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THE NATIONAL APPLICATION OF FOREIGN LAW

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ABSTRACT

When a dispute is brought before a judge which is related to a legal relation in the field of private law, and includes a foreign element, the judge looks for the most appropriate law to govern the dispute. In this area, the legislator gives the judge, as an exception, the possibility to apply a foreign law instead of his own law, when the rules of reference (conflict rules) established by the legislator direct him to that. Here, a jurisprudential theory appeared, trying to put a legal basis upon which it is possible to rely when the national judge applies the foreign law.

KEYWORDS

Judge, National, Application, Foreign Law

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Introduction:

Originally, the national judge is required only to apply his own law and the rules set by his legislator, starting from the principle of sovereignty, which imposes full legislative and judicial sovereignty. Saying the opposite could lead to harming and infringing on the sovereignty of the state.

The principle that insists on the sovereignty of the state and its legislation, and the application of the state's laws to all persons belonging to it by nationality and to all acts that occur within its territory, can be accepted if transactions happened only between persons belonging to the state and if they performed their dealings only on its territory. But reality is different; the movement of people and the diversity of transactions have forced the establishment of legal relationships and dealings that involve a foreign element, and this has led to competition between laws regarding the rule of the legal relationship.

This earlier situation has compelled most countries to put conflict-of-laws rules whose task is to choose between laws and to determine the law best suited for governing the legal relationship, through setting rules of reference to guide the judge.

The rules of reference set by the legislator to guide the national judge to the applicable law over a legal relationship with a foreign element may guide him to apply the national law, or may guide him to apply a foreign law, so the judge becomes obligated to apply this latter in such a case. This raises the following question: What are the mechanisms for applying the foreign law by the national judge, and when can he exclude this application?

Objectives of the Study:

The study aims to examine the effect of resolving conflict of laws on the principle of the national judge applying the national law, and how this judge has now become obliged to apply the foreign law in legal relationships with a foreign element, within the limits set by the legislator.

The Method Followed in Studying the Subject:

In order to study the subject, we followed the descriptive method in order to start from assumptions that would bring us to facts about the topic under study, as well as the analytical method by analyzing jurisprudential opinions and legislative approaches concerning the controversial issues among jurists regarding the application of foreign law by the national judge.

Studying the application of foreign law by the national judge requires mechanisms for applying this law (First Section), and then clarifying the cases in which the national judge can exclude the application of the foreign law (Second Section).

First Section: Mechanisms for Applying Foreign Law by the National Judge

Studying the mechanisms for applying foreign law by the national judge requires us to study the basis of this application (First Subsection), how to prove the foreign law (Second Subsection), and its interpretation (Third Subsection), as well as studying how to determine the foreign law in the case of countries with multiple legislations (Fourth Subsection).

First Subsection: The Basis for the National Application of Foreign Law

Jurists have differed over the basis on which the national judge relies to apply foreign law, and from this difference many theories have appeared. Some see that the application of foreign law is on the basis of it being a fact among the facts (First Branch), while others see that the application of foreign law is on the basis of the idea of delegation (Second Branch). Another side of legal scholars sees that the basis for applying foreign law is the idea of reciprocity (Third Branch), and some have traced the basis to the idea of reception and incorporation (Fourth Branch), and there are those who see that the foreign law is applied as law while keeping this character (Fifth Branch).

First Branch: The Theory of Treating Foreign Law as if It Is a Fact

Some jurists see that foreign law should be considered as part of the facts, but even among the advocates of this opinion, there is a division into two directions:

1- **The French Direction:** At its head, Professor Henri Batiffol, who sees that foreign law loses in front of the national judge the external enforcing power, and by this, he means the element of command which the law enjoys in the country where it was issued and where it is applied. That is because the legislature which enacted this law has no power of command over the national judge, so cannot require him to apply this law. This makes the law simply a fact before the courts of other states and is treated as such based on orders of the national legislature to those courts (Dabbab, n.d., p. 41).

