

FAMILY LAW AND RELIGION -THE INDIAN EXPERIENCE

By

Anil Malhotra and Ranjit Malhotra*

INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on the 26th day of November 1949 resolved to constitute India as a Union of States and a sovereign, socialist, secular, democratic republic. Today, a population of over one billion Indians live in twenty eight states and seven union territories within India. In addition, about twenty five million Indians called non-resident Indians, reside in foreign jurisdictions. Within the territory of India, spread over an area of 3.28 million sq. kms., the large Indian population comprised of multicultural societies professing and practicing different religions and speaking different local languages coexist in harmony in one of the largest democracies in the world.

The Indian Parliament, at the helm of affairs, legislates on central subjects in the Union and concurrent lists and state legislatures enact laws pertaining to state subjects as per the state and concurrent lists with regard to the subjects enumerated in the Constitution of India. Likewise, pertaining to the Judiciary, under article 214 of the Indian Constitution there shall be a High Court for each State and under Article 124 there shall be a Supreme Court of India. Under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all Courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures to its citizens “fundamental rights” which can be enforced directly in the respective high courts of the states or directly in the Supreme Court of India by issue of prerogative writs under Articles 226 and 32 respectively of the Constitution of

* Anil Malhotra and Ranjit Malhotra are partners in the firm of Malhotra & Malhotra Associates International Lawyers, Chandigarh, India. Anil Malhotra may be contacted at: anilmalhotra1960@gmail.com. Ranjit Malhotra may be contacted at: malhotraanjitindia@rediffmail.com.

India. Under the constitutional scheme, amongst others, freedom of religion and the right to freely profess, practice and propagate religion is sacrosanct and is thus enforceable by a writ.

Simultaneously, Part IV of the Indian Constitution lays down “directive principles of state policy” which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making laws. Under Article 44 of the Constitution in this part, the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. However, realistically speaking, to date, a uniform civil code remains an aspiration which India has yet to achieve and enact

How does the system of law and society work in India? In the background of an enforceable fundamental right of religion in a multicultural and diverse society professing different religions, how does a uniform civil code fit in? How do Indian Courts harmonize law and religion in a democratic, secular, sovereign, socialist Republic? What are the views expressed by courts in judgments on such issues? Do religious courts and extra judicial forums find acceptance in the Indian judicial system? Is a uniform civil code an illusion? Does family law in India need reform? Does judicial activism in India trigger an impetus for making changes in family laws? How are the clashes on issues of personal family laws resolved? Does custom override statutory family laws? Does child removal as fallout of broken marriages need to be curbed by legislation? Do non-resident Indians bring in foreign judgments contrary to Indian family law which Indian courts do not implement mechanically? These are only some conflict areas which will be dealt with in this paper, along with supporting case law in some areas of family law to see how best the current system seeks to handle them.

In the backdrop of the above brief description, this paper is a modest attempt to put together possible answers to the above questions and issues raised to examine the harmonious coexistence of law and religion in the Indian democracy in the light of different family law legislations enacted by the Indian Parliament and the views of the Indian Supreme Court expressed on the issues posed above.

EXISTING FAMILY LAW LEGISLATIONS PREVALENT IN INDIA

India is a land of diversities with several religions. The oldest part of Indian legal system is the personal laws governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislations in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given as hereunder.

The main marriage law legislation in India applicable to the majority population, constituted of Hindus, is known as The Hindu Marriage Act, 1955, which is an Act to amend and codify the law relating to marriage among Hindus. Ceremonial marriage is essential under this Act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The Act also applies to Hindus who reside outside the territory of India. Nothing contained in the Act shall be deemed to affect any right recognized by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act, 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act, 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act, 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

It may be pertinent to point out that the Indian Succession Act, 1925, is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt out and choose to be governed by their respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act, 1890 would apply to non-Hindus. Interestingly, Section 125 of the Code of Criminal Procedure 1973, provides that

irrespective of religion, any person belonging to any religion can approach a Magistrate to request maintenance. Therefore, apart from personal family law legislations, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

The Indian Parliament also enacted the Special Marriage Act, 1954, as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnizing marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act, 1969, a person has only to be a citizen of India to have a marriage solemnized under this Act outside the territorial limits of India.

The Parsi Marriage and Divorce Act, 1936 as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

The Christian Marriage Act, 1872, was enacted as an Act to consolidate and amend the law relating to the solemnization of the marriages of Christians in India and the Divorce Act, 1869 as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Muslim Women (Protection of Rights on Divorce) Rules, 1986, apply to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislations mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective enactments themselves. There is an organized system of designated

civil and criminal judicial courts within every state in India which works under the overall jurisdiction of the respective high court in the state. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided. In addition, the Indian Parliament has enacted The Family Courts Act, 1984 to provide for the establishment of family courts with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organized, well regulated and established hierarchy of judicial courts in India, there are still unrecognized parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorized and unwarranted bodies work without the authority of law and are not parts of the judicial system.

