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The Status of Foreign Law before the Algerian National Judiciary

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Abstract. Foreign law occupies an important position before the Algerian national judge whenever the conflict-of-law rules provided for in the Civil Code refer to it, particularly in matters of an international nature such as personal status, contracts, and commerce. The judge is considered obliged to apply it as law rather than as a fact. However, this obligation sometimes encounters difficulties related to proving the content of foreign law and interpreting it, especially when the parties are unable to provide the approved texts or accurate translations. The judiciary also faces technical and institutional challenges, such as lack of training, the absence of databases for foreign laws, and divergent jurisprudence. Nevertheless, the application of foreign law contributes to enhancing justice in private international relations. Developing evidentiary tools, updating legislation, and training judges remain essential factors for improving the effectiveness of the Algerian judiciary in this field.

1. INTRODUCTION

The application of foreign law before the national judge is based on the fact that the jurisdiction of this law is determined by an order of the national legislator, who expressed his will through the conflict-of-law rule that refers to the application of that law. Foreign law retains its legal character even though its application may occur outside the borders of the state that enacted it. Herein lies the importance of this topic, which concerns how the national judge deals with the competent foreign law pursuant to national conflict-of-law rules.

Accordingly, this topic will be examined by posing the following problem: How does the national judge deal with the competent foreign law in terms of proving its content and interpreting it? Several questions arise from this problem, namely: Is the national judge obliged to ascertain the content of foreign law on his own initiative, or does this burden fall on the litigants? How is this law interpreted—according to the law of the state that enacted it or according to the law of the judge? In the event of an error in interpreting this law, does the Supreme Court have a role in supervising the correctness of the application and interpretation of this law?

These issues and the related questions will be addressed using the descriptive and analytical approach, through two main sections. The first section deals with the status of foreign law before trial judges, while the second section addresses the status of foreign law before the judges of the Supreme Court.

Chapter One: The Status of Foreign Law before Trial Judges

If the conflict-of-law rule referred to in national law determines the law applicable to the dispute, and this rule is mandatory and must be raised by the judge on his own initiative, then the process of applying foreign law requires addressing an important legal issue related to proving this law by specific means, the scope of its application, and the ruling in cases where proving its content is impossible. This will be discussed in the following subsections.

First Section: Searching for the Content of Foreign Law

Determining the foreign law competent to govern a conflict does not finally resolve the dispute; rather, it requires the judge to apply that law. Such application presupposes that the national judge has sufficient knowledge of foreign law, which is almost impossible, as it would impose on the judge a task beyond his capacity. Therefore, comparative legislations have not equated national law with foreign law in terms of knowledge of their content. The judge is presumed to know national law and is obliged to apply it, failing which he may be deemed to have committed a denial of justice. As for foreign law, the burden of proving it falls on the party invoking it, unless the judge is knowledgeable about it.

Foreign Law as a Material Fact:

Some legislations and judicial precedents have considered foreign law as a material fact that must be proven by the litigants by all legal means. This traditional approach is justified by the following:

- The national judge does not raise it on his own initiative, due to the difference between national and foreign law in terms of the presumption of knowledge. Presuming that the national judge knows foreign law involves practical difficulties, especially if the law is unwritten or if judicial solutions to a single issue are scattered. While national law does not require proof, foreign law must be proven and treated as a material fact. Otherwise, the parties might be surprised by an unexpected solution. Therefore, foreign law must be proven as facts are proven.
- Considering foreign law as a material fact is justified by the practical difficulties associated with knowing foreign law and proving its content. This justification has resonance in French and Lebanese law. For example, French jurisprudence, at

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certain stages, considered that foreign law combines both fact and law, and that the national judge may apply foreign law on his own initiative whenever he is aware of its content.

Foreign Law Retains Its Legal Nature and Has Special Procedural Treatment:

This modern approach has been adopted by French jurisprudence, which recognizes the legal nature of foreign law.

The modern approach is the one to be relied upon, as it places the issue in its true context. The national conflict-of-law rule breathes life into foreign law and confers upon it a binding character. If the national judge is not informed of foreign law and the burden of proof lies with the litigants, this does not strip the law of its legal nature. A material fact may be proven by all means of proof, whereas foreign law cannot be proven by admission or oath. If the judge's function is to apply the law and foreign law were considered a mere fact, the judge would ultimately be applying a fact to facts. Moreover, the inability to prove a fact results in dismissal of the claim, whereas failure to prove foreign law leads to the application of the law of the judge, as stipulated in Article 23 bis of the Algerian Civil Code as amended in 2005.

