

Obstacles to Implementing Foreign Law: A Comparative Study of Afghan and French Laws

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ABSTRACT

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The provisions of Afghan law indicate that applying foreign rulings in Afghanistan is not absolute; rather, it is conditional and subject to various requirements. For instance, a foreign ruling is applicable in Afghanistan only when it does not conflict with the sacred teachings of Islam, public order, or public morals. Additionally, the relevant ruling must be issued by a competent authority, confirmed by the Ministry of Foreign Affairs, free from forgery or fraud. Similarly, French laws also subject the application of foreign rulings to certain conditions. In France, a foreign ruling is considered applicable if it is issued by a competent authority and does not contradict French public order or general morals. For this research, a bibliographic approach was utilized, with materials and information sourced from reputable books. The purpose of this research is to elucidate, in a comparative manner, the obstacles to the implementation of foreign law from the perspectives of Afghan and French legal systems. Upon completing this research, it was concluded that when Afghan and French courts perceive the application of foreign law to conflict with their respective public orders, they should refrain from applying such law and instead enact relevant Afghan or French law. Additionally, the laws of both Afghanistan and France lack explicit provisions regarding fraud against the law. However, logically, should such a situation arise, the rule to prevent fraud against the law should be applied.

INTRODUCTION

When a lawsuit is pending in the national courts of a country and foreign law is deemed applicable for its resolution, the competent relevant courts will identify and apply the foreign law in the relevant section. However, before judges apply foreign law, they refer to those parts of their own country's law that are designated for the application of foreign law. If the sections of the relevant country's foreign law applicable to the case under consideration by the court are accepted and the

application of foreign law is approved, the judge will study that law. The judge considers the public order and morals of their own country and also contemplates whether the plaintiff has not avoided or committed fraud concerning the application of the law, which is essentially deemed applicable and competent to the case. If the judge concludes that the relevant law does not conflict with the public order and morals of the court's country and the plaintiff has not tried to escape from or committed fraud against the competent law, then the

judge will obligate themselves to apply the foreign law in the relevant matter.

It is worth mentioning that if the judge of the court's country or the competent court concludes that the relevant foreign law conflicts with the public order and morals of the court's country, or it is demonstrated to the competent court that the plaintiff has created such a situation to escape the competent law and apply a law beneficial to them based on this fraud, then the judge will not apply the foreign law. Thus, to comprehensively understand the above two issues (public order and escape or evasion from the law), it is important to explore what public order and escape from law mean, when these actions began and what their legal consequences are.

Research Problem

From the perspective of the laws of Afghanistan and France, if a foreign law conflicts with the public order of these countries, it will not be applied. However, the similarities and differences between the laws of Afghanistan and France regarding public order were not clear before the completion of this research, which became evident as a result of this research. Likewise, the laws of Afghanistan and France do not have explicit provisions regarding fraud against the law. So, if such a situation arises in these countries, what should be done? This question is also addressed based on this research.

Importance of the Study

The importance of this study is explained in the following points:

1. With the completion of this research, the obstacles to the application of foreign law in Afghan laws were clarified and by utilizing French laws, reasonable and suitable solutions to existing issues were proposed.
2. The findings of this research can benefit legal professionals, prosecutors, defense attorneys, judges, diplomats, consular officers and instructors of legal sciences in understanding, analyzing,

teaching and conducting further research on related legal matters.

3. The completion of this study has enriched the discussion of private international law, especially since the application of foreign law and its challenges is a significant topic within this legal field.
4. Given Afghanistan's necessity for foreign investment, ensuring proper legal arrangements for the rights and activities of foreigners is crucial for this investment, which is expected to improve significantly with the completion of this research.

RESEARCH METHODOLOGY

To conduct this research, a library-based approach has been used and the following principles and criteria have been observed in the collection, analysis, assessment, arrangement and organization of materials and information:

1. Initially, a general discussion on each topic has been provided, followed by an explanation of the Afghan legal position, then the French legal position and subsequently clarifying the points of convergence and divergence between the laws of Afghanistan and France.
2. For the discovery of materials and information, we initially consulted credible sources; however, if we did not find the necessary materials, we also utilized other secondary sources such as internet sites.
3. Additionally, as a researcher, I have strived to present both the positive and negative aspects of the subject, thereby ensuring the principle of justice in this research

Obstacles to the Implementation of Foreign Law

There are generally two main obstacles to the implementation of foreign law:

First Discussion: Public Order.

Second Discussion: Fraud against the Law or Evasion.

Let us examine each separately.

First Discussion: Public Order

When a judge finds that the foreign competent law within the legal system of their country is intolerable, they may disregard the application of that law by invoking public order. Every state accepts to a certain extent the laws of foreign countries on its territory, provided they do not conflict with the fundamental structures, domestic security, moral sentiments, ethical, religious and cultural codes, customs and traditions of that country. When a country's judge is asked to apply foreign law, they must first ensure that this law does not conflict with the aforementioned issues. If the judge receives a positive response in this regard, they should apply the foreign law. (Seljuqi, 1998). Public order is considered one of the most significant issues, not only in the realm of private international law but also in other branches of legal sciences. Some legal scholars even extend the historical background of public order to the fourteenth-century (Durani, 2019).

Because public order is one of the aspects that prevents the application of foreign competent law, it is essential to clarify it. Although the concept of public order is similar in both domestic and international law, there are still differences. We mustn't become entangled by this common term. We must discuss this barrier within the framework of private international law and to gain more understanding of public order, the following topics will be discussed sequentially. (Akhundzada, 2017).