CONFLICT AREAS IN INDIAN FAMILY LAW:

To assess, evaluate, analyze and examine how different codified Indian family laws actually work in the Indian societal set up, how courts interpret them, and what lacunas exist in these individual family causes, it would be appropriate to deal with the individual subjects, as hereunder:

Marriage Laws- Societal Conflicts, Law and Realities

All the codified marriage legislations in India stipulate conditions of a valid marriage. The bone of contention in these stipulations hovers around two harsh realities- age at marriage and registration of marriages. The principal family law legislation in India i.e. The Hindu Marriage Act, 1955 does not render a marriage void or voidable in the event that the boy has not completed the age of twenty one years or the girl has not completed the age of eighteen years. Child marriages are performed even though The Child Marriage Restraint Act, 1929 provides punishment for solemnizing child marriages of boys below twenty years of age and girls below eighteen years of age. To add to the problem, India to this date does not have a compulsory requirement by law for registration of marriages. This practice is a harmony with reality. Child marriages in practically all religious communities in India are accepted practices, which obviously cannot be registered due to non-fulfillment of minimum age of marriage. Therefore the violation

of the condition of minimum age at marriage does not entail nullity of marriage since registration is optional and not compulsory.

However, the lack of will on the part of the Indian legislature to enact a compulsory law for registration of marriages has not gone unnoticed by the courts. The Supreme Court of India in **Seema vs Ashwani Kumar**, reported at **Judgments Today 2006(2) SC, 378**, has directed all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage. The Supreme Court of India in another unreported decision dated March 27, 2006 has stayed the legal validity of the marriages of minor girls below eighteen years of age, which had been earlier upheld by the two high court's orders. AT least seven states in India have a high incidence of child brides and the law does not take care of the anomaly to ban child marriages.

The orders of the Indian Apex Court may open a Pandora's box. Besides Hindus the problem will be with the other minority religious communities also. Even among Muslims, mere non registration of a marriage will not make it invalid. Codification of personal laws among some religious communities in India is itself a very debatable issue. Besides, consequences of non registration of marriages has created a large number of abandoned spouses in India deserted by non-resident Indians who habitually reside abroad. Times have changed; laws have not. Education, economic prosperity, agricultural improvements, cross border migration and western influences have changed practices and lifestyles in urban India while rural setups are still struggling with adherence to customary practices in family law matters. Will society catch up with law or will the legislature enact a law on the asking of the courts to change societal practices? This remains to be seen. However, the fact remains that until the rural masses in India are educated and motivated to change for the better, any change in laws may not really help. True change is not likely to come until the local society concludes that the unhealthy social edifices of child marriage must be

dismantled and that the exploitation of married women must cease. Awareness and motivation for change must come from within the community and cannot be enforced by any law.

Inter Caste Marriages: A National Interest

The Constitution of India guarantees the fundamental rights to equality, freedom and protection of life and personal liberty. Equality of laws and equal protection of laws is the touchstone and the spirit of these rights. Additionally, the Directive Principles of State Policy endeavor that the State shall strive to promote the welfare of the people in a social order in which justice, social, economic and political, shall inform all the institutions of national life. However, the fact remains that in India when young men and women marry outside their castes or community, it evokes strong sentiments and even honor killings even though there is no bar to inter caste marriages under any codified marriage law. In one such recent decision rendered by the Indian Supreme Court in **Lata Singh vs State of UP**, reported at **Judgments Today 2006(6) SC, 173**, it was held that the caste system is a curse on the nation and needs to be destroyed for the better. Acts of violence and threats against such inter caste couples are wholly illegal and those who commit them should be severely punished. The administration and police authorities all over the country were directed by the Supreme Court to ensure that no inter caste couple is harassed by anyone or subjected to any threat or act of violence. Truly, the message of the Court is clear, India of the twenty first century cannot be built on the basis of casteism. To amalgamate as a nation, inter caste and inter religious marriages among communities in India must be accepted by society. Barbaric practices of honor killings must be obliterated. But how far can court decisions achieve this? The government must enforce the law of the land and uphold the citizen's fundamental rights. A heavy hand is required to check this menace. Even realization must dawn on citizens that in the path to development such archaic practices retard growth, reverse progress and kill the spirit of equality. Therefore, law and society must be in tandem to root out such prejudicial practices.

