

COURT OF CASSATION'S CONTROL OVER INTERPRETATION OF RULES OF THE FOREIGN LAW BY THE NATIONAL JUDGE ACCORDING TO THE JORDANIAN LEGISLATION

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ABSTRACT: *This study examines court of cassation's control over interpretation of rules of the foreign law by the national judge. The study concludes that some legal systems prohibit control over interpretation of the legal provisions by the high court except in some exceptional circumstances like causation. Other legal systems provide for control over interpretation of rules of the foreign law by the national judge. These systems provide for such control either expressly in legislation or through applications of the high court that evidently indicate to this principle. In this context, the Jordanian legislator does not expressly require permissibility of imposing control of the Jordanian court of cassation over rules of the foreign law by the Jordanian trial judge. Further, some decisions issued by court of cassation indicate that the foreign law will maintain its legal capacity before the Jordanian courts and that it should be dealt with equally as the Jordanian law.*

KEYWORDS: *court of Cassation, public system, interpretation, foreign rules, national judge*

INTRODUCTION

The law was originally emerged from the basic human need for regulating the individuals' behavior in society in terms of definition of mutual rights and obligations, regulation of the human transactions and prevention of any conflicts in such transactions, recognition and protection of the individual and collective interests, where the collective interests must take preference over the individual interests. Law must be general, impartial and binding. To this end, the legal provisions must be drafted accurately and evidently and they should be comprehensive and applicable in the changing temporal conditions.

Upon the foregoing, the legal provisions should be basically clear and accurate so that they denote the legislator's intent through legal provision phrase or sentence. However, the legal provision wording could be ambiguous or inaccurate, which requires exercise of judgment in

interpreting such provisions in order to understand the exact intent of the legislator so that the legal rule is soundly applied.

Thus, interpretation of law is one of the significant and basic topics of the legal sciences. Based on such significance, many rules that govern interpretation have been developed, so some types of interpretation such as legislative, judicial and juristic interpretations, in addition to the approaches and schools of interpretation have been emerged.

While the trial judge interprets the legal provisions at his own discretion depending on his own understanding, such interpretation is basically a legal issue that is controlled by the court of cassation, since the error in interpretation will definitely lead to erring in applying or contradicting the legal rule. Hence, it is not sufficient for the trial judge to adopt a certain method of interpretation; rather approval of the court of cassation must be obtained, where it controls the issue either by confirming the interpretation used by the trial judge or disproving such interpretation after defining deficiencies therein.

In controlling interpretation of the law, court of cassation must take the following matters into account: differentiation between interpretation of law and interpretation of facts and disposals, where it does not have jurisdiction to control interpretation of facts exercised by the trial judge, as well as it is required to control the interpretation made by the trial judge and not the interpretation made by litigants for the same legal rule. Further, court of cassation should ascertain that the legal rule, subject of interpretation, is ambiguous, since if the legal rule is clear, interpretation does not exist.

In exercising control over interpretation of the rules of law by the trial judge, court of cassation intends to ensure unity of interpretation of the legal rules, where it disapproves the provisions that impair meaning of the legal rule since they contradict rules of interpretation. Misinterpretation of the legal rule by the trial judge assumes that the legal rule, subject of interpretation, is ambiguous and disputed; i.e. it could be applied in different ways, where the trial judge adopts a certain interpretation of the respective rule, and court of cassation finds that such interpretation does not agree with the real meaning of such rule. In principle, it does not relate to contradiction with literalism but with spirit of the legal provision, and this is the difference between misinterpretation of the law and violation of the law. Misinterpretation occurs when the trial judge tries to reach the meaning of the legal concepts contained in hypotheses of the legal rule, or when he tries to interpret the solution established in the legal rule. Error is not considered unless misinterpretation leads to a wrong legal solution to the dispute.¹

While interpretation of the national legal rules is not problematic, it is different when it comes to interpret rules of the foreign law. If a dispute in a legal relationship involving a foreign element is lodged with the national judge, the legislative jurisdiction in this case will be vested in one or more foreign laws. The situation of conflict of legislative jurisdiction has raised many problems in the scope of the private international law; notably nature of the foreign law, and in determination of authority of the national judge to apply the foreign law in terms of looking for such law and of proving its content, interpretation and application, as well as the extent to which such authority is subject to the judicial control. The position of legal systems has differed from a country to another in finding solutions to these problems.

¹Zarqoun Nour Eddin, Authority of Trial Judge in Choosing an Appropriate Legal Rule to Settle the Dispute, research published in Books of Politics and Law Journal, QasidiMarbah University, Algeria, volume 8, 2013, p.9.

This study examines one of these problems, namely court of cassation's control over interpretation of rules of the foreign law by the national judge.

Significance of the Study:

Significance of this study stems from the importance of interpreting the legal rules in general. In applying the legal rules, the judge must interpret such rules to remove any ambiguity so that he can settle the dispute lodged with him. This significance applies to the rules of foreign law, where the national judge should understand concept of the foreign substantive legal rule and remove any ambiguity in it so that he can soundly apply it to the respective dispute and settle such dispute where fact is established and justice is achieved.

Problem of the Study

If interpretation of the national legal rules is mandatory and is subject to control of court of cassation, does this apply to interpretation of rules of the foreign law? This issue is contentious among legal systems of countries. This controversy stems from difference of legal systems of countries about proving content, interpretation and application of the foreign law. This is due to the different positions on status of the foreign legal rules, where proving the foreign law is one of the most accurate issues in the international private law. This issue arises when applying a foreign law to a dispute in a relationship involving a foreign element by the national judge with a view to resolving such dispute. If rules of attribution indicate that the applicable law is the national law, then the national judge will not face any problem or difficulty in applying the law since he is fully familiar with the national law. However, if rules of attribution indicate to applying of a foreign law, then the problem of proving such foreign law will appear, due to lack of sufficient knowledge of the foreign law by the judge.

