

THE NRI LAWS OF INDIA:MARRIAGE RELATED PROBLEMS AND THE LAW

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In common language a citizen of India who stays abroad for employment/ carrying on business or having vacation outside India or stays abroad for uncertain period under certain circumstance is called a Non -Resident Indian. Income Tax Act and Foreign Exchange Regulation Act also defines NRI.

Transnational migration of people is not new phenomenon but the new heights that is now scaling thanks advancement in field of communication and transportation technologies and the increasing interdependence of nation states is unprecedented in the history of the humankind. In today's globalized world as well as "global village" the movement of men and women within a continent or from one continent to another for different reasons, ranging from employment to business or from education to tourism, marriages and divorces on a transnational scale are on the rise. With the increase in number of foreign marriages and divorces, we are now witnessing a significant rise in the matrimonial disputes that may destroy sanctity of family, it is being considered fundamental unit of the society.

Due to wide divergence among personal laws; courts of different countries are now confronted with insuperable difficulties in adjudicating disputes arising therefrom. Globalization and greater mobility of the world population are bound to make the task of the courts more difficult than ever. Advances in the field of Information technology especially internet have brought to the fore fresh problems as far as celebration of foreign marriage is concerned. As a result of these developments it is not unusual to come across cases where husband and wife reside in different countries, possess domicile of a third country and their children are residing in fourth country.²

The legal problems that marriages and decrees of divorce with international dimensions give rise to also increasing due to reasons stated above. Many Indian men and women have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence giving rise to many matrimonial disputes.

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² Govindaraja, V. C., and C. Jayaraj, eds. *Non Resident Indians and Private international Law*. Gurgaon: Hope India Publications, 2008.

I. MATRIMONIAL PROBLEMS FACED AS A RESULT OF THE NRI MARRIAGES:

National Council for women in the “Regional workshop on problems relating to NRI Marriages” held at Chandigarh in the year 2004; has brought into light typical instances of the issues that arise in NRI marriages that have been repeatedly shown up in the actual case studies from different states of the country:

- Woman married to NRI who was abandoned even before being taken by her husband to the foreign country of his residence.
- Woman who went to her husband’s home in the other country only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill-treated by him in several other ways. She was therefore either forced to flee or was forcibly sent back
- Woman who was herself or whose parents were held to ransom for payment of huge sums of money as dowry, both before and after the marriage, her continued stay and safety in her husband’s country of residence depending on that.
- Woman who reached the foreign country of her husband’s residence and waited at the international airport there only to find that her husband would not turn up at all.
- Woman who was abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay on in that country.
- Woman who learnt on reaching the country of her NRI husband’s residence that he was already married in the other country to another woman, whom he continued to live with. He may have married her due to pressure from his parents and to please them or sometimes even to use her like a domestic help.
- Woman who later learnt that her NRI husband had given false information on any or all of the following: his job, immigration status, earning, property, marital status and other material particulars, to con her into the marriage.
- Woman whose husband, taking advantage of more lenient divorce grounds in other legal systems, obtained ex-parte decree of divorce in the foreign country through

fraudulent representations and/ or behind her back, without her knowledge, after she was sent back or forced to go back to India or even while she was still there.

- Woman who was denied maintenance in India on the pretext that the marriage had already been dissolved by the court in another country.
- Woman who approached the court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdiction of courts, service of notices or orders, or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country to make her legal action.
- Woman who sought to use criminal law to punish her husband and in-laws for dowry demands and/ or, or matrimonial cruelty and found that the trial could not proceed as the husband would not come to India and submit to the trial or respond in any way to summons, or even warrant of arrest.
- Woman who was coaxed to travel to the foreign country of the man's residence and get married in that country, who later discovered that Indian courts have even more limited jurisdiction in such cases.
- Woman who had to fight nasty legal battles for custody of her children and for child support, and to bring them back with her after she was divorced or forced to leave, sometimes even facing charges of illegally abducting her own children.
- Many women have also approached the Commission seeking redressal of their grievances having been deserted by their NRI Spouses.³

³http://ncw.nic.in/PDFFiles/Book-NRI_Marriage.pdf; last visited on September 25, 2012.

