



Acts of Pleading Public Policy as a Guarantee for the Exclusion of Foreign Law and Its Applications in Algeria

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Abstract:

The emergence of private international relations has led to permitting the application of foreign laws within the territories of host states. Based on the dual nature of national conflict-of-laws rules, these rules may, in certain cases, designate foreign law as the applicable law. While the general principle requires the judge to apply such law, national legislations grant the judge the authority to exclude the application of foreign law if it contains provisions that contradict the fundamental principles of the judge's state, in application of the concept of public policy. This approach has been adopted by the Algerian legislator within the provisions governing conflicts of laws, specifically in Article 24 of the Algerian Civil Code, in the context of resolving disputes involving a foreign element.

Keywords: Private international relations – exclusion of foreign law – public policy – conflict of laws

Introduction:

The multiplication and complexity of private international relations have led to the emergence of the problem of conflict of laws between different legal systems. Faced with this situation, states have sought to regulate this type of private relations by determining the applicable law to resolve the dispute at hand.

In order to achieve considerations of appropriateness upon which national conflict-of-laws rules are based, given their dual nature, legislations have allowed for the application of foreign laws within their territories, in application of the principle governing conflict of laws due to the existence of a foreign element within the legal relationship. This principle requires allowing the application of foreign laws. Thus, if a conflict rule refers, for example, to the application of a foreign law and establishes its jurisdiction by virtue of the legal relationship, the judge is obligated to apply the provisions of that law.

Due to the wide differences in the nature of legal systems among states, certain obstacles often arise that necessitate the exclusion of the application of the competent foreign law, among which is what is known as public policy. While invoking public policy at the domestic level aims to invalidate any agreement that violates mandatory national rules, invoking public policy in the field of private international relations is justified, as its role lies in excluding foreign law



from the scope of application altogether when it contradicts the fundamental and supreme values prevailing in the judge's state.

Although legislations authorize the application and recognition of foreign law in disputes involving private international relations, this rule is not absolute. It is limited by the public policy exception, which prevents the application of such law. This is what the Algerian state has sought to establish through its conflict-of-laws rules set forth in Articles 9 to 24 of the Algerian Civil Code, specifically Article 24, which provides for the exclusion of foreign law when it conflicts with public policy and public morals in Algeria.

From this perspective, it clearly appears that pleading public policy constitutes a guarantee for excluding the application of the foreign law competent by virtue of the dispute submitted before the Algerian judge, in application of the amended text of Article 24 of the Civil Code.

Accordingly, the following problem arises:

To what extent is public policy effective as a guarantee for excluding the application of foreign law in Algerian legislation?

A descriptive and analytical study of Article 24 of the Algerian Civil Code.

To answer this problem and the questions it raises, this article is divided into two main sections. The first section addresses the plea of public policy and the conditions for its application, while the second section is devoted to the effects of invoking public policy and its applications.

Section One: The Plea of Public Policy and the Conditions for Its Application

The Algerian legislator has established public policy as a guarantee by granting the judge the authority to apply foreign laws when designated by national conflict-of-laws rules. However, this authority is restricted insofar as such application must not contradict the requirements of public policy in Algeria, subject to a set of conditions. Accordingly, this section addresses the concept of public policy and the conditions for its application under Algerian legislation.

First Requirement: The Concept of Public Policy

Public policy is a widespread and multifaceted concept encompassing various branches of law, both public and private, due to its effective role in protecting the fundamental foundations of the judge's legal system. Given its legal specificity, there is no unified and precise definition of public policy due to the diversity of legal systems among states. Therefore, it is necessary to examine its concept and determine its legal nature.

First Branch: Definition of Public Policy

Public policy is a judicial concept through which the judge assesses the extent to which the competent foreign law conflicts with the legal system of his state. Most national legislations do not define public policy, but rather consider it a restriction limiting the application of foreign law, as inferred from Article 24 of the Algerian Civil Code. This provision does not define public policy but grants the judge the authority to exclude foreign law whenever it conflicts with the fundamental principles and foundations of the Algerian state.



In contrast, many jurists and some judicial precedents have attempted to define public policy, although no consensus has been reached on a unified definition due to its broad and relative nature, which varies according to time and place. Nevertheless, there is general agreement on certain elements based on shared foundations and mandatory rules from which individuals may not derogate.

