CHAPTER IX

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Conflict of laws is that branch of law which deals with cases having a foreign element. In other words, the conflict of laws is that body of rules the purpose of which is to assist the court in finding out a solution to a case which contains a foreign element. If there is no foreign element in a dispute, the question of conflict of laws does not arise. For instance, if an Englishman and woman who are both British citizens, domiciled and resident in England, go through a ceremony of marriage in England and later, when they are both still domiciled and resident there, the wife petitions for divorce in an English court, here because no foreign element is involved, the case will be decided by the English domestic law.

By foreign element is meant simply a contact with some system of law other than the domestic law. Such a contract may arise because a contract is made or is to be performed in a foreign country or because the parties are not of the same country.

But if in the above case, at the time either party petitions for divorce, the other is domiciled and resident in India, and the ceremony has taken place in India and the
husband argues that it has not complied with the requirement of Indian law so there is no marriage to dissolve, the conflict of laws becomes relevant. Here the husband's absence raises the issue as to whether Indian or English law is to determine the validity of the marriage.

In India, the usual cases that come for trial before the courts are those where the parties are resident or domiciled in India and the cause of action arises in India. Occasionally, Indian courts are confronted with cases having a foreign element. For instance, it may happen that an Indian court is called upon to decide a petition for divorce presented by an Indian domiciled in India who married an English woman in England. Thus in respect of cases having foreign element, a municipal court has to determine the following three important questions: First, in what circumstances the court will assume jurisdiction over cases having foreign element; secondly, if the answer is yes, then which law will determine the issue; and lastly, in what circumstances it will recognise a foreign judgment.

In India, where people of different religions live together—where there is unity among diversity, the conflict may also arise between the laws of the same country. This
may happen because in personal matters laws of Hindus, Muslims, Christians and Parsis differ from each other in India. If two persons professing different religions intermarry or if one party to the marriage convert to another religion and then the dispute with regard to matrimonial relief arises, this would result in a case of conflict between the personal laws of the two communities.

The social, economic and cultural position of India has undergone a drastic change since independence. Exchange of ideas and cultural and educational facilities have provided more and more opportunities for young people to have spouses of their own choice cutting across every bars and inhibitions. This has undoubtedly resulted into a trail of social, religious and human sufferings and agonies. The British society is traditionally monogamous and Muslims in India and all over the world are polygamous. This has exposed the British society to an apparent danger. Consequently, the British Parliament has to enact laws so as to provide legal solution to the baffling problems of polygamous people.

Moreover, India has now achieved at least the same position in Asia as England has in the world. People from neighbouring nations like Pakistan, Bangladesh, Sri Lanka, Maldives, Nepal, Burma and many other countries have taken
shelter in India. Students from underdeveloped and developing nations come here for education. So the problems with regard to conflict of laws are bound to come before our courts. It is, therefore, incumbent on our part to have our own law to deal with such problems.

Though Indian courts have attempted to lay down certain rules to tackle such disputes, yet our law is in a state of infancy. Mostly the Indian courts have decided such cases by applying rules propounded by English courts. They have sometimes applied English precedents blindly and apishly. The Indian courts are now free and in a fortunate position to study and use as their guide not only the English law but also the legal systems of other countries and then adopt their own rules of conflict of laws as accord best with the Indian sense of justice, equity and good conscience.

Before talking about divorce under conflict of laws (as the topic of this work suggests) it will be most appropriate to inquire about the marriage and its validity. Unless there is a valid marriage, the question of matrimonial relief (i.e. divorce) does not arise. Therefore, there are various occasions when the existence of a marriage has to be established as a preliminary to legal proceedings. For instance, the institution of matrimonial cause, such
as a petition for divorce or judicial separation, implies that the parties are related to each other as husband and wife. If a person claims an inheritance or insurance policy as a widow or widower of the deceased, she or he as the case may be has to prove that a regularly constituted marriage exists.

