

**APPLICATION OF FOREIGN LAW BEFORE THE  
EMIRATI JUDGE  
COMMENTARY ON  
THE RULING OF THE DUBAI COURT OF  
CASSATION IN APPEAL NO. 501 OF 2021  
PERSONAL STATUS ISSUED JAN. 12, 2022**

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***Abstract***

This research addresses the commentary on the appeal's ruling of the Dubai Court of Cassation No. (501) Personal Status law of 2021 issued on 12 January, 2022, which is related to the application of foreign law before the Emirate judge. This ruling raised several legal principles and problems that require clarification and attention due to their importance. This is the first ruling on the application of the legislative amendment introduced by the UAE legislator to Article 1 (3) of the Personal Status Law No. (28) of 2005 by Federal Decree Law No. (29) of 2020. According to thereto, the application of foreign law before the Emirate judge is contingent on the adherence of one of the litigants by applying it in accordance with the attribution rule mentioned in Article 13 (1) of the amended Civil Transactions Act in 2020.

The research showed that the applicable rule of attribution is Article 15 because the correct qualification of the given case in

question is that it is maintenance on relatives, for which the law of the nationality of the person charged with it applies. So, it not as the Court decided that it results from the financial effects of marriage, but rather it is beyond that. The study indicated that although the Court of Cassation affirmed the Trial Courts' commitment to the rule of attribution mentioned in Article 13 (1) and its application to the dispute in question, it concluded that the application of the foreign law (the British law) presented in the case and the national law (the UAE law) thereto was excluded. However, it did not appear to us - based on the facts of the ruling in question - the fact that the Trial Court had actually decided in the personal status case, before it, between two foreigners according to the rule of attribution referred to in the ruling. The study also showed that the modern judicial trend, which confirms the obligatory nature of foreign law, and is referred to in the rule of attribution, should be first followed.

**Keywords:** private international law, conflict of laws, foreign law, attribution rule.

## تطبيق القانون الأجنبي أمام القاضي الإماراتي

تعليق

حكم محكمة التمييز بدبي في الطعن رقم 501 لسنة 2021 الحالة  
الشخصية الصادرة في 12 يناير 2022

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الملخص

يتناول هذا البحث التعليق على حكم محكمة تمييز دبي في الطعن رقم (501) أحوال شخصية لسنة 2021 الصادر بتاريخ 2022/1/12، والمتعلق بتطبيق القانون الأجنبي أمام القاضي الإماراتي. وقد أثار هذا الحكم العديد من المبادئ والإشكاليات القانونية التي تستوجب التوضيح وتسليط الضوء عليها؛ نظرًا لأهميتها. ويعد أول حكم جاء تطبيقًا للتعديل التشريعي الذي أدخله المشرع الإماراتي على المادة (3/1) من قانون الأحوال الشخصية رقم (28) لسنة 2005 بالمرسوم بقانون اتحادي رقم (29) لسنة 2020، والتي بمقتضاها يُعتبر تطبيق القانون الأجنبي أمام القاضي الإماراتي مرهونًا بتمسك أحد الخصوم بتطبيقه وفقًا لقاعدة الإسناد الواردة في المادة (1/13) من قانون المعاملات المدنية المعدل سنة 2020.

وقد بينت الدراسة أن قاعدة الإسناد الواجبة التطبيق هي المادة (15) باعتبار أن التكييف الصحيح للدعوى المطروحة هو أنها نفقة فيما بين الأقارب، والتي يسري بشأنها قانون جنسية المكلف بها، وليس كما قررت المحكمة أنها من آثار الزواج المالية. بل أبعد من ذلك، فقد بينت الدراسة أنه رغم تأكيد محكمة التمييز التزام قضاء الموضوع حكم قاعدة الإسناد الواردة في المادة (1/13)، وأنه طبقها على النزاع المطروح وخُص منها إلى استبعاد تطبيق القانون الأجنبي المقدم في الدعوى (القانون البريطاني) وبتطبيق القانون الوطني عليه (القانون الإماراتي)؛ إلا أنه لم يظهر لنا -من وقائع الحكم محل التعليق- حقيقة أن محكمة الموضوع قد فصلت فعلاً في دعوى الأحوال الشخصية المطروحة أمامها بين أجنبيين وفقاً لقاعدة الإسناد المشار إليها بالحكم. كما بينت الدراسة أن الاتجاه القضائي الحديث القائل بالزامية القانون الأجنبي الذي تُشير إليه قاعدة الإسناد هو الأولى بالاتباع.

**الكلمات الدالة:** القانون الدولي الخاص، تنازع القوانين، قاعدة الإسناد، القانون الأجنبي، قاعدة الإسناد.

## Introduction

Given the great human diversity witnessed by the United Arab Emirates, which is one of the most popular destinations for foreigners from all over the world, and the presence of foreigners, there will be many cases related to personal status issues that concern these foreigners and that might be subject to disputes before the UAE courts. Before the latter, the Emirate law does not always have to be applied to these cases, as the UAE legislator of attribution in Civil Transactions Law No. (5) of 1985 as amended, which a national judge will resort to guide him to the law applicable to the dispute. Then, the judge applies the provisions of the law referred to by those rules, whether national law or foreign law. If the attribution rule indicates that the applicable law is a foreign law, then it requires determining the extent of the UAE judge's commitment to applying this law, whose competence is indicated by that rule.

It appears that the reason for re-introducing this problem is because of the amendment of Article 1 of the Personal Status Law No. (28) of 2005 in accordance with Federal Decree Law No. (29) of 2020 regarding personal status law. The amendment introduced a new treatment of foreign law that differs slightly from what was previously approved by the UAE courts. This treatment - before the amendment - was represented in the fact that the application of foreign law depends on the insistence of one of the litigants to apply his law in accordance with the second paragraph of this article. If none of the litigants insist on the application of foreign law, then the national judge applies the UAE law, deciding the dispute as if it were purely national.

By carefully examining what the Personal Status Department of the Dubai Court of Cassation concluded in its ruling

issued in Appeal No. 501 of 2021, on 12 January, 2022 - the subject of the commentary - it seems that “[t]he Trial Court must decide on the personal status case, before it, between two foreigners according to the law of the country where the marriage took place on the money-related effects, and that the burden of proving this foreign law and its submission to the court of first instance rests on the opponent who adheres to its application. He must submit a complete copy of it, undiminished, including all the amendments to it, documented and duly certified, and translated if his language is not Arabic. Bearing in mind that the foreign law is nothing more than a material fact, the litigant adhering to it must establish evidence of it and that it is still in force in his country. If it is submitted incomplete or not related to the subject of the dispute, or if it does not include the texts applicable to the dispute in question, then the provisions of the national law shall apply to the dispute.”

Hence, our comment on this ruling derives from its importance and recentness as it followed the issuance of the 2020 amendments to the Personal Status and Civil Transactions Laws and in implementation of them. Further, because it (the ruling) was issued by the Court of Cassation, which is the highest court in the Judiciary of the Emirate of Dubai and that this ruling is final and conclusive. It is also not permissible to appeal against the verdict or stop its implementation by any means of legally suspending execution. The importance of this ruling also lies in the problems it raises and the legal principles it decided.

Therefore, we first present the facts and reasons for this ruling in the context of commenting on it, then we discuss the most critical problems and legal principles that this ruling has dealt with and our observations on them, as follows:

## FIRST TOPIC

### FACTS AND REASONS FOR THE RULING:

The facts of this case are summarized according to what is shown in the appealed judgment and all its papers and reasons, in that..... “the appellant in the first appeal and the respondent in the second appeal after she resorted to the complaint against her father..... The respondent in the first appeal and the appellant in the other appeal to the Guidance and Family Reform Department, which referred the dispute to the court due to the impossibility of conciliation between the two parties. She filed Case No..... of 2020 for non-Muslims against her father, requesting the ruling - as settled by her final requests - to oblige him to pay an amount of 11,000 dirhams as filiation maintenance, as of September 2020, 70,000 dirhams for the rent of the house in which she lives with her mother, and 3,000 dirhams per month for water, electricity and internet bills, all as of June 2020, as well as paying her university fees, based on the fact that she was born on 16 December, 2000 and her sister... who was born on 22 November, 1998, that they are his two daughters from his wife...., and that, according to a judgment issued by the Guilford County Court 22 October, 2009, her parents' marriage contract was dissolved. He then continued to pay the rent of the house in which the plaintiff lives with her mother (Villa No..... Street..... Emirate Dubai) until he stopped paying in February 2020. Since the dissolution of his marriage contract with her mother, he has been paying 7,500 dirhams for each daughter, then he increased it to 11,000 dirhams, before he reduced it in September to 6,000 dirhams. Since she was his daughter and had no money, that he was responsible for spending on her and paying her education fees; that he had stopped paying the rent of the house in which she lives with her mother, and that he also

reduced maintenance for filiation, she then filed a lawsuit to rule on her aforementioned requests.