2- **The American Jurisprudence:** The proponents of this direction see that foreign law is applied out of respect for the idea of rights acquired abroad. The judge, in their opinion, cannot look into a right established abroad except under that law (Boulssina & Belghith, 2020, p. 230).

Second Branch: Application of Foreign Law Based on the Idea of Delegation

The proponents of this approach believe that the foreign legislator commands the national judge based on a delegation from the national conflict rules (rules of reference), so foreign law is applied in accordance with and based on this delegation (Aarab, 2002, p. 144).

Third Branch: Application of Foreign Law Based on the Idea of Reciprocity

The Dutch school relies on the principle of territoriality in the application of law. According to this theory, the law has absolute authority inside the territory of the state which issued it. Consequently, obliging the national judge to apply foreign law contradicts sovereignty, except that the idea of comity allows the state to permit the application of foreign law on its territory, also considering the interests of individuals (Kettal, 2011, p. 140).

Fifth Branch: Application of Foreign Law Based on the Idea of Reception and Incorporation

According to the opinion of the supporters of this approach, the national conflict rule which permits the application of foreign law actually attracts it and incorporates it into national law, so the national judge, when applying the foreign law, is really applying the national legal rule that has allowed for the application of this law (Boulssina & Belghith, 2020, p. 232).

Sixth Branch: Application of Foreign Law as a Law Retaining All Its Characteristics

The supporters of this approach believe that every law has certain characteristics and keeps these not only when applied in its own country but also when applied in other countries. So it is not a mere fact but remains law in the full sense of the word. However, those advocates do not agree on the exact basis upon which foreign law is applied (Boulssina & Belghith, 2020, p. 231).

In our opinion, the basis for applying foreign law within countries is clear—it is the legal rule which has permitted the national judge to apply this law in his territory. But if we mean the basis on which the legislator allows for the application of foreign law inside his territory, then all of this is really in order to solve the matter of conflict of laws.

Second Subsection: Proof of Foreign Law

Among the problems arising from the application of foreign law is upon whom falls the burden of proving the foreign law (First Branch), and how this law is to be proven (Second Branch).

First Branch: The Burden of Proving Foreign Law

There are two opinions in this regard: there are those who put the burden on the parties (First), and there are those who put it on the judge (Second).

First:Placing the Burden of Proving Foreign Law on the Parties:

This approach, which places the burden of proving foreign law on the parties, is founded on the consideration of foreign law as a mere fact which he who claims its existence must prove it. This is the position that the French jurisprudence settled upon for a long time, since the "Lautour" judgment of the year 1498, which ruled that "the burden of proof rests on the party claiming that his right, which he is claiming, falls under this law, and it does not change things even if his opponent is the one claiming the applicability of the foreign law." Advocates of this approach base their stance on the fundamental argument of the impossibility for the judge to know the laws of all countries in the world, as it is difficult to require the judge to search for the provisions of the law which ought to be applied to the dispute. Therefore, it is not proper to use against him the rule that the court “knows the law.” The judge is required only to search for the rules of his national law and to prove and interpret them when the dispute is presented before him, and he is not required to know the provisions of foreign laws (Article about the proof of the content of foreign law, 2023).

Second: Placing the Burden of Proving Foreign Law on the Judge:

The laws which put the burden of proving foreign law on the parties consider foreign law to be a fact; by contrast, the laws which grant the foreign law the status of law require that national courts, acting upon orders of their legislator, themselves search for its rules, and the matter does not depend on the will of individuals. The supreme courts have the right to oversee the validity of the application of the relevant foreign law and its interpretation (Article about the proof of foreign law, 2023).

Second Branch – How to Prove the Foreign Law:

We can distinguish in this regard between two situations:

First:Means of proof when the burden is on the parties:

In this case, they can present the text of the foreign law itself or its translation, in addition to presenting scholarly works and foreign judicial decisions which can allow deduction of the real rules of this law. In general, they can use all means of proving except for oath and admission, and the judge can also use expertise if he is not convinced by the evidence provided by the parties (Aarab, 2002, p.149).