The position of the legal systems on proving the rules of foreign law and the legal nature of these rules is divided into three trends: the trend which considers the rules of foreign law a matter of fact, the trend that considers the rules of foreign law a matter of law, and a mixed trend (compromise). Thus, the main problem that this study seeks to examine is to what extent the national judge is committed to interpreting the foreign substantive legal rules and, if this is the case, to what extent such interpretation is subject to control of court of cassation. To achieve objectives of this study, the following important questions will answered:

- I. What is the effect of considering the law as a matter of fact on court of cassations' control over interpretation of rules of the foreign law?
- II. What is the effect of considering the law as a matter of law on court of cassations' control over interpretation of rules of the foreign law?

METHODOLOGY

The special nature of this study requires use of these two scientific research methods: A Descriptive Analytical Method; to describe and analyze the legal provisions, jurisprudence and juristic opinions in connection with subject of the study in order to learn about court of cassation's control over interpretation of rules of the foreign law by the national judge. In addition this research uses a Comparative Method; to compare the legal systems that are closely associated with our legal system - the Latin system - as in France and Egypt in particular, and other legal systems that have a distinct view of the subject, in order to reach results that commensurate with the specificity of this subject.

In order to achieve objectives of study and answer its questions, this study is divided into two sections; in which this first section will discuss the issues of controlling over interpretation of the foreign legal rules as a matter of fact (section one). This part of research two issues will be discussed; the rejection of control over interpretation of the foreign substantive legal rules, and the exceptions to rejection of control over interpretation of the foreign substantive legal rules. Section two will discuss the matter of control over interpretation of the foreign legal rules as a matter of law by discussing the position of the legal systems in the comparative countries on imposition of control over interpretation of rules of the foreign law, and position of the Jordanian legal system on imposition of control over interpretation of rules of the foreign law in two separate subsections.

Control Over Interpretation of the Foreign Legal Rules as A Matter of Fact

Supporters of this trend believe that the rules of the foreign law are a matter of fact whose burden of proof lies on the litigant, and if he does not adhere to it, it will be deemed to be waived. Supporters of this trend argue that every law contains two elements; element of order (immaterial element, the execution order), and element of content (content related material element) which is the actual element in the legal rule. They also argue that the foreign law lacks the element of order or compulsion when it is applied before the national court. In this case, only the element of content remains and it is insufficient to keep element of the law. Further, requiring the judge to know and to be familiar with all foreign laws is impossible, and that the conflict rules are not of the public order.²

According to this trend, which believes that the rules of foreign law are mere a matter of fact, interpretation of the foreign legal rules is not controlled by the court of cassation, since it is a court of law and not a court of facts, where interpretation of law is one of the discretionary powers of the trial court that is out of control of the court of cassation. However, rejection of court of cassation's control over interpretation of the foreign legal rules is limited according to this trend, where there are exceptional cases that are excluded from this general principle and permit court of cassation's³ control over interpretation of the foreign legal rules. This will be detailed in the following two branches.

Rejection of control over interpretation of rules of the foreign law

The French Court of Cassation has decided to reject control over interpretation of the rules of foreign law. It has established a principle that the interpretation of the rules of foreign law falls under the absolute discretion of the trial court⁴. This rejection is accepted on the basis that the French Court of Cassation considers, in its decision issued in 1938 in the case (DE MARCI DELLA COSTA)⁵, that the rule of referral is a foreign rule.

This rejection appeared in many forms, where Court of Cassation, in its decision issued on 13.06.1960, rejected the appeal that criticized the trial court for distortion of the foreign law since distortion or deformation of the law was not controversial. Further, in its decisions issued

²Mohammad Walid Masri, Wajeez in the Private International Law, edition 1, 2002, Dar Hamed for Publication and Distribution, Amman, p.251.

³Ukasha Seham, Foreign Law, Proof and Interpretation, a master thesis, M'Hamed Bougara University of Boumerdés, Algeria, 2009/2010, p.65.

⁴Ukasha Seham, Ibid, p.66.

⁵ A decision published in Ukasha Seham, Ibid, pp.66-67.

on 11.07.1961 and 15.06.1982, the court of cassation decided that interpretation of rules of the foreign law is subject to the sole discretionary power of the trial judge.⁶

Judicial powers of some countries (like, Germany, Spain, Netherlands, Romania, Tunisia, Morocco and Lebanon) have adopted rejection of control over interpretation of rules of the foreign law, which has been adopted by the French court of cassation. This approach has been adopted by the German legislator in Article 549 of the German Procedural Code, which prohibits acceptance of the appeal for amendment save when a German legal rule is violated. In other words, the high court may not control application and interpretation of the foreign law. This principle has been confirmed by the German high court in its decision dated 03.10.1956, which states that the error made by the court of first instance or the court of appeal in interpretation of the foreign law does not give the amendment power to the high court.⁷

The Lebanese judiciary is an example of the Arab judiciary that prohibits control over interpretation of the rules of foreign law. The Lebanese Court of Cassation decided that: the misinterpretation that allows litigants to appeal decision before the high court is the interpretation of the Lebanese law and not interpretation of the foreign law⁸. The courts rejecting control over interpretation of the legal rules have built this opinion on two controls; the first is the nature of foreign law, and the second is the function of the Court of Cassation.⁹

The French jurisprudence supported trend of the French court of cassation when it rejected its control over interpretation of rules of the foreign law. However, in this support, it did not rely on the consideration that the rules of the foreign law are a matter of fact, but on other considerations related to the principle that governs their regulation and defines their functions, as well as practical considerations and the difficulties associated with such control¹⁰. This jurisprudential trend presents the following arguments that support its position:

Theoretical Argument:

The function of the court of cassation is to maintain unity of application of the jurisprudence of the French law and regulate its provisions and not to regulate the provisions of the foreign law, since this is one of the functions of the foreign court of cassation. If the court of cassation starts to exercise function of interpretation of the foreign law, then it performs a function that is irrelevant to its own functions.¹¹ In this context, part of Jurists rely on the role of the French court of cassation which is defined in the Law of Court of Cassation of 1790, where it confines its function to the express violation of the French Law¹², where Article 3 of the said Law provides that the court of cassation is entitled to control every express violation of the law, i.e. the French Law.¹³

⁶See Hamzeh Qattal, Role of Judge in Application of the Foreign Law, in the Algerian Law and Comparative Law, PhD dissertation, University of Algeria, 2010, pp.255-256.

