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UNIFORM CIVIL CODE (UCC) VS. CONFLICT OF LAWS

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Introduction

In India, generally there is no possibility of direct conflict arising between the laws of various communities. Every community has its own personal law which ordinarily prohibits inter-religious marriages.However, such conflict of inter communal law may raise indirectly. For instance, when one of the spouses of marriage converts to another religion then the question that arias is - whether the marital relations between the parties will be governed by the law as applicable at the time of marriage or the law applicable after conversion. In the later cases, whether it would be the law of the spouse who has converted or the law of the non-converted spouse. This question has come before our courts in several cases.

Conflict between Hindu Law and Christian Law

Now the question is, if there is conflict of Hindu law vs. Christina Law, which law will decide that particular problem? The Indian court was confronted with such problem in *Parmial Khosla vs. Rajnish Kumar Khosla*,[1] In this case the parties got married according to Arya Samaj rites. Subsequently the wife petitioned for judicial separation on the ground of cruelty under the Indian Divorce Act, 1869 on the basis that she professed Christina religion and the Act required only one party to be a Christina for its applicability.[2] The husband contested the petition on the ground that There was a Hindu marriage performed in a Hindu form and should therefore be governed by the Hindu Marriage Act, 1955. The court was, thus, faced a problem whether the said marriage was governed by the Hindu Marriage Act, or the Indian Divorce Act.

The court in this case observed that the whole position has been radically changed by the Hindu Marriage Act, 1955, which by Section 2(a) applied to 'Arya Samaj'. A Hindu Marriage has now been rendered monogamous by that Act, as Section 5 makes it a condition that neither party has a spouse living at the time of the marriage. The

[1] AIR 1978 Delhi 78.
[2] Section 2, Indian Divorce Act, 1869

bar to relief emanating from English law by virtue of Section 7 of the Indian Divorce Act,[3] no longer operates. Reliefs can now be had under the Act in respect of Hindu marriage provided, of course, one of the parties professes the Christian religion when the petition is filed.

The court further observed that nowhere in the Act it has been required that the marriage, in respect of which relief is sought, should have been solemnized in any particular from. It is sufficient that one of the parties is a Christian when the petitions filed.[4]

The court thus reached the conclusion that in respect of a Hindu marriage, relief can be hand under the Hindu Marriage Act and the Indian Divorce act as well if one of the parties is a Christian when proceedings are commenced.

In this case the court *suo moto* raised doubt about the possible consequences that might follow, for instance, the husband may go to the court for the relief under the Indian Divorce Act and on the other hand the wife may go for relief under Hindu Marriage Act. The court here suggested that the solution lies with the legislature.

A pertinent question was raised by one Research fellow[5] i.e. whether a valid marriage could take place where one party was a Hindu and other a Christina? Because Section 5 of the Act,[6] requires that both parties to the marriage must be Hindus. The averments of both the parties to the marriage were ambiguous as to whether wife was a Christian at the time of the marriage or hand then converted to Hinduism but was later reconverted to Christianity. Here the court mentioned that presumption of validity was granted to every marriage, which in this case would only mean that both parties were competent to marry according to Hindu rites as they were Hindus. Thus, if the wife now professed to be a Christian, it can only mean that she later converted (on reconverted) to Christianity. If so, the case will be governed by the Hindu Marriage Act, 1955.[7]

It is submitted that though ordinarily conflict between different religious laws does not arise in India, as all personal laws purport to govern their own followers. Personas following different religions are permitted to contract a civil marriage under the Special Marriage Act, 1954. In this modern era particularly in India where persons of different religious faith live in a society, inter-caste and inter-religious marriages cannot be ruled out. The parties may opt to undergo a marriage in a religious form instead of having a civil marriage. For this they may temporarily change their religion in love or emotion and after that when / they face the music of marital reality they claim to be governed by their own law (as seems to have happened in this case). In such a case it will be in the interest of justice that the marriage should not be declared null and void but the validity of marriage should be determined by lex loci celebrations. And because the divorce is the incidence of marriage, therefore, it may be governed by a different law. As I have already submitted that their mistake, that they should solemnize their marriage under the Special Marriage Act, should be rectified at a later stage by applying the Special Marriage Act,

[3] Indian Divorce Act, 1869, Section 7 para 2-. Nothing in this section shall deprive courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is found.
[4] *Khambatta vs. Khambatta* , AIR 1935 Bom. 5.
[5] Parsher Archana : "Conflict of Laws – Hindu vs. Christian Law", 1982, 1 & CLQ, Vol. II, p. 302.
[6] Hindu Marriage Act, Section -5A marriage may be solemnized between any two Hindu.
[7] The Hindu Marriage Act, 1955, Section 13(1) (ii) – Any marriage solemnized whether before of after the commencement of this Act, may on a petition presented by either the husband or the wife. Be dissolved by a decree of divorce on the ground that the other party has ceased to be Hindu by conversion to another religion.

1954.

Conflict between Muslim Law and Hindu Law

Now the important question that requires a little stipulation is : when one party at the time of the institution of the suit of dissolution of marriage is a Hindu and the other is a Muslim, which personal law, whether Hindu or Muslim is to be administrative by the court. This involves the obvious question of a 'apostasy and conversion'[8] for which we have to first consider the case of Mohammadan law, the application of which differs in a county under Islamic rule as compared to one under non-Islamic rule. The former *Dar- ul-Islam* and the latter is *Dar-ul-Harb*. As India is a non-Muslim State, Mohammadan law of *Dar-ul-Harab* will apply, the position under this law is that Islam is to be offered by the court three times to the non convert spouse, and if he does not accept Islam the court can dissolve the marriages. In the case *Dar-ul-Islam*, after the conversion of the wife, the marriage is dissolved automatically, unless of the wife, the marriage is dissolved automatically, unless the husband adopts Islam within the expiration of three menstruation periods of wife or alternatively three months in the circumstances.

According to the general principles of Mohammadan law, a person who embraces Islam is immediately governed by Islam law. In order to understand the principles underlying the body of rules relating to the matrimonial status of person renouncing or embracing Islam, we shall consider four classes of cases: first a Muslim husband may become a apostate, secondly a Muslim wife may renounce Islam these are the two commonest from of apostasy. Thirdly a non-Muslim husband and fourthly, a non-Muslim wife may embrace Islam; these are two commonest cases of conversion.[9]

Apostasy may either be express, as we hereby renounce Islam'; or we do not believe in God and the Prophet Mohammad'; or it may be by conduct, for instance, by using grossly disrespectful or abusive language towards the prophet, conversion to another faith is also tantamount to apostasy.

