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An Indian Revolution in Conflict of Laws

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ABSTRACT

Through this article, the author purports to draw a detailed comparison of European and American revolution, along with India's position in the conflict of laws. The Indian Private International law has been long viewed as a model strongly influenced by the English system of Conflict of Laws, which the author of this paper believes should undergo a revolution of its own in order to suit the quasi-federal system of this nation. The past few years have observed a drift from the English Private International law, such as the evolution of the choice of jurisdiction of courts vested in the hands of the parties to disputes. While the private international law in the Western Nations deal more with the conflicts between the territorial laws, the conflicts in India are mainly based on personal laws. This paper purports to establish the revolutionary changes that were brought about by the US and the European in their own ways to the Conflicts law regime. Secondly, it draws a difference between the two conflicts revolution and how they respectively impacted the Conflict regime. Thirdly, through the two revolutions, this paper shall aim to establish whether Indian revolution should rely on one of the two methods of revolution as adopted by US or Europe, or whether India should fall back on a third method of revolution.

I. INTRODUCTION

The impetus of having a well-established procedure for conflict of laws is to determine how to confront a legal dispute in a national court, with a foreign element. A state's conflict rules will provide the answer to three basic questions: in what circumstances their courts may assume jurisdiction over cases involving a foreign element, what system of municipal law to apply (their own or that of some foreign legal system) and which foreign judgments are capable of recognition and enforcement within their national system.

The Indian Private International law has been long viewed as a model strongly influenced by the English system of Conflict of Laws, which the author of this paper believes should undergo a revolution of its own in order to suit the quasi-federal system of this nation. The past few years have observed a drift from the English Private International law, such as the evolution of the choice of jurisdiction of courts vested in the hands of the parties to disputes. While the

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private international law in the Western Nations deal more with the conflicts between the territorial laws, the conflicts in India are mainly based on personal laws.[2]

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II. AMERICAN REVOLUTION OF CONFLICT OF LAWS

The First Restatement of the Conflict of Laws in the United States was published in 1934. During that time, they were dependent on the principle of *Lex Loci*, in which the conflict rule applied was the law of the place of the wrong. [3] The dissatisfaction with the rule started to appear very clearly in the American system, as due to the presence of fifty states, there were many conflicts taking place amongst the states, which led the scholars to oversee quite early that the rule of lex loci was flawed and shall result in unjust results.[4] For instance, in the case of *Alabama Great Southern R.R. v. Carroll*,[5] the plaintiff was employed by a railroad company of the same state. While he on a duty to be a brakeman for the company's train that was leaving from Alabama to Mississippi, he got injured by the breaking of a link between two cars in Mississippi. Unfortunately, due to the prevalence of the lex loci rule, the Mississippi's rule of "fellow servant rule" prevailed over Alabama's policy of employer's liability, as the injury took place in Mississippi. Hence the plaintiff could have been recovered, and deserved to be recovered, but due to the flawed principle of lex loci, did not get the deserved compensation.[6] Hence, a series of such cases led the American system of conflict of laws in the early 1960's, to undergo a transformation, which aimed at revolutionizing the *lex loci* rule, and the premises and goals of the then established choice of law system mentioned in the First Restatement of Conflict of Laws. The US jurisdictions in torts conflicts changed the method from the *lex loci* rule to a much more modern approach which rely on multiple contracts and policies that are

[2] V.C. GOVINDARAJ, THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL AND INTER-PERSONAL CONFLICT, (2nd Ed, 2019) DOI:10.1093/oso/9780199495603.001.0001

[3] Bernard Hanotiau, *The American Conflicts Revolution and European Tort Choice-of-Law Thinking*, THE AMERICAN JOURNAL OF COMPARATIVE LAW 30, no. 1 (1982): 73-98. Accessed May 15, 2021. doi:10.2307/839869.

[4] Ibid.

