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**the cases where foreign law proof'nt possible accordance with in
technological development's light**

حالات تعذر إثبات القانون الأجنبي في ظل التطور التكنولوجي

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Abstract:

A dispute involving a foreign element may be raised before the judiciary in which the attribution rule is likely to refer to the application of a foreign law, the Algerian legislator has decided in this case to provide for the application of Algerian law in case it is impossible to prove the applicable foreign law, but in light of openness to the world, technological development, exchange of experiences and strengthening cooperation between countries in the judicial field, how can we imagine a situation where it is impossible to prove the applicable foreign law.

Keywords: foreign law; impossibility; proof; technological development; national law.

المخلص:

نظرا لأن قد يثار أمام القضاء نزاع يتضمن عنصر أجنبي ومن المحتمل فيه أن تشير قاعدة الاسناد إلى تطبيق قانون أجنبي، ومنه تحديد من يقع عليه عبء الإثبات هذا القانون الأجنبي سواء أكان قاضي الدعوى أو أطراف الخصومة، وعليه فصل المشرع الجزائري في هذه الحالة بأن نص على تطبيق القانون الجزائري في حالة تعذر إثبات القانون الأجنبي الواجب التطبيق، ولكن في ظل الانفتاح على العالم والتطور التكنولوجي وتبادل الخبرات وتعزيز التعاون بين البلدان في المجال القضائي كيف يمكننا تصور حالة تعذر إثبات القانون الأجنبي الواجب التطبيق .
الكلمات المفتاحية: القانون الأجنبي؛ التعذر؛ الإثبات؛ التطور التكنولوجي؛ القانون الوطني.

Introduction

National courts aim to resolve disputes brought before them, regardless of their nature, whether internal or involving a foreign element. This raises numerous legal issues, particularly in matters of private international law, specifically concerning the application of foreign law.

Jurisprudential schools have differed on how to apply and prove foreign law. The Dutch school adopted the principle of applying foreign law as a matter of international comity, meaning that the state determines the rules of conflict of laws and is not obligated to accept foreign law. If it does accept it, it is on the basis of international comity. In Anglo-Saxon countries, the theory of vested rights prevailed. This theory holds that the judge applies foreign law in his own country out of respect for the vested right that this law confers upon the right holder. A group of French and German jurists argued that the judge applies foreign law based on a delegation from the foreign legislature,

which grants him the choice-of-law rule in the judge's own law. Therefore, the view that foreign law is a factual matter became prevalent in French jurisprudence, a view also adopted by jurists in America.

In contrast, Italian and German jurisprudence considers foreign law to be law, not fact. This has been explained through the theory of reception and assimilation, which suggests that the judge applies foreign law as if it were integrated into his own law. Thus, whenever a conflict-of-laws rule refers to the application of foreign law, this rule absorbs the foreign law, and the judge is incorporated into it. These views and theories have been criticized for revealing shortcomings in interpreting and classifying cases involving a foreign element. Despite the jurisprudential differences, the distinction between foreign law and fact remains, sometimes considered fact and other times law.

Since the judge is obligated to resolve the dispute, the issue of applying his own

country's law does not arise. However, a difficulty arises when the conflict-of-laws rule refers to a foreign law that must be applied in the dispute before him. This creates a number of difficulties for the judge in attempting to establish this law, especially in light of technological advancements. To address this issue, we will examine the most significant challenges that can arise in establishing foreign law, even with current technological developments. The difficulties that a judge generally faces are real difficulties that cannot be ignored. The judge's task is not easy, but these difficulties do not in any way negate the judge's refusal to acknowledge foreign law. Therefore, it can be said that the difficulties facing the acknowledgment of foreign law are either material or legal, and we define them as follows:

1. In the case of foreign law, which is written:

Although information and communication technologies facilitate access to information and thus to foreign legislation, we distinguish two difficulties here:

