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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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**PRIVATE INTERNATIONAL LAW**  
**PROOF AND APPLICATION OF FOREIGN LAW:**  
**COMMON LAW PERSPECTIVE AND INDIAN POSITION**

AUTHORED BY - JIGAR MEHTA 19A076  
GUJARAT NATIONAL LAW UNIVERSITY

**STATEMENT OF PURPOSE**

The primary objective and purpose of the research paper is to analyse the application and proof of foreign law in common law jurisdiction and that of Indian jurisdiction. It attempts to bring out the variation in approach by the courts of different jurisdictions.

**IMPORTANCE OF RESEARCH**

The research paper helps to understand the difference in interpretation by the different courts and how the application of conflict of law rules vary in the two paradigms. Thereby, the research helps to establish the applicability of different judicial precedents in different cases.

**INTRODUCTION**

The central concepts in “International Conflict of Laws,” also known as “Private International Law” in the civil law system, are the use and validation of “foreign law.” It’s important to determine whether foreign law is acknowledged as a legitimate legal system, and how it should be proven and interpreted. Alternatively, it may be viewed as a factual issue, and its application will only be considered if parties involved in the case request it and provide evidence of its validity and impact.<sup>1</sup>

Three main concerns arise when showing that "foreign law" is applicable: who is accountable for demonstrating the existence, content, and enforceability of foreign law; how one can demonstrate

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<sup>1</sup> Andre Weiss, Manuel de Droit International Privé 398-99 (6th ed.1909).

these features of foreign law; what to do if it is impracticable to produce proof of foreign law. The way in which foreign law is applied will be directly reflected in the answers to these questions. If the court is not compelled to implement foreign law and can choose to do so only when so requested by the parties, then "*foreign law is viewed as a matter of fact*". In such situations, the parties must demonstrate the evidence in the same way they would for other facts. If the parties do not present the proof, the judge is at liberty to make a decision based on the *lex fori*. On the other hand, if the conflicts rule requires the use of foreign law, it is considered as a legal system and the judge's job is to decide what the foreign law should be as a matter of law. Only if it becomes completely impossible to prove the content of the foreign legislation may the court choose an alternate course of action.<sup>2</sup>

Judges are obligated to apply foreign law voluntarily since it is their duty to make decisions based on the law they deem applicable, regardless of whether any of the parties request it. This approach equates foreign statutory law with domestic statutory law, as both are considered to be directives that the court must adhere to. Whenever a "private international law" regulation mandates the use of foreign law for an international legal relationship, the court must comply with this regulation, thereby ensuring that foreign law is given full effect.<sup>3</sup>

Globalisation, a multidimensional process, has increased the regularity with which courts are asked to rule on foreign law concerns. The common law tradition's underlying idea is that international or foreign laws are facts, not rules. As a result, a common-law judge is rarely able to investigate and expand upon foreign law doctrine. In most cases, a court must decide two sets of questions: fact and law. On the former, the parties present oral and documentary evidence to support their claims. Regarding the latter, the court acknowledges the applicable law without requiring parties to present evidence. However, when it comes to personal or marital foreign laws, they may differ depending on the jurisdiction and are often intertwined with local customs and practices. Therefore, in most jurisdictions, they must be presented and proven as facts, often through expert testimony. An expert witness is an individual who has devoted time and effort to a particular field of expertise and is thus highly proficient in providing testimony in the relevant areas.<sup>4</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Gregory S. Alexander, 'Application and Avoidance of Foreign Law in the Law of Conflicts' (1975-1976) 70 Nw U L Rev 602.



In some situations, a foreign law issue may develop in a domestic legal dispute. The parties to the dispute, on the other hand, have complete discretion over whether or not to use foreign law, as pleading it is purely voluntary. The judge does not have the authority or responsibility to act in this capacity *ex officio*. In most courts around the world, including India, “international law is treated as a matter of fact” and is usually supported by expert testimony. While proof of foreign law is a fact, the effect of that legislation on the parties' rights is a legal question. If a judge chooses to apply foreign law to a case with a foreign element, or a portion of it, two fundamental inquiries arise: how can the court determine the foreign law and whether there are any grounds to reject it in the specific case. The process of establishing foreign law can be challenging, particularly for Indian lawyers and judges who are unfamiliar with it. The foreign law may be written in a different language and may contain concepts and ideas that are entirely distinct from those with which they are familiar.