First Topic: Historical Background of Public Order

The concept of public order in private international law derives from domestic law. In domestic law, public order refers to the boundary of individual freedom. Since society imposed limitations on this freedom, public order emerged, evolving until the fourteenth century when its indications were recognized. It was first noted in ancient Roman law under the term "good morals," which became

synonymous with public order. (Abdul Wahid Afzali and Mohammad Ishaq Rahimi., 2013).

In the fourteenth century, the school of commentators paid attention to this issue. They divided laws into two categories: favorable and adverse. Favorable laws were deemed tolerable abroad, while adverse laws were considered intolerable. During the Middle Ages, many aspects of Roman law were not fully applicable and public order issues could prevent their application. However, since legal conflicts during that time had an internal aspect and existed between major Roman cities, the concept of public order received limited attention. (Nasih, 2016).

In the seventeenth century, "Douma" introduced two terms: "social order" and "foreign order." He believed individuals are autonomous in contracts, but this autonomy does not imply they may act against the social order, as such contracts could harm the social order. After the French Revolution in the eighteenth century, this term was first incorporated into French law (Napoleon's Article 6) and gradually spread to the legislation of other countries. Another perspective on the emergence of public order is that it was first discussed in England before France, in 1750, when Judge "Lord Haick" used the term "public policy" as a substitute for public order while addressing the case of "Johnson" v. "Chesterfield," later adopted by other common law countries. (Abdul Wahid Afzali and Mohammad Ishaq Rahimi., 2013).

Second Topic: Definition of Public Order

Articles 56 and 57 of Afghanistan's 2004 Constitution have the following provisions regarding public order:

- **Article 56:** Observance of the provisions of the constitution, compliance with laws and observance of public order and security are the duties of all Afghan citizens (The Constitution of Afghanistan, 2004).
- **Article 57:** The state guarantees the rights and freedoms of foreign nationals in Afghanistan

according to the law. These individuals are obliged to respect the laws of the Afghan state within the limits of international law (The Constitution of Afghanistan, 2004)

Similarly, Article 35 of Afghanistan's 1977 Civil Code states: The provisions of a foreign country's law apply to the extent that they do not conflict with public order or moral standards in Afghanistan. (The Civil Code of Afghanistan, 1976).

Article 6 of the French Civil Code defines public order as: A set of obligatory legal rules, laws and regulations established for the management of a country or to ensure the safety and good morals among its citizens, which individuals cannot contravene and any action contrary to them directly affects those individuals. (The Law of Police of Afghanistan, 1388AH).

The renowned French jurist Capitant describes public order as: The collection of all institutions and laws in a country established for the proper conduct of public affairs and the strengthening of individuals' relationships, where persons cannot contract against them. (Nia, 2010).

In Iranian jurist Dr. Mohammad Naseri's view: Public order is a set of rules and principles governing people's relations in a country for the proper conduct of public services, security and moral virtue, which private individuals cannot violate through contractual agreements (Abdul Wahid Afzali and Mohammad Ishaq Rahimi., 2013).

These definitions imply that public order and good morals are interconnected concepts and anything conflicting with good morals is also inconsistent with public order. Consequently, the concept of public order varies in different legal systems in terms of meaning and application and its complete structure and definition are still not comprehensively clear.

The definition is also vague and does not reflect the essence of public order. Based on this definition, public order refers to social tranquility and calmness. (Abdullah

N. a.-D., 2017).

First Example: Suppose the law of a foreign country permits marriage between close relatives. If citizens of that country marry under this law, citing Article 19 of Afghanistan's 1977 Civil Code, which considers the marriage subject to the law of the spouses' country, their marriage would not be recognized due to its inconsistency with Afghanistan's public order and consequently, Afghan courts would not accept it. In other words, Afghan courts, based on reference to public order, cannot apply the law of their country regarding marriage in Afghanistan. (Al-Masi, 2004).

Second Example: As we know, polygamy is allowed in some countries and prohibited in others. If an Afghan citizen, where Afghan law permits polygamy, goes to another country, such as France, where it is not permitted, the French marriage registration officials would not register such a marriage. If this issue is brought before French courts, the individual would be prohibited from this type of marriage since it is considered against France's public order, even if the lawsuit is filed by someone whose home country permits polygamy. (Jafari, 1998).

Third Example: As we know, the laws of some countries allow for divorce between a husband and wife, while others prohibit it. If a woman from a country in the first category, for instance, a French citizen, files for divorce in a court of a country from the second category, such as Spain, against her husband who is also a French citizen, the Spanish court cannot accept their request for divorce. This is because it contradicts Spain's public order, given that those rights that Spanish citizens themselves are deprived of cannot be afforded to foreigners. (Khalili, 2013).

Public order is considered at both national and international levels, but the mentioned phrase does not convey the same concept at both levels. Therefore, to clarify the meaning and concept of public order in domestic law and private international law, we will

explore the following topics. (Nasiri, 1995).

First Part: Public Order in Domestic Law

In domestic law, public order encompasses rules and statutes established to ensure public interests and the provision of public (political, administrative and economic) affairs, along with family protection. These are rules that individuals cannot contravene. In other words, public order in domestic law consists of mandatory rules, whether they are related to private or public law, such as rules concerning capacity, inheritance and wills, mandatory contractual rules, as well as rules related to administrative law, criminal law and others. (Jafari, 1998).

From the above explanations, it becomes clear that public order in domestic law has a broad concept, including all rules and regulations with a mandatory nature, which individuals cannot contravene through agreement. No private contract can override these rules, as individuals cannot confer capacity through a private contract or change matters related to inheritance, wills and kinship. Therefore, in short, public order in domestic law refers to adherence to those mandatory rules that individuals cannot breach through private contracts and there are no contrary provisions without breaching public order in domestic law.