Unconstitutional Extra Judicial Courts: A blow to Codified Laws

Community practices in certain states and in certain religious denominations In India have led to the creation of community or religious courts which do not have the legitimate backing of

the system of law and have no sanctity in the official legal system. It is in the matter of inter caste or inter religious marriages or divorces that such self-styled extra-constitutional authorities take upon themselves the power of courts of law to issue community mandates to people within the community. Such religious edicts result from summary hearings often in violation of fundamental rights guaranteed by the Constitution of India. In this regard, the Supreme Court of India on March 27, 2006 in **Vishwa Lochan Madan vs Union of India and others**, issued notices to the central government, sState governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a challenge to the Indian judicial system. In this petition filed as a Public Interest Litigation petition in the Supreme Court of India, Advocate Vishwa Lochan Madan sought immediate dissolution of all Islamic and Shariat Courts in India. Earlier, on, August 16, 2005 in **Vishwa Lochan Madan vs Union of India and others**, the Supreme Court of India had also issued notices to the Indian States of Uttar Pradesh, Haryana, Assam, Madhya Pradesh, Rajasthan, West Bengal and Delhi, where, according to the petition, Islamic courts had been formed and were posing a challenge to the judicial system of the country.

The Petition sought an immediate dissolution of all Islamic and Shariat courts in India, alleging that the AIMPLB claimed to have established Darul Qaza (Muslim Courts) in India at Thane (Maharashtra), Akola Dholiya (Rajasthan), Indore (Madhya Pradesh), South and East Delhi, Asansol and Purulia (West Bengal), Lucknow and at Sitapur (Uttar Pradesh). Citing the fatwa (a religious decree) issued by the Deoband-based seminary in the State of Uttar Pradesh known as Darul-Uloom in an earlier rape case and the supporting stand of AIMPLB, the petitioner pointed out that the criminal law was not allowed to take its natural course as the entire issue was said to be hijacked by the Muslim clerics.

The petitioner sought a ban on the establishment of such Islamic courts, along with a declaration that these fatwas have no legal sanctity, and requested the court to direct the central and the state governments to take effective steps to dissolve all Darul Qazas and Shariat Courts in India. In addition, the petition further sought a direction from the court to the AIMPLB and Darul Uloom, Deoband, other seminaries and Muslim organizations, to refrain from establishing a parallel Muslim judicial system (Nizam-e-Qaza).

A direction from the court was also sought to restrain these organizations from interfering with the marital status of Indian Muslim citizens or passing any judgments, remarks, fatwas or deciding matrimonial disputes amongst Muslims. This petition no doubt raises a crucial issue as to whether there could be two parallel legal systems in operation—one legal and the other religious, particularly when the Constitution of India prohibits discrimination on grounds of caste or religion, and whether the right to freedom of religion could be extended to the establishment of a parallel judicial system. Till recently, the matter was still pending final adjudication in the Supreme Court of India and no conclusive final decision stands reported on the said issue by the Supreme Court.

On similar lines exist the caste panchayats (village council), especially in the State of Haryana in India. These caste panchayats throw several lives into turmoil, often by declaring marriages invalid. Invariably their victims belong to the weakest sections of society. Traditionally, caste panchayats have played a powerful role at the village level in several other states of the country also. However, khap panchayats (caste based village councils) are not elected bodies and their decisions are not enforceable by law, as such extra-constitutional bodies have no sanctity or recognition in law. They however, derive support from community recognition.

Khap panchayats are so powerful because of their ability to mobilize a large number of people that they appear to be democratic from outside, but they are not. They exclude women, the youth, as well as the groups who are lower down in the caste hierarchy in the village.

Recently, in response to a public interest litigation (PIL) filed by the Haryana unit of the People's Union for Civil Liberties (PUCL), the state's high court directed the government to protect the life and liberty at all costs of a couple who had entered in an inter caste wedlock. The high court also directed the authorities to ensure that nobody coerced the couple to change the status of their marriage. A similar situation had arisen when the Punjab and Haryana High Court heard a number of writ petitions challenging the fatwas issued by the self-styled caste based khap panchayats in the State of Haryana, ordering married couples to dissolve their marriages and live separately and ordering their expulsion from the villages on their refusal to do so. Another recent village

panchayat dictate that a divorced Muslim woman could remarry her husband only if she married and divorced her brother-in-law first.

The positive decisions by the courts of law are no doubt a setback to the caste panchayats of Haryana which have a powerful influence in its socially and culturally backward villages. A positive step has been taken by the court but there cannot be a constructive outcome until the society as a whole decides to fight back to demolish this age old obsolete system. The executive authorities have done little to check the extra-judicial activities of these extra constitutional courts which are a blatant interference with the fundamental rights of the citizens. The responsibility of the state cannot be abdicated. If this be so, judicial Courts in India seem to be the best recourse in giving relief in individual matters involving blatant violation of fundamental Rights of the citizens which are dictated by community councils enforcing their edicts by force and extra-judicial means on alleged moral grounds. But then, should courts grant relief as an alternative to ailing legislation? Courts may not legislate but must vindicate human rights. Clearly, the duty of the state to enforce the law of the land is the need of the day. The courts unhesitatingly should strike down all mandates of any such extra-judicial bodies which have no legal sanctity in a civilized society.