### COMMON LAW PARADIGM

In the current era of globalization, individuals and businesses frequently encounter legal issues involving foreign law, which can present significant difficulties in common law jurisdictions that rely on judicial precedent instead of statutory law. During British colonial rule in India, the English common law doctrine was followed, and even after India's independence, the country has mostly adhered to the basic principles governing the interplay between international law and municipal law. Various methods are available to the court for resolving issues related to foreign law. However, not all of these methods necessitate the court's engagement in discovering and enforcing a foreign law that appears to be applicable.<sup>5</sup>

Courts still utilize established procedural methods that sidestep the issue and simultaneously conceal the challenges associated with determining any foreign law. Techniques such as “judicial notice and presumptions concerning the substance of foreign law” enable courts to give the impression that they have resolved the applicable law issue. However, they are mainly non-conflict strategies that tacitly reject the existence of foreign law.<sup>6</sup>

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<sup>5</sup> J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.4 (1935).

<sup>6</sup> Foreign Law in Civil Litigation: A Comparative Survey, 16 AM. J. CoMp. L. 332, 335-39 (1968).

## **THE “FACT APPROACH” OF COMMON LAW**

Before going into these strategies, it is crucial to quickly review the common law method for addressing foreign law issues, which American courts adopted and is still in use in the majority of jurisdictions today. This method treats any foreign laws that a party chooses to rely on as facts that the litigant must submit and prove rather than as components of a legal system. This rule's theoretical justification is that since the forum can only apply domestic law, all other aspects of the case must be viewed as facts that must be demonstrated. A claim based on foreign law was frequently dismissed right away for failure to comply with this condition.<sup>7</sup>

## **PROOF OF FOREIGN LAW**

The 1<sup>st</sup> step in dealing with “foreign law” is to determine its content and application. This can be a challenging task as foreign law may be written in a language that is not familiar to the judge or lawyer, or may be based on legal principles that are unfamiliar to the common law system. In such cases, the court will need to rely on expert evidence to understand the content and application of foreign law. Within common law jurisdictions, foreign law is often supported by legal experts who possess a comprehensive knowledge of the pertinent foreign legal system. These experts commonly produce written reports, and may also be requested to give evidence in court. The accuracy, objectivity, and impartiality of this expert testimony is crucial. Furthermore, the expert is required to provide a clear and understandable account of the “foreign law's content and application”, so as to enable the presiding judge to make a well-informed ruling.<sup>8</sup>

## **APPLICATION OF FOREIGN LAW**

After determining the “content and application of foreign law”, the judge is faced with the challenge of applying it to the case. The common law system presents a particular challenge as foreign law may conflict with its principles. Hence, the court must determine whether to follow common law principles or to adopt foreign law. In common law jurisdictions, the method for applying foreign law will vary depending on the legal situation at hand. The court may immediately use foreign law if the issue involves property rights or the interpretation of a contract. As an alternative, the court may decide to respect the “foreign legal system” while applying foreign law in good faith and without being obliged

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<sup>7</sup> *Harrison v United Fruit Co.* 143 F. Supp. 598 (S.D.N.Y. 1956)

<sup>8</sup> Gregory S. Alexander, 'Application and Avoidance of Foreign Law in the Law of Conflicts' (1975-1976) 70 Nw U L Rev 602.

by it. If it is against public policy or interferes with key tenants of the "common law system", like the "rule of law" or "natural justice, the court may in some cases decide not to enforce foreign law at all.<sup>9</sup>

## INDIAN PARADIGM

### EXCLUSION OF FOREIGN LAW

When a conflict is brought before a jurisdiction with any foreign aspects, the judge must evaluate two criteria when considering if to adopt the international law: first, determining what the foreign law is; and second, determining whether there are any justifications for not implementing the provisions.<sup>10</sup> The entity who claims that foreign law should be implemented bears the burden of establishing if it really should or should not be implemented. In addition, the same side must determine what foreign law applies.<sup>11</sup> Even if the "conflict of laws" rules require the implementation of "foreign law", the courts can yet find that such statutes are not applicable. The justification for banning foreign laws from applicability in a certain country derives from the notion that providing legitimacy to foreign laws would be a violation of the integrity of the state where the legislation is sought to be executed. This is due to the premise that foreign laws must be recognised on the grounds of the foreign state's sovereign powers being exercised. Definite international law requirements are not applicable in India, according to Indian courts. The Hon'ble Top Court has ruled that foreign laws such as penal and revenue laws would not be enforced in India by Indian judiciary.<sup>12</sup> In light of the aforementioned question of public policy, it has also been decided that Indian courts will refuse to apply foreign laws that are contrary to India's public strategy.<sup>13</sup>