II. THE PRESENT LEGAL STATUS ON DISPUTES RELATING TO NRI MARRIAGES:

To deal with a large number of foreign decrees in matrimonial matters, India like other countries is in need of well-developed body of private international law rules on solemnization and reorganization of marriages, recognition of a foreign decree of divorce, nullity of marriage, legitimacy, custody of children etc. But unfortunately, the rules of private international law as applied in this country are not codified and are scattered in different enactments like Code of Civil Procedure, The Special Marriage Act , the Indian succession Act, The Indian Divorce Act etc.in addition some rules have been evolved by our courts but their overall approach to the matrimonial dispute with international element has been deeply influenced by the English rules of Private International Law whether common law rules or statutory rules. The research will deal with two aspects of the legal position on NRI marriages in detail namely marriage and divorce.

A. Marriage:

The country also needs definitive rules for recognition of foreign marriages and their solemnization here. The problem is complex one given the fact that marriages are governed here by personal laws of different communities. The Hague Marriage Convention has already laid down some common principles in this regard. But India has not accepted it yet.

Also Private International Law rules relating to solemnization of foreign marriages and the recognition of such marriages differ from one legal system another. Apart from a wide divergence among states in respect of the concept of marriage, there is a wide divergence as to the circumstances in which a marriage will be valid.

The special marriage act does not only permits civil marriage between any of the persons in India or abroad but also provides for the registration of such marriage .any such marriage whether performed in this country or abroad, whether performed as

civil marriage or as a religious marriage, and regardless of the fact as to which community religion parties belong to can be registered under the Act.⁴As a result of registration the marriage is deemed to be solemnized under the Act from the date on which a certificate of marriage has been finally entered into the marriage certificate and all provisions of the Act become applicable to the parties. The act also provides for dissolution of a marriage by mutual consent of the parties.⁵ The foreign married couples and the foreign domiciled couples can take advantage of this provision. The most notable feature of the act is that it avoids the conflict of inter-communal and inter- religious laws that may arise because of the fact that parties to marriage belong to different communities or different religions.

It is an established principle of Indian private international law that a marriage to be formally valid must comply with the *lex loci celebrationis*(law of the place where marriage is celebrated). The Foreign Marriage Act, 1969 which is modelled on the English Foreign marriage order, 1964 provides for consular marriages if one of the parties to the marriage is an Indian national. Before looking into the Foreign Marriage Act, it is necessary to look into the fact that the Special Marriages Act, 1954 provides that the marriages abroad between citizens of India who are domiciled in India might be solemnized under it.

Section 4 in The Special Marriage Act, 1954 provides for the conditions relating to solemnization of special marriages.-

“Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act.”

The word used here is “person” and not “citizen”. It is held by the Himachal Pradesh High Court in *Marian Eva v. State of Himachal Pradesh* that marriage under the special marriage act may be solemnized between two citizens of India or two foreigners or between a foreigner and a citizen.⁶ The Kerala High Court has taken the same view in *Rajeev v. State of Kerala*.⁷

⁴ Section 15 ,Special Marriage Act, 1956.

⁵ Section 28, Special Marriage Act, 1956.

⁶ AIR 1993 HP 7

⁷ (2001) 1 Ker LT 578

But the Special Marriage Act contained no provisions for marriages abroad where one of the parties alone was a citizen of India. The Foreign Marriage Act, 1969 which has been enacted to implement the 23rd Law Commission Report providing for solemnization of marriage between parties one of whom at least is a citizen of India in a foreign country. The act provides for an enabling form of marriage more or less on the same lines as the special marriage act, 1954 which can be availed outside India where one of the parties to the marriage is an Indian citizen. The form of marriage provided under the act is not in suppression of but only in addition to or as an alternative to any other form that might be permissible to the parties. Section 4 of the Act lays down that a marriage between parties one of whom at least is an Indian citizen may be solemnised under this Act by or before a Marriage officer in a foreign country. Such marriage shall be solemnised at the official house of the Marriage officer with open doors between the prescribed hours in the presence of at least three witnesses. The marriage may be solemnised in any form which the parties may choose to adopt. But such marriage shall not be complete and binding on the parties unless each party declares to the other in the presence of the marriage officer and the three witnesses and in any language understood by the parties.⁸ where the said declaration is made in any language which is not understood by the Marriage officer or by any of the witnesses, either of the parties shall interpret or cause to be interpreted the declaration in a language which the marriage officer as the case may be, and such witness understand. The essential conditions which are required to be fulfilled at the time of marriage are:

- a) Neither party has a spouse living
- b) Neither party is an idiotic or lunatic
- c) The bridegroom has completed the age of 21 years and bride the age of 18 years at the time of marriage
- d) The parties are not within the degrees of prohibited relationship.