(i) As has already been observed, a marriage is a contract between a man and a woman for the procreation and education of children. Procreation of children is not a necessary requirement of a valid marriage nowadays, though it is usually envisaged by the parties. It seems to have been instituted as necessary to the very being of society. Marriage, in fact, is a description of the institution from a practical and utilitarian point of view. According to the Marxist viewpoint, marriage was, in the past, a frank bargain arranged by overlords and monogamy was encouraged to make certain the inheritance of wealth.

Under the English domestic law, 'marriage' has been defined to be a voluntary union for life between one man and one woman to the exclusion of all others. The marriage contract is fundamentally different from a mercantile contract, since it creates a status that affects both the parties themselves and the society to which they belong. It is sui generis. It becomes functus officio upon the
solemnization of marriage ceremony and then the parties are governed by altogether different law.

The requirement of a life long union does not mean that the marriage must be indissoluble. It simply means that the parties have married in a form which envisages that, in the ordinary course of things, they will cohabit as husband and wife for the rest of their lives. Although the form of marriage recognised by English law is generally described as a "Christian marriage", this reference to religion is misleading. The fact is that whatever may be the religion of the parties or of the country in which they marry, their union is a marriage in English sense provided that it possesses the two attributes of indefinite duration and the exclusion of all other persons.

India is a country where people of different religion reside. They have their own personal laws. To govern personal matters or matters pertaining to family, there is no national or regional law in India. Hindus have their own family law, so have the Muslims. Other minority communities like Christians, Parsis and Jews too have their own separate personal laws. In India, apart from law, customs have always played an important role in personal matters. It has been an established rule of Hindu law that custom overrides sacred law. Among Muslims also it
has played a significant role, though after the Shariat Act, 1937 its importance has been greatly reduced. Christian law in India is partly statutory and partly customary.

Before the enactment of the Hindu Marriage Act, 1955 the marriage among Hindus was considered as a sacrament. Even in our contemporary world most Hindus still regard their marriages a sacrament. Marriage is one of the essential samskaras for every Hindu. To be mothers were woman created and to be fathers men, the Vedas ordain that Dharma must be practised by man together with his wife (Manu, IX, 96). But after the passing of the Hindu Marriage Act, 1955 the nature of Hindu marriage has undergone a vital change. Monogamy has become an accepted rule. A particular age for marriage has been prescribed for both the bride and bridegroom. The parties should be able to give a valid consent.

The important thing to see is, whether the Hindu marriage is still regarded as a sacrament? To prove that a Hindu marriage is a sacrament, it is essential that it should be permanent and indissoluble union; it should be an eternal union, and a holy union. It is observed that the Act has obliterated the first element, for divorce is recognised. The second element seems to
be destroyed when widow remarriage is given statutory recognition. Probably, the third element is retained to some extent, for in most of the Hindu marriages a sacred or religious ceremony is still necessary. But the ceremonial aspect of the sacramental marriage is of the least importance. Therefore the Hindu marriage seems neither a sacrament nor a contract. It has a semblance of a contract as consent is of some importance; it has a semblance of a sacrament as in most marriages a sacramental ceremony is still necessary.

So far as the Muslim marriage is concerned it has been established beyond doubt by the court that it is a contract. In the words of Justice Mehmood, marriage among Muslims is not a sacrament, but purely a civil contract; and though it is solemnized generally with recitation of certain verses from the Quran, yet Muslim law does not positively prescribe any service peculiar to the occasion (Abdul Quadir's Case). The similarity of a Muslim marriage to a contract is so pronounced that some jurists have treated it entirely as a civil contract. Another view is that Muslim marriage is not purely a civil contract but a religious sacrament too (Anis Begum's case). Thus it seems that Muslim marriage is an institution of Ibadat clothed in the legal form of contract.
The marriages among Christians and Parsis are generally regulated by the statutes in India. The nature of such marriages are contractual rather than sacramental. Above all, any person residing in India, irrespective of his/her religion; can go through a civil marriage under the Special Marriage Act, 1954, provided that the required conditions mentioned under it are fulfilled. But the marriage under the Special Marriage Act, 1954 is essentially a contract. None of the parties married under the Act is governed by their personal law and all matrimonial matters relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce are governed by the provision of this Act. Where the parties solemnize their marriage abroad and if one of the parties is an Indian, their marriage will be governed by the Foreign Marriage Act, 1969. It is modelled on the line of the Special Marriage Act, 1954 and the English law on the subject. This Act of 1969 in fact, was passed with the object to solve the conflict of laws problems.