⁷Ukasha Seham, Ibid, p.70.

⁸Ukasha Seham, Ibid, p.67.

⁹Said Yusuf Bustani, Private International Law, edition 1, 2004, Manshourat Halabi Hoqoqia, Beirut, p.2012.

¹⁰Said Yusuf Bustani, Ibid. p.2013.

¹¹Hamzeh Qattal, Ibid, p.252.

¹²Ukasha Seham, Ibid, p.69.

¹³Said Yusuf Bustani, Ibid. p.2013

Practical Argument

This argument is based on the idea that controlling interpretation of rules of the foreign law by the court of cassation requires that it should look for content of the foreign law, which is out of its jurisdiction, and it may cause the court to err and to deviate from understanding the real content of the foreign law, which may affect its reputation. Further, this task is hard and tiring.¹⁴

This jurisprudential trend, which supports rejection of control over interpretation of rules of the foreign law, has been criticized. The jurisprudential trend criticizing this trend thinks that the function of the court of cassation is unifying the prevailing judicial solutions in the state, which is supposed to extend its control over the interpretation of both national and foreign legal rules. On the other hand, if the interpretation of foreign law is not an easy task, the development of comparative legal studies has facilitated this task. In addition, the control exercised by the court of cassation would not lead to conflict or prejudice the judiciary, rather lack of control over the trial judges and their interpretation of the foreign law, at their own discretion, would lead to conflict and prejudice the court of cassation.¹⁵

Exceptions to rejection of control over interpretation of rules of the foreign law

In the light of criticism of the French judiciary's approach for adopting the principle that rejects control over interpretation of the foreign substantive legal rules by the trial judge and denies giving him the full freedom to interpret rules of the foreign law without being controlled by the court of cassation on the basis that such rules are a matter of fact and they do not fall under control of court of cassation, the court of cassation renounced this rigorous approach where it permitted the control in limited cases as an exception to the general principle that rejects control. These exceptional cases include:

Permitting control over the interpretation of the rules of foreign law through the idea of distortion:

The case of distortion, misrepresentation or deformation of the rules of foreign law is one of the exceptions created by the French court of cassation to the principle of control rejection. This idea means that the trial judge ignores the evident and specified meaning of the provisions of the foreign law¹⁶, and that the idea of distortion is taken from the contracts and documents domain, where the French judiciary ruled that interpretation of contracts is subject to the sole discretion of the trial judge which is out of control of the court of cassation unless conditions of a contract are general and abstract as in the model contracts and insurance policies. If distortion occurs when a trial judge deviates from the clear and specified meaning of one of conditions of the contract without sufficient causation, then such distortion is subject to control of the court of cassation. Hence, the French court of cassation deviates from the principle of lack of control over interpretation of contracts if the trial judge deviates from the clear and express meaning of the conditions of the contract under the guise of interpretation, since it deforms will of the contracting parties and ignores the provisions of the contract, which violates Article 1134 of the French Civil Law, and this requires to make decision of the trial court subject to control of the court of cassation.¹⁷

¹⁴Hamzeh Qattal, Ibid, p.252.

¹⁵Hamzeh Qattal, Ibid, pp.253-254.

¹⁶Said Yusuf Bustani, Ibid. p.2014

¹⁷Ukasha Seham, Ibid, p.74.

The French Court of Cassation adopted the idea of distortion for the first time in its decision dated November 21, 1961 in the case of *Monteverho*, which overturned a judgment of the trial, where the trial judge had ignored and distorted the clear meaning of the foreign legislative document. This was confirmed by the French Court of Cassation in the decision issued on 1/7/1997 in the case of *Africa Tours*, which overturned the judgment of the trial judge for ignoring the literal meaning of Article 1380 of the Senegalese Civil and Commercial Obligations Act, and suggested the same interpretation given to Article (244) of the French Civil Code, despite the differences in the wording of the texts and their inconsistency and without reference to any other sources in Senegalese law¹⁸. While the Court of Cassation relied, in its control, on Article 1134 of the French Civil Code in the event that the subject judge disregards the foreign law submitted as a case law, it retracted this Article and based its rule on Article 3, based on the violation of the French Support Rule, where distortion of the foreign law indirectly leads to breach of the rule of attribution and this is what was taken by the Court of Cassation as well in the case (*Amoswa*)¹⁹.

In its decision issued on 24.02.2006, the French Court of Cassation reconfirmed this exception, where the trial judge should determine the legislative, judicial and customary rules and the appropriate interpretation of them, except distortion of the foreign law itself. The court of cassation overturns the decision in question, which deforms the clear and precise meaning of a foreign legislative text.²⁰

The French jurisprudence supported position of the court of cassation, but they disagreed about the nature of this law. The jurisprudence, which supports the idea that the foreign law is a matter of fact, supported the court of cassation on the basis of similarity between the foreign law and contracts. The jurisprudential trend, which supports the idea of treating the foreign law on the grounds that it maintains its legal capacity before the French judiciary, found that the approach of the Court of Cassation is a step towards opening the way for starting control over of foreign law.²¹

While jurisprudence supported approach of the French Court of Cassation, they disagreed about limits of control that can be exercised by the court of cassation. Some jurists said that control over distortion of the foreign law is extension of control of distortion used in contracts, where it is determined by the cases in which the trial court deviates from the exact meaning of the respective rule whose text is submitted to the court by the parties to dispute. Other jurists believe that narrowing control of distortion and confining it to the documents of the case would reduce its effectiveness, and lead to conflict with the proper meaning of the rules of foreign law as interpreted by judges in its own country. According to this juristic opinion, control of distortion is similar to control of interpretation.²²

Having verified the said decisions issued by the French court of cassation, whether with respect to contracts or the foreign law, we find that the said court has developed a criterion to differentiate between the matters that fall under its control and those out of its control, namely the evident contractual condition or the evident foreign legal provision. If such evident

¹⁸Hamzeh Qattal, Ibid, p.261.

¹⁹Ukasha Seham, Ibid, p.75.

²⁰Hamzeh Qattal, Ibid, p.261.

