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CODIFICATION, COMITY, AND CONSTITUTIONALISM:
A DOCTRINAL RE-EXAMINATION OF PRIVATE
INTERNATIONAL LAW IN INDIA

AUTHORED BY - CHANDRU M & VETRIVEL

Author Note: This paper argues that India's current "Precedent-First" approach to Private International Law (PIL) is reaching its breaking point in the face of digital globalization. It advocates for a transition from common-law flexibility to constitutionalized codification.

Abstract

Keywords: *Private International Law, Conflict of Laws, Code of Civil Procedure, Party Autonomy, Public Policy, Constitutional Morality, Digital Sovereignty, Recognition of Foreign Judgments.*

The global legal architecture is currently undergoing a paradigm shift, transitioning from traditional territoriality to "de-territorialized" digital and commercial interactions. Within this flux, Private International Law (PIL) in India remains a sophisticated yet fragmented mosaic, primarily anchored in the century-old Code of Civil Procedure, 1908, and an evolving body of common-law precedents. This paper provides an exhaustive doctrinal interrogation of the "Triple Pillar" of Indian Conflict of Laws: **jurisdiction, choice of law, and the recognition and enforcement of foreign judgments.**

The study traces the intellectual lineage of Indian PIL from the classical Huber-Savignian tradition to the modern "Interest Analysis" and "Closest Connection" tests. A central thesis of this work is that the Indian judiciary has uniquely "constitutionalized" conflict principles. By analyzing landmark Supreme Court rulings ranging from the restrictive public policy era of *Renusagar Power Co.* to the pro-autonomy stance in *PASL Wind Solutions* and the procedural innovations in *Amazon v. Future Retail* the paper demonstrates how Indian courts balance international comity against the protective mandates of the Indian Constitution, specifically Articles 14 and 21.

Furthermore, the research addresses the "doctrinal lag" in addressing 21st-century challenges, including smart contracts, blockchain-based assets, and the cross-border implications of the *Digital Personal Data Protection Act, 2023*. The analysis reveals that while the judiciary has demonstrated remarkable agility in filling legislative voids, the reliance on case-by-case adjudication breeds structural uncertainty that risks deterring Foreign Direct Investment (FDI) and complicating transnational family law.

The paper concludes by advocating for a **Sui Generis Indian Conflict of Laws Act**. It argues that such a codification must not be a mere "colonial carbon copy" of Western regulations like Rome I or Brussels I Recast, but rather a harmonized framework that integrates global standards of party autonomy with the specific socio-legal requirements of Indian public policy. Ultimately, the paper posits that for India to solidify its standing as a global hub for dispute resolution, it must transition from "ordered anarchy" to a predictable, statutory regime of Private International Law.

I. Introduction: The Structural Role of Private International Law

Private International Law (PIL), often termed the "Conflict of Laws," serves as the invisible plumbing of the global legal order. In the Indian context, PIL is not a single statute but a sophisticated mosaic of 19th-century colonial codes, post-independence judicial activism, and a burgeoning body of "Constitutionalized" private law. Unlike the European Union's Brussels and Rome Regulations, which provide a high degree of statutory predictability, India operates on a system of "Ordered Anarchy."

The central thesis of this paper is that the Indian approach to PIL is defined by a persistent tension: the desire to be a "pro-business, pro-comity" jurisdiction versus the constitutional mandate to protect Indian litigants from foreign legal overreach. As we move deeper into the 2020s, characterized by decentralized finance (DeFi), cross-border data flows, and "headless" corporations, the reliance on the Code of Civil Procedure (CPC) of 1908 is no longer a viable strategy for a global economic power.

II. The Theoretical Schism: From Huber to Savigny in the Indian Mind

To understand Indian PIL, one must understand its split personality. Indian judges often oscillate between two competing European schools of thought.