However, where the personal law or a custom governing at least one of the parties permits of a marriage between them such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.⁹ The act

⁸ Section 12, Special Marriage Act, 1956.

⁹ Section 4, Special Marriage Act, 1956.

lays down procedure for solemnization of foreign marriages. Section 11 is very important provision from the point of view of conflict of laws. It lays down marriage prohibited by *lex loci celebrations* or marriages appearing to be in contravention of international law or the comity of nations will not be solemnised by the marriage officer.

Although in through various legislations and some cases our courts have tried to develop new rules for recognition of a foreign judgment in the matrimonial cases by putting an innovative interpretation of the statutory provisions, there are still gaps, loopholes and ambiguities in the existing law.

B. Divorce:

The Indian law of recognition of foreign divorces is also not well developed. The general provisions relating to recognition of foreign judgments and decrees are also applied to the recognition of foreign divorces. Section 13 of the Code of Civil procedure 1908 embodies a fundamental principle of private international law that a judgment delivered by foreign court of competent jurisdiction should be respected and enforced. The Indian courts have to accord-recognition to a foreign judgment not by way of courtesy but on considerations of justice, equity and good conscience. It is true that different countries have different rules of private international law but there are certain common principles which have been recognised in civilized jurisdiction. The principle that where a foreign court of competent jurisdiction had adjudicated upon a claim, there is a legal obligation to satisfy that claim is one such principle which like other judicial system has come to be well entrenched in our judicial system, too. We are undoubtedly sovereign within our territory but as apex court has rightly said in a case “it is no derogation of sovereignty to take account of foreign law.” Indeed, an awareness of foreign law in a parallel jurisdiction will serve as a useful guideline in determining our nations of justice and public policy.¹⁰

Courts in India can examine a foreign judgment from the point of view of competence but not of errors. They cannot go into the merits of the original claim and a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the parties subject to exceptions set forth in clauses (a) to (f) of section 13.

¹⁰Govindaraja, V. C., and C. Jayaraj, eds. *Non Resident Indians and Private international Law*. Gurgaon: Hope India Publications, 2008.

Thus determining the conclusiveness of foreign judgment our courts will not require whether conclusions recorded by a foreign court or findings are otherwise tenable.

In *Teja Singh v.SmtSatya*¹¹ , the High Court laid down the principle that a divorce decree of the *lexdomicilli* (law of domicile) would be recognised in India. Justice Sandhawalia observed “it now seems to be beyond all dispute that the domicile of the husband at the time of the suit for divorce is the sole test for the purpose of giving jurisdiction to the matrimonial court. Whatever doubts existed had long been laid to rest by the decision of the privy council in *Le Mesurierv. Le Mesurier*¹².”

After quoting a number of English Authorities the learned judge observed that a decree of divorce pronounced by the court of domicile will be according Recognition University and would be recognised in India.

Where a foreign judgment is founded on a breach of any laws in force in India it would not be enforced in India. The rules of private international law cannot be adopted mechanically and blindly. Every case which comes before an Indian court must be decided in accordance with Indian law. It is implicit that foreign law must not offend our public policy. ¹³

¹¹ (1975) 1 SCC ,120

¹²[2003] All ER (D) 126 (Apr)

¹³ Section 13, Code of Civil Procedure , 1908

III. ACTIONS UNDERTAKEN BY INDIAN LEGISLATION ON THE NRI ISSUES:

As a measure to resolve disputes of NRI marriages various steps have been taken by the legislature. One of the recommendations of the Parliamentary Committee on Empowerment of Women (EWC) (14th Lok Sabha) on the subject “Plight of Indian women deserted by NRI husbands” was to evolve a well-defined/coordinated mechanism to deal with the issue of problematic NRI marriages to enable the aggrieved women to get a respectable solution to the problem. This recommendation of the EWC was deliberated at an Inter-Ministerial meeting comprising of representatives from Ministry of Overseas Indian Affairs, External Affairs, Law and Justice, Women and Child Development, National Commission for Women (NCW) and National Human Rights Commission (NHRC) held on 7th July, 2008 and it was decided that the National Commission for Women will be the coordinating agency at the national level to receive and process all the complaints related to Indian women deserted by their overseas Indian husbands. Accordingly, the NRI Cell of NCW was formally inaugurated on the 24th September, 2009 and is actively engaged in assisting unfortunate victims by taking their cases with foreign missions abroad. Active interaction is also maintained with the Ministry of Overseas Indian Affairs, Ministry of External Affairs, Ministry of Law and Justice and Ministry of Home affairs to sort out the procedural problems faced by NCW in giving timely relief to the victims.¹⁴