²¹Ukasha Seham, Ibid, p.74

²²Ukasha Seham, Ibid, p.74

provision or condition is distorted by the trial judge, then such distortion is subject to control. By means of a contrario, if the contractual condition or the foreign provision is ambiguous, the interpretation of either of them by the trial judge is not subject to control of the court of cassation. As a result, if the trial judge deviates from the meaning when he interprets an ambiguous foreign legal provision, then such interpretation will not be subject to control of the court of cassation.²³

The difficulty lies in differentiation between the clear and ambiguous foreign provisions. Hence, part of jurisprudence argues that the aforementioned criterion developed by the French court of cassation is not built on a sound basis, since when the ambiguous contractual provision is disputed, it will be interpreted by the trial judge. In this case, the trial judge tries to know intent of contracting parties depending on the realistic circumstances associated with formation of the contract, and this does not fall under control of the French court of cassation. It cannot be said that the meaning of the contract is probably clear, since Article 1156 of the French Civil Law provides expressly for necessity of seeking intent of the contracting parties without sticking to the linguistic meaning of the contract. The legislator looks at the clear and unclear contractual conditions equally. There may be a clear expression, but, it, according to the contracting parties, involves a meaning that contradicts the evident meaning. Furthermore, the clear condition might contradict the remaining conditions, which requires the judge to seek the actual intent of the contracting parties in both cases.²⁴

It is different for the foreign law; it is difficult to differentiate between its clear and ambiguous provisions. Text of the foreign law is only one of the components of the foreign legal system in its entirety. It can only be explained by reference to all the components of this system, which represent the foreign legal rules, on the one hand, and the jurisprudence of the foreign judiciary and the prevailing principles on the other hand. Therefore, it seems risky to take the appearance of the foreign text as a criterion of control.²⁵

Another part of jurisprudence argues that criterion of differentiation in the permissible control over distortion is determined only in the case documents, where control over distortion can only extend if the case contains the legislative document to which appeal is attributed and which has been distorted by the trial court. In this case, distortion of the foreign law is similar to deformation of contracts and pleading documents, where the submitted documents are only controlled. Supporters of this trend suggest the need for distinguishing between that control over distortion and control over interpretation, where control over interpretation is exercised upon the foreign laws, while control over distortion is only exercised on the case documents whether they contain an agreement or a foreign law.²⁶

In sum, the jurisprudential opinions mentioned above erred in differentiation between ambiguity and clarity, and between control over interpretation and control over distortion or deformation. It seems also that the French court of cassation has not imposed its control through distortion of the legislative document, which drove some jurists to say that control over distortion reflects the discretionary power of the court of cassation in imposing its control over interpretation in some circumstances. Under the guise of the idea of distortion, the court of

²³Ukasha Seham, Ibid, p.75.

²⁴Ukasha Seham, Ibid, pp.75-76.

²⁵Ukasha Seham, Ibid, p.76.

²⁶Ukasha Seham, Ibid, p.76.

cassation has exercised its control over interpretation of the foreign law. This distortion is measured according to the foreign law in the way it has been presented before the trial court whether in official or unofficial manner. In its decision in *Monteverho's* case, the French court of cassation relied on Article 1134. As to distortion of the foreign law, it should be viewed through abuse of the rules of attribution, or through a broader view, namely distortion of document theory.²⁷

In the French court of cassation's decision in *Monteverho's* case, the legislative document was distorted by the trial court in a successful separation process between the legislative document and the legal system to which it belongs. As a result, it is required to apply the foreign law in its integrated scope, where the legislative document is not separated from such legal system. This has been rectified by the French judiciary through expanding scope of control over distortion exercised by the court in a manner that respects the moral integration of the foreign law, provided that the legislative document should reflect positivism of the foreign law.²⁸

Control over Causation

Causation means the realistic or legal grounds on which a trial court builds his decision. This control is a formal type. Through the idea of causation, the French court of cassation controls indirectly the proper application and interpretation of the foreign law. The court of cassation has concluded that the decision of the trial court is subject to appeal if its causation of its decision is insufficient²⁹. Decision of the trial court can be appealed for insufficient causation if a legislative document is submitted in the case to prove content of the foreign law, and that such legislation can be interpreted in different ways in accordance with its legal system, where the trial judge can choose one of the interpretations, and here he has to cause it under the challenge of appeal on the grounds of causation.³⁰

It is envisaged that the parties to the case submit a document that contains a certain interpretation of the applicable foreign law and that such document is ignored by the trial judge, so he is required to sufficiently cause such ignorance under the challenge of appeal. On the other hand, litigants might not submit any legislative document to interpret the applicable foreign law, then the judge must interpret such law, and the interpretation reached should be caused by the trial judge, otherwise, his decision will involve lack of causation. This was confirmed by the court of cassation in its decision issued on 10.10.1078.³¹

The approach of the French Court of Cassation is consistent with the approach of some Arab countries such as the Egyptian Court of Cassation, the Lebanese Court of Cassation³² and the Supreme Council of Morocco, which is confined to matters of personal status.³³

Control Over Interpretation of the Foreign Legal Rules as A Matter of Law

Supporters of this trend argue that the foreign law maintains its legal capacity and it should be dealt with as the national law on the same footing. However, they have differed on the basis of

²⁷Ukasha Seham, *Ibid*, p.78.

²⁸Ukasha Seham, *Ibid*, p.78.

²⁹Ukasha Seham, *Ibid*, pp.79-81.

³⁰Hamzeh Qattal, *Ibid*, p.258.

³¹Hamzeh Qattal, *Ibid*, p.258

³²See decision No. 56 dated 10.4.1971, and decision No. 32/93 dated 2.7.1969 of the Lebanese Court of Cassation, Hamzeh Qattal, *Ibid*, footnote 5, p.263.

³³Said Yusuf Bustani, *ibid*, p.213.

the application of foreign law. Some of them have built it on the idea of integration that is based on the idea that the foreign law becomes binding after being integrated into the national law. When rules of attribution indicate to jurisdiction of the foreign law, they integrate it at the same time into the national law. Some jurists have built it on the theory of authorization, i.e. The national legislator authorizes, under the rules of attribution, legislators of other countries to establish a legal rule that suits the respective dispute.³⁴

According to this trend, the national judge is required to deal with this law as he deals with the national law in terms of application and interpretation. If the national judge errors in application or interpretation of the foreign substantive legal rules under rules of attribution, then such error is subject to control of the court of cassation³⁵. Hence, according to this trend, interpretation of the foreign substantive legal rules should be controlled. This matter has been agreed unanimously by majority of jurists of the private international law based on reasonable arguments. This will be explained in the following two branches.

