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The Nature of Foreign Law and its Application before Algerian Courts

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Abstract

The application of foreign law in cross-border private disputes is a core challenge in private international law for the Algerian judiciary. The purpose of this study is to determine the legal status of foreign law before Algerian courts, and define the procedural rules governing its application, proof, and review by the Supreme Court of Algeria, with a specific focus on the regulatory framework established by Article 358(6) of the Code of Civil and Administrative Procedure. The research uses normative legal analysis of legislative provisions, domestic judicial jurisprudence, and comparative doctrinal assessment of private international law standards. The results confirm that Algeria applies a dual nature regime for foreign law: all foreign law unrelated to family law is classified as a question of fact, the burden of proving its content rests on the party invoking its application, and misapplication of these rules is generally not subject to cassation review, except for cases of errors in the application of domestic choice of law rules or defects in judicial reasoning. Foreign law governing family law matters is treated as equivalent to domestic law, applied ex officio by judges, and its misapplication is a valid ground for cassation. The study concludes that the current dual regime creates practical difficulties for courts, and recommends the adoption of a uniform regulatory framework for all categories of foreign law.

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Introduction

Disputes arising from cross-border private relations that contain a foreign element necessarily require the court to first determine the applicable law governing the dispute. As these legal relations are connected to more than one jurisdiction, subjecting all such disputes exclusively to domestic national law would create significant theoretical and practical barriers inconsistent with the specific nature of cross-border transactions. For this reason, the vast majority of states allow for the application of foreign law before their domestic judiciaries, and Algeria is no exception. Algerian choice of law (conflict of laws) rules operate as bilateral rules: they may designate either domestic Algerian law or the law of a foreign state as the law applicable to a given dispute.

However, the application of foreign law before Algerian courts raises a number of legal questions and controversies related to the procedures for its interpretation and application by the judge seised of the dispute, as well as the scope of review of decisions applying foreign law by the Supreme Court. The Algerian legislator has explicitly addressed this matter in Article 358, paragraph 6, of the amended and supplemented Code of Civil and Administrative Procedure, a provision that establishes a distinct legal regime for foreign law separate from other legal rules.

This research focuses specifically on the legal framework established by Article 358(6), and the legal controversies surrounding the application of foreign law before Algerian courts. The core research question addressed in this paper is the following: *What is the legal status of foreign law before Algerian courts, and what procedures govern its application?*

This study is divided into two main sections. Section 1 examines the legal nature of foreign law before Algerian courts. Section 2 analyses the special regime governing foreign law relating to family law, which is treated as equivalent to domestic law for review purposes.

Section 1: The Legal Nature of Foreign Law before Algerian Courts

The legal status of foreign law in the Algerian legal system is explicitly defined in Article 358, paragraph 6, of the Code of Civil and Administrative Procedure, which lists the admissible grounds for an appeal in cassation, and provides as follows: *"An appeal in cassation may only be brought on one of the following grounds [...] misapplication of foreign law governing family law matters."* (Ordinance No. 08-09, 2008)

A plain reading of this provision demonstrates that the Algerian legislator classifies all foreign law unrelated to family law matters as a question of fact. Classifying foreign law as a question of fact means that it does not carry the same binding legal force as domestic Algerian law, raising key questions regarding the procedures for its application by courts of first instance, as well as the scope of Supreme Court review of lower court decisions applying such rules.

1.1 Foreign Law is Treated as a Question of Fact by Courts of First Instance

Domestic judges are not bound to apply foreign law as a binding legislative rule enacted by a foreign sovereign, as judges take an oath to apply only the rules enacted by their own domestic legislator. Legal analysis standardly distinguishes between two core components of any judicial decision: questions of fact, and questions of law. Questions of fact must be pleaded and proven by the parties to the dispute. Questions of law, by contrast, fall within the exclusive knowledge of the court, which applies legal rules to the proven facts of the case (Al Masri, 2002). Under this framework, foreign law is classified

as a question of fact for the purposes of proceedings before domestic Algerian courts (Abdullah, 1986).

