



THE ROLE OF THE ALGERIAN LEGISLATOR IN PROTECTING ORPHANED CHILDREN FROM INTERNATIONAL INHERITANCE DISPUTES

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Abstract:

Many disputes and practical challenges arise in inheritance matters in domestic law, which is family law in its third book containing inheritance provisions, not to mention disputes in international law. We have chosen inheritance as a model for study and research due to the variation in provisions and effects between national law and foreign laws, considering that its reference in family law, which inevitably results in the difference in the general system in these relationships, which may sometimes lead to the application of the judge's law and the exclusion of the application of foreign law that differs from the personal law of the parties in terms of source and provisions.

Keywords: inheritance disputes, public policy, family law, civil law.

Introduction:

The issues related to inheritance and post-mortem legal dispositions are among the most prominent issues that provoke conflicts of laws, considering the significant development in the field of communication, which has fostered connections and collaboration between the citizens of different countries. This has led to the diversification of elements of these relationships in more than one country and their separation into multiple legislative jurisdictions. All these factors have contributed, in one way or another, to the intervention of the foreign element in these relationships.

It is noteworthy that Algerian law regulates inheritance matters on religious grounds, which has led to differences in its provisions from one country to another and difficulty in unifying its rules due to

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the sensitivity of this subject, as it is related to the principles, beliefs, and culture of each society.

On this basis, the provisions of inheritances derived from Islamic law in Algeria and various Arab legislations will necessarily lead to the exclusion of the provisions of foreign law that conflict with the fundamental principles and essential principles of the state.

Therefore, we raise the following question: What mechanisms does the Algerian legislator adopt in regulating the issue of conflicts of laws? And does this variation in the general system affect judicial rulings?

To answer this question, we relied on the analytical and critical approach, and we divided this research into two sections. In the first section, we will address the law applicable to inheritance, while in the second section, we will highlight the application of the deceased's nationality law in inheritance between the scope and status of the general system.

1- The Law Applicable to Inheritance:

Issues related to inheritance, which include a foreign element, are characterized by their transcendence beyond the nation's territory to other countries. Consequently, they go beyond the national legal system, and conflicts arise in several legal systems. This necessitates the resolution of this conflict, and the first step taken by the judge in this case is to place the relationship subject to conflict in one of the legal categories (Shabour, 2011, p. 10).

Therefore, we will divide this section into two sub-sections. In the first sub-section, we will delve into the historical origins of real and personal property inheritance. As for the second sub-section, we will elucidate the position of the Algerian legislator in the law applicable to inheritance.

1.1- Historical Origins of Real and Personal Property Inheritance

Scholars and legislators have differed on whether inheritance falls under personal or proprietary matters, aiming to determine the applicable law.

Countries that have subjected inheritance to personal matters have derived their provisions from religion, as is the case with countries whose family laws are subject to Islamic Sharia provisions, such as Algeria (Triki, 2015, p. 264).

If we turn to comparative law, most countries distinguish between real and personal property inheritance, each described by the doctrine of "lex situs" (law of the situs), notably in Britain and the United States. This will be evident in the following branches.

1.1.1- Lex Situs Principle for Real Property Inheritance

There is a discrepancy among jurists regarding the application of the lex situs principle to inheritance, whether limited to real estate or encompassing both real and personal property.

Real estate holds significant value, especially in feudal times based on feudalism, where land had a territorial concept as the most valuable asset, being the lifeline of society. This idea reflects the application of the fundamental principle that property is subject to the law of its situs, one of the earliest principles in the world. Its origins lie in the regional laws prevalent during the feudal era, later adopted by the jurists of the old Italian school. In the 16th century, the principle of lex situs for real estate was independently highlighted by "D'Argentre," where only matters concerning real estate were territorially applied, affirmed by French jurists and others, and embraced by the German jurist "Savigny" (Belqāssim, 2002, p. 268; Abdullah, 1986, p. 338).

As a result, inheritance concerning real estate falls within the realm of money matters. "Niboyet" argued that the entirety of inheritance, both real and personal property, should be subject to the law of the situs due to economic, social, and political factors.

The distinction between real and personal property becomes apparent in exceptional circumstances. Supporters of this view cite the case of George Sand's granddaughter, who bequeathed her house and furniture in Nohant, France, to the French Academy. However, upon her death in Italy, the furniture became subject to another law, the Italian law. This pertains to real estate, but the situation differs concerning personal property (Zerouti, 2000, p. 184; Triki, 2015, p. 258).