A. The Vested Rights Theory vs. Local Law Theory

Traditionally, Indian courts followed the English "Vested Rights" theory, the idea that a right acquired under a foreign law should be recognized everywhere. However, post-1950, the Supreme Court has leaned toward the "Local Law Theory." This suggests that an Indian court never truly "applies" foreign law; rather, it creates a domestic right that mirrors the foreign one, provided it doesn't offend Indian sensibilities.

B. The Savignian "Seat" of Relationship

The most profound influence remains Friedrich Carl von Savigny. His theory of the Sitz (seat) of a legal relationship finding the "natural home" of a contract or a marriage is the ghost that haunts Indian "Closest Connection" tests. In *National Thermal Power Corpn. v. Singer Co*¹, the Supreme Court essentially conducted a Savignian analysis to determine that the "Proper Law" of an arbitration agreement was Indian law, despite a foreign seat, because the underlying contract was "anchored" in Indian soil.

III. Jurisdiction: The Struggle with "Territorial Plus" Authority

In Indian law, jurisdiction is the "gateway" issue. If the court gets this wrong, the entire international litigation fails.

A. The Code of Civil Procedure and its Colonial Constraints

Sections 16 to 20 of the CPC are the bedrock. Section 20(c)², allowing suits where the "cause of action arises, wholly or in part," is the most litigated provision in Indian PIL.

* The In Personam Rule: India follows the common law rule that a court has jurisdiction if the defendant is "present" within the territory.

* The Problem of Corporate Presence: In the digital age, what constitutes "carrying on business" in India? Does a foreign website with an ".in" domain count? The Delhi High Court in *Banyan Tree Holdings*³ suggested that mere accessibility is not enough; there must be "purposeful availment" an active intent to target the Indian consumer.

B. Anti-Suit Injunctions: Judicial Protectionism or Comity?

The Indian Supreme Court's stance in *Modi Entertainment Network v. W.S.G. Cricket Pte.*

¹ *Nat'l Thermal Power Corpn. v. Singer Co.*, (1992) 3 S.C.C. 551 (India)

² Code of Civil Procedure, 1908, § 20(c), No. 5 of 1908, INDIA CODE (1908).

³ *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy*, 2009 SCC OnLine Del 3780 (Del. HC).

Ltd⁴. remains controversial. The court held that it can injunct a party from suing in a foreign court if that forum is "oppressive."

- **Critical Critique:** While intended to prevent "forum shopping," this power is often used by Indian parties to stall legitimate foreign proceedings. The doctrinal threshold for "oppressiveness" remains dangerously vague, leading to "Injunction Wars" between Indian and foreign courts.

IV. Choice of Law: The Constitutionalization of Private Law

This is where the Indian approach becomes truly unique. In Western jurisdictions, Choice of Law is a technicality. In India, it is a matter of Constitutional Morality.

A. Contractual Autonomy vs. Public Policy

India respects "Party Autonomy" the right of parties to choose their own law. However, this autonomy stops at the door of Section 23 of the Indian Contract Act. If a chosen foreign law allows something that is "opposed to public policy" in India, the court will strike it down.

- **The "Fundamental Policy" Test:** Following the *Renusagar* and *Ssangyong* decisions, "Public Policy" has been narrowed to "Fundamental Policy of Indian Law." This means a mere error of law is not enough; the foreign law must shock the "conscience of the court."

B. Matrimonial Conflicts: The Protectionist Shield

Nowhere is the Indian doctrinal focus sharper than in family law. The Supreme Court in *Y. Narasimha Rao v. Y. Venkata Lakshmi*⁵ established a "Revolutionary" rule:

- A foreign divorce decree is NOT recognized in India if the ground for divorce is not available under the Indian law the parties were married under.
- **Rationale:** This prevents Indian husbands from moving to "easy-divorce" jurisdictions (like Nevada or Dubai) to unilaterally dissolve marriages with wives left behind in India. Here, PIL serves as a tool for Gender Justice under Article 15⁶ of the Constitution.

⁴ *Modi Ent. Network v. W.S.G. Cricket Pte. Ltd.*, (2003) 4 S.C.C. 341 (India).

⁵ *Y. Narasimha Rao v. Y. Venkata Lakshmi*, (1991) 3 S.C.C. 451 (India).