Position of the legal systems in the comparative countries on imposition of control over interpretation of rules of the foreign law

Imposition of control over interpretation of rules of foreign law is one of the prevailing principles in most countries. This principle has been applied by these countries based on various reasons. Some countries have applied this principle on the basis that nature of judiciary permits such control like the English judiciary. Other countries, like Italy, Egypt and UAE, have applied this principle based on the idea that generality of the legal provision permits such control, while some countries have relied on the provisions of the law³⁶ to decide this issue. Jurists have presented several arguments that support the idea of imposition of control over interpretation of rules of the foreign law.

Position of comparative judiciary on imposition of control over interpretation of rules of the foreign law:

In England, the high court considers that its role is not only confined to control the lower courts in proper application of the law, rather it can reconsider assessment of facts. It therefore can review all elements of the legal and realistic case, and it is not prevented from examining content of rules of the foreign law. Thus, nature of the English judiciary (high court) permits such court to control application and interpretation of the law.³⁷

As to Italian Court of Cassation, nothing in the Italian law prevents imposing control of the court of cassation over application and interpretation of rules of the foreign law. It is argued that Article 360 of the Italian Procedural Code of 1940 has general and flexible wording that allows imposition of control. Thus, the Italian court of cassation exercises control over application and interpretation of the foreign law as long as such law is applicable in accordance with the Italian rules of attribution.³⁸ Moreover, the Italian jurisprudence argues that rules of the foreign law are integrated into the Italian law, and that the Italian judge, when applying the

³⁴Mohammad Walid Masri, ibdi, pp. 254-255.

³⁵Mohammad Walid Masri, ibid, p.266.

³⁶Hamzeh Qattal, Ibid, p.266

³⁷Hamzeh Qattal, Ibid, p.267

³⁸Hamzeh Qattal, Ibid, p.267

foreign law, applies the Italian rules of attribution, and they should be properly applied, otherwise, the decision issued by an Italian judge would contradict the Italian law.³⁹

Courts of Austria, the Soviet Union and Latin American countries have adopted the principle of control over the proper application and interpretation of the foreign rules based on application of provisions of (Bustamante) in the private international law, where Article 12 thereof provides that: (In any Contracting State where there is an appeal in cassation system or any other similar system, it is permissible to lodge an appeal with it for violation of the law of another Contracting State or for an error in its interpretation or application and also in the same conditions and situations of foreign law).⁴⁰

In Egypt, the Egyptian court of cassation has adopted the principle of control over the proper application and interpretation of the foreign law in several decisions, the most important of which the decision issued on 8.1.1953 which overturns the decision of the Court of Appeal for its error in the application of French law in its provisions concerning the legality of obtaining the papers that benefit the marriage, where it states: (the court should have examined defense of the appellate to state whether the means of marriage in obtaining the documents is permissible to accept them as evidence or impermissible to reject them, and then to establish its decision on results of such examination...). In this decision, the Egyptian court of cassation challenged control over interpretation of the foreign law, and it found that the court of appeal had erred in it, which caused misapplication of the foreign law.⁴¹

Part of the Egyptian jurisprudence supported approach of the court of cassation on the basis that the term " law" mentioned in Article 425 of the Egyptian Procedural Code, which defines the cases in which appeal in cassation is permitted, includes the national and foreign laws on the same footing, where the decision that errs in application or interpretation of the foreign law is appealable before the high court. On the other hand, the high court is required to unify the judicial solutions in the country. Thus, the decision of the high court, controlled by nature and duties of court of cassation, is true. Further, the lack of control leads to denying justice and undermining the Egyptian rules of attribution.⁴² Other part of the Egyptian jurisprudence suggests limitation of control since this exceeds function and capacity of the high court in addition to the difficulties faced by such court, and it suggest to confine control to exceptional circumstances and limit it to causation and distortion of the foreign law.

In this context, courts of Greece, Turkey, Morocco, Kuwait, and the United Arab Emirates have adopted the approach of the Egyptian courts.⁴³ The Laws of some countries have adopted the principle of imposition of control over interpretation of the foreign law, like Turkey and Greece, where Article 559 of the Greek Procedural Code of 1971 and the Swiss Private International Law of 1987 provide for this principle.⁴⁴

³⁹Ukasha Seham, *ibid*, p.115.

⁴⁰Ukasha Seham, *ibid*, p.115.

⁴¹Hamzeh Qattal, *ibid*, p.268.

⁴²Hesham Ali Sadeq, *Status of the Foreign Law before the National Judiciary*, MunshaatMaaref, Alexandria, 1968, p.289.

⁴³Hamzeh Qattal, *ibid*, p.269, Ukasha Seham, *ibid*, p.116.

⁴⁴Hamzeh Qattal, *ibid*, p.266.

In Tunisia, however, the Tunisian High Court used to neglect control because it does not consider it necessary to control the interpretation of the rules of foreign law. However, the Tunisian legislator has intervened and resolved this issue by an explicit provision for imposing control over the interpretation of the rules of foreign law⁴⁵, where Article 34 of the Journal of Private International Law of Tunisia provides that ... (the interpretation of foreign law is subject to the control of the Court of Appeal ...).

Position of comparative jurisprudence on imposition of control over interpretation of rules of the foreign law:

The predominant trend in jurisprudence gives a number of arguments, which support the imposition of control over the interpretation of the rules of foreign law, the most important of which is as follows:⁴⁶

Making the error in application and interpretation of the foreign law subject to control of the court of cassation is consistent with legal nature of rules of the foreign law for the following considerations. Since the rules of attribution are, in terms of application and interpretation, subject to control, this logically requires that the control will extend to application and interpretation of the foreign law as avoiding control by the high court will make control over rules of attribution useless unless it is followed by control over application and interpretation of rules of the foreign law. This is because the error in application and interpretation of rules of the foreign law is like the error in interpretation of the rules of attribution; where the proper application and interpretation of the foreign law is required for the proper implementation of the rules of attribution. Furthermore, if rules of the foreign law cross boarder of the country of such law, this does not mean that it loses the legal capacity, and this requires its proper application and interpretation. This can be guaranteed by imposition of control over the error in its application and interpretation, since such control agrees with the legal capacity of rules of the foreign law, which cannot be divested of the proper application and interpretation.