1.1.1 Procedures for Application of Foreign Law by First Instance Judges

The Algerian legislator classifies all foreign law falling outside the scope of family law as a question of fact. This distinction is explicitly established by Article 358(6), which draws a clear line between foreign family law rules which are treated as questions of law, and all other categories of foreign law which are not afforded the status of binding legal rules.

As non-binding rules classified as fact, the application of foreign non-family law by the court is contingent on proof of its content. This approach is consistent with longstanding jurisprudence, most notably the landmark 12 May 1959 *Bisbal Case* decided by the French Court of Cassation, which established the dual nature of foreign law:

Facts of the Bisbal Case: A married couple of Spanish nationality were habitually resident in France. They brought proceedings before French courts requesting that a judicial separation order be converted into a divorce decree, even though divorce was explicitly prohibited under Spanish law at the time. The French courts granted the divorce request applying domestic French law, holding that the choice of law rule designating the application of foreign law does not require application of foreign provisions that violate domestic public policy.

The Court held in this decision that where a French choice of law rule designates a foreign law as applicable, and the applicable foreign rule does not violate French public policy, the foreign law is to be applied in the same manner as domestic rules of private law (Abdel Aal, 2007; Qatal, 2011).

1.1.2 Proof of the Content of Foreign Law

The burden of proving the exact content of an applicable foreign law falls on the party requesting its application. As foreign law outside family law is classified as fact, first instance judges are under no legal obligation to conduct independent research to ascertain its content. This rule reflects the dual nature of choice of law rules: where a choice of law rule designates domestic Algerian law as applicable, the rule is binding on the court of its own motion; where the same rule designates foreign law as applicable, the parties must plead and prove the content of that foreign law, failing which the judge will apply domestic Algerian law by default (Kamal, 2011).

This position was also confirmed by the French Court of Cassation in a subsequent ruling dated 5 November 1991 related to the *Bisbal* case jurisprudence, which explicitly held that the burden of proof for the content of foreign law rests on the party invoking its application, due to its classification as a question of fact. An identical position is adopted by Egyptian jurisprudence: multiple rulings issued by the Court of First Instance of Alexandria dated 3 November 1985 and 30 November 1986 confirm that reliance on foreign law constitutes a material fact that must be proven by the parties invoking it (Aykouche, 2010; Qatal, 2011).

Under Algerian law, this rule was first established under Article 233 of the old Code of Civil and Administrative Procedure, and is now codified in Article 358(6) of the current code. The explicit distinction drawn between foreign family law rules subject to Supreme Court cassation review, and all other foreign law rules not subject to such review, confirms that the general rule places the burden of proving the content of foreign law on the invoking party.

Accordingly, as a general rule, the burden of researching the content of foreign law, pleading its application, and proving its content rests on the parties to the dispute, not on the judge. First instance judges retain the discretionary power to conduct further research into the content of foreign law submitted by the parties, but are under no legal obligation to do so.

1.2 Implications of the Classification of Foreign Law as Fact for Supreme Court Review

Provisions of Article 358(6) and Article 360 of the Code of Civil and Administrative Procedure explicitly establish that the Supreme Court of Algeria may only exercise cassation review of lower court decisions for misapplication of foreign law if the foreign law in question relates to family law matters. No cassation review is available for misapplication or misinterpretation of other categories of foreign law.

1.2.1 General Rule: No Cassation Review for Non-Family Foreign Law

Articles 358 and 360 of the Code of Civil and Administrative Procedure clearly define the scope of Supreme Court review. As Article 358(6) explicitly lists misapplication of foreign family law as the only ground for cassation related to foreign law, the legislator has formally adopted the principle of the dual nature of foreign law: foreign law is treated as a binding rule of law only if it regulates family law and personal status matters, and as a question of fact in all other cases. This approach differs from the legal framework adopted in a number of other jurisdictions, which treat all categories of foreign law as questions of law subject to high court review (*Al Fadli, 2004*):

A number of European jurisdictions follow the alternative approach that all foreign law retains its status as a rule of law regardless of its subject matter. The Italian Court of Cassation has consistently adopted this position in its jurisprudence including rulings dated 28 July 1940 and 12 August 1946. German law also follows this principle, holding that the application of foreign law is a question of law, not a question of fact. Among Arab jurisdictions, the Jordanian Court of Cassation confirmed in a ruling dated 10 November 1983 that the prevailing position in doctrine and jurisprudence is that foreign law retains its legal nature before domestic courts, does not qualify as a fact to be proven by the parties, and that the court seised of the dispute is under an obligation to conduct independent research to ascertain the content of applicable foreign law (Al Fadli, 2004).