A Muslim husband who renounce Islam is an apostate and as such his marriage with his Muslim wife is dissolved *ipso facto*,[10] when a Muslim married couple abandon Islam and adopt another faith, their marriage is not dissolved but remains intact.[11]

The mere renunciation of Islam by a Muslim wife does not by itself dissolve his marriage. But this rule is not applicable to a women converted to Islam for some other faith who re-embraces her former faith, his marriage will be dissolved ipso facto.[12]

According to modern view all religions are equal in the eye of law and the court judicially administrating the law, cannot say that one religion is better than another. Here a non-Muslim, lawfully married in accordance with his own law, cannot be mere conversion to Islam dissolve his own marriage.[13]

[8] A Muslim may renounce Islam, this is known as apostasy (ridda); or a non-Muslim embrace Islam, this is called conversion.
[9] Fazee, A.A.A. : Outlines of Mohammadan Law, 4th Ed. P. 178.
[10] Ali, Amir, Mohammadan Law, 4th Ed. Vol. 1, 390
[11] Ali, Amir, Mohammadan Law, 4th Ed. Vol. 1, 394.
[12] Now the dissolution of Muslim marriage Act, 1939, provides that apostasy by itself does not dissolve the marriage, unless it be that a women re-embraces her former faith.
[13] According to Islamic law, conversion to Islam on the part of the man following a scriptural religion , such as Christianity or Judaism, does not dissolve his marriage with a woman belonging to his old creed. But if the couple belong to a non-scriptural faith the Muslim

The conversion of a non-Muslim wife to Islam does not ipso facto dissolve her marriage with her husband, and the ancient procedure of "offering Islam" to the husband and, on his refusal, obtaining a dissolution of marriage cannot be followed in India. By this procedure wife cannot get rid of her husband.

Many deliberations took place on this point in a Bombay case,[14] decided by Blagden J. in December 1945, and confirmed by a Division Bench on Appeal. Robaba, an Iranian woman, Zoroastrian by religion, who was domiciled in India, was married to Khodadad in Persta according to Zoroastrian rites. Two sons were born of the Union. She embraced Islam and "offered Islam" to her Zoroastrian husband. On his refusal, she filed a suit for a declaration that held by the court that a Zoroastrian (or Christian) wife cannot do away with her marriage by a mere profession of Islam. Fyzee, rightly makes the following observations:

1) When a court of law has to decide a case involving change of marital status due to conversion or apostasy, it must never be overlooked that since the rules were formulated in Islamicjurisprudence, social conditions have changed so completely that a blind adherence to some of the rules, torn out of their proper context, would lead neither to justice nor to a fair appraisal of the system under which they were promulgated.[15]
2) In all such cases the court is entitled to ask: who is the person that seeks relief ? If the husband change his religion, it is understandable that the wife should complain and sue for dissolution; a vice-versa. But it is right and just that one spouse should declare himself a convert and then ask the court ot declare the marriage dissolved? The result would be that by these means a party to a marriage would be able to evade legal obligations of marriage entered into at a prior time and in accordance with a different system of personal law.[16]
3) The third matter of serious concerns would be: can one spouse by changing his/her religion alter the status of another person who has not changed his faith? A man may be, and is, permitted to change his religion at his own choice, but why should such an act be allowed completely to alter the legal status of another spouse who has not changed his religion?[17]

On a keen perusal of the above observation define that these are some of complex legal and social problems raised by the law in modern society; and while it has so far been found impossible to formulate a law of marriage and divorce which would be satisfactory in all respect, it is therefore, submitted that in holding the balance equally between conflicting principle, it is the duty of the court to decide the case on the basis of equity, justice and good conscience.

Now to consider the matter under the Hindu law, it is observed that in India, the Hindu Marriage Act, 1955 (as amended substantially) amends the traditional law by permitting a right of divorce for Hindus, the act contains an interpersonal conflict of Law rule in section 13(1) (ii) which provides the Hindu spouse with the means to bring a petition for divorce on the grounds that the other spouse has converted to another religion.[18] Regardless of the

husband cannot lawfully retain a non-Kitabiyya wife; wherefore Islam is to be offered to her and, on her refusal, a decree for dissolution will be passed.

[14] *Robaba Khanum vs. Khodadad Bomanji Irani*, ILR (1948) Bomb. 223.

[15] Fazee, A.A.A. : Outlines of Mohammadan Law, 4th Ed. p. 178.

[16] Fazee, A.A.A. : Outlines of Mohammadan Law, 4th Ed. p. 178.

[17] Fazee, A.A.A. : Outlines of Mohammadan Law, 4th Ed. p. 178.

[18] The Hindu Marriage Act, 1955, Section 13(I)(ii)– Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented either by the husband or the wife, be dissolved by a decree of divorce on the ground that the other part– II,

personal law rules applicable to the newly converted spouse, the other spouse may petition for a divorce under Section 13(1)(ii) on the ground that the respondent has ceased to be a Hindu by conversion to another religion.[19] An interpersonal conflict of law rule is laid down : when a spouse to a Hindu marriage converts to another religion, on an application for divorce by the unconverted spouse, the court applies the reformed Hindu law.

As in the Dissolution of Muslim Marriage Act, 1939, the Hindu Marriage Act, 1955 does not state whether the Hindu law is to be applied as lex celebration is or as lex personal of the parties at the time of the marriage, or indeed as the lex personam of the petitioner at the time of the suit. It may be remarked that under the Hindu Marriage Act, 1955 a divorce may be granted by the court to the petitioner who is the unconverted partner and whose personal law is still the law under which the marriage was celebrated. Under the Dissolution of Muslim Marriage Act, 1939, by contrast, a divorce may be granted by the court under Section 2 of the Act of the wife, whose personal law no longer corresponds with the law under which the marriage was celebrated. Presumably the difference lies in the fact that in Muslim law, the husband can divorce his wife by talaq. In traditional Hindu law the spouse who remain a Hindu has no remedy, the Section 13(1) (ii) is introduced to alleviate the plight of such person.[20]

Though the courts does not possess jurisdiction to try a suit brought by a non- Hindu spouse for divorce under Section 13 (1)(ii) of the Hindu Marriage Act, because under Section 2(1) of the Act, it is expressly stated that the his wife by talaq.[21] Act shall apply to a Hindu who converts to Islam or Christianity is no longer a Hindu for the purpose of the Act. Put on analogy it may be constructed that the non-Hindu spouse should be permitted to petition on any grounds under Section 13 of the Hindu Marriage Act, 1955, 13 a because this section state that the court may grant a divorce on a petition presented by either the husband or the wife.

