CHAPTER I

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At the very outset, it will be pertinent to make it clear that the expression "conflict of laws" is also known by the name of "the Private International law". These two terms are interchangeable. However, neither of them is wholly accurate nor properly descriptive. The term "conflict of laws" is somewhat misleading. The object of this branch of law is to eliminate any conflict between two or more systems of laws having competing claims to govern the issue before the court. The term is not to provoke such a conflict, as the words appear to suggest. The term "conflict of laws" was given by A.V. Dicey.

Another synonymous term i.e. "private international law" which is generally used in Europe. This is even more confusing since each of its three words require comments. "Private" distinguishes this subject from "Public". As we know, public international law is the body of rules and principles which govern states and international organisations in their mutual relations. On the contrary private international law is primarily concerned with the legal

relations between private individuals and corporations. Its sources are the same as those of any other branch of municipal law.

The word "International" is used to indicate that the subject is concerned not only with the application of a particular law of a particular country but also the rules of foreign law. The word is inapt, however, in so far as it might suggest that it is in some way concerned with the relations between states.

The word 'law' here must be understood in a special sense. The application of the rules of English private international law does not by itself decide the case, as does that of the rules of the law of contract or tort. Private international law is not substantive law in this sense, for it merely provides a body of rules which determine whether the English court has jurisdiction to hear and decide a case, and, if yes, what system of law, English or foreign, will be employed to decide it, or whether a judgment of a foreign court will be recognised and enforced by and English court.

At this moment we are not very much concerned with the controversy and we will use these two expressions as synonyms to each other.
The first question which one may raise by looking at the topic is: What do we understand by the expression "conflict of laws"? In the words of Dicey and Morris, "conflict of laws" or "English private international law" is that branch of law of England which "consists of rules which do not directly determine the rights and liabilities of particular persons but which determine the limit of the jurisdiction to be exercised by the English courts and also the choice of the body of law, whether domestic law of England or the law of any foreign country by reference to which English courts are to determine different matters brought before them for decision". However, in the words of Cheshire: "Private international law, then, is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system."

Thus these expressions may accordingly be described as the branch of law which deals with cases having a foreign element. In other words the conflict of laws is a body of rules the purpose of which is to assist the court in deciding a case which contains a foreign element. By a "foreign element" is meant simply a contact with some system of law

2. Dicey and Morris: Conflict of laws, 8th ed. p.5
3. Cheshire and North: Private international law, 8th ed. p.5
other than domestic law. Such a contact may arise when a contract was made or was to be performed in a foreign country or because the parties are not English or because a tort was committed in a foreign country or because property was situated there.

If the case contains no foreign element, the conflict of laws is irrelevant. If a man and woman who are both British citizens, domiciled and resident of England, go through a ceremony of marriage in England and later on, when they are both still domiciled and resident there, the wife petitions in an English court for a divorce, no foreign element is involved. The case will, therefore, be governed by English law alone, for no problem of jurisdiction arises and all questions relating to validity of the marriage or the grounds upon which a divorce can be granted along with procedural or evidential matters will be governed by English law.

But if we vary slightly the above facts and suppose that in the example given above, if wife petitions for a divorce when the husband is domiciled and resident of France, and that the ceremony had taken place in France and the husband argues that it did not comply with the requirements of French law so there is no marriage to dissolve. Here the conflict of laws becomes relevant. The husband's absence
raises the question of the court's jurisdiction and his argument raises the issue as to whether French or English law is to determine the validity of the marriage.

In India, however, the municipal courts generally decide the cases where parties are internal, i.e. living in the same country in which the courts are situated. Thus, the usual cases that come for trial before the Indian courts are those in which cause of action arises in India, the parties being Indians or domiciled in India and other elements also being of domestic character. Occasionally, Indian courts are confronted with cases having a foreign element, i.e. one of the elements of the suit is connected with some foreign country. For instance, it may happen that an Indian court is called upon to decide a petition of divorce presented by an Indian domiciled in India who had married an English woman in England, or who had married a French woman in Berlin; or to determine the question of succession to the property of a person who died in India (domiciled in India or abroad), who has left movable or immovable properties both in India and abroad.

One more important question with which a municipal court may be faced is of recognition of a foreign judgment or enforcement of a foreign decree. For example, if an Indian wife files a petition for maintenance under section
125 of Criminal Procedure Code, 1973 in an Indian court against her husband domiciled in New York and the husband takes the plea that the marriage had already been dissolved by a decree of a New York court and therefore the applicant's claim is not maintainable. Here the question arises whether the Indian court will recognise the New York decree and give effect to it.

