

## The Status of Foreign Law before the Algerian National Judiciary

Dr: Abdelhadi abdelkarim

University of AhmedDraia, Adrar

[AlgeriaKarimdroit01@gmail.com](mailto:AlgeriaKarimdroit01@gmail.com)

2DERDOURI AbdelghaniMansoura;

University –Egypt

[ghaniderdouri@gmail.com](mailto:ghaniderdouri@gmail.com)

3Hachmi kemerchou

University d'El Oued

[hachmi.kama@gmail.com](mailto:hachmi.kama@gmail.com)

Submitted: 14.09.2025. Accepted: 15.11.2025. Published:16.12.2025

### Abstract:

Foreign law occupies an important position before the Algerian national judge whenever the conflict-of-law rules stipulated in the Civil Code refer to it, especially in matters of an international nature such as personal status, contracts, and commerce. The judge is considered obliged to apply it as law and not as a fact. However, this obligation sometimes encounters difficulties related to proving the content of the foreign law and interpreting it, particularly when the parties fail to provide the approved texts or accurate translations. The judiciary also faces technical and institutional challenges, such as lack of training, absence of databases of foreign laws, and divergence of judicial interpretations. Despite this, the application of foreign law enhances justice in private international relations. The development of means of proof, modernization of legislation, and training of judges remain essential factors in improving the effectiveness of the Algerian judiciary in this field.

**Keywords:** Foreign law, Algerian judiciary, Conflict of laws ,Private international law; Judicial interpretation, Proof of law

**Introduction:**

The application of foreign law before the national judge finds its basis in the fact that the competence of this law has been determined by order of the national legislator, who expressed his will in the conflict-of-law rule that referred to the application of that law. Foreign law retains its character even though it is applied outside the borders of the state that enacted it. Hence, the importance of this topic appears in how the national judge deals with the competent foreign law according to national conflict-of-law rules.

Accordingly, we will study this topic by raising the following problem: How does the national judge deal with the competent foreign law in terms of proving its content and interpreting it? Several questions arise from this problem: Is the national judge obliged to ascertain the content of foreign law on his own initiative, or do the litigants bear this burden? How is this law interpreted—according to the law of the state that enacted it or according to the law of the forum? In the event of an error in interpreting this law, does the Supreme Court have a role in supervising the correctness of its application and interpretation?

We will answer this problem and its related questions by relying on the descriptive and analytical method, through two main sections. In the first section, we address the status of foreign law before trial judges, and in the second section, its status before the judges of the Supreme Court.

**Chapter One: The Status of Foreign Law before Trial Judges**

If the conflict-of-law rule referred to in national law determines the law applicable to the dispute, and this rule is mandatory and must be raised by the judge on his own initiative, the process of applying foreign law nevertheless requires addressing an important legal issue related to proving this law by specific means, determining its scope of application, and deciding what ruling applies if its content cannot be proven. This is what we will address in the following requirements.

**Section One: Searching for the Content of Foreign Law**

Determining the foreign law competent under conflict rules does not finally resolve the dispute; rather, it requires the judge to apply that law. Such application presupposes that the national judge has sufficient knowledge of foreign law. This is almost impossible, as it would impose on the judge what is beyond his capacity. Therefore, comparative legislations have not equated national and foreign law in terms of presumed knowledge of their content. The judge is presumed to know national law and is obliged to apply it, otherwise he is considered to have committed a denial of justice. As for foreign law, the burden of proving it falls on the party invoking it unless the judge is aware of it.

### **Foreign Law as a Material Fact:**

Some legislations and judicial precedents have considered foreign law as a material fact that must be proven by the parties through all legal means. This traditional approach is justified by the following:

- The national judge does not raise it on his own initiative;
- There is a difference between the two laws regarding the presumption of knowledge;
- Presuming that the national judge knows foreign law entails practical difficulties, especially if the law is unwritten or if judicial solutions concerning a single issue are dispersed;
- While national law does not require proof, foreign law must be proven and considered a material fact;
- Allowing the application of foreign law without proof may surprise litigants with an unexpected solution; therefore, foreign law must be proven as facts are proven.

