by filing proceedings before a court in Gauhati. The Gauhati High Court rejected the plea and held as follows:

The action initiated by the wife in US is neither contrary to international law nor contrary to any law in India. No plea of want of any reasonable opportunity or breach of judicial process was ever raised by the husband. He also did not plead any misrepresentation on jurisdictional facts or otherwise pointed out to indicate any fraud perpetrated by the wife in matter of assumption of jurisdiction by the court in California court. There were no proceedings relating to maintenance pending before any Indian court when interim order was passed by court in California for the maintenance of the child. The proceedings which were filed before the district court at Shillong by the husband were in respect of dissolution of marriage, custody of child and visitation rights. California court passed interim order on merits of case to support child. The order passed by the court in California cannot be defeated on ground of fraud. On date of said order, no other order by any court for maintenance of minor was in existence. No law, policy or convention mandating ouster of California Court’s jurisdiction was brought to notice of this court. Section 43 of Divorce Act does not exclude jurisdiction of any other court of competent jurisdiction. Hence the exception under clause (b) and (c) of Section 13, CPC are not applicable to this case.

Where the marriage was performed abroad and thereafter, due to desertion, the wife was constrained to return to India, courts have upheld the woman’s right to file proceedings in India, despite the fact that the marriage was performed abroad and for all material time the couple had lived together as husband and wife, abroad.
This issue has been granted statutory recognition through the amendment to the Hindu Marriage Act and the Special Marriage Act. The wife is now entitled to file proceedings at a place of her residence though the marriage was performed and the couple resided together at a different place.309

Vulnerability of ‘NRI Brides’ and Remedial Measures

As we can observe, courts in India have used discretionary powers to redeem women of the archaic notions of domicile. This has become imperative in a globalized world where a large number of people migrate and yet retain the customs, traditions, and practices of their community. This is particularly true for Asian and African communities who strive to retain their cultural identity in foreign countries. At times applying Western standards of the country of residence regarding divorce may violate the principles of equity and natural justice, particularly as far as women are concerned. This is particularly true for dependent wives who are subjected to torture and violence due to exorbitant demands for dowry and are driven out of their residence. Courts have recognized the vulnerability of women trapped in such situations and have used innovative legal dicta, discretionary powers, and principles of natural justice to bring some solace by expanding the parameters of women’s rights.

Most NRI marriages involve men who are citizens of foreign countries and women who have lived in India and migrate only after their marriage. Usually their residence in a foreign country is a legal incident arising from the fact of marriage. They have a dependent status and do not qualify for an independent status as the citizen of the particular country where the husband has obtained citizenship. Women also become extremely vulnerable as they are uprooted from their native family surroundings and become devoid of all kinship and peer group support networks. They are usually not familiar with the language/culture of the country of migration. Further, their legal status does not allow them to work and they become economically dependent on their husbands. The husband acquires not only emotional and financial control, but also holds the key to the women’s legal status of residing in the country of migration. This makes them particularly vulnerable to dowry harassment, physical, verbal, mental, and sexual abuse. In the United States of America, a policy is now being implemented which allows such women to pursue their immigration status based on filing a self petition as a battered spouse of a US citizen or Green Card holder. The required criteria is to establish that they were married to a US citizen or a Green Card holder in good faith, they were subjected to cruelty, they lived with the abuser, and are of good moral character.

Families of the bride often have no way of checking the credentials of the groom and this often leads to problems later on. There have been cases of men contracting bigamous marriages or of misrepresented their income, family background, etc.

Issues of custody of children and enforcing maintenance orders have also been extremely problematic. This forces the wife to return to India, leaving the children in the custody of the husband. Later, in divorce proceedings, it is easy for the husband to
obtain legal custody of the children and the wife has no recourse to fight custody battles. At times even the basic right of visiting her children is denied to her. Maintenance orders granted by Indian courts remain mere paper decrees as it becomes impossible to enforce them in a foreign country.

The Supreme Court, in *Neeraja Saraph v. Jayant Saraph*,\(^\text{310}\) suggested the need to consider a legislation safeguarding the interests of women trapped in such marriages and had suggested the following remedial measures:

a) No marriage between an NRI and an Indian woman, which has taken place in India, may be annulled by a foreign court.

b) Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

While this judgment expresses a salutary concern for women’s rights, the directions are rather sweeping and may even amount to throwing the baby out with the bath water.\(^\text{311}\)

Confronted with a large number of complaints by women who are married to NRI men, the National Commission for Women had also prepared a report on the problems of NRI marriages and prepared a draft for a convention on the issue. The report commissioned by them made the following recommendations:

a) Registration of marriages be made compulsory.

b) Bilateral agreements for protection of such marriages to be concluded between India and such other countries where the Indian diaspora is in large numbers.

c) If the NRI husband has not become a citizen of the country in which he resides, concerned Indian laws to apply irrespective of the place of the filing of the petition for dissolution of the marriage.

d) Government monitored conciliation process of settlement of matrimonial disputes be initiated.

e) Suppression of information regarding marital status by NRI grooms to be dealt with under the provisions of the criminal law and steps to be taken through extradition treaties wherever operational.

Other measures suggested in the report include: (i) seeking the help of authorities at the work places of the husband, (ii) attaching property, if any, in India, (iii) initiating legal action against the fraudulent spouse for compensation in India, and (iv) if Overseas Citizenship has been granted to the husband, the same to be withdrawn.

The High Level Committee on People of Indian Origin also dealt with this issue and suggested that a special cell should be created in the relevant ministry to handle diaspora issues, with the mandate to provide free legal counseling for the families of girls contemplating marriage to NRIs/PIOs. Such families should be advised to check the voter or alien registration card of such NRIs/PIOs and their social security number and tax returns for the preceding three years. The bridegroom should be asked to give an affidavit stating his current marital status. That document should be attached to the
application for marriage registration. This should be a mandatory pre-requisite to the issuance of a marriage registration certificate.

The issue was again discussed at the Pravasi Bharatiya Divas, 2005 and the following conclusions were reached:

1. There should be a comprehensive legislation so that there is a legal remedy available to such girls. Instituting special courts without such legislation would be futile.
2. Registration of marriages should be made compulsory in case of Overseas Indians. This will ensure compliance of conditions of a valid marriage. There will be complete proof of marriage and it would be a very strong deterrent against bigamous marriages.
3. If a person abandons his wife, he should forfeit his property.
4. Such instances may be made criminal offences.
5. Overseas citizenship of such a person should be forfeited.
6. An affidavit to be produced by the overseas Indian intending to marry an Indian citizen stating that he is single, his income, social security, and immigrant status, supported by documentary evidence at the time of registration of marriages. This affidavit should be authenticated by the Indian Embassy of the country he resides.

On the same occasion, the Government also made a commitment to sign the Hague Convention providing for recognition of judicial verdicts among signatory states.

While the concern of various governmental authorities and statutory bodies is genuine, these have not resulted in any concrete and legally enforceable provisions which would protect women placed in this precarious situation. Meanwhile, litigations involving NRI husbands continue in Indian courts, raising newer and more complex problems. The case, discussed below, highlights one of the emerging complexities of the issue. This case is popularly referred to as the ‘South African Child Custody Case’ and received a great deal of media attention. The husband, a South African citizen of Indian origin, was married in Mumbai. After marriage, when the wife went to South Africa, she was subjected to extreme mental harassment and was made to live in inhuman conditions. She was denied all contact with her family in India and was also not allowed to visit India. Her situation deteriorated after the birth of the child. She was reduced to being a domestic help and was even denied free and unrestrained access to her child. Finally her husband decided to come down to Mumbai along with his wife and child. The husband’s scheme was to leave the wife in her parental home and return to South Africa with her passport, along with the minor child. Once this plan was executed, she would have no access to her child, who was a South African citizen. She could conveniently be discarded as she was an Indian passport holder who could enter South Africa only as a dependant of her husband. Due to timely legal intervention she was able to obtain an ad-interim order restraining the husband from removing the child from her custody. On receiving summons, the husband fled the country fearing arrest, under the mistaken notion that the proceedings were initiated under Section 498A of the IPC under which he was liable to be arrested. Later,
he was awarded the right of access to the child during his visits to Mumbai. The wife was able to use the litigation process to get back the passports of herself and her child as a pre-condition to access.

The important legal issue which surfaced in this case was whether Indian courts have jurisdiction to decide the issue of custody of a South African child. The husband challenged the jurisdiction of the family court at Mumbai and pleaded that the child ordinarily resides in South Africa and is a citizen of that country. The child’s visa had expired and the child did not have the legal status to continue to reside in Mumbai. Faced with all these complications, the family court upheld the husband’s contention that since the child ‘ordinarily’ resides in South Africa, the family court in Mumbai has no jurisdiction to entertain the petition for custody. The fact that a petition was filed within ten days of the child entering the country became a factor in favour of the husband. But when the interim order was passed, the child had already been residing in Mumbai for over a year. By the time the appeal filed by the wife against the order of the family court was heard, one more year had gone by. Since efforts at amicable settlement failed, the high court remitted the matter back to the family court to decide the issue on merits and in the meantime, the wife was allowed to retain custody of the child. But the core issue—how a woman would be able to secure custody of her two year old infant son, through litigation in South Africa—remained unresolved.

In this case, through a carefully crafted legal strategy, the woman was able to retain the custody of her minor child. But there are several cases where women could not obtain timely legal help or were unaware of their rights, and thus lost custody. When the wives are abandoned in their native country, they are left without any viable option. It is very easy for husbands to discard them and women are deprived of every right, including travel documents, citizenship of the foreign country, educational certificates, valuables, and, most importantly, custody of their child/children.

A similar issue was addressed by the Kerala High Court in *Hareendran Pillai v. Pushplatha*. The parties were married in Kerala and the child was born in Bahrain. The custody of the child was with the mother, but the father snatched the child and brought her to India. The mother filed a petition in the family court at Kerala, seeking restoration of the custody of the child to her. The father challenged the jurisdiction of the court to decide the issue on the ground that the child was born and was living in Bahrain. But overruling this objection, the High Court of Kerala held that Indian courts have the jurisdiction to adjudicate over this issue. While granting custody to the mother, the court observed that even though the father was the natural guardian of the minor child, he could not, on this ground alone, have any preferential right over the child.

The rules of private international law or appropriate and relevant domestic statutes need to provide certain guidelines to matrimonial courts in defense of women’s rights to deal with these complex issues in matrimonial law.

Registration of Marriages
Evolution of the Concept

The Special Marriage Act and the Indian Christian Marriage Act, both enacted in 1872, were the first enactments which provided for the registration of marriages. Later, in 1886, to provide for the registration of all births, marriages, and deaths, the Birth, Marriage and Death Registration Act was enacted by the British in order to compile the demographic profile of the territory. This law could not make much headway with regard to registration of marriages, but it was successful with registration of births and deaths.

Since Muslim, Christian, and Parsi religions are more institutionalized, the rules and procedures for contracting marriage are clear and unambiguous and are complied with. Under laws governing Christians and Parsis, as well as the Special Marriage Act, formalities of solemnizing marriage are strictly prescribed and the officiating priest has to provide a marriage certificate or it is mandated that the marriage be registered with the Registrar of Births, Deaths and Marriages. But Hindu marriages (as well as Hindu law), which are based more on community practices, are relatively less institutionalized and hence their legality is more ambiguous. The situation has deteriorated further due to the breakdown of traditional communities within which these marriages were performed. Lawyers and touts have exploited the situation further by projecting that any sham ceremony can be adopted for solemnizing a Hindu marriage by invoking ‘custom’. Marriages run the risk of being declared invalid during litigation. In this context ‘Registration of Marriages’ has become an important concern under matrimonial law.