Accordingly, public policy is defined as the power through which the foreign law applicable to a legal relationship is excluded and replaced by national law due to a fundamental conflict that undermines the vital interests of the judge's state. It is also defined as "a set of non-changeable values encompassing public interests, namely political, moral, economic, and social interests of society."

These values acquire legal legitimacy only when translated into binding rules whose violation is prohibited. Jurist Ph. Lerebours-Pigeonnière defines public policy as "the means aimed at stabilizing matters of personal status by avoiding complex issues."

From these definitions, it is clear that public policy applies in the absence of common agreement between national and foreign law. Accordingly, it may be defined as the authority granted to the judge, as an exception, to exclude the application of foreign law when it conflicts with the fundamental components of the state before which the dispute is brought.

Second Branch: The Nature of the Plea of Public Policy

Examining the nature of the plea of public policy raises the question of whether the excluded public policy is domestic or international. Since the legal relationship includes a foreign element, the issue concerns international public policy. The fundamental difference between the two lies in the fact that domestic public policy prevents individuals from deviating from mandatory rules, resulting in the invalidity of acts that violate them, whereas international public policy empowers the judge to exclude foreign law from the scope of application if it conflicts with the fundamental principles of the judge's state.

The plea of public policy is exceptional in nature and does not constitute the application of the general rule requiring the application of foreign law designated by national conflict rules. Rather, it suspends the application of that rule when foreign law conflicts with the state's fundamental values. Nevertheless, this plea must remain an exceptional guarantee, invoked only when the supreme foundations of the state are affected.

With regard to its legal nature, the majority of legal scholars consider the exclusion of foreign law to be a substantive plea rather than a procedural one, as it concerns a violation of the essential values and constants of national law. This divergence constitutes the very basis of the conflict of laws.

Second Requirement: Conditions for Invoking the Plea of Public Policy

For the judge to exercise the authority to invoke public policy in private international relations, several conditions must be met.

First Branch: Recognition by National Conflict-of-Laws Rules of the Competence of Foreign Law



The dual nature of national conflict-of-laws rules requires the judge hearing the dispute to determine the competent foreign law. While the judge is obligated to apply it, he also has the authority to exclude it. Outside this framework, foreign law may neither be applied nor excluded unless designated by national conflict rules. In such cases, there is no need to invoke public policy.

The exclusion of foreign law in the name of public policy is a recognized principle across legal systems. This is confirmed by Article 24 of the Algerian Civil Code, which establishes this authority through conflict-of-laws rules contained in Articles 9 to 24. It should also be noted that certain laws, such as labor laws and security and police regulations, apply automatically as laws of immediate application, without recourse to conflict-of-laws rules.

Second Branch: Clear Conflict Between the Content of Foreign Law and the Law of the Judge

For the exclusion of foreign law to be legally justified, there must be a clear disparity between the principles enshrined in national law and those of foreign law. The legislator did not grant absolute discretion but required exclusion only when foreign law contradicts the fundamental principles of the state. For example, a marriage between a Muslim woman and a non-Muslim man constitutes a barrier to application in Arab countries, as it violates Islamic Sharia principles, unlike in certain European countries.

Given the changing nature and difficulty of defining these principles, legal doctrine has entrusted their determination to the judge, while restricting his authority to prevent excessive preference for national law. Based on Article 24, once the judge establishes that foreign law violates public policy and public morals in Algeria, he must exclude it automatically, without examining the consequences of its application.

Third Branch: Temporal Applicability of the Plea of Public Policy

Public policy is assessed by national courts, and its application requires that it be “current,” meaning at the time the action is brought. The judge has discretionary power to assess each case individually and does so at the time of adjudication, not at the time the right arose, since public policy is a functional concept considered at the time the lawsuit is filed.

Section Two: Effects of Invoking the Plea of Public Policy and Its Applications

The Algerian legislator authorized the judge to apply foreign laws in Algeria, provided that none of the obstacles mentioned in Article 24 exist. The presence of such obstacles leads to several effects, which have been affirmed by judicial practice.

First Requirement: Effects of the Plea of Public Policy Under Article 24 of the Algerian Civil Code

Invoking public policy results in the exclusion of the competent foreign law, known as the “negative effect.” However, the Algerian legislator departed from this approach by substituting national law for the excluded foreign law, producing the “positive effect.”