Second: Means of proof where the burden falls on the judge:

Here, the judge can use his own means or those provided by his government in this area to reach the content of the foreign law, and he can also use the parties as is done in some legal systems like Germany (Aarab, 2002, p.149).

Third Subsection: Interpretation of Foreign Law

Studying the interpretation of foreign law requires determining how the foreign law will be interpreted by the national judge (First Branch), and the oversight of the Supreme Court over the interpretation of foreign law (Second Branch).

First Branch:How the National Judge Interprets Foreign Law:

With this, we aim to study whether the judge, when interpreting the foreign law, does so in reliance on what is found and prescribed in the country where the law was issued, or whether he does his interpretation based on what is prescribed in his own law.

In solving the previous issue, most comparative jurisprudence goes to the opinion that the interpretation of foreign law must be made according to the interpretative rules used in the foreign law itself (Kettal, 2015, p.266).

Second Branch: Supreme Court Oversight of the Interpretation of Foreign Law:

In this context, two trends have appeared as follows:

First: The opinion opposed to Supreme Court oversight over the judge's interpretation of the foreign law: In some European countries, jurisprudence and the judiciary go to not subjecting the application of foreign law to the Supreme Court's oversight. The Supreme Courts only supervise application of the national rules. This is because, for them, foreign law is considered a fact, and practically it is difficult to make the Supreme Court responsible for such a task concerning various foreign laws. In addition, their duty is to protect the national law, not the foreign one (Article about Supreme Court oversight, 2023, 19:00 pm). Also, the Supreme Court's interpretation of the foreign law may lead to incorrect or inexact interpretation.

Second: The opinion supporting the necessity of the Supreme Court's supervision of the national judge's interpretation of the foreign law: A large part of the judiciary has gone to giving Supreme Courts the right to oversee the application of foreign law as they do for national law. Their argument is that foreign law is law, not merely a fact, and that error in applying the law is only an error in applying the connecting rule (conflict law) in the judge's law which requires the law to be respected by actually applying the foreign law and implementing the ruling derived from it. Otherwise, the courts violate not only the foreign law itself but also the national law itself (Article about Supreme Court oversight, 2023).

Fourth Subsection: Determining the Applicable Foreign Law in Countries With Multiple Laws:

Although this matter was the subject of disagreement and debate among comparative jurisprudence and the judiciary, the Algerian legislator mentioned in Article 23 of the Algerian Civil Code: "When it appears from the rules contained in the above articles that the applicable law is the law of a country with multiple legislation, the internal law of that country is what shall determine which of its legislation should be applied. If in the relevant law there is no rule in this regard, the dominant law in the country shall be applied in the case of denominational multiplicity, or the law in the capital city in the case of regional multiplicity."

With this, the Algerian legislator has resolved the dispute in this area, and made it so that the internal law of the foreign country itself determines which law to apply. It also covered the case where there is no rule, and in cases of denominational multiplicity where the dominant law will be applied, or in the case of regional multiplicity the law of the capital is to be applied.

Second Section: Excluding the Application of Foreign Law

The national judge may exclude the application of foreign law which is designated by the national conflict rule as competent, in the case that it violates public order (First Subsection), or if it appears that the competence of this law has been established through fraud (Second Subsection).

First Subsection: Exclusion of the Application of Foreign Law Contradicting Public Order:

We discuss this element by defining the idea of public order (First Branch), the conditions for applying this idea (Second Branch), and the effects of excluding the application of foreign law due to its contradiction with public order (Third Branch).

First Branch: Definition of Public Order

The issue of defining public order is a difficult matter due to the relativity and change of this idea over time and place. What is considered public order in a particular place may not be so in another, and what is considered public order in a specific place and time may not remain so at another time.