Provisions under Personal Laws

The provisions of registering the marriages under various personal laws are discussed below.

Christian Law

It is necessary to emphasize the Indian Christian Marriage Act, 1872 is not a ‘religious law’ but a civil law of marriage enacted by the colonial rulers, formulated within the then prevailing norms of English law. So though there is a sacramental aspect to a Christian marriage, as far as the state is concerned, it is purely a civil contract and the Act was enacted to prescribe the essential ingredients, conditions, and ceremonies for the performance of a Christian marriage. It also provided for the registration of these marriages under the state authority, i.e., Registrar of Births, Deaths and Marriages. Hence though a Christian marriage is performed in a church, it cannot be dissolved by a church dictate. It is mandatory for the couple to obtain a civil divorce.

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Though the Act was based within the confines of the Protestant (Church of England) based English law, it provided for the registration of marriages of various other Christian denominations as well. The registration of marriages solemnized by the Minister of Religion was regulated by the Clergyman of the Church of England, in accordance with the form laid down in the third schedule of the Act. Section 30 of the Act deals with the registration of marriages solemnized by Clergyman of the Church of Rome, while Section 31 deals with the registration of marriages solemnized by the Clergymen of the Church of Scotland.

The Indian Christian Marriage Act, 1872 also provides for the solemnization of marriages in civil form. This is a purely civil ceremony and the designating civil authority administers the marriage oath to the couple.

On completion of the nuptial ceremony, whether as per the religious norms or the marriage oath under the civil authority, the parties and their respective witnesses sign in a register maintained by the church, in the presence of the officiating priest or in the presence of the civil authority. An extract of this register is issued to the parties as a certificate of Marriage. It is mandatory for the Church to forward the contents of this register to the Registrar of Marriages every three months. This provides for a routine registration of all Christian marriages. Therefore, the certificate of marriage issued by church authorities is a conclusive proof of a valid marriage having been performed.

As an added precaution the Act prescribes a notice period of a minimum of three weeks. Notices of the intended marriage are displayed outside the civil registry or read out during the sunday service in the parish church to which the respective bride and groom belong. This is done to ascertain that there are no impediments or hurdles for the solemnization of the marriage and as a precaution against bigamous marriages. Anyone who knows of any impediment against the performance of the marriage is duty bound to inform the authority. The marriage is performed only after the notice period is over. This is called ‘reading of the banns’. Marriage banns, the English equivalent of notice, were primarily addressed to parents and guardians, to alert their vigilance and afford them opportunities of protecting their lawful rights which may be flouted by secrecy. Marriage banns are rooted in centuries of Christian tradition (Diwan and Diwan 1988: 16).

**Parsi Law**

There are no preliminaries prescribed for a Parsi marriage. The registration of a Parsi marriage is compulsory but non-registration does not affect (p.95) its validity. The Parsi Marriage and Divorce Act has an in-built mechanism for the registration of the marriages performed by the officiating priest. The marriage certificate issued by the officiating priest is conclusive proof of a valid marriage having been performed.
Muslim Law

A Muslim marriage, since its inception, is a contract. In fact all other civil and religious authorities have borrowed the Islamic concept of a contractual marriage to modernize the institution of marriage and introduce the concept of divorce. The essential ingredients of a valid marriage are offer and acceptance and mandatory mehr, which was deemed as a consideration for marriage. Without these ingredients, there cannot be a valid Muslim marriage.

The contract of marriage, which is referred to as nikahnama, bears the name and signatures of the bride and groom, their parents/guardians, their respective pleaders —vakil-e-nikah— and the seal of the officiating qazi. Hence, though not conclusive, the nikahanma is valid proof of a Muslim marriage having been performed. In some states, certain enactments provide for voluntary registration of the nikahnama. The earliest statute of this nature is the Bengal Mohammedan Marriages and Divorces Registration Act, 1876. This enactment is now applicable in Bihar and West Bengal. It is relevant to note that even without a law stipulating mandatory registration, it is not easy to deny the solemnization of a Muslim marriage. Also, since Muslim law permits polygamy, the question of the ‘real’ wife and entitled to maintenance becomes irrelevant during contentious litigation.

Hindu Marriages

Section 8, Hindu Marriage Act, 1955:

(1) for the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.
(2) Notwithstanding anything contained in sub-Section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-Section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.
(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.
(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.
(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

Section 8 of the Hindu Marriage Act merely provides for registration of an already
solemnized marriage. It does not provide for solemnization of a marriage by a civil authority, i.e., the Registrar of Marriages. Parties to the marriage may apply to the Registrar in whose jurisdiction the marriage is solemnized or to the Registrar in whose jurisdiction either party to the marriage has been residing at least for six months immediately preceding the date of marriage. Both the parties have to appear before the Registrar along with their parents/guardians or other witnesses within one month from the date of marriage. There is provision for condonation of delay up to five years by the Registrar and thereafter by the District Registrar concerned.

Although Section 8 (1) of the Act stipulates registration of marriages, this clause refers to valid marriage performed as per Section 7 of the (p.96) Act being registered by the parties. There is no provision for the administration of a marriage oath by the officiating priest. There is no requirement of a notice period or a provision to ascertain whether there are any impediments for the solemnization of the marriage. There is also no requirement of witnesses. Though the Act prescribes a valid consent, the consent does not form part of the marriage ceremony. So what needs to be proved is whether valid ceremonies, as per the custom of the parties, were performed.

In Kanagavalli v. Saroj314 it was held that registration of a marriage [Section 8(5)] is a necessity and that it must be made compulsory to avoid bigamous marriage and to prove the status of a woman and the legitimacy of children born out of the alleged marriage. The court held that because of non-registration of marriage, a woman who has given herself physically, emotionally, and otherwise, gains nothing but stands to lose everything if the marriage is denied by the man. The other compelling factor is the trauma that a child may go through in his formative years with his paternity in doubt. This assault on a child’s sensibilities can be easily avoided if there is a certificate of registration of marriage between his mother and father which though may not validate the marriage if otherwise void, will at least bear testimony to the identity of his biological parents.

Registration under the Special Marriage Act

The Special Marriage Act, being a secular, civil law, does not prescribe any religious ceremony of marriage. The marriage is performed in the office of the Registrar of Marriages. The designated officer administers the marriage vows to the couple. After this, the couple, along with the three witnesses, has to sign in the register of marriages maintained by the Registrar. The relevant page in the register will also be countersigned by the officiating authority and will bear the seal of the sub-registrar of marriages of the district. The extract from this registrar is issued as a ‘Marriage Certificate’ which will bear the sign and seal of the designating authority. In matrimonial litigation, the certificate provides proof of a valid marriage and it can not be rebutted.

Ironically, the provisions of the statute and the procedure prescribed for registration is nascent and has not kept up with present day needs, which renders it almost redundant. Several issues concerning these procedures have been raised in recent times in the context of the difficulties which a couple faces in the process of registering their marriage under the Act.
An important component of the Act is that it provides for registering of a marriage solemnized in any other form, under any law, upon the fulfilment of certain conditions. After the registration, all the provisions of the Act will become applicable to such parties.

In the context of re-registering the marriage which has been performed as per the respective personal laws, a question which came up before the Kerala High Court was whether these marriages can be registered before the expiry of the mandatory 30 days notice period. In *Giby George v. Marriage Officer*, it was held that a marriage solemnized between persons who were residing within the jurisdiction of the Special Marriage Officer can be registered even if it was solemnized within 30 days of the filling of an application for registration. In *John Raji v. Marriage Officer*, the high court did not accept the plea of the Marriage Officer that a certificate of marriage could be issued only after the statutory period of one month is over and after registering the marriage. Instead, the court directed the Marriage Officer to issue a certificate of marriage within a week from the date of production of the copy of the judgment. As a measure of caution, the court ordered that if it is found that the petitioners are not entitled for registration of marriage, it would be open to the Marriage Officer to recall the certificate issued. In *John Lukose v. District Registrar*, while interpreting Section 16 of the Act, it was held that in exceptional cases, the marriage certificate can be issued even before the expiry of 30 days. But a later ruling, in *Deepak Krishna v. District Registrar*, has held that the statutory period of 30 days is mandatory and is not liable to be waived. Discretion to deviate from the statutory provisions is not given to the Registrar of Marriages by the statute.

The mandatory requirement of one month makes it difficult for a couple to register the marriage under the Act. This requirement causes impediments and many times, a couple who needs a certificate expeditiously is in a hurry, prefers to register the marriage under the Hindu Marriage Act where there are no such requirements and registration can be done immediately since registration in the Act implies only the registration of a marriage performed elsewhere.

In order to register the marriage under the Special Marriage Act, the parties are required to be personally present before the registrar. Many a time the registration is done for the sake of securing a spousal visa or travel permit, as per the directions issued by the host country. In such an event, it may not be possible for the spouse who is already residing in a foreign country to be personally present before the Registrar. Regarding this requirement, Ravindra Bhat J. of Delhi High Court, in *Charanjit Kaur Nagi v. Govt. of NCT of Delhi*, held as follows:

> Law has to adapt to changing times. The requirements stipulated half a century ago act as impediments to registering a marriage, even though the technology myriad solutions. It is open to evolve suitable mechanisms with the support of technology by incorporating a procedure of video conferencing, authentication of identities by Embassies and attestation of signatures, etc. The inaction or indifference of the State to recognize these developments and provide for a suitable mechanism to facilitate registration of marriages of spouses separated by distances has to be
addressed.

In this case, the court directed that the husband’s signature on the prescribed form, attested by the Consul General available in the nearest town in the USA along with the description of his passport and affidavit attested by the Consul General and an attested copy of his photograph, should be submitted for the purpose of registration. Based on these documents, the court authorized the Registrar of Marriages to register the marriage. The court clarified that this procedure was prescribed in view of the particular circumstances of the case, since compelling the husband to appear along with the wife for the purpose of registration would entail avoidable delay and expense. In Nishana Mol v. Alappuzha Municipality, the Kerala High Court held that the rule of personal appearance before the authority for registration is not a rule but only an exception. Only when there is some reasonable doubt regarding the identity of the parties or credibility of the material produced the presence of parties is required. In other situations the parties need not be present.

In Firoz Khan v. Union of India, the Orissa High Court has held that even when one of the parties is not an Indian citizen, the Registrar of Marriages does not have the authority to refuse registration of the marriage. In this case, a marriage was solemnized between an Indian citizen and a French national as per Islamic law. The French national got married on the strength of the visa and he registered his marriage with the French embassy. Later, the couple sought to register the marriage under the provisions of the Special Marriage Act. But the Registrar of Marriages refused to register the marriage. The parties approached the high court, which held that the refusal to register the marriage by the marriage officer without assigning any reason is not legal and justified. The high court quashed the order of the Marriage Registrar and issued directions to register the said marriage under the Special Marriage Act.

In Baljit Kaur Boparai v. State of Punjab, the marriage was performed, before the bridegroom attained the minimum age of marriage, as per the Sikh marriage ceremony, anand karaj. Subsequently, the Registrar refused to register the marriage on the ground that the parties had not completed the required age of marriage. The high court held that the Registrar does not have the authority to refuse registration of marriages performed when the parties were minors. The court held that the marriage was not void since the boy would complete 21 years within a matter of two months.