If the Supreme Court were to exercise review over the interpretation of all categories of foreign law, and adopt an interpretation of a foreign legal rule different from the interpretation applied by courts of the foreign state that enacted the rule, this would undermine the legitimacy and legal certainty of judicial decisions (*Aykouche, 2010*). Classifying non-family foreign law as fact means that the Supreme Court will not review the interpretation of such foreign law by lower courts (*Mohand, 1989; Kamal, 2011*).

The question of Supreme Court review of the interpretation of foreign law is closely linked to the obligation of first instance courts to correctly apply domestic choice of law rules. While the general rule provides that the Supreme Court does not review misapplication of foreign law classified as fact, this general rule is subject to a number of well-established exceptions (*Sadiq, 2007*).

1.2.2 Exceptions to the Rule of No Review

The Supreme Court may exercise review over decisions applying foreign law outside family law in the following two circumstances:

First: Review for misapplication of domestic choice of law rules

The Supreme Court will always exercise cassation review if the lower court judge committed an error in the application of the domestic Algerian choice of law rule itself, and incorrectly identified the law applicable to the dispute. Such an error constitutes a misapplication of domestic law, and is a valid ground for cassation (Kamal, 2011).

This power of review over errors in the application of choice of law rules is a general power applicable to all choice of law rules, regardless of whether the rule originates from domestic legislation or from a ratified international treaty. If a judge incorrectly applies a choice of law rule and designates the wrong applicable law to a dispute, this error constitutes a violation of domestic procedural law subject to cassation review (Abdel Aal, 2007).

Second: Review for defects in reasoning and legal qualification of facts

All judicial decisions are required to state the factual evidence and legal reasoning on which they are based. This obligation is codified under Article 277(1) of the Code of Civil and Administrative Procedure, which requires all judges to provide full reasoning for their rulings, including identification of the relevant facts and the applicable legal provisions:

Article 277(1) of the Code of Civil and Administrative Procedure provides as follows: "No judgment may be issued without written reasoning. All judgments must contain reasoning relating to both the findings of fact and the applicable law, and must explicitly reference the legal provisions applied".

This rule is also consistently applied in French jurisprudence. The Supreme Court may accept an appeal in cassation on the grounds of insufficient or defective reasoning in a decision applying foreign law, which constitutes indirect review of the correct application of the foreign rule. This power of review also extends to errors in the legal qualification (classification) of the facts of the dispute (Abdel Aal, 2007; Sulaiman, 2005).

French Court of Cassation jurisprudence confirms that if a lower court interprets foreign law in a manner clearly inconsistent with the plain meaning of the foreign legal rule, or if the reasoning provided for the application of the foreign law is insufficient, the decision is subject to cassation (Abdel Aal, 2007).

The Supreme Court also exercises review over errors where a first instance judge incorrectly classifies a legal relationship, for example incorrectly categorizing a personal status dispute as a contractual dispute, or vice versa. Legal qualification of facts is a question of law governed by the law of the forum. As the judge is required to classify the proven facts into the correct legal categories, any error in this classification process is an error of law subject to Supreme Court review (Kamal, 2011).

This position is confirmed by Algerian Supreme Court jurisprudence, including a ruling dated 10 April 1988 which held:

[...] The contract concluded between the parties is not a loan contract as claimed by the appellant, and as regulated under Article 454 of the Algerian Civil Code. The dispute concerns a contract for the sale of chicken eggs, a contractual relationship governed by Article 18 of the Civil Code, which provides that contractual obligations are governed by the law of the place where the contract was concluded. (Supreme Court of Algeria, Ruling No. 48855, 10 April 1988, p.80)

This ruling demonstrates that the Supreme Court raised the issue of correct legal qualification of the nature of the contract of its own motion, and applied the relevant provision of the Civil Code, confirming its power to review errors in legal qualification.

