INTRODUCTION

Transnational migration of people is not a new phenomenon but the new heights that it is now scaling thanks to advances in the field of communication and transport technologies and the increasing interdependence of nation states is unprecedented in the history of the humankind. In today’s globalised world the movement of men and women within a continent or from one continent to another for different reasons, ranging from employment to business or from education to tourism, marriages and divorces on a transnational scale are on the rise. With the increasing number of foreign marriages and divorces, a significant rise in matrimonial disputes is taking place.¹ There have always been a large number of Indians living abroad, a substantial number of Indians have settled in the West and are prospering in places like the United States, Canada, Australia, Germany, France and the United Kingdom. The lure for setting in foreign jurisdictions attracts a sizeable Indian population, but the problems created by such migration largely remain unresolved.² The legal problems relating to the international dimensions of marriage and divorce are also on the rise. Advances in the field of information and technology especially the internet, have brought to the fore new problems as far as celebration of foreign marriage is concerned. As a result of these developments it is not unusual to come across cases where

husband and wife reside in different countries, possess domicile in a third country and their children reside in a fourth country.

Due to a wide divergence among the personal laws (including private international law rules), courts of different countries are now confronted with insuperable difficulties in adjudicating disputes arising therefrom. Globalisation and greater mobility of the world population are bound to make the task of the courts more difficult than ever. There are cases, where a citizen of this country marries here, and either, one or other both migrate to foreign countries. Marriages between parties, at least one of whom, is an Indian national are being solemnised here or abroad. There are instances where parties having married here have been either domiciled or resident in different foreign countries. The problems in the field of marriage and divorce have been confronted by Indian courts many a times. To deal with a large number of foreign decrees in matrimonial matters, India like other countries is in need of a well developed body of private international law rules on solemnisation and recognition of marriages, recognition of a foreign decree of divorce, nullity of marriage etc.

It is true that each country has its own culture, which regulates inter-personal relationship in the field of family law. Nevertheless, there is a need for the unification and codification of rules of conflict of laws relating to matrimonial matters so as to prevent limping marriages. Requirements of rule of law and gender justice on the one hand, and the need to protect the basic human rights of parties to a marriage on the other, also demand internationally accepted norms to deal with inter personal and international disputes. This paper attempts to analyse the Hague Convention, known as “The Hague Convention on the Recognition of Divorces and Legal Separations” that seeks to reconcile divergent
social and religious philosophies of different States, on basic questions of the nature of marriage and the desirability of divorce or of legal separation. However, the paper starts with the common issues in NRI marriages affecting the women in India.

**NRI Marriages and Status of Women in India:**

The issue of “NRI marriages” has gained paramount importance over the years as the problem of Indian women trapped in fraudulent marriages with Non-Resident Indians (NRIs) and people of Indian Origin (PIOs) has assumed alarming dimension. “Contemporary global shifts” have produced “new types of consumerism in the form of escalating dowry demands,” increased transnational mobility, and fueled a desire by parents to have their daughters marry spouses living and working abroad. Against this transnational backdrop, wives are routinely “abandoned” by their husbands across borders: left without resources, divorced without consent, and strategically denied access to forums where they can advocate for their social and economic rights. The scale of the problem is staggering. By a 2012 estimate, over 30,000 women were abandoned in the state of Punjab alone. This “transnational abandonment” of South Asian women by their husbands is “a new face of violence against women.”

3 Though a gender neutral term, NRI marriages, generally and for the purpose of this paper, is to be understood as a marriage between an Indian woman and an Overseas Indian man which would include NRIs and foreign citizens of Indian origin.

4 Urjasi Rudra & Shamita Dasgupta, Manavi, Transnational Abandonment of South Asian Women: A New Face of Violence Against Women, pp. 7, 18 (2011) (reporting that the “number of transnationally abandoned women in India has reached staggering proportions. Nearly every Indian state has women deserted by non-resident Indian (NRI) husbands although not all such men are immigrants to the U.S. A significant number of men who have migrated to other countries including Canada, U.K., Europe, and the Middle East have also deserted their wives and children in India. By a 2004 estimate, approximately 12,000 women were abandoned in the state of Gujarat, and according to a 2012 study, an estimated 30,000 women have been left behind in the state of Punjab. In 2008, India’s minister for Overseas Indian Affairs, Vayalar Ravi, stated that in Punjab alone, at least 20,000 legal cases were pending against NRI husbands, presumably for abandoning
In recent years, abandonment of Indian wives by their NRI (non-resident Indian) husbands has taken on epidemic proportions. The phenomenon of wives abandoned by their NRI husbands has been growing invisibly for more than a decade. Nearly every Indian state has women deserted by NRI men who live in various foreign countries including Canada, UK, various European and Middle Eastern countries, and the USA. The pattern of NRI wife abandonment falls into three categories: (a) a woman who is married before her husband migrates to a foreign country or while he is visiting India but is never sent sponsorship for a visa to join him; (b) a woman who has been residing abroad with her husband is either deceptively or coercively taken back to India and left there without her passport, visa, and money and thus without any way of rejoining her husband; and (c) a woman who is residing with her husband in a foreign country suddenly finds her husband has disappeared leaving her in the lurch.