Pluralistic Practices and Fraudulent Marriages

In the event that the fact of a Hindu marriage is contested, it becomes the most illusory legal incident which is difficult to prove in a court of law. This is because though the Hindu Marriage Act prescribes certain essential ingredients and ceremonies which are essential for a valid marriage, it also validates customary practices of marriage and divorce.

The problem arises while proving custom, which, according to legal norms, have to be ancient, continuous, and immemorial. But this colonial legal mandate of proving custom has lost its relevance in modern times where communities have altered customary
practices to suit the modern day lifestyles. Couples have been declaring themselves as married by exchanging garlands, applying sindoor on the bride’s forehead, seeking the blessings of a deity, or signing on a judicial stamp paper prepared by a lawyer. The media, particularly Hindi films, have further contributed to the confusion by projecting such practices as legal under the Hindu Marriage Act.

At times the parties declare themselves as married by naming the ceremony as ‘Arya Samaj marriage’. Arya Samaj is a reformist sect which revolted against Brahminical rituals and ceremonies and evolved simple, non-ritualistic procedures to solemnize marriages. Unfortunately, this progressive agenda could be exploited to solemnize marriages of couples marrying in haste, against parental dictates. A certificate of marriage can protect the boy against criminal proceedings initiated by the girl’s parents. But Arya Samaj norms cannot be applied to anyone who is not an Arya Samaji and does not subscribe to its tenets. Hence, if the validity of such a marriage is contested in matrimonial proceedings, the other spouse would find it difficult to prove the marriage.

The problem has been acute even in an urban city like Mumbai, where fraudulent marriages and sham divorces take place every day. These marriage shops, termed as vivaha karyalayas, are situated outside the magistrate’s courts and have become a very lucrative business for lawyers. Marriages and divorces on stamp paper were routinely conducted with the collusion of lawyers, notaries, touts, and state officials within the office of the Sub-Registrar of Marriages. The mischief was caused by the anomaly between the provisions of the Hindu Marriage Act, 1955 and an earlier Act entitled, Bombay Registration of Marriages Act, 1953. The purpose of the latter was only to inculcate a culture of registration of marriages and it did not prescribe any conditions or ceremonies for a valid marriage. It only provided for the registration of a valid marriage. The Registrar of Marriages did not have the authority to scrutinize the facts submitted and examine whether a valid Hindu marriage had been performed. The parties did not have to present themselves before the Registrar of Marriages; information regarding a marriage having been performed could be sent even by post and memorandum could be obtained. Even a marriage performed in contravention of the provisions of the Hindu Marriage Act could be registered under the Act. The document issued under the seal of the Sub-Registrar of Marriages was only a ‘Memorandum of Marriage’ and not a ‘Certificate of Marriage’ as in the case of Christian marriages or marriages solemnised under the Special Marriage Act. Hence it did not provide concrete proof of a valid Hindu marriage having been performed. But the couple believed that it was a valid certificate of marriage.

A writ petition filed by Majlis, a Bombay-based NGO, served to highlight the problem caused by irregular and fraudulent marriages due to which women were deprived of their rights. In response, the Bombay High Court directed the state government to frame adequate laws to plug the loop holes. Subsequently, a new legislation was enacted, titled the Maharashtra Regulation of Marriage Bureaus and Registration of Marriages Act, 1998. This brought in some regulations in the process of registering Hindu and Muslim marriages. As per the stipulation of this Act, the parties are required to be
personally present before the Registrar for registering their marriages and the Registrar has been granted the power to scrutinize the information and documents produced before the registration authority.326

In the same vein, Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1973, Himachal Pradesh Registration of Marriages Act, 1996, and Andhra Pradesh Compulsory Registration of Marriages Act, 2002, provided for compulsory registration of marriages. In five Indian states, Assam, Bihar, Meghalaya, Orissa, and West Bengal, there are provisions for voluntary registration of Muslim marriages. In Jammu and Kashmir, Section 3 of the Jammu and Kashmir Muslim Marriages Registration Act, 1981 mandates registration of marriages contracted between Muslims after the commencement of the Act, within 30 days from the date of conclusion of nikah ceremony.

In 2005, the National Commission for Women drafted the Compulsory Registration of Marriages Bill, 2005, to provide a legal framework for registration of all marriages, irrespective of the religion of the contracting parties. The Bill does not interfere with the solemnization of marriage and only prescribes the procedure of getting the marriage registered within 30 days of the solemnization. The statement of (p.100) object and reasons pointed out that registration of marriages was necessary:

i) To prevent child marriages and to ensure minimum age of marriage
ii) As a deterrent to the practice of selling daughters under the garb of marriage
iii) To prevent polygamy, unless the same is permitted under any law or custom
iv) To ensure that prior wives get notice of intended marriage
v) To prevent desertion of women and subsequent denial of marriage
vi) To enable married women, including the women married to NRI/foreigners, to claim their right to shelter and maintenance.

Since it was not presented to Parliament, the Bill lapsed.

Intervention by the Supreme Court

In a transfer petition filed by a woman, Seema, against her husband Ashwin Kumar,327 Arijit Pasayat and S.H. Kapadia JJ of the Supreme Court issued directions that within three months, all states should frame rules for registration of marriages. They expressed concern that in a large number of cases, unscrupulous persons deny their marriages by taking advantage of the fact that there is no official record of their marriage, since most states do not provide for registration of marriages. In its judgment, the Supreme Court endorsed the view expressed by the National Commission for Women that compulsory registration would be of critical importance to protect the rights of women and children. The court commented that a Central legislation would enable women to claim the inheritance rights and other benefits and privileges which they were entitled to after the death of their husbands and would deter men from deserting women after marriage. It would also deter parents and guardians from their selling daughters/young girls to any person, including a foreigner, under the garb of marriage. The court endorsed the view that maintenance of official records on registration of marriages would facilitate faster disposal of litigation regarding validity of marriage as a marriage certificate would provide
clinching proof of a marriage having been solemnized.

The All India Muslim Personal Law Board expressed its discomfort with this ruling as they felt that the Muslim community has a clear procedure for the registration of marriages and a written document, the contract of marriage (nikahnama), as proof of a valid marriage. They expressed the view that state governments ought to recognize the practice prevailing among Muslims and evolve a system for automatic registration of marriages performed by the officiating cleric, with the government authority. There was an apprehension that compulsory registration of marriage might pave the way for the enactment of a Uniform Civil Code.

Homogenizing the registration of marriages across communities, would cause problems to certain sections if their customary practices are not accepted by the registration officer. For instance, in Alungaprambil Abdual Khader Suhud v. State of Kerala, a Muslim man who wanted to solemnize his subsequent marriage under the Special Marriages Act was denied registration under the Act as the court decree of dissolution of his previous marriage was not produced. The accepted practice of oral talaq under Muslim law was not recognised by the Registrar. The fact that there was no legal provision for him to approach the court for a decree of divorce as the Dissolution of Muslim Marriages Act, 1939 applies only to Muslim women was not accepted. The high court held (p.101) that adequate proof of the dissolution of the first marriage as required under Muslim law has been produced, i.e., a certificate issued by the Muslim Jamat. The court directed the Registrar to act on a declaration submitted by petitioner that he is a divorcée and register the marriage under the provisions of the Special Marriage Act.

Though registration of a marriage is intended to provide a clear proof of a valid marriage, there are instances where the marriage has been invalidated when the same is contested in court. For instance in Gullipilli Sowria Raj v. Bandaru Pavani, the Supreme Court invalidated a marriage registered under Section 8 of the Hindu Marriage Act where a Christian man married a Hindu girl as per Hindu rites by exchanging thali in a temple. Later the girl pleaded that the marriage is void as her husband is a Christian. The court upheld this plea. The registration by itself could not come to the rescue and save the situation for the husband.

If the husband has a previous subsisting marriage and gives a false declaration at the time of registering a second marriage under the Special Marriage Act, the mere registration will not come to the rescue of the wife and provide any relief to her and her marriage is likely to be declared void. At best the husband can be prosecuted for fraud but if the marriage is of many years duration and there are children concerned, merely initiating criminal proceedings against the husband will not bring any respite to the wife. The case of Seema who faced similar predicament is discussed in detail in the concluding chapter of this book.

Presumption of Marriage and Legitimacy of Children
These instances bring to the fore the protection awarded to women and children under the Indian Evidence Act regarding certain presumptions regarding validity of marriage and legitimacy of children. The proposed Bills, state enactments, and Supreme Court directions for compulsory registration of marriages need to be viewed in the context of these protective provision. In a country where registration of marriages is not the norm and where the government has failed to provide for adequate and easily accessible facilities for registration of marriages, legal maxims of presumption of marriage and legitimacy have come to the aid of women and children and have helped them to secure their economic rights.

Sections 50, 112, and 114 of the Indian Evidence Act deal with presumption of facts regarding a valid marriage and legitimacy of children. These presumptions are rebuttable but only when there is strong and cogent evidence to the contrary. They cannot be rebutted lightly by a mere balance of probabilities. The evidence repelling the presumption must be strong, distinct, and satisfactory.

When a man and a woman have cohabited continuously for a number of years, law presumes in favour of marriage and against concubinage. The longer the period of cohabitation, the stronger will be the presumption in favour of a valid marriage. If there is some evidence on record that the couple had gone through some form of marriage, the presumption gets further strengthened. Long cohabitation of a person’s mother with the father raises the presumption of a lawful wedlock and legitimacy of the child.

While granting maintenance under Section 125 of Cr.PC, which is a beneficial legislation, courts have also held that strict proof of marriage is not necessary as is required under criminal proceedings of bigamy or matrimonial litigation. When the paternity of children is denied, the presumption under Section 112 of the Indian Evidence Act comes to the rescue of children, not just to safeguard their economic rights but also to save them from the social stigma of illegitimacy. Since these challenges (p.102) are posed in the context of maintenance and succession rights, the maxim of presumptions and the manner in which they have been used in litigation are discussed at length in the next chapter, under the law of maintenance.

The proposed move for mandatory registration of marriages needs to be examined within the perspective of women’s rights. Though the demand for compulsory registration of marriages is articulated within the framework of protection of women and children, to deter bigamous marriages and child marriages, there is hardly any thought as to the adverse impact it would have upon their rights.

Solemnization of marriage was important at a stage when rights of women and children were located only within formal and monogamous European, Christian marriages. Devolution of rights was confined strictly to children within these ‘status’ marriages. But this was not the norm under Hindu and Muslim marriages which were polygamous and within this context awarded rights to women and children in plural relationships. Various customary forms of marriages were validated under these systems. The norm of monogamy introduced through the Hindu Marriage Act did not result in curbing
polygamous unions but the sum effect has been denial of rights to a large section of women who cannot prove a monogamous marriage. The strict monogamy of the Hindu marriage ushered in through this codification, was not along the lines of medieval Christian marriages which were of a permanent nature and intrinsically linked to land ownership and property devolution.

When divorce, even consent divorce, is firmly entrenched within the legal code, what the law needs to take into consideration is contractual obligations of cohabiting partners, almost along the lines of Muslim law. Even while prescribing the strict norm of monogamy, the law has simultaneously moved in a diagonally opposite direction by awarding rights to those outside the pale of strict monogamy. The first in this realm has been the move to protect illegitimate children, by abolishing the difference between legitimate and illegitimate children in respect of their right to maintenance. The second welfare measure was to award legitimacy to children of void marriages (usually bigamous marriages) in order to bestow upon them the rights of maintenance and succession under matrimonial statutes. More recently, the Protection of Women from Domestic Violence Act, 2005 has granted recognition to informal relationships or ‘live in relationships’. Any woman who claims relief under the Act, such as protection against domestic violence, restraining orders, or even maintenance, would not have to prove marriage, as has been held by the Madras High Court in *M. Palani v. Meenakshi*.