The relationship between the Hindu Marriage Act and the Dissolution of the Muslim Marriage Act has been expressed in a serious of proposition by David Pearl-

1) If either spouse of the marriage which was celebrated in Hindu for converts to Islam, the Hindu partner can petition for adivorce for this reason under section 13 (I) (ii) of the Hindu Marriage Act, 1955.
2) If the wife of a marriage which was celebrated in Muslim from a converts to Hinduism, then the wife can petition for a divorce on any of the ground mentioned in Section 2 of the Dissolution of Muslim Marriage Act, 1939. The renunciation of Islam by itself, however, does not provide any ground for a divorce to such wife.
3) If either spouse of a marriage celebrated in Hindu from converts to Islam, it is submitted that the Hindu apostate is barred from instituting a petition for a divorce under Section 13(1) of the Hindu Marriage Act, 1955.
4) If a wife of a marriage celebrated in Muslim form converts to Hinduism, then the marriage will not be automatically dissolved but the husband can divorce.
5) If the husband of a marriage celebrated in Muslim from converts to Hinduism, then the wife may have cause to petition for divorce, but not for this reason alone, under Section 2(viii) (a) or Section 2(viii) (e) of the

has ceased to be a Hindu by conversion to another religion.

[19] Apostasy from Hinduism without a conversion, to another religion does not provide the ground for a divorce petition by the other spouse, at least because in law the apostate is still a Hindu governed by Hindu law.

[20] Peral David, Interpersonal conflict of Laws India, Pakistan and Bangladesh, p. 66-67.

[21] *Jatio vs. Jatio*, 1967, P.L.D. SC 580

Dissolution of Muslim Marriage Act, 1939.[22] Though the traditional Muslim doctrine of apostasy provides that the marriage is dissolved ipso facto when the husband converts to another religion.[23]

6) Finally, there are two further possibilities, First, in a marriage celebrated in Hindu from, the husband may convert to Islam and purports to divorce his wife by talaq. It is submitted that the talaq should not be recognized in this situation. Second, in a marriage celebrated in Muslim form, the husband may convert to Hinduism and allege that the court has jurisdictionto grant a divorce under the terms of the Hindu Marriage Act.It is submitted that the attempt should fall, although it is submitted that the attempt would fall, although it is admitted that there is nothing is the Act to bar jurisdiction in thesecircumstance either on the ground that the respondent is a non-Hindu or alternatively that the marriage was celebratedin a non-Hindu from. In any event, it is contended that the government law in this situation in Muslim law, and under this law, the marriage, is dissolved *ispo facto* on the conversion of the husband.[24]

It will be appropriate to have a look at the other provisions with regard to conversion under different statues. Section 10 of the Indian Divorce Act, 1869 provides a Christian wife with a ground for divorce if the husband converts to another religion and goes through a form of marriage with some other woman.[25] In other words, we may say that a non-Christian spouse may petition for divorce, so long as the respondent professes the Christian faith.

Similarly, Section 32 (J)[26] The Parsi Marriage and Divorce Act, 1936 provides that either the husband or the wife may petition for divorce on the grounds that he other party has ceased to be a Parsi. On procedural requirement under this section is that no divorce shall be granted on this ground if the suit has been filed for more than two years after the plaintiff has come to know of the fact.

The Special Marriage Act, 1954 permit couples to opt for a civil marriage ceremony, or to register their existing marriage under the Act, which has been celebrated in a religious form.[27] Irrespective of the personal laws of the parties at the time of marriage or at any time in future, a marriage celebrated or registered under this Act is regulated by the provisions of this Act in relation to any possible matrimonial relief. Except in the case of marriage between two Hindu, the Indian Succession Act, 1925 regulates the succession to the property of any person whose marriage has been solemnized or registered under this Act. The Hindus who marry under this Act,

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[22] The Dissolution of Muslim Act, 1939, Section 2: A woman married under Muslim law shall beentitled to obtained a decree for the dissolution or her marriage on any once or more of the following grounds :
viii- that her thousand threat her with cruelty, that is to say-
(a) Habitually assault her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment.
(b) Obstructs; he in the observance of her religious profession or practice.
(c) On any ground which is recognized a valid for the dissolution of marriages under Muslim law.

[23] *Abdul Ghani vs. Aziz- ul-Haq.* 1912, ILR 39 Cal 409

[24] Hindu Marriage Act, Section -5A.

[25] Indian Divorce Act, 1896, Section -10 – Any wife present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnizationthereon, he husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman.

[26] The Parsi Marriage a Divorce Act, 1936, Section 32 (j) Any married person may sue for divorce on any one or more of the following grounds, namely- (j) that the defendant has ceased to be Parsi.

[27] The Special Marriage Act, 1954, Section -15. Any marriage celebrated, whether before on afterthe commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872, or under this Act, may be registered under this Chapter by Marriage officer in a territory to which this Act extends….

are now governed by Hindu Succession Act, 1956 with regard to succession of the property.[28] Section 21-A of the Special Marriage Act, 1954 (as amended by the Act of 1976) excludes Hindu from the effect of Section 19 and Section 21 of the Act. Section 19 affects a severance of any member of an undivided family who professes Hindu, Buddhist, Sikh or Jain religion. Cumulative effect of these sections are where two Hindus inter marry, Section 19 will not be applicable. Subject to Section 19 however, a marriage under the Special marriage Act, 1954, does not affect any vested rights of inheritance under the particular personal laws of the parties to the marriage.

Concluding the above discussion it may be noticed that any of the above statue on book does not provide any satisfactory accepted choice of law rule which can be applied in the conflicting situation. In any event, the law of the celebration of the marriage and the personal law of the parties at the time of the marriage will usually be identical so a choice of law governing the dissolution of the marriage qua lex celebration or qua lex personae will not be necessary.[29]

Now we fare to see the outlook of the court when they have to face such type of cases. In *Ayesha Bibi vs. Suboth Chandra Chakravarty*,[30] theplaintiff and the defendant were Hindu Brahmins married in 1941, In 1943 the plaintiff was converted to Islam, and then offered Islam to defendant, herhusband. As he refused conversion to Islam, the plain tiff brought the suit for dissolution of marriage converted to Islam, and then offered Islam to defendant, her husband. As he refused conversion to Islam, the plaintiff brought the suit for dissolution of marriage.