For instance, in Islamic countries, divorce is a right of the husband and no one other than the husband has the authority to divorce his wife. Hence, a person cannot, based on a private contract, assign the right to divorce his wife to his father, brother, or any other person, as this act contradicts the rules governing this society and which the society has agreed to implement.

Public order rules are not only codified in laws but can also be derived from the customs and traditions of a society, as many subjects are not explicitly stated in the relevant state's laws but form the foundations of public order, which may be referred to as prevailing morals or public decorum.

Thus, apart from the written rules and regulations, an essential part of public order consists of good morals (prevailing morals) or public decorum. When a judge applies foreign law, they must refer to their country's laws. If the foreign law in question is contrary to public order, the foreign law will not be applied. Similarly, if it contradicts the public decorum of the relevant country, the judge will not apply the foreign law. The competent court cannot, at its discretion or personal opinion, consider every action contrary to the country's public order and refrain from applying foreign law.

This raises the question of whether, in case of doubt, a judge can independently consider an issue as conflicting with the country's public order. There is no legal solution provided in the laws for this, but it is believed that judges cannot place every issue in conflict with public order at their discretion. When faced with such issues, the judge should obtain a ruling from a superior court or a higher authority, as superior courts, due to their scientific and practical experience, are more knowledgeable than subordinate courts and they should provide guidance to the subordinate judges in this regard. (Farooq, 2016).

Second Part: Public Order in Private International Law

In private international law, there is a divergence of opinion among jurists regarding the meaning and concept of public order. Some jurists attribute a broad meaning to public order, while others attribute a limited meaning. Both views will be discussed separately.

First Theory:

According to the perspective of scholars like P. Y. Mancini, public order includes those rules with a general intra-border nature. These are rules that are enforceable on all individuals within a country's borders, whether domestic or foreign, such as rules concerning public law, property-related rules, criminal rules, rules relating to civil responsibility and procedural principles.

Criticisms have been raised against this theory, some of

which are briefly mentioned. The first critique is that contrary to P. Y. Mancini's view, the intra-border nature of laws does not necessarily align with public order. In other words, not every law that has an intra-border nature is necessarily related to public order. For example, property-related laws and laws concerning responsibility arising from crime have an intra-border nature, meaning they apply to all property and individuals located within the country. However, they are not necessarily related to public order, as a country's judge may handle a movable property claim located abroad or a crime committed in a foreign country based on the applicable foreign law.

According to P. Y. and Mancini, public order in private international law emerges as a principle rather than an exception. From their perspective, the application of foreign law should not be permitted. This view, however, is subject to critique, as most scholars in private international law consider public order to be an exception. Nevertheless, P. Y. and Mancini argue that the scope of public order is so extensive that it serves as a principle, whereas today, by consensus among legal scholars and based on the laws of most countries, the application of foreign law is accepted as an exception. Consequently, these jurists perceive a broad interpretation of public order in international relations, treating it as a principle. (Al-Masi, 2004).

Second Theory:

As previously mentioned, public order in domestic law includes all laws that individuals cannot contravene through private contracts. Moreover, individuals are not allowed to alter rules related to capacity, inheritance, wills, marriage and divorce through private agreements. However, if public order in international relations is accepted with the same definition as in domestic law, such that the application of foreign law regarding capacity, inheritance and wills is prevented, private international law would lose its existential philosophy. Therefore, public order in domestic law and private

international law cannot have a singular meaning. In international relations, public order comprises the set of rules and regulations tied to the civilization and legal system of a country, which its courts must prioritize over foreign law.

This group of jurists views public order in international relations with a limited interpretation and treats it as an exception. (Abdullah N. a.-D., 2017).

NOTE: Differences in Public Order in Domestic and Private International Law

Based on the above explanations, it can be said that different interpretations of public order exist in domestic and private international law, which will be discussed in order:

1. In domestic and private international law, public order is verbally identical but conceptually different. To differentiate the concept of public order in these contexts and prevent confusion, it would be better to use a different term for each area. Some jurists use the terms "domestic public order" and "international public order" for this distinction. However, the use of these terms is neither appropriate nor accurate. First, a common public order that encompasses the concept of international public order among countries does not exist. Second, public order is always national and internal, whether in domestic or international relations. This means that public order pertains to the principles of civilization and the unique legal system of each country and differs from the public order of another country.

Some other jurists propose using "relative public order" for domestic relations and "absolute public order" for international relations. However, this terminology is also inappropriate, as public order is always relative, whether in domestic or international relations and varies with time and place.

Therefore, it is better to use the term "public order" in domestic law and "public order in private international law." In the latter context, public order should not be

mentioned as absolute and its meaning should be clarified with a qualifier, for example, using terms like "public order in international relations" or "public order exception."

2. There exists an absolute relationship between general and specific in domestic law and the public order in private international law. This means that what is considered contrary to public order in private international law is also contrary to domestic law. However, the reverse is not true. What is deemed contrary to public order in domestic law may not be contrary to private international law. Thus, it can be said that the scope of public order in domestic law is broader than in private international law (AbdAH1).

Third Topic: The Scope of Public Order

Public order does not have a fixed scope and changes according to the demands of time and place. In other words, the instances that prevent the enforcement of foreign law under the guise of public order are not precisely defined and it is never possible to comprehensively determine all aspects related to public order (we cannot precisely identify what contradicts public order in international relations for a particular country). Therefore, identifying the benchmarks of public order in international relations is a challenging task.