We cannot afford to be shortsighted and prescribe populist measures which will only provide transient and superficial solutions to deep-rooted social problems. The stipulation of mandatory registration of marriages will lead to enhanced state control over sexuality and sexual choices of its citizens. This will drastically impact women, who are placed in an unequal position within patriarchal power structures and are not well versed in dealing with state institutions. Within an overwhelmingly extremely pluralistic social structure, in order to protect the rights of the weaker and the dependent, we need to widen the scope of validating and legitimizing relationships rather than constrict them.

**Legal Incidents of Marriage**

Marriage (and its dissolution through death of the husband or divorce) is a legal incidence which alters a woman’s relationship to her family, community and state. Several rights accrue or get altered through this legal incident. So for women, marriage is not just a sexual contract but a social, economic and legal contract which defines their relationship with the state and community, and alters their right to citizenship and nationality.

The oft cited quote from *Manusmriti* which places the dominion over women with various categories of men by stating that a woman must be dependent upon her father in childhood, upon her husband in youth and upon her sons in old age, has a resonance in modern law. Similarly, the Blackstonian principle of English law that after marriage, the husband and wife become one person in law, and that person is the husband, seems to still prevail in certain contexts. These notions have adversely impacted women’s claim to citizenship and nationality within modern States and have served to deprive women of their fundamental right to an independent legal identity. Though the constitution of...
modern States bestowed equal rights of citizenship upon women, women continued to have a dependent nationality, based on the concept of unity of nationality of spouses. The result of the application of this principle was that a woman who married a foreigner automatically acquired the nationality of her husband. Usually this was accompanied by the loss of her own nationality.

The rationale for the principle of dependent nationality derived from two assumptions: first, that all members of a family should have the same nationality and, secondly, that important decisions affecting the family would be made by the husband. It was believed that if a married woman were to have a nationality different from that of her husband, her loyalties would be divided, and she might be placed in a conflicting situation. This assumption was also linked to the idea of citizenship, which relates to a person’s public identity—the relationship between an individual and the State. Loyalty to the State is the counterpart of the State’s duty to protect its citizens. In many States, the assumption that a married woman’s primary location is in the private sphere, within the home, and under the protection of her husband, prevailed. Hence, her need for a separate public identity and legal relationship with the State was not given due recognition.

By virtue of the application of the principle of dependent nationality, a woman who married a foreigner, despite the fact that she continued to remain in her own country, was deprived of her nationality of origin. This in turn resulted in the loss of her civil, political, economic, social and cultural rights which depend on that nationality. She became an alien in the place where she had always resided, and lost all the privileges of citizenship. Where citizenship is restricted for nationals (for example where foreign nationals are denied the right to hold or inherit property), the position of a woman who had been rendered ‘non national’ through her marriage was one of total dependence upon her non-national (foreign) husband. Her identity and sense of belonging to her State of origin, and of being important to that State, were compromised and disregarded because of her reduced status within the place she had always called home.

Nationality is the legal basis for the exercise of citizenship. Although frequently used interchangeably with ‘nationality’, the term ‘citizenship’ has a wider meaning, and denotes a status bestowed on full members of a community (Davis 1997). In many countries, the full exercise of political, social and cultural ‘citizenship’ rights is predicated on nationality. Nationality frequently determines if individuals are entitled to participate fully in the political processes. Within the notion of dependent citizenship women were denied basic rights such as the right to vote, to obtain an identity card or a travel document such as a passport, to access social welfare schemes and entitlements, the right to secure admissions in educational institutions, the right to own land, and most relevant, the right to pass on citizenship to their children. These rights were mediated through their husbands.

Laws that entrench the principle of dependent nationality disempower married women by depriving them of any choice about their nationality. The problem became more acute after the First World War when many women who had married foreigners in armed forces, became stateless if they became war widows. Hence it was among the first issues
that women sought to place on the international legal agenda, alongside issues of social and political inequality and the right to vote. Women held demonstrations and led a deputation to the Hague Codification Conference in Netherlands, in 1930 (Knop and Chinkin (2001)).

Later after the Second World War, the Universal Declaration of Human Rights in 1948 proclaimed the notions of non-discrimination and the right to a nationality. Inspired by this, the Convention on the Nationality of Married Women was adopted in 1957, bestowing upon women the right to an independent nationality. However, not all States changed their laws, and some newly independent States maintained the limitations upon the retention of a separate nationality by married women that had existed under colonial laws. While proclaiming in their constitutions that there shall be no discrimination based on sex, in practice, the legislation on nationality continued with the old practice of denying women their nationality upon marrying men with different nationalities.

This situation is also reflected within Indian laws. While Articles 14 and 15 of the Constitution, which came into effect in 1950, assured equality and non-discrimination, the Citizenship Act of 1955 continued to discriminate against married women. The situation was altered only in 1992 due to the mandate of Article 9 of the CEDAW which declared the right of women to hold independent nationalities.332

The relationship between women and the State is mediated not just through their husbands, several other constraints also impinge upon these rights. In Conclusion to the Chapter 2 of the first volume I have discussed the issue which became a national shame after Independence, the abducted women. Though these Hindu women had since then married their Muslim abductors and were quite content to settle down within the new State of Pakistan, they had to be reclaimed to restore the nation’s honour. The flip side of this political agenda is that women from Pakistan who marry Indian men are not easily recognized as Indian nationals and have a long wait to gain Indian nationality. This inspite of the prevailing international norm of dependent nationality, where upon marriage, women automatically acquire their (p.105) husband’s nationalities and thereby forsake their own nationality.333 Even when they are given the status of a dependent national, in the event of a divorce, these women would lose their nationality and would have to be deported despite their long stay in India and despite the fact that they may not have any contact left in Pakistan.

The case of Sobha Hymavathi Devi v. Setti Gangadhara Swamy334 unfolds yet another aspect of the contested relationship between women and the state. The woman’s election from a seat reserved for backward castes was challenged on the ground that though she had married a person from the backward caste, since she herself belonged to an upper caste prior to her marriage, she could not avail of the reservation meant for the backward castes. So in this case, her identity acquired through her marriage was disregarded. In order to retain her seat, the woman argued that her mother belongs to the backward caste and that she had married her maternal cousin who also belongs to the same caste. Further, though her mother was living with a man from an upper caste, the marriage was not valid since her mother’s earlier marriage had not been dissolved.
and since she is an illegitimate child of that relationship, she inherited her mother’s caste. The Supreme Court while rejecting her arguments and setting aside her election, expressed dismay over the extent to which a person could go merely to retain her seat, and even reduce her mother’s status to that of a concubine and rendering her other siblings illegitimate. But rather curiously, the Supreme Court paid no attention to the patriarchal scheme where the daughter could not claim her privileges through her mother and had been reduced to advancing an argument of illegitimacy to claim her lineage through her mother.

While mediation with the State is one aspect of married women’s disentitlement, there are also several others, which are governed by customary practices and community dictates, which affect women’s rights. Even basic issues such as the right to hold a separate surname or the right to continue with the husband’s surname after divorce become contested issues for women. In some communities customary practices compel women to change not just their surname but also their first name after marriage. Customs in several regions also mandate a woman to use her husband’s first name as her middle name. In this context, a recent ruling of the Bombay High Court which restrained the woman from using her husband’s surname after divorce and held that use of such surname after divorce amounts to fraud, raised many eyebrows. 335 Though the ruling was confined to a specific case, the heightened media response projecting the comment as a legal precedent, caused concern among women who were divorced many years ago but had retained their husbands’ surname. What did not get highlighted in this entire debate is that the law does not require a woman to use her husband’s name or surname after marriage and that she can continue to use her maiden name. Within the patriarchal structure of marriage, all state institutions demand that the woman uses her husband’s surname despite the fact that this stipulation has no legal validity. Other conceptions also prevail that after marriage a woman is not permitted to hold bank accounts in her own maiden name and needs her husband’s consent to start and operate bank accounts. It is absurd to presume that after going through a name change process at the time of marriage a woman is compelled to reverse this process upon divorce.

(p.106) Marriage also affects women’s rights to hold property. For instance, until the 2005 amendment to the Hindu Succession Act, Section 23 of the Act prevented married women from claiming the right of residence in their natal homes though technically women had the right to inherit their father’s property since 1955. Several laws governing rights to the tribal land prohibit women who marry non-tribals from gaining access to common tribal lands as they feel such women betray the cause of the tribal community. There is also the fear that the women will be exploited and the marriage is contracted only to gain access to the tribal land. In March, 2010, a Bill titled, Permanent Resident Disqualification Bill was introduced in the State Assembly of Jammu and Kashmir in order to deprive women, who marry outside of the state, their right to citizenship of the state. The Bill sought to deny women their ancestral rights, property rights and job rights if they marry men outside the state. 336

There are several other realms even within religious communities, castes and tribes
where women lose their affiliations and identity upon marrying ‘outsiders’. Under the Parsi law, women who marry non-Parsis lose their right to pass on their Parsi identity to their children.337 The notion that intermarriage leads to a dilution of faith and weakening of cultural bonds still prevails. The children of such mixed marriages are not recognized as Parsis and are not admitted into the Parsi fold and are not permitted to perform the Navjot ceremony (the initiation ceremony).338 They also lose all benefits which the Parsi panchayats grant to the community, such as subsidized housing, educational support etc. But this is not the case if a man marries a non-Parsi. Though this amounts to a blatant discrimination against women under Articles 14 and 15 of the Constitution, the same has continued unchallenged.

Conclusion
This chapter explored the material basis of the institution of marriage, its historical evolution, forms of dissolving it and the challenges posed to it in contemporary times. Newer issues emerging in the horizon of matrimonial law such as diaspora marriages, or NRI marriages as they are more commonly referred to, as well as newer dimensions of older concerns such as prevention of child marriages, complexities involved in registration of marriages and legal incidents of marriage and its impact upon women also form part of this chapter. By examining contemporary litigation processes through the medium of case law, an exposure to the current trends in matrimonial law is provided.

The prevailing unequal power relationships within marriage and the manner in which rights are assessed through the prism of equality within the matrimonial statutes is the central concern of this chapter. How does one negotiate a super structure of equality which is based on an infrastructure of inequality and how do legal terms such as ‘cruelty’, ‘desertion’, ‘irretrievable breakdown of marriage’, etc., lend themselves for application within a gendered context—these are some issues which have been contextualised here. When the status, roles, functions, and responsibilities differ so extensively, can the application of a gender-neutral term, ‘spouse’, be a magic wand which will flatten out inequalities at the ground level? More importantly, can a premise of equality be imposed upon an inherently unequal relationship of superior and subordinate? These become crucial questions while we contextualise the rights within marriage and divorce in the Indian setting. Since the norm of equality can only be applied to equals, treating unequals as equals will only widen the gulf of inequality. The contract of marriage and its operational modalities are examined in order to highlight these concerns.

There are several instances where the judiciary has departed from the norm of equality while taking into account the inherent inequality within marriage. In these instances, adhering blindly to the premise of equality, as prescribed by the marriage laws, may have caused further injustice to women, weaker partners within marriage. These important departures need to be flagged for a nuanced understanding of how notions of equality are played out within the family laws.