The first relates primarily to the language in which the foreign law is written. A judge may not know the language of that country, and despite the availability of translation applications and websites, they may have to resort to a translator. Consequently, the translation depends on the translator, and it is possible that the translated text reaching the judge may be distorted from the original. Translation may not be reliable in conveying legal terminology accurately and precisely, especially with software and websites that lack this feature. Although some countries adopt a codified text in two languages, such as Arabic and French, we sometimes find differences between the Arabic and French texts. The second difficulty is a legal one, represented by the legal procedures followed by each country regarding the entry into force of its law, ratification, publication, conformity of the law to the constitution, and retroactive application, which

necessitates a precise definition of the foreign law.¹

2 Foreign Law Based on Custom:

If the source of foreign law is custom and practice, as is the case with Anglo-Saxon law, the difficulties are no different from those of written law. Consequently, identifying its origin and how it emerged is challenging. Furthermore, there is disagreement regarding the legal status of certain rules originating from custom, such as established commercial practices. Some deny their legal status, considering them a condition of the contract and obligating the parties to adhere to them. Others describe them as legal rules that require the judge to seek them out and apply them *ex officio*. However, overcoming this difficulty is not impossible, as it is always possible to ascertain the existence or absence of a custom or practice at the time of its emergence and to verify it. The judge's knowledge of foreign law is not presumed in the same way as his knowledge of national law, which is based on the presumption of publication in the official gazette. This law can be viewed from a different perspective than national law, even though the foreign law is legislation. This is achieved by drawing a parallel with custom within national law, with the crucial difference that custom is considered law, but it does not have the same legal force of knowledge as legislation. In this case, the legislator allows the judge to verify the custom through other means, relying on experts in the profession among whose members the custom originated.

3 Foreign Law Originates from the Judiciary

Herein lies the difficulty in determining the legal value of judicial rulings originating from the courts of the country where they were issued. Judicial systems vary from country to country. In England and the United States, judicial precedents are given binding force, equivalent to that of law, and the judge is obligated to follow them. This is not the case in some other countries, such as France and

Egypt, where judicial rulings have only relative value and are only relevant to the litigants in the case. Therefore, when a judge establishes a foreign law, he must ascertain the weight of judicial precedents in relation to that law. If it becomes clear that they have the force of law, then he is obligated to seek them out and understand them. This raises difficulties that the judge may not be able to overcome.

4 The case where the foreign law is based on jurisprudence:

If jurisprudence is a source of law, the difficulties that arise lie in determining the legal weight of this source for each country. For example, scholars of private international law enjoy a privileged position before English courts, and their opinions are often taken as established fact.² If this jurisprudence were to be applied before an Algerian court, these courts would be able to accept the opinions of these scholars, just as the English courts themselves do.

The National Judge's Ability to Identify the Provisions of Foreign Law

This refers to the impossibility for the judge to ascertain the provisions of foreign law, despite exerting every effort to do so. In such cases, the judge's task becomes difficult and arduous, especially when the foreign law lacks any provisions applicable to the dispute. Several theories have been proposed in this regard, which we summarize as follows:

A. The Theory of Rejection of the Application

This theory stipulates that the judge should reject the case if it is impossible for him to identify the provisions of foreign law. However, this approach is untenable, as rejecting the application would constitute a denial of justice. The judge is always obligated to adjudicate disputes brought before him and to seek answers in the various sources of law. Failure to fulfill this duty would be a denial of justice.³

B. The Theory of Applying General Principles Prevalent in the Civilized World
The application of general principles prevalent in the developed world is a

difficult concept to define precisely. While these principles can be considered a source of public international law rules governing relations between states, their application to disputes between individuals is challenging. These principles contain few specific provisions and are considered general principles, making them difficult to apply to disputes between individuals that require detailed rulings. For example, the general principle of compensating the injured party for the harm suffered is too broad to be applied in many cases. It does not specify the extent of liability, nor does it precisely define the obligation to compensate for indirect or moral damages, the amount of compensation, or who is entitled to it. The general principle of compensating the injured party for the harm suffered is difficult to apply in many situations.

C. The Theory of Applying the Law Closest to Foreign Law in its Provisions
Some legal scholars believe that if the content of the foreign law indicated by the conflict-of-laws rule cannot be ascertained, the law closest to it in its provisions should be applied. This is because laws worldwide can be traced back to specific legal systems, such as the Anglo-Saxon, Latin, socialist, or Islamic systems. The law of another country closely related to that country can also be applied, such as American and English law, French and Italian law, or Polish and Egyptian law. Thus, this theory is difficult to adopt because it is impossible to ascertain the degree of similarity between the unidentified law and another law, even if the legal family to which the applicable foreign law belongs can be determined. Furthermore, the shared source from which the provisions of the laws of two or more countries are derived does not necessarily imply that the provisions contained in these laws are identical. Legal rules evolve in ways that differ from country to country.