Section 2: Foreign Family Law is Treated as Equivalent to Domestic Law for Judicial Review Purposes

Ensuring legal certainty and uniform application of legal rules relating to personal status requires that first instance judges do not have unlimited discretion to interpret and apply foreign law governing family law matters, as unregulated discretion would lead to contradictory and inconsistent rulings (*Al Wakil, 1963*).

The Algerian legislator has drawn an explicit distinction between foreign family law and all other categories of foreign law. This distinction was first provided under Article 233(5) of the old Code of Civil and Administrative Procedure, and is now codified in Article 358(6) of the current code, which as noted previously lists misapplication of foreign law relating to family law as a valid ground for appeal in cassation.

Classifying misapplication of foreign family law as a ground for cassation reflects the fact that these rules are considered to relate to public policy, and first instance judges are under an obligation to research their content and apply them correctly. Misapplication of other categories of foreign law is not a valid ground for cassation. The classification of foreign family law as a rule of law equivalent to domestic law raises two key questions: the obligation of first instance courts to apply these rules, and the scope of Supreme Court review of their interpretation.

2.1 Mandatory Application of Foreign Law Governing Personal Status and Family Law Matters

The classification of foreign law directly determines the procedures governing its proof, interpretation and application by the courts. The fact that misapplication of foreign family law is listed as a ground for cassation explicitly confirms that errors in the application of these rules by lower courts are subject to review by the Supreme Court.

By including foreign family law within the list of grounds for cassation, the legislator explicitly establishes that the application of applicable foreign family law is mandatory, and must be applied by the court of its own motion (*Qatal, 2011*).

2.1.1 Mandatory ex officio application by domestic courts

Where a domestic Algerian choice of law rule designates a foreign law as applicable to a family law or personal status dispute, the judge is required to apply that foreign law of his own motion, even if none of the parties request its application. The judge may not refuse to apply the applicable foreign law on the grounds that he is not aware of its content, as such a refusal would constitute a failure to administer justice (*Aykouche, 2010*).

The legislator has explicitly departed from the general rule of no review for foreign law for family law matters, due to the close link between personal status rules and domestic public policy. For this reason, foreign family law rules are subject to the same procedural rules as domestic Algerian law: judges are under a mandatory obligation to apply them correctly, and failure to do so is a ground for cassation of the ruling. Judges are also under an obligation to conduct independent research to ascertain the content of applicable foreign family law, in the same manner as they are expected to know the content of domestic law. Courts may request the assistance of the parties to identify the content of applicable foreign rules, but this does not shift the burden of proof to the parties (*Mohand, 1989*).

2.1.2 Implications of classifying foreign family law as a rule of law

The obligation to research the content of applicable foreign family law rests on the court, not on the parties to the dispute. The court is required to raise the application of

the applicable foreign law of its own motion, and may request assistance from the parties to ascertain its exact content (*Abdullah, 1986*).

Judges are required to interpret foreign family law rules using the same interpretive methods applied by the courts of the state that enacted the rule, and must refrain from applying personal or discretionary interpretations of foreign rules. The judge must apply the foreign law in the same manner as it would be applied by courts in its state of origin (*Rahawi, 2021*).

As family law and personal status rules are considered to be part of public policy, the parties may not waive the application of applicable foreign family law rules, nor may they agree to deviate from its provisions. The Supreme Court may raise misapplication of applicable foreign family law of its own motion, as these rules are considered mandatory peremptory norms that may not be violated.

A further implication of the classification of foreign family law as a rule of law is that misapplication of the rule constitutes a valid ground for cassation, regardless of whether the error is raised by the parties or identified by the Supreme Court of its own motion.

2.2 Interpretation of Foreign Family Law and Supreme Court Review

The Algerian legislator has limited Supreme Court review of misapplication of foreign law exclusively to family law matters, confirming the dual nature regime applicable to foreign law. Foreign family law is subject to the same rules of application, interpretation and review as domestic Algerian legal rules.