Nonetheless, some jurists have attempted to present a criterion for identifying elements within public order. The renowned German jurist Savigny presents a common legal community as a benchmark for this purpose. French jurist Bartin supports Savigny's view and considers the common legal community as the foundation of public order. According to them, for a country's law to be applicable in another country, both countries should be members of a common legal community and belong to the same legal family. However, a common legal community or equality in the degree of civilization does not imply that the laws of two

countries should be identical, or that there should be no differences, allowing the enforcement of one country's laws in another without conflicting with public order. For example, European countries are very similar in terms of civilization and laws, yet implementing their laws on each other's soil may contradict public order. For instance, French law permits divorce between husband and wife, whereas Spanish law considers divorce against public order, leading Spanish courts to refrain from enforcing French law in such cases. A similar situation exists between German and French laws, where in certain areas, there is no legal concordance (e.g., children born from illegitimate relationships) regarding the causes and grounds for divorce, such as insanity, which might not be considered a cause for divorce in some countries but could be a reason in others (Al-Masi, 2004). The examples mentioned above indicate that firstly, it is necessary to separately examine legal concordance in each case to determine whether the enforcement of foreign law conflicts with public order. Secondly, the change of location must be considered, as an issue might conflict with public order in one country but not in another. Public order also changes based on the demands of time, meaning an issue may be at odds with the public order today but could be considered legal and normal after a few years, or an action might not conflict with public order today but could be viewed as contrary after some time. For example, in France until 1884, divorce and up until 1912, the establishment of natural paternal lineage were considered actions against public order and French courts would not enforce foreign law due to this reason. However, post these dates, these matters were recognized as legal, normal and included in public order. From the explanations above, it is evident that public order changes with the transformation of time and place. This is why no fixed and definitive standard exists for identifying public order and a common legal community serves merely as a guide, leaving the identification of

public order solely up to the discretion of the judge (Nasih, 2016).

Fourth Topic: Various Aspects of Public Order

As previously discussed, public order refers to the proper conduct of public services, the establishment of welfare and security and the effective establishment of relations among individuals. Hence, when the law of a foreign country is contrary to the state and administrative order, judicial order, or the order in the areas of capacity and personal status of the court's host country, whether Afghanistan, France, or any other country, the courts of Afghanistan, according to Article 35 of the Civil Code and the courts of France, according to Article 6 of the French Civil Code, will not apply foreign law but instead implement their national law. To understand the above-mentioned aspects of public order, they are discussed in order. (Al-Masi, 2004)

First Part: State and Administrative Order

Every citizen must adhere to the political and administrative system of their respective state and abide by all the laws enacted by the various organs of that state. Similarly, foreign citizens living in a country must respect the state and administrative order of that country and cannot disrupt the order of the country they reside in by invoking the laws of their home country. Thus, if foreign laws conflict with the state and administrative order of a country, they should not be applied.

Second Part: Judicial Order

The principles of civil and criminal litigation, the authority of courts to conduct trials effectively and the duties of the state in establishing justice are included within the framework of public order. The recognition of the right to file a lawsuit aims to maintain public order and no person, including foreigners, may resolve disputes on their own. Everyone has the right to approach the court in case of an infringement by others. Accordingly, the determination of the jurisdiction and subject matter of the courts has been established to uphold public order. Furthermore, provisions for appeal,

cassation and new reviews of court judgments are included in the laws to ensure public order is not disrupted. Consequently, if foreign laws conflict with these matters, for instance, if an Afghan court does not hear a case due to the disruption of public order, foreign individuals cannot disturb this order and compel the court to hear the case by invoking the laws of their home country. (Nasih, 2016).

Third Part: The Rules of Eligibility and Personal Status

The rules that determine a person's civil status in society are not only established for their benefit, but such rules aim to ensure public interest. Based on this, foreign individuals cannot disrupt public order according to the laws related to eligibility. For example, they cannot change their gender or renounce their paternal or filial relationship, nor can they reconcile with each other, because the rules related to eligibility pertain to public order. (Al-Masi, 2004).

Commentary: Public Morality

Public morality, also referred to as good morals or prevailing ethics, is a set of rules that specify certain social behaviors and are observed in a specific time and place. In other words, these are accepted social standards whose observance is necessary among people for fulfilling a legal obligation or in the context of other social relations, by law, customs and traditions.

Fifth Part: Legal Effects of Public Order

Whenever the courts of Afghanistan and France determine that the application of foreign law conflicts with their public order, they must refrain from applying it and instead implement the law of Afghanistan or France at that time. Therefore, the ordinary legal effect of public order is that the enforcement of foreign jurisdictional law is prevented and the law of the court's jurisdiction is applied and enforced in its place. The legal effects of public order are not always of the same type and different legal effects are produced based on each indicator of public order. On one hand, public order

sometimes produces positive legal effects and sometimes negative legal effects and on the other hand, the effects of public order gain strength and weakness in the stages of the creation of rights and the effects of rights.

For this reason, studying the legal effects of public order is considered a necessary matter. First, we will discuss the negative and positive effects of public order and in the second step, we will examine the effects of public order in the stages of the creation of rights and the effects of rights.

First Paragraph: Negative and Positive Legal Effects of Public Order

The effect of public order is negative when a judge prevents the application (enforcement) of foreign jurisdictional law and does not apply the law of the court's jurisdiction in its place. The effect of public order is positive when a judge prevents the application (enforcement) of foreign jurisdictional law and applies the law of the court's jurisdiction instead.

Example of Negative Effect of Public Order: Suppose a French woman files for divorce against her husband in a Spanish court. Since divorce is prohibited in Spain, the Spanish court, considering that divorce is against the public order of Spain, does not grant the French woman the right to divorce and refrains from issuing a divorce decree. In this scenario, it is seen that both the application (enforcement) of French law is prevented and the Spanish law enters the enforcement stage (because the Spanish law prohibits divorce, it only prevents the application of French law, which allows divorce and does not positively enforce another law in its place).