Considering foreign law as a material fact is justified by the practical difficulties related to knowledge and proof of its content. This justification has resonance in French and Lebanese law. For example, French jurisprudence at one stage considered that foreign law combines fact and law, and that the national judge may apply foreign law on his own initiative when he is aware of it.

### **Foreign Law Retains Its Legal Nature and Has a Special Procedural Treatment:**

The modern approach, adopted by French jurisprudence, recognizes the legal character of foreign law. This approach is preferable as it places the issue in its true position, considering that the national conflict rule breathes life into foreign law and confers upon it a binding character. Even if the burden of proof falls on the litigants, this does not strip foreign law of its legal nature. Unlike material facts, foreign law cannot be proven by confession or oath. If we considered foreign law as a fact, we would end up saying that the judge applies a fact to facts. Furthermore, failure to prove a fact leads to dismissal of the claim, whereas failure to prove foreign law leads to the application of the law of the forum, as stipulated in Article 23 bis of the amended Algerian Civil Code (2005).

The judge is bound by the factual elements defined or agreed upon by the parties; however, the parties' agreement on a particular interpretation of foreign law does not bind the court. The judge's reliance on the parties to prove the content of foreign law does not alter its legal nature. This situation is similar to the proof of custom without denying its legal character. If foreign law were a material fact in the technical sense, the judge could not intervene. Yet, when there is doubt about the validity of the foreign law presented before him, he has room to intervene.

## Legal Means of Proving Foreign Law before Trial Judges:

The judge plays a positive role in proving foreign law when he is aware of its content, and the litigants also have a role. However, the proof intended here does not aim to subject foreign law to ordinary rules of judicial evidence. Its means of proof have a particular nature that distinguishes them from the legally defined methods of proving facts. In comparative law, although some legislations did not explicitly specify methods of proof, jurisprudence has established that proof may be made by all means capable of achieving the purpose. Accordingly, the judge may resort to the following:

- **Written Certificates:** Foreign laws cannot be proven by witness testimony, as witnesses usually testify to facts they have seen or heard, whereas foreign law requires expertise and written data. In France, foreign law is proven through a written document issued by a person specialized or sufficiently knowledgeable in the foreign law, drafted in the language of the forum.
  - a) Certificate issued by the embassy or consulate of the foreign state whose law is to be proven. Lebanese courts have accepted such certificates, for example, a certificate issued by the Iraqi consulate in Beirut to prove Iraqi law. If issued by a non-Arab diplomatic authority, it must be translated.
  - b) Certificate issued by an ordinary person specialized in foreign law, such as a foreign lawyer, jurist, or knowledgeable citizen. However, courts are often skeptical of such certificates due to possible bias, and the judge has discretionary authority to exclude them.
- **Expert Opinion:** The judge may, on his own initiative or at the request of the parties, appoint an expert, orally or in writing. The judge retains discretion in evaluating the expert report, which must be discussed by both parties to respect the right of defense.
- **Translated Foreign Law Texts:** If foreign law texts are translated by a competent authority or included in an accredited scholarly work, the judge may rely on them.
- **Doctrinal Opinions:** The judge may rely on scholarly works and references explaining and interpreting foreign laws.
- **Judicial Decisions:** Trial judges may rely on previous judgments, whether issued by national courts applying foreign law, by courts of the foreign state itself, or even by courts of another foreign state. However, problems may arise if the factual circumstances differ.

All these means are subject to the judge's discretionary power. The judgment must include the means relied upon in proving foreign law; otherwise, it may be challenged for insufficient reasoning.

## **The Necessity of Resorting to Legal Means to Facilitate Adequate Knowledge of Foreign Law:**

It is necessary not to burden the judge and litigants alone with proving foreign law but to provide adequate means for the judge's knowledge of it, including:

- **International Agreements:** Concluding bilateral or multilateral agreements to exchange information about laws.
- **State Role in Providing Foreign Laws:** Establishing a scientific center for foreign laws supervised by the Ministry of Justice, calling specialized experts before courts, creating an institute of comparative law, and providing translation services.
- **Judicial Delegation (Letters Rogatory):** A request from one judicial authority to another—judicial or diplomatic—to carry out investigative measures or collect evidence abroad. This is an effective means but should only be used when the national judge cannot ascertain foreign law. The parties must be informed, respecting the adversarial principle. The foreign judge responding acts as an expert.