1.1.2- Subjecting Inheritance of Personal Property to the Law of the Deceased's Domicile

According to this theory, transactions related to personal property are subject to the law of the owner's domicile, and this idea



dates back to the ancient Italian school of private law, where personal property was linked to the liability of its owner.

It is assumed that personal property remains with its owner at their habitual residence, and the basis of this theory is the subjection of transactions related to personal property to the law of its presumed situs. The domicile of the deceased is considered the presumed situs because personal property remains in continuous motion. To maintain the stability of its legal system, it is presumed to be located at the domicile of its owner.

Moreover, the domicile of the deceased serves merely as a jurisdictional location for the personal property left by the deceased. In most cases, both real and personal property will fall under the law of the situs of the money, and thus within the domain of the monetary system, particularly concerning inheritance subject to the monetary system (Al-Asadi, 2012, p. 103; Alawneh, 2015, p. 38).

On the other hand, the law of the deceased's domicile may be considered as the personal law for those subject to personal status matters. A key argument is that the conflict of laws issue is resolved by focusing on the legal relationship spatially. Among the elements of focus in inheritance is death, with the domicile of the deceased considered as its location. Therefore, the law governing inheritance is the law of the deceased's domicile.

Secondly, the stance of the Algerian legislator regarding the law applicable to inheritance and its protection of orphaned children is considered. Inheritance is considered one of the personal status matters due to many considerations, as its basis is connected to a person's life and death, being the natural result of that death. The reasons leading to inheritance are elements derived from a person's status. Hence, inheritance is subject to the legal system governing the individual, whether it's the nationality law or the law of domicile.

Only the Norwegian, Danish, Argentinean, and Soviet Union laws have adopted the law of the deceased's domicile. Meanwhile, legislations that consider inheritance as part of personal status matters, including Algerian law in Article 16 of the Civil Code, as well as Arab legislations, subject the entire inheritance, whether immovable or movable, to the nationality law of the deceased. However, some legislations intervene in real matters, subjecting them to the law of the

deceased's domicile, while distinguishing between movable and immovable property (Suleiman, 2000, p. 79).

The inheritance is considered connected to the family system, as it regulates the transfer of the deceased's wealth to their heirs among their relatives. Family law is responsible for elucidating its provisions, as the legislator has subjected it to the law of the deceased's nationality according to Article 16 of the Civil Code, stating: "The inheritance, will, and all posthumous dispositions shall be governed by the law of the deceased or the testator or from which the disposition has emanated at the time of their death."

1.3. - The Algerian legislator's stance on the law applicable to inheritance and the extent of its protection for orphaned children.

Inheritance is considered one of the personal status matters due to its connection with the individual's life and death, being a natural consequence of the latter. Moreover, the reasons leading to inheritance are elements derived from the individual's status. Therefore, inheritance is subject to the legal system applicable to the individual, whether it is the nationality law or the domicile law.

Only Norwegian, Danish, Argentine, and Soviet laws adhere to the law of the deceased's nationality, while legislations considering inheritance as part of personal status, including Algerian legislation under Article 16 of the Civil Code, and other Arab legislations, have subjected the entire inheritance, whether immovable or movable, to the law of the deceased's nationality. However, some legislations interfere with personal status matters and subject them to the law of the deceased's domicile, distinguishing between movable and immovable property.

On the other hand, the law of the deceased's domicile may be regarded as personal law for those subjected to personal status matters. A primary argument in this regard is that the conflict of laws issue is resolved by focusing on the spatial dimension of the legal relationship, and among the elements of focus in inheritance is death, the place of which is assumed to be the domicile of the deceased. Thus, the law governing inheritance is the law of the deceased's domicile.



1.3.1- The application of the law of the deceased's nationality in inheritance between the scope and position of public policy.

Based on the foregoing, we have concluded that Algerian law has subjected inheritance to the law of the deceased's nationality due to religious considerations, as the provisions of inheritance are derived from Islamic law, which constitutes the backbone of family law in many of its provisions.

Accordingly, we will first discuss the scope of the application of the law of the deceased's nationality (first subtopic), followed by an examination of the position of public policy that may hinder the implementation of Article 16 of the Civil Code, which operates based on the nationality of the deceased (second subtopic).

3.3.2- Matters governed by the law of nationality.

The legislator, in Article 127 of the Family Code, stipulates that inheritance is deserved upon the death of the testator in reality or as a result of a judicial judgment. Thus, the legislator considers both legal and actual death as reasons for inheritance entitlement.

