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INDIA

Sources of Law

The Indian legal system has its basis in English common law, while personal status law is administered according to the various religious traditions in India. Although India is a majority Hindu State it also has a significant Muslim minority. The majority of these Muslims follow the Hanafi School of law, although there are also other Sunni groups and Shia Muslim communities in India. India also has Christian, Buddhist, Sikh, Jain, Zoroastrian and Jewish minorities. Due to this diversity each group is protective of their personal status laws and for this reason India has been unable to enact a uniform personal status code, despite the commitment of Article 44 of the Constitution to work towards legal uniformity. The form of marriage undertaken by a couple determines the substantive law applied to them and their children in matters of personal status. Marriages between persons of the same religion are governed by their respective laws. Where the marriage is solemnized between persons belonging to different religions the personal laws are governed by the Indian Succession Act, 1925.

The primary sources of law include acts passed by the Parliament or the State Legislatures. A secondary source of law is the judgments of the Supreme Court and High Court. According to the Indian Constitution of 1950 (as amended) the laws declared by the Supreme Court are binding on all courts within India, although the Supreme Court is not bound by its own decisions.

Foreign Courts Orders

According to sections 13 and 14 of the Code of Civil Procedure Indian courts are obliged to give weight to foreign judgements meeting the following requirements: 1. The order is not contrary to Indian law 2. The court issuing the order had jurisdiction over the matter 3. International law

was correctly applied 4. The merits of the case were considered 5. The foreign proceedings are not opposed to natural justice and 6. The judgement has not been obtained by fraud.

In matters of child abduction to India recent case law, such as *Dhanwanti Joshi v Madhav Unde (JT 1997 (8) SC 720)* and *Sarita Sharma v Sushil Sharma (JT 2000 (2) SC 258)*, has shown that foreign orders are not automatically enforced. The tendency has been for courts in India to come to an independent judgement based on a consideration of the full merits and circumstances of the case, irrespective of foreign orders for custody. Similarly a notarised agreement on the custody of a child signed by the parents is not legally binding in India but can give weight to a custody case.

Court Structure

India has an integrated court system and at present English remains the official language of the majority of the courts. Courts are divided into civil and criminal divisions. At the lowest level are the Sub district (*Munsif*) Courts, which are the court of first instance for civil matters. These courts are subordinate to the District Courts. Appeals from the *Munsif* Courts are referred to the District Courts and then the High Court. Some disputes are resolved at the villages level in 'people's courts' called *Panchayats* or *Lok Adalats*.

The Supreme Court is at the apex of the Indian court system and acts as the ultimate court of appeals for the entire country. It hears appeals from the High Courts, of which there are twenty one for the twenty-five states and seven Union Territories. The Supreme Court also has advisory jurisdiction. The High Court hears appeals from the subordinate courts and tribunals. The High Courts have supervisory authority over all subordinate courts within their jurisdictions and some High Courts also exercise original jurisdiction in civil matters and admiralty jurisdiction. Specialised tribunals can also be established under the supervision of the High Court. For example, the Sales Tax Appellate Tribunal and the Central and State Administrative Tribunals.

In addition, the Family Courts Act 1984 established specialised Family Courts. The Family Courts are empowered to deal with the following matters: 1. A suit or proceeding between the parties to a marriage for nullity of marriage or restitution of conjugal rights or dissolution of marriage. 2. A suit or declaration as to the validity of a marriage or as to the matrimonial status of any person. 3. A suit or proceeding between the parties to a

marriage with respect to the property of the parties or of either of them. 4. A suit or proceeding for an order or injunction in circumstances arising out of a marital relationship. 5. A suit or proceeding for a declaration as to the legitimacy of any person. 6. A suit or proceeding for maintenance. 7. A suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Subject to the other provisions of this Act, a Family Court shall also have and exercise the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and such other jurisdiction as may be conferred on it by any other enactment. The Family Court has a duty to encourage settlement where the nature and circumstances of a case are appropriate and where there is the possibility of a settlement court proceedings should be adjourned for a set period in order to facilitate attempts to come to a settlement.

Filiation

Children born outside a marital relationship are illegitimate but they are entitled to a share of the property of the father.

Custody

According to the Muslim Personal Law (Shariat) Application Act No. 26 of 1937, when the parties are Muslim personal status matters, including marriage, divorce and guardianship, should be considered in accordance with Muslim personal law. Muslim personal status law in India is largely uncodified and is based on Hanafi jurisprudence. On this basis, the custody of female children prior to puberty is with the mother. The mother has custody of male children until they reach the age of seven.