The judge in a dispute is bound by the factual elements as determined or agreed upon by the parties. However, the parties' agreement on a specific interpretation of foreign law does not bind the court. The national judge's reliance on the parties to prove the content of foreign law does not alter its nature as law. This situation is similar to proving custom without denying its legal character. If foreign law were a fact in the technical sense, the judge would not be able to intervene. However, when there is doubt as to the validity of the foreign law presented, the judge has room to intervene.

Legal Means of Proving Foreign Law Before the Trial Judge:

The judge plays a positive role in proving foreign law whenever he is aware of its content, and the litigants also play a role in this regard. However, the proof intended here does not aim to subject foreign law to judicial rules of evidence applicable to facts, as the methods of proving foreign law have a special character that distinguishes them from legally defined methods of proving facts, without severing the link between them. Some comparative legislations have not expressly specified methods of proof, leaving it to jurisprudence to determine them. Comparative law has settled on the principle of proof by all means capable of achieving the intended purpose. Accordingly, the judge may resort to the following legal means to ascertain the content of foreign law:

- Informal certificate: Foreign laws may not be proven by witness testimony, as witnesses usually testify to facts they have seen or heard, whereas foreign law requires expertise, knowledge, and written data. However, in France, practice allows proof of foreign law through a written document issued by a person specialized in foreign law or sufficiently knowledgeable about it. This certificate is drafted in the language of the judge's state and may be issued by official bodies or by a person knowledgeable in foreign law.

a. Certificate issued by the embassy or consulate of the foreign state whose law is to be proven:

This method has been adopted by Lebanese courts, such as a case where a certificate issued by the former Iraqi consulate in Beirut was used to prove Iraqi law. Such a certificate must be authenticated before the judge and translated if issued by a non-Arab consular or diplomatic body.

b. Certificate issued by an ordinary person specialized in foreign law:

This person is usually a lawyer, a foreign jurist, or a citizen knowledgeable about the law of the state concerned. The certificate may include legal texts or interpretations thereof, with examples from judicial decisions. However, courts often distrust such certificates due to possible bias toward the party requesting them. The judge has discretionary power to disregard such a certificate if he deems the jurisprudence it relies on to be obsolete.

- Expertise:
  The judge may, on his own initiative or at the request of the parties, seek expertise, whether oral or written. Oral expertise is common in English courts, which exclude witness testimony. The judge retains discretion in assessing the expert report and the extent to which he is bound by it. If the expertise involves disclosing the content of foreign law, the expert report must be discussed by both parties in respect of the right of defense.
- Foreign law and its translation:

When foreign legal texts are translated by a competent authority or included in an accredited academic work, the judge may rely on them to prove foreign law.

- Doctrinal opinions:

According to prevailing doctrinal and judicial trends in comparative law, the judge may rely on scholarly works and references submitted in the case that analyze and interpret foreign laws.

- Judicial decisions:

To ascertain the content of foreign law, trial judges may rely on previous judicial decisions issued in similar disputes, whether issued by the national judge applying foreign law, by the judge of the foreign state concerned, or even by another foreign court.

Finally, all these means are subject to the judge's discretionary power and are used for guidance. The judge must ensure that the judgment states the means relied upon to prove foreign law; otherwise, the judgment may be challenged for insufficient reasoning. The judge must also justify disregarding any means used to prove foreign law.

The Necessity of Resorting to Legal Means to Facilitate Adequate Knowledge of Foreign Law:

It should be emphasized that neither the judge nor the parties alone should bear the burden of proving the content of foreign law. Instead, adequate mechanisms should be provided to ensure sufficient judicial knowledge of foreign law, such as:

- Concluding international agreements for exchanging legal information.
- State involvement in providing foreign laws through establishing a scientific center for foreign laws under the supervision of the Ministry of Justice, creating institutes for comparative law, and equipping them with translation facilities.
- Judicial delegation (letters rogatory):

This involves requesting a foreign judicial or diplomatic authority to carry out investigative measures or collect evidence abroad. This method is effective but should be used only when the judge lacks knowledge of foreign law and cannot obtain it otherwise, while respecting the principle of adversarial proceedings.