The defendant requested the application of the British Matrimonial Law of 1973 submitted by him, translated into Arabic, and insisted in his reply's memorandum that she is not entitled to any payments from him under the ruling of Article 29 (1), as she is over the age of eighteen, and is out of custody, and not residing in the UAE with her mother, as she claimed, but resides in Britain. She studies at the University of Bristol, and although she was not entitled to any financial maintenance from him according to the aforementioned law, he used to send her - benevolently on his own initiative - tuition fees, housing bills and all her needs and that even if the UAE law is applied, her custody will be with him if she exceeds the age of thirteen. At the end of his memorandum, he requested the judge to dismiss the case for lack of proof or eligibility. After the Court of First Instance offered reconciliation to the two parties and heard their statements, it ruled, in attendance, on 22 April, 2021, (First) to oblige the defendant to pay the plaintiff, as of 22 April, 2021, 6,000 dirhams, as maintenance for filiation, inclusive of all aspects of legally prescribed payments - except housing, its supplies, medicine and service - 30,000 dirhams annually for housing rent, and 500 dirhams per month for water, electricity and internet bills from the same date above. Second, the Court also obliged the defendant (the father) to continue paying her university fees and providing her with accommodation during study periods in the country in which she is studying (England), as long as the plaintiff continues her education with usual success and by rejecting any requests over that.

The parties were not satisfied with this ruling, and they appealed against it, appealed No..... of 2021 Personal Status and Inheritance, requesting the annulment of the appealed judgment

and the application of the British law, submitted by him, before the Court of First Instance in order to dismiss the case.

The plaintiff appealed it with Appeal No.... of the same year, requesting that the appealed judgment be amended and reconsidered with all its requests in the case. The Court of Appeal, after it included the two appeals to be linked so one judgment can be issued for them together and that the reconciliation that was offered to them was not fulfilled, it ruled in the 22 September, 2021 session to accept the two appeals in form and merits (subject). In terms of the merits, (first) the Court requested to annul the appealed judgment in its ruling, which obliged the original appellant to provide housing in Britain according to what was stated in the third clause of the second paragraph of the judgment. Second, the Court requested to uphold the rest of the appealed judgment, obliging each appellant to pay the expenses of his appeal and confiscate the insurance. Both parties did not accept this judgment and challenged it by cassation. The plaintiff in cassation No. 491 of 2021 personal status and, according to an initiatory pleading registered electronically on 29 October, 2021 requested its revocation. The respondent's attorney submitted a memorandum of reply, at the end of which he petitioned for the rejection of the appeal. Similarly, the defendant in Cassation No. 501 of the same year according to an initiatory pleading registered electronically on 20 October, 2021 requested overruling it. The respondent's attorney submitted a memorandum of rebuttal, at the end of which she petitioned for the rejection of the appeal.

After presenting the two appeals to the court in a counseling room, it deemed them worthy of consideration and set a secret session to consider them by remote visual communication technology, in which the representative of the appellant attended the second appeal and insisted on requesting an annulment of the



ruling. In the other appeal, he asked to reject it. Then, before the end of the session, the attorney of the appellant of the first appeal requested to proof his presence and his requests to overturn the ruling. As for the other appeal, he requested it to be rejected. The court then decided to join the second appeal to the first for connection so that one judgment could be issued in today's session.

Since the appeal was based on two grounds, the appellant finds fault with the first appeal on the contested judgement for the error in applying the law, the violation of what is established in the papers, and the corruption in the inference. The preliminary verdict upheld in its judgement the rejection of applying his nationality law (British law) to the incident of the case, taking into account that the copy submitted by him for that law was not certified by the official authorities, and the two papers submitted by him in the 21 March, 2021 session do not resemble any paper of the law submitted by him in the 28 January, 2021 session, nor its translation. Therefore, this confirms that this law is not duly certified, which agrees with what the appealed judgment concluded regarding the application of the national law as sound and must be supported. However, the court, whose decision was appealed, did not examine the case papers, including the English law submitted by it, which was proven to be duly certified and translated and therefore required its application and implementation of what was stated in the text of Article 29 (1) thereof, that his daughter, who is contested against, is not entitled to any financial maintenance from him because she is over the age of eighteen, contrary to what the ruling ruled; which is defective in what necessitates its repeal.

The Court of Cassation denied this reason of appeal on the grounds that “according to what is stipulated in the third paragraph of Article 1 of the Federal Personal Status Law No. 28 of 2005 replaced by Federal Decree Law No. 29 of 2020, the provisions of

Federal Law No. 28 of 2005 apply to non-citizens unless one of them adheres to the application of his law according to the rules of attribution stated in Articles 12, 13, 14, 15, 16, 17, 27, 28 of the Civil Transactions Law, then Federal Decree Law No. 30 of 2020 was issued amending some provisions of Federal Law No. 5 of 1985 by issuing the Civil Transactions Law, published in the Official Gazette, Issue No. 687, appendix issued on 30 September, 2020 and effective in accordance with Article 3 thereof from the day following the date of its publication, stipulated in its first article that Articles (12- 1), (13), (17), (27), (1166) of the Civil Transactions Law issued by Federal Law No. (5) of 1985 shall be replaced by the following texts: Article (12- A...) Article 13 (1)- the law of the country in which the marriage took place shall apply to the personal effects and the money-related effects that are arranged by the marriage contract..., and all the above leads to that the Trial Court must decide on the personal status case before it between two foreigners in accordance with the law of the country in which the marriage took place on the effects related to money”.<sup>1</sup>

## SECOND TOPIC

### THE MOST IMPORTANT LEGAL PRINCIPLES APPROVED BY THE RULING

Based on the previous presentation of the facts and reasons for the ruling, it seems that the Dubai Court of Cassation has approved - from the point of view of private international law (conflict of laws) - the following principles:

**First:** The Emirati judge’s application of the foreign law concerned with adjudicating personal status cases brought before him between two foreigners, based on one of the litigants insisting on applying his law, which was determined by the national attribution rule.

**Second:** The law is applicable to the dispute in question.

**Third:** Foreign law is nothing more than a material fact, and the opponent, who is adhering to it, must establish evidence of its content.

**Fourth:** The exclusion of the applicable foreign law, which is based on the inability to prove the existence of the applicable foreign law or determining its meaning, means the application of the UAE law.

## **THIRD TOPIC THE COMMENTARY**

### **Preface and Division:**

The Court of Cassation, through its approved principles, clarified its position on several important problems within the framework of private international law or in terms of identifying and proving the provisions of foreign law.

Perhaps the problem of the Emirati judge's commitment to applying foreign law in matters of personal status under the rules of national attribution is considered one of the most controversial legal and jurisprudential problems in the UAE until 2005. The legislator at that time preferred not to take a specific position on a problem in which controversy raged and let the judiciary has the opportunity to deliberate and take the appropriate position in accordance with the conclusions of the development of contemporary private international law thought.

However, a unified position on this issue was never taken by the UAE judiciary, – which apparently prompted the UAE legislator to issue Personal Status Law No. (28) of 2005. In this law, the legislator noticed this difference in the UAE

jurisprudence regarding that issue, and the legislator wanted to resolve this judicial dispute. Accordingly, the text of the first article of the UAE Personal Status Law came to address this issue, as it stipulated that “[t]he provisions of this law shall apply to the citizens of the United Arab Emirates unless non-Muslims among them have their provisions specific of their sects and that its provisions apply to non-citizens unless none adheres to the application of his law.”