The Court after considering the position under Mohammadan law, examined if the Hindu law could be administrated in this case. Since there was no Hindu marriage 4 Act, 1955, it came to the conclusion that the Hindu law neither provided that after one spouse forsaking the religion, the marriage was dissolved, nor did it lay down that it was not dissolved. The court also considered the fact that if the marriage was not dissolved. The court also considered the fact that if themarriage was not dissolved, the defendant could not have control over his Mohammadan wife. The court observed that, in the absence of any general law, to be administered in this case, and since the court had assumed jurisdiction, it was for the court to make a choice of law, to be applied by it to such a case of conflict of personal laws. If there are no statutory direction the court would have to make its own choice of law in accordance with the general juristic principles as best as it can.

The court, therefore, after considering the implication of both the Mohammadan law and Hindu law, chose to administer Mohammad law in this case and granted a decree to the plaintiff dissolving her marriage with the defendant as the court considered that its decision was in no case contrary to the public policy.

With due respect to the decision of court, it is submitted that thedecision of the court is against the rule of justice and contrary to public policy. The decision cannot be followed in the present time. Though in our constitution freedom of religion is guaranteed to every person,[31] but this freedom cannot be practiced to the prejudice of another person. As in the present case, since the Hindu wife could not get divorce from her husband under the

[28] The Special Marriage Act, 1954 Section 21(a) – Where the marriage is solemnized under this Act or any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who profess the Hindu, Buddhist, Sikh,Jain religion, Section 19 and Section 21 shall not apply and so much of section 20 and creates a disability shall also not apply.

[29] Pearl, David,op. cit

[30] ILR (1945) 2 Cal. 405.

[31] Article 25 of the Indian Constitution : (1) Subject to public morality and health and to the other provision, practice and propagate religion.

Hindu law so she, with the intention to get rid of her husband, renounced, her faith and embraced Islam. Here the wife should have been punished for her misconduct but she was rewarded to impose her fait on the husband and in case of dissent claimed dissolution of marriage. Even under the Hindu Marriage Act, 1955 the converted spouse has not been given any right to claim divorce on this ground. Here the proper course would have been that the converted spouse should not be given any right to dissolve her marriage on the ground of difference of religion. Their marriage should have been immediately and automatically converted to a civil marriage and civil law should be applied i.e. the special marriage Act, 1872 -1954. It will be in the real spirit of Article 44 of our Constitution.[32] These are the appropriate cases where the uniform Civil Code should be applied.

This will serve at least two purpose : First, the children of such union will continue to get affection of the parents, for there is no ground to get divorce on the ground of change of religion under the Special Marriage Act, and; second, if the spouse think that the charm of the matrimonial life has gone and no use of keeping empty shells together then they may go the court to seek divorce on the ground of mental cruelty (because a change of religion amounts to mental cruelty).

As the defendant did not contest this case, the courts decision in the circumstances of the case might be correct from the practical point of view. But as it has been observed that this decision was against the rule of justice and right. In *Robaba Khanum vs. K. B. Irani*,[33] two Zoroastrian married in 1927 in Iran in accordance to Zoroastrian rites. Thereafter the wife got converted to Islam and offered Islam to her husband who refused to accept it. She filed a suit in the Bombay High Court for a declaration that their marriage stood dissolved it will be recalled that that in classical Islamic law, a marriage cerebrated in non-Muslim from between two non-Muslim in a non-Muslim country is usually brought to an end three months after the wife conversion to Islam, without any intervention form the court. If, however, the conversion takes place in Duriul-Islam, and the other spouse in resident there, a Muslim judge offers the Islamic faith to the non-Muslim spouse and if the faith is refused three times, the judges separates the particles. The wife in this case pleaded for the Muslim law. After her conversion she became a Muslim governed by Muslim personal law. She claimed that either of the two rules of Muslim law should govern the case. Mr. Justice Blagden rejected the alternative plea. He observed :

> "*The law of India is not Mohammadan law nay more that it is Hindu law or Christian ecclesiastical law, but the Mohammadan law is by virtue of the general law of India the personal law of the minority of Indians, regulating their relations with one another it differs in degree but not in kind, from (say) by the law of the Willingdon Club*."[34]

"It is true that a convert is generally subject to the personal law appropriate to his new religion as against that appropriate to his old one. But why should this apply to the wife or husband of the convert…."[35]

Having held Muslim law to be inapplicable to the case, Mr. Justice Blagden decided the case according to justice, equity and good conscience. According to this criterion, the wife contention was so monstrous and absurd that it

[32] Article 44, The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.
[33] I.I.R, (1948), Bomb. 223.
[34] *Robaba Khanum vs. K. B. Irani* , I.I.R, (1948), Bomb. 232.
[35] *Robaba Khanum vs. K. B. Irani* , I.I.R, (1948), Bomb. 233..

carried its own refutation with it. On appeal, Blagden J's decision was upheld. The Muslim personal law was held inapplicable, and therefore the Appeal Court decided the case in accordance with justice and right. And it is not in accordance with justice and right. And it is not in accordance with justice and right that on the conversion of one of the parties to the marriage to Islam it should be held that the marriage stands dissolved.[36]

The same view was taken by the Calcutta High Court in *Rakeya Bibi vs. Anil Kumar Mukherji*,[37] wherein the parties were Hindu at the time ofmarriage. The wife embraced Islam. The marriage was never consummated . She offered Islam to her husband who refused to accept it. She then petitioned the court for a declaration that her marriage was dissolved. Ormand J. submitted the case of Special Bench. The Bench examined the relevant rule to Muslim law relied upon by the plaintiff. In Chakravortti J's opinion, the rule of possibly may have been irrelevant to the type of case before the Bench. In our opinion, the rule is intended to apply to only to a case where both the parties to the marriage are subjects of an Islamic country, both go abroad, one of them embraces Islam is in the foreign country, and return to his or her native land, but the other remains in the foreign country. In such a case, the Islamic law relieves one of its followers, i.e. the convert, of his or her marriage with an unbeliever by providing for its automatic dissolution, because the Islamic State, under the protection of which the convert lives and which has a responsibility toward him or her as of one of its Muslim subjects, cannot act in or her as of one of the Muslim subjects, cannot act in personam against the other spouse and tender Islam to that person.[38]

Chakravortti J. admits that there is no authority for this view, and does not base the court's decision on this suggested interpretation of the Muslim law. The problem, as the judge formulated it, was whether or not to apply the personal law of the plaintiff to the case before the Bench. If one of the parties to a marriage brings about a conflict of personal law by forsaking their common religion and adopting another, can the new personal law of the converted spouse prevail over the old personal law retained by the unconverted spouse, under which the marriage was celebrated. Chakravortti J. answered this question by deciding that the personal law of the converted spouse die not govern the case. The Plaintiff was unable to prove to the satisfaction of the Bench that there was any law in force in India which brought the rule of Muslim law into prominence as the law governing the dissolution of the marriage. It was not just nor right to apply the rule of Muslim law to the case.[39]

The Bench decided that the extra-judicial Muslim law cannot apply to the case, because there are two parties to a marriage, and therefore, the marriage still subsists until judicially dissolved or dissolved by some rule of law recognized by the courts other than Muslim law. No choice of law was made, although it can be argued that the formula was used in negative sense; the refusal to recognize an alleged accomplished act.