Thus in respect of cases having foreign element, a municipal court has to determine the following three questions:

(a) In what circumstances the court will assume jurisdiction over cases having foreign elements;

(b) If the answer is in affirmative, then which law will determine the case— an Indian law or the appropriate foreign law (the rules governing this selection are known as choice of law rules) and

(c) In what circumstances it will recognise a foreign judgment or when it will order the execution of a foreign decree.

In fact, the third question arises only when there is a foreign judgment. However, the first two questions arise in every case with foreign elements. So long as the international relations are based on the sovereign equality of nations, the municipal courts are not bound to recognise or to give effect to a foreign law or foreign judgments. The doctrine of sovereignty imposes no obligation on municipal
courts to apply any other law. But in the present civilised international life no country can claim to decide a case having foreign elements entirely on the basis of its domestic law. The law of every modern country has rules dealing with these questions. These rules in other words are called conflict of laws in contrast to its domestic or internal law. But there is no uniformity in the laws of the countries of the world as to in what circumstances municipal courts will assume jurisdiction over cases having foreign elements or in what circumstances a foreign law is to be applied or in which cases foreign judgments are to be recognised.

With regard to divorce the English rules of conflict of laws are peculiar in character to safeguard the interest of English people. The rule is: if the English court has jurisdiction, it will apply English domestic law without recourse to foreign law. Conversely, there are many situations in which, if a foreign court has jurisdiction according to English rules of the conflict of laws, its judgments or decree will be recognised in England, regardless of grounds on which it was based or the choice of law rule which it applied.

The private international law is essentially a branch of municipal law, and that is why every country has its own private international law. The need for this law arises
because different countries have different system of law. Every country makes laws regarding marriage, matrimonial causes, adoption, succession, contract, debts, torts and like matters. But there is no uniformity among laws of different countries regarding these subjects. Sometimes even within a country laws are different. For example, laws of different states of the United States are different from these of others. Had it not been so, there would not have been any need for private international law. Thus, if marriage means the same thing all over the world and the rules of capacity and ceremonies of marriage are the same in all countries, the question of conflict between the laws of two countries would not arise. And if there is no conflict between the laws of different countries, there would be no need for private international law. Since the laws of different countries differ, it becomes indispensable for every country to have a branch of law to solve these conflicts. This very branch of law is called the conflict of laws or private international law.

According to Professor Paras Diwan⁴, conflict of laws may arise in the following two cases:

(i) When the laws of two or more countries with which the case is connected, differ from each other.

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⁴ Diwan, Paras: Indian and English Private International law, 1977 p.3
(ii) The conflict may also arise between the laws of the same country. This may happen:

(a) When laws of different states or provinces of a country differ from each other, just as the laws of states of the U.S.A. or of the Soviet Union or of the provinces of Canada differ from each other. This is a case of conflict of territorial laws, or

(b) When the laws of different communities in a country differ from each other. For instance, in personal matters laws of Hindus, Muslims, Christians and Parsis differ from each other in India. This is a case of conflict between the personal laws of communities.

As a subject of study, conflict of personal laws can be separated from private international law for two reasons:

In the first place, in private international law the systems of laws between which the choice lies are territorial, while in personal conflicts of laws, the choice lies between the legal systems prevailing in the same country. Here most of the rules of the former can be applied to the latter by analogy. Secondly, many writers who have studied conflict of personal laws as a subject, think that the two systems are quite distinct. They claim that the rules of conflict of law like lex fori, lex situs, and the sovereignty principles do not apply in the case of interpersonal conflicts which are to be decided on the basis of well defined rules of personal laws.

It may, however, be observed that although private international law has a territorial character as is reflected
in the connecting factors and the conflict of personal laws has a non-territorial character, it cannot be denied that the techniques of private international law like choice of law and jurisdiction are very much applied in the case of conflict of personal laws. In this sense, the similarity between the private international law and the conflict of personal laws is remarkably close. Another point of similarity is the similarity in the subject matter. Both of them deal with the family law, that is, marriage, matrimonial causes, legitimacey, succession, etc. Although private international law deals with these matters from territorial aspect while the conflict of personal laws deals with them in the non-territorial aspect.

Though the private international law is essentially a branch of municipal law or internal law of a country, yet it can be distinguished from municipal law. Municipal law of a country decides the rights and obligations of persons residing in the country. Private international law, however, determines the jurisdiction of courts and decides cases involving foreign elements. It also looks into the applicability of domestic law or some foreign law in that particular case. In other words, if there is a case before an Indian court involving a foreign element, it will have to decide according to Indian private international law if it has
jurisdiction then it is to determine the choice of law, whether Indian or foreign law.