Example of Positive Effect of Public Order: Suppose in France, parents and children do not have the right to receive or demand alimony from each other, meaning that according to French law, parents are not obligated to provide alimony for their children and at the same time do not have the right to demand alimony from their children. Now, if a son who is a French citizen files a

claim against his father in Afghanistan, where the alimony between parents and children is obligatory, the Afghan courts, considering that alimony is part of Afghanistan's public order, prevent the application of French law (negative effect of public order) and instead apply Afghan law (positive effect of public order), thus obligating the father to provide alimony to his son. In other words, in this case, public order demonstrates legal effects in two stages: in the first stage, a negative legal effect is produced on public order, resulting in the prevention of the enforcement of foreign jurisdictional law and in the second stage, a positive legal effect is produced on public order, resulting in the application and enforcement of the law of the court's jurisdiction at the specified time. (Nasih, 2016).

Second Paragraph: The Effect of Public Order in the Stages of the Creation of Rights and the Effects of Rights

The effects of public order differ in the stage of the creation of rights and the stage of the effects of rights. Whenever a right is not recognized in a country, the creation of that right is impossible in that country. For example, if the right to prove illegitimate parentage is not recognized in a country and a person wants to establish their lineage, the courts of that country will reject the person's claim because proving illegitimate parentage conflicts with the public order of that country. However, if that person establishes their illegitimate lineage in a country where it is permitted, they can benefit from the effects of that created right in a country where it is not allowed and conflicts with the public order of that country. Therefore, the effects of public order differ in the stages of the creation of rights and the effects of rights.

The courts of France have explicitly stated regarding this issue that: "The reaction of public order against the provisions of foreign law is not uniform and for this reason, the issue of the creation of rights and the rights that are created in a foreign country according to the

competent law and without any form of fraud will show different reactions." In general, it can be said that in the stage of the effects of rights, public order produces a slight effect and therefore it is rarely cited.

Example: For instance, Afghanistan, as an Islamic country, permits polygamy, while in France, polygamy is legally prohibited. Now, if an Afghan citizen who has more than one wife goes to France and one of his wives files a claim in French courts regarding the legal effects of marriage, will the French court accept this claim or not?

The judicial practice in France has adopted a distinction in this regard, meaning that some legal effects arising from polygamy are acceptable in France and the plaintiff's claim is accepted. However, some legal effects arising from polygamy are considered contrary to the public order of France and are not accepted by the plaintiff's claim. For example, in this case, if the wife files a claim against her husband regarding dowry or alimony, her claim is acceptable and will be addressed by the French courts. However, if in the same case, a claim for the wife's obedience is filed against the husband in French courts, the French courts will not address this case because it is considered contrary to the public order of France.

Similarly, in the stage of the creation of rights, a positive effect may be produced on public order because in this case, the issue of the creation of rights is raised and the right may not be created based on foreign law (the creation of rights based on the stated conditions in foreign law may be considered in conflict with public order). However, it may be possible to create it based on the law of the court's jurisdiction; and in the stage of the effects of rights, public order produces negative effects because in this stage, public order only prevents the legal effects of rights that have emerged in a foreign country, without the law of the court's jurisdiction positively replacing it. (Abdullah N. a.-D., 2017).

Second Section: Fraud Against the Law or Evasion of the Law

As you know, the conflict of laws plays a prominent role in the application of conflict resolution rules and the determination of the competent law. Therefore, individuals may create a new situation for themselves to evade the laws of their governing state and consequently may benefit from foreign law. Fraud against the law means that individuals can bring certain elements of the competent law under their control and thus change that law, ultimately placing themselves under the enforcement of a law that would not normally apply to them. Among the mentioned elements are nationality, residence, the location of movable property and the place of contract formation.

First Example (Change of Residence): An Indian woman and man want to marry, but Indian law does not allow them to marry based on prohibited relationships. They change their residence and settle in a country where personal status is subject to residence and where marriage between prohibited relatives is not restricted. For instance, they settle in England, marry there and then return to India to live.

Second Example (Change of Nationality): In the above example, the Indian woman and man change their nationality and assume they have acquired Belgian nationality. Since there is no prohibition on marriage between prohibited relatives in Belgium, they marry and then return to India, living there as a Belgian woman and husband.

Third Example (Change of Place of Contract Formation): An Afghan signs a mining contract with a Frenchman. Suppose that according to Afghan law, a 30% tax is levied on mining, while according to French law, a 40% tax is levied and according to Tajik law, a 10% tax is levied on mining. To ensure that the desired person pays less tax on mining, they concluded the mining contract in Tajikistan instead of Afghanistan and

France, thus evading the law.

To clarify fraud against the law or evasion of the law, we will discuss the following topics in order. (Seljuqi, 1998).

First Topic: Understanding Fraud Against the Law or Evasion of the Law

Fraud (تقلب) linguistically refers to the transition from one state to another, indicating an incorrect situation or deception. In legal terms, it is defined as achieving illegal objectives through a legal means or performing an act to escape a legal obligation.

According to Article 1167 of the French Civil Code, "a transaction aimed at evading a loan or debt under the guise of a guarantee is considered fraud against the law." Based on this principle in French law (Fraus omnia corrumpit), it introduces exceptions to all legal rules.

In Afghan laws, there is no explicit mention of fraud against the law or evasion of the law; however, Article 2137 of the Civil Code states: "A person may bequeath a part of their property to a third party, provided that the heirs consent." If a person gives more than a third of their property to someone under the guise of a settlement to evade this condition and the judge becomes aware and proves that this act was done to evade the law, it may be declared void.

In private international law, fraud against the law means that a person alters the course of a case from the jurisdiction of one country to that of another to apply the law of their preference. Therefore, it can be said that fraud requires the presence of both material and moral elements to change the course of the case.