This formula of "justice, equity and good conscience" or "justice and right" was again applied to solve the problem of the interpersonal conflict of laws in *Sayeda Khatoon vs. M. Obadih*. In this two Jews domiciled in India performed their marriage in India in 1943 by Jewish ceremony. In 1945 she embraced Islam and offered it to

[36] *Robaba Khanum vs. K. B. Irani* , I.I.R, (1948),Bomb. 263.
[37] ILR (1948) 2, Cal. 119.
[38] *Rakeya Bibi vs. Anil Kumar Mukherji,* ILR (1948) 2, Cal. pp. 129-30.
[39] *Rakeya Bibi vs. Anil Kumar Mukherji,* ILR (1948) 2, Cal. pp. 129-30.

her husband. On his refusal to accept it, she launched divorce proceedings. "Why should Islamic law be preferred to the Jewish law is a matrimonial dispute between a Mohammadan and a jew, particularly when the relationship was created under the jewish law? Queried Mr. Justice Lodge. Dismissing the petition he held that Muslim law should not govern the dispute, and that he was bound by "justice and right" to conclude that the marriage still subsisted.

On the basis of the above decision two proposition may be formulated:

(a) If both the parties change their religion, then they will begoverned by the new personal law;

(b) If one of the spouses alone changes his / her religion, then no matrimonial relief can be granted to the converted spouse on the basis of his/ her new personal law and the matter will be decided by the principle of justice, equity and good conscience.

The first view appears to just but there is a possibility of its abuse. A couple, to whom no matrimonial relief is available under its personal law, may conveniently convert to a religion under which desired matrimonial relief can be obtained. The second proposition does not provide a solution to the problem: it is merely its negative disposal. Now, does it mean that parties can claim only that matrimonial relief which is available to them under their original personal law? As is evident from Section 13(1) (ii) of the HinduMarriage Act, 1955,[40] if one of the spouse ceases to be Hindu by converting to some other faith, then the other spouse can seek divorce on the that ground. Under Muslim law apostasy from Islam operates as a complete and immediate dissolution of marriage. But, again it is one sided solution of the problem. The question still remain : should the convert spouse not be entitled to any relief?

The solution of the above problem may be found in the provision of the Native Convert Dissolution of Marriage Act, 1886- a master piece "missionary legislation" by the British rulers of India. Under the Act, if one of the native spouse converts to Christianity and or account of this if other spouse abandons him or deserts him for six months or more, than a divorce can be passed on the petition of the convert–spouse. If the respondent is wife, then the court would postpone the consideration of the petition for one year to enable her to accept the religion and to cohabit with him. If she does not do during that period, then the decree of divorce would be pronounced. Prof. Paras Diwan is of the opinion that if a similar law is made available tothe people of all communities in India it would provide a socially desirable solution to a problem which arises on account of the change of religion by one spouse and non-accommodation by the other spouse to this changed situation. He further suggests that provision applicable to the members of allcommunities should also enacted on the lines of Section 13(1)(ii) of the Hindu Marriage Act, 1955. So long as India do not have a uniform family law, such a solution of the inter-communal conflict of laws is necessary.[41]

With due respect to the suggestions of the learned Professor, it is humbly submitted that a more desirable solution may be found to this problem. As I have already submitted , that in such situation the provisions of the Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste,

[40] *Khambatta vs. Khambatta* , AIR 1935 Bom. 5.

[41] Diwan Paras India and English private international Law- A Comparatives study, 1st Ed. P. 213.

creed or religions. The persons who converts to another religion is guilty of matrimonial misconduct therefore she/ he should not be given any privilege to dissolve the marriage. Moreover, the Special Marriage Act, 1954 is not affected by the change of religion and therefore the marriage can be protected from being dissolved. It is further submitted that all marriages where one spouse changes his/her religion should be considered as a secular marriages governed by the Special Marriage Act, 1954. I think that this will not be a wrong interpretation because in India two persons cannot marry if they belong to different religions except under the Special Marriage Act, 1954. There is no harm if pre and post marriage situations are governed by the same law. More ever it cannot be forgotten that the establishment of a secular society is the aim and goal of our Constitution and such an interpretations will be in tune to Article 44 as well as the preamble of the Constitution.

But what appears from the judicial work that has been done by Indian courts in the cases cited above relating to the matrimonial causes and relief thereof is that the Indian courts are not unanimous in applying either the principle of lex loci celebrations or lex domicile or the lex personnam. Further they are not unanimous in giving effect to the change of status or change of religion while determining the issues in question. The judicial approach seems to be uncertain and not guided by any well established principle of law. However, the judicial approach apart from being humanitarian should also be guided by the principles of law.

Recently Delhi High Court in *Madan Mohan Behl vs. Veena Rani*,[42] got an opportunity to decide a case with regard to conversion under Section 13(1) (ii) of the Hindu Marriage Act, 1955. In this case the court held that till the decree of divorce on the ground of apostasy is passed the marriage of the husband with the wife is not dissolved.

Conversion of a Hindu wife to Islam does not ipso facto dissolve the marriage tie with her husband. She continues to be his wife in spite of her conversion until and unless the court passes the decree of divorce.

In another case of *Vilayat Raj vs. Sunila*,[43] the Delhi High Court held that the marriage sought to be dissolved under the Act has to be a Hindu marriage. It can be dissolved only in accordance with the provisions of the Act. It would, therefore, appear that Section 2 of the Hindu Marriage act, 1955 says that this Act applies to any person who is a Hindu, it also contemplates a person who was a Hindu at the time of marriage but has since ceased to be a Hindu at the time when the petition presented. The relevant date on which both the parties are required to be Hindus in order for the Act to apply is the date of the marriage. The court further held that religion is a matter of one's conscience and freedom of religion has been guaranteed under our Constitution. A party who has married under this Act cannot be debarred from changing his religion. Of course, if he changes his religion, he must be prepared for the consequence there of i.e. a likelihood of a petition under Section 13(1) (ii) of the Act.[44] But if no such petition is moved and he is able to establish that he has been treated with cruelty, he is surely entitled to relief, unless, there are order reasons for not granting relief.