Even in the existence of this text, as some believed,<sup>2</sup> there is no longer a dispute with the Emirati judiciary regarding this issue, except that this text has created a jurisprudential and judicial dispute caused by the lack of clarity of the word (his law) stated in this text. So, does this mean it is his personal or another law? Therefore, the Emirati legislator took notice of this matter and, according to his amendments to the Personal Status Law in 2020, entered Article 3 (1), which reads as follows, “[t]he provisions of this law apply to non-citizens, unless one of them adheres to the application of his law, without prejudice to the provisions of Articles (12, 13, 14, 15, 16, 17, 27, 28) of the Civil Transactions Law promulgated by Federal Law No. (5) of 1985.

Despite this addition made by the legislator, which is represented in the phrase (without prejudice to the provisions of the articles...), it did not clarify the intended meaning of the word (his law) mentioned in this text, which preceded that phrase. This is evident from the two recent rulings of the Court of Cassation that came after the issuance of this amendment, where we can find that the word (his law) was interpreted in accordance with the personal law of the opponent<sup>3</sup> and not according to the rules of attribution until the subject matter of the ruling came and explained to us the word (his law) according to the rules of attribution outlined in the previous article.

However, in its ruling in question, the Court of Cassation took an unclear position, given its reference to the following statement that “[t]he Trial Court must decide in the personal status case, before it, between two foreigners according to the law of the country where the marriage took place in relationship to the money-related effects, and that the burden of proving this foreign law and its submission to a court of first instance falls on the opponent who insists on applying it.” This is another problem in which the position of the Court of Cassation is still unclear. Whereas despite its explicit reference to the legislative amendments that suggest - at first sight - that its ruling came in the application of those amendments, it is - unfortunately - only a theoretical reference to the relevant amended legal texts, and this led us to believe that it did not base its ruling on these texts. Rather, it found its judgment on those texts but before amending them.

Hence the importance of this ruling appears here, as it took a specific position on the problem, which jurisprudence must address in light of contemporary trends in private international law. Perhaps this is, in particular, what prompted us to try to address this issue on the occasion of commenting on the ruling of the Court of Cassation under our study, which alerted people to the importance of the problem and the field of contention in it.

Whatever the case, this commentary focused on two issues. The first relates to the extent of the Emirati judge’s commitment to applying the foreign law, whose competence is indicated by the attribution rule. The second relates to how to identify the content of foreign law; it is not enough for one of the litigants to adhere to the application of the foreign law, but rather the national judge must be empowered with the content of this law,<sup>4</sup> provided that mediating these two issues is subject to the nature of the issue that

is the subject of the original case, which led to the issuance of the ruling of the Court of Cassation in question. Is it a matter of “financial effects of marriage” or a matter of “spending among relatives”? If the last condition is correct - this is what I believe - then why the attribution rule that specifies the law applicable to this expense, which is British law was not applied?

Though we do not hesitate from the beginning to support the position of the Court of Cassation regarding this issue, we nevertheless believe that the matter requires more clarification, whether about the conditions for applying foreign law before the Emirati judge in the case of the first issue or how to identify the provisions of foreign law. It is noticeable that the application of British law was not in accordance with the attribution rule stated in Article 13 (1) regarding the effects of marriage, as was the case by the Court of Cassation in the ruling, in question. This raises the question about the extent to which the judicial solutions of the Court of Cassation in this regard have changed from judicial solutions prior to the issuance of relevant legislative amendments.

In this commentary, we discuss all the advanced problems raised by the ruling of the Court of Cassation under study. Firstly, we present the extent of the Emirati judge's commitment to applying foreign law determined by the attribution rule. Then, we discuss the nature of the issue that is the subject of the case in question that led to the issuance of the ruling under study. We then address the extent to which traditional judicial solutions have changed in this regard. Finally, we present the problem of proving the content of foreign law before the Emirati judge. The articulation of the extent to which UAE law is correctly applied in this case will be followed. derives from it.

In the following paragraphs, we will study the previous issues, each in a separate section.

## First Requirement

### The Extent of the Emirati Judge's Commitment to Applying Foreign Law Specified by the National Attribution Rule

To find out the solution that is now clearly applied in the Dubai Court of Cassation, as the last link in the chain of its development, we must review the stages of development that the issue went through of the extent of the Emirati judge's commitment to applying the foreign law designated by the national attribution rule.<sup>5</sup>

**The First Stage:** It is the stage prior to the issuance of Personal Status Law No. (28) of 2005, as no legal text in the UAE law indicated the extent to which the rules of attribution relating to matters of personal status are obligatory for the Emirati judge. In the absence of a text, the position of the higher courts in the country differed from looking at foreign law as a matter of fact that the parties must adhere to or as a matter of law applied by the judge on his own. The Federal Supreme Court did not regard the compulsory rule of national attribution. Hence, the Court did not consider the rules of attribution as relevant to public order; "This results in the litigants' commitment to uphold, before the Trial Court, the application of foreign law and provide evidence of the legal rule that they want to apply".<sup>6</sup> On the contrary, the rulings of the Dubai Court of Cassation came in and recognized the mandatory character of the national attribution rule and then obligated the national judge to apply the foreign law even if the litigants did not adhere to its application.<sup>7</sup>

**The Second Stage:** It is a prior stage of the issuance of the Personal Status Law of 2005, during which the Court of Cassation retracted its previous position and adopted the legislative approach adopted by the UAE legislator under Article 1 of this law. This law considers that the rules of attribution are not related

to public order and adopts the principle of considering foreign law as merely an element of reality. Consequently, the judge cannot apply it on his own; that the litigants must adhere to it, and establish evidence of it and determine its meaning. In the implementation of this, the Court of Cassation ruled that “[i]t is decided, according to what is stipulated in the second paragraph of Article 1 of Law No. 28 of 2005 regarding personal status, that the provisions of this law apply to non-citizens, unless one of them adheres to the application of his law, to the effect that if a non-citizen adheres to the application of his law, then this law must be applied”.<sup>8</sup>

If the existence of this text would resolve the disagreement that existed between the supreme courts in the state, it - nevertheless - created a disagreement in jurisprudence and judiciary, caused - this time - by the lack of clarity of the word (his law) that appears at the end of the text referred to. Thus, is the intent of this law his personal law, or is it intended a return to the application of the rules of attribution stated in the Civil Transactions Law, which may lead to the application of another law determined by the rules of attribution stated in the Civil Transactions Law? If the intended answer is the first option; so, the rules of attribution in the Civil Transactions Law have no value. However, if the intended answer is the second option (according to the rules of attribution), this would mean that the judge neglects the directives of the legislator, which suggest the necessity of applying the law of the person who adheres to its application.<sup>9</sup>

Fortunately, the Federal Supreme Court has indicated in its ruling in Appeal No. (30) of 2006, that is to say, after the issuance of the Personal Status Law of 2005, which did not clearly indicate the meaning of the word (his law) mentioned at the end of the text



of Article 1 (2) before it was amended - that the word (his law) means the foreign law according to the rules of attribution. “It is established in the judiciary of this court that the principle of the Court is the application of the judge’s law and that the litigants must insist before the Trial Court on the application of the foreign law that is determined by the rule of attribution, and in this case, they must present evidence that it included the legal rule to be applied because the foreign law is considered to be a reality that evidence must be established for it, otherwise the judge will apply his law.”<sup>10</sup>

At the same time, the Dubai Court of Cassation indicated in a recent ruling in Appeal No. (280) of 2020 that what is meant by the word (his law) is the law of his nationality. It was stated, “[i]t is decided in the judiciary of this court - according to the second paragraph of Article 1 of Federal Law No. 28 of 2005 regarding personal status, and as stated in the explanatory memorandum to the text above – that the provisions of this law apply to non-citizens unless one of them insists on the application of the law of his nationality... which means that the court must decide on the personal status case before it between two foreigners in accordance with the law of their nationality if one of them proves it and upholds the application of its provisions before a court of first instance...”<sup>11</sup>

Because of this inconsistency in judicial rulings as a result of the legislator’s formulation of the word “his law” that did not express his will, which was indicated by the Federal Supreme Court’s judiciary, as mentioned above, some called for the need to reformulate Article 1 of the Personal Status Law of 2005 in a way that reflects the direction and true application of it.<sup>12</sup> Although the legislator responded to that but did the amendment come in this way? This is what we will see in the next paragraph.