Imposition of control over the proper application and interpretation of the foreign law is a function of the high court. The function of high courts is to unify the prevailing judicial solutions in a country, and unifying application of the law through unity of judiciary. To this end, the high court is required to impose its control over interpretation of the foreign law, whether national or foreign. It would be groundless to argue that such control is confined to the national law, where reputation of judiciary beyond border of its country requires limitation of a trial judge's authority in application and interpretation of the foreign law. This will not cause conflict of provisions, which lead eroding confidence in the national judiciary, and this discretionary power cannot be reduced except by imposition of control over the proper application and interpretation of the foreign law.

If the high court fails to control the proper application and interpretation of the foreign law referred to in the National Attribution Rules, this will inevitably lead to a difference in the rulings issued by the trial courts. Absence of control would lead to omission of some provisions that involve misapplication of the foreign law to deviate it from its actual meaning, which may lead to distort and deform such law; this is indeed not only misapplication of the foreign law but also misapplication of the national low. This indicates to disagreement among decisions of

⁴⁵Ukasha Seham, ibdi, p.116.

⁴⁶Hamzeh Qattal, ibid, pp.164-266, Ukasha Seham, ibid, pp.122-126.

the national courts and lack of unity of the national judiciary. This matter cannot be ignored or avoided except by imposition of control to ensure unity of the national judiciary.

On the other hand, if a trial judge is required to seek content of the foreign law using all legal means, and to prove, apply and interpret such law, it is therefore most appropriate that the high court should undertake this task since it is more experienced and knowledgeable. Arguing that imposition of control over interpretation of the foreign law by the high court is beyond its capacity due to associated difficulties, there is no doubt that there are difficulties but they are manageable, especially in presence of studies centers specialized in the comparative law, as well as making use of the experts who are specialized in the foreign law and the concerned parties like diplomats, politicians and parties to the dispute.

Position of the Jordanian legal system on imposition of control over interpretation of rules of the foreign law

Indeed, the Jordanian court of cassation's control over interpretation of rules of the foreign law as mentioned in the Jordanian rules of attribution cannot be examined before demonstrating how the Jordanian legal system views nature of rules of the foreign law in terms of whether they are just facts or they have their legal capacity before the Jordanian judiciary. This requires explaining position of the Jordanian legal system on proving content of the foreign law. Interpretation of the legal rules is associated with their application and they cannot be separated, since interpretation of a legal rule is required for its application. Hence, position of the Jordanian legislation, judiciary and jurisprudence will be examined as follows:

Position of the Jordanian Legislator

The Jordanian legislator does not expressly indicate to nature of rules of the foreign law not does he evidently indicate to his position on proving content of the foreign law or how it is interpreted. Rather, the legislator has established a set of rules of attribution in Articles (11-29) of the Jordanian Civil Code, which indicate to the law applicable to disputes in a legal relationship involving a foreign element.

As to proving content of the foreign law, the Jordanian legislator has not developed legal provisions that represent comprehensive solutions for the problems raised by this subject. Proving the foreign law is mentioned in a single provision in Article 79/1 of the Jordanian Civil Procedure Code, which provides that (in application of a foreign law, the court may entrust the litigants to submit the provisions on which they rely along with an official translation).

As to the court of cassations' control over application or interpretation of the foreign law, the Jordanian legislator does not expressly indicate to such control. Rather he mentions in Article 198/1 of the Jordanian Civil Procedure Code that provisions may not be appealed unless:

A. "The appealed decision is based on violation of the law, or an error in its application of interpretation. Upon the foregoing, it is found that the Jordanian legislator has not developed express and clear legal provisions that explain the legal capacity of rules of the foreign law, or how its content can be proven or interpreted, or a court's control over application or interpretation of rules of the foreign law."

Position of the Jordanian Court of Cassation

As to determining nature of rules of the foreign law, its applicability, and who bears its burden of proof, the Jordanian court of cassation has issued many decisions, the most important of which are as follows:

It is mentioned in the decision No. 539/1983 issued by the Jordanian court of cassation "the prevailing opinion established in jurisprudence and judiciary is that the foreign law applicable before the national judiciary shall maintain its legal capacity and it is not deemed to be one of facts that the litigant is required to submit a proof for its existence, and that the national court that tries the case is not entrusted to search for the foreign law or apply it as the local law is applied".⁴⁷

In another decision, the court of cassation ruled that "as to the fifth reason for the need for proving the Kuwaiti Law by the one who relies on it other than the national law, this reason is dismissed since application of the legal rules to facts of the case is an obligation of the court whether the applicable law is foreign or national. As long as the trial court has applied this rule, then it cannot be said that its proof lies with the person who relies on the foreign law in which it is mentioned, as long as he does not deny its existence in the foreign law, since what is important is existence or non-existence of such rules in the foreign law, whether the court has obtained this law from the litigant or anyone else, or it has already existed with it, hence this appeal is dismissed."⁴⁸

The Jordanian court of cassation decided, in criticizing decision of court of appeal, not to exempt the labor case from fees due to absence of such provision in the Kuwaiti Law, where it stated "as to the first ground of cassation, we find that it is mentioned on the decision subject to cassation in accordance with the provisions of Article 96/1 of the applicable Kuwait Labor Law No. 38 of 1964 which expressly provides that " the cases filed by a labor in accordance with the provisions of this law and it is subject to summary proceedings and that it may not be tried after one year shall be exempted from fees."⁴⁹

In its decision No. 2414/2003, the Jordanian court of cassation ruled that "as to the first ground in which the appellant criticizes the court of appeal for its error in not dismissing the case for prescription, since the case is indeed a demand for completion of the price of the car. In answering this appeal, we find that Article 20/1 of the Jordanian Civil Code provides that contractual obligations shall be subject to the law of the state in which the contract is made. Whereas the contract is a cash financing agreement for buying a vehicle in installments and it was made in Kuwait, then the Kuwaiti law shall apply to this contract, and whereas Article 438 of the Kuwaiti Law provides that the limitation period is fifteen years..... and whereas the court of appeal reached this result, then its decision in this respect is consistent with the provisions of the law and this ground shall be dismissed".⁵⁰

⁴⁷Decision No. 539/1983 issued by the Jordanian court of cassation on 15/11/1983(five-judge tribunal), published on page 1505 of the Bar Association Journal on 1.1.1983.