Despite what has been said about the difficulty of giving a unified definition of public order, most legal scholars define public order as the political, social, economic, and moral foundation that prevails in society at a certain time, so that it is not possible to imagine the society's survival without the stability of this foundation,

and so that society would collapse if its fundamental components were breached. Therefore, legal rules relating to public order are imperative and may not be contravened (Mousakh, 2019, p.4).

Second Branch: Conditions for Applying the Idea of Public Order

For the idea of public order to be applied, two basic conditions must be met (Mousakh, 2019, p.8–10):

- For the national conflict rules to refer to the foreign law which contradicts public order.
- There must be a necessity arising from public order to invoke and apply public order as a defense and exclude foreign law, in that the foreign law is in partial or total contradiction with national law or with public order within the state.

Third Branch: Effects of Invoking Public Order to Exclude the Application of Foreign Law

Invoking public order to exclude the application of foreign law because of its contradiction with public order results in various effects. There is one effect relating to a relationship that is intended to be created in the judge's state (First), and another effect relating to a right acquired abroad or one that its effects are sought to be enforced in the judge's state (Second).

First: The Effect of Invoking Public Order Regarding a Relationship to Be Created in the Judge's State:

There is a negative effect and a positive effect. The negative effect is to exclude the application of the relevant foreign law in accordance with the national conflict rules, although jurists are divided over the issue of complete or partial exclusion of the foreign law. Some legal scholars support total exclusion of foreign law in contradiction with public order, while the majority see that only the part contrary to public order should be excluded without the rest (Aarab, 2002, p.176–177).

As for the positive effect of public order, it is replacing the excluded foreign law with another applicable law. The French judiciary and legal doctrine have settled on replacing the excluded foreign law with the judge's own national law in the name of public order, which is also the judgment adopted by Egyptian courts and supported by most Egyptian jurists. The Algerian legislator followed this with the recent amendment to the Civil Code, where the new text of Article 42, section two, explicitly introduced the principle of the positive effect of public order by saying: "Algerian law applies instead of the foreign law that violates public order or morals" (Mousakh, 2019, p.12).

Accordingly, the exclusion of foreign law due to its contradiction with Algerian public order necessarily requires the automatic application of Algerian law in its place by force of law (Mousakh, 2019, p.12).

Second: The Effect of Invoking Public Order on a Right Acquired Abroad or Being Claimed in the Judge's State:

Understanding the idea of the mitigated effect of public order requires distinguishing between the case where rights are to be established in the judge's state, where public order has its full effect both negative and positive (this is the complete effect), and the case where rights are established under a foreign law contrary to public order and their effects are sought in the judge's state, where some of their effects may be recognized—thus, public order here has a mitigated effect (Kettal, 2011, p.163).

The idea of the mitigated effect of public order is based on the fact that there are cases where the foreign law conflicts with public order, whether the right in dispute arose abroad or in the judge's state, and there are other cases where there is a conflict only if it arose in the judge's state, but there is no conflict for the enforcement of this right; because the general feeling in the judge's country is less affected by its enforcement than by its creation (Kettal, 2011, p.163).

Second Subsection: Exclusion of the Application of Foreign Law Because of Fraud Against the Law

The judge may exclude the application of foreign law if he establishes that this law became applicable through fraud against the law, a concept which we must define (First Branch), then clarify the conditions for invoking fraud against the law (Second Branch), as well as explain the sanction resulting from fraud against the law (Third Branch).

First Branch: Definition of the Concept of Fraud Against the Law as a Reason for Excluding the Application of Foreign Law

Jurisprudence has provided several definitions for fraud against the law, including that it is a voluntary measure by means that lead to escaping the law of a state that would normally govern a legal relationship, and substituting it with the law of another state which achieves more sought-after results (Mousakh, 2019, p.16).