Second Section: Interpretation of Foreign Law

Once foreign law is proven before the national judge, it must be applied as it is applied in the state that enacted it, in accordance

with the general principles governing its interpretation there. The judge must adhere to prevailing judicial interpretations in that state and verify the validity and applicability of the law.

Verification of the Validity of Foreign Law

The judge must ensure the legal nature of the applicable rule, its constitutionality according to the foreign constitution, and its temporal applicability.

The judge must distinguish between formal constitutional review (such as publication and entry into force) and substantive constitutional review. If the foreign legal system does not allow judicial review of constitutionality, the national judge may not undertake such review. If such review is entrusted to a specific authority, the judge must respect its decisions. Divergent doctrinal trends exist where ordinary courts are allowed to review constitutionality, reflecting differing views on state sovereignty and judicial competence.

If foreign law allows ordinary courts to review the constitutionality of laws, there are two opposing trends in this regard:

First trend:

The judge does not have the right to review the constitutionality of foreign law. The argument is that granting the judge constitutional review ultimately means interfering in the exercise of the foreign legislative authority, which contradicts the principle of sovereignty and independence of each state. Moreover, granting such review to the judge implies engaging in a political initiative aimed at refusing to apply an act issued by the foreign legislative authority.

Second trend:

The judge does have the right to review the constitutionality of foreign law. The predominant doctrine tends to grant the judge a role in constitutional review whenever the ordinary courts in the foreign state whose law is being applied are able to exercise such review, particularly in cases where the foreign judiciary has not already ruled on the constitutionality of the law.

Verification of the Entry Into Force of Foreign Law

In this case, the issue is to examine the foreign law applicable as indicated by the conflict-of-law rule, especially if the matter at hand is governed by two laws during the period between the date of its occurrence and the date of adjudication of the related lawsuit. What law should be applied to resolve the problem of temporal conflict between foreign laws? In this regard, there are two opposing trends:

a. Resolving the problem by applying the rules of temporal conflict in foreign law:

Comparative doctrine and jurisprudence hold that determining which substantive foreign rule applies temporally is an issue resolved by reference to the prevailing principles in the foreign state whose law is applied. The solution to this issue is unified and does not vary depending on the internationally competent judge. Proper application of foreign law requires observing its three elements—persons, place, and time—conferred upon it by its drafter (the foreign legislator).

b. Resolving the problem by referring to the rules of private international law in the law of the judge's state:

Some contemporary jurists consider that temporal conflict in foreign law should be resolved by reference to the law of the judge, meaning its rules of private international law. This implies that spatial conflict of laws affects the resolution of temporal conflict between substantive rules in foreign law. This opinion is weak, whereas the first opinion is the prevailing one. But what is the solution if proving the content of foreign law is impossible?

Third Section: Possible Solutions When the Content of Foreign Law Cannot Be Proven

If the national judge is aware of foreign law, he raises it on his own initiative, or the burden of proving it falls on the litigants. If the parties succeed, no problem arises, and foreign law is applied and interpreted as presented. If the parties fail to prove it, the judge reasons his judgment and applies the law of his state. The situation addressed here is when the party invoking foreign law fails to prove its content despite being required by the judge to do so, without providing evidence of the impossibility of proof. Under Lebanese law, the court rules to stay proceedings for a specified period it determines, during which the person is required to provide proof of foreign law.

Accordingly, if the judge fails to ascertain foreign law after exhausting all means, he must include this impossibility in his judgment. However, when the matter is not governed by a text, or where a text exists but jurisprudence is scarce, or where judgments exist but are contradictory, the national judge assumes the position of the foreign judge and seeks the solution that the foreign judge would have adopted had the dispute been brought before him. There are divergent trends regarding the position to be adopted when it is impossible to prove the content of foreign law.

a. Rejection of the claim or request:

According to this trend, when it is impossible to ascertain the content of foreign law, the judge must reject the claims brought. This approach was adopted by U.S. courts in the *Walton* case. The facts are summarized as follows: an American citizen, Walton, was injured in a collision between his car and a transport vehicle belonging to an American company in Saudi Arabia. Walton filed a claim for compensation before the federal courts of New York State against the company. At the first stage, neither party invoked the application of Saudi law, which was competent as the law of the place where the harmful act occurred. However, Judge Bricks raised the application of Saudi law on his own initiative but was unaware of its content and asked Walton to prove it. Walton made no attempt to prove Saudi law, so the court rejected his claim, and the judgment was upheld on appeal. Doctrine criticized this trend, considering it a denial of justice that undermines the rights of the injured party merely because he was unable to prove foreign law.

b. Application of the law closest in its provisions to the competent foreign law:

When the applicable law is determined but its content cannot be proven, the judge applies the closest law, meaning the law presumed to be closest in its provisions to the law whose content cannot be proven, due to belonging to the same legal family or due to mutual influence. For example, if the competent law is American law, English law may replace it. Another meaning of the closest law refers to the law most closely connected to the relationship after the law whose content cannot be proven, such as applying the law of domicile regarding capacity if proving the content of nationality law is impossible. This trend gained acceptance in German jurisprudence but is surrounded by practical difficulties, particularly in determining the degree of proximity between different legislations.

c. Application of the law of the judge when proving the content of foreign law is impossible:

In domestic law, a judge may not refrain from ruling on the pretext of ambiguity or lack of clarity of the text; the judge has a duty to adjudicate disputes involving a foreign element as he would national disputes. This constitutes an obligation on the judge, as he applies a law not published in his state. The judge applies his own law not because its provisions match the content of foreign law, nor because the default is the application of the law of the judge, but because this law applies by virtue of its general residual jurisdiction when it is impossible to ascertain the content of the foreign law competent for the international dispute pursuant to the conflict-of-law rule. Applying the law of the judge is a fair solution because it spares the parties the negative consequences resulting from the rejection of their claim. Moreover, it is a law not alien to the dispute—application of the law of the judge is endorsed by the purpose of the conflict-of-law rule. This third trend is applied in some comparative legislations, such as Lebanon and Algeria, pursuant to Article 23 bis of the amended Civil Code of 2005.

Chapter Two: The Status of Foreign Law before the Judges of the Supreme Court

The national judge raises the conflict-of-law rule on his own initiative as an obligation imposed by the national legislator, or the litigants may prove the content of foreign law. However, the national judge may misapply this law. In such a case, is it subject to the supervision of the Supreme Court? This question will be addressed through the following subsections.

First Section: Review of the Application of the Conflict-of-Law Rule

If the conflict-of-law rule is a national rule that the judge must apply as a directive from the legislator, then any error in applying it is subject, according to comparative doctrine, to the review of the Supreme Court. If the claimant argues that the challenged judgment failed to apply the competent law due to incorrect interpretation of the conflict-of-law rule, the court reviews that interpretation. For example, if the judge deviates in interpreting the rule and applies his own law instead of foreign law, or applies the law of domicile in matters of personal status instead of the law of nationality, such cases constitute errors in application or misinterpretation subject to review. The Supreme Court's review of errors in applying or interpreting the conflict-of-law rule is a general review governing all rules related to financial transactions or personal status.

In Algeria, this review has been confined to personal status matters pursuant to Article 358(6) of the Code of Civil and Administrative Procedures:

"An appeal in cassation shall be based only on one or more of the following grounds: … 6- Violation of foreign law relating to family law."

Second Section: Error in Characterization

Characterization is a legal process aimed at determining the nature of the issue raised by the dispute—providing it with a legal classification—to identify the conflict-of-law rule governing it and thereby determine the applicable law. Trial judges have absolute authority in assessing facts, which falls outside the Supreme Court's review. However, assigning the correct legal characterization to facts must be subject to review, as it is a legal operation. For example, assessing the existence of fault by the person causing damage is based on factual assessment and is not subject to review. However, determining the type of liability—whether tortious, subject to the law of the place of the harmful act, or contractual, subject to the law of will—is subject to review.