The hollowness of the promise of equality within marriage confronts us as we examine the trends within criminal law where the domain of the family has emerged as a patriarchal stronghold and a particularly violent terrain for women. The enactment of the Dowry
Prohibition Act, special provisions for the offence of dowry death and cruelty to wives within the Indian Penal Code (Sections 304B and 498A) and the more recent enactment, the Domestic Violence Act all of which are applicable only to women serve to highlight the stark and poignant reality of married women in our society.

The humiliation and violence within marriage has been a major concern for Indian women down the ages. Tarabai Shinde, in her famous essay, *Stree Purush Tulna* (a comparison between women and men), published in 1882, provided an incisive analyses of this inequality in the nineteenth century (Tharu and Lalita 1991). The two letters published by Rukhmabai in the *Times of India* in 1885, under the pseudonym, ‘A Hindu Lady’, around the time of her trial in the case filed against her by her husband for restitution of conjugal rights is another such example. Addressing the inequalities within marriage, she commented:

> Marriage does not interpose any insuperable obstacle in the course of their (men’s) studies. They can marry not only a second wife, on the death of the first, but have the right of marrying any number of wives at one and the same time, or any time they please. If married early they are not called upon to go to the house and to submit to the tender mercies of mother-in-law, nor is any restraint put upon their action because of their marriage. (Chandra 1998: 29)

Early autobiographies by women in nineteenth century Bengal also addressed concerns regarding oppressive marriages and joint family structures, lack of freedom, and the pain of widowhood and the hypocritical stance of sexual morality (Tharu and Lalita 1991). There are several other voices of protest in Indian history and mythology which interrogate these inequities, such as Sita and Draupadi, protesting against the injustice within marriage in the Public domain. Women poets like Akkamahadevi (twelfth century), Lalleshwari or Lal Ded (fourteenth century), Mirabai (sixteenth century), and many others, broke the shackles of oppressive marriages and domesticity and entered the public domain through the medium of *bhakti* (devotion to the divine power).

One of the earliest articulations of protest regarding the status of women in marriage in England was from Mary Wollstonecraft (1792) in her path breaking book, *A Vindication of the Rights of Women*. She criticized the patriarchal claim that woman was created merely to gratify the appetite of man, or to be the upper servant who provides his meals and takes care of his linen. Like the Bhakti poets, she too rebelled against the norm of patriarchy, but her rebellion was expressed through worldly affairs unlike the other-worldliness of the Bhakti poets. She gave birth to a daughter outside marriage. Sadly, she died at the very young age of 38 years.

(p.108) So women across the world from East and West have been conscious about the inequalities within marriage and have addressed this concern, but these concerns were not adequately addressed in the march towards modernity. While the public domain of civil society was subjected to various political theories, the private domain of the household was excluded from this scrutiny. Carole Pateman (1988) argues that though feminists have persistently pointed to the complex interdependence between the private
and public domains, 'civil' society is usually treated as a realm that subsists independently, by political theorists.

In the nineteenth century, when Europe and England changed from feudalism to capitalism in the wake of the industrial revolution, land ownership went through a major transformation. In order to make land available for the needs of industrialization, for building factories and mines, the feudal manors and feudal land had to be made alienable. This changed the earlier status based relations into contracts between consenting parties. This emerging concept of contract between individuals affected all other aspects of social life and transformed feudalism into capitalism. It is within this new theory of contracts, that status marriages were transformed into contractual obligations. This enabled women to acquire rights of dissolution of marriage and property ownership. This transformation took place in England around the later half of nineteenth century.

The credit for evolving the new theory of marriage is attributed to the legal scholarship of Sir Henry Sumner Maine. In his monumental work published in 1861, The Ancient Laws, he laid down a new prescription for the legal order of marriage. 'Patriarchy' was viewed as synonymous with 'status' and transformation of the old world into a new order was viewed as a movement from 'status to contract'. Contract was synonymous with freedom, in contrast to and in opposition to the order of subjection of status or patriarchy (Pateman 1988: 9).

This was a big leap ahead for women in the Western world. Prior to this, marriages were governed by the legal principles laid down by the English jurist Sir William Blackstone in his Commentaries on the Laws of England in 1789. His dictates reduced the position of women to slaves within marriage. After marriage, they had no legal existence. They had no right to enter into contract. Their person and property belonged to their husbands. They had to abandon their own names and take on the name of their husbands. The husband was in control of his wife’s chastity and morality and he could chastise her for her lapses with impunity. A notion of ‘thumb rule’ prevailed where the husband could beat his wife with a stick not thicker than his thumb. He was forbidden to beat her between sunset and sunrise as her wailing would cause disturbance in the neighbourhood. Her ‘person’ itself became the property of the husband. The husband had the legal right of recovery and restoration of a woman who had escaped from his custody. He could even sell her to clear his debts. If she had committed adultery, the sale would save the adulterer from penal prosecution or from paying a fine, for violating the ‘property’ of the husband. All these are symptoms of extreme servitude.

After the publication of John Stuart Mill's essay, Subjection of Women, in 1869, where he compared the marriage contract to a slave contract, women who were active in the abolitionist movements could quickly draw a parallel between the condition of the slaves and their own condition. The comparisons between wives and slaves reverberated through the women’s movement in the nineteenth century in England and the United States (Pateman 1988: 120).

(p.109) While it did seem for a while, that changing marriages from status to contract
would bring an end to matrimonial servitude and transform matrimonial relationships into partnerships of equality, the prevailing situation at the ground level did not meet this expectation. Retrospectively, feminists have questioned whether the marriages were ever transformed into ‘pure’ contracts between equals, as earlier vestiges of servitude lingered on and cast a deep shadow upon the newer ‘contractual’ marriages. According to many legal scholars, marriage has continued to be a patriarchal stronghold reinforcing male power and women have continued to be subordinate, their status has continued to be that of glorified slaves (Pateman 1988; Okin 1989; Fineman 1991, 1991a). Since the transition from status to contract was not complete, the notion of a contract between equals works to the detriment of the women’s interests.

This change from feudalism to capitalism and from status to contract took place at the height of colonialism and was transported to the colonies through the newly established legal order. This was meant to usher in ‘modernity’ and pave the way for capitalist economies. But the patriarchal biases framed within unequal partnerships of the colonial legal order served to strengthen local patriarchies. The Rukhmabai case, discussed in detail in Chapter 1 of the first volume is a clear indicator of this remoulding of marriage contracts and contractual obligations, in the context of the remedy of restitution of conjugal rights and its impact on women.339

Almost all liberal theorists have assumed that the ‘individual’, who is the basic subject of the theories, is the male head of a patriarchal household. Hence they have not usually considered applying the principles of justice to women or to relations between the sexes. Susan Moller Okin comments:

Theories of justice that apply to only half of us simply won’t do; the inclusiveness falsely implied by the current use of gender-neutral terms must become real. The best theorizing about justice is not some abstract “view from nowhere,” but results from the carefully attentive consideration of everyone’s point of view.


According to Martha Albertson Fineman, understanding the movement of marriage from status to contract is related to two differing ideas of marriage. The first is the more modern view that marriage has been transformed to be more consistent with the ‘formalistic notions of equality between the sexes’. The second is the more traditional view that it is an unequal relationship which creates needs and dependencies for women which need to be addressed (Fineman 1991a: 265). While embracing the idea that marriage is a contract, the legal system ignores the existence of these dependencies.340

These theoretical formulations which critique the premise of equality need contextualization within the Indian family laws and litigation processes. Since gender roles are clearly defined and since families are patrilocal, the grounds of ‘cruelty’ and ‘desertion’, which are clothed in gender-neutral language, become very distinct and gender-specific in divorce contestations because the husband and wife are judged by entirely different set of rules. Their roles, obligations, and expectations are placed in diagonally opposite directions. There is no semblance of equality here. These roles
evolved in the context of ‘status marriages’ and are predefined as per patriarchal norms. Just because the enactment of the Hindu Marriage Act in 1955 transformed the religious and sacrosanct, (p.110) status-based marriages into contractual relationships of equality, it does not mean that the differences between the sexes were flattened out into an equality mould.

The peg on which the notion of cruelty hinges are poles apart for the husband and the wife. Not conceding to the demand for sex, terminating pregnancy without his knowledge and consent, perusing a professional career and ‘neglecting marital obligations’, refusal to stay in the joint family set up, not serving tea to his friends or refusal to wear the mangalsutra (the customary thread or ornament which is worn as a symbol of marital status)—all this could be pleaded as cruelty on the part of the wife, entitling the husband to a decree of divorce. The wife’s notion of cruelty rests on a different set of social realities such as physical violence, denial of food, humiliation by the mother-in-law, demands for dowry, and false allegations against her chastity and morality. A gendered pattern is clearly discernible while analysing reported judgments. These grounds cannot be applied in the reverse because they reflect the subordinate status of the wife within the contract of marriage. Even terms like ‘neglect of marital obligations’ mean different things when applied to the husband and the wife. For the husband, it would be measured in economic terms, such as non-payment of maintenance, whereas for the wife it would be neglect of household duties, not looking after the children, or refusal to have marital intercourse.

The historical ruling in Dastane v. Dastane,341 widened the scope of cruelty beyond the physical to the conceptual and the contextual. V. Bhagat v. D. Bhagat,342 opened up the boundaries even further by declaring that ‘mental cruelty’ can be of such a nature that the parties cannot reasonably be expected to live together and it is not necessary to prove that it would be injurious to the health of the petitioner. While these rulings are hailed as progressive because they widened the notion of legal cruelty, it is important to note that both were in the context of a husband’s claim to divorce on the ground of cruelty and the rulings were in favour of the husband and against the contentions of the wife. In order to bring an end to the long winding litigation, the Supreme Court, tentatively and cautiously invoked the ground of ‘breakdown of marriage’ in the Bhagat case.

These rulings helped loosen the marital knot and led to a large number of cases being filed by husbands on frivolous grounds. The underlying reason for filing a petition for divorce in most cases was the validation of his subsequent relationship with another woman, defying the dictate of monogamy. The changes brought into the Hindu Marriage Act to protect the rights of wives, could easily be circumvented with the option of an easy divorce invoking the breakdown theory. Though the ground was premised on equality and could be invoked by both men and women, social conditioning, stigma against remarriage, responsibility of motherhood and economic dependency prevented most women from availing of this remedy in a similar manner. So the cases where women have pleaded this ground are few and far between. When the courts were flooded with a large
number of cases filed by husbands on flimsy grounds, they were constrained to reign in
the scope and impose certain restrictions in order to protect women’s rights. Here the
courts had to evolve another legal dictum, ‘normal wear and tear of marriage’.

The same holds true when we analyse the reported cases on the ground of desertion.
The general norm of traditional marriages is that after marriage, a woman leaves her natal
home (p.111) and enters the matrimonial home. The notion of the two distinct abodes
can be applied only to women within the patriarchal structure. Under the Hindu joint
family structure, upon birth the man becomes a joint holder of family property. He also
has a pious obligation to look after his aged parents and perform their last rites.
Conversely, the woman is not even viewed as a member of her own natal family. The
ground of desertion needs to be examined within this social reality where the woman
leaves her natal home and comes to reside in her ‘matrimonial home’ where she is an
outsider. If she is humiliated, assaulted, or violated, she will return to her natal family if
they are willing to accept her back. In most situations, this is not the case.