According to the Ministry of Overseas Indian Affairs, some women are taken abroad only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill treated by their husbands and sometimes their in-laws for dowry. In *Venkat Perumal v. State of A.P.*, the wife has alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate the pregnancy, she was dropped penniless by her husband at Dallas Airport in the US and she returned back to India with the help of her aunt and on account of the humiliation and agony she suffered miscarriage their wives. In Canada, there may be as many as 10,000 runaway grooms. However, the official estimates do not necessarily tally with the non-governmental numbers. According to Government of India’s estimate, émigré husbands have abandoned at least 30,000 women in India, a number significantly less than what newspaper reports and NGOs suggest.”

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6 *Marriages to Overseas Indians- A guidance booklet*, Ministry of Overseas Indian Affairs, p. 9
at Hyderabad. In certain cases, wives reach the foreign country of their husband’s residence and are left waiting at the international airport, abandoned in a foreign country. They are deserted with no support or means of sustenance or the permission to stay on there. There are several cases where a woman later learns that her NRI husband has given false information about his job, immigration status, or earning to con her into marriage. Some of these men turn out to be married already or living with another woman abroad. Keeping in mind the socio cultural situation in India, once abandoned these ‘holiday’ brides lose everything including their social standing.

The Ministry further warns of the aggravated risks in marriages to Overseas Indians. These include the woman’s increased feelings of isolation, difficulties owing to constraints of language, difference in culture, lack of a support network of friends and family and readily available monetary support. Further she is confronted with the problem of the lack of knowledge of the foreign criminal justice system, police and legal system. Most of these women have no place to take shelter when they are thrown out of their matrimonial home by their husbands and not received by their parents. It is hardly surprising that even as the number of NRI marriages is escalating by thousands every year, with the increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also risen proportionately, in fact at some places much more than proportionately.

The problem in NRI marriages is manifold and is not only about the woman being abandoned in India but includes demand for dowry, cruelty and

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9 Marriages to Overseas Indians- A guidance booklet, Ministry of Overseas Indian Affairs, p. 9
forms of harassment, non-consummation of marriage, marriage of convenience, concealment of pre-existing marriage, \textit{ex-parte} divorce etc. A most conspicuous disturbing trend, however, appears to be the easy dissolution of such marriages by the foreign courts even though their solemnization took place in India as per the Indian laws. The process of such divorce is filled with problems for women who are abandoned outside the country where their husbands reside. This is because in many cases, the women may never receive the legal notice of filing, a copy of the complaint or summons to appear. It has also been suggested that in some cases men’s family may suppress such notices from being served in India and forge the recipient’s signature to indicate legally binding acceptance.\footnote{Shamita Dasgupta, “\textit{Woman Abuse in a Globalising World: Abandonment of Asian Women}” in \textit{Indian Journal of Research}, 2011, p. 4.} Even when a notice is served properly, it may reach to the woman late with only couple of weeks left to respond. This time may not be sufficient for the woman to obtain visa, travel requirements and legal representation in the country of her husband’s residence. Therefore she is unable to defend her own and in some cases her child’s legal and financial interests in the case. Further, most women are unaware of foreign laws and often do not have easy access to appropriate legal advice in India.\footnote{Ranjana Sheel, “\textit{The Migrant Indian Community}” in \textit{Indian Journal of Gender Studies}, 28, 2011, p. 12.}

Even when an abandoned woman has lodged legal complaint in India either before or in response to her husband’s legal case, foreign courts may not be aware of these proceedings as there may be miscommunications or delays which allow the husband to obtain the \textit{ex-parte} decrees without contest. Further, the two countries involved may have different laws- for instance, fault- based divorce is no longer recognized in Canada (which now recognizes only irretrievable breakdown of marriage as grounds for divorce) while India still has
fault-based divorce and does not recognize irremediable breakdown of marriage as a separate ground of divorce. The courts may also ignore each other’s judgments, and thereby issue conflicting orders- for example, the Indian law of restitution of conjugal rights\textsuperscript{12} has no equivalent in most US and Canadian jurisdictions and therefore courts in these jurisdictions may not consider this law. Such jurisdictional disagreements and legal contradictions often endanger the rights of women who are not in a position to protect them in the first place. Since there is no comprehensive and special law to govern such aspects, women are being deprived of justice.

