

PUBLIC POLICY- A LIMITATION TO THE APPLICATION OF FOREIGN LAW IN PRIVATE INTERNATIONAL LAW

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ABSTRACT

This paper deals with the concept of public policy as a limitation to the application of Foreign law in the Private International Law. Initially I will deal with the concept of foreign law and then after I will do a short focus on the enforcement of foreign laws in context to the Indian laws. In later part I will touch a little bit about all the four exclusion of application of foreign law and those are public policy, Penal laws, Revenue laws and Mandatory rules and then elaborate the concept of public policy exception mainly in context of America that how in many cases the public policy can be easily accessible as exception or in many different cases the concept of public policy is not accepted by the Honourable Courts in against the enforcement of foreign law. But before going to this aspect, this paper deals with the origin and historical background of public policy and relation with the private international law. Lastly I will conclude the topic with my opinion and suggestions in enforcement of the foreign law while keep an eye on the public policy exception.

KEYWORDS- Public Policy, Morality, Foreign Law, Libel, Penal Sanctions

INTRODUCTION

Foreign law is not parallel to the international law. Foreign law is the law of any individual foreign country or, in some instances, of a certain specific group of countries that have a common rules and regulations or a similar set of rules in a specific context of law.¹ Foreign laws

are the laws of any jurisdiction having a distinguish system of law from that enforced by court considering an issue. In case where the finds the issue in regard to the foreign law the court has to looked it from different point of view. Many a times we are in situation where we are unable to understand that the question of foreign law is a question of law or a question of fact. But it is clearly held in many cases by the Honourable courts that the question of foreign law is the question of fact. When it is a question of fact then definitely the parties may prove the matter evidences or with the help of expert opinion. In India, we can see these two concept in The Indian Evidence Act that the role of evidences and the role of public opinion is how much important to do give the fair justice to the parties. Also apart from these two the judgement of highest court of foreign law is the best evidence as to law of foreign countries.ⁱⁱ Under Indian laws, the foreign law may be proved with the help of expert opinion and the court also take judicial notice of such documents that containg foreign law and whichb are published under the authority of that particular government.

But the application of foreign law may be excluded in these following four cases-

1. Public Policy- An eminent scholar stated public policy as the complex concept that refers to those matters regarded by the Parliament and the Court as one the fundamental concerns of the State and the society at large. In india, the Court can not recognise or enforce that contract in which the fact of the contract opposed the concept of public policy.ⁱⁱⁱ Similarly an Indian Court does not recognise any right of an individual which is gainst the public morality.
2. Foreign Penal Laws- A penal law is the law which contains some punishment for the breach of duties in respect to the State. A court will not enforce the foreign penal laws both directly and indirectly. Also when a particular law is both which contains penal as well as remedial provisions in that case also the court will only enforce the law which are of remedial nature not the penal one.^{iv}
3. Foreign Revenue Law- It can also be seen on the same footing as the foreign penal laws. The revenue law of foreign court can neither impose the burden nor confer a benefit on subjects of any other states. The court can also not able to collect taxes of foreign countries irrespective of the identity of the person. Only the court can entertain theforeign revenue laws for any other legal purposes but will not enforce it. ^v

4. Mandatory rules- This concept is of positive nature. The impact of enforcement of mandatory rules is that a foreign domestic law which used to govern under choice of law is not applied.

Apart from these four exclusions the court will not enforce the foreign laws where the scope of principle is not clear.^{vi} Now we will see the concept of Public Policy exception in detail.

CONCEPT OF PUBLIC POLICY EXCEPTION

There are two main features of the public policy exception in private international law: first, its less clarity in context of scope and content and, second, its necessity because not everyone has an exact idea about what public policy encompasses but everyone wants to create a possibility of claiming this as an exception. Even if general concepts of the exception are almost the same in various countries, but their specific content remains unclear unless a case exists that requires a court to (1) check a particular public policy and (2) recognize it as being reasonable enough to trigger the application of the exception.^{vii} The "public policy exception" authorises a court that is asked to recognize and enforce a foreign law to reject doing so if that court determines that its enforcement would come into conflict with a fundamental public policy of the enforcing country. It is also not clear how often parties raise it as an exception since, unfortunately, as with many other features of private international law, the utilization of the exception has not been reasonably captured by data which are gathered by empirical method.^{viii} Dean Symeonides argues that the exception is raised quite newly in society, earlier we can not see it as an exception. It is commonly presumed that to prevent the application of foreign law on public policy grounds is to authenticate that somehow the content of the foreign law, when tested by notions at the forum, is seriously not mature in quality.^{ix}

ORIGIN OF PUBLIC POLICY DOCTRINE

In practice the concept of public policy reflects in Common law countries. In 15th Century, it was recognised in the English law. It was employed in that manner what it meant today in late 18th century to reserve the power of court to refuse a claim or cause of action in the absence of precedent or laws. Initially, it was to prevent or to refuse the acts which are immoral or illegal. Judge Burrough's held in 1824 "I protest arguing too dynamically upon public policy. It is a very

uncontrollable .horse and once you get ride it, you never imagine where it will deliver you."^x The uncertainty and flexibility of public policy results to a pressure between its role as a ground of last resort for justice, and the demands for a definite common law conflicts jurisprudence, which is just and reasonable in its arrangements of interjurisdictional conflicts. In October 1996, Hague Conference had negotiated the context of multiple judgement conventions in which the public policy was one the elements in center for negotiation. Such an exception strongly disturbs both the practicing and academic communities. Now we will see the concept of this exception in US.