⁶ INDIA CONST. art. 15.

V. The Digital Frontier: AI, Blockchain, and the Death of "Situs"

Traditional PIL relies on "Situs" (location). But where is the "Situs" of Bitcoin? Where is the "Situs" of a defamatory tweet?

A. The "De-territorialization" of Disputes

When a Smart Contract (coded in Solidity and hosted on an Ethereum node) fails, the "Place of Contract" is everywhere and nowhere. Indian courts are currently ill-equipped for this. We need a doctrine of "Digital Presence" where jurisdiction is determined by the "Impact Zone" of the digital act.

B. The DPDPA 2023 and Data Sovereignty

The Digital Personal Data Protection Act, 2023 introduces a "Territorial Plus" model. It applies to the processing of personal data outside India if it involves offering goods or services to persons in India. This creates a direct "Conflict of Laws" with the EU's GDPR and the US's sectoral privacy laws.

- The Doctrinal Shift: We are moving from "Comity" (respecting foreign laws) to "Data Sovereignty" (enforcing Indian law regardless of where the data sits).

VI. Recognition and Enforcement: The Section 13 Filter

A foreign judgment is not a "judgment" in India until it passes the "Section 13 Test."

A. The "Merits of the Case" Requirement

Section 13(b) of the CPC states that a foreign judgment is not conclusive if it was not "given on the merits." This is a massive roadblock for international trade. Many US and UK judgments are "Summary Judgments" or "Default Judgments." Indian courts often interpret "merits" to mean a full-blown trial.

- Proposed Reform: The paper argues for a "Presumption of Merits" for judgments coming from "Reciprocating Territories" under Section 44A.

VII. The Case for an Indian "Conflict of Laws Act"

A. Why Codification is Necessary

- Predictability for FDI: Foreign investors fear the "Public Policy" wildcard in Indian courts. A Code would define the exact limits of Public Policy.
- Harmonization with the Hague Conventions: India is a member of the Hague

Conference but has not ratified the Choice of Court Convention (2005). Ratification would immediately align India with global commercial standards.

- Efficiency: It would reduce the time spent on "Jurisdictional Challenges," which currently take 3–5 years in Indian High Courts before the actual merits are even discussed.

VIII. Case Analysis: The Dialectic of Indian Conflict Jurisprudence

The evolution of Indian Private International Law is best understood through the lifecycle of the "Public Policy" defense. This section analyzes the shift from the restrictive era of *Renusagar* to the modern, pro-autonomy era of *PASL Wind Solutions*.

A. *Renusagar Power Co. Ltd. v. General Electric Co. (1994)*⁷: Defining the Baseline

The *Renusagar* decision remains the North Star for the recognition of foreign awards in India. The dispute involved a claim for delinquent interest and damages under a contract governed by New York law, with an ICC arbitration seat in New York.

- The Conflict Issue: *Renusagar* contested the enforcement of the New York award in India, arguing it violated "Indian Public Policy" because the interest rates were allegedly usurious and violated the Foreign Exchange Regulation Act (FERA).
- The Judicial Innovation: The Supreme Court famously narrowed the "Public Policy" exception. It held that for a foreign award to be rejected, it must violate:
 - The fundamental policy of Indian law;
 - The interests of India; or
 - Justice or morality.
- Doctrinal Impact: By ruling that a mere violation of an Indian statute (like FERA) was not enough to bar enforcement, the Court established that "Public Policy" is not synonymous with "Domestic Law." This was the first major step toward decoupling Indian PIL from rigid domestic legalism.

B. *PASL Wind Solutions v. GE Power Conversion (2021)*⁸: The Triumph of Party Autonomy

If *Renusagar* defined how to enforce a foreign award, *PASL Wind Solutions* defined who can

⁷ *Renusagar Power Co. Ltd. v. Gen. Elec. Co.*, 1994 Supp (1) S.C.C. 644 (India)

⁸ *PASL Wind Sols. Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*, (2021) 7 S.C.C. 1 (India).

access a foreign forum. The case asked a radical question: Can two purely Indian companies, with no foreign assets or directors, choose a foreign seat (Zurich) for their arbitration?