Third Subsection: Review of the Interpretation of Foreign Law

At the outset, it should be emphasized that the positions of legislation and jurisprudence in comparative law are divided between supporters and opponents of such review.

a. Rejection of review (the position of the Courts of Cassation in France and Lebanon):

The prevailing doctrine in France and Lebanon holds that there is no review of the interpretation of foreign law. This principle is also established in Germany, Spain, the Netherlands, Romania, and some Arab countries such as Tunisia and Morocco. This trend relies on several arguments:

- Foreign law is a material fact that must be proven, and as such it is not subject to review by the Supreme Court.
- The function of the Supreme Court is to unify the application of national law, whereas supervising the coordination of foreign judgments falls within the competence of the Supreme Court of the foreign state whose law is applied.
- The Supreme Court is authorized to review the interpretation of national laws, not foreign laws, to avoid error and deviation from the content of foreign law.
- Granting review to the Supreme Court could lead to conflict with the judgments of the foreign Supreme Court of the state that enacted the law.

a. Acceptance of review (the doctrine of Egyptian jurisprudence and some Arab and foreign legislations):

Errors committed by trial judges in interpreting foreign law are subject to review by the Supreme Court. This approach is adopted in Italy, Turkey, Greece, Egypt, Kuwait, Jordan, and the United Arab Emirates. Proponents rely on the following grounds:

- Granting the Supreme Court the authority to review trial judges' interpretation and application of the conflict-of-law rule completes the cycle of supervision over the interpretation of foreign law.
- One of the functions of the Supreme Court is to unify judicial interpretation; to achieve this, it must impose its review over the interpretation of law, whether national or foreign.
- Subjecting the interpretation of foreign law to Supreme Court review is consistent with recognizing foreign law as law in the true sense, not as a material fact, and ensuring the correctness of its application.

Egyptian jurisprudence has adopted this approach, with the Court of Cassation establishing and exercising its review over the interpretation and application of foreign law.

b. Mitigating the absolute rejection of review through certain mechanisms:

Although France and Lebanon reject review, examination of judicial decisions in these systems reveals that the Supreme Court exercises effective review over the interpretation of foreign law through the following mechanisms:

- Review of reasoning entails review of interpretation: When parties present foreign law to support their claims, the court exercises a degree of review.
- Review through respect for the adversarial principle: When the national judge interprets foreign law, as established by the Lebanese Court of Cassation through review of reasoning.
- Review through the concept of distortion or denaturation: The concept of distortion of foreign law was developed by the French Court of Cassation to review misinterpretation. Borrowed from contract law, where interpretation generally falls within the discretion of trial judges, denaturation occurs when judges depart from a clear contractual term, which then becomes subject to review.

2. CONCLUSION

The study of the status of foreign law before the Algerian national judge shows that the Algerian legislator has adopted an open approach toward applying foreign law whenever conflict-of-law rules refer to it, reflecting harmony between national legislation and the requirements of private international relations. However, practical judicial application reveals several difficulties, most notably proving the content of foreign law, differences in methods of interpretation, and lack of uniform judicial practice in this field.

The absence of clear institutional and technical mechanisms for obtaining foreign legal texts or verifying their validity has led to significant disparities among courts in handling such cases, affecting legal certainty for litigants.

Based on the findings, several recommendations can be proposed to improve the performance of the Algerian judiciary in dealing with foreign law:

First: The necessity of introducing explicit legislative provisions defining the burden of proving the content of foreign law, while enabling the judge to redistribute this burden according to the parties' capacities and access to foreign legal information.

Second: Establishing new legal rules obliging the Algerian judge to follow the method of interpreting foreign law adopted in its state of origin, and creating national advisory committees specialized in comparative law to assist when necessary.

Third: Developing the structural framework of courts by creating legal support units specialized in obtaining and translating foreign legal texts, and providing digital mechanisms for communication with embassies and foreign judicial bodies.

Fourth: Enhancing specialized training for judges through continuous programs in conflict of laws, comparative law, and methods of researching foreign legal texts, with the integration of applied courses within the Higher School of the Judiciary.

Fifth: Working on digitizing procedures for requesting foreign legal texts, establishing a national information bank for the most frequently applied foreign laws, and unifying judicial practice by periodically publishing decisions related to the application of foreign law.

Sixth: Granting judges more consistent discretionary authority through precise criteria for assessing the establishment of foreign law and the validity of its translation, thereby reducing judicial errors and enhancing legal certainty.

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