There are also possibilities of her being thrown out of the matrimonial home. Courts have
been confronted with the challenge of having to decide whether such ‘leaving’ would
amount to desertion. The process of ‘leaving’ and ‘returning’ is confined to wives. Faced
with this problem, courts had to evolve the notion of ‘constructive desertion’ in the
landmark cases, Bipinchandra v. Prabhavati343 and Lachman v. Meena.344 This legal
premise of constructive desertion is invoked in defense of women who are accused of
desertion, after being thrown out of the matrimonial home. Courts had to abandon the
gender-neutral premise and evolve a gender-specific construct to deal with the problem
at hand. Courts have repeatedly reiterated that a husband cannot be allowed to ‘take
advantage of his own wrong’.

A similar concern emerges as we analyse other matrimonial remedies. For instance, the
grounds of annulment of marriage have very different connotations for women and men.
As discussed in the following chapter, husbands can use the ground of not only the
wives’ bigamy, but also their own, in order to defeat the women’s claim of
maintenance.345

Grounds such as fraud, coercion, concealment of illness, etc., impact men and women
very differently. The cases filed against women by their husbands far outnumber the
cases filed by wives against their husbands. It is a social reality that natal families, in a
desperate urge to marry off their daughters, do conceal severe mental illnesses. For this
reason, even when the marriage is annulled on this ground, courts have been
compassionate and have advocated a humanitarian approach, as prescribed in Pramatha
Kumar Maity v. Ashima Maity.346

Rather curiously, in the midst of gender-neutrality, we also come across a very specific
gender-specific ground of pre-marriage pregnancy, which can be used only by the
husband against the wife. The notion of a sexually impure bride, carrying in her womb the
seed of a stranger, threatens the very basis of a patriarchal marriage. There is no
gender-neutrality here and it does not affect the foundation of a patriarchal marriage if
another woman is pregnant with the husband’s ‘seed. The price for this lapse would have to be paid by that ‘other’ woman.

Restitution of conjugal rights is yet another contested field. Both historically as well as during the post-Hindu Marriage Act period, this vestige of patriarchal order has been difficult to shed. This is brought out very starkly when we examine the ‘Lord and Master’ cases, where the courts chastised women for holding on to jobs against the wishes of their husbands, not withstanding the fact that they were the breadwinners of their families. Despite the fact (p.112) that Hindu Marriage Act had transformed Hindu marriages into contracts, while awarding orders in favour of husbands, courts relied upon the notion that according to Hindu law, it is the sacred duty of the wife to obey his dictates. This, even when the wife’s income was needed to support the family.347 While examining the constitutionality of this provision, the Delhi High Court validated the sublime nature of sacramental Hindu marriages and held:

In a sensitive sphere which is most intimate and delicate, there is no room for constitutional principles to enter. The ‘domestic community’ does not rest on contracts sealed with seals and sealing wax, nor on constitutional law. It rests on that kind of moral cement which unites and produces ‘two-in-oneship’.348

A more recent concern in this discourse on the gender specificity of matrimonial relief is the incorporation of a newer remedy of ‘irretrievable breakdown of marriage’ through judge-made laws. Usually, when the grounds pleaded for cruelty are flimsy and frivolous and a husband is not able to prove legal cruelty, he invokes the ‘breakdown’ theory. Courts have been cautious while applying this principle, but there is a pressure to include this remedy within the realm of matrimonial laws. There have also been recommendations of the Law Commission of India to this effect.349 But the gender-specific context of this remedy has not been sufficiently explored. Women’s groups have opposed this move as it would cause untold misery to women and children. Our matrimonial law does not function on the premise of division of property upon divorce. The wife’s right to reside in the matrimonial home after divorce has no statutory recognition. A routine use of this ground would seriously hamper the rights of women and children to shelter and economic security. At times courts have offered sums such as Rs 2,00,000 as compensation or economic settlement to the woman for her life time of service to the husbands. Whether such low amounts could indeed provide economic security to women is a question that both the judiciary and the parliamentarians must address. In this context it is interesting to note the recent Supreme Court ruling in Vishnu Dutt Sharma v. Manju Sharma,350 where it was held that the courts do not have the power to legislate and add new grounds for dissolution of marriage and that it is the duty of the legislature to do so. Hopefully, in the ensuing wider political debate around this issue, women’s concerns will be the primary focus rather than judicial convenience. What is not linked here is the ‘need’ of the woman, which Fineman refers to in the above cited passage. Unless a clear assessment of the wife’s need is made and a policy is in place regarding matrimonial residence and the division of matrimonial assets based on need as well as contribution (in terms of housework, child care, and economic
contribution), it would be premature to suggest this ground as it will cause great hardships to women.\footnote{351}

In this context, it would be worth our while to learn from the experience of other countries. Lenore Weitman (1985: xi-xiv), in a detailed study on the non-fault based ‘divorce revolution’ in California, USA, mentions that a simple\footnote{352} change to gender-neutral divorce rules has had appalling consequences on the condition of women and children. This is because when law views the husband and wife as ‘equal’, it ignores the inequalities that have been created by the marriage itself and the inequalities between men and women in society. Courts, in this process, violate the norms of the original marriage contract and deprive the wife of a share in the husband’s income as they are now equal and equally capable of earning a living. The woman bears great financial burden, given the cost of sole child support, (as women usually get custody) given the fact that they have been outside the labour market for the duration of the marriage, and given that women in general, in society, are offered lower paying jobs than men. Weitman calls the consequence of this law, ‘the systematic impoverishment of divorced women and their children’ (ibid.: xiv).

While there is a need to contextualize ‘gender’, a superficial and generalized framework of women’s rights may not be adequate to deal with the question of rights and entitlements. This is particularly relevant while we examine the issue of child marriages. In litigation, it is crucial to particularize rights. We cannot impose ideologically determined formulas upon people’s lives without understanding the implication of such an imposition on the people whose interest is sought to be served. Here, more than anywhere else, it is essential to bring to the centre stage the concerned individual, woman or child, and her agency in seeking justice. The position advocated by some feminists, that depriving some women/girls of their rights for the greater good of all women, seems to be based on an erroneous presumption. Statutory law, campaigns, and judicial pronouncement weave a complex web of legal claims.

An examination of reported judgments on child marriage serves to further highlight gender-specific rights and entitlements and the contexts in which a legal provision gets activated. There have been cases where girls were married when they were very young and courts had refused to dissolve these marriages at the instance of the girls on the ground that minority is not a ground on which a marriage could be dissolved. These judgments invoked the traditional notion that the Hindu marriage is sacramental and indissoluble. In these cases, the girls were very young, at times even less than 10 years. Upholding this traditional view and not examining the issue from the perspective of women’s rights deprived the minor girls of their basic human rights. While adjudicating these cases, judges had to keep in view that at times strict adherence to or mindless application of laws could lead to injustice. This problem was resolved when the option of puberty was included in the Hindu Marriage Act in 1976.

Later cases on this issue came up in the context of imposition of patriarchal norms resulting in denial of rights to women—when husbands challenged the validity of marriage to escape the liability of paying maintenance, when husbands’ relatives challenged the
validity of marriage of a widow in order to disinherit her, or in defense of parental authority in cases of elopement marriages. Here the judges expressed greater sensitivity towards the rights of minor girls by upholding the validity of such marriages. Mensky brings in a nuanced framework of gender-specificity and comments that judges have to take up the challenge of developing the legislative foundations into a socially meaningful system of regulation within the framework of social responsibility (Mensky 2003: 367). It is this social responsibility of activists and scholars that needs to be contextualized in this debate.

(p.114) When the issue of compulsory registration of marriage is raised through women’s rights groups and judicial pronouncements, the adverse effects of this norm needs to be carefully examined. This norm should not be used to deny a large number of vulnerable women of our country their right to maintenance and marital status. I have argued that a framework of ‘presumption of marriage’ would work better for women than a strict mandate of compulsory registration. Registration can only be a facilitating measure, the responsibility of providing adequate infrastructure, easy procedures, and due publicity regarding the advantages of registering marriages is entirely upon the state. It is one thing to say that all marriages should be registered and another to stipulate that non-registered marriages are invalid and hence women in such marriages will cease to have rights. The price will be paid only by women since their economic rights depend upon the validity of marriage. Children will not suffer economic loss since children of invalid marriages are deemed legitimate. Further, we have observed, through the case law as well as through experiences in court, registration itself will neither obviate the ambiguity within Hindu marriages nor prevent bigamy.

Problems arise when women approach courts for claiming their rights in situations where the community accepts bigamous marriages and the law declares them as void. In this process, women suffer. Men also have the option of entering into ‘marriage like’ relationships since ‘mistresses’ and ‘concubines’ are accepted through community norms. Due to the wide prevalence of these customary practices, such relationships have been awarded judicial recognition through the Domestic Violence Act, in order to avoid hardships to women.

There is a need to bridge the wide gulf between community practices and the legal norms of a modernist, regulating state. Currently they function from two different planes and it becomes the task of the lawyers representing the parties to bring these plural practices within the ambit of law through various means, fair and foul. It is rather unfortunate that the debate around legislative reforms takes place, many a times, without contextualizing the reality of poor, rural, and illiterate women and gets framed in the context of middle class social activists (Singh et al.1994).

Both marriage and its dissolution are determined by community practices, as can be observed from the discussion regarding community-based norms of securing divorce by mutual consent. After the Supreme Court ruling in Seema v. Ashwani Kumar, the Principle Judge of the family court at Mumbai brought in a rather absurd and ineffective rule, that when a couple approaches courts for a decree of divorce by mutual consent,
prior to filing the petition, they ought to register their marriage. This move might augment the figures of registration of marriage, but it seems a futile exercise as the parties would register their marriages only in order to obtain a divorce. The only effect of this stipulation is the delay it would cause in the divorce proceedings.

The issue of diaspora marriages brings out another set of problems for women. Here, the norm, that a woman’s domicile follows that of her husband, is followed. Women enter foreign countries as dependent spouses. In a foreign land, they become extremely vulnerable. Further, they have to subject themselves to the law of the land which is contrary to their own culture, values, and traditions. The most difficult cases in this category are the one’s where the husband, after marriage, has left the country with the woman’s valuables, with the promise of sending the visa and has stopped communicating with her thereafter. At times she receives a decree of divorce based on ‘no fault’, as applicable in the country of residence of the husband. If by then the woman has become pregnant, one can only imagine her trauma.

Equally traumatizing are the cases where the husband brings the wife and children to India and then leaves the country, deserting her, and takes with him the children as well as valuables and travel documents of the wife. The wife does not even get to see her children who were born abroad and are citizens of the foreign country, while she continues to be an Indian citizen. Her entry into the foreign country depends solely on the whim of the husband as his dependent. At present we lack the legal framework and legal instruments to bring these women within the ambit of rights and entitlements.

In this context, the Law Commission has recommended that amendments must be carried out in the Hindu Marriage Act and the Special Marriage Act to provide for various contingencies that a marriage with an NRI would entail, including issues such as maintenance and alimony, child custody and child support, and settlement of matrimonial property. The Commission has also recommended that the respective state governments must simplify and streamline procedures for succession, transfer of property, reparation of NRI funds, etc. It has also been suggested that the government must accede to the Hague Convention on the Civil Aspects of International Child Abduction.

The legal incidents of being married, widowed or divorced is integrally linked to larger legal and political questions and affects women’s fundamental right to citizenship, nationality and domicile. It also affects women’s right to belong to a community, inherit property, use a particular surname and more importantly, to pass on their legal identity to their children in the event that their husband’s nationality and domicile varies from theirs. This has caused a great deal of hardship to women, in the context of issues relating to marriage and divorce.