2.2.1 Limitation of Supreme Court Review of Foreign Law to Family Law Matters

Classification of foreign family law as a binding rule of law means that it is binding on first instance courts, and misapplication or misinterpretation of the rule is subject to cassation review, in the same manner as misapplication of domestic law.

Supreme Court review of the interpretation of foreign family law

Even though foreign law is enacted by a foreign sovereign, errors in its interpretation when it applies to family law matters are subject to full review by the Supreme Court. While there is as of yet limited consistent Supreme Court jurisprudence in Algeria on the interpretation of foreign family law, Article 358(6) explicitly grants the Supreme Court the power to review lower court decisions for misinterpretation or misapplication of applicable foreign family law, and parties may base their appeal in cassation on this ground. By necessary implication, misinterpretation of foreign law governing all other subject matters is not subject to cassation review. This regime is designed to allow the Supreme Court to fulfill its core mandate of ensuring uniform application of the law and consistency of jurisprudence.

2.2.2 Admissibility of Appeals in Cassation for Misapplication of Foreign Family Law

As explicitly provided under Article 358(6), misapplication of foreign family law by a lower court is a valid ground for appeal in cassation, which may be raised by the parties, or identified by the Supreme Court of its own motion (*Kamal, 2011*).

First instance courts are required to interpret and apply applicable foreign family law of their own motion, and failure to do so renders their decision subject to cassation. Article 360 of the Code of Civil and Administrative Procedure explicitly grants the

Supreme Court the power to raise grounds for cassation of its own motion for any of the grounds listed in Article 358. This power is further confirmed by Article 4 of Ordinance No. 89-22 governing the organization, powers and procedures of the Supreme Court, which provides that the Supreme Court acts as a court of law, and may set aside any decision that violates applicable legal rules (*Ordinance No. 89-22, 1989*):

Article 360 of the Code of Civil and Administrative Procedure provides: "The Supreme Court may raise one or more grounds for cassation of its own motion". Article 4 of Ordinance No. 89-22 of 12 December 1989: "The Supreme Court shall act as a court of law, and shall remedy all violations of the law".

The distinction drawn by the Algerian legislator between foreign family law and other categories of foreign law establishing the dual nature regime for foreign law creates practical difficulties for judges, as there is no legal justification for treating different categories of foreign law as having a different legal nature. Treating one category of foreign law as a rule of law and all others as questions of fact leads to contradictory outcomes, and creates legal uncertainty as to the status of other categories of mandatory foreign legal rules outside the scope of family law.

Conclusion

This study examined the legal status of foreign law before the Algerian judiciary, the procedures governing its application by first instance courts, and the scope of Supreme Court cassation review of decisions applying foreign law.

Analysis of the provisions of Article 358(6) and Article 360 of the Code of Civil and Administrative Procedure leads to the following key findings:

1. Pursuant to Article 358 of the Code of Civil and Administrative Procedure, the Algerian legislator has adopted a dual nature regime for foreign law: Supreme Court cassation review for misapplication of foreign law is only available if the foreign law in question governs family law matters.
2. Errors in the application of domestic choice of law rules by lower courts are always subject to Supreme Court review, as these errors constitute misapplication of domestic Algerian law.
3. For disputes outside the scope of family law, the party requesting the application of a foreign law designated as applicable by a choice of law rule bears the full burden of proving the content of that foreign law.
4. While foreign family law is treated as equivalent to domestic law for review purposes, it remains a rule enacted by a foreign sovereign, and differs from domestic Algerian law in accordance with the requirements of private international law.

Recommendations

1. The Algerian legislator should enact additional explicit legislative provisions governing the procedures for proof, interpretation and review of foreign law, as the single provision set out in Article 358(6) is insufficient to address all practical and legal issues arising from the application of foreign law before Algerian courts.
2. The legislator should abolish the current dual nature regime that draws a distinction between foreign family law and other categories of foreign law. This distinction creates significant practical difficulties for adjudicating courts. A uniform legal regime treating all categories of foreign law in the same manner would provide greater legal certainty and consistency of jurisprudence.

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