The material element refers to the change of the connecting element of the case, while the moral element refers to the intent to evade or escape the law. When a person seeks to escape the law that normally governs them, they adopt deceptive means to create a situation where another law governs their relevant issue. The judge disregards the law that governs the subject and applies the law of the country that genuinely and

effectively governs the relevant subject.

First Example: For instance, before 1884, divorce was prohibited in France. If a French woman and man wanted to divorce, they would acquire the nationality of a country where divorce was legally permissible. However, today in France, divorce is permitted, whereas in Spain, it is legally prohibited. Now, if a Spanish woman and her husband wish to divorce, they can acquire French nationality to achieve this goal and execute their divorce.

Here, the question arises whether the outcome of the individual's actions in this case is legally valid or not. Will the Spanish courts recognize the mentioned divorce as valid and on what legal basis? Without a doubt, if a divorce case is presented between a French woman and her husband in France and the French court issues a divorce decree, the Spanish courts must generally recognize that divorce as valid. However, if a Spanish woman and her husband acquire French nationality under the guise of evading the law, the Spanish courts may prevent this action based on the rule against evasion of the law and consider the divorce invalid.

To understand the basis on which the rule against evasion of the law is established and whether evasion of the law or fraud against the law is one of the indicators of public order or an independent subject, we will discuss both topics separately. (Al-Masi, 2004).

First Section: Legal Basis of the Rule Against Fraud Against the Law

Legal scholars do not agree on the importance and necessity of the rule against fraud against the law; there are two theories regarding this matter, each of which we will discuss separately.

First Theory: According to this group of legal scholars, the application of the rule against fraud against the law is not mandatory or necessary. This is because the application of this rule requires that the competent authorities investigate the details of each case and determine the intent of the individuals regarding the

relevant act. The validity or invalidity of the outcomes derived from individuals' actions is not precisely ascertainable and largely depends on the judge's discretion. Therefore, the rule against fraud against the law should not be viewed as a mandatory rule. If two foreigners in a country request the application of their governing state's law and the laws of the relevant state permit the application of foreign law, then the governing body or individuals in the relevant case should not delve further into the details of the case. For example, if a Spanish woman and her husband have acquired French nationality and have agreed to execute a divorce in France and they wish to benefit from this newly created situation in the Spanish courts, the Spanish judge does not have the right to investigate their intent regarding the acquisition of French nationality, as they are currently French citizens, not Spanish. The Spanish court must recognize the mentioned divorce as valid and accept its legal consequences without refusing their request based on the rule against fraud against the law.

Second Theory: According to this perspective, the rule against fraud against the law is mandatory and essential and it should be upheld in all cases. In any case, where a person exploits their legal right for fraudulent purposes, resulting in the application of foreign law, the application of foreign law should be prevented due to fraud, deception and trickery and the outcome derived from the relevant act should be declared void. According to this group of legal scholars, if a Spanish woman and her husband abandon their Spanish nationality to evade the law and acquire French nationality and subsequently divorce under French law, the Spanish courts should not recognize such a divorce as valid. If the woman remarries, the new marriage should be declared void. However, if the woman and her husband abandon their Spanish nationality without any fraud or trickery and acquire French nationality and then divorce, the Spanish courts must recognize that divorce as valid. If the woman then marries another person, that marriage should be

valid and its legal consequences should be acknowledged.

In the same way that the judicial practices of several countries have accepted, this rule should be recognized as an important and mandatory rule because it guarantees the enforcement of conflict resolution rules and simultaneously serves the goal of private international law (the protection and assurance of the effects of rightful laws). Otherwise, some individuals may evade compliance with the laws of their governing state through fraud and trickery, while others may find themselves subject to the regulations of domestic laws. For instance, if the law of one country stipulates a condition for the validity of a contract, while that condition does not exist in a neighboring country, some individuals may seek to evade the law of their governing state by going to the neighboring country, organizing their documents there and placing themselves under a rule where the conditions for the validity of the contract are governed by the law of the place of contract formation.

Thus, to ensure that the laws of a country do not remain ineffective and that individuals cannot evade the rightful laws of a country through fraudulent means, the conditions of the rule against fraud against the law must be precisely considered. (Abdullah N. a.-D., 2017).

Second Section: The Relationship between the Rule Against Fraud Against the Law and Public Order

The relationship between the rule against fraud against the law and public order is so close that some legal scholars believe that the rule against fraud is a factor of public order and not an independent rule. French jurist Barten states that the rule against fraud is a component of public order: "Whenever the application of foreign law in a country causes social harm, it must be prevented. Social harm can be conceived in two forms: one is in the form of opposition to the public order of the internal community and the second is creating a situation that results in evasion of the internal law and placing

oneself under foreign law."

In the first case, the application of foreign law is legally in conflict with the public order of a country therefore it must be prevented. For example, if an Afghan woman and her husband seek divorce in a Spanish court, the Spanish court may refuse to issue such a ruling because it conflicts with Spain's internal public order.

In the second case, foreign law may not inherently and legally conflict with the public order of the internal community, but it may practically apply to individuals who, in terms of rights, should not be subject to foreign law. Therefore, its application must be prevented. For instance, if a Spanish woman and her husband evade their governing law (which prohibits divorce between husband and wife) by first acquiring Afghan nationality and then divorcing, Afghan law would not apply to them in terms of rights because this act would be considered in conflict with Spain's public order.

Thus, according to Barten, the non-application of foreign law to prevent fraud is a form of applying the rule of public order, in that foreign law is not applied due to its conflict with public order. However, in the rule against fraud, the application of foreign law is not specifically determined; rather, it involves avoiding the acceptance of a law that is ordinarily applicable when fraud and trickery are involved and its application is then prevented due to its conflict with public order and social interests.