Thus the common thing among all marriages solemnized under different systems of law is that it has much semblance with the contract rather than sacrament. This should be welcomed because it will be helpful in future for evolving a uniform law of marriage particularly in cases of conflict
between two systems of laws.

(ii) Now we move towards the question of validity of marriage. If a marriage is solemnized in a country where the parties live, the validity of the marriage will be determined by the domestic law of the country. But if a marriage is solemnized abroad, or a foreign element is involved or there is any inter-personal conflict of laws then the problem is by which law the formal and material validity of marriage will be determined? The problem has become complicated as the domestic laws of countries of the world display much diversity. It usually happens that the courts of one country regard a matter relating to marriage as a matter of formal validity, while the courts of another country consider the same matter as relating to material validity. Basically, the requirements of a valid marriage are that the requisite formalities are complied with; the parties have legal capacity to marry each other; and that they freely and knowingly consent to such marriage.

Formal requirements of a marriage include such matters as whether a religious or civil ceremony is necessary, whether banns have to be called or notices published etc. Now it has been established that in conflict of laws cases the formal validity of the marriage will be determined by the lex loci celebrationis, the law of the place where the
ceremony takes place. In other words, if the marriage is valid according to the form (where it is celebrated) it will be formally valid all over the world. However, a marriage which is not valid at its inception according to *lex loci celebrationis* should not be allowed to be formally valid later on.

Although the parties have gone through a ceremony formally valid by the *lex loci celebrationis*, the marriage may nevertheless be void if the man and woman do not have legal capacity to marry each other. For instance, if one party has already been married, or one or both the parties are underage or they are within the prohibited degree of relationship, the important problem then is which law will determine the capacity to marry?

Dicey and Morris in this regard advocated that if both the parties have capacity to marry each other by the laws of their domiciles at the time of the ceremony the marriage is valid, but if by either or both of those laws they do not have such capacity then the marriage will be invalid. But Cheshire and North are of the view that the law of the intended matrimonial home, that is, the country where, at the time of ceremony, the parties intend to, and after the ceremony do, set up home, should determine the capacity to marry. Both the views have a support of the
court. However, the view that the capacity to marry should be determined by the ante nuptial domicile is appropriate.

In India, marriages are generally solemnized in two ways: First, according to personal law if both the parties belong to the same religion; and secondly, under the Special Marriage Act, 1954 if the parties belong to different religion. So whenever a marriage is performed in India compliance with one of the above formalities is essential. Non-compliance of the above formalities will render the marriage null and void. It can, therefore, be said that if a marriage is performed in India between two Hindus, two Muslims, two Parsis, two Christians or under the Special Marriage Act, 1954 between any two persons will remain valid in India, even if neither of the parties is domiciled in India. The question of the intended matrimonial home, whether they decide to live in India or not, will not affect the validity of marriage in any way.

So far as the capacity to contract a marriage is concerned in the conflict of laws cases, there is no direct authority. We are still adhered to the old English approach where both the formal and material validity depended upon the lex loci celebrationis. This is true not only under the law of those communities whose personal laws are still uncodified, but also with regard to the laws of those communi-
ties whose laws are codified. The English courts are making distinction between formal and material validity but we do not make any such distinction.

Now the time is congenial to develop our own theory to deal with such cases of conflict of laws. The theory should be that in conflict of laws cases i.e. where there is a conflict between two personal laws or where a foreign element in involved, the marriage should be deemed to be a civil marriage and so the capacity should be determined by the Indian secular law i.e. by the Special Marriage Act, 1954, and the same principle needs to be applied in India if marriage is performed here. This theory seems to be just, reasonable and socially most desirable.