Divorce-Customs, Practice and Law:

The two principal family law legislations in India, The Hindu Marriage Act, 1955 and The Special Marriage Act, 1954 contain three sets of separate grounds in a three-tier divorce structure in these legislations. These are the fault grounds, break-down grounds on non-compliance with judicial separation or restitution of conjugal rights, and grounds of mutual consent. Irretrievable break-down of marriage simpliciter is not a ground for divorce under any codified Indian family law. The Parsi Marriage and Divorce Act, 1936 (as amended) and the Divorce Act, 1869 (as amended) follow suit. The Dissolution of Muslim Marriages Act, 1939 sets out the grounds for a decree for dissolution of marriage of Muslims.

Custom and the effect of codified law:

Section 29 of The Hindu Marriage Act, 1955 gives statutory recognition to customary divorces. This in effect means that parties relying on a custom need not go to court and obtain a decree for divorce. However, the onus on the party who relies on a custom is indeed weighty and the custom should be ancient, certain, reasonable and not opposed to public policy. Even though courts take judicial notice of customs, the validity of a deed of dissolution of marriage under a customary practice has to be established by substantial cogent evidence by the person propounding such custom. In **Subramani Vs. M. Chandralekha**, reported at **Judgments Today 2005 (11) SC 562**, the Apex Court following well-settled earlier principles of law, held that since there was no custom prevalent in the community to which the parties belonged for dissolution of marriage by mutual consent, the alleged deed of dissolution marriage could not be executed.

It is common for parties in India to attempt to use customary divorce practices as a short cut to statutory procedures, but with the vigilant judiciary, such abuse of the process of law does not generally succeed. Regardless, multiple marriages are often solemnized in contravention of codified law by taking advantage of non-existent customs. To this extent neither law nor the courts come to rescue of such parties. However, Section 16 of The Hindu Marriage Act clearly provides that notwithstanding that such a marriage is null and void, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate. Consequently, even though spouses may not benefit, the statute protects and provides property and other inheritance rights to children of such unions. Conferring such rights upon children has been recently reiterated by the Supreme Court of India in **Bhogadi vs. Vuggina** reported at **2006 (5) Supreme Court Cases 532**. The policy of law is therefore clear to provide beneficial effects to the offspring without condoning the contravention and violation of marriage laws. Customs are slow to, but their misuse must be prevented and curtailed.

Divorce by Irretrievable Break Down of Marriage: Is it now a necessity?

Keeping in mind that the institution of marriage in Indian society is largely still a sacrament and not a contract, especially under The Hindu Marriage Act, any major overhaul of the law may be counter-productive to the very concept of Hindu Marriage. The existing three-tier divorce

structure in India, largely applicable to all communities i.e. fault grounds, break down theory and the mutual consent principle provide the codified and statutory grounds for divorce in Indian courts. Two different high court decisions i.e. **Yudhister Singh Vs. Sarita 2004 (1) Hindu Law Reporter 228**, **Kakali Dass Vs. Dr. Asish Kumar 2004 (1) Hindu Law Reporter, 448** and a Supreme Court of India decision in **Sham Sunder Vs. Sushma, Judgments Today 2004 (8) SC 166** give a clear indication that the ground of irretrievable break down of marriage should be rarely used.

However, the some recent decisions of the Supreme Court of India indicate that the Apex Court has recommended that “irretrievable break down of marriage” should be added as a ground for divorce on the statute book. The Supreme Court in **Naveen Kohli Vs. Neelu Kohli, Judgments Today 2006 (3) SC 491** has recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act to incorporate irretrievable break down of marriage as a ground for divorce. It is not uncommon for the Apex Court to apply this principle in dissolving marriages as was recently done in **Durga Prasanna Vs. Arundhati**, reported at **Judgments Today 2005 (7) SC 596**, following five earlier precedents of the Apex Court rendered in the last five years.

In view of the above noted position of law, in the opinion of the authors, a civilized parting of spouses where a marriage has irretrievably broken down should be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the Court for such relief. This will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted, time consuming legal battle on trumped-up grounds. Secondly, recourse to ex-parte divorce in foreign jurisdictions by non-resident Indians against hapless spouses on Indian soil may decline once a proper legal option of irretrievable break down is available to spouses on Indian soil. However, to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Retaining the ceremonial and sacramental concept of marriage, irretrievable break down, hedged with safeguards can be introduced where both parties consent to it. To harmonize and blend modern family requirements in urban areas with traditional Indian concepts of family law, the above middle path can be best advocated.