### **Section Two: Interpretation of Foreign Law**

Once foreign law is proven, the national judge applies it as it would be applied before the courts of the state that enacted it, adhering to the general principles governing its interpretation there and verifying its validity and applicability.

#### **First: The National Judge's Adherence in Some Systems to the Judicial Interpretation Given in the Foreign State**

If the foreign legal rule has been interpreted by foreign courts, the national judge must adhere to that interpretation and cannot give it a different meaning. This solution prevails in French and Arab jurisprudence.

a) If the foreign rule exists only as a legislative text without judicial interpretation, the national judge must interpret it as the foreign judge would, even if the interpretation appears erroneous.

If the foreign law is silent on a solution, the judge must search for the applicable rule by referring to the sources recognized by foreign law.

b) If foreign jurisprudence provides conflicting interpretations, the national judge interprets the rule according to the general principles prevailing in that foreign state and may appoint an expert.

## **Second: Verification of the Validity of Foreign Law**

Before interpretation, the judge must verify the validity, constitutionality, and temporal applicability of foreign law.

### **A- Verification of the Legal Nature of the Applicable Rule**

Foreign law consists not only of legislation but of all sources recognized by the foreign legislator. If custom is not recognized as a source of law in that state, the judge must not rely on it.

### **B- The Judge's Verification of the Constitutionality of Foreign Law**

In this case, does the national judge examine the constitutionality of the foreign law to be applied according to the constitution of the state that enacted it? For example, if a dispute is brought before the Algerian judge and the applicable law is French law, and the parties raise the unconstitutionality of this law pursuant to the conflict-of-laws rule, does the judge examine the issue of constitutionality even though the Algerian judge does not have this authority regarding the rules of his national law? The answer to this requires a distinction between formal review and substantive review.

### **Formal Review of the Constitutionality of Foreign Law**

Some constitutions require formal conditions for the validity of a foreign legal rule to be applied, whether regarding its existence or its entry into force, such as ratification, publication, or the passage of a period of time from the date of its issuance for it to take effect. These procedures and formalities do not pose a problem for doctrine and jurisprudence. The judge must ensure that these requirements imposed by the constitution of the state issuing the law are fulfilled, and the failure of any condition of the legal rule means its non-existence.

### **Substantive Review of the Constitutionality of Foreign Law**

In this case, the judge presented with the dispute, who rules according to a foreign rule, must provide a solution similar to the one actually applied in the foreign state that enacted it. The judge must take into account the following: if the foreign law of the state whose law is invoked before the national courts does not allow for substantive constitutional review of laws, the judge cannot undertake a review of the foreign law even if it appears that the text being applied contradicts the constitution of the foreign state. However, if the foreign legal system grants constitutional review to a specific authority, the judge cannot examine its

constitutionality unless the competent authority has ruled on it. If the foreign law allows ordinary courts to review the constitutionality of laws, there are two opposing trends:

### **First Trend**

The judge does not have the right to review the constitutionality of foreign law. Their argument is that granting the judge constitutional review ultimately means intervening in the exercise of foreign legislative authority, which violates the principle of sovereignty and independence of each state. Granting such review also implies a political initiative aimed at rejecting the application of an order issued by a foreign legislative authority.

### **Second Trend**

The judge has the right to review the constitutionality of foreign law. The prevailing doctrine holds that the judge may exercise constitutional review when ordinary courts in the foreign state whose law is applied are able to conduct such review, especially in cases where the foreign judiciary has not actually ruled on the constitutionality of the law.

### **Judge's Verification of the Validity of Foreign Law**

In this case, we need to examine the foreign law to be applied as indicated by the conflict-of-laws rule, particularly if the matter is governed by two laws between the date it arose and the date of judgment. What law should be applied to resolve the temporal conflict between foreign laws? Regarding this issue, there are two opposing trends:

#### **A- Resolving the Issue by Applying Temporal Conflict Rules in Foreign Law:**

Comparative doctrine and jurisprudence hold that determining the applicable foreign substantive rule in terms of time should refer to the principles prevailing in the foreign state whose law is applied. The solution should be uniform regardless of the judge's nationality. Proper application of foreign law requires considering its three elements: persons, place, and time, as provided by the foreign legislator.