The foremost legal challenge that transnationally abandoned women face is the problem of jurisdiction when the habitual residences of the spouses are in different countries, thus rendering judicial or administrative decisions virtually unenforceable. The issue of split jurisdiction becomes even more pronounced when the courts in the two countries involved have disparate laws and pass conflicting judgments. Such jurisdictional disagreements and legal contradictions often jeopardize the financial and social rights of women who are not in a position to protect them in the first place. In cases of transnational abandonment, an abandoned wife may file for restitution of conjugal rights in India and receive a decision in her favor, while the foreign court may concurrently grant an ex-parté divorce in response to the resident husband’s petition. In the foreign court case, the wife may end up without any monetary awards and maintenance based on her non-participation in the proceedings. Case laws from Indian High Courts and Supreme Court further highlight this conflict of jurisdiction.

\textsuperscript{12} Sec. 9, the Hindu Marriage Act, 1955.
In *Harmeeta Singh v. Rajat Taneja*, the Delhi High Court passed an order of restraint against the husband to stop him from continuing with divorce proceedings in the U.S. while a maintenance case was going on in India filed by the abandoned wife. The High Court asked the husband to present a copy of this order to the U.S. court and observed that if he still obtained a divorce from the U.S. courts, such a divorce would not be recognized in India. Since under Section 44A of the Civil Procedure Code (CPC) the United States was not a “reciprocating territory,” orders issued by a U.S. court would not be automatically recognized by the Indian court. As per CPC, foreign decrees from non-reciprocating countries must be filed in Indian District courts to seek recognition and enforcement.

Section 44A of the CPC provides for execution of decrees passed by courts in a reciprocating territory. It lays down that where a certified copy of decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as it has been passed by the District Court. Government of India has notified Singapore, Malaysia, UK, New Zealand, Hong Kong and Fiji as reciprocating territories.

In a similar case, the Supreme Court of India refused to recognize a divorce decree obtained by the abandoning spouse from a Circuit Court in Missouri. The Circuit Court in Missouri had issued the decree on the basis that the marriage was “irrevocably broken” and the petitioner had fulfilled the minimum requirement of residence having lived there for ninety days prior to filing for divorce. In *Veena Kalia v. Jatinder N. Kalia*, the Delhi High Court

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14 AIR 1996 Del. 54.
made an observation that even if the husband succeeded in obtaining a divorce decree in the US, that decree would be unlikely to receive recognition in India as the Indian court had jurisdiction in the matter. The Indian courts have also made this very clear in their own pronouncements that they will not simply mechanically enforce judgments and decrees of foreign courts in family matters. The Supreme Court of India in *Y. Narsimha Rao v. Y. Venkata Lakshmi*\(^{15}\) observed that “habitual residence” should not mean a temporary residence that can merely serve the purpose of obtaining a divorce decree and ruled, “The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.” The court itself laid down the only three exceptions to this rule:

(i) *Where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;*  

(ii) *Where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;*  

(iii) *Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.*

Unfortunately, the problems of jurisdictional conflict and legal contradiction are not resolvable by unilateral ruling about choice of applicable

\(^{15}\) (1991) 2 SCR 821.
law for dissolution of marriage and establishment of maintenance obligation. Rulings such as the Indian Supreme Court decision quoted above can only go so far, and its enforcement in the transnational context will remain elusive if the abandoning spouse refuses to submit to Indian jurisdiction and cannot be extradited. When abandonment and dissolution of marriage occur in transnational arenas, bi-lateral, multilateral, and/or international agreements are required to clarify the choice of applicable laws that protect the rights of both the petitioner and the respondent.