Child Removal – A Fallout of Broken Marriages

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Caught in cross fire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

Cross border family relationships arising from such exchange has carved out a new niche in the jurisdiction of family law disputes. Such problems have no ready-made solutions in the conventional legislations prevailing within the legal system in India. The net result: the innovative judicial system in India with its dynamic jurisprudence when invoked, provides a tailor-made answer for every individual case. But then, this does not provide a consistent, uniform and universal remedy to be adhered to in an international perspective. What then is the answer in a highly sensitive area of family law disputes involving conflict of jurisdictions in inter parental child custody cases when children are removed to India in violation of inter-parental rights or infringement of foreign court orders.

In a recent decision dated March 3, 2006 the High Court of Bombay at Goa in a case between a 62 yeas old American father and 39 yeas old British mother residing in Ireland, and who were litigating over the custody of their 8 year old minor daughter, said to be illegally detained in Goa by the father, the court declining the issuance of a writ of habeas corpus, held that the parties could pursue their remedies in normal civil proceedings in Goa. The court dismissing the mother's plea for custody, concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that the status quo be observed. This in effect meant that the 8 year old minor girl must continue to live in Goa in the father's house, without her mother or any other female family member.

The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and has now 75 contracting nations to it. The Convention seeks to secure the prompt return of children wrongfully removed to or retained in any contracting State and ensures the rights of custody and access under the laws of such contracting states. India unfortunately, is not a signatory to the Hague Convention and from practical experience it can be stated that the principles laid down in the Convention are not applicable in India.

The above situation promotes and encourages child removal to India by an offending parent and deprives the child of having custody rights determined by the laws of the country where he/she was normally resident. It also subverts the best interest of the child, as the litigation in India gets converted into a fight of superior rights of parents, whereas the real issue of the welfare of the child becomes subordinate. Practical experience also shows that foreign courts now largely disallow children from overseas jurisdictions to be brought to India, out of a real fear that they will not be returned to the country of their residence.

In the totality of the emerging scenario, it is now practically seen that in the absence of any Indian legislation on the subject, there is no uniform pattern of decisions to resolve issues of custody and contact which arise when parents are separated and live in different countries. The recent decision quoted above and another child custody dispute where a US Court's declined the return of children to India despite the Supreme Court of India's direction, shows that the time has now come for some international perspective in this regard. In January 2005, the British government appointed Lord Justice Thorpe as Head of International Family Law in the UK judicial system to promote development of international instruments and conventions in the field of family law, the goal of greater International judicial collaboration. Pakistan has signed a Judicial protocol between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for cooperation between judicial authorities of the two countries on such issues.

In the larger interest of children at risk, the conflict of jurisdiction of courts must take a back seat. It is therefore, the need of the hour that the Indian legislature should consider enacting legislation

to protect the rights of the abducted child, to attempt to resolve the clash between the rule of domicile and the nationality rule. Perhaps, until such legislation is enacted, the Supreme Court of India could well lay down some uniform guidelines to be consistently followed in interparental child abduction from foreign jurisdictions. India must not be promoted as a haven for wrongfully removed children.

Enforcement of Judgments and Orders Of Foreign Courts In India Arising In Family And Matrimonial Matters In Overseas Jurisdictions:

With the ever increasing multifold population of Indians migrating and settling in foreign jurisdictions, the link with their home country does not sever. Family ties, connections of property and moveable assets, and numerous other continuing connections with India, often lead to cross border litigation in human relationship matters. Situations abound when a non-resident Indian invokes the jurisdiction of the foreign court where he is resident and convinces the overseas court to pass favorable orders, which are thereafter sought to be executed through the courts of law in India.

Indian law reports contain a number of judgments on matters relating to marriage, divorce, maintenance, succession, settlement of matrimonial property, child custody, parental abduction of children from foreign jurisdictions in matrimonial disputes and cases relating to adoption. These foreign court orders once having been passed are sought to be enforced or executed in India through the medium of the courts. Since there exists no separate provision for recognition of foreign matrimonial judgments or other foreign decisions in related matters in the Hindu Marriage Act, 1955, Special Marriage Act, 1954, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956, Hindu Minority and Guardianship Act, 1956 or in any other Indian legislation relating to family matters, the only recourse lies in Section 13 of the Indian Code of Civil Procedure(CPC) which is the general provision of law relating to conclusiveness of judgments by foreign courts.