#### **B- Resolving the Issue by Referring to the Conflict-of-Laws Rules of the Judge's State:**

Some contemporary scholars consider that temporal conflicts in foreign law are resolved by referring to the judge's own law, meaning its conflict-of-laws rules. That is, the concept of spatial conflict of laws affects the resolution of temporal conflicts between substantive foreign rules. This view is less favored, while the first view is predominant.

## **What if it is impossible to prove the content of foreign law?**

### **Third Section: Possible Solutions When the Content of Foreign Law Cannot Be Proven**

If the national judge is aware of the foreign law, he raises it *ex officio*, or the burden of proof falls on the parties. If the parties succeed, no problem arises, and the foreign law is applied and interpreted accordingly. If the parties fail to prove it, the judge justifies his ruling and applies the law of his own state. In cases where a party fails to prove foreign law content when required by the judge without showing impossibility, Lebanese law allows the court to suspend the case for a specified period and obliges the person to provide proof of the foreign law.

Thus, if the judge cannot determine foreign law after exhausting all methods, he must include in his judgment the impossibility of proof. When there is no text governing the issue, or a text exists but with scarce or conflicting case law, the national judge substitutes himself for the foreign judge and seeks a solution the foreign judge would have applied.

#### **Approaches When Foreign Law Cannot Be Proven:**

##### **A- Dismissal of the Claim:**

This approach holds that if the content of foreign law cannot be determined, the judge must dismiss the claim. The U.S. courts applied this in *Walton*, where an American citizen filed a claim for damages following an accident in Saudi Arabia. The federal court in New York raised the application of Saudi law but did not know its content. When the plaintiff failed to prove it, the court dismissed the claim. Doctrine criticized this approach as denying justice and violating the injured party's rights merely because he could not prove foreign law.

##### **B- Applying the Closest Law to the Foreign Law:**

If the applicable law cannot be proven, the judge applies the closest law, meaning a law presumed to be similar in rules to the law whose content cannot be proven, due to shared legal family or influence. For example, if U.S. law cannot be proven, English law may be applied. Alternatively, the closest law may mean the law most connected to the person's relationship, e.g., applying the law of the person's domicile when nationality law cannot be proven. This approach is used in German courts but has practical difficulties in assessing legal proximity.

##### **C- Applying the Judge's Law When Foreign Law Cannot Be Proven:**

National law does not allow the judge to refrain from ruling due to unclear or ambiguous text. The judge must adjudicate disputes with a foreign element as if they were domestic. Applying the judge's law is a fair solution, preventing negative outcomes for parties, and the law is not foreign to the dispute. This approach is used in some comparative laws such as Lebanon and Algeria, according to Article 23 bis of Law 2005/10 amending the Civil Code.

## **Chapter Two: The Position of Foreign Law Before the Supreme Court Judges**

The national judge may raise the conflict-of-laws rule ex officio, or the parties may establish the content of foreign law. However, if the national judge misapplies this law, is he subject to Supreme Court review?

### **First Section: Review of the Application of the Conflict-of-Laws Rule**

If the conflict-of-laws rule is national, the judge must apply it. Comparative doctrine holds that errors in applying the rule are subject to Supreme Court review. For example, if the judge applies his own law instead of foreign law or the law of domicile instead of nationality law, the Supreme Court can review such misinterpretation. In Algeria, review is limited to personal status matters, according to Article 358, paragraph 6 of the Civil and Administrative Procedure Code.

### **Second Section: Error in Qualification**

Legal qualification aims to determine the nature of the dispute to identify the applicable conflict-of-laws rule. Subject-matter judges have full authority to assess facts, which is beyond Supreme Court review. However, proper description of facts must be reviewed as a legal process. For example, determining fault is based on the judge's factual assessment, but determining the type of liability (tort or contractual) is subject to review.

### **Third Section: Review of Foreign Law Interpretation**

Legislation and jurisprudence in comparative law are divided between supporting and rejecting review.

#### **A- Rejection of Review (France and Lebanon):**

The dominant doctrine in France and Lebanon rejects review of foreign law interpretation. This is also followed in Germany, Spain, the Netherlands, Romania, Tunisia, and Morocco. Arguments:

- Foreign law is a material fact requiring proof, so it is not subject to Supreme Court review.