Although the rules against fraud and public order are similar in some respects, they are not the same and should be distinguished from each other. In public order, the text and content of foreign jurisdictional law are at issue and public order is only relevant when the text and content of foreign law conflict with domestic law. Additionally, the goal of public order is to defend a country's legal regulations against the chaos that may arise from the application of foreign law. In contrast, the rule against fraud addresses the evasion of individuals from the law that should apply to them in terms of rights

and therefore, it must prevent the application of foreign law. Thus, the rule against fraud is not applicable merely because the text and content of foreign law conflict with domestic law, but rather because individuals have created a pathway to the application of foreign law through fraud and trickery. This distinction can be recognized in cases of fraud against the law (fraudulent nationality). For example, suppose a Spanish woman and her husband evade their governing law to execute a divorce and acquire French nationality. In that case, they can successfully implement the divorce in France and the Spanish courts may refuse to apply French law, which would ordinarily apply.

The second distinction between the rule against fraud and public order is that the application of the rule against fraud is conceivable, whereas utilizing public order in favor of foreign law is meaningless. As previously stated, public order has national aspects and is only relevant for the defense of the legal regulations of the judge's governing state.

Therefore, based on the above arguments, the rule against fraud is not a component of public order and should be considered an independent rule of private international law. As mentioned, this rule also ensures the enforcement of a country's mandatory laws. (Nasih, 2016).

Second Topic: Conditions for the Application of the Rule Against Fraud

For the rule against fraud to be enforceable at the international level, two conditions are necessary: first, that fraud has occurred (the existence of fraud); and second, that there is no other means to prevent the application of foreign law (the subsidiary and compensatory aspects of the rule).

First Condition: Existence of Fraud

At the international level, fraud against the law means that a person uses the means legally at their disposal to achieve a fraudulent objective, in other words, fraud against the law occurs when a person evades the law of

their governing state through fraudulent means and benefits from foreign law as a result. It should be noted that in private international law, fraud against the law differs from fraud in domestic law. In domestic law, fraud occurs when an individual acts with the intent to evade a loan or deceives the other party in a transaction. In contrast, in private international law, fraud means that an individual evades the enforcement of the law that holds rightful legal status against them and considers its provisions in conflict with their interests, thus placing themselves under a law whose provisions align with their interests. Therefore, fraud occurs when a person intentionally evades the regulations of their governing law and falls under the provisions of foreign law and as soon as the intent is established, fraud is recognized.

A prominent example related to the rule against fraud is the fraudulent change of nationality and in this regard, the most famous case is that of Dubo Bauffremont regarding divorce, which gained a special status and reputation throughout Europe.

The case unfolded as follows: Dubo Bauffremont, a Belgian woman, married a French man named Prince Dubo Bauffremont. However, after some time, they announced their separation and sought to completely end their marital relationship and obtain a divorce. At that time, before 1884, divorce was legally prohibited in France. To obtain a divorce from Prince Dubo Bauffremont, she acquired German nationality in 1875 and approached a German court for divorce. In the same year, she managed to obtain a divorce decree from the German court and shortly after the issuance of the divorce decree, she married Prince Bisco in Romania and returned to France with her second husband. Her first husband claimed that the divorce case was invalid and filed a lawsuit against her for marital rights. The French court ultimately declared the divorce and the second marriage invalid, reasoning that she had fraudulently abandoned her French nationality to acquire German nationality, thus evading the laws of her

governing state. In this case, the proximity of the date of acquiring German nationality to the date of approaching the German court for divorce, as well as the proximity of the date of issuing the divorce decree to the date of the second marriage, were considered evidence of fraud. The essence of this case indicates that Dubo Bauffremont's goal in acquiring German nationality was not to remain a German citizen but rather to obtain a divorce from Prince Dubo Bauffremont and marry Prince Bisco. After achieving this goal, she abandoned her German nationality.

The application of the rule against fraud can also be realized in the fraudulent change of residence. (Seljuqi, 1998).

Second Condition: The Subsidiary and Compensatory Aspects of the Rule

The rule against fraud is a means through which we can prevent the application of foreign law. Therefore, this rule should only be utilized when no other means exist. In other words, the subsidiary and compensatory aspects of the rule against fraud mean that "whenever another means exists to prevent the application of foreign law, in this case, reliance on this rule is not necessary."

To clarify this issue, we will provide examples for each case separately (the first case where another means exists to prevent the application of foreign law and the second case where no other means exists to prevent the application of foreign law).

First Example: When another means exists to prevent the application of foreign law: An Afghan Muslim woman wishes to marry a non-Muslim French man (contrary to Afghan law, which prohibits Muslim women from marrying non-Muslims) and evades the law of her governing state (Afghanistan) by going to France to marry a non-Muslim man. If the effects of this marriage are claimed in Afghan courts, her request should be rejected and the marriage should be declared void (even though the issue of fraud against the law is raised here, the marriage must be declared void based on Article 92

of Afghanistan's 1355 Civil Code). Therefore, there is no need for the rule against fraud in this case (Abdullah N. a.-D., 2017).

Second Example: When no other means exist to prevent the application of the rule against fraud: If we assume in the above example that the Afghan Muslim woman abandons her Afghan nationality to evade the law and acquires French nationality, then returns to Afghanistan, the Afghan courts will apply the rule against fraud because, in this scenario, the short path to resolving the issue is indeed this rule.

Third Topic: Legal Effects of the Rule Against Fraud Against the Law

The legal effects of the rule against fraud can be discussed and studied from three perspectives:

1. From the perspective of the state from which the law has been evaded;
2. From the perspective of the state whose law the interested party is requesting to be applied;
3. From the perspective of a third state.