The Court further held that even if both the parties of a Hindu Marriage get converted to a religion other than Hindu, their earlier Hindu Marriage can be dissolved only under the provision of this Act. To hold otherwise,

[42] (1984) DMC 249 (Delhi)
[43] AIR 1983, Delhi 51
[44] *Khambatta vs. Khambatta* , AIR 1935 Bom. 5.

would lead to very unsettling situation for society. The Court further held that a marriage solemnized between two Hindu in accordance with the Hindu ceremonies and rites must be dissolved in accordance with the Act, and a petitioner or a respondent or both who have since ceased to be Hindu can approach the court for this purpose. For, if both the parties to the marriage together present a petition for divorce by mutual consent in terms of Section 13(B), the fact that since marriage they have both converted to some other religion should not stand in their way.

The court further observed that the concept of marriage as between Hindu and Muslim is very different. A Muslim marriage is a matter of contract. A Hindu marriage was in the past primarily and essentially a sacrament. Prior to the present Act, 1955, the Hindu marriage wasindissoluble. The Hindu marriage solemnized in accordance with the conditions and provisions of the Act, is a voluntary union between one man and one women to the exclusion of all others. The dissolution of such amarriage can only be in accordance with the statue. The change of religion by one of the parties does not automatically dissolve the marriage but provides a ground to the other party for dissolution Conversion also does not pre se operate to deprive the party of rights which maybe otherwise available to him under the Act.

It is submitted that this decision of the Delhi High Court is contrary to the established principle of conflict of laws. This may be criticized on the following ground: First it is an established principle of conflict of laws that when both the parties to a marriage convert to another religion then they will be governed by their new faith and not by the law which was at the time of the solemnization of marriage; second *lex loci celebration* is useful only for determining the validity of the marriage contract and rights and obligations arising out of the marriage are governed by the *lex domincilii*,[45] according to conflict of laws and third, application of such principle will not provide a satisfactory solution for the parties in cases of inter-personal conflict of laws. It is, therefore, earnestly submitted that such cases of inter-personal law should be decided by a law which is secular and does not favour any particular personal law. Fortunately we have such a law, that is the Special Marriage Act, 1954.

In *Sarla Mudgal vs. Union of India*,[46] the apex court has adopted a different attitude of the problem relating to inter-personal conflict between Muslim and Hindu. In this case there were four petitions under Article - 32 of the Constitution of India. In first petition, there was one Meena Mathur who was married to Jitendera Mathur in 1978. Three children were born out of the wedlock. In 1988 the petitioner came to know that her husband had solemnized second marriage with one Sunita (Fatima). The marriage was solemnized after they converted themselves to Islam and adopted Muslim religion. According to the petitioner conversion of her husband to Islam was only for the purpose of marrying Sunita and circumventing the provisions of Sec. 494 IPC. On the other hand Jitendra Mathur asserts that having embraced Islam, he can have four wives irrespective of the fact that his first wife continues to be a Hindu. In a second petition, interesting Sunita alias Fatmia was the petitioner. She contended that she along with Jitendra Mathur who had earlier being married to Neena Mathur embraced Islam and there after got married. A son was borne to her. She further stated that after marrying her, Jitendra Mathur

[45] AIR 1935 Bomb. 5
[46] (1995) 3 SCC 635.

under the Influence of his first Hindu wife had reverted back to Hinduism and had agreed to maintain his first wife and three children. Her grievance is that she continues to be a Muslim, and is not being maintained by her husband and has no protection under either of the personal law.

The Supreme Court in this case has held that Hindu Marriage Act strictly enforces monogamy. A marriage preformed under this Act, cannot be dissolved except on the grounds available under Section 13 of the Act. In that situation parties who have solemnized the marriage under this Act remain married even when the husband embraces Islam is pursuit of another wife. Till the time of Hindu Marriage is dissolved under the Hindu Marriage Act, noneof spouses can contract a second marriage. Conversion to Islam marrying again would not, by itself, dissolve the Hindu Marriage. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless bea marriage involution of the provisions of Hindu Marriage Act by which he would be continuing to be governed so far as his first marriage under that Actis concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Hindu Marriage Act and continues to be a Hindu. Though the marriage solemnized by a Hindu husband after embracing Islam may not strictly be a void marriage under the Hindu Marriage Act because he is not longer a Hindu but between the apostate and his Hindu wife. The second marriage is in volution of the provision of the Hindu. Marriage Act and as such would be non est.

The court has further observed that the expression 'void' defined under Section 11 of the Hindu Marriage Act has a limited meaning within the scope of the definition under the section. On the other hand the same expression has different purpose under section 494 IPC and has been used in wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494 IPC. The real reason for the voidness of the second marriage is the subsistence of the first marriage, which is not dissolved even by the conversion of the husband. The second marriage by a convert, therefore, being in violation of the Hindu Marriage Act would be void in terms of section 494 IPC. Any act which is in violation of mandatory provisions of law is pre se void.

The above interpretation of section 494 would advance the interest of justice. It is necessary that there would be harmony between the two systems of law just as there should be harmony between two communities. The result of the interpretation, would be that the Hindu law on the one hand and the Muslim law on the other hand would operate within their respective ambits without trespassing on the personal laws each other. Since it is not the object of Islam nor is the intention of the enlightened even Muslim community that Hindu husband should be encourage to become Muslim merely for purpose of evading their own personal laws by marrying again, the courts can be persuaded to adopt a construction of the law resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law.

In *Lily Thomas vs. Union of India*,[47] there was a lady Sushmita Ghosh, who was the wife of Shri G.C. Ghosh (Mhod. Karim Ghazi) filed a writ petition stating that she was married of shri G.C. Ghosh in accordance's with the Hindu rites in 1984 and since then they were happily living at Delhi. In 1992,the husband told he wife that

[47] AIR 2000 SC 1650

she should in her own interest agreement as he had converted to Islam and therefore he would remarry. In fact the husband had embraced Islam and fixed a date to marry – Miss Vaneeta Gupta.

The court in this case observed that for the past several years it has become very common amongst the Hindu male who cannot get a divorce from their first wife, they convert to Muslim religion solely for the purpose ofmarriage. This practice is invariably adopted by those erring husband who embrace Islam for the purpose of second marriage but again became reconvert so as to retain their rights in the properties etc. and continue their services and all other business in their old name and religion.

