**CHOICE OF LAW IN ENGLAND AND INDIA**

English courts invariably apply their own domestic law once their jurisdiction has been determined. This is not negated even when it becomes known that matrimonial misconduct does not constitute a ground for divorce in the foreign country of residence/domicile. While this may find justification in the grounding of English divorce law in domicile, it cannot explain away the insistence of the English courts to apply their domestic law while assuming jurisdiction on the basis of residence of the parties. Special statutory jurisdiction has come to be abolished over time, but English domestic law is still applied in all the cases where the English court has jurisdiction.

In India, once questions of jurisdiction have been entertained and determined, the courts apply the personal law of the parties involved. Thus, the Parsi Marriage and Divorce Act, 1936 would be applied in a case where the parties to the dispute belong to the Parsi community. The Special Marriage Act, 1954 is applied even when both parties belong to the same religion, in situations where the marriage involves a foreign element, or has been performed abroad. It becomes evident, then, that the question is not of applying the lex domicilii of the parties, but their lex fori.

**RECOGNITION OF FOREIGN DIVORCES**

[A] ***England***

The recognition of foreign divorces in India has come to be codified by the Recognition of Divorces and Legal Separations Act, 1971. Prior to the enactment of this statute, it had been held that a foreign divorce decree would not be recognized unless the judicial pronouncement was made by a competent court in the country of domicile. In **Le Mesurier v. Le Mesurier**, the court had observed that: “The principle of recognizing the validity of a decree pronounced by the court of the domicile has been long established and forms an essential part of the comity of nations.” Even when such a pronouncement was not made, but only recognized as valid by the foreign court of domicile, the English courts would recognize the divorce. This position changed with **Travers v. Holley,** which laid down that the validity of the basis of exercising jurisdiction before the foreign court, whether domicile or otherwise, would determine recognition of the divorce. This was taken even further by the judgment of the House of Lords in **Indyka v. Indyka**, which qualified real and substantial connection between the parties and the court as a valid ground for seeking divorce before that particular forum.

Following the enactment of the Act of 1971, recognition of foreign divorces is guided by Sections 3 and 6 of the statute. The latter of these provisions has been reconstituted with the passing of the Domicile and Matrimonial Proceedings Act, 1973, which permits the wife to have her separate domicile. The Act of 1971 identifies two new grounds for divorce viz. habitual residence and nationality, and is arguably a step forward in the sense that it retains liberality while injecting fresh certainty. ‘Habitual residence – a whittled down version of domicile – offers an alternative to the concept of domicile, which has developed in a largely erratic manner. ’At the same time, the absence of a clear-cut definition for “habitual residence”, under either statute or case-law, may deprive the law of the requisite clarity.

When any of these grounds contained in sections 3 and 6 exist, the foreign divorce is recognized regardless of whether it has been obtained through judicial proceedings or otherwise. However, at times when this is not the case, it becomes necessary to construe the term “other proceedings” for non-judicial divorces. This issue came to consideration before the**House of Lords in Regina v. Secretary of State for the Home Department, Ex parte Ghulam Fatima,** where a wholesome reading of the provisions of the statute led the court to conclude that a single set of proceedings had to be necessarily instituted in the country where the divorce was obtained.

In 1899, Lindley, M.R. had observed that English courts only needed to look at the finality of the judgment and jurisdiction of the court before recognizing a foreign divorce, provided that English notions of substantial justice were not offended. This viewpoint is reflected in the Act of 1971, which permits refusal on grounds of violation of principles of natural justice and public policy.