Foreign legislation is excluded in various nations if it breaches native laws and regulations protecting public welfare. The foundation for this is "the notion of *ordre public*".<sup>14</sup>

*Ordre public* is used in much of continental Europe and is comparable to the idea of "public policy",

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ertel Bieber v Rio Tinto Co Ltd* [1918] AC 260

<sup>11</sup> *Guarantay Trust Co v Hanny & Co* [1918] 2 KB 623

<sup>12</sup> *Viswanathan R v Rukn-ul-Mulk Syed Abdul Wajid* AIR 1963 SC 1

<sup>13</sup> *Technip SA v SMS Holding Ltd* (2005) 5 SCC 465

<sup>14</sup> *Peter North, Cheshire North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017)

which is used in a number of common law jurisdictions around the world, however the former has a broader scope. The issue of foreign laws being excluded because they violate public policy has been discussed in depth in the next chapter. As a result, the aforementioned elements covered the primary reasons why foreign laws are not applicable in India.

### EXCLUSION ON PUBLIC POLICY GROUNDS

The prevailing notion globally is that “a foreign law will not be enforced by any court if doing so would contravene the public policy of the country”. However, in the realm of private international law, the extent to which public policy applies is up to certain limits.<sup>15</sup> The Apex Court restated the British Courts' position on foreign judgments in the case of “*Technip SA v SMS Holding Ltd*”, where it was asserted that acknowledgement and implementation of foreign laws and judgments is itself encapsulated within public policy, and that if foreign law is to be dismissed, it should only be in extraordinary situations and only in instances where the implementation of such law would be harmful.<sup>16</sup>

“Section 34 of Arbitration and Conciliation Act, 1996” as well as “Section 23 of Indian Contract Act, 1872”, are two statutory rules in Indian statutes that preclude the implementation of foreign laws in India. While the term “public policy” is not directly stated in Indian Contract Act, it has been interpreted that the abovementioned Section incorporates 'public policy' within its scope relying on court rulings and analysis. However, article (iii) of the latter legislation, the Arbitration and Conciliation Act, expressly states that foreign awards that are contrary to India's public policy cannot be implemented in India.

In the case of the Indian Contract Act, “public policy” has been defined as not only something that has a negative impact, but also which exhibits destructive inclinations in and of itself. Lord Atkin established this understanding of the word and the resulting doctrine in the case of *Fender v St John Milady*.<sup>17</sup> In the case of “*Gherulal Parekh v Mahadevdas Maiya*”,<sup>18</sup> this was later reinforced in the

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<sup>15</sup> *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5)* [2002] 2 AC 383

<sup>16</sup> *Technip SA v SMS Holding Ltd* (2005) 5 SCC 465

<sup>17</sup> *Fender v St John Milady* 1983 AC 1 (HC)

<sup>18</sup> *Gherulal Parekh v Mahadevdas Maiya* AIR 1959 SC 781

Indian setting. In “Kedar Nath Motani v Prahlad Rai”<sup>19</sup>, the Hon'ble Supreme Court of India went on to elucidate on exemptions based on public policy, holding that if a person bases his allegations on an unlawful activity, such a claim should not be considered.

The exclusion does not apply simply to laws. In a series of instances, including “Pires v Pires”<sup>20</sup> “Renusagar Power Co v General Electric Co”<sup>21</sup> and “Oil and Natural Gas Corporation Limited v Saw Pipes”<sup>22</sup> the Apex Court has decided that foreign awards and judgments that are against India's “public policy” would not be implemented. Indeed, the Oil and Natural Gas Corporation Case establishes a set of standards for determining what constitutes public policy. In this situation, public policy was defined as something that incorporates the basic policy of Indian law, something that is in India's best advantages, and ultimately something that has to do with equity and decency.

In the process of this discussion, the issue of patent infringement is quite important. In “Central Inland Water Transport Corporation Limited v Brojo Nath Ganguly and Anr”<sup>23</sup>, It held that if a foreign award is violative, that is, illegal on its face and in contravention of applicable statutes, it is interpreted to be completely opposed to the efficient judicial process, and thus can be regarded to be opposite to “public policy”.