Now conversely, if a marriage takes place abroad—such marriages may be divided into two categories: First, when one of the parties (or both the parties) is an Indian national and the marriage is performed or registered under the Foreign Marriage Act, 1969, the validity of such marriages will be governed by the Foreign Marriage Act, 1969. This Act does not deal with the problem of conflict of laws. It simply says that the Marriage Officer will refuse to solemnize the marriage if it is inconsistent with the _lex loci celebrationis_ or the international law or comity of the nation. Secondly, if the marriage is solemnized abroad
but not covered by the provision of the Foreign Marriage Act, 1969 such marriages will be governed by the rules of private international law. In this regard Dr. Paras Diwan is of the opinion that the material validity should be judged by reference to the laws of the matrimonial home of the parties. But the proper course would be that the material validity of the marriage should be judged by reference to the ante-nuptial domicile, because by doing so many baffling problems regarding age etc., will easily be coped with. This will be the just and reasonable rule and judiciary will also support this.

(iii) As it has already been seen and discussed that English marriage is a strictly monogamous whereas Muslim in India and all over the world are polygamous. The matrimonial laws of England are adapted to Christian marriage, and are wholly inapplicable to polygamy. Initially the English courts were much reluctant to recognise polygamous marriages both actual and potential. Parties to a polygamous marriage were denied remedies, adjudication or relief under the matrimonial law of England. This led much hardship and injustice with the people of polygamous marriage. But an increasing inflow of immigrants from the Afro-Asian countries and some decisions of the court necessiated the enactment in this regard. The British Parliament found itself in a dilemma as to how and in what manner the problem of polygamous marriages could
be adjusted with the requirements of the English society?
The British Parliament thus came out with a legislation known as the Matrimonial Proceedings (Polygamous Marriages) Act, 1972. This Act conferred the power to the court to adjudicate upon and to grant remedies to the people of polygamous marriage.

On the question, as to which law should determine whether the marriage be characterised as monogamous or polygamous, the juristic opinion is divided. Some jurists are of the opinion that the *lex loci celebrationis* should determine the nature of marriage, while other say that it should be the law of *lex domicilii*. But the proper course would be— if the domicile of the parties are same then the law of *lex domicilii* should determine the nature of marriage but where the domicile of husband and wife is different or where the parties are not domiciled in England then it should be determined by *lex loci celebrationis*. However, the nature of the marriage, whether it is actually or potentially polygamous should be determined at the date of the institution of the proceedings.

The fallacy of English law is that if a marriage is monogamous at its inception, it will remain monogamous although a change of religion or of domicile may entitle the husband to take another wife. But if it is polygamous
at its inception, it may become monogamous by reason of change of religion or of domicile before the happening of the events which give rise to the proceedings. Since the monogamous marriage cannot be changed into a polygamous marriage in any case, therefore the polygamous marriage should also not be allowed to change its nature merely because of change of domicile or religion of one or both of the parties. The most affected people by this rule are Indian Muslims. The Indian immigrants accept or choose English domicile only because of their vested interests. The real problem which will result from such change, has not been noticed. Suppose if they wish to come back to India then they will be deprived of the privilege which has been conferred upon them by their personal law to marry again even in most urgent contingency. However, the most interesting aspect of the English law is that a person while domiciled in England cannot contract a polygamous marriage but if a person has two or more wives before acquiring English domicile, there is nothing to prevent him from contracting one more wife.

(iv) During the eighteenth and nineteenth centuries English society advanced with pace and therefore impressed upon the need of recognition of divorce. All the ingenuity of the Church failed to avert its reception in English law. In 1857 the first Matrimonial Causes Act, 1857, was passed
which brought fundamental changes in the English matrimonial laws. This Act transferred the entire jurisdiction in matrimonial causes from ecclesiastical courts to civil courts and also recognised divorce. The Act set up a "Court for Divorce and Matrimonial Causes", and conferred upon this civil jurisdiction to entertain suits for divorce and other matrimonial causes. After that many reforms were made in the matrimonial law. The same have now been consolidated in the Matrimonial causes Act, 1973 and have been further supplemented by the Domicile and Matrimonial Proceedings Act, 1973.