[5] Alabama Great Southern R.R. v. Carroll, 97 Ala. 126, 11 So. 803

[6] Bernard Hanotiau, *The American Conflicts Revolution and European Tort Choice-of-Law Thinking*, THE AMERICAN JOURNAL OF COMPARATIVE LAW 30, no. 1 (1982): 73-98. Accessed May 15, 2021. doi:10.2307/839869.

contrary to the *lex loci* rule. The modern approaches include methods such as *Second Restatement, interest analysis,* or *the better law approach*. [7] The very premises of the of the then established choice-of-law system underwent a revolution. [8]

One of the pioneering cases that launched the revolution, was the case of *Babcock v. Jackson.* [9] This was the first case which openly abandoned the traditional lex loci delicti rule, which eventually kept picking up, and by 1977, half of the states of United States had given up the rule. [10] In the field of civil wrongs, the doctrine of lex loci had proved rather ambiguous. For instance, in a scenario which involved death actions, the place where the blow was struck would be the place which the First Restatement picked.[11] This methodology lacked the reasoning that if the crime say poison was induced in one place and the poison finally affected in a wholly different area, by effect of the doctrine of lex loci, the murder would have taken place where the person died, and not where the poison was inflicted, which was extremely absurd.[12] Thus, the revolution in US began in order to abandon this principle, and come up with modern methods which would make much more sense.

The revolution brought about two main changes:

(1) The first change takes a shift from the territoriality to personality and affects the cases involving loss-distribution conflicts in which the tortfeasor and the victim are domiciled in the same state and are involved in a tort occurring in another state. [13]
(2) The second change entails an intra-territorial change, opposed to the notion subscribed in the Restatement of applying the law of the place of injury in the cross-border torts. [14]

As the rising number of cases raised questions of ambiguity of the lex loci, the US jurisdictions concluded with a majority to abandon the rule as the single rule to resolve all disputes.[15] They chose to approach the disputes with other modern approaches as mentioned above. The single-mindedness of the lex-loci rule is what seems to have led to the necessity of the multiple modern approaches, which relied on multiple contacts, factors, and policies. [16] The US courts

[7] Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons,* Volume 82, TULANE LAW REVIEW (2008).
[8] Ibid.
[9] Ibid.
[10] Symeonides, *The Choice-of-Law Revolution*, UNIVERSITY OF ILLINOIS LAW REVIEW, Vol. 2015, No. 2, 2015
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

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also continued with the territoriality methodology in disputes. They would ensure that the parties' domiciles shall be undermined and instead emphasis must be laid on the place of conduct and the place of injury. For instance, if the cases happen between two people belonging to the same state, then law of the state would apply. But if the citizens were from difference states, the courts would apply the place of the conduct, or the law of the place of injury, whichever of the two states prescribes a higher standard of conduct for the tortfeasor. [17]

The modern approaches included two significant methodologies which are: -

III. INTEREST ANALYSIS

The interest analysis was included as a method to address conflict of laws in the Second Restatement of United States, which laid emphasis upon interpretation of the substantive rules of law when it comes to the deciding factor for application in a dispute consisting of multi-state elements. This methodology came into place through a tort case wherein it was adopted by a 4-3 majority, and thus leading to its gradual unanimous acceptance throughout the nation and giving it the name of a revolutionary change in the American system of Conflict of laws.[18] The inquiry is conducted by the courts that consider purpose of an applicable law, and why. [19] The significant contacts test incorporated in the Second Restatement becomes an interest analysis when the significance of a contact is assessed in terms of the policies underlying each state's law. [20] The choice of approach in determining applicable law in a conflict by a court will be considered to be conducted with "interest analysis". Even though this method in itself may not appear to be the most significant replacement of lex loci, but since the American revolution brought about quite a lot of modern changes, which also includes the better law approach, this methodology seems to be one of the efficient and unbiased choices that the judges of the court had in deciding a case. The interest analysis has the cardinal virtue of recognizing that to the extent laws are adopted and rules of decision laid down in order to accomplish their respective social goals, they must be applied so as to carry out their purpose whether the case is multi-state in nature or not.