The provisions of Section 13 CPC are fully applicable to matrimonial matters decided by foreign courts. In such a situation, the precedents giving instances of such reported matters are therefore

available only in the shape of judicial pronouncements of Indian courts who have from time to time rendered a laudable service in interpreting foreign court orders in the best interests of human relationships rather than executing them simpliciter in letter and spirit. The Indian judiciary in such a pivotal role is extremely humane and considerate in family matters by implementing the foreign court orders in a practical way rather than a mechanical execution of the Order or judgment of the overseas court. Perhaps this openness and fluidity is possible since the Indian Courts are not strictly bound by a foreign court order in family matters but when asked to implement or enforce the same, the Indian courts apply principles of good conscience, natural justice, equity and fair play thereby rendering substantial justice to parties in litigation. This can be best seen in decisions of some Indian courts which have resulted by the Court being asked to implement or execute a court order or judgment arising from a foreign jurisdiction.

A very commonly arising issue pertains to recognition and indirect implementation of divorce decrees of foreign courts produced in India by spouses residing in foreign jurisdictions. In this regard, different views have been expressed by different Indian courts at different points of time. Consequently, the Supreme Court of India in 1991 laid down fresh comprehensive guidelines for the recognition of foreign matrimonial judgments by the courts in India. It is significant that under Article 141 of the Constitution of India, the law declared by the Supreme Court be binding on all courts within the territory of India. The Apex Court in **Y. Narasimha Rao vs. Y. Venkata Lakshmi, reported at Judgments Today 1991 (3) Supreme Court 33**, made it clear that Indian courts will not recognize a foreign judgment if it had been obtained by fraud, which need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts. By this ruling, the Supreme Court, on the facts of the case declared a divorce decree entered by a US court unenforceable in India. Interpreting Section 13 of the Indian CPC, the Court laid down broad principles to be followed by Indian courts with special emphasis on matrimonial judgments.

Likewise in **Neeraja Saraph Vs. Jayant Saraph** reported at **Judgments Today 1994 (6) Supreme Court 488**, on the facts of the case, the Apex Court came down heavily on the erring non-resident husband residing in a foreign jurisdiction who had abandoned his Indian wife without providing for any maintenance to her.

The proposed guidelines in both the above-mentioned Supreme Court rulings are meaningful and if implemented can mitigate the plight of wives dumped in India by foreign husbands. Though, the Apex Court has clearly stated the need for suitable legislation on the subject, as yet no Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, the judicial verdicts of courts of law are the only available law in India to come to the rescue of hapless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained by default by spouses from overseas jurisdictions. Thus, some codified law in India on the subject is now an absolute necessity.

A reading in totality of the matters in the overseas family law jurisdictions gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has become important that some composite legislation is enacted to deal with the problems of non-resident Indians to protect them from judgments from foreign courts imported to India for implementation of their rights. The answer therefore lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Until this is done, foreign court judgments in domestic matters will continue to come before the courts of India, and those courts will continue to use their best efforts to interpret them in harmony with the Indian laws and to attempt to do substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear: the Indian courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law and the best interest of the parties, rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and until the Indian Legislature comes to rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian judiciary which is rendering a yeoman service.

Dowry and the Law: A Social Menace.

The evil of dowry, i.e. any property or valuable security given or agreed to be given by parties to the marriage or to their parents and given before or at any time after the marriage in connection with or in consideration of the marriage, is widely rampant in India. Though, The Dowry Prohibition Act, 1961 was enacted to prohibit the giving and taking of dowry, but this social menace in the institution of marriage is a deep rooted community practice which carries on despite stringent court verdicts. The practice by which dowry seekers attempt to justify it, by quoting examples from Hindu scriptures has percolated to all religions in India though it has no customary or religious sanctity attached to it. Both the Dowry Prohibition Act and Section 498-A of the Indian Penal Code (IPC) deal with dowry-related harassment of a married woman. Unfortunately, sometimes dowry leads to death by hanging or burning of a helpless girl tortured for the greed of money. Dowry deaths by burning or suicide have become a ponderous point. Section 304-B was introduced in the Indian Penal Code by the Dowry Prohibition Amendment Act, 1986 and Section 113-B of The Indian Evidence Act, 1872 was also amended in 1986 to reinforce the statutory presumptions of dowry deaths. The decisions of the Supreme Court of India in **Vidhya Devi Vs. State of Haryana** reported at **All India Reporter 2004 SC 1757**, **Surinder Kaur Vs. State of Haryana** reported at **All India Reporter 2004 SC 1747** and **Kunhiabdulla Vs. State of Kerala, All India Reporter 2004 SC 1731** show that dowry deaths by suicide result in conviction of only one person whereas dowry deaths by burning result in convictions of all concerned. This anomaly of law does not mitigate the crime. Therefore, if a married woman commits suicide on account of the dowry menace, the law and the law courts ought to be sensitized to the crime of the silent sufferer. In societal terms, the menace of dowry cannot be eliminated until the masses are educated about the ills of this malpractice and awareness comes from within. At the same time, law must come down with a heavy hand on dowry seekers and provide severe deterrent punishment, to be quoted as an example for others who follow it. Harsher and more stringent penalties in law must be further advocated.