The Complaints and Investigation Cell is the core unit of the Commission. It processes oral/written complaints/newspaper reports and take suo-moto notice of cases under Section 10 of the NCW Act, 1990. The complaints received relate to various categories of crimes against women such as domestic violence, harassment, dowry, torture, murder, kidnapping/abduction, complaints against NRIs/NRI marriages, desertion, bigamy, rape, police harassment/brutality, cruelty by husband, deprivation of rights, gender discrimination and sexual harassment at workplace, etc. During the year 2007, 12386 complaints were received during April to 31st December, 2007. The complaints are acted upon in the following manner:

¹⁴<http://ncw.nic.in/PDFFiles/Background%20Note%20Seminar%20Issues%20Relating%20to%20NRI%20Marriages.pdf>; last visited on September 25, 2012.

- Specific cases of police apathy are sent to the police authorities for investigation and cases are monitored.
- Family disputes are resolved through counselling.
- For serious crimes, the Commission constitutes Inquiry Committee, which makes on the spot inquiries, examines various witnesses, collects evidence and submits reports with recommendations. Such investigations help in providing immediate relief and justice to the victims of violence and atrocities. The Commission monitors the implementation of the recommendations.
- The NCW has also placed advertisement in the leading newspapers of the States for constituting Internal Committees for enquiring into matters of sexual harassment at work place in Government and corporate sector.

Scheme for giving legal /financial assistance to Indian women deserted by their overseas Indian spouses

I. Objective:

The objective of the scheme is to provide some financial assistance to needy women in distress who have been deserted by their overseas Indian spouses for obtaining counselling and legal services. The term “Overseas Indian” would include NRIs and foreign citizens of Indian origin. The counselling and legal services would be provided through credible Indian Women’s Organizations/Indian Community Associations and NGOs identified for providing such services and empanelled with the Indian Missions in the USA, the UK, Canada, Australia, New Zealand and the Gulf. The scheme is a welfare measure to support women of Indian origin in distress, through the mobilization of the local Indian community in the endeavour and with some financial assistance from the Government.

II. Scope of and Eligibility for the Scheme:

The scheme would be available to the women who have been deserted by their overseas Indian spouses or are facing divorce proceedings in a foreign country subject to the following conditions:-

1. The woman is an Indian passport holder.
2. The marriage of the woman has been solemnized in India.

3. The woman is deserted in India or after reaching abroad within five years of the marriage.
4. Divorce proceedings are initiated within five years of the marriage by her overseas Indian spouse.
5. An ex-parte divorce has been obtained by the overseas Indian spouse within 10 years of marriage and a case for maintenance and alimony is to be filed .
6. The scheme would not be available to a woman facing criminal charges or having a criminal case decided against her.
7. The domicile of the woman seeking relief under the scheme is not relevant for allowing the benefit. The woman may be domiciled in the country of her overseas Indian spouse or in India at the time of making the application.
8. Preference may be given to applicants on the basis of financial needs.
9. Assistance will be limited to meeting initial cost and incidental charges for documentation and filing of the case by the Indian women's organization/NGO on the woman's behalf.
10. The assistance will be limited to US \$1500 per case and will be released to the Indian community organizations/NGO concerned to enable it to take steps to assist the woman in documentation and preparatory work for filing the case.
11. The women's organization/NGO will make efforts to enlist community advocates, preferably women advocates, to extend further legal assistance/appearance in court etc. on a pro-bono basis.¹⁵

¹⁵ <http://wcd.nic.in/ar0708/English/Chapter-10.pdf> ;last visited on September 25, 2012.

IV. PROPOSAL FOR FRAMING COMPREHENSIVE LEGISLATION FOR NRI LAWS:

Indian Society of International Law (ISIL) conducted a research and study on the problems of Non-resident Indians in relation to validation and dissolution of marriage, enforcement of divorce decrees, maintenance obligation, matrimonial property regime, child custody etc. Further an examination of relevant Hague convention on Private International Law was also carries out. The NRI laws as has been said above is scattered among various provisions of the Indian laws at present. But making an amendment in so many legislation s for the purpose of solving NRI problems is a complicated and time consuming task, so it is proposed that there should be one single comprehensive Indian Legislation dealing with all the legal problems of NRI's. so a framework has been made for such a proposal.