APPLICATION OF PUBLIC POLICY EXCEPTION IN US

Abstractly, this exception may be easily misued. A defendant can easily claim a public policy exception any time. Recognizing this level for abuse, U.S. courts have narrowly interpreted the exception of public policy and exercised it in rare matters. U.S. courts may decline the recognition of a foreign law on public policy grounds only if its application will injure the public health, the public morals, the public trust in the working method of the administration of law, or terror the sense of security for individual rights, whether of personal liberty or in relation private property. A court may not refuse the implementation merely because a foreign law is different from local public policy.^{xi} In cases like loss of goodwill and fee of attorney, court costs, repayment of gambling debt, prejudgement interest, default judgement and damages for moral reparation, U.S. courts have periodically declined to accept the public policy exception and have enforced foreign law in very flexible manner. In *Gutierrez v. Collins*,^{xii} the Texas Supreme Court implemented a Mexican law in a negligence action that reflects the damages for moral reparations i.e. injuries in relation to plaintiff's reputation, dignity or honor, even though such a cause of action did not available under the laws of Texas.

U.S. courts have also consistently enforced the public policy exception in other types of cases and refused the enforcement of foreign laws. We will see it one by one.

1. Awards in relation to Wrongdoer's Misconduct

U.S. courts have consistently declined to implement foreign laws where the offender, most often an escape from justice, seeks to enforce a judgment for damages related to his offence. In case of *Jaffe v. Snow*,^{xiii} the Florida District Court of Appeals rejected to enforce a Canadian judgment giving damages to a plaintiff who disrespected bail terms and was subsequently kidnapped and

harmful when a bailiff energetically returned him to Florida. The court held that " 'an escape from justice is not entitled to call upon the resources of court for granite of his case.' In other words, "a fugitive from justice 'cannot eat his cake and have it too.'^{xiv}

2. Libel Judgements

U.S. courts have also adduced the exception of public policy and refused foreign libel judgments where the foreign standards are dreadful to both local public policy and the U.S. Constitution. In *Bachchan v. India Abroad Publications Inc.*^{xv} a New York state court rejected to apply a English libel judgment against a New York based news service operator because the judgment had been charged without any precaution for freedom of speech and press, as mandated in the U.S. Constitution by the First Amendment. So, according to the this case, the refusal of recognition by the court is mandatory in context of U.S. Constitution.^{xvi}

3. Penal Sanctions

If a judgment serves to "punish an offense against the public policy of the state, or to afford a private remedy to a person injured by the illegal act" of the defendant, U.S. courts will execute the public policy exception.^{xvii} In the *Republic of the Philippines v. Westinghouse Electric Corp.*,^{xviii} the District Court of New Jersey, declined to enforce a judgment that contains sanctions, which the Republic of the Philippines brought against the corporation of defendant because the action of defendant the impacted the whole community, Thus, the court rejected to enforce the sanctions which are penal in nature of the Philippine judgment.

In summarising the concept in US we see although U.S. courts have enforced the public policy exception and decline to enforce judgments in selected types of cases, U.S. courts have not broadly but interpreted the exception of public policy and applied it in rare circumstances.

CONCLUSION

In concluding the whole concept of public policy, I can say this exception is one of the most important step to keep alive the morality in law but at same time also we have to keep a flexible check and balance of the escape because many a times it is used as political tool. In this research

we can see the periodic development of the concept of public policy. In practice the concept of public policy reflects in Common law countries. In 15th Century, it was recognised in the English law. It was employed in that manner what it meant today in late 18th century to reserve the power of court to refuse a claim or cause of action in the absence of precedent or laws.

The result of rejection of foreign law on the basis of public policy is to criticize a foreign law as not acceptable because of its immoral nature, its threat to social order and trust, or some other fundamental issues rendering it unworthy of enforcement mainly in a country which is of civilised nature. The principal of exception of the public policy shows that they provide an alternative for analysis. The concepts stand in the way of reasonable thought, and of policy development in true ways in the private international laws.

ⁱIs Foreign Law International Law by Fredric Kirgis available on

<https://www.asil.org/insights/volume/9/issue/33/foreign-law-international-law>

ⁱⁱ Suganchand Bhinkinchand v. Mangibhai Gulabchand (1942) 44 BOMLR 358

ⁱⁱⁱ Satya v. Teja Singh AIR 1975 SCR 2 (97)

^{iv} Raulin v. Fischer(1911) 2 K.B. 93

^v Regazzoni v. K.C Sethia (1956) 3 W.L.R. 79

^{vi} USA v. Inkney

^{vii} The Public Policy Exception to Recognition and Enforcement of Judgments in Cases of Copyright Infringement by Marketa Trimble available at <https://scholars.law.unlv.edu/facpub/564>.

^{viii} HILLEL Y. LEVIN, "What Do We Really Know About the American Choice-of-Law Revolution?," 60 Stan. L. Rev. 247. available at <https://scholars.law.unlv.edu/facpub/564>

^{ix} "Public Policy" in the Conflict of Laws by Monrad G. Paulsen available at msovern@law.columbia.edu.

^x Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824)

^{xi} Ackerman, 788 F.2d at 842.

^{xii} 583 S.W.2d 312 (Tex. 1979).

^{xiii} 610 So. 2d 482 (Fla. Dist. Ct. App. 1992).

^{xiv} United States v. Eng., 951 F.2d 461, 462 (2d Cir. 1991)

^{xv} 585 N.Y.S.2d 661 (Sup. Ct. 1992)

^{xvi} Bachchan, 585 N.Y.S.2d at 662.

^{xvii} Huntingon v. Attrill, 146 U.S. 657, 673-74 (1892).

^{xviii} 821 F. Supp. 292 (D.N.J. 1993).