Now the question arises what justification is there for the existence of the conflict of laws? Why should we depart from rules of our own law and apply those of another system? The main justification for the conflict of laws which one can give is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence. Dicey and Morris⁵ have aptly cited the following situations which would happen if the conflict of laws did not exist:

1. It would be possible for English courts to close their doors to all except English litigants. But if they do so, grave injustice would be inflicted not only on foreigners but also on Englishmen. An Englishman who made a contract with a Frenchman in Paris would be unable to enforce it in England; and if the courts of other countries adopted the same principle, the contract could not be enforced in any country in the world.

2. It would be possible for English courts, while opening their doors to foreigners, to apply English domestic law in all cases. But if they did so, grave injustice would again be inflicted not only on foreigners but also on Englishmen. For example, if two English people married in France in accordance with the formalities prescribed by French law, but not in accordance with the formalities prescribed by English law, the English court, if it applied English law to the validity of the marriage, would have to treat the parties as unmarried persons and their children as illegitimate.

⁵. Dicey and Morris, op.cit. p.5
3. It would be possible for English courts, while opening their doors to foreigners and while ready to apply foreign law in appropriate cases, to refuse to recognise or enforce a foreign judgment determining the issue between the parties. But if they did so grave injustice and inconvenience would result. For instance, if a divorce was granted in a foreign country in which the parties were settled, and afterwards one of them married in England, he or she might be convicted for bigamy.

It is, therefore, clear that conflict of laws is that branch of law by reference to which no adjudication can be finally determined. It merely indicates the governing law under which a case should be decided. For example, a case is brought before the court to determine the validity of a marriage performed between an Indian domiciled man and an English domiciled woman, the ceremonies of marriage were performed in Paris. The conflict of laws or the private international law merely informs us that the question as to capacity to marry is to be determined by the law of the domicile of the parties and the question of the performance of ceremonies is to be determined by the law of the place where the marriage was solemnized. If the question is with regard to capacity, the matter will be decided with reference to Indian law or English law; and if the question is whether requisite ceremonies have been performed or not, the court will decide it by reference to French law.
Position in India

It is well known that ancient India had trade with countries far beyond its borders but it is very difficult to find that in what form this conflict of laws or the private international law existed in India. It is a proven fact that during the Gupta and Mauryan dynasties, India had a flourishing trade and commerce with countries far and beyond, across the highseas and through the inland routes. Consequently, many suits pertaining to contracts and transactions relating to trade, commerce and other matters must have come for adjudication before the Indian Courts. The Indian courts did not decide these matters entirely by reference to Indian law: India had a fairly developed law and custom of merchants and suits were adjudicated thereunder.

After the advent of Mughals in India, the Muslim law became the law of the land and was applied in general on various matters irrespective of caste or creed. As the then existing social and cultural atmosphere was such that inter-community or inter-religious relations could not take place, there were hardly any chances of conflict of personal laws. However, in most cases, where both the parties were Hindus, Hindu law applied and if both parties were Muslims,
Muslim law applied. In the entire area of family law, it was the personal law of the parties that applied.

During the British regime, various communities in India were governed by their personal laws in personal matters. They, wisely enough, did not disturb the Indians particularly in this field. Thus Hindus were governed by Hindu law, Muslims by Muslim law, Christians by Christian law, Parsis by Parsi law and Jews by Jewish law. Therefore, there was almost no possibility of conflict between inter-personal laws. This was so because a Hindu could not marry a non-Hindu under Hindu law and a Muslim could not marry a non-Muslim except Kitabiya under Muslim law. In short, inter-community relations under the law of each community were not possible. Inter-community or inter-religious marriages could be performed in a form called civil marriage under a separate statute, the Special Marriage Act, 1872. If a marriage was solemnised under the aforesaid statute, the parties ceased to be governed in most matters by the law of their respective community. With regard to all matrimonial matters they were governed by the Special Marriage Act and succession to their properties was regulated by the

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6. Which was amended several times up to 1928. This statute has now been repealed and replaced by the Special Marriage Act, 1954, under which on the satisfaction of certain requirements as to capacity any two persons can perform a civil marriage.
Indian Succession Act, 1925. This continues to be the position even now. Another characteristic of Indian personal law is that it is personal and not territorial. For examples a Hindu living in any area is governed by the Hindu personal law prevailing in that area and even if he settles in another part of India, he continues to be governed by the same personal law.\textsuperscript{7}

In the march towards development India came into contact with different other countries of the world. The result was that the cases with foreign element were bound to come before Indian courts. The Indian courts decided such cases by applying rules propounded by English courts. They sometimes applied English precedents blindly and apishly. Thus in general we can say that basically the rules of Indian conflict of laws are based on the rules of English conflict of laws.