First Branch: The Negative Effect of Public Policy – Exclusion of the Competent Foreign Law

The incompatibility between foreign and national law inevitably leads to the exclusion of foreign law, which constitutes the negative effect. Article 24 refers to this effect implicitly through the phrase “foreign law shall not be applied.”

In this context, the judge’s role is limited to excluding foreign law from the scope of application without replacing it, which may result in a legal vacuum incompatible with judicial principles. This raises the issue of whether exclusion should be partial or total. Legal doctrine is divided: some advocate total exclusion to preserve the effectiveness of conflict rules, particularly in personal status matters, such as the invalidity of marriage between a Muslim woman and a non-Muslim man under Islamic law.

Others support partial exclusion, allowing the judge to exclude only the conflicting provision while maintaining the remainder, such as excluding usurious interest clauses in a valid commercial contract, provided that this does not undermine the contract’s essence.

The Algerian legislator did not explicitly address partial or total exclusion, leaving the provision general and implying automatic exclusion upon violation of Algerian public policy.

Second Branch: The Positive Effect of the Plea of Public Policy – Attribution of Jurisdiction to the Law of the Judge

When the judge excludes foreign law, he must address the resulting legislative vacuum. The Algerian legislator remedied this by amending Article 24 to allow substitution of Algerian law for the excluded foreign law. For instance, if a foreign legal system prohibits divorce and a divorce action is brought before Algerian courts, the foreign law is excluded and replaced by Algerian law.

Thus, the Algerian legislator combined both negative and positive effects, ensuring legal continuity and facilitating judicial determination of the applicable law, consistent with comparative legislation and judicial practice.

Second Requirement: Practical Applications of the Plea of Public Policy and the Exclusion of Foreign Law

Legislative provisions achieve practical relevance through judicial application. Accordingly, several cases demonstrate the invocation of public policy to exclude foreign law, particularly in Algerian and comparative jurisprudence.

First Branch: Cases Adjudicated by Algerian Courts Concerning Personal Status

First: Proof of Lineage

Algerian law governs lineage based on the father’s nationality pursuant to Article 13 bis of the Civil Code. Given the close link between marriage and lineage, attributing illegitimate children to their father under foreign law violates Algerian public policy, as Islamic Sharia recognizes lineage only through valid marriage. The Supreme Court ruled that recognizing such lineage under French law contradicts Algerian public policy.



Second: Inheritance and Testamentary Matters

In a case concerning inheritance between a Muslim and a non-Muslim, the Supreme Court ruled that the heir must be Muslim at the time of the testator's death. Conversion after death deprives the heir of inheritance. The decision dated 20 June 2001 held that granting inheritance rights to a spouse who converted after the husband's death violated Algerian law.

Likewise, there is the decision rendered by the Supreme Court dated **17-10-1990**, the facts of which concern a **will relating to an estate**, whereby an Algerian Muslim husband residing in France bequeathed his estate to his wife on **10-10-1952** and chose the application of **French law**, which permitted such a disposition. Following the husband's death, the wife filed a lawsuit before the **Bejaia judiciary**, which ruled on **14-02-1987** that the will was valid and that the wife was entitled to the entire inheritance, relying on **Article 16 of the Civil Code**, which subjects inheritance and wills to the nationality of the husband at the time of his death. Accordingly, the provisions of French law were applied.

However, the judgment was challenged before the **Supreme Court (Personal Status Chamber)**, which upheld the exclusion of the foreign law for violating **Algerian public policy**, and consequently annulled the contested judgment of the Bejaia court that had affirmed the validity of the will and the transfer of the entire estate to the wife.

Third: Some cases examined by the Emirati judiciary

The Emirati judiciary with regard to divorce between persons of different religions

By referring to Emirati judicial practice, we find that the **Dubai Court of Cassation** held that the application of foreign law that contradicts the provisions of **Islamic Sharia** does not serve the interests of Muslims in matters relating to divorce between non-Muslims for harm, considering that the **Maliki school** permits divorce for harm. However, the court granted legitimacy to the judge to exclude the application of the foreign law invoked by the appellant in the lawsuit, reasoning that its provisions contradict Islamic Sharia due to the existence of an impediment to marriage, namely the marriage of a non-Muslim man to a Muslim woman.