- A. **Registration of NRI marriages:** Registration of all NRI marriages must be made compulsory, notwithstanding any existing provisions under present marriage laws.
- B. **Affidavit:** Before solemnization of marriage , the NRI party should compulsorily file affidavit that he is not married earlier or he is divorced from earlier marriage, if he had a child out of his marriage before and if any custody etc. of the child.
- C. **Passport Law:** The Indian Passport Act may be amended to provide a separate page for describing marital status and age, name , photograph of spouse etc. this will serve as an evidence of his being married and to curb Bigamy , desertion etc.
- D. **Legitimacy of Marriage:** the proposed law should provide that a marriage between an NRI and Indian spouse will be legitimate within India and abroad only if marriage takes place under the provisions of this law.
- E. **Divorce:** to protect the Indian from a divorced decree obtained abroad, the proposed law should clearly state that a divorce obtained by NRI husband will not be enforceable in India if the decree was obtained not according to the provisions of the proposed law.
- F. **Maintenance:** the proposed law should provide for maintenance of the party against whom a divorce decree has been obtained. And the quantum of the maintenance should be at par with the standards of residence of the NRI.
- G. **Child Custody:** the proposed law should provide for the custody of the children with the father or mother as per the circumstances of father and mother, welfare ogf the child, the age of the child etc.

- H. **Adoption:** the law should also provide for the NRI adoptions independence of the provisions under the Hindu Adoption and Maintenance Act or The Guardianship and Wards Act.
- I. **Matrimonial Property:** the property of a married NRI couple should be recognised as a joint property by law and upon separation it should be divided between them as decided and in case of no such decision one third of the matrimonial property should be given to the diseased party.
- J. **Succession:** proper rules for the succession and validity of wills, capacity to make wills, registration etc should be made.
- K. **NRI Properties in India:** provisions should be made to prohibit sub-tenancy of NRI properties by a tenant in position.
- L. **Legal Aid:** the law should provide for legal aid/ services under the prescribed circumstances to NRI's. Necessary institutional, professional and financial assistance may be provided particularly to the women and children.
- M. **Bilateral Cooperation:** the law should provide for bilateral cooperation between the authorities of overseas governments and Indian governments through proper channels with regards to the protection of the needy women and children in abroad. ¹⁶

¹⁶Govindaraja, V. C., and C. Jayaraj, eds. *Non Resident Indians and Private international Law*. Gurgaon: Hope India Publications, 2008.

V. CONCLUSION:

Various attempts have been made by legislation as well as Indian Society of International Law (ISIL) to bring solution to the existing dispute regarding NRI marriages. But in absence of its proper implementation problems regarding matrimonial issues and law subsist to a larger extent.

As has been discussed in the research, various courts in the Indian Judiciary have resolved the issues of NRI's but in absence of a proper uniform codified law (though there is Foreign marriage act 1969 it is limited only to certain aspects of marriage and has no mention of other issues like succession, maintenance divorce etc.); there becomes an additional burden on the already overburdened Indian judiciary. As a result there are certain suggestions that research puts forward:

- The Indian constitution under article 246(1) provides parliamentary powers to make law under list 1 of 7th schedule. Entry 17 list I provides the parliament powers for making laws regarding citizenship. So under this list parliament can make a proper codified law for the marriage related problems of NRI's. this law should give due consideration to the proposal made by ISIL and make a law in line with that proposal
- The uniform codified law should also provide for a provision for constitution of a special tribunal wherein the matters in dispute could be heard only by that tribunal and not by any other court.

The tribunal having been given the sole authority to deal with the matters pertaining to NRI laws will lessen the burden on the Indian Judiciary

- Also to resolve the issue at global level (like the problem of ex-parte divorce form overseas court) the countries can enter into an international treaty for the protection of the spouses of NRI wherein a proper procedure is laid down for resolution of the dispute giving due consideration to the award of the tribunal to be constituted as suggested above. (in spite of existence of Hague Marriage Convention and other international treaties; an international treaty specially addressing issues of NRI marriages can be entered into by India and other foreign countries for greater good of all)