Now the English law under the Act of 1973 recognises only one form of divorce that is the marriage has broken down irremediably. The grounds which are enunciated in the Act appear to be a fair blending of the three traditional fault grounds that is adultery, cruelty and desertion with the modern theories of consent and breakdown of marriage evidenced by living separate for certain duration.

In India, before 1955, except by customs, divorce was not recognised in Hindu law. The Hindu Marriage Act, 1955 originally, incorporated the guilt or fault theory. But all the three traditional fault grounds, adultery, cruelty and desertion, were made the grounds of judicial separation but not of divorce. Under Section 13 of this Act, nine
grounds of divorce were recognised both for husband and wife and two additional grounds were recognised on which the wife alone could seek divorce. After the amending Act of 1976 these fault grounds have been recognised as a ground of divorce. Two more fault grounds have been recognised on which the wife alone may seek divorce. Another theory of divorce which has been recognised by the courts in India is that of consent theory. The protagonists of this theory argue that the parties to the marriage should be as free to dissolve a marriage as they are to enter it. If the marriage is a contract based on free volition of parties, the parties should have equal freedom to dissolve it.

The guilt and consent theories of divorce have not been found exhaustive, since the former recognises the divorce only on certain grounds whereas the latter makes divorce either too easy or too difficult. The problems that the present law faces is that if a marriage has, in fact broken down on account of any reason, there is no sense in continuing such a marriage. From such a marriage the intrinsic love and affection withers away, the empty shell of marriage should be exploded on the first available opportunity without further bitterness. With this object in view and to facilitate divorce when the matrimony is only a humdrum deariness the breakdown theory of divorce is
recognised by the amending Act of 1964 and the same is retained by the Hindu Marriage (Amendment) Act, 1976.

The Special Marriage Act, 1954 has the unique distinction of incorporating all the above three theories of divorce. It recognises eight grounds for both husband and wife and two special grounds for the wife alone. Two breakdown grounds have also been recognised. The Indian Divorce Act, 1869 recognises only fault theory. The Parsi Marriage and Divorce Act, 1936 also recognises fault theory of divorce but the peculiar feature of this Act is that it gives no place to voidable marriages. The grounds of voidable marriages have been made the grounds for divorce. This Act provides nine fault grounds for divorce of which two relate to pre-marriage faults and seven to post marriage faults.

On keen perusal of the Indian laws on divorce it may be observed that in contrast to English law, the Indian Divorce Act, 1869 stands as a reminder of the 19th century English matrimonial law, while the Special Marriage Act, 1954 presents a spectacle where guilt grounds of divorce have been put side by side with divorce by mutual consent and divorce on the ground of irretrievable break down of marriage. In between them stands the Parsi Marriage and Divorce Act, 1936 which is though an outcome of the late 19th century outlook of English matrimonial law has some flashes of modernity, and the Hindu Marriage Act, 1955
which has a remarkable blending of traditional Hindu conservatism with the modern notion of matrimonial law.

Divorce under Muslim law is an exception under Indian law. Divorce under Muslim law is generally non-judicial. Before 1939 there was hardly any ground on which the Muslim wife could seek divorce. The husband was having unilateral power to divorce his wife even at his will. There was hardly any restriction on the exercise of such unbridled power. The Dissolution of Muslim Marriage Act, 1939 was passed to enable the Muslim wife to obtain divorce on certain grounds. Now it can be said that except 'talaq' which only husband can pronounce, Muslim law also has some glimpses of fault and consent theory of divorce.