To conclude, we find that traditional personal laws, customary laws as well as statutory law function from a patriarchal base. It was left for the judges to weave-in the notion of gender specificity in order to protect the rights of women. To a certain extent the judiciary has succeeded in achieving this, as we can observe from the volume of case law referred to above. Yet, it is a daunting task, as every case has to be fought with its own
facts and merits and in each instance, one must invoke judicial sensitivity, since it is possible for the pendulum to swing either way. It is in this context, that there is a need to evolve a clear perspective or theory of family law, keeping in view the impact legislative reforms will have upon the lives of women.

In 1978, in his thought provoking book titled, *The Death of a Marriage Law: Epitaph for the Rishis*, while commenting on Hindu law, Derrett predicted that the future of Hindu marriage law would be dependent on the balance of power between an individualism in the form of ‘contract’ and a resistance to it by a ‘status’ bound family and social relationships. He also predicted that eventually property matters will become more important in the context of matrimonial litigation, than the grounds for divorce. These predictions seem to have come true.

Mensky (2003) contends that modernity propounded on the basis of single linear ‘progressive’ line of development has not worked well within the complex socio-legal reality of modern India which demands a more sophisticated and nuanced approach. He asserts that within a manifestly hybrid realm of family law, there is no right answer that fits all situations. Hence the mental energy of judges revolves around solving the real problems of real people, in line with recognition of litigants means and practical needs. Further, it is now impossible to analyse developments in personal laws in isolation from other legal areas. Justice does not respect the subject borders of legal specialisms. Hence in recent times, the Indian higher judiciary has become instrumental in creating a legal regime which is economically sustainable and remarkably justice-focused, but, Mensky laments, ideologically bound to Western-style prescriptions of formal equality and Western interpretations of human rights (Menski 2003: 259). It is in this context that this chapter has attempted to evolve a theory of marriage and divorce based on Indian realities even while contextualizing Western theories of family law and women’s rights.

Notes:

1. Recently some Scandinavian countries, the United Kingdom, and some states in the United States of America have awarded legal recognition to marriages between persons of the same sex. Despite this, heterosexual marriages continue to be the norm in most societies.

2. The term refers to the Jewish custom of a younger brother marrying the elder brother’s childless widow. Several communities in India also practice this custom.

3. This archaic feudal remedy is still retained under Section 497 of the Indian Penal Code.

4. Sections 34 and 35 of the Indian Divorce Act which has now been deleted.

5. Section 39 of the Indian Divorce Act which has also been deleted.

6. Section 50 of the Parsi Marriage and Divorce Act, 1936.
(7) See 19th Century Social Reform Movements in Chapter 1 Personal Laws and Women’s Rights of the first volume of this book for a detailed discussion.

(8) The matrilineal inheritance patterns followed in some parts of Africa, North-East India, and the Malabar Coast are an exception to this norm. But many of these customary practices were eroded with the advent of colonization.

(9) The term ‘paterfamilias’ refers to the father of a patriarchal family, under Roman Law. The term ‘Patrias potestas’ denotes the aggregate of those peculiar powers and rights which belong to the head of a family in respect to his wife, children, and lineal descendants. The power of the father was extensive, including the power of life and death. But gradually, this power was curtailed and finally it amounted to little more than a right in the paterfamilias to hold as his own any property or acquisition of one under his power (Black’s Law, 1990, 6th edn. pp.1126–7).

(10) For a detailed discussion see Agnes 2000: 106–37.

(11) Krishna Iyer J., Islamic Law in Modern India at p. 23 as cited by Diwan & Diwan (1997) p. 22, fn 8

(12) Instead it was laid down that the presence of a priest and three witnesses is essential for solemnization of a marriage.

(13) See section titled ‘Social Reform Movements and Legislative Reforms’ of Chapter 1 Personal Laws and Women’s Rights of the first volume of this book where this issue is discussed in detail.

(14) This has been discussed in detail in section titled ‘Codified Law and Illusory Inheritance Rights’ of Chapter 1 Personal Laws and Women’s Rights of the first volume of this book.


(16) Later, he was also appointed as India’s permanent member to the United Nations.

(17) Report of the Hindu Law Committee 1941: 23

(18) For a detailed discussion on this act including its loopholes, see section titled ‘Law of Marriage and Divorce’ in Chapter 1 Personal Laws and Women’s Rights of the first volume of this book.

(19) See the judgment in Rukhmabai case discussed in detail in Chapter 1 Personal Laws and Women’s Rights of the first volume of this book.

(20) For a custom to be valid it must be ancient, continuous, and not against public policy. See section titled ‘Constitutional Challenges’ of Chapter 1 Personal Laws and Women’s Rights of the first volume where customary laws of marriage are discussed.
(21) See sections titled ‘Rights of Women in Bigamous Marriages’ and ‘Rights of Women in Informal Relationships’ of Chapter 2 Matrimonial Rights and Obligations for further discussion on this issue.

(22) The issue is discussed later under the sub section, ‘Children of void and voidable marriages’.

(23) Santosh Kumari v. Surjit Singh, AIR 1990 HP 70.


(27) I (2005) DMC 453 P&H

(28) AIR 2007 P&H 74

(29) See the discussion on ‘the Rights of Children of Void and Voidable Marriages’ later in this section.

(30) See section titled ‘Maintenance Rights of Women’ of Chapter 2 Matrimonial Rights and Obligations.


(32) II (2001) DMC 419 Del

(33) The right of women to maintenance in cases where the husband advances the defense of non-consent is discussed in Chapter 2 Matrimonial Rights and Obligations at section titled ‘Violation of Essential Conditions of Marriage’.

(34) I (2009) DMC 164 SC

(35) See section titled ‘Inter-Religious Marriages’ of Chapter 2 Matrimonial Rights and Obligations.

(36) I (2000) DMC 709 Cal

(37) II (2000) DMC 368 MP

(38) I (2003) DMC 742 SC

(39) I (2008) DMC 233 P&H

(40) I (2010) DMC 667
(41) I (2008) DMC 731 All
(42) I (2000) DMC 79 Bom
(43) II (2005) DMC 408 Ori
(44) I (2006) DMC 622 AP
(45) I (2007) DMC 878 Mad
(46) I (2000) DMC 704 Ker FB
(47) AIR 2007 (NOC) 145 Mad
(48) I (2006) DMC 110 Kar
(52) AIR 1969 Guj 48
(53) AIR 1991 Cal 123
(54) II (2006) DMC 609 Bom
(55) AIR 2007 Chh 110
(57) II (2008) DMC 171 All
(58) AIR 2007 NOC 1032 Raj
(60) *Nandkishore v. Munibai*, AIR 1979 MP 45.
(62) AIR 2007 MP 103
(63) I (2008) DMC 249 HP
(64) I (2007) DMC 246 AP
(65) Section 18 (a) of HMA
The issue of child marriage is discussed in detail later in this chapter.

Section 16 (3) of HMA and Section 26 (3) of SMA. But in Sarojamma v. Neelamma, II (2005) DMC 567 Kar, the court awarded illegitimate children rights in ancestral property. See Chapter 2 Matrimonial Rights and Obligations.

The right of maintenance of illegitimate children is discussed later in Chapter 2 Matrimonial Rights and Obligations.

(1867) 11 MIA 551
(1886) 10 Bom 301
Dadaji Bhikaji v. Rukhmabai, (1885) ILR 9 Bom 529.
See section titled ‘A Moment of Defiance: The Rukhmabai Case’ of Chapter 1 Personal Laws and Women’s Rights of the first volume.

For judicial decisions on this issue as well as constitutional challenges to this remedy see section titled ‘The Legal Loopholes and Constitutional Challenges’ of Chapter 1 Personal Laws and Women’s Rights of the first volume.

But more recently, it has been held that once litigation commences, the husband cannot pronounce divorce upon his wife. See cases discussed under section titled ‘validity of triple talaq’, in Chapter 1 Personal Laws and Women’s Rights of the first volume.

See Chapter 1 Personal Laws and Women’s Rights of the first volume.

(2002) DMC 371 P&H
2005 MLR 551
II (2008) DMC 278 Mad
I (2004) DMC 442 MP
AIR 1984 SC 1562
2004 MLR 576 (Cal)
Section 23(1) (a), which deals with taking advantage of one’s own wrong. This concept is discussed later.

Non compliance of the decree of restitution of conjugal rights for one year.

Section 10 of HMA
Section 13 (1-A) of HMA and Section 27 (2) of SMA.

I (2003) DMC 375 Kar


(1964) 2 All ER 22

As mentioned earlier, this concept was already incorporated within the Muslim law.


They further comment that after the reform in English law, the Family Law Act, 1996 has now replaced all pretence that substantive law is involved, by overtly introducing a purely procedural set of hurdles which must be jumped in order to achieve the desired divorce order.

AIR 2005 All 16

II (2006) DMC 298 Ker

II (2004) DMC 301 Jha

See also Arokia Rah Morias v. Mabai Bibai Rani Morias, II (2007) DMC 209 Mad, where it was held that incident of adultery prior to marriage is not a ground of divorce.

See the discussion on DNA testing in section titled ‘Presumption of Paternity and DNA Testing’ of Chapter 2 Matrimonial Rights and Obligations.

I (2007) DMC 756 Mad

II (1994) DMC 15 Raj

II (2004) DMC 503 MP

II (2007) DMC 762 Raj


I (2005) DMC 595 P&H

II (2007) DMC 559 Utt

AIR 1989 Cal 1

But the situation has been changed after the amendment of 2001 to the Indian Divorce Act of 1869 and courts are now mandated to apply the principle of
'preponderance of probability' rather than strict proof as per the maxim 'beyond reasonable doubt' as applicable under other matrimonial statutes.

(107) See Chapter 2 Matrimonial Rights and Obligations.

(108) AIR 1975 SC 1534


(110) (1994) 1 SCC 337: AIR 1994 SC 710

(111) AIR 207 Mad 462 (NOC)

(112) AIR 1985 All 253

(113) AIR 2007 Del 118

(114) (1988) 1 SCC 105

(115) II (2006) DMC 553 AP

(116) II (2008) DMC 202 P&H

(117) AIR 2007 NOC 2494 AP

(118) AIR 2007 NOC 158 Raj

(119) I (2007) DMC 457 P&H

(120) I (2007) DMC 566 Cal

(121) AIR 2007 NOC 563 MP

(122) AIR 2007 Raj 160


(124) AIR 2007 NOC 800 Mad

(125) AIR 2005 P&H 134

(126) I (2007) DMC 446 Bom

(127) I (2007) DMC 211 Del

(128) I (2007) DMC 492 P&H

(129) II (2008) DMC 278 Mad

(130) II (2008) DMC 482 Del
(131) I (2004) DMC 112 MP
(132) I (2007) DMC 460 Gau
(133) I (2005) DMC 96 P&H
(134) I (2007) DMC 871 Del
(135) II (2005) DMC 707 AP
(137) II (2008) DMC 774 SC
(138) II (2008) DMC 454 Utt
(139) I (2007) DMC 427 Raj
(140) II (2008) DMC 94 P&H
(141) II (2002) DMC 446 Ori
(142) II (2002) DMC 279 Raj
(143) II (2003) DMC 723 Del
(144) II (2008) DMC 327 AP
(145) AIR 1957 SC 176
(146) AIR 1964 SC 40
(147) AIR 1985 Del 43
(148) AIR 1988 Cal 111
(149) AIR 1993 Mad 174
(150) AIR 1995 Raj 86
(151) I (2000) DMC 609 Ker
(152) II (2001) DMC 680 Raj
(153) II (2002) DMC 397 Jha
(154) I (2002) DMC 735 P&H
(155) II (2003) DMC 472 Del
(156) II (2003) DMC 316 Gau
(157) II (2005) DMC 83 Ori
(158) I (2006) DMC 780 Utt
(159) II (2008) DMC 670 HP
(160) (2002) 1 SCC 308
(161) II (2008) DMC 759 Raj
(162) II (2008) DMC 315 HP
(163) II (2008) DMC 390 Raj
(164) I (2004) DMC 257 P&H
(165) I (2006) DMC 765 Bom
(166) I (2007) DMC 833 Del
(167) AIR 1946 Pat 467
(168) AIR 1959 Ker 151
(169) AIR 1953 Mys 145
(170) AIR 1971 Ker 261
(171) AIR 2003 Kar 373
(172) I (2000) DMC 134 Bom
(173) See the discussion under section titled ‘Grounds for Annulment of Marriage’.
(174) AIR 2006 SC 1662
(175) AIR 2007 NOC 285 Ker
(176) Section 2 (vii) of the Dissolution of Muslim Marriages Act, 1939
(177) Section 13 (2) (iv) of the HMA
(178) The issue of child marriage is discussed in detail later in this chapter in section titled ‘Marriage of Minors’.
(180) 1971 RLR 10
(181) Section 10A of the Divorce Act, 1869.