Second Branch: Cases Examined by the French Judiciary

In this regard, we shed light on some decisions issued by the French judiciary concerning matters of public policy.

First: With regard to custody cases

Among the judgments issued by the French judiciary is the ruling of the **French Court of Cassation**, which upheld the decision of the **Nîmes Court of Appeal dated 12 December 2006**, concerning the case of the adoption by Ms. **Sh. H.** of her nephew born in Morocco on **22 October**. Pursuant to a Moroccan kafala decision issued on **17 August 2003**, the woman submitted a request for adoption before the French court of first instance. However, her request was rejected on the grounds that French law conflicts with Moroccan law regarding rights related to lineage.

As a result, the claimant filed an appeal before the Court of Appeal, which also rejected the request, reasoning that the adoption of a minor is prohibited under Moroccan law except on the



basis of the criterion of birth in France, namely the criterion of **French nationality**, or the criterion of **residence in France**. Accordingly, the French judiciary considered that the adoption of a mother to her child and granting him his father's name resulting from adultery constitutes a violation of public policy in the French state.

It is clear from the decision of the French Court of Cassation that it upheld the ruling of the Court of Appeal on the basis that it distinguished between adoption as a system distinct from kafala, and therefore it cannot be accepted under French law because it contradicts the requirements of Islamic Sharia in Moroccan law. As such, it affects the very foundation of public policy.

“Mlle X” (2005)

Second: With regard to mixed marriage cases

The facts of this case relate to a marriage contract concluded between a French woman and a person of Iranian nationality. The marriage was concluded in Iran in accordance with Iranian domestic law. In **2003**, the French woman submitted a request for recognition of her marriage in France, but her request was rejected by the French authorities on the grounds that Iranian law conflicts with French law concerning mixed marriage cases.

Based on this, the **French Court of Cassation** issued a decision on **15 March 2005**, holding that this marriage could not be recognized within French territory, relying on the fact that Iranian law does not recognize mixed marriages. Moreover, the court clarified that the marriage concluded in Iran violates the principle of **gender equality**. Accordingly, the French Court of Cassation decided to exclude the application of foreign law due to its contradiction with the requirements of **French public policy**.

Conclusion:

We conclude that invoking public policy constitutes an obstacle to the application of foreign law in private international relations, as it represents an exceptional guarantee and thus a departure from the general rule requiring the application of foreign law. This has been enshrined by the Algerian legislator, who mandated the exclusion of the application of foreign law whenever its provisions conflict with the fundamental principles and core values of the Algerian state.

In response to the issue raised, it can be stated that public policy has demonstrated considerable effectiveness in excluding foreign law and limiting its application, as evidenced by numerous practical cases. Accordingly, we have arrived at a set of results and recommendations.

Results :

1. Despite the fact that most states have enshrined public policy as a guarantee preventing the application of foreign law, they have not provided it with a definition, due to its broad and relative nature, as well as differences between states and their legal systems.
2. The position of the Algerian legislator regarding the effects of invoking public policy is explicit, as it combines both effects in accordance with Article 24 and its two



paragraphs, namely the exclusion of foreign law (the negative effect) and its replacement by Algerian national law (the positive effect).

3. The role of the judge is not limited to excluding the application of foreign law due to its violation of public policy, but also extends to refusing to grant enforceability to foreign judgments that contradict it.
4. Public policy is consistently invoked to protect the fundamental principles and values of the judge's state, as demonstrated by the judicial examples presented, particularly those related to personal status matters, which constitute a fertile ground for invoking public policy and consequently excluding the application of foreign laws due to their contradiction with the provisions of Islamic Sharia.

Recommendations :

1. Despite numerous attempts to reach a common definition of the concept of public policy, the Algerian legislator, like other legislations, has remained silent, limiting itself to excluding foreign law without elaborating on its content. Accordingly, we propose that the legislator add further legal provisions or precisely reformulate Article 24 of the Civil Code by:
 - **First:** Providing a definition of the concept of public policy and clarifying its pillars and elements.
 - **Second:** Clarifying its position on the extent of total or partial exclusion affecting the provisions of foreign law when it conflicts with the requirements of Algerian public policy, in order to facilitate the judge's task in applying the law correctly.
2. Working towards the enactment of an independent private international law separate from the Civil Code to regulate all matters related to disputes involving a foreign element within the framework of private international relations.

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