The conceptual stages of the interest analysis include:

[17] Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons,* Volume 82, Tulane Law Review (2008).
[18] David P. Earle III, *Conflict of Laws and the Interest Analysis - An Example for Illinois*, 4 J. Marshall J. of Prac. & Proc. 1 (1970)
[19] Ibid.
[20] Ibid.

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(i) First Stage: The identity of the involved states where the framework of "competing positive laws" is unidentified. [21]

(ii) Second Stage: Track the underlying policies of each of the competing laws. [22]

(iii) Third Stage: Divide the results of the tracking process into three conceptually different groups which are:

1. False conflicts: The cases in which only one state has an interest in applying its law.
2. True Conflicts: Cases in which a number of states have an interest in applying their law.
3. No-interest Pattern: Cases in which none of the involved states are interested in applying its law. [23]

After categorizing it, the interest analysists purport in offering a pre-agreed solution depending on the category.[24] The distinctive feature of the interest analysis is that the inquiry is strictly limited to the scope of application of the relevant laws in light of their underlying policies.

IV. BETTER LAW APPROACH

Post the interest analysis approach, the foundational father, Professor Robert Leflar came up with the better law approach.[25] This approach attempts at determining which of the two potentially applicable laws is better as a solution to the dispute in question. The better law approach tends to apply the concept of *lex fori*. The case of ***Chaplin v Boys***[26] presents a great example of an actual operation of the better law approach. The better law approach has been compared to the concept of lex fori that was used in the case of ***Chaplin v Boys***. In this case, the Mr. David Boys was a technician in the British military and was at the same time stationed in Malta. Unfortunately, in a tragic accident caused by Mr. Chaplin, Boys suffered serious injuries and his sense of balance was permanently impaired. The court refrained from applying the principal of "double actionability" which was defined in the case of ***Philip v Eyre***, and instead concluded that the tortfeasor has to be "*civilly actionable*" meaning that where the lex fori had a much closer connection with regards to the dispute, and hence the "lex fori" or in American terms, the "better-law approach" was applied, and the double actionability was

[21] Sagi Peari, *Better Law as a Better Outcome*, vol. 63, THE AMERICAN JOURNAL OF COMPARATIVE LAW, no. 1, 2015, pp. 155–195. JSTOR, www.jstor.org/stable/26386651. Accessed 10 May 2021.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Adrian Briggs,. *What Did Boys v. Chaplin Decide?*, no. 4, ANGLO-AMERICAN LAW REVIEW 12, (October 1983): 237–47. https://doi.org/10.1177/147377958301200402.

disapplied. The better law approach signifies that where a particular dispute is being governed wherein the parties belong to different states, the law governing must be the one that tends to have the most significant relationship with the occurrence of the dispute.

The better law approach to some extent has been criticized by the scholars, due to its close resemblance to the "*cadi justice*" by which the very essence of the judicial work would be reduced purely to the practice of only responding to the particular facts of the respective dispute.

To conclude, it can be said that the American revolution has proven to be one of the most successful implementations of the Conflict of Laws. Revolution need not take place over-night. In fact, it is a slow and gradual process towards the building up of a successful and efficient legal system for Private International Law.

V. EUROPEAN REVOLUTION OF CONFLICT OF LAWS

The European conflicts law has evolved conceptually and structurally from the traditional model. The new "Choice of Law" revolution by the European Community is overcoming three elements of the old system namely, 1. Privatization; 2. Nationalization; and 3. Domestic Internationalism. [27] The revolution differs majorly from the American revolution as the European paradigm against which the revolution is based, is extremely different from the theory of vested rights. [28] Therefore, the three mail relevant aspects, that appear to be missing from the American Conflict law is one, federalization; two, constitutionalization; and three, pluralization. [29]

(1) Federalization: The federalization of the Conflicts law generally indicates that the federal body such as the European Court of Justice, shall advocate the various conflicts arising between jurisdictions. [30] The national choice of law is revolutionized by withdrawing the advocacy from the states and making it more centralized. [31] Post the Treaty of Amsterdam, [32] the European Union was granted the competence to regulate