Fraud against the law has also been defined as "an attempt to change the connecting factor in order to avoid the rulings of a certain law and resort to the application of the rulings of another law" (Article Fraud Against the Law, 2023, 19:45 pm).

Second Branch: Conditions for Applying the Idea of Fraud Against the Law

Applying the concept of fraud against the law to exclude the application of foreign law requires several conditions, which are as follows:

First: Voluntary Change in the Connecting Factor (Material Element):

This requirement means that the person committing fraud or the person interested changes the connecting factor that can be changed by the will of individuals. In this case, the change should be real, not only formal, and must be legitimate. Change achieved by illegitimate means is not considered, as it invalidates the application of foreign law in this case without needing to implement the theory of fraud against the law (Ben Ziyada, 2015, p.247).

Second: Existence of Fraud Intent (Moral Element):

This refers to the intention to evade and escape the provisions of the law that should apply to the legal relationship. If this intent is absent, the act carried out by the defrauder is valid and cannot be invalidated. Some jurists believe that the existence of intent need not always be a requirement, and consider fraud to occur with the mere act of changing the connecting factor coupled with external circumstances. For example, two citizens who are tourists in a foreign country during their stay there enter into a gift contract within the territory of that foreign country without there being a clear reason to do the gift there; it can, according to them, be inferred that the fraud is against their national law in pursuit of non-submission to it and the desire to be subject to the provisions of foreign law relating to the gift contract, especially if the latter serves their interest better in some respect (Mousakh, 2019, p.17).

Most of the jurists and courts believe it is necessary to adopt the condition of intent when applying fraud against the law (Mousakh, 2019, p.17).

It should be noted that both previous conditions are agreed upon among jurists, though there are other disputed conditions such as whether the fraud concerns a mandatory legal rule, the effectiveness of the fraud means, whether the fraud concerns a rule from the judge's law, etc.

Third Branch: The Sanction Resulting from Fraud Against the Law

While the effect of fraud in domestic law is limited to depriving the party acting in bad faith from benefiting from the result of a fraudulent act under the same domestic law, it is found in the field of conflict of laws that the defrauder is deprived of applying the law acquired through fraud (Kettal, 2011, p.167). The sanction is lack of effect, but the disagreement among jurists is whether this lack of effect touches just the result the defrauder sought to achieve, or both the result and the means.

First: Lack of Effect on the Result:

Most jurists say the effect of fraud is restricted to preventing the unlawful result the person sought when changing the connecting factor, without touching the means since the means were achieved in a legal way. What counts in the transaction is the intention and the goal, and there is no need to exaggerate the sanction. It suffices just to prevent the defrauder from achieving his intended goal, while other effects resulting from the use of legal means are not relevant, nor should the courts impose them (Ben Ziyada, 2015, p.258).

Second: Lack of Effect Extends to Both Means and Result:

According to this approach, the effect of invoking fraud covers both the result and the means, meaning that the law which gained jurisdiction as a result of fraud, for example by changing the nationality, is excluded and the competent law (the law of the judge in this case) is applied instead, and the new nationality that the person acquired is annulled, as it is unreasonable to split the legal act.

Conclusions:

It becomes clear from what has preceded that the national judge can apply foreign law, if the national conflict rule has determined that this is the applicable law. And although there has been a dispute among jurists, as we have seen, about the basis which allows the national judge to apply foreign law instead of his own law, and despite the opinions that have appeared in this area, we believe that the only basis which truly obligates the judge to apply foreign law is complying with the order of his legislator by applying the conflict rule that so requires. As for the juristic question about why the national legislator allows the judge to apply foreign law, the answer is simply that all of this is for the purpose of choosing a law from the competing laws that are vying to govern the legal relationship with a foreign element, and putting an end to this conflict.

It is also clear from what has been discussed that, even though the national legislator allows the judge to apply foreign law, this is always subject to limits and conditions, especially regarding the absence of any conflict with public order, and if the judge finds that its application would lead to fraud by one of the parties.

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