**The Third Stage:** It is the stage developed by the UAE legislator on the basis of its amendments to Article 1 of the Personal Status Law in 2020, where the jurisprudential and judicial differences regarding the definition of the meaning of the word (his law) mentioned in this text led to add a new paragraph that has not been in the law in its previous state, which is the third paragraph of Article 1 of this decree. The paragraph reads as follows, “[t]he provisions of this law shall apply to non-citizens, unless one of them adheres to the application of his law, without prejudice to the provisions of Articles (12, 13, 14, 15, 16, 17, 27, 28) of the Civil Transactions Law promulgated by Federal Law No. (5) of 1985”.

However, the reformulation of this text through the development added that the UAE legislator made to it did not reflect the actual direction and application of it that the Court of Cassation concluded in the judgment in question. “[T]he Trial Court must decide in the personal status case before it between two foreigners in accordance with the law of the state in which the marriage took place regarding the money-related effects, and that the burden of proving this foreign law and its submission to a court of first instance rests on the litigant who adheres to its application, and that he must submit a complete copy of it, undiminished, including all the amendments to it documented and duly certified, and translated if his language is not Arabic, bearing in mind that the foreign law is nothing more than a material fact, the litigant adhering to it must establish evidence of it and that it is still in force in his country. If it is submitted incomplete or not related to the subject matter of the dispute, or if it does not include the texts applicable to the dispute in question, then the provisions of the national law shall apply to the dispute.”

It is clear that the Court of Cassation stressed the non-compulsory nature of the attribution rule. Therefore, the Emirati judge is not bound to apply foreign law referred to by that rule unless any of the litigants adhere to the application of his law. What is new at this stage, according to the ruling of the object of the commentary, is that the litigants' adherence to their law must be in accordance with the rules of attribution stated in Articles (12, 13, 14, 15, 16, 17, 27, 28) of the Civil Transactions Law promulgated by Federal Law No. (5) of 1985. Did the Court of Cassation - and prior to it was the Court of First Instance - apply the applicable attribution rule related to the subject matter of the case presented? Or did they err in that?

### **Second Requirement**

#### **The Law Applicable to the Personal Status Case Subject to the Judgment (the Child Maintenance Claim)**

In its ruling under study, the Court of Cassation dealt with the problem of the law applicable to the child maintenance claim. The court ruled that "[t]he Trial Court must decide on the personal status case before it between two foreigners in accordance with the law of the country in which the marriage took place on the money-related effects. This means that it applied the attribution rule stated in the first paragraph of Article 13 of the Civil Transactions Law. This last paragraph refers to the application of the law of the state in which the marriage took place with regard to the personal effects and the money-related effects that are arranged by the marriage contract. Hence, the field of application of the law of the country where the marriage took place governs all the effects of the marriage contract, whether they are about persons or money, and these effects are in reality mutual obligations and rights between both husband and wife.

Based on the above paragraphs, we wonder about the nature of the issue that is the subject of the original case that led to the issuance of the ruling of the Court of Cassation and is the subject of the study. Is it a matter of “financial effects of marriage” or a matter of “spending on relatives”? If the last adaptation is the correct one - and this is what I believe – then why was not the attribution rule that specifies the applicable law applied to this maintenance? It is definitely not the law of the state where the marriage took place, but rather the law of the nationality of the person charged with spending, i.e., the British law.

Considering that the correct characterization of the dispute of the presented case - which relates to the daughter's claim for maintenance from her father - is considered to be spending on relatives but not the financial effects of the marriage. Therefore, the one who demanded payment in the case in question is not the wife who is included in the attribution rule stated in Article 1 (13) related to the effects of marriage.

Spending on relatives is regarded as one of the articles of personal status; it is based on the fact that it must be subject to personal law, which is the law of the nationality of the person assigned to it. This is because the legislator added the phrase “on relatives” to ward off the suspicion that what is meant by maintenance is “marital alimony”.<sup>13</sup> The latter is subject - as previously said - to the law of the countries where the marriage took place. Jurisprudence in most Arab countries went to apply the law of the debtor or the person charged with spending on relatives,<sup>14</sup> whether they are direct<sup>15</sup> or indirect.<sup>16</sup>

Consequently, the ruling in question has erred in applying the rule of attribution in the dispute, in question. As the two parties to the dispute (the daughter and the father) hold British citizenship, therefore the applicable law in the dispute between

them is British law. Particularly, it is decided that maintenance for children fall within the maintenance of relatives, to which the nationality law of the person assigned to it applies. Then, the Court of Cassation - previously was the Trial Court - had to apply this rule stated in Article 15 of the Civil Transactions Law.

If the issue of defining the applicable law in the case is of importance to inform this foreign law, whether or not it is the law adhered to by the opponent, and by reference to the rules of national attribution, then it is not valid to adhere to the insignificance of this determination - in the case under study - due to the unity of the result in this case. This means that the solution is the same, whether through the implementation of Article 13 (1) or Article 15, where in both cases, the British law is the applicable law, whether as the law of the place where the marriage contract was concluded or as the law of the nationality of the taxpayer (who is the British father in this case), on the pretext that this law, whatever it was, was excluded due to the inability of those who adhered to it to prove its content, which led to the application of the UAE law.

We do not question the validity of the application of UAE law as a result of the inability to prove the content of the foreign law (British law), as Article 28 confers this status on it, including its reserve jurisdiction. However, the problem with the Court of Cassation is the means that are led to this result, as the court has erred in applying the rule of attribution. Instead of applying the rule stated in Article 15, the rule mentioned in Article 13 (1) was applied. This ruling was accused of corruption in reasoning,<sup>17</sup> as it confused the marital alimony with children's maintenance and equated the two matters in consequence of it, which is the application of British law, before its exclusion due to the inability of proving it. In addition, we also criticize the court's position

when it applied this last article, which had to show with certainty - as we shall see - that Britain is the country in which the marriage took place.

### **Third Requirement**

#### **The Extent to which the Judicial Solutions of the Present Ruling have Changed from the Previous Judicial Solutions Prior to the Issuance of the Relevant Legislative Amendments**

We believe that the ruling of the Court of Cassation under our study did not bring anything new. This is because it literally echoed the traditional formula stated in general, represented in “[a]dherence to a foreign law is nothing more than a material fact that the adversary adhering to must establish evidence of it.” Nevertheless, the legislative amendment to Article 1 of the Personal Status Law in 2020 has an undeniable importance- at least in principal - in the evolution of the Court of Cassation's position regarding the issue of applying foreign law before the Emirati judge, which lies in its departure from its previous position, and is related to the meaning of the word (his law) mentioned in this text, which was indicative of personal law. As the court clearly stated - in its judgment subject of the commentary - that the word (his law) indicates his law according to the rules of attribution shown in the previous text.

Given this result, we wonder, did the Trial Court decide in the personal status case, before it, according to the law of the country where the marriage took place on the money-related effects? In other words, did the Trial Court refer - following the opponent's adherence to applying his law - to the rule of attribution that governs the dispute? The importance of this question appears in that it represents the core of the problem that

the new amendment to Article 1 of the Personal Status Law came to take into account. Did the Court of Cassation also consider this in its ruling under study?

A reviewer of this ruling would note that the Trial Court - when the opponent insisted on applying his British law - considered that this is the applicable law without clearly showing us - from the facts of the case - that it is, in fact, so. As it did not appear to us from the facts of the case that Britain is the country in which the marriage took place, thus it is right for us to have doubts about the nature of the country where the marriage took place. Among that is the ruling's explicit reference to the relevant legislative amendments. Perhaps what reinforces our doubts are many things from which the following phrases of the ruling themselves flow.

**First:** The defendant (the British father) requested the application of the British Matrimonial Law of 1973 submitted by him, translated into Arabic. The Court of First Instance rejected that, considering that the copy submitted for that law is not certified by the official authorities.