[27] Ralf Michaels, *The New European Choice-of-Law Revolution*, Duke Law School Faculty Scholarship Series, (2008) Paper 151. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2552&context=faculty_scholarship
[28] Ibid.
[29] Ibid.
[30] Jürgen Basedow, *Federal Choice of Law in Europe and the USA—A Comparative Account of Interstate Conflict*s, 82 TUL. L. REV. 2119 (2008).
[31]Ralf Michaels, *The New European Choice-of-Law Revolution*, Duke Law School Faculty Scholarship Series, (2008) Paper 151. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2552&context=faculty_scholarship
[32] Aude Fiorini, *The Evolution of European Private International Law*, vol. 57, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, no. 4, 2008, pp. 969–984. JSTOR, www.jstor.org/stable/20488261. Accessed 20 Apr. 2021.

the Conflict of Laws, which enabled them with the power to codify the laws for non-contractual obligations stuck between different jurisdictions, in the Rome II Regulation. [33]

(2) Constitutionalization: The European court established that it is vital to recognize the conflict of laws issues. This method correctly addresses the quasi-federal aspect of European Union. Through Constitutionalization, it leads to two major developments: Firstly, though the case of *Cassis de Dijon*, the court passed a decision laying importance on the mutual recognition of laws by the member states[34] that helps in the establishment of an internal market for domestic law. Secondly, it also introduces the concepts of Non-discrimination, EU citizenship that is based on the traditional connecting factor of Conflict of Laws, and Human rights.

(3) Pluralization of Method: This method attributes the combination of both the methods of Federalization and Constitutionalization. The first method represents the traditional choice of law, and the second method regulates the states' regulatory interest on the one hand, and the private rights on the other hand through the four freedoms. [35]

The Pluralization of Method seems to be extremely useful, as it harmonizes the case laws instead of privatizing it, and hence making sure that the two fundamentally different methods coexist with one another. In the *Vikings* case, [36] the Viking ABP wanted to reflag its ship "Rosella" in Estonia, thus being able to enter into a Collective Bargaining Agreement with an Estonian Union, and thus employing Estonian crew members with lower wage costs[37]. This was considered a violation of the policy of the International Transport Workers Federation (ITWF). The court could have addressed the case as per Article 8(1) of the Rome I, which determines that the provision of law of the country in which the employee is carrying out his or her work shall apply.[38] Although, the court did not privatize the case, and only apply the Finnish law, but instead harmonized the laws, to make the case a case between the unions exercising their social rights on one hand and the corporation exercising its free right to

[33]Ralf Michaels, *The New European Choice-of-Law Revolution*, Duke Law School Faculty Scholarship Series, (2008) Paper 151. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2552&context=faculty_scholarship
[34] Ibid.
[35] Ibid.
[36] international Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62005CJ0438
[37]Niklas Bruun, *The Viking Line Case*, INTERNATIONAL UNION RIGHTS 13, no. 4 (2007): 8-9. Accessed April 21, 2021. http://www.jstor.org/stable/41936400.
[38] Ralf Michaels, *The New European Choice-of-Law Revolution*, Duke Law School Faculty Scholarship Series, (2008) Paper 151. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2552&context=faculty_scholarship

movement on the other hand. [39] In the *Laval* case, similar dispute had arisen, and the court had opted the same method. Thus, showing that it's revolutionizing the law from "*Method of Conflicts*" to "*Conflicts of Method*".[40] The Mutual recognition also helps to take significant connections into accounts.[41]