- The Supreme Court's role is to unify national law application; oversight of foreign rulings belongs to the foreign state's supreme court.
- Granting review may conflict with foreign supreme court decisions.

### **B- Acceptance of Review (Egypt and some other jurisdictions):**

Errors by judges in interpreting foreign law are subject to Supreme Court review, as in Italy, Turkey, Greece, Egypt, Kuwait, Jordan, and UAE. Arguments:

- Review ensures completeness of supervision over foreign law interpretation.
- The Supreme Court's role in unifying jurisprudence justifies reviewing foreign law interpretation.

### **C- Softening Absolute Rejection via Mechanisms:**

Although France and Lebanon reject review, courts exercise indirect control through:

- Reasoning review: monitoring interpretation when parties invoke foreign law.
- Respecting procedural fairness between parties.
- Detecting distortion or misinterpretation of foreign law, as developed by the French Court of Cassation.

### **Conclusion:**

The study of the position of foreign law before the Algerian national judge shows that Algerian legislation adopts an open approach to applying foreign law via conflict-of-laws rules, reflecting alignment with private international law requirements. However, judicial practice reveals difficulties, including proving foreign law, differences in interpretation, and lack of unified jurisprudence.

### **Recommendations:**

1. Include clear legislative provisions specifying the burden of proof for foreign law content and allow the judge to redistribute this burden according to parties' capabilities.
2. Establish rules obliging Algerian judges to follow foreign law interpretation in its original jurisdiction and create advisory national committees specialized in comparative law.
3. Develop court infrastructure with units specialized in sourcing and translating foreign legal texts, and provide digital communication mechanisms with embassies and foreign judicial bodies.
4. Enhance specialized training for judges in conflict-of-laws, comparative law, and methods for locating foreign law, including practical courses in the Higher Judicial School.

5. Digitize procedures for requesting foreign legal texts, create a national database of frequently used foreign laws, and unify jurisprudence through periodic publication of rulings.
6. Grant judges more consistent discretion via precise criteria for evaluating proof and translation of foreign law, reducing judicial errors and enhancing legal security.

## References

1. Redha, T. (2015). *Le droit international privé algérien: principes et application* [Algerian private international law: Principles and application]. Algiers: Edition Universitaire.
2. Belkacem, M. (2018). *Application du droit étranger par le juge national en Algérie* [Application of foreign law by the national judge in Algeria]. *Revue Algérienne de Droit Comparé*, 12(3), 45–68.
3. Lazreg, A. (2016). *Les conflits de lois en matière de statut personnel en Algérie* [Conflict of laws in personal status matters in Algeria]. Algiers: Éditions Juridiques.
4. Bouzidi, R. (2019). *Difficultés d'application du droit étranger dans le système judiciaire algérien* [Difficulties in applying foreign law in the Algerian judicial system]. *Revue de Droit International Privé et Comparé*, 21(2), 101–125.
5. Kherfi, S. (2020). *La preuve du droit étranger devant le juge national algérien* [Proof of foreign law before the Algerian national judge]. *Journal Algérien de Science Juridique*, 5(1), 77–94.
6. Meziane, F. (2017). *L'interprétation des lois étrangères par les tribunaux algériens* [Interpretation of foreign laws by Algerian courts]. *Revue Juridique d'Algérie*, 14(4), 33–56.
7. Djellouli, H. (2021). *La formation judiciaire et le droit comparé en Algérie* [Judicial training and comparative law in Algeria]. Algiers: Presses Universitaires d'Algérie.
8. Labidi, N. (2018). *Harmonisation des textes étrangers et sécurité juridique en Algérie* [Harmonization of foreign texts and legal security in Algeria]. *Revue de Droit et Justice*, 10(2), 59–81.
9. Touati, M. (2019). *Les sources du droit étranger et leur application dans le contentieux algérien* [Sources of foreign law and their application in Algerian litigation]. *Revue de Droit Privé*, 7(3), 115–138.
10. Saadi, A. (2022). *Modernisation du droit international privé en Algérie: défis et perspectives* [Modernization of private international law in Algeria: Challenges and perspectives]. Algiers: Éditions du Centre Juridique.