It is well known that laws differ regarding the designation of heirs, despite all of them allowing kinship to permit it. This includes recognizing certain categories for inheritance rights and recognizing them for other categories, such as cases of inheritance between spouses and between the legitimate child, their father, and the relatives of their father.

For example, Muslim countries, including Algeria, do not recognize inheritance for the illegitimate child except from their mother's side and her relatives, while European countries do recognize it, even regarding their father and his relatives. Similarly, inheritance in adoption cases is prohibited in Islamic countries except for the Tunisian and Turkish systems, while it is permissible in European countries (Sadek & Al-Haddad, 1999, p. 318).

As for the conditions for entitlement to inheritance, they all revolve around verifying the death of the deceased and the life of the heir. For example, the legal ruling regarding presumptive death, which applies to missing persons and when they are considered legally deceased, and regarding the heir, the legal ruling regarding the unborn child and whether it is considered an heir, and whether it is sufficient for the fetus to be born alive or viable, or whether its life must

continue for a certain period, and whether it is permissible to inherit the missing person and when they are considered alive. Another example is the situation of the death of both the deceased and the heir and the uncertainty about which of them died first and the ruling on this situation.

Similarly, the nationality law also governs the issue of the death ruling of a group of individuals in a single incident, whether they have the right to inherit from each other or not, and if so, what are the conditions and criteria for determining who died before others and the indications thereof.

As for the obstacles to inheritance, Article 135 of the Family Law specifies them as follows: "The following persons are prohibited from inheritance:

- The murderer of the deceased intentionally or aggressively, whether the killer is the actual perpetrator or an accomplice.
- The false witness whose testimony led to the death sentence and its execution.
- The person who knows about the murder or plotted it if they did not inform the relevant authorities."

This is regarding the issues that fall under nationality and are unanimously agreed to regulate the rules of inheritance. However, there are other issues subject to jurisprudential dispute, which we will mention in the following section.

2- Issues Exempted from the Application of Nationality Law

Among the issues exempted from the application of nationality law are those related to intestacy. It is known that intestacy with no heirs reverts to the state. However, the ambiguity lies in determining which state the intestacy reverts to, whether it is the state where the property is located or the state determined by the law applicable to inheritance.

This raises the question of how to assign intestacy to the state on the basis that it is the heir of someone with no heirs. The transfer of intestacy to the state is regulated by the inheritance law of the deceased's nationality. If the transfer is based on the sovereignty of the state over its territory, then the intestacy reverts to it as unclaimed property.



Different legislative systems adopt the same approach, albeit with variations in the nature of the state's seizure of these assets. Among the countries that consider the properties of their nationals as reverting to them because they are their heirs are Germany and Switzerland.

Other countries consider it unclaimed property that they seize based on their sovereignty over their territory and in the name of public order, such as France and Arab systems, as found in Article 180 of the Family Law and Article 773 of the Algerian Civil Code (Belqāssim, 2002, p. 271; Triki, 2015, p. 262; Zerouti, 2000, p. 185).

The majority of jurists argue that the state is not considered an heir, but rather the estate reverts to it as a matter of safeguarding public interest. Based on Article 222 of the Algerian Family Law, the judge adopts this interpretation because the previously mentioned articles do not clarify the nature of the transfer of the estate to the state. However, Decree No. 454/91 dated November 23, 1991, which includes conditions for managing private and public state properties, stipulates in Article 98 that: "In accordance with the law, the governor of the province where the vacant estate properties are located shall demand before the competent judicial authority the state's right to inherit those properties."

As for the rights of the estate's creditors, initially, it appears that settling the estate's debts concerns the estate and the law it is subject to. However, prevailing jurisprudence does not subject these rights to inheritance law because the matter pertains not to personal status but to financial matters and transaction integrity.

Consequently, if inheritance is subject to the deceased's personal law, then actions related to the estate will be subject to the law of the estate's location. Those who argue otherwise contend that the estate only becomes vacant after the debts are settled, meaning inheritance law is only applicable after debt matters are resolved. Discussing the application of the law of the estate's location pertains not only to creditors' rights but also to actions related to the transfer of ownership, estate finances, possession, and all matters concerning estate transactions. This does not conflict with the application of the deceased's nationality law, as the latter elucidates the reasons, impediments, conditions, inheritable shares, rights of heirs, and does

not relate to methods and procedures of property transfer (Abdul Hamid, 1984, pp. 32-35; Decree No. 91-954, 1991; Belqāssim, 2002, p. 272; Kamal, 2007, p. 264; Triki, 2015, p. 263).