**Second:** The Court of Appeal upheld the preliminary ruling in its ruling, refusing to apply British law (as the law of the nationality of the adversary who adheres to it) to the facts of the case. Taking into account that the two certified papers submitted in the 21 March, 2021 session do not resemble any paper of the law introduced in the 1 January 28 session, nor its translation, which confirms that the proposed law is not duly certified.

**Third:** The word (shall) used by the ruling, which indicates that the speech in it is directed to what the Trial Court should follow in the future by (deciding in the personal status case, before it, between two foreigners according to the law of the country in

which the marriage took place on the money-related effects), it does not indicate that the latter has already decided the present case in accordance with the law of the state where the marriage took place. This was the case despite the assertion - surprisingly - of the Court of Cassation that the judiciary of the subject "has adhered to the rule of the previous attribution rule, which it applied to the dispute in question, and concluded to excluding the application of foreign law presented in the case and applying the national law to it...".<sup>18</sup> Further to this, it added that "...if it was related to the ratification of the documents, nothing was indicating the ratification of the same law that should be applied to the dispute, the British Matrimonial Law of 1973."

**Fourth:** The plaintiff's refusal (by her attorney) to apply the British law because it was not approved by the official authorities in Britain.

**Fifth:** The Trial Court's reference to the fact that "neither of the two parties holds the Emirati nationality," referring to the non-fulfillment of the exception reserved for the benefit of the UAE law stated in Article 14 of the Civil Transactions Law,<sup>19</sup> should have necessarily followed - after its reference to the general rule mentioned in Article 13 (1) of the same law - proving that Britain is the country where the marriage contract was concluded.

Hence, what is reproached for the judiciary of the subject – and later the judiciary of cassation - is that the British law should be applicable without showing us with certainty that it is so by stating that Britain is the country where the marriage took place. The latter may have been held in a country other than Britain, such as France, for example, then the British law is not applicable, but the French law is applicable according to the attribution rule stated in Article 13 (1) of the amended Civil Transactions Law in 2020, thinking - that Britain is not the country where the marriage



contract was concluded. So, how is it possible for the court to exclude the British law adhered to and apply the other law (French law) to which the aforementioned attribution rule indicated? Or is the role of the Emirati judge only limited to verifying whether the British law adhered to is competent to adjudicate the dispute according to the rules of attribution? So, if it turns out that he is not competent to do so (because Britain was not the country where the marriage took place), does the Emirati judge apply the French law, considering that it is the applicable one according to the rules of attribution? Or does the UAE law apply?

In fact, the ruling under study – and previously the UAE legislator - did not indicate whether it includes cases in which one of the litigants adheres to the application of a law other than his personal law. That is to say that the ruling in question did not specify whether the term (his law) mentioned in Article 1 (3) of the amended Personal Status Law in 2020 included personal law or any other law.

We hoped that the legislator deletes the word (his law) from this text and instead replace it with the phrase “applicable law”, so that the text would be as follow, “[t]he provisions of Federal Law No. 28 of 2005 apply to non-citizens unless one of them insists on applying the applicable law.” The application is in accordance with the attribution rules stated in Articles 12, 13, 14, 15, 16, 17, 27, 28 of the Civil Transactions Law...". The phrase (applicable law) includes personal law or any other law.

We were looking forward to our Court achieving this matter in the ruling in question. However, it is clear that the Court went along with the jurisprudence of the subject and considered that British law is applicable.<sup>20</sup> Our hope extends beyond that that it is the duty of the Emirate judge to apply foreign law, even if the opponent does not adhere to its application, where the burden of

proving it will be on him (the judge). Thereafter, the question that would arise here is what would the national judge do if the existence of a foreign law cannot be proven or its meaning cannot be determined? All these issues fall within the problem of proving the content of foreign law, which we will address in the next paragraph.

### **Fourth Requirement Proof of Foreign Law**

When the rule of attribution refers to the competence of foreign law, its application before the national judge raises several questions about the application of the provisions of this law, both in terms of determining who bears the burden of proving it, the methods of proving it, and finally the impact of the inability to prove the foreign law. The Emirati legislator only dealt with resolving this last issue. However, the Court of Cassation - in its judgment subject to commentary - dealt with all of these issues, as its rulings have been recurred - since the issuance of Personal Status Law No. (28) of 2005 - and that adhering to the application of foreign law before the national judge is nothing more than a material fact, and the opponent adhering to it must establish evidence of it, which is still in force in his country. Accordingly, foreign law has become the subject of proof. If the opponent is unable to prove it, the Emirati judge must apply his law and find out the nature of those judicial solutions. We present these issues in a separate section.

#### **First Branch**

#### **The Burden of Proving the Foreign Law**

It is known that determining who bears the burden of proving foreign law depends initially on assessing the nature of the foreign

law. If we consider foreign law as a law and not a matter of fact, then the burden of proving it and searching for its meaning rests with the judge; it is not permissible to ask the litigants to prove it. Since foreign law is binding, the judge is obligated to apply it without requiring the litigants to adhere to it. If none of the litigants comply with the application of foreign law explicitly, the national judge is not obliged to apply it independently.<sup>21</sup>

The Court of Cassation adopted this approach - after the issuance of the Personal Status Law in 2005 - as it considered foreign law a material fact that must be evidenced.<sup>22</sup> The Court continued to confirm this opinion in the judgment in question, indifferent to the winds of development brought about by the rulings of the French judiciary that the Court of Cassation had reached. Instead, it was more developed than the French judiciary before the issuance of this law, when it adopted the modern trend that considers that foreign law is a law and not a matter of fact. Then, the judge is the one who is obligated to prove it alone. We hoped that the Court of Cassation - and our UAE judiciary in general - would maintain such a position on the issue of proving foreign law, but not retreat and adopt the traditional approach that was repeated in the rulings of the Court of Cassation. In the judgment in question, we saw how it rejected the appeal submitted by the appellant (the father) on the basis of many reasons confirming that it tended to consider that “[t]he foreign law is nothing more than a mere material fact that the opponent adhering to must establish evidence for it.”

Where it was stated in the ruling’s rationale that “[t]he British law, which the original appellant submitted, has not been duly certified, as it is established that the law was presented and translated in the 28 January, 2021 session. The submitted copy was not ratified, and the translation was also devoid of any

indication of the existence of any ratification of the law.” The two certified papers submitted by him in the 21 March, 2021 session did not resemble any paper of the law introduced by him in the 1 January 28 session, nor its translation, which confirmed that the law proposed by him was not duly certified. Then, the Court of First Instance ended up excluding it and applying the UAE law. If this what the ruling has come up with regarding the application of the national law is sound and tolerable, that it has its specific evidence in the papers, that there is no violation of the law, especially since it is clear from the certification proposed by the appellant (Document No. 1 of the documents’ folder presented in 21/03/2021 session), and that not being translated to the Arabic language though it was related to the ratification of the documents, it was devoid of any indication of the ratification of the same law that should be applied to the dispute - the British Matrimonial Law of 1973 - and therefore the criticism is unfounded.

Perhaps there are some points in this judicial position that are worth noting and evaluating, as follows:

**1-** The Court of Cassation decided that the judge examining the dispute does not have to search for and present the content of foreign law, as this obligation rests with the opponent who adheres to the application of the foreign law whose competence is indicated by the attribution rule.

**2-** It is not enough to apply the foreign law referred to by the rule of attribution that one of the litigants only requests that, but whoever adheres to the application of this law must prove its content by highlighting its texts themselves or translating them in an official form so that the judge can apply it.