The European revolution replaced the privatized choice of law with a regulatory choice of law, thus setting the approach of private law resolution of conflicts based on the closest connection to the back. Thus, the federalized regime is no longer treated as the referring rules but are instead used as the distributive rules.[42] The next revolutionary change that replaced the national character of the choice of law, was the European choice of law. In a case where the Individual wishes to appeal, he or she shall get the chance to appeal against the rules of her own state. And lastly, the mediatized choice of law, which initiates the supranational foundation in the choice of law regime.[43] The external side is more unilateral and serve essentially to protect and determine the boundaries of the European Union, while the Internal side is regulatory. Prior to the revolution, the choice of law was more bilateral, and through the revolution, it is trying to become more unilateral, with the choice of law becoming a European law. [44]

VI. INDIAN EVOLUTION OF CONFLICT OF LAWS

The very foundation of the Indian Private International Law was drafted by the Englishmen. Although, through various judgements, the judiciary to some extents have deviated from the English rules which will be deemed to be unsuitable to the Indian conditions.

India's evolving approach to Private International Law on Commercial Contracts: The traditional connecting factors requirement for the place of conclusion of a contract and place of performance of the contract has been replaced with the new principle of party autonomy which gives the parties the right to decide the governing law from any part of the world.[45] While the unconnecting factor was not always permitted. In the earlier cases, such as *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*,[46] the court allowed for choice of law which was bona fide and not against public policy but disagreed with the choice of law being completely unconnecting. Eventually, through the cases of *National Thermal*

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] : Saloni Khanderia, *Indian private international law vis-à-vis party autonomy in the choice of law*, OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL (2018) DOI:10.1080/14729342.2018.1436262.
[46] British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries 1990 SCR (1) 884.

Power v Singer Company followed by the judgement of *Modi entertainment v WSG Cricket Ltd*, the Supreme court successfully confirmed that the Indian Private International Law on commercial contracts permits the choice of any legal system, even if it lacks the pertinent nexus to the contractual agreement in question. [47]

Inter-Personal Laws: The Inter-Personal laws in India are still underdeveloped and are following acts such as the Christian Marriage Act, 1872, and the Indian Divorce Act, 1869, which have proven to be hopelessly out of tune with the present day needs of the Indian Christian community.[48] India is a diversified country, with the prevalence of multiple religions and faiths. A uniform code of conduct might hurt the sentiments of different religions. Hence, the author of this article suggests a more modified method of the interest analysis as adopted by the United States. In India, the laws specifically related to the Law of Persons, girdles around the concepts of marriage, adoption, legitimacy, and the fact that each religious community namely the Hindu, Muslim, Christian, Parsi, Buddhist, Sikh and the Jain is governed by its own set of rules and laws. Due to such diversity, a conflict of laws is bound to occur.

VII. CAN THERE BE AN INDIAN REVOLUTION OF CONFLICT OF LAWS?

The Indianization of the Conflict of Laws can be considered to be in its state of infancy. There have been recent developments in the legislative measures with regards to the marriage and matrimonial causes, succession, minority and guardianship, and adoptions and maintenance, by the passing of the various legislations by the Parliament of India. [49] The conflicts in the western nations such as Europe and United States are more to do with territorial disputes, whereas India consists of a variety of inter-personal issues as well, due to the co-existence of different religions and faiths.

(A) Is Indianization of Conflict of Laws necessary?

Every country must undergo the necessary revolution in Private International Law, as it is wholly dependent on the structure and functioning of the respective nation. For instance, the English courts till date have recourse to the mechanical selection of the country or jurisdiction on the basis of the connecting factor whose laws determine the rights of the parties.[50] On the other hand, the Americans have a more case to case analysis of which law is better and why, barring the connecting factor. They do not examine the contents of the chosen law till they

[47] Diva Rai, *Choice of law, international contracts and Indian jurisprudence*, October 2020. https://blog.ipleaders.in/choice-laws-international-contracts-indian-jurisprudence/
[48] V.C. GOVINDARAJ, THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL AND INTER-PERSONAL CONFLICT, (2nd Ed, 2019) DOI:10.1093/oso/9780199495603.001.0001
[49] Ibid.
[50] Ibid.

choose to apply it to determine the rights of the parties, which the author believes is extremely restrictive, especially when it comes to topics such as Intellectual property rights or International Commercial contracts.[51] The case could be a case of false conflict or as the case may be, the application of the chosen law may lead to an injustice to the parties concerned. If India follows the model of the English Conflict of Laws blindly, it is likely that various irreparable loss and hardship might occur when it comes to the law and justice.[52] Compared to the two models, India has a more liberal attitude when it comes to the connecting factors, thus providing the parties the right to choose any forum as suits them, irrespective of the connecting factor.