(v) Now the very important aspect of the problem is that of the jurisdiction of the courts to try the suits seeking divorce as a relief under conflict of laws. According to the old English law, the domicile of the married pair affords the only true test of jurisdiction to dissolve their marriage, (Le Mesurier Vs. Le Mesurier (1895) A.C.517). The essence of the rule has been that there should be only one test of jurisdiction and only one court capable of dissolving a particular marriage i.e. the court of the parties' domicile. As the domicile of the wife during marriage was the same as the domicile of her husband, this meant that the court had no jurisdiction to grant divorce.
at the suit of the wife unless the husband was domiciled in England at the time of the institution of the proceedings. This resulted in hardship to a wife whose husband deserted her and acquired a foreign domicile.

Various reforms and proposals have been translated into law in the form of the Domicile and Matrimonial Proceedings Act, 1973. Now English courts have jurisdiction to entertain proceedings for divorce or judicial separation if either of the parties to the marriage (a) is domiciled in England on the date when the proceedings are begun; or (b) was habitually resident in England throughout the period of one year ending with that date.

Though the expression "habitual residence" has nowhere been defined statutorily or judicially yet it is clearly distinguishable from domicile in as much as any intention as to the future is not relevant. It can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence. Since the common law rule of unity of domicile of husband and wife caused hardship on the wife, the English Parliament was forced to do away this rule. Now the wife is permitted to have her own domicile on the basis of which she can file a petition in an English court simply by showing one year's habitual residence.
Though, in India, matrimonial laws differ from community to community yet the jurisdictional laws differ only slightly. Except Muslims, the matrimonial law of each communities is now a statutory law. Except the Indian Divorce Act, 1869, the domicile or nationality of either party is not relevant for the purpose of acquiring jurisdiction under any statutes. The outstanding feature of all these statutes is that in all matrimonial causes the jurisdictional basis is same i.e. residence. The jurisdictional rule both under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 are same. If the marriage has been solemnized or registered under these Acts, the petition may be presented to the District Court within the local limits of whose jurisdiction (i) the marriage was solemnized; or (ii) the parties last resided; or (iii) the respondent, at the time of the presentation of the petition resides or (iv) the petitioner is residing at the time of the presentation of the petition, in case where the respondent is, at that time, residing outside the territories to which this Act extends or has not been heard alive for a period of seven years. One more special ground for jurisdiction to the wife has been provided i.e. if the husband is not resident of India and the wife is residing in India for the last three years the District Court will entertain the petition for divorce.
Under the Indian Divorce Act, 1869, the court shall assume jurisdiction on the basis of domicile and residence in India. Under the Parsi Marriage and Divorce Act, 1936 the jurisdictional basis are generally the same as in the Special Marriage Act, 1955.

Under Muslim law, husband is not required to have recourse to the court, the question of jurisdiction, therefore, does not arise. The Dissolution of Muslim Marriage Act, 1939 does not contain any provision with regard to jurisdiction and the matter should, therefore, be regulated by Section 20 of the Civil Procedure Code.

There is no law in India to deal with cases where marriage has been solemnized abroad or where a foreign element is involved. Our courts on this point are not uniform in opinion. Now as has been observed that except Muslim personal law, the law of divorces in India and England have recognised all the three theories of divorce that is guilt, consent and breakdown, so there should not be any hitch in evolving a consensus law relating to jurisdiction. A law should, therefore, be enacted on the pattern of the Domicile and Matrimonial Proceedings Act, 1973 in which domicile of either parties or one year residence may be made the basis of jurisdiction. By doing so both the problems of Indian residents and a case where a foreign element is involved, can be solved in a fair and
just way.

(vi) The question of choice of law under the English rules of conflict of laws has posed no problem. Once the English court determines that it has jurisdiction to entertain the petition for divorce, it has never applied any other law of divorce except the domestic law of England. The court has applied it not as the lexDomicilii but as the lex fori.