**THE HAGUE CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS:**

The Hague Convention on the Recognition of Divorces and Legal Separations, 1970\(^\text{16}\) is a complex piece of international legislation. It reconciles divergent social and religious philosophies of various States, on basic questions of the nature of marriage and the desirability of divorce or of legal separation. It seeks to reconcile differences in the approach of different systems to the problems of private international law involved. Article 1 (1) of the Convention\(^\text{17}\) provides for recognition in one contracting State of divorces and legal separations obtained in another contracting State. Thus the Convention limits its application only to contracting States. Article 1 (1) also indicates that the duties of recognition assumed by contracting States under the Convention do not apply in the case of a State having plurality of legal systems to the recognition in that State of divorces and legal separations obtained in one of its constituent systems.


\(^{17}\) Convention on the Recognition of Divorces and Legal Separations, 1970.
Article 1 (1) does limit divorces and legal separations to which the Convention applies, to those, which ‘follow judicial or other proceedings officially recognized in that state and which are legally effective there.’ The first clause of the paragraph, represents a fragile compromise between two opposing philosophies- ‘recognition of divorces permitted or provided by the granting state irrespective of their form or method, and non-recognition of divorces emanating from systems which, by failing to establish official procedures, might fail to protect a depending spouse.’ Thus the compromise formula adopted covers overseas divorces and legal separations obtained by judicial, legislative, executive or administrative process and probably religious procedure. The only conditions are that the decree must have been obtained in proceedings ‘officially recognized’ and ‘legally effective’. Another interesting aspect of the Convention is its non-applicability to foreign ‘negative decrees’. Though Article 9\textsuperscript{18} permits the contracting States to refuse to recognize a foreign divorce or legal separation which is incompatible with a previous decision whether positive or negative, which by the law of the State in which recognition is sought determines the matrimonial status of the spouses.

Different legal systems adopt divergent approach to the problems of private international law in respect of divorce and legal separation. While common law countries give more weight to questions of jurisdiction and ignore the question of application of foreign law in matters of divorce and legal separation, civil law countries give due weight to the application of appropriate choice of law rules in respect thereof. The Convention, however, adopts the standpoint of common law systems of private international law rather than that of continental European systems. The principle basis of the Convention is that the

\textsuperscript{18} Ibid.
duties of the contracting States to recognize foreign divorces and legal separations derive from the granting State’s compliance with the tests of jurisdiction. The main objective of the Convention has been to reduce the incidence of limping marriages. But to achieve this objective the Convention does not adopt the extreme position that all foreign divorces should be recognized regardless of their jurisdictional basis. Such an approach may be possible within a limited group of States adopting essentially the same conflict rules in matters of divorce but it is certainly an impracticable proposition within a larger circle of States with divergent conflict rules. The Commission rejected this suggestion not only because of this reason but also in defence to the wishes of many delegates that the Convention should do nothing to encourage ‘forum shopping’.

Under Article 2 of the Convention a foreign divorce or legal separation shall be recognized if at the date of institution of proceedings in the State of origin, i.e. the State of divorce or legal separation the respondent had his habitual residence there. But a divorce or legal separation in favour of the petitioner shall not be recognized on the basis only of his habitual residence in that and the Convention requires that such habitual residence had continued for not less than one year immediately prior to the institution of proceedings or that the spouses have habitually resided there.

Historically, nationality has been the basic ground of jurisdiction in civil law countries. Its recognition as a basis of jurisdiction under the Convention was therefore a foregone conclusion. But the Conference admitted the nationality criterion with certain modifications in deference to the criticism voiced against it

19 Ibid.
by certain delegates. Thus under the Convention nationality of the respondent is not recognized as a basis for the recognition of a foreign divorce or legal separation. But it allows for recognition of a divorce or legal separation on the grounds that both spouses were nationals of the granting State. The petitioner’s nationality is recognized as a ground of recognition, but only when coupled with such fortifying elements as (i) petitioner’s own habitual residence in his national state, or (ii) his habitual residence there for a continuous period of one year falling at least in part, within the two years preceding the institution of proceedings. The Convention also permits recognition of divorce on the basis of petitioner’s nationality of the granting State if both the following conditions were satisfied: (a) the petitioner was present in that State at the date of institution of the proceedings and (b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Although domicile has been the historic basis of jurisdiction in personal matters in common law countries. As a result the Convention allows the concept of ‘domicile’ in an indirect way. Article 3, which was introduced as a compromise solution provides ‘where the state of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression ‘habitual residence’ in Article 2 shall be deemed and include domicile as the term is used in that statement.’ Thus this does not exclude the recognizing State having regard to tests prescribed in Article 2 but requires it, in addition, to

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recognize divorces and legal separations based jurisdictionally upon the domicile of the respondent or the domicile of the petitioner with, where necessary, the appropriate “fortifying elements”.