Uniform Civil Code – An Aspiration or an Illusion.

Article 44 of the Constitution of India requires the state to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique

blend and merger of codified personal laws of Hindus, Christians, Parsis and to some extent of laws of Muslims. However, there exists no uniform family related law in a single statutory book for all Indians which is universally acceptable to all religious communities who co-exist in India.

Indian Case Law: Directions to enact a Code.

The Supreme Court of India for the first time directed the Indian Parliament to frame a Uniform Civil Code in 1985 in the case of **Mohammad Ahmed Khan Vs. Shah Bano Begum** reported as **All India Reporter 1985 SC 945**. In this case a penurious Muslim woman claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure after her husband pronounced triple Talaq (divorce by announcing the word “Talaq” thrice). The Apex Court held that the Muslim woman had a right to get maintenance under Section 125 of the Code and also held that Article 44 of the Constitution had remained a dead letter. To undo the above decision, the Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim Woman for maintenance under Section 125 of the Court was enacted by the Indian Parliament.

Thereafter, in the case of **Sarla Mudgal Vs. Union of India** reported as **All India Reporter 1995 SC 1531**, the question which was raised was whether a Hindu husband married under Hindu law can, by embracing Islamic religion, solemnize a second marriage. The Supreme Court held that a Hindu marriage solemnized under Hindu Law can only be dissolved under The Hindu Marriage Act and conversion to Islam and marrying again would not by itself dissolve the Hindu marriage. Further, it was held that a second marriage solemnized after converting to Islam would be an offence of bigamy under Section 494 of the Indian Penal Code. In this context, the views of Mr. Justice Kuldip Singh are pertinent:

“Where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the ‘Uniform Civil Code’ for all the citizens in the territory of India.”

Thus, the Supreme Court reiterated the need for Parliament to frame a common civil Code which will help the cause of national integration by removing contradictions based on ideologies. The Directive Principle of enacting a uniform civil Code has been urged by the Apex Court

repeatedly in a number of decisions as a matter of urgency. Unfortunately, in a subsequent decision reported as **Lily Thomas Vs Union of India, 2000(6)Supreme Court Cases 224**, the Apex Court, dealing with the validity of a second marriage contracted by a Hindu husband after his conversion to Islam, clarified that the court had not issued any directions for the codification of a common civil code and that the judges constituting the different benches had only expressed their views in the facts and the circumstances of those cases. Even the lack of will to do so by the Indian government can be deciphered from the recent stand stated in the Indian press. It has been reported in the Asian Age dated August 5, 2006, by the Press Trust of India (the Official Government News Agency) that the Indian government does not intend to bring legislation to ensure a uniform civil code because it does not want to initiate changes in the personal laws of minority communities. However, this ought not to deter the efforts of the Supreme Court of India in issuing mandatory directions to the central government to bring a common civil Code applicable to all communities irrespective of their religion and practices in a Secular India. Hopefully, the Apex Court may review its findings in some other case and issue mandatory directions to the central government to bring a Common civil code applicable to all communities irrespective of their religion.

Secularism and The Uniform Civil Code:

The Preamble of the Indian Constitution resolves to constitute a “Secular” Democratic Republic. This means that there is no State religion and that the state shall not discriminate on the ground of religion. Articles 25 and 26 of the Constitution of India as enforceable fundamental rights guarantee freedom of religion and freedom to manage religious affairs. At the same time Article 44 which is not enforceable in a Court of Law states that the state shall endeavor to secure a uniform civil code in India. How are they to be reconciled. What will be the ingredients of a uniform civil code. Since the personal laws of each religion contain separate ingredients, the uniform civil code will need to strike a balance between protection of fundamental rights and religious principles of different communities. Marriage, divorce, Succession, inheritance and maintenance can be matters of a secular nature and law can regulate them. India needs a codified law which will cover all religions in relation to the personal laws of different communities.

Critics of the uniform civil code think that the true principles of Muslim law remain eclipsed by its extensive alleged misreading over the years. It is suggested by Tahir Mahmood, an eminent scholar in his article in *The Hindu* dated July 30, 2006 titled, “Muslim Personal Law : Clearing The Cobwebs” that “an Indian Code of Muslim Law based on an eclectic selection of principles from the various schools of Shariat is the ideal solution to all the contemporary problems of Muslim Law”. In another report dated May 11, 2006 in *The Hindu*, it has been reported that the Supreme Court of India dismissed a public interest litigation petition challenging the legality of the customs of polygamy, talaq and divorce practiced by Muslims under personal laws. The plea for a direction to the Central Government to make Uniform Marriage Laws for all communities was rejected on the ground that it is for Parliament to change or amend the law. Thus, the debate is endless and the issue remains unresolved.