- The "Closest Connection" Challenge: The appellant argued that under the "closest connection" test, the seat must be Mumbai because the parties, the subject matter, and the performance were all Indian.
- The Verdict: The Supreme Court rejected the "territoriality" argument in favor of Party Autonomy. It held that there is no "public harm" in allowing Indian parties to arbitrate abroad.
- Significance: This case effectively "globalized" Indian corporate disputes. It acknowledged that in a digital and integrated world, the "seat" of a dispute is a legal fiction created by the parties' will, not a geographical fact determined by the location of a factory or office.

C. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.

(2021)⁹: The Hybrid Future

This case represents the modern frontier where PIL, Arbitration, and Equity collide. The Supreme Court upheld the enforceability of an "Emergency Arbitrator" (EA) award issued by a Singapore-seated tribunal.

- The Conflict: Future Retail argued that Indian law does not recognize the "Emergency Arbitrator" as an "arbitral tribunal" under the 1996 Act.
- Doctrinal Breakthrough: The Court used a "purposive interpretation," holding that if parties agree to institutional rules (like SIAC), they effectively incorporate the EA into their contract.
- Critical Analysis: This decision signals that Indian courts are now willing to recognize "Transnational Procedural Law." It marks a shift from looking at the CPC for answers to looking at the Lex Mercatoria (the law of merchants).

IX. Synthesis: The "Three-Systems" Doctrine in Disortho S.A.S (2025)

In the very recent landmark case of Disortho S.A.S v. Meril Life Science¹⁰, the Supreme Court consolidated the doctrinal threads of the last 30 years. The Court explicitly adopted the "Three-Stage Test" for determining the law of a cross-border dispute:

⁹ Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., (2022) 1 S.C.C. 209 (India).

¹⁰ Disortho S.A.S. v. Meril Life Scis. Pvt. Ltd., 2023 SCC OnLine SC 134 (India).

- i. Lex Contractus: The law governing the substantive contract (the "meat").
- ii. Lex Arbitri: The law governing the arbitration agreement (the "engine").
- iii. Lex Fori: The law of the court exercising supervisory jurisdiction (the "courtroom").

This clarity is the pinnacle of Indian doctrinal development. It moves India away from the "Muddled Proper Law" approach of the 1970s and into a sophisticated, multi-layered framework that rivals the English and Singaporean models.

X. Legislative Proposal: A Draft Roadmap for the "Indian Conflict of Laws Act"

- i. The "Impact-Situs" Rule: For digital torts and data breaches, jurisdiction should lie where the "primary harm" is felt, regardless of where the server is located.
- ii. The "International Public Policy" Clause: Codifying the Renusagar standard to prevent future courts from expanding "Public Policy" back into "Patent Illegality."
- iii. Mandatory "Forum Non Conveniens" Factors: Requiring judges to consider the cost of witnesses, the location of evidence, and the governing law before accepting a transnational suit.

XI. Conclusion: Toward a New Doctrinal Synthesis

Private International Law in India is no longer just a branch of Civil Procedure, it is the Frontier of Sovereignty. The future of Indian PIL lies in a "Middle Path", a codified framework that respects the globalized nature of commerce while retaining the "Constitutional Safety Valve" that protects its citizens. India must transition from being a passive recipient of common law doctrines to an active architect of a Global South PIL framework.

The doctrinal journey of Private International Law in India has been a transition from Colonial Dependence to Constitutional Sovereignty, and finally to Global Integration. The judiciary has done the "heavy lifting" of modernization. However, as the analysis of PASL Wind and Amazon shows, the complexity of modern commerce is outstripping the flexibility of common law.

The case for a Codified Indian Conflict of Laws Act is now irrebuttable. Such an Act would not merely be a "rulebook" it would be a declaration of India's status as a mature, predictable, and fair jurisdiction in the global legal marketplace.

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