**INDIAN PRIVATE INTERNATIONAL LAW ON RECOGNITION OF FOREIGN DECREES OF DIVORCE AND LEGAL SEPARATION:**

The Indian law of recognition of foreign divorces is not well developed. The general provisions relating to recognition of foreign judgments and decrees are also applied to the recognition of foreign divorces. Section 13 of the Code of Civil Procedure, 1908 embodies a fundamental principle of private international law that a judgment delivered by a foreign court of competent jurisdiction should be respected and enforced. The Indian courts have to accord recognition to a foreign judgment not by way of courtesy but on considerations of justice, equity and good conscience. It is true that different countries have different rules of private international law but there are certain common principles which have been recognized in civilized jurisdiction. The Indian law adheres to the English approach according to which “a foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either of fact; or of law.

Section 14 enacts that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on record, or is proved. Section 13 of the Code of Civil Procedure, 1908 lays down a seven-fold criterion, the fulfillment of which will

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22 Code of Civil Procedure, 1908.
impart to a foreign judgment, brought before an Indian court for recognition and enforcement, finality and conclusiveness.

According to the said Section 13 of the C.P.C., a foreign judgment shall be conclusive between the parties as to any matter directly adjudicated upon, as also their privies litigating under the same title. However, its conclusiveness can be challenged on the following grounds, namely:

a) where it has not been pronounced by a court of competent jurisdiction;
b) where it has not been on the merits of the case;
c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
d) where the proceedings in which the judgment was obtained are opposed to natural justice;
e) where it has been obtained by fraud;
f) where it sustain a claim founded on a breach of any law in force in India.

For a foreign judgment to be conclusive in India it is necessary that it has been pronounced by a court of competent jurisdiction. The foreign court must be competent both in terms of the law of the state which has constituted it and in an international sense. It is important to note that what is conclusive is the judgment and not the reasons given by the foreign court. Courts in India can examine a foreign judgment from the point of view of competence but not of errors. Thus in determining the conclusiveness of a foreign judgment our courts will not require whether conclusions recorded by a foreign court are correct or findings otherwise tenable.
A word of caution is needed while recourse is had to Section 13 of the C.P.C. in that the section is just illustrative, not exhaustive. This is borne out by leading illustrations where *ex-parte* judgments to foreign courts were obtained as in *Smt. Satya v. Teja Singh*\(^{23}\) and *Y. Narasimha Rao v. Y. Venkatalakshmi*\(^{24}\) to annul marriages duly performed in India as per Hindu law. To execute such make-belief *ex-parte* decrees of divorce obtained by errant husbands in foreign courts here in India, is to say the least, travesty of justice. To counter such malady, Section 13 of the C.P.C. has to be suitably amended so as to effectively deal with the scope of jurisdiction exercised legally but invoked unjustly with a view to circumvent decrees obtained in violation of rules of conflict of laws.

**CONCLUSION:**

India lays emphasis on several policy goals viz. sanctity of the institution of marriage, justice to both spouses, certainty in the law, needs of the modern life protection of the interests of the women who very often become victims of a foreign decree of divorce. Since the Hague Convention also seeks to secure these policy goals in a varying degree, it is submitted that India can use it as a useful framework for the development of its private international law rules. It should be recognized that a wife deserted or abandoned by her husband not only needs a forum which is the most appropriate for her to sue but also certainty of the execution of a divorce she obtains on internationally accepted grounds. In the past whenever a wife approached an Indian court to seek justice against an *ex parte* foreign decree of divorce and the court granted her an appropriate relief maintenance or restitution of conjugal rights, it generally failed to serve her purpose due to serious difficulties in execution of the decree. Since the Hague

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\(^{23}\) AIR 1975 SC 105.

\(^{24}\) (1991) 2 SCR 821.

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Convention offers some solution in this regard India should consider the desirability of its accession. It is true that in order to become a party to the Hague Convention, the State shall also have to accept certain rules which are not easily palatable to it, but this is not unusual in any global regime. The Hague Convention merely implies toleration by participating states of certain grounds of jurisdiction adopted by other States. So an answer to the question whether India should accede to The Hague (Divorce) Convention depends on whether India is willing and prepared for such toleration in view of advantages that this international legislation offers to a contracting State.