In India, once the court decides that it has jurisdiction to entertain a petition for divorce, it will be for the court to make the choice of law. If there is any statutory direction making a particular choice of law obligatory, the court will be bound to make the choice of law accordingly. For instance, if the dispute is between two Indian Hindus, Muslims, Christians, and Parsis, the court will apply the personal law of the parties i.e. the law of the community to which the parties belong. If there is a civil marriage the court will apply the provisions of the Special Marriage Act, 1954.

However, when there are no such directions the courts make their own choice of law in accordance with the general juristic principles as best it can. The court are not uniform in their attitude. Presently, the expression "general juristic principles" is vague and ambiguous.
The law should be very clear simple and easily understandable. For instance, in a case, where any foreign element is involved or where an Indian domiciled Hindu, Christian, Muslim, Parsi or Jew performs a marriage abroad with any person who does not belong to their religious community, such couples come to India and ask matrimonial relief from an Indian court, the court would faced with a difficult task as to which of the communal law (choice of law) it should apply whether of the petitioner or of the respondent. If the court takes the view that in such cases the personal law of neither parties is applicable except the provisions of the Special Marriage Act, 1954 this will be a just, reasonable and good choice of law. Here the question is not for applying the *lex domicilii* of the parties, but of *lex fori*.

(vii) After many amendments, the statutory law of recognition of foreign judgments in England has now been much simplified. But the courts always, through their interpretations have been posing problems of uncertainty. Moreover, the British Parliament has unnecessarily made a distinction between judicial and non-judicial overseas divorces. It has also made a different sets of rules to govern such divorces for the purposes of recognition. An overseas divorce which has been obtained by means of judicial or other proceedings will be recognised in England if, at the
date of commencement of the proceedings, either party (whether petitioner or respondent) was (i) habitually resident or (ii) domiciled according to England law or the law of that country in family matters or (iii) a national of that country. Whereas an overseas divorce obtained otherwise than by means of proceedings can be recognised only if both parties to the marriage were domiciled in the country in which it was obtained or if one was domiciled there and the other in a country whose law would recognise it when it was obtained.

This distinction should be abolished and the overseas divorces whether obtained judicially or not if it satisfies the court beyond doubt should be entitled for recognition. This will be a reasonable and correct law for the Muslims who are Indians or Jews for whom extra-judicial divorces in the form of 'Talaq' or 'Ghet' are still accepted and practised respectively.

As said earlier the British courts have always been by means of interpretation, creating much confusion and obstacles in deciding such cases. For instance, while interpreting Section 2(a) of the Recognition of Divorce and Legal Separation Act, 1971, the court introduced the notion of "transitional divorce" and observed that whole of the proceedings must take place in a country where the
divorce was pronounced. For instance, a Pakistani national pronounced divorce in England against his wife who was living in Pakistan and in accordance with Pakistani law sent written notice to her, the talaq became effective because it was not revoked within 90 days. The court held that the pronouncement of talaq was part of the 'proceedings' by means of which the divorce had been obtained, and accordingly the proceedings had taken place partly in England and partly in Pakistan. Such divorce, therefore, was not entitled to be recognised. (R Vs. Immigration Appeal Tribunal (1984) 1 All E.R. 489). The requirement in Section 2(a) of the Recognition of Divorces and Legal Separations Act, 1971 that the overseas divorce obtained by means of other proceedings in any country outside the British Isles clearly mean that the entirety of the proceedings should be in overseas country. It is not possible to imply the words 'or partly in' after the words 'other proceedings in'.

This seems to be technically hollow, for the required goal can be achieved by simply going to Pakistan. So if a husband of Pakistani nationality can afford the fare to that country and pronounce talaq there the divorce would be recognised but if he could afford the postage only it would not.
In India, the foreign judgments and decrees are recognised under Section 13 of the Civil Procedure Code, 1908. The courts here do not make any distinction between judicial or extra judicial divorce and recognise the divorce if it is pronounced either in accordance with the personal law of the parties or by a competent court. Sometimes, the Indian law also proves handy in this regard. Therefore, the law should be that, apart from Civil Procedure Code, if the Court is satisfied beyond doubt that the divorce is given in a particular case it should recognise such divorce.