⁴⁸Decision No. 374/2001 issued by the Jordanian court of cassation on 15.5.2001 (five-judge tribunal), published on Qestas Website. .

⁴⁹Decision No. 1137/97 issued by the Jordanian court of cassation on 26.7.1997 (five-judge tribunal), published on Qestas Website.

⁵⁰Decision No. 2414/2003 issued by the Jordanian court of cassation on 30.10.2011 (five-judge tribunal), publications of Adalah Center, see also its decision No. 2001/2265 (five-judge tribunal) on 5.9.2011, publications of Adalah Center.

In its decision No. 3090/2014, the Jordanian court of cassation ruled that “whereas this document was signed in Kuwait, the Kuwaiti law shall apply to this case in accordance with the provisions of Article 20/1 of the Jordanian Civil Code. Having reviewed Article 745 of the Kuwaiti Civil Code it is found that it defines surety-ship as "Surety-ship is a contract where a person joins his liability with that of the debtor in the performance of an obligation on him by undertaking to the creditor to discharge it should the debtor fail to do so, and where the legal disposition made by a unilateral will does not create an obligation nor it will modify or terminate an existing obligations except in the specific circumstance provided for in the law in accordance with the provisions of Article 220/1 of the Kuwaiti Civil Code. The said provisions indicate that the responsibility or surety does not exceed responsibility and obligation of the debtor.... And whereas the appellant (plaintiff) did not submit any document to prove that he has any amount from the warrantee and it is not proven that he has failed to pay the payable amounts, then the surety-ship and the acknowledgment made by the appellee are not binding... and since the court of appeal reached this result, then its decision is consistent with the law and the cassation grounds shall be dismissed".⁵¹

In its decision No. 384/2008, the Court of Cassation ruled that “whereas the accident occurred in the Iraqi territories, the trial court should have applied the provisions of the Iraqi Compulsory Insurance, and whereas both trial courts applied the Insurance System No. 29 of 1985, then they did not apply the applicable law, so the appealed decision shall be revoked due to this ground”.⁵²

In its decision No. 3876/2006, the Jordanian court of cassation ruled that " The law of the country in which common domicile of parties exists shall apply to the contractual obligations and If domicile of parties is different, the law of the country in which the contract is made shall apply as provided under Article 20/1 of the Civil Code. In the present case, we find that the court of appeal had applied the provisions of Article 53/1 of the Jordanian Companies Law to the facts of the case through parties to the case have different domiciles, and though the relationship on which the case is based had been created in Kuwait, which contradicts the legal rule established under Article 20 of the Civil Code, hence the decision filed to cassation is revoked".⁵³

In its decision No. 957/2005, the Jordanian court of cassation ruled that " if the case has been filed based on the agreement made between both parties (investment immigration application/ self-employed/limited service), and since the parties in Article 12 of the Agreement decided that the Laws of Canada shall prevail as to the contract... and since the defendant/appellee has raised this defense depending on the fifth ground of the appeal and that the court of appeal did answer it contrary to Article 188/4 of the Civil Procedure Code, which obliges the court of appeal to answer clearly and in detail. Hence and without need for examining grounds of appeal in cassation, it is decided to revoke the appealed decision and return the documents to the court of appeal to answer the ground 5 of the appeal and to determine the applicable law of the

⁵¹Decision No. 3090/2004 issued by the Jordanian court of cassation on 2.3.2005 (five-judge tribunal), publications of Adalah Center.

⁵²Decision No. 384/20089 issued by the Jordanian court of cassation on 28/10/2008 (five-judge tribunal), publications of Adalah Center

⁵³Decision No. 3876/2006 issued by the Jordanian court of cassation 8/3/2007 (five-judge tribunal), publications of Adalah Center

country, whether the Jordanian Civil Law or the Canadian laws in accordance with Article 12 of the Agreement, and in light of Article 20 of the Jordanian Civil Code and then to issue the decision".⁵⁴

Having verified decisions of the Jordanian court of cassation above, we conclude that the Jordanian court of cassation has dealt with rules of the foreign law in a manner that gives them the legal capacity before the Jordanian national law and that burden of proof lies with the trial court, and that it could resort to the parties to case to submit a document containing the provisions of the foreign laws on which they rely. Further, the Jordanian court of cassation controls validity of application of rules of attribution, and validity of application of rules of the foreign law and the proper interpretation of them, it also controls the causation regardless of the decision issued by the trial court whether causation for rejection or acceptance of application of the foreign law, and it controls validity of interpretation and application of rules of the foreign law.

Position of the Jordanian Jurisprudence

Large part of Jordanian jurisprudence supports the trend that gives the foreign law, referred to by the rules of attribution, the status of law, and that the national courts search, on their own, for its rules. It does not depend on the will of the people. The high court has the right to control the validity of the application and interpretation of the relevant foreign law.

Part of the Jordanian jurisprudence adopts this opinion and obliges the court to search for content of the applicable foreign law and to check its content even if not asked to do by litigants. It relies in this on the mandatory forms in the provisions of rules of attribution in the Jordanian Civil Code. These forms do not indicate at all that application of the foreign law is contingent on the will of litigants; rather they indicate that application of the foreign law is mandatory in all cases required under the rules of attribution. The court is required to search for and verify the foreign law. This opinion is based on the aforementioned decision No. 539/1983 issued by the Jordanian court of cassation⁵⁵.