The Apex Court has ruled that awards that violate Indian exchange control regulations are invalid on the grounds that they violate the notion of public policy itself.<sup>24</sup> Furthermore, in areas of law where India has adopted regulations, foreign laws derived from identical laws and policies can be implemented without being considered contradictory to the nation's public policy.<sup>25</sup> Even if the laws of a foreign country enable anybody to profit from their own misconduct, such regulations would not be acknowledged in India in circumstances of *ex turpicausa*, or the principle that no one can profit from their own malfeasance.

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<sup>19</sup> *Kedar Nath Motani v Prahlad Rai* AIR 1960 SC 213

<sup>20</sup> *Pires v Pires* AIR 1967 GDD 113

<sup>21</sup> *Renusagar Power Co v General Electric Co* AIR 1994 SC 860

<sup>22</sup> *Oil and Natural Gas Corporation Limited v Saw Pipes* (2003) 5 SCC 705

<sup>23</sup> *Central Inland Water Transport Corporation Limited v Brojo Nath Ganguly and Anr* AIR 1986 SC 1571

<sup>24</sup> *Renusagar Power Co v General Electric Co* AIR 1994 SC 860

<sup>25</sup> *Delhi Cloth & General Mills v Harnam Singh* AIR 1955 SC 590

Even international conventions allow a local court to ignore “foreign law” and refuse to implement it due to public policy concerns. However, the restriction will only take place if the foreign law is clearly incompatible with the country's “public policy”.

## **VALIDITY OF FOREIGN JUDGEMENTS IN INDIA**

A “foreign court” is a court situated beyond the judicial territory of India, and not under jurisdiction of the central administration, and a ruling rendered by such a court is a foreign judgement. Foreign judgements are those rendered by courts in nations like the USA, the UK, France, or Germany. When relating to external decisions, the CPC (Sections 13 and 14) provides for res judicata, which reflects the idea of “Private International Law”. With the exclusion of the instances described in Sec. 13, a foreign decision issued by a court of adequate authority is binding in Indian courts and serves as res judicata. When a foreign judgement is not decisive, “Sec.13 of CPC” applies. However, a foreign decision is only binding between the stakeholders to the judgement, not third parties.

### **1. The C. P. C. Sec. 14**

The presumptions as to foreign judgments are set forth in “Section 14 of CPC”. Unless there is information to the opposite, the court assumes that a record purporting to be a signed copy of a foreign decision was issued by a court of appropriate authority.

The Apex Court ruled in “Narsimha Rao v. Venkata Lakshmi”<sup>26</sup> that a duplicate of a foreign judgement order is insufficient and that it must be validated by the Central Government of America's official.

### **2. Sections 13 and 14 of the C. P. C.'s purpose**

Even though each state's principles of private international law varies, basic norms apply to all civil jurisdictions. A dispute that has already been determined by a foreign court must be fulfilled. Not out of civility, but out of notions of fairness, equity, and moral conscience. It is beneficial for justice to be cognizant of concurrent authority.

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<sup>26</sup> *Narsimha Rao v Venkata Lakshmi* 1991 SCR (2) 821

According to Dicey, a judgement cannot be overturned for a mistake of fact or law, and it is decisive in whatever issue decided.

In the key case of “Gurdayal Singh v. Rajah of Faridkot”<sup>27</sup>, -

*“A initiated a case in the Native State of Faridkot against B, alleging that B misappropriated Rs. 60,000 while in A's service at Faridkot. In the case of B, an ex parte decree was issued. B, on the other hand, was neither a resident nor a domiciled in Faridkot. As a result, the Faridkot court had little jurisdiction to hear the case. The fact that the embezzlement occurred in Faridkot was insufficient to confer jurisdiction on the Faridkot court. As a result, a foreign court lacks jurisdiction to issue a decree relating to immovable property in another country”.*

Judgment from another country Not on the basis of merits A foreign ruling must be founded on grounds in order to be considered res judicata. When a judge determines a matter on its merits after analysing the veracity of the evidence, it is called a merit judgement. The real test is whether the parties' allegations are true or false.