(182) For Christians the period of separation is two years.


(184) AIR 1991 Bom 105

(185) I (2009) DMC 93 Bom

(186) II (2003) DMC 741 SC

(187) II (2003) DMC 795 SC

(188) II (2005) DMC 105 Ori

(189) II (2005) DMC 214 P&H

(190) AIR 2007 Jha 34


(192) II (1998) DMC 19 Cal

(193) I (1998) DMC 724 MP

(194) I (2008) DMC 235 Ker

(195) AIR 2009 SC 2840

(196) I (2003) DMC (DB) 805 Raj

(197) Section 498(A) IPC

(198) II (2006) DMC 410 Del

(199) I (2003) DMC 95 AP

(200) They were framed subsequently in 2005. See the discussion on this issue in Chapter 3 Family Courts and Gender Justice.

(201) I (2002) DMC 401 Ker

(202) (2002) 10 SCC 194

(203) I (2005) DMC 801 Del

(204) I (2008) DMC 605 P&H

(205) II (2008) DMC 253 Del

A similar problem also arose in *Alungaprambil Abdual Khader Suhud v. State of Kerala*, I (2007) DMC 38. This case is discussed subsequently in the section on ‘Registration of Marriages’.


The case of Molly Joseph cited earlier is an example.

*A. Yousuf Rawther v. Sowramma*, AIR 1971 Ker 261

*Aboobacker Haji v. Mamu Koya*, 1971 KLT 663

Though California is given the credit of first introducing this provision, it was first introduced in 1953 in Oklahoma. But that did not trigger off a ‘divorce revolution’. The term ‘divorce revolution’ is borrowed from the title of Lenore Weitman’s book, *The Divorce Revolution*, published in 1985, where she assessed the impact of this provision upon the lives of women.

The issue of division of property upon divorce is discussed at section titled ‘Notion of Matrimonial Property and Rules for its Divisions’ of Chapter 2 *Matrimonial Rights and Obligations*.

Section 32A of Parsi Marriage and Divorce Act also provides a similar relief.
(225) I (2009) DMC 332 Cal

(226) I (2009) DMC 579 All

(227) I (2009) DMC 515 SC

(228) AIR 1984 SC 1562. This case is discussed under section titled ‘Restitution of Conjugal Rights’ earlier in this chapter.

(229) I (2001) DMC 714 SC

(230) AIR 2001 Ori 151

(231) See also the decision in *Chiranjeevi v. Lavanya*, II (2006) DMC 553 AP, discussed under sub-section ‘Cruelty’.

(232) AIR 2002 Cal 6

(233) II (2002) DMC 738 Kar

(234) II (2002) DMC 177 MP

(235) II (2004) DMC 146 Cal

(236) II (2002) DMC 630 Ori

(237) I (2003) DMC 421 Ori

(238) II (2004) DMC 738 Bom

(239) II (2005) DMC 66 Jha

(240) II (2007) DMC 684 Del

(241) II (2008) DMC 167 SC

(242) I (2002) DMC 78 Bom


(244) AIR 1994 SC 710

(245) See Chapter 1 *Personal Laws and Women’s Rights* of the first volume where this issue is discussed in detail.

(246) *Queens Empress v. Huree Mohan Mythee*, XVIII ILR (Cal) 49 (1891)

(247) See Chapter 1 *Personal Laws and Women’s Rights* of the first volume for a further discussion on this issue.
(248) Imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and fine.

(249) Section 2 (vii), Dissolution of Muslim Marriages Act, 1939.

(250) Section 13 (2) (iv), HMA.

(251) AIR 1986 MP 218

(252) II (2006) DMC 427 Raj


(254) AIR 1997 Guj 185

(255) AIR 1997 Kar 77

(256) 2003 MLR 631 P&H

(257) II (2002) DMC 791 Bom


(259) Premi v. Daya Ram, AIR 1965 HP 15.

(260) AIR 2007 Chh 64

(261) See the discussion further

(262) II (2003) DMC 774 Cal

(263) II (2006) DMC 4 AP


(265) I (2007) DMC 786 Del

(266) See this chapter further for a detailed discussion on ‘Registration of Marriages.’

(267) The minority of a child is defined under Section 2 (a) of the Act as a male below the age of 21 years and a female below the age of 18 years as that is the permissible age of marriage under various personal laws. This contravenes the definition of minority under all other provisions of law where it is defined as 18 years, including for voting rights.

(268) The Act makes an exception in case of women and provides that no woman shall be punishable with imprisonment.
(269) The Medical Termination of Pregnancy Act, 1971 (MTP Act), which gave women the right of legal abortion, was also enacted in this context.


(271) Due to the process of sanskritization and Hinduization in the intervening years, many communities have started adopting upper caste Hindu practices. (Srinivas 1962). See Chapter 1 Personal Laws and Women’s Rights of the first volume where this issue is discussed in detail.


(273) Dadaji Bhikaji v. Rukhmabai, (1885) ILR 9 Bom 529. See section titled ‘A Moment of Defiance: The Rukhmabai Case’ of Chapter 1 Personal Laws and Women’s Rights of the first volume where this case is discussed in detail.


(275) In any case, since most marriages are not registered, official statistics on child marriage may not accurately reflect the ground reality.

(276) AIR 1978 SC 1351

(277) p. 1354, para 8 of the judgment

(278) See Chapter 2 Constitutional Law and Citizenship Claims of the first volume for further discussion on this issue.

(279) Provision to Section 17 of the draft Bill

(280) Such as ‘preventive measures should be adopted rather than invalidating the marriage’

(281) II (2007) DMC 136

(282) I (2009) DMC 646 AP

(283) I (2009) DMC 120 P&H

(284) AIR 2001 All 254
(285) AALI, Choosing a Life...Crimes of Honor in India The right to, if, when and whom to Marry Lucknow: AALI 2004 (Informal Publication of the NGO).


(287) Prohibition of Child Marriage Act, 2006


(292) For a detailed study of the cultural and legal pluralism among the South Asian migrant communities, see Prakash Shah, Legal Pluralism in Conflict (2005).

(293) AIR 1963 SC 1


(295) AIR 1963 SC 1.

(296) The Hague Convention is an international legislation, the purpose of which is to specify the heads of jurisdiction which would secure international recognition of the decrees of divorce or legal separation. The Hague Convention of 1902 (on marriage) and 1905 (on the effects of marriage) represented the first attempts to codify the conflict of law rules relating to marriage and its effects. The Hague Convention deals only with the recognition of foreign decrees of divorce and of legal separation and is not concerned with the assumptions of jurisdiction and questions of choice of law.

(297) AIR 1975 SC 105

(298) 1991 3 SCC 451

(299) 2003 MLR 21 Bom


(301) Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

(302) I (2003) DMC 139 Del

(303) See the discussion on Desertion earlier in this Chapter.
‘Non est factum’ is a Latin term which permits one of the parties to escape from contractual obligations despite a valid contract which is in existence.

Section 19 (iii-a) and (iv) of Hindu Marriage Act, 1955 and Section 31 (iii-a) and (iv) of Special Marriage Act, 1954 inserted by Act 50 of 2003 with effect from 23 December 2003.

(310) I am using this phrase in the context that all divorces obtained in a foreign country are not fraudulent. Making it mandatory for all couples, who were married in India and have since migrated, to return to India for the purpose of obtaining their divorce is not a realistic or feasible option.


See Box in Chapter 1 Personal Laws and Women’s Rights of the first volume for relevant sections under the Hindu Marriage Act which validate customs.
of elopement marriages is discussed in detail.


(326) Section 6 (1) (b) of the said Act stipulates that the parties to a marriage along with three witnesses should appear in person before the Registrar of Marriages and sign the Memorandum of Marriage.

(327) Seema v. Ashwani Kumar, I (2006) DMC 327 SC.

(328) I (2007) DMC 38

(329) I (2009) DMC 164 SC

(330) AIR 2008 Mad 162. For further discussion of this case, see Section titled ‘Rights of Women in Informal Relationships’ of Chapter 2 Matrimonial Rights and Obligations.

(331) ‘Nationality’ has reference to the jural relationship under international law. ‘Citizenship’ has reference to the jural relationship under municipal (or domestic) law. Nationality determines, the civil rights of a person with reference to international law and citizenship is connected with civil rights under municipal law. See State Trading Corporation of India Ltd. v. Commercial Tax Officer, AIR 1963 SC 1811.

(332) Article 9 (1) : States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. Article 9 (2): States Parties shall grant women equal rights with men with respect to nationality of their children.


(334) (2005) 2 SCC 244

(335) Deshpande, S. ‘Divorced Woman Can’t Use Ex’s Name: HC’ in Times of India, Mumbai: 19 February 2010.


(339) See section titled ‘A Moment of Defiance: The Rukhmabai case’ of Chapter 1
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*Personal Laws and Women’s Rights* of the first volume. The case is also referred to briefly in this chapter.

(340) The doctrine of ‘need’ and dependencies which Fineman contextualizes is discussed in detail at section titled ‘Need Versus Contribution in Division of Property’ of Chapter 2 *Matrimonial Rights and Obligations*.

(341) AIR 1975 SC 1534

(342) (1994) 1 SCC 337 : AIR 1994 SC 710

(343) AIR 1957 SC 176

(344) AIR 1964 SC 40

(345) For a more detailed discussion see section titled ‘Maintenance Rights of Women’ of Chapter 2 *Matrimonial Rights and Obligations*.

(346) AIR 1991 Cal 123


(348) Harvinder Kaur v. Harminder Singh, AIR 1984 Del 66. See Chapter 1 *Personal Laws and Women’s Rights* of the first volume where the constitutional validity of the provision of restitution of conjugal rights is discussed.

(349) LC Report No. 217 of March 2009

(350) I (2009) DMC 515 SC

(351) The issue of matrimonial home and property is discussed in detail in section titled Right to ‘Matrimonial Home and Property’ of Chapter 2 *Matrimonial Rights and Obligations*.


(353) I (2006) DMC 327 SC

(354) This is based on personal knowledge of the author.

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