Upholding the decision in Saral Mudgal Court Case, the Supreme Court has held that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law would be invalid, the second marriage would be void in the terms of provisions of Section 494 IPC and the apostate husband would be guilty 7 of the offence under Sec 494 IPC doses not lay down any new law. It cannot be said that the second marriage by a convert male Muslim has been made offence only by judicial pronouncement. The court has only intercepted the existing law which was in force. It is settled principal that of a provision of law vela's back to the date of law itself and cannot be prospective from the date of the judgment because concededly the court does not legislate but only five an interpretation to an existing law. It cannot therefore be said the decision in *Sarla Mudgal case*,[48] has to be given prospective operation and that the decision cannot be applied to persons who have solemnized marriages violation of the mandate of law prior to the date of judgement.

The court has further observed that making convert Hindu who has taken second wife offer conversion liable for prosecution under Sec. 494 of the IPC is not against Islam. The concept of Muslim law is based upon the edifices of shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law in condition precedent. Even under the Muslim law plurality of marriage is not unconditionally conferred upon the husband. It would, therefore, be doing in justice bigamy notwithstanding the continuance of his marriage under the law which he belonged before conversion. The violators of laws who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject-matter of prosecution under the general penal law prevalent in the country.

Marriage is the very foundation of the civilized society. The relation ones formed, the law steps in and binds the parties various obligations and liabilities there under. Marriage is an Institution of which the friable at large is deeply interested. It is the foundation of the family and in turn of the society without which no-civilization can exist. Past several years, it has became very common amongst the Hindu males who not get a divorce from their first wife, they convert to Muslim religion solely for the purpose of the marriage. This proactive is invariably adopted by those erring husband who embraced Islam for the purpose of second marriage but again reconvert so as to retain their rights in the properties etc. and continue their service and all other business in their old name and religion. Of course Islam never encourage Conversion for the purpose of second marriage so those person's who get convert for the above purpose should be dealt with accordingly. View from this angle the foregoing two

[48] 1995 AIR SCW 2326

decisions of the Supreme Court may be appreciated. But the sweeping remarks by the Apex Court, pleading for uniform civil code applying to all irrespective of their religion is not tenable. India is a secular country and every citizen has a freedom of religion (which includes right to propagate and rights to profess) therefore, if a person converts to Islam in its spirit and conscience (otherwise than the purpose of having a second wife) should be governed by his new personal law. Infact the conflict a common civil code and not uniform civil code may be enacted.

Conflict between Christian Law and Muslim Law

Now coming to next complex problem of Muslim Christian marriage where the lex celebrations and the *lex personam* are different. According to law a Muslim male can marry with any Kitabiyya women. In a situation wherea Muslim male marry with a Christian female in Muslim form it would appear that such a marriage would be recognized by the general law notwithstanding Section 4 of the Christian marriage Act, 1872.[49] Here it is submitted that the section 4 of the Christian marriage and Divorce Act 1872 should be interpreted in such a way as to harmonies with the general Muslim law. It should, therefore, be read as "every marriage purporting to be Christina marriage shall be solemnized…"

This interpretation found from the court in *Emperor vs. Maha Ram*,[50] Where Walsh J. said that obiter… In my opinion it deals with Christian marriage, and with Christina marriage alone… The Act does not prohibit even a professing Christina from marrying otherwise than under the act if he wishes to do so.[51] If such a construction is correct then it should be an acceptable proposition that he Muslim husband of a Christian girls married in Muslim form has the capacity to divorce his wife by talaq. In such situation it is doubtful whether the court would assume jurisdiction to grant a divorce to the wife under the provision of Indian Divorce Act, 1869. Though there is no statutory prohibition in the Indian Divorce Act, 1862 against the assumption of jurisdiction in a case where the marriage was celebrated in a non-Christian form. The court may possibly acquire jurisdiction under the Dissolution of Muslim Marriage Act, 1939 because the marriage is celebrated under Muslim law.

It may, therefore, be suggested that the law which governs the dissolution of a marriage between a Muslim male and a Christian female celebrated in Muslim form is the law which is the law of the celebration and of the personal law of the husband both at the time of the dissolution and at the time of the marriage.

The parallel to this rule should be that in the case where a Muslim male marries a Christian girl in non–Muslim form (for instance in English register office) then the law governing the dissolution should be the law which is both the lex celebrations and the personal law of the wife.

A dispute of the type last referred to was before the Pakistan Supreme Court in *Jatoi vs. Jatoi*,[52] where in May 1959 Marina, a Christian girl domiciled in Spain, and Nuruddin Jatoi, a Muslim domiciled in Pakistan and a Bar student in London, were married at a registrar office in London. The marriage was not a happy one and within a

[49] The Christian Marriage Act, 1872, Section 4 says Every Marriage between persons, one or both of whom is (or are) a Christian or Christians , shall be solemnized in accordance with the provisions of the next following section; any such marriage solemnized otherwise than in accordance with such provisions shall be void.

[50] 1918), ILR 40 All 393

[51] *Emperor vs. Maha Ram*, (1918), ILR 40 All 404.

[52] (1967) PLD SC 580, Pearl, David op. cit. pp. 71-72.

year the husband returned toPakistan. The wife and their newly born son remain in London. In March, 1961, Jatoi married a second wife, a Swedish girl, who had converted to Islam. The marriage ceremony was celebrated in a mosque in Karachi in Muslim form. Meanwhile, Marina applied to the Magistrates' Court in London for maintenance under the Matrimonial Proceedings (Magistrate's Courts) Act, 1960. In 1963, Marina obtained a maintenance order which was then registered in Pakistan and confirm by the Karachi District Magistrate's Court. The husband failed to remit maintenance and thus, in 1965, the wife traveled to Karachi with the intention of seeking enforcement. Whilst she was in the city, Jatoi repudiated his wife by talaq, and sent a copy of the talaq to Chairman of the local Union Council as required by the Muslim Family Law Ordinance (1961).[53] After 90 days Jatoi applied to the District Court for revision of the English maintenance order on the ground that he was no longer marked to Marina. According to Muslim law, the husband is not obliged to maintain an ex-wife beyond a three month period (Known as 'Iddat Period') after the talaq has become irrevocable. The District Court refused to rescind the registration on the order, but on appeal to the High Court of West Pakistan the ruling of the lower courts was reversed. Marina appealed to the Supreme Court of Pakistan. Her appeal was rejected by the majority (Yaqub Ali J.dissenting). The majority took the view that the talaq was effective to dissolve the marriage between Marina and Jatoi.