It is true that Indian courts often refer to English law in the cases of private international law before them, but on some occasions our courts have attempted to lay down its own law. For instance, in \textit{Miss Shanti Singh V. Governor of Punjab}\textsuperscript{8}, the petitioner argued that her domicile of origin in India had continued although she had left for Pakistan.

\textsuperscript{7} In respect of uncodified Hindu law, Hindus are still governed by their schools. The two main schools of Hindu law are Mitaksha and the Dayabhaga school. In respect of codified Hindu law, schools have no relevance and all Hindus are governed by the codified Hindu law.

\textsuperscript{8} AIR 1959 Punj. 375
She relied on the decision given by the English court in *Winans V. Attorney General*. Justice Dua observed that the rules of conflict of laws or private international law as adumbrated by various writers do not have statutory force of universal application. Those rules had been derived from certain decided cases as they arose from time to time in different countries. As in 1947 there was an unprecedented change in India due to partition and the British Indian domicile ceased to exist, the *Winans' case* had no application to this case. But, as stated by Mr. Justice Sinha, 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 private international law as accord best with the Indian sense of justice, equity and good conscience. By doing so the Indian courts can profit by the experience of legal systems of other countries and at the same time avoid their errors. But while doing this the Supreme Court in *Smt. Satya V. Teja Singh* warned that the principles of American and English conflict of laws are not to be adopted blindly by Indian courts.

9. (1904) A.C. 287
10. AIR 1952 Cal. 508 (Para 22)
11. AIR 1975 SC 105 (Para 39)
Now the time is conducive to evolve and develop our own private international law. Obviously, no sovereign state would like to apply the rules of another country. Every state should develop its own private international law in accordance with the social needs and circumstances prevailing in contemporary society and in accordance with the notion of world justice. With the advent of the British Empire in India, Indian social milieu did not remain without being influenced. The social cultural ethos got inter-mingled leading towards socio-legal issues. These issues were and are to be adjudicated humanly and of course within legal bounds. After the lapse of British paramountcy, this problem has assumed an aggravated form because of rapid advancement of international communication and travel for a variety of reasons with an addition of increasing inter-racial marriages among English and Indians.

Exchange of ideas, cultural and educational facilities have provided more and more opportunities for young people to have spouses of their own choice cutting across the social, religious and cultural bars and inhibitions. This has undoubtedly resulted into a trail of social, religious and human sufferings and agonies. Moreover, 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. Now the question is as to how to save it from increasing proliferation of polygamous people because of increasing number of Asiatic immigrants in England in search of job and education. This has necessitated the British Parliament to enact laws so as to provide legal solution to the baffling problems of married people. Consequently, British Parliament has enacted certain law including Matrimonial Causes Act, 1973, Domicile and Matrimonial Proceedings Act, 1973, Matrimonial Proceedings (Polygamous Marriages) Act, 1972, etc. to deal with such problems. Initially, the British courts did not recognise the polygamous marriages. But later on the British courts were forced to recognise polygamous marriages and provide matrimonial relief to the actually and potentially polygamous men and women.

Moreover, India has now achieved the same position in Asia as England has in the world. People from neighbouring nations like Sri Lanka, Burma, Bangladesh, Maldives, Nepal, Pakistan and many other countries have taken/are taking refuge in India. Students from underdeveloped and developing nations are coming here for education. This may give rise to many problems relating to conflict of laws. It is, therefore, necessary on our part to have our own law to deal with such problems.
Keeping the above stated facts in view, the basis of the present thesis is twofold: first, to find out a rationally acceptable solution to a dispute having a foreign element through our own indigenous rules of law, and, secondly, to find out solution to cases of inter-personal conflict of laws in a more judicious way. Since the topic itself deals with and involves the application of conflict of laws, it impels me to confine this research work within the judicial parameters which can be described as the "case-oriented study".