The Indian legislature has not yet shown any initiation to develop the private international laws. Due to the British influence on India and its laws for a long period of time, the pattern of the Indian judiciary of falling back on the rules of the English Conflict of Laws is not a surprise. Compared to the tardy growth of England and its conflict of laws revolution, the American revolution, with the introduction of the interest analysis, third restatement and better law approach, they have been evolving for over the last few years, and it has proven to be nothing but awesome.[53] The phenomenal growth of the subject of the United States approach towards the conflict of laws, does render a sense of hope for the Indian judiciary to develop the private international law. Though it is a slow process, it surely can take place if given the right attention and if the other methods are not forced upon, but instead other methods are modified to cater to the needs of the Indian society and the legislature as a whole.

The Indian courts may have to adopt an issue-based approach to resolving conflicts, keeping in view at the same time our background as also the structure, the attitudes, and the needs of our society.[54] The author of this paper, after careful scrutiny of the two different models of conflict of laws adopted by the United States and Europe, believes that Indianization of conflict laws are a must for the following reasons:

(1) India as a quasi-federal nation has various personal laws which sometimes overlap with one another, or with the constitution, as had occurred with the provision of Triple-talaq or Dissolution of Muslim marriage. In order to make sure every personal law is protected at the same time, making sure that they do not overlap or cause injustice to

[51] V.C. GOVINDARAJ, THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL AND INTER-PERSONAL CONFLICT, (2nd Ed, 2019) DOI:10.1093/oso/9780199495603.001.0001
[52] Ibid.
[53] Ibid.
[54] Ibid.

the citizens of the nation, it becomes extremely pertinent for the nation to develop various methods to resolve these inter-personal conflicts.

(2) Cases such as *Y. Narasimha Rao And Ors vs Y. Venkata Lakshmi And Anr* show how dependent India is on English precedents in absence of legislation on a matrimonial dispute, which resulted in a debatable decision by the courts. [55] Instead, India must develop its own precedents, which suit the country's diversified cultural environment. It must not feel the need to fall back on the English laws, as for one, they do not have the same diversified social and cultural environment as India, two, their rules suit their disputes a lot more compared to India.

(3) While the author finds the new developments in the European Conflict of Laws to be commendable, and there is a possibility India could fall rely on it due to the importance given in the revolution to the quasi-federal nature, and the evolution of the mutual recognition which will definitely benefit the Indian internal conflicts, it should not be the deciding factor, as EU does not consist of inter-personal disputes as India does.

Hence, the author firmly believes, that Indian revolution of conflict of laws is a must. The need to fall back on other country's principles, though beneficial in a way, should not be the deciding factor in a quasi-federal nation such as India.

VIII. CONCLUSION

India is still believed to be in its infancy when it comes to the private international law. Although it has been developing at its own pace. The author does believe that there can be an Indian revolution of the Conflict laws, provided it does not follow other country's methods, and instead choose to modify laws suited for the nation's cultural and social environment. If India must revolutionize the conflict of law, it must not derive its principles from Europe and United States. The author of this paper believes that a modified application of the pluralization method of Europe, and the interest analysis of the United States must be targeted. Reason being, when it comes to the personal laws, due to the prevalence of so many statutes, it becomes impossible to form a unified code. Hence, India must find a way to harmonize with the interest analysis and provide a reasonable judgement of why it chooses to use those laws.

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[55] V.C. GOVINDARAJ, THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL AND INTER-PERSONAL CONFLICT, (2nd Ed, 2019) DOI:10.1093/oso/9780199495603.001.0001