In light of this, although the position of the Court of Cassation, which perpetuates the treatment of foreign law as a material fact, limits the burden on the court by localizing legislative jurisdiction<sup>23</sup> in favor of Emirati law<sup>24</sup>, however, it ignores technical developments and the reality of relations between states at present. This made it easier for the court to obtain the applicable foreign law, according to the national rules of attribution through official correspondence.<sup>25</sup>

By examining the philosophical basis on which the Court of Cassation based its orientations regarding the treatment of foreign law, it becomes clear that we must affirm that considering foreign law as a mere material fact was not the basis for that treatment. Rather it is a consequence of another cause that can be deduced from looking at article 1 (3) of the amended Personal Status Law in 2020. If we look at this text, we can conclude that the UAE legislator - and then after the Court of Cassation in the present ruling - has made the application of the rule of attribution from the outset dependent on the desire of the opponent who insists on applying his foreign law in accordance with that rule, as the rule of attribution is not on the first place applied, unless the opponent adheres to the application of the foreign law. As just in the second stage, after the opponent adheres to the application of this law, the court has also made proving its content the responsibility of this opponent, as he is the one who presents it to the judge without any interference. In such a case, he ignores the developments that have occurred in the jurisprudence of private international law<sup>26</sup> and the positions of the comparative judiciary regarding this issue, which in turn, makes the research for the content of foreign law a burden on the judge and the litigants, as well, to assist him in it. They are the stakeholders who are concerned about proving the content of the foreign law that is relevant to ruling the dispute.

The judge is not freed from this obligation unless he is unable to reach its content, and he must mention in the reasons for his ruling this inability and explain its reasons.<sup>27</sup> This requires addressing the issue legislatively with explicit texts, as some Arabic laws have developed, which indicate that foreign law is a binding law, and the judge must prove it with the assistance of the litigants.<sup>28</sup>

But does the judge's request to assist the litigants in proving the content of the foreign law mean that the latter has become a subject of proof according to the intended meaning of this word? In other words, is foreign law subject to the rules of evidence organized by the legislator to establish facts? This is what the following lines will answer.

## **Second Branch**

### **Means of Proving the Content of Foreign Law**

To begin with, we concluded that the Emirati legislator did not explicitly define the means that can be used to reveal the content of the foreign law before the Emirati judge. According to the opinion of the Court of Cassation, in the ruling under study, we find that it decided - what can be understood - that if the applicable law is foreign, then it is obligatory for those who uphold it. By applying it, the litigants must submit a duly authenticated and attested copy of this law.<sup>29</sup> If its language is not Arabic, it must be then officially translated,<sup>30</sup> given that the foreign law is a material fact that the litigants must establish evidence of. If the litigants do not comply with that, then the ruling does have to follow either, overlooking the application of this law. Also, providing an Arabic translation of this law is not indispensable for presenting a copy of this law in a foreign language or translating some of its articles, particular, if this translation does not reveal the clarity of the meaning of what is included in those texts or if they are not sufficient to derive the

terms and conditions from being applied to the dispute. Because the texts of this translation are related to the texts of other materials that have not been submitted or translated.<sup>31</sup>

However, is the issue of the extent of relevance and sufficiency of the provisions of foreign law presented in the case to settle the dispute subject to the discretion of the trial judge without a commentator? The discrepancy in this matter is apparent between the judgments of the Dubai Court of Cassation. To understand the issue, we will discuss the position of the Court of Cassation before issuing the verdict in question, then its position in light of the latter.

**• Placing the Issue before the Court of Cassation According to its Latest Ruling before the Ruling in Question**

The Court of Cassation ruled in one of its recent rulings - less than a month precedes the judgment in question - that "...it is decided that the assessment of the extent of relevance and adequacy of the provisions of foreign law presented in the case to settle the dispute is one of the legal issues that are subject to the control of the Court of Cassation".<sup>32</sup>

**• Placing the Issue According to the Ruling in Question:**

The Court of Cassation decided in its ruling that “whether or not the litigant has presented foreign law... it is a matter of fact that the Trial Court is independent of, without any commentary when it founds its judgment on plausible reasons that have their proven origin in the papers.”

We see the inadequacy of translating foreign law, as a national judge cannot understand it even if it is translated into Arabic because the text as part of a whole needs to be interpreted, regulated and applied. Therefore, it remains valid for someone to explain to the judge how the courts in that country whose law is

required to be applied is interpreted. Because the Court of Cassation, for example, may develop the interpretation of the legal rule in a manner that may be narrow or broad, according to what is happening in that country in terms of circumstances.<sup>33</sup> Therefore, we tend with some people to adopt experience as an appropriate and effective means in revealing the content of foreign law in the UAE legal system,<sup>34</sup> especially since the UAE judiciary - represented this time in the Federal Supreme Court - has obligated the judge to resort to a technical expertise in revealing the content of foreign law. So, it decided that “...even though the court is the supreme expert in the case, however, when the subject needs special technical expertise, it shall commit to it. Translation issues are among the technical issues in which special expertise is required; therefore, when there are two different or conflicting translations of a text, adopting either of them may lead to different reports or results in a dispute. The court does not have the right to appoint itself as an expert in the case due to its knowledge of the foreign language from which the translation was made, and prioritize one over the other, considering that this is a verdict by personal knowledge in a technical matter that essentially requires recourse to special expertise”.<sup>35</sup>

### **Third Branch**

#### **The Effect of the Impossibility of Proving Foreign Law (Excluding the Foreign Law and Applying the UAE Law)**

We concluded that proving foreign law is the responsibility of the opponent who adheres to its application. Still, he may be unable to prove the foreign law because of the difficulties that prevent that. So, what is the ruling if the opponent is unable to prove the foreign law?



The UAE legislator explicitly adopted the decision to apply the judge's law in a case foreign law cannot be proven. Article 28 of the Civil Transactions Law stipulates that “[a] he law of the United Arab Emirates shall be applied if it is not possible to prove the existence of the applicable foreign law or determine its meaning.”

Based on the above paragraphs, the judge must verify (first) the existence of foreign law before resorting to applying the provisions of the national law. Therefore, the mere failure of the opponent to present the foreign law to the court is not considered that he was unable to prove it, which would justify the application of the UAE national law. It also requires (secondly) the judge actually to investigate the inability to prove foreign law and deduce its meaning.

We saw that the Court of Cassation upheld the judgment of the Trial Court in what it ended in, providing that the foreign law was excluded and the UAE law was applied. It decided that “...if one of the litigants did not adhere to its application and submission, adhered to it but did not submit it to the court of first instance, if what he submitted was incomplete or not related to the subject matter of the dispute, or if it did not include the texts applicable to the dispute in question, then, the provisions of national law shall apply to the dispute...”.

The Court of Cassation not only affirmed the correctness and soundness of the Trial Court's position of excluding foreign law and applying UAE law, instead it approved the Trial Court's ruling by adding another reason for excluding British law. “[T]hat in addition to not translating it into Arabic, even though it was related to the ratification of documents, it was devoid of any indication of the ratification of the same law applies to the dispute - the British Matrimonial Cases Act of 1973.

We conclude from the above that the Court of Cassation, in the ruling under study, required the following conditions for the foreign law to be applied. **First**, the litigant adheres to its application first. **Second**, he presents it to a court of first instance, given that the foreign law before the Emirati judge is nothing more than a material fact. **Third**, what he submitted is complete and related to the subject matter of the dispute. **Fourth**, it should include the foreign texts applicable to the dispute in question. If any of these conditions fails, the UAE law's provisions shall apply to the dispute.

Although we acknowledge the validity of this conclusion reached by the judgment in question, which excluded British law but adopted the application of Emirati law, however, we disagree with it regarding its determination of what the applicable law is: (British Matrimonial Cases Act of 1973). In particular, it is assumed to have been established in the doctrine of the Court of Cassation that the applicable law is British law, bearing in mind - as we explained before - that the court did not show us the fact that it is so. In addition, - as seen before - the Court of Cassation, in its ruling under study, erred in applying the attribution rule. Because it confused marital maintenance, which is considered one of the effects of marriage and governed by the attribution rule of Article 1 (13) of the Civil Transactions Law, with children's maintenance, which fall within the "maintenance on relatives" and is governed by the attribution rule stated in Article 15 of the same law.

Finally, we shall point out to an issue raised by the Court of Cassation in its ruling under study, meaning that if the opponent presented foreign law he adheres to before the judge, and the latter had no doubts about its validity, would the judge apply this law despite the objection of the other opponent to its validity? To

answer this question, we present the position of jurisprudence (first) and then the position of the Court of Cassation in the judgment in question (second).

### **First: The Opinion of Jurisprudence and Comparative Judiciary**

The opinion of one side of the Egyptian jurisprudence is that “[i]f an opponent presents a foreign law, and the judge has no doubts about its validity, then this is acceptable as long as the other opponent does not dispute it.”