Pakistani law was applied as the *lex domicilii*: "under the rules Of Private International Law, the lex loci celebration is such has nothing to do with the question of divorce which is a matter solely for the law that happens to be *lex domicnillii* of the parties, at the time of the suit. This may well be different from the law that governed the solemnization of the marriage".[54]

According to S.A. Rahman J. "If the Muslim husband is married to a Christian woman in a form recognized by Muslim law, or to a non-Christina woman, there is no reason why Section 7 b of Muslim Family Law Ordinance would not apply.[55]

It is, therefore, clear that whenever there is an internal conflict between the Muslim law (the personal law of the husband) and the provision of the Indian Divorce Act, 1869 (the marriage was celebrated under the British Marriage Act, and the wife was at all times a Christina), the curt chooses to apply the Muslim law. According to the "The languages…. has therefore be constructed in the sense that if one of the parties to the marriage professed in the Christian faith, the marriage can be dissolved only by decree of the court under the Act and not otherwise. A contrary view would lead to court there is no provision in the Divorce Act, 1869 or the Christian Marriage Act, 1872 whish in express terms, prevents a Muslim husband of a Christian woman from having resort to this personal law for the purpose of the dissolution of the marriage. But Mr. Justice Yaqub Ali, dissenting rejected the argument accepted by the majority that the Divorce Act, 1869, Section 2 is n enabling Act.[56] He said, anomalous result such as, if a Muslim husband petitions to court under the Divorce Act, 1869 for his dissolution of marriage with a Christian wife, he shall have to private to the satisfaction of the curt that she has been guilty

[53] (1967) PLD SC 580, Pearl, David op. cit. pp. 71-72..
[54] (1967) PLD SC 580.
[55] (1967) PLD SC 592.
[56] The Indian Divorce Act, 1869, Section 2 – "Nothing hereinafter contained shall authorized any court to grant any relief under this Act except where the petitioner or the respondent professes theChristian religion".

of adultery and shall also be obliged to pay her alimony pendent lite and costs of the suit as well as permanent alimony on obtaining a decree for dissolution. On the contrary if the Muslim law applies he can avoid all these obligations by pronouncing talaq and bringing to an end the marriage by his unilateral act. No husband would, therefore, ever make resort to a court for dissolution of marriage."[57]

On the other hand, if Marina had petitioned for a divorce in Pakistan, presumably, the courts would have assumed jurisdiction under the Divorce Act, 1869, and not under the Dissolution of Muslim Marriage Act, 1939, because Marian was not married according to the rites of Muslim law. It will, therefore, be slightly inequitable to permit the husband the choice between Muslim law and the Divorce Act, and to deny this choice to the poor wife.

It is submitted that the dissenting Judge has interpreted the relevant statutes in a more positive way. If this case would have arisen in Indian then I would submit that such case must be decided by the Special Marriage Act, 1954. In this case because of foreign element is involved therefore the court, first, has to see whether it has jurisdiction to try this case. Since the husband id domiciled and resident of India therefore the court has jurisdiction to decide this case. After deciding the jurisdictional issue, the court has to choose the law to apply. In India there is no specific statue to govern such cases. If we accept the view of the Pakistan Supreme Court that if the marriage has been solemnized in Muslim form or not (where one party is a Muslim and domiciled in Pakistan) Muslim law will be applied or if it is so solemnized in Christian form, Indian Divorce Act 1869 will be applied (as opined by Justice Yaqub, dissenting) then the decision will not be consistent with the principle of equity, justice and good conscience. Here ultimately we have to give overriding effect of one law over the other. It is therefore, humbly submitted that in such circumstances a secular law should be applied i.e. The Special Marriage Act, 1954. One may question that the marriage is not registered or there is no relevant provisions in the Act to deal with such problems then how this will be governed by the aforesaid Act. True but a suitable amendment may be made in the Act according to the line that all marriages solemnized under any form shall, if interpersonal conflict arises, be governed by the Special Marriage Act, 1954.

In an Indian case of *John Jiban Chandra Dutta vs. Abinash Chandra Sen.*[58] Dukhiram an Indian Christian married an Indian Christian woman Sudakshina. He was subsequently converted to Mohammedanism and contracted a marriage with a Muslim woman Alfatenessa in a Mosque. The court had to decide whether the second marriage was valid but in course of his judgment. Mr. Justice Henderson said : "It might be difficult to say whether Dukhiram could have divorced Sudakshina by talaq.[59]

The House of Lords in Attorney *General of Ceylon vs. Reid*,[60] has held that the conduct of spouse who converts to Islam has to be judged on the basis of the roof of justice, equity and conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim Spouse is not a dispute "where the parties are Muslim" and, therefore, the rule of decision is such a case was or is not required to be the "Muslim Personal Law". In such cases the Court

[57] Perhaps the court did not take into account the fact that a Muslim in India could not contract marriage with a Kitabiya. Since a Christian is a Kitabiya. Since a Christian is a Kitabiya so a marriage between a Muslim male with a Christian Female is valid and such a marriage can be dissolve by talaq.

[58] ILR (1939) 2 Cal 12

[59] *John Jiban Chandra Dutta vs. Abinash Chandra Sen* , ILR (1939) 2 Cal 16.

[60] (1965) 1 All ER 812

shall decide the contents of the disputes under the personal laws according to justice equity and good conscience.

Conclusion

The minorities especially Muslims must be assured that the government is their well wisher and does not want to impose an alien law upon them by force. The government must also remove the feelings of insecurity and dissatisfaction among the Muslims.

The reform of Muslim Personal Law should be encouraged by the government through the leading and respected *Ulema* of Muslim community. The solution of the problem of the Muslim Personal Law should be searched within the Islamic law. No effort should be made to cross the limits set by the Islamic law i.e. *Shariat.*

To dispel the fear from the minds of the minority especially the Muslim the state can repeal 'Article 44' of the Constitution or at least to treat it as unworthy of being activised. Removal of this threat or perception of threat to Muslim identity will, it can be hoped, cause the enlightened sections of Muslims to undertake the required reforms.

The government should never try to impose a uniform code of family laws on its citizens specially the minorities for the sake of 'national unity' or national integration. Such a move by the government will further alienate the Muslims because they would consider it to be extending the Hindu majority rule over them. This would cause discontent and rebellion in the Muslim community and would be injurious to the 'national unity' and 'national integration'.

Before enacting a Uniform Civil Code throughout the territory of India the government must also keep in mind the religious freedom guaranteed under Article 25 and Article 26 of the Constitution.

The government must also take into account the legality and enforceability of Article 44 and the relationship between Fundamental Rights and Directive Principles of state policy. The state must realise that in case of conflict between Fundamental Rights and the Directive Principles of the Constitution of India must the former shall prevail over the later.

If the above measures are adopted sincerely and honestly the problem of implementation of Article 44 can be solved in India.

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