The present thesis primarily deals with the law regarding divorce under conflict of laws in England and India. Since the interpersonal conflict of laws have also been considered as a part of conflict of laws so a due consideration has also been given to this aspect. The study of law with regard to divorce can not be complete without knowing the concept and nature of the marriage under different systems of law. It is, therefore, pertinent on my part to have a separate chapter on the marriage and its validity. The next three chapters deal with the very essential aspects of conflict of laws i.e. jurisdiction of the courts, choice of law and recognition of foreign judgments. An effort has also been made to find out the deficiencies, inadequacy and ineffectiveness of the English law applied on the Indians. There is no comprehensive Acts on
this subject therefore various Acts and Codes both of England and Indians have been taken up for consideration. These provide useful guidelines for future Indian legislation on the subject. Thus, the present thesis has been divided into the following nine chapters each dealing with a separate and independent aspect of the general theme.

The first chapter is devoted to find out the meaning and scope of the expression "conflict of laws". An effort has also been made to determine the development of this branch of law in the context of India.

In the second chapter, an attempt has been made to find out the conceptual understanding of the institution of marriage as it is understood under the English and Indian law. It has been tried to prove that the contractual element is common in every type of marriage. This may become helpful in evolving a uniform law of marriage particularly in case of conflict between two systems of law.

It is a well known fact that for being a valid marriage, it has to be formally and materially valid. The most difficult problem with regard to the validity of marriage is which of the law should determine the formal and material validity of a marriage. The problem has become more complicated as the domestic laws of countries of the
world display much diversity in this field. The English courts have made a distinction between formal and material validity of marriage but we do not make any such distinction. The English courts have evolved a formula that the formal validity of a marriage will be governed by lex loci celebrationis, whereas the material validity will be determined by the law of ante nuptial domicile in conflict of laws cases. It has been tried to find out in this work that what should be the Indian viewpoint to determine the formal and material validity of marriage.

The concept and nature of polygamous marriages and its recognition by the English courts have been discussed in the third chapter of the thesis. Although the continuous inflow of polygamous people from Islamic countries has necessitated the British Parliament to recognise the polygamous marriage but the court has always through interpretation created obstacles in recognition of polygamous marriages and granting relief therein.

The fourth chapter of this thesis deals with the modus operandi adopted by the English courts particularly in conflict of laws cases regarding the three main problems i.e. the jurisdiction of the court, choice of law and recognition of foreign judgments. The essential feature in this part is to deal with the procedural aspect— as to how the
court acquires the jurisdiction over a particular matter; what law may or may not be applied to that matter; how and in what manner the foreign judgments may be recognised by the courts and how the summons will be served by the courts to the respective parties. An attempt has also been made to suggest as to which course the Indian courts should adopt with regard to procedural matter in conflict of laws cases.

Though the expression "matrimonial causes" includes divorce, nullity of marriage, judicial separation and restitution of conjugal rights but this work strictly confines to divorce. The remaining causes have been voluntarily left for my further study. It has been emphasised that under both English and Indian legal systems all the three divorce theories fault, consent and breakdown have been uniformly recognised. This may help to evolve a consensual formula to deal with the problem of jurisdiction, choice of law and recognition of foreign divorces. The fifth chapter is devoted for the aforesaid purpose.

The sixth chapter of the thesis deals with the question of choice of law. English rule in this regard is very simple. Once the court determines that it has jurisdiction to try a particular case, it applies the English domestic law. In India, however, if there is any statutory direction, the courts are bound to follow that. But in
inter-personal conflict of laws cases or where any foreign element is involved an attempt has been made to evolve a just law for application.

The English law with regard to recognition of foreign divorces is ambiguous, arbitrary and discriminatory. It has unnecessarily made the distinction between judicial and extra-judicial divorces. Moreover, the English courts have introduced the notion of transitional proceedings. Though an attempt has been made to simplify the law in this regard through the Family Law Act, 1986 but in vain. An attempt has been made to throw light on the discrepancies in the English law on this point in chapter seventh. The Indian law also proves handy on this point. The law requires certain changes and modifications keeping in view the need of the contemporary society.

The law with regard to inter-personal conflict of laws is highly vulnerable. On the one hand religious freedom has been guaranteed to every citizen of India under Article 25 of the Constitution but on the other hand the converted spouse is deprived of any remedy in matrimonial cases. The law in this regard lacks the quality of oneness, simplicity and clarity. The law is quite dissatisfactory. The Indian courts in dealing with such disputes have unhesi-
tatingly followed the English procedents. In modern society where inter-caste and inter-religious marriages are being encouraged the law should also be helpful in this regard. An attempt has been made in the eighth chapter to find out a rationally best suitable solution to this problem.

In the end of this endeavor I have made a meagre effort to suggest some concrete suggestions in connection with the problem of divorce under conflict of laws vis-a-vis inter-personal conflict of laws.