### **3. Foreign Judgment Enforced in Violation of International or Indian Law**

It is not decisive when a judgement is not in congruence with international or Indian national law "It is a defiance of the law when a foreign judgement is based on a jurisdiction or on a ground that is not accepted by Indian law or international law." Consequently, the court does not find it persuasive.

#### **a. Foreign Judgments That Are In Conflict With Natural Justice**

Each decision must be based on the fundamental values of justice, equity, and morality. As a result, a legal procedure must be undertaken. In essence, justice necessitates objectivity, fairness, and good faith; each party shall be provided a fair chance to be represented, and the case must be unbiased and balanced. Consequently, the verdict will be declared null and void, and the case will be declared "coram non iudice."

#### **b. Fraudulently Obtained Foreign Judgment**

A decision acquired through deceit, according to Lord Denning, cannot be upheld."

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<sup>27</sup> *Gurdayal Singh v Rajah of Faridkot* (1895) ILR 22 Cal 222

"It is clearly recognized that a foreign decision is indictable for fraud in the extent that it cannot be implemented by proceedings in England upon proof of fraud," Cheshire correctly states.

As a result, any decision acquired by fraud, whether issued by a home or foreign court, is null and void. Concerning the "nature of fraud", De Grey, C. J. noted that for a judgement to be deemed gained by fraud, the court must have been misled rather than misinformed. There is a distinction to be made between mistake and deceit, and it is not acceptable to set apart a move solely on a mistake.

In "*Satya v. Teja Singh*"<sup>28</sup>, a husband secured a judgement in an American court declaring that he was domiciled in America against his wife. However, he was neither a resident or domicile of America, and the decree was gained through deception. The Supreme Court ruled that the ruling was void.

In "*Narsimha Rao v. Venkata Kakshmi*," the court ruled that the decree was invalid in India since the accused were not citizens of the United States. The Hon'ble Apex Court stated in "*Chengalvaraya Naidu v. Jagannath*"<sup>29</sup> that "it is the established doctrine of law that a judgement or decree acquired by performing deception on the court is invalid and void." Even in collateral processes, the decree, whether issued by the lowest or highest court, might be contested.

#### **c. A Foreign Judgment Based on a Violation of Indian Law**

It is invalid when a foreign decision violates any legislation in effect in India. As a result, the "principles of private international law are not mindlessly applied", and the matter must be judged according to Indian law. As a result, in India, a judgement relating to a gambling debt is banned. The foreign judgement must not be used to circumvent the country's public policies.

#### **d. Submission to a foreign court's jurisdiction**

An individual may overtly or implicitly accept to the authority of a "foreign court." As a consequence of the parties' willing participation, foreign courts are regarded internationally capable. A side cannot turn around after a verdict is not in his interest, for the same reasoning.

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<sup>28</sup> *Satya v Teja Singh* 1975 AIR 105.

<sup>29</sup> *Chengalvaraya Naidu v Jagannath* 1994 AIR 853



## CONCLUSION

Demonstrating and enforcing foreign law within the context of common law can be a complicated and demanding undertaking. It entails having an in-depth comprehension of the foreign legal framework and making a judicious evaluation of the principles of the common law and the foreign legal system. Moreover, it necessitates having a dependable and unbiased expert who can give testimony on the substance and implementation of foreign law.

As the world becomes increasingly globalized, the need for an understanding of foreign law and legal systems will only increase. Common law jurisdictions will need to develop mechanisms to ensure that foreign law is properly understood and applied, while at the same time maintaining the integrity of the common law system. This will require ongoing dialogue and cooperation between legal systems, as well as a willingness to embrace new ideas and approaches.

After reading and analysing regulations and principles relating to the exclusion of foreign laws in India, it is clear that the primary reason for their exclusion is always a question of public policy, and whether or not the foreign law is in violation of it. Other important grounds for excluding foreign laws are those relating to income and expropriation of property. The assertion of sovereignty is the primary reason why foreign laws are not applied because doing so would jeopardise the nation's legal system. The majority of Indian jurisprudence on the question of exclusion is based on precedents established by foreign judgments, particularly those issued by British courts. These precedents have aided in the formulation of India's position on foreign judgments.

Penal laws are not to be imposed on Indian soil, and foreign judgments against Indian people are not recognised in India. Other foreign laws relating to revenue and public law are likewise exempt from enforcement due to a variety of considerations. In the case of foreign arbitral awards, the most common reason for exclusion is public policy.

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