D. The Theory of the Judge's Application of National Law
The prevailing opinion, held by the majority of jurists, is that the judge should refer to the provisions of his own law when he cannot ascertain the content of the

foreign law. Professor Batifoul justifies this by stating that national law has general jurisdiction over all relationships subject to private law. This approach is adopted by Article 23 bis ⁴ of the Algerian Civil Code, which stipulates the obligation to apply Algerian law when it is impossible to prove the applicable foreign law. However, this theory cannot be accepted, because in practice, judges are more inclined to apply their own law, which is natural since they are more familiar with its provisions and methods of interpretation. This undermines the considerations that the legislator intends when enacting the rules of conflict of laws. The Problem of Interpreting Foreign Law When a judge applies foreign law, he will face challenges in interpreting its rules. Should the judge resort to the same method he uses to interpret the foreign law he wants to apply, or should he follow a different approach? There are differing viewpoints on this issue. Some jurists believe the judge should have complete freedom in interpreting foreign law, considering that this law has become intertwined with national law and an integra⁵l part of it. Another viewpoint holds the opposite view, advocating for interpreting foreign law according to the concepts and circumstances in which it was applied in the country where it was issued. In this case, the judge must adhere to the decisions of the courts and the prevailing legal opinion in the country whose law is to be applied. The Egyptian Court of Cassation has adopted this approach, and this is the prevailing opinion because it is not acceptable for a court to apply the law of a foreign country and then contradict the interpretation of that law ⁶by the supreme court of that country. It is highly unlikely that a court of a national addressing such impossibility, provided a solution in Article 23 bis of the Civil Code, which stipulates the application of the law of the court of jurisdiction in cases where proving the applicable foreign law is impossible.

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judge would be more accurate in interpreting the law of a foreign country, especially if its supreme courts have already interpreted it.⁷

Challenges Posed by Technology in Evidence

Despite the advantages offered by technology in transferring information and data and facilitating communication, it cannot always fill the legislative gap with regard to foreign laws. Since electronic media are readily available to everyone, we sometimes cannot distinguish whether the author of legal information is a legal expert. In such cases, technology becomes inadequate, particularly in the face of customary presumptions, which are central to the laws of some countries. Furthermore, electronic translation software does not guarantee accurate translations of legal texts, making it unreliable. Technology cannot, in every instance, resolve the fundamental difficulties related to the sources of applicable foreign law, especially if those sources are custom, judicial precedent, or legal scholarship.

Conclusion:

In conclusion, we note that proving foreign law is one of the most complex issues in private international law, as it revolves around the application of a foreign law issued by the legislature of a foreign state before a national judge. A distinction must be made between the fact in dispute and the legal rule that the judge applies to that fact. The parties are responsible for proving the former, while the latter falls within the judge's purview, as the judge independently seeks and applies it. Legal scholars have differed in finding solutions to cases of impossibility of proving the applicable foreign law. However, the Algerian legislator, in .1Al-Hadawi Hassan, Private International Law: Conflict of Laws, Dar Al-Thaqafa, Amman, 1997

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³ Rashid Samia, The Rule of Consent before the Judiciary, Journal of Legal and Economic Sciences, Ain Shams University, Cairo, 1972, No. 2, pp. 119-119.

⁴ Article 23 bis of the Algerian Civil Code: "Algerian law shall apply if it is not possible to prove the applicable foreign law."

⁵ Al-Hadawi Hassan, Private International Law: Conflict of Laws, Dar Al-Thaqafa, Amman, 1997, p. 57.

⁶ Yassin Mustafa Kamal, Application of Foreign Law, Al-Ani Press, Baghdad, 1957, p. 24.

⁷ Fahmy Muhammad Kamal, Supreme Court Control over the Application of Foreign Law in the Scope of International Conflict of Law, Journal of Law and Economics, 1963, pp. 1-87.