The Lebanese Court of Cassation provides that “since foreign law requires establishing evidence on its content, in case if the opponent objected to its validity, or if the judge doubted its validity, and since the opponent did not object to the validity of the Palestinian law presented, and that the Court of Appeal did not consider it necessary to establish evidence on its content, then this reason necessitates a response”.<sup>36</sup>

It is clear from this that there are two conditions for establishing evidence on the content of foreign law. **1-** The opponent does not object to the validity of the foreign law presented in the case. **2-** The judge does not doubt the validity of the foreign law presented in the case, and as such, these two conditions are inseparable. The opponent's non-objection to the content of foreign law presented by the other party in the case should not be complete proof of the validity of that content. Still, it up to the judge to intervene to highlight the objective truth.<sup>37</sup>

### **Second: Putting the Issue in Accordance with the Ruling in Question**

This issue came within what was stated in the preliminary judgment with its supporting reasons and supplemented by the contested judgment (appeal judgment), stating that “... the

plaintiff's attorney did not accept the application of that law submitted because the official authorities did not ratify it in Britain...". As a result, the Court of Appeal - and then the Court of Cassation - supported what the Court of First Instance concluded in excluding the foreign law and applying the UAE law. This means that the Court of Cassation relied on the non-dispute of the other opponent in applying foreign law, meaning the possibility of refusing to apply foreign law adhered to by one of the parties if the other party objects and disputes its validity, which is what is understood from the ruling in question. Particularly, the other opponent disputed the validity of the British law and did not accept the application of that law presented because the official authorities did not ratify it in Britain.

However, the application of the judge's law in the case where it is impossible to prove the content of the foreign law confirms the inaccuracy of what the Court of Cassation concluded in the ruling under study that foreign law is nothing more than a material fact. If that were the case, the opponent's inability to prove this fact (foreign law) would have resulted in the court's rejection of their requests, i.e., that is to say, that the judiciary rejects the case, as is the case in proving the facts.<sup>38</sup>

## Conclusion

As was seen, our commentary on the Dubai Court of Cassation ruling showed that the national judge is not obligated to apply foreign law on his own, but rather the litigants must insist on applying it in accordance with the rules of attribution stated in Articles 12, 13, 14, 15, 16, 17, 27, 28 of The Civil Transactions Law. It follows that the litigants are obligated to prove the foreign law by submitting its texts or translating them. Failure to observe these controls will result in excluding foreign law and applying UAE law to the dispute. This ruling has raised some problems but also developed some legal principles. The most important results and recommendations of this ruling are as follows.

### First: Results

**1-** After issuing the Personal Status Law and its amendments, the Court of Cassation decided that the application of foreign law depends on one of the litigants adhering to it according to the rule of attribution.

**2-** The judgment was incorrect in describing the presented case as falling within the effects of marriage. Thus, it did not differentiate between marital maintenance, which is considered one of the effects of marriage and is governed by the attribution rule of Article 13 (1) of the Civil Transactions Law, and children's maintenance, which falls under "maintenance on relatives", which is governed by the attribution rule stated in Article 15 of the same law.

**3-** The ruling, in question, confirmed that the judiciary of the subject has adhered to the rule of attribution stated in Article 1 (13) of the Civil Transactions Law and applied it to the dispute in the issue. It concluded the exclusion of the application of foreign law presented in the case and the application of the national law

to it, except that it did not appear to us - through the facts of the case - the fact that the Trial Court had decided in the personal status case, before it, between two foreigners according to the aforementioned rule of attribution, which requires the application of the law of the country where the marriage took place on money-related implications.

4- The ruling decided that the burden of proving foreign law and its submission to the court of first instance rests with the opponent who insists on applying it, considering that it is a material fact.

### **Second: Recommendations**

To avoid the consequences and implications of this ruling, we propose the following recommendations.

1- We request our national legislator to take the initiative to amend the text of the third paragraph of the first article of the amended Personal Status Law in 2020 by deleting the following phrase: (his law, without prejudice to the provisions of the articles) from the text, and replacing it by the following “the applicable law in accordance with the rules of attribution mentioned in the following articles...”. So, the text will read as follow. “The provisions of Federal Law No. 28 of 2005 apply to non-citizens unless one of them insists on applying the applicable law according to the rules of attribution stated in Articles 12, 13, 14, 15, 16, 17, 27, 28 of the Civil Transactions Law...”. The phrase (applicable law) includes personal law or any other law.

2- We wish the Dubai Court of Cassation not to confuse wife’s maintenance with maintenance imposed on relatives and not to apply the attribution rule related to Article 1 (13) because the predominant jurisprudence in most Arab countries tends to differentiate between them. In addition to the fact that Arab

legislation and comparative jurisprudence became expressive of this predominant jurisprudence.

**3-** As it is established, the judgment in question did not contain a statement indicating that Britain is the country where the marriage took place, although it is one of the statements that influenced the case. We hope that the Court of Cassation will not neglect this statement, whose absence in this judgment led to the belief that it did not take into account the essence of the relevant legislative amendments, which came - as is the case - (as the first ruling) in applying them.

**4-** We urge the legislator to clarify the legal position on the issue of the authority entrusted with proving foreign law. Given the technical developments and those that occurred in international relations, it may be more appropriate to make the search for foreign law a duty for the judge; and also, for the legislator to impose an obligation on the litigants to cooperate with the judge in that matter.

## Footnotes

<sup>1</sup> Dubai Courts website:  
<https://dc.gov.ae/SubscribedServices/Verdict.aspx?SessionDate=12-01-2022&CaseYear=2021&CaseSerialNumber=491&CaseSubtypeCode=451&DecisionNumber=4>.

<sup>2</sup> Al-MADHAHAN, Nayef Jalil, 2017, The Role of the Emirati Judge in Applying Foreign Law in Personal Status Matters “Legal and Judicial Study”, Journal of the College of Sharia and Law, Article (12), Volume (19), Issue (6), By Tafhouna Al-Ashraf - Dakahlia, Al-Azhar University, p.: 4214.

<sup>3</sup> Appeal No. 280, Personal Status Department, Session date: 4/11/2020, and Appeal No. 470, Personal Status Department, Session date: 12/22/2021.

<sup>4</sup> In its ruling under study, the Court of Cassation also raised the idea of public order in private international law as a tool to exclude the applicable foreign law, and it is noted that the court - in this ruling - did not come up with anything new regarding this issue, which was previously discussed in detail in Emirati jurisprudence in connection with its comment on other rulings of the same court. Therefore, we will not present this problem through this study.

<sup>5</sup> The importance of this question appears especially when the litigants refuse to adhere to the attribution rule because they are not aware of it, they do not want to apply it, they neglect it, or for any other reason.

<sup>6</sup> Appeal No. (184) of 2019 Judicial - Sharia - 11/7/1998, Technical Office 20, Part (2), Rule No. 147, p.: 833.

<sup>7</sup> Appeal No. (49) and (50) of 2000, Personal Status Department, No. (11), Rule No. (146), p.: 936.

<sup>8</sup> Appeal No. (52) of 2006 - Personal Status Department, on 10/3/2006.

<sup>9</sup> Al-SABOUSI, Abdullah Saif Ali, 2020, the Problems of Defining the Law Applicable to Personal Status Disputes According to the Provisions of Conflict of Laws of the United Arab Emirates, Analytical jurisprudence study, Volume (11), Issue (19), Department of Research and Studies, Ministry of Justice, Emirates, p: 22.

<sup>10</sup> Appeal No. (30), for Judicial Year 28, Civil and Commercial Judgments Department, on 4/30/2006.

<sup>11</sup> Appeal No. (280), Personal Status Department, Session date: 4/11/2020; That is, this ruling came after the amendments to the Personal Status Law in 2020 entered into force, and it is surprising that it was not based on it!! Rather, I use Article 1 of the Personal Status Law before it was amended.

<sup>12</sup> Al-Sabousi, Abdullah Saif Ali, The Problems of Defining the Law Applicable to Personal Status Disputes According to the Provisions of Conflict of Laws of the United Arab Emirates, p. 22.