Although personal status laws in India have developed separately according to religious tradition, the foundational law in the field of custody and guardianship is the Guardians and Wards Act No. 8 of Year 1890. Section 17 of this Act emphasises the importance of the best interests of the child and directs the courts to award custody taking into consideration the personal law of the minor. The issues to be taken into account when making a judgement as to what constitutes the welfare of the child are the age, sex and religion of the minor, the character and capacity of the proposed

guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the child is old enough to form an intelligent preference, the court may consider that preference.

Guardianship

The legal guardian of minor Muslim children is the father.

Access

The non-custodial parent cannot be denied the right of visitation and cannot be denied access to the child. This was confirmed by a ruling of the Supreme Court of India, in *N. Nirmala v Nelson Jeyakumar* (JT 1999 (5) SC 223). This ruling held that depriving a mother of visiting rights is not justified.

Non-Muslim Family Law

Hindu Family Law

Personal status matters of Hindu, Buddhist, Jain and Sikh citizens of India and anyone domiciled in India who is not a Muslim, Christian, Parsi or Jew come under the jurisdiction of the Hindu Minority and Guardianship Act No.32 of 1956. Custody of a child under the age of five must ordinarily be with the mother but the concept of the best interests of the child is of key importance in the awarding of custody. Case law, for example *Om Prakash Bharuka v Shakuntala Modi* (AIR 1993 Gauhati 38), has also underlined the importance of the welfare of the child in child custody cases.

According to Section 6 of the Hindu Minority and Guardianship Act the natural guardian of a minor in respect of the person and property of the minor is the father followed by the mother. The guardian of a married female is the husband. No person shall be permitted to act as guardian if they have ceased to be a Hindu or if they have become a hermit or an ascetic. According to Section 7 the natural guardian of an adopted child is the adoptive father followed by the adoptive mother. Section 13 states that the welfare of the minor is the paramount consideration in the appointment or declaration of any person as guardian of a Hindu minor by a court.

The guardian of an illegitimate child is the mother followed by the father. The Honourable Supreme Court in *Gita Hariharan v. RBI AIR 1999 SC 1149*, held that 'after father' does not mean after the death of the father. The mother also has the right to act as guardian, if the father is not able to take care of the child. The Hindu Adoptions and Maintenance Act No. 78 of Year 1956 states in Section 20 that a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children.

Christians

The marriages of Indian Christians are governed by the Indian Christian Marriage Act No. 15 of 1872. However there is no mention of custody issues. Therefore custody for Christian Indians is decided according to the principles of the Guardians and Wards Act and customs applicable to the parties.

Parsis

Applications for custody can be made under The Parsi Marriage and Divorce Act No. 3 of 1936 and in accordance with the Guardians and Wards Act.

Nationality

The acquisition of citizenship is governed by the Citizenship Act No. 57 of Year 1955. Citizenship can be acquired through birth within India if one of the parents has Indian citizenship. Citizenship is also acquired if a child born outside India has at least one parent of Indian citizenship. If the child is born outside of India and the father has Indian citizenship by descent only then Indian citizenship will only be acquired if the birth is registered by an Indian consulate. Indian citizenship may also be acquired through registration or naturalisation. Those eligible for registration are people who are of Indian origin and the minor children or spouse of someone with Indian citizenship.

Leaving the Jurisdiction

The issuing of passports is governed by The Passport Act No.15 of 1967. There are no particular restraints on the right of a minor to apply for a passport.

International Law

India became party to the UN Convention on the Rights of the Child in 1992.

Child Abduction

Although India is not a signatory to the Hague Convention and the Indian Courts will not automatically enforce a foreign custody order, under Article 226 of the Indian Constitution a left behind parent can petition the State High Court to issue a writ of habeas corpus against the abductor to have the child presented to the court. Under Article 32 of the Constitution it is also possible to petition the Supreme Court directly. The case of *Miss Atya Shamim v Deputy Commissioner/Collector, Delhi (Prescribed Authority under Citizenship Act) (AIR 1999 J&K 140)* reaffirmed that an applicant for a writ of habeas corpus need not be a citizen of India.

Since foreign court orders and mirror orders cannot be enforced in India, one option where a parent is concerned about allowing their child to travel to India with the other parent is to obtain a letter of request from the foreign court, incorporating a number of safeguards that may help to ensure the return of the child to the country of habitual residence. This could include a request that the parent taking the child to India swear a declaration before the Registrar General of the High Court of the relevant jurisdiction in India. A letter could also be sent by the relevant foreign court to the Registrar General of the High Court of the jurisdiction where the child is likely to be resident while in India requesting that the passport of the child be deposited with the Registrar General of the High Court and that the airport manager and the Director General of Police of that particular state be alerted in the event of the child being removed outside the state.

Child abduction to India by a parent is not currently considered an extraditable crime.

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27/07/05

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