To sum up, it can be concluded that for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a unified code is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of Secularism. India needs a unified code of family laws under an umbrella of all its constituent religions. Whether it is the endeavor of the State, the mandate of the court or the Will of the people is an issue which only time will decide.

Judicial Activism in Family Laws: A Turning Point.

A series of decisions by the Supreme Court of India in the areas of family laws in the recent past has gone to show that the Apex Court is motivating a lot of positive and well meaning reforms which have become necessary over a period of time. Three recent decisions of the Apex Court can be cited in support of this proposition:

In, **In Re: Enforcement and Implementation of Dowry Prohibition Act, 1961**, reported as **Judgments Today 2005(5) SC 71**, the Apex Court directed the Indian central and state governments to implement all the interim directions issued by the Supreme Court earlier and take effective steps for framing rules and enforcing the provisions of the Dowry Prohibition Act, 1961

by devising measures to create honest, efficient and committed machinery for the purposes of the implementation of this Act.

In **Sushil Kumar Sharma Vs Union of India and others**, reported as **Judgements Today 2005(6) SC 266**, the Apex Court, upholding the constitutional validity of Section 498A of the Indian Penal Code, held that the object of Section 498A is prevention of dowry menace and to check cruelty and harassment of women. Therefore, the court concluded the provision does not offend the Constitution of India.

In **St. Theresa's Tender loving Care Home Vs State of Andhra Pradesh** reported as **Judgments Today 2005(9) SC11**, the court held that the workings of the homes run by state governments for abandoned and destitute children and the process of offering them for adoption need to be seriously improved and the central and state governments would do well to look at these problems with the humanitarian approach and concern they deserve.

However, the Supreme Court has also tested various aspects of personal laws on the touchstone of fundamental rights. In **Gita Hariharan Vs Reserve Bank of India** reported as **1999(2) Supreme Court Cases 228**, the Supreme Court interpreted Section 6 of The Hindu Minority and Guardianship Act, 1956 to mean that the mother is also a natural guardian and irrespective of whether the father was unfit or not, the mother should also be given equal rights as a natural guardian. In **John Vallamattom vs. Union of India, All India Reporter 2003 SC 2902**, Section 118 of the Indian Succession Act was struck down as unconstitutional, as it was held to be discriminatory against Christians in imposing unreasonable restrictions on the donation of their property for religious or charitable purposes by Will. In **Danial Latifi Vs Union of India** reported as **2001(7) Supreme Court Cases 740**, a Constitutional Bench of the Supreme Court gave a categorical finding that in view of their interpretation of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the provisions of the Act were not in violation of Articles 14 and 21 of the Constitution, which fundamental rights guarantee equality of law and right to life and personal liberty.

The views of the Indian Apex Court on the issue of registration of marriages, inter caste marriages, child marriages, Dowry Prohibition Act, irretrievable breakdown of marriage, uniform civil code

and a secular approach have already been referred to earlier. A legislative setup which is slow to respond to societal changes and a proactive judiciary which is keen to motivate reforms in law is therefore clearly visible on the Indian horizon. Even in matters affecting environment, pollution and health of people, the role of the judiciary in India has been very constructive. The vibrant, dynamic and open jurisprudential system in India is amenable and flexible to changing needs of people. We could therefore well have reform in family law with the views of the court even if there is opposition from religious communities in respect of personal laws. If a uniform civil Code does not come as a result of legislation, decisions of courts will always suggest reforms to improve the plight of children and women who are affected the most. The Indian judiciary indeed deserves to be hailed in this regard for its yeoman efforts in this regard, or the welfare of Indians

CONCLUSION:

A net analysis of the various propositions and view points discussed above drives home the ideal solution that for Indians there is needed one indigenous Indian law applicable to all its communities which coexist democratically. Analytically speaking, the answers to the social issues discussed above are within the system. Codification of a unified civil code may be the ultimate solution. Other measures will only tide over time. Judicial verdicts will keep the momentum going. Accommodating personal laws of all religions under such a code is an uphill task. It may take time. The legislature will ultimately have to perform this onerous duty of drafting the Code. Religion will have to keep pace with law. Unity in India exists in its diversity. Times have moved ahead, but personal laws have not kept pace. The courts in India perform a Herculean task in carving out solutions on a case to case basis. The executive and the legislature arms of the government in India however now need to contribute to provide the much needed solutions. In the e-age today, the path to progress must be chartered with harmony at home. As the largest democracy in the world, India has an opportunity to be a role model in various aspects of family laws. Maybe, with further changes and amendments in some aspects, a better role model to emulate may emerge in the Indian sub continent.