2.1- The Role of Public Policy in Applying the Law of the Deceased's Nationality in Inheritance:

One of the recent established principles in private international law is the necessity to exclude the application of foreign law if its application conflicts with the requirements of public policy in the judge's country. However, implementing this principle is not without challenges that judges face when examining the relevant foreign law, particularly the absence of a unified and agreed-upon concept of public policy.

Article 24, paragraph 1 of the Civil Code stipulates: "Foreign law cannot be applied if it contradicts the public order and morals in Algeria."

To apply this article, certain conditions must be met (first branch), followed by an examination of the relationship between inheritance and public policy (second branch).

2.1.1- Conditions for invoking public policy

To invoke public policy, the foreign law to be applied must be specified based on a national attribution rule. As the jurist "Nibouaieh" argues, the purpose of invoking public policy is to protect the state from the dangers posed by certain cases where foreign laws are applied. If there are no mandatory foreign laws, then invoking public policy against foreign law does not arise.

The second condition requires the presence of a provision from the public policy, necessitating the refusal to apply the provisions of the relevant foreign law. When the national legislator refers in the attribution rule to the application of foreign law, it does not intend to apply this law unconditionally, especially if it contradicts social and political principles in the country.

The third condition involves the foreign law being currently contrary to public policy. This raises questions about the moment the judge should consider whether the foreign law contradicts or complies with the public policy requirements in his country. The foreign law may have been contrary to public policy at the inception of the legal



relationship, but it might have changed later due to subsequent legislation. Should the judge exclude its application?

Inheritance laws are generally considered fixed and not subject to debate or change. Nevertheless, it is generally agreed upon that the principle of assessing the current state and content of public policy should be taken into account when adjudicating the case (Boukhruba, 2014, p. 14; Zaidoun, 2011, p. 141; Boukhruba, 2014, p. 50; Zaidoun, 2011, p. 143).

This pertains to the conditions of the public order in general. However, how is the public order applied in the rules specific to inheritance?

2.1.2- Inheritance and Public Order

In addition to the issue of conflicting laws raised in the inheritance attribution rule, there is the issue of public order, especially between Arab countries and Western countries. This arises due to the inheritance laws in Arab countries being based on religious principles, directly derived from Islamic Sharia. This can obstruct the application of the inheritance attribution rule, where foreign law contradicts Islamic Sharia provisions, regardless of the party's nationality (Zaïr, 2011, p. 23).

For example, foreign law that allows inheritance to an heir who intentionally kills their benefactor is excluded under the pretext of public order. Similarly, the law that grants inheritance to a Muslim natural child from their Muslim father is excluded. Additionally, the law allowing inheritance between a Muslim and a non-Muslim is also excluded. The Egyptian judiciary affirmed this in a case brought by a Christian Lebanese wife against the heirs of her Muslim Lebanese husband. The Egyptian Court of Cassation decided: "Although inheritance matters and post-mortem dispositions are subject to the provisions of the Civil Code of the deceased's nationality at the time of his death, the application of foreign law is conditional upon not contradicting the provisions of public order in Egypt, according to Article 28 of the Egyptian Civil Code."

Conclusion:

In conclusion, applying the law of the nationality of the deceased is not absolute but may be excluded under the pretext of public order. This is quite common among countries that derive their family law

from Islamic Sharia provisions, especially concerning inheritance, such as Algeria, which has dedicated an entire book to inheritance provisions in family law.

In summary, the Algerian legislator has paid special attention to protecting the orphan child and their moral and material rights, including inheritance, as one of the consequences of marriage dissolution and a cause of property rights within the provisions of private international law.

Regulating and organizing the rules of private international disputes is of utmost importance, as it sets the boundaries between foreign law and national law while preserving national interest and public order within the national territory.

However, this positive step by the Algerian legislator needs refinement and scrutiny, with the hope of allocating a law that consolidates the scattered issues of international dispute resolution in various branches, including inheritance issues. This law should serve as a reference for judicial proceedings, characterized by a degree of detail and precision to dispel ambiguity in current texts, such as the Kuwaiti Law on the Regulation of Legal Relations with a Foreign Element No. 05 of 1961 dated February 14, 1961, and the Tunisian Journal of Private International Law issued on November 27, 1998.

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