(viii) In India, since the inter-communal or inter-religious marriages are not permitted, there is least possibility of a direct conflict between personal laws of any two communities. However, such inter-communal conflict may arise indirectly. When one of the spouses of a marriage converts to another religion, then the considerations before us are—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 latter case, whether it would be the law of the spouse who has converted or the law of a non convert spouse. This can be studied in the following circumstances—
(1) When one party at the time of the institution of the suit for dissolution of marriage is a Hindu and the other, a Muslim, this involves the question of apostasy and conversion. One party may insist that his case should be governed by Hindu law and other may plea for Muslim law. The rules regarding apostasy and conversion under both the system are so inconsistent that they can not be reconciled with each other. The courts in India are of the view that in holding the balance equally between conflicting principles, the cases will be decided on the basis of equity, justice and good conscience.

In order to solve such problems the proper course of law would be that the converted spouse should not be given any privilege to dissolve his/her marriage on the ground of difference of religion. Here one party has committed the matrimonial guilt so he/she should be punished for misconduct rather than being rewarded. Since religious sanctity of such marriage has gone, for one party has renounced his/her faith, therefore such marriage should be automatically converted to a civil marriage and a civil law should be applied i.e. the Special Marriage Act, 1954. It will be in real spirit of Article 44 and the preamble of our Constitution. These are the appropriate cases where the uniform civil code should be applied. This will serve atleast two purposes: first, the children of such union
will continue to get love and affection of the parents, for there is no ground to get divorce on the basis of change of religion under the Special Marriage Act; and second, if the spouses think that the substance of the marital life has gone and no use of keeping empty shells intact then they may go to the court to seek divorce on the ground of irretrievable breakdown or mental cruelty. However, it cannot be forgotten that the establishment of a secular society is the aim and goal of our Constitution, therefore such an interpretation will be in tune to Article 44 as well as the preamble of the Constitution.

(ii) When one party at the time of the institution of the suit for dissolution of marriage is a Muslim and the other, a Christian. According to Muslim law, a Muslim male can marry with a Christian female since she is Kitabiyya. He can also divorce such wife by pronouncing 'talaq'. On the other hand, to get divorce under the Indian Divorce Act, 1869 only one party to the marriage should be a Christian. Such dispute may also arise where one party embraces Islam or Christianity. Thus there will be a direct conflict between two personal laws where one party claims divorce under one law and the other under a different law.

Here if the law of one party is applied then, it will certainly be a discrimination with the other party.
It will, therefore, be proper to apply a secular law in such circumstances. And in India the Special Marriage Act, 1954 is a secular law, therefore, the provision of this Act should be applied.

(iii) When one party at the time of institution of the suit for dissolution of marriage is a Hindu and the other a Christian. Here, at the first glance, one may question that they can marry only under the Special Marriage Act, 1954 otherwise their marriage is void. It may be possible here that one has changed his religion temporarily in the wake of love or emotion before marriage and re-embrace his/her original faith afterward. The law always leans in favour of validity of marriage whether it be valid according to lex loci celebrationis or lex domicilii or lex fori. Here again to apply the law of one party will be a discrimination to the other. It will, therefore, be a correct approach if the case be governed by the Special Marriage Act, 1954.

Conclude the whole for suggestions the Special Marriage Act, 1954 with some suitable amendments discussed earlier in thesis should be applied to cases of conflict of laws and also to cases of inter-personal conflict of laws. This will not only be in tune with the spirit of the Constitution but also promote the communal harmony and
social integrity. The application of such amended Special Marriage Act, 1954 will create a sense of Justice in the minds of the parties in the following ways: first, this law is the lex fori of India; secondly, no party to the marriage is being discriminated by the application of such law, for this is not the personal law of the parties; and lastly this law will bring a clarity and uniformity in law. It is, therefore, submitted that either a separate exhaustive legislation be enacted on the line suggested in this work or suitable amendments should be made in the Special Marriage Act, 1954 so as to deal with cases of conflict of laws.