As for court of cassations' control over validity and soundness of interpretation and application of the foreign law, part of jurisprudence (Dr. Ghaleb Daoudi) thinks that "interpretation and application of the special foreign law must be in all cases subject to the control and audit of the court of cassation in the trial judge' country , just like the national law. Function of the court of cassation is to maintain unity of interpretation and solutions and validity of application of the law. Its understanding of the intent of the legislator in the relevant foreign law may be more than the understanding of the single judge because of the long experience available to its members. Since the judge may neglect examination of the special foreign law if he knows that his decision is final and un appealable, this will cause a certain damage to the victim and it contradicts spirit of justice and the national rules of attribution that have ordered to apply the foreign law. Thus, decision of the Jordanian judge on interpretation and application of the special foreign law must be examined by the Jordanian court of cassation if the decision was built on a violation of the provisions of such law, or an error in its application, or a defect in its

⁵⁴Decision No. 957/2005 issued by the Jordanian court of cassation on 27.7.2005 (five-judge tribunal), publications of Adalah Center

⁵⁵ Hasan Hadawi, Private International Law, no edition, 1997, Dar Thaqa for Publication and Distribution, Amman, pp.211-212, see the same trend, Ghaleb Ali Daoudi, Private International Law, edition 2, 2013, Dar Thaqa for Publication and Distribution, Amman, pp. 265-268.

interpretation so that it is soundly applied like the Jordanian law, especially that the task of the court of cassation in Jordan is to unify the sound judicial solutions, decisions and trends in the country.⁵⁶

Dr. Mohammad Walid Masri supports the idea that the foreign law should maintain the legal capacity though it crosses boarder of its own country, and that misinterpretation of the foreign law must be controlled by the court of cassation for a number of reasons, the most important of which: court of cassations' control over interpretation and application of rules of the foreign law is a logical result of its legal capacity established by the Jordanian judiciary. Rejection of control would make rules of attribution meaningless.

Moreover, it is not enough to say that there are difficulties in examining interpreting and applying foreign law. The trial judge is obliged to do so using his limited potentials. It is even more appropriate that the Court of Cassation is entrusted with this task; in particular, that it has greater experience and wider potential. Further, control of the Court of Cassation on the interpretation and application of foreign law would make decisions consistent and compatibles and would maintain the prestige and reputation of the national judiciary outside the borders of the State.⁵⁷

From the researchers' point of view, the interpretation and application of the rules of foreign law must be subject to the control of the Court of Cassation. In addition to and the strong arguments mentioned above, nothing prevents the imposition of control over the interpretation and application of the rules of foreign law based on Article 198/1 of the Jordanian Civil Procedure Code, which provides that "provisions may not be appealed unless:

The appealed decision is based on violation of the law, or an error in its application of interpretation. The term "law" in this said Article could be either the Jordanian law or a foreign law where it is not restricted; the general term is still general unless it is restricted.

To the best of our knowledge, nothing can confine the appeal to the Jordanian law exclusively. It could be said that, according to the said Article, it is acceptable to appeal the judgment of the trial court if the contested judgment is based on a violation of the foreign law or an error in its application or interpretation. Upon the foregoing, we find that the approach of the Jordanian court of cassation is aimed at imposing control over interpretation of foreign law. This approach is supported by the majority of Jordanian jurisprudence. It is also a trend that agreed upon by almost all legal systems and Juristic opinions in the field of private international law.

CONCLUSION

This study examines court of cassation's control over interpretation of rules of the foreign law by the national judge. This is made through discussing the trend that refrains from imposition of control and the trend that supports such control, based on legislative texts, case law and jurisprudential opinions. The study ends up with some findings as follows:

⁵⁶GhalebDaoudi, *ibid*, p.278.

⁵⁷Mohammad Walid Masri, *ibid*, pp.266-268.

In some legal systems, control over the interpretation of legal provisions by high courts is prohibited except in exceptional circumstances such as the state of distortion and causation. This finding has been reached either from the explicit provision for this prohibition or the existence of explicit judicial decisions that establish this principle.

Some legal systems require control over interpretation of rules of the foreign law by the national judge, where legislations in some legal systems expressly provide for this principle. In some legal systems, this principle is adopted expressly by the high court, and some permit imposition of control based on generality of the provisions.

The Jordanian legislator does not expressly indicate to permissibility of imposition of court of cassation's control over interpretation of rules of the foreign law by the Jordanian trial judge. Further, some decisions of the Jordanian court of cassation suggested that the foreign law will maintain its legal capacity before the Jordanian judiciary and that it should be treated equally like the Jordanian law. This is an unclear approach, but it could be deduced that the Jordanian court of cassation tends to impose its control over the interpretation and application of foreign law. As for the Jordanian jurisprudence, it is almost unanimously agreed that the interpretation and application of foreign law should be subject to the control of the Court of Cassation, based on a set of arguments and solid grounds.

To conclude, the researchers hope that the Jordanian legislator will intervene at the earliest opportunity to address all the problems raised in connection with the private international law by developing explicit and clear provisions in this respect, especially the problems related to proving the foreign law, its interpretation and application. It is preferred to gather such provisions in a special legislation to be called the Jordanian Private International Law, or at least making amendments to the existing provisions of the Jordanian Civil Code and the Civil Procedure Code.

References

- Bustani, S. (2004) Private International Law, 1st edition, Manshourat Halabi Hoqoqia, Beirut,
 Daoudi, G. (2013) Private International Law, 2nd edition, Dar Al-Thaqafa for Publication and Distribution, Amman.
 Hadawi, H. (1997) Private International Law. Dar Al-Thaqafa for Publication and Distribution, Amman,
 Masri, M. (2002) Wajeez in the Private International Law, 1st edition, Dar Hamed for Publication and Distribution, Amman.
 Nor Eddin, Z. (2013) *Authority of Trial Judge in Choosing an Appropriate Legal Rule to Settle the Dispute*, Journal of Politics and Law Journal, 8.
 Qattal, H. (2010) Role of Judge in Application of the Foreign Law in the Algerian Law and Comparative Law, PhD dissertation, University of Algeria.
 Sadeq, H. (1968) Status of the Foreign Law before the National Judiciary, Munshaat Maaref, Alexandria.
 Seham, A. (2010) Foreign Law, Proof and Interpretation, A Master Thesis, M'Hamed Bougara University of Boumerdés, Algeria.