First Section: The State from Which the Law Has Been Evaded

From the perspective of this state, the rule against fraud cannot be applied in all cases and situations; rather, the effects of this rule can only be utilized to the extent necessary to prevent fraud. For example, if the abandonment and change of nationality is done to evade the prohibition of marriage (as in the previous example where a Muslim woman is prohibited from marrying a non-Muslim), as soon as the court declares the non-application of foreign law regarding the marriage and consequently considers the marriage contract void, that is sufficient. There is no need to further discuss the change of nationality that was obtained according to principles, nor to declare it void. In the case of Dubo Bauffremont, she abandoned her French nationality due to the prohibition of divorce in French law and acquired German nationality. Therefore, the French court applied

the rule against fraud to the extent necessary to prevent fraud and did not confirm the invalidity of her nationality. (Al-Masi, 2004).

Second Section: The State whose Law the Interested Party Requests to Be Applied

Although international law requires respect for the regulations of this state, which may reject the claim of the fraudulent party based on the rule against fraud, courts are compelled to apply the laws of their governing state in such a way that the mentioned rule is applied when it is in favor of foreign law, while in terms of rights, this rule should only apply in cases of preventing fraud.

They generally justify their actions by stating that the rule against fraud guarantees the enforcement of mandatory national laws and judges can only prevent fraud against their governing laws and cannot prevent fraud against foreign laws.

Third Section: The Legal Effects from the Perspective of a Third State

A third state, which is not considered an interested party in preventing fraud, meaning that it has neither evaded its governing law for fraud nor requested the application of its law (is not involved in the rule against fraud), will consider the actual status and condition of the concerned person and will rule accordingly. This means that the new situation must be established and it will not delve into further details, such as the intent or purpose of the concerned individual. For example, if the case of Mr. and Mrs. Dubo Bauffremont had been tried in a third state, the court would not have ruled on the invalidity of their divorce because the court of the third state would have considered their actual status as German citizens and would not have applied the law of their governing state (France) to them (Nasih, 2016).

DISCUSSION

When codified laws emerged in the world, legal scholars began to investigate why the laws of one country are

applied in another country. Over time, four theories have developed in this regard: the theory of acquired rights, the theory of acceptance of law, the theory of representation and the theory of international courtesy. The theory of acquired rights, which is also known as the Anglo-American theory, posits that a right established in a specific place based on certain conditions should be respected and recognized by the courts of other countries. The aim here is to show respect for the law that created that right. According to this theory, rights established in other countries should be applied by the judge of the court's jurisdiction, provided they were created based on the law of the governing state and per all relevant conditions set by that country. However, this theory of rights is considered incomplete and has faced criticism from other legal scholars. One criticism is that when acquired rights conflict with the public order of countries, foreign law will not be applied and if a ruling contrary to acquired rights is issued in the court's jurisdiction, foreign jurisdictional law will not be applied in that case. The second theory is the theory of acceptance of law, which is known in the Italian school. According to this theory, when a judge in the court's jurisdiction applies foreign law, it means that foreign law has been applied within the laws of the judge's governing state. The third theory has been developed by German and French legal scholars and is known as the theory of representation. According to this theory, foreign law should not be incorporated into the law of the court's jurisdiction but should be applied as foreign law. When permission is granted for the application of foreign law, it means that the court's jurisdiction recognizes the foreign legislator as a representative. This theory is also not free from criticism; one criticism is that countries have not established any agreements that state if the citizens of one country file a claim in another country, the law of the governing country, will be applied and recognized as a representative. Moreover, if we accept that foreign law has a representative status, then foreign

law should be applied in all matters concerning foreigners, whereas all countries have specified the conditions under which foreign law applies and outside of those specified areas, foreign law is not applied.

Finally, the fourth theory, known as the theory of international courtesy, has emerged from the Dutch school. According to this theory, countries apply the laws of other countries in their territory based on international courtesy, although there is no mandatory aspect to this. However, it should be noted that this courtesy is not considered during the application of the law; rather, it is taken into account during the law-making process, where legislators incorporate issues related to foreign law into their national laws while not allowing the application of foreign law outside of specified cases. In brief, this courtesy is not considered by judges when addressing cases, as this authority belongs solely to the legislator.

CONCLUSION

Therefore, when a judge applies foreign law in a matter, they must consider the compatibility of the relevant country's constitutional and ordinary laws and ensure that the foreign ordinary law aligns with the foreign constitutional law. If there is any doubt in this regard, the judge should seek assistance from the relevant country's competent authorities through diplomatic channels. Additionally, if interpretation of the relevant foreign law is necessary or if that law has been interpreted abroad, the judge should obtain the interpretation of the relevant foreign law or, if the law has been previously interpreted, obtain interpretative materials from the relevant country through diplomatic channels and apply them. Finally, the most important point is that if the judge obtains foreign law and is competent in the relevant matter, but it conflicts with the public order of the court's jurisdiction, then the judge will not apply the foreign law, citing that it conflicts with the public order of the court's jurisdiction.

Recommendations

After this scholarly research article, I offer the following recommendations and hope that professors, students, legislators and legal scholars in the Faculty of Law and Political Science will benefit from them in their professional and work areas.

1. It is recommended that Afghan courts exercise great caution and diligence when applying foreign law. If foreign law conflicts with Islamic Sharia, the values of Afghan society, public order and ethics, it should not be applied. Additionally, Afghan courts should apply the rule against fraud against the law against individuals who evade Afghan laws because they are detrimental to them and request the application of foreign law.
2. Since obstacles to the application of foreign law are an important topic in private international law, legal scholars, experts, and authors should conduct further writings and research to clarify this issue.

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