<sup>13</sup> See in this regard, ABDELRAHMAN, Jaber Jad, 1954-1955, Principles of Private International Law, a group of lectures delivered to fourth-year students in conflict of laws - conflict of authorities - conflict of jurisdiction, (Cairo: Al-Mutaba`ah Al-Alamiyah, p.: 402.

<sup>14</sup> FAHMY, Muhammad Kamal, 1985, The Fundamentals of Private International Law, (Cairo: Dar Al-Nahda Al-Arabiya, (ed. 1<sup>st</sup>), p.: 438; SALAMA, Ahmad Abd al-Karim, The Knowledge of the Rule of Conflict, p. 919; Raniyar Qader Ahmed, 2021, Maintenance and the Law Applicable to it, Rabin University, Department of Law, College of Humanities, Rania, Kurdistan Region, Iraq, p. 494. Available at: [https://doi.org/10.26750/Vol\(8\).No\(3\), Paper 23](https://doi.org/10.26750/Vol(8).No(3), Paper 23).

<sup>15</sup> It is based on a vertical sequence between those united by the unity of blood, that is to say, it is the link between the origins and the branches; OTHMAN, Nasser Othman Muhammad, 2009, Egyptian Private International Law, Book Two, International Jurisdiction - Conflict of Laws - International Effects of Judgments - Private International Arbitration, (Cairo: Dar Al-Nahda Al-Arabiya, (ed. 1<sup>st</sup>), p.: 157.

<sup>16</sup> As it is called “kinship of Al-Hawashi”, which is established between people who share a common origin without one of them being a branch of the other, such as kinship between brother and brother; and between a person and his maternal uncle; Al-Hawari, Ahmed Muhammad, 2016, Al-Wajeez in Conflict of Laws and Conflict of International Jurisdiction, University of Law, p.:266.

<sup>17</sup> It is decided in the Dubai Court of Cassation, “The reasons for the judgment are considered to be tainted by corruption in the inference if they involve a defect affecting the soundness of deduction, and this is achieved if the court relied in its conviction on evidence that is not objectively valid to be convinced of, or on a lack of understanding of the factual elements.” Particularly, it has proven, or the occurrence of a contradiction between these elements...”. See Appeal No. (96) of 2005, Personal Status Department, dated 6/26/2006.

<sup>18</sup> Is it not surprising that the ruling under study refers - in its preamble - to all papers and documents related to the subject of the dispute in question, and neglects to indicate the place of conclusion of the marriage contract, despite its importance in knowing the law applicable to this dispute, and whether it is the same one that adheres to it or not?! Also, this statement is no less important than the statement of the court that ruled the annulment of the marriage contract arising from the case in question, which is the (Guilford County) court in England. Noting that the Court of Cassation, in a recent ruling issued in 2020 - that is to say, before the issuance of the suspended ruling - indicated the importance of indicating the place of conclusion of the marriage contract; where it ruled that “[i]t is established in the judgment of this court that the Trial Court must evaluate its judgment on elements derived from what has an established origin in the papers, and that its judgment includes what reassures

the viewer that it has examined the evidence and documents presented in the case so that the judgment is based on what it is supported by reasons that are focused on the section of the dispute in the case and lead to the result on which its judiciary is built. If the ruling does not examine the evidence and the documents presented to it, which influenced the case and that the opponent adhered to its indications, or if the opponent does not respond to the essential defenses that he presented to it, with evidence that it encompasses the truth, the reality of the case and the evidence and documents presented in it, then its ruling is tainted by a violation of the established papers, shortcomings in causation, and a breach of the right of defense... If it is limited to mere brief reference to the documents submitted by the litigants to which they relied to prove the validity of their defense without being concerned with examining and scrutinizing these documents, the extent of confirming or denying what the litigants invoked regarding it and its impact on the court's belief, then its ruling is tainted by deficiencies in reasoning." Dubai Cassation, Appeal No. (280) of 2020, Personal Status Department, on 11/4/2020.

<sup>19</sup> It reads as follow, "[i]n the cases stipulated in the two preceding articles, if one of the spouses was a national at the time of the marriage contract, the law of the UAE alone applies except for the eligibility condition for marriage."

<sup>20</sup> If scientific integrity requires that we acknowledge the fact that the previous position of the Court of First Instance at the time of filing the case (as the relevant legislative amendments had not yet been issued) and until the judgment was issued on 4/22/2021 (that is to say, shortly after the issuance of those amendments) has what justify it given that the case was filed before the relevant legislative amendments were issued, there is no excuse for the Courts of Appeal and Cassation for not redressing the mistake they made in the matter under discussion (forgetting to indicate the place of conclusion of the marriage contract through the facts of the case).

<sup>21</sup> In the name of HAROUN, Muhammad Fathi, 2015, Proof of Foreign Law Before the National Court, Journal of Fiqh and Law, Publisher: Salah El-Din Dakkadak, Issue 31, p.: 84 et seq.

<sup>22</sup> Appeal No. (470), Personal Status Department, on 12/22/2021.

<sup>23</sup> It means attributing jurisdiction to Emirati law by name, in the sense of naming the "Emirati" national law as a law applicable in relations to a foreign element without relying on specific attribution controls, or by adopting attribution controls that increase the opportunity for applying the Emirati law before the Emirati judiciary in disputes with a foreign element the alien. See: Abdel Nasser Ziyad HAYAJNEH, Critical Readings on Conflict of Law Provisions in Qatari Civil Law, International Journal of Law, 2019, Qatar University Press, College of Law, Regular Issue (2), p.:166.

<sup>24</sup> Decided because the applicable foreign law could not be established; This means a case in which the applicable law is not presented by the opponent who

insists on applying it, noting that this case was decided by the jurisprudence of the Court of Cassation - in the ruling under study - and not by a legislative text. The reason for this is due to the difficulty of proving foreign law, and this is a traditional reason dating back to several decades ago, which was characterized by the rarity of cases involving a foreign element that was brought before the national judge. But today, as the means of information technology developed through the internet, which makes it easy to find the texts of any foreign law, and even translating it through these means, it has become easy to prove foreign law. See, Muhammad Walid Hashim AL-MASRY, The Extent to which the Compulsory View of the Rule of Attribution and Foreign Law before the National Judge Correlates towards a Unified Position for Arab Private International Law Legislation, Sharia and Law Journal, 2008, No. (35), United Arab Emirates University, p.: 253.

<sup>25</sup> In terms of the progress made in the means of communication between judges from different countries of the world, which also facilitated the growth of audio-visual communication via the internet, which makes it easier for the Emirati judge to cooperate officially with foreign judicial authorities in the country whose law is applied. In addition to the movement of convergence between the legislation of countries in the field of private international law, which makes it easier for the Emirati judge to deal with some laws of countries with a legal background close to the UAE; such as the Arab countries and countries belonging to the Latin legal system in general. Hussam Osama SHAABAN, Treatment of Foreign Law before the Bahraini Judiciary, a Comparative Study in Light of Contemporary Jurisprudential and Judicial Directions in Private International Law, Journal of Sharia and Law, 2017, Issue (19), Al-Azhar University, Cairo, p.:36.

<sup>26</sup> The preponderant jurisprudence confirmed that searching for the content of foreign law is an obligation on the judge and the litigants assist him in it; Fouad Abdel Moneim RIYAD and Samia RASHED, Mediator in Private International Law, Conflict of Laws, Dar Al-Nahda Al-Arabiya, Cairo, 1971, p.: 106. Okasha Mohamed Abdel-Al, Conflict of Laws, A Comparative Study, Alexandria: New Publications House, 2002, p.:363. Ahmed Abd al-Karim Salama, The Knowledge of the Rule of Conflict and Choice among Canons, New Galaa Bookshop, Mansoura, 1996, p.: 517

<sup>27</sup> The Egyptian Court of Cassation opined that “[r]elying on foreign law is nothing more than a mere material fact that the litigants must establish evidence of.” Appeal No. (804), Judicial Year 44, (Civil), dated 4/7/1981, Technical Office 32, Part (1), Rule No. (201), p.: 1078; But this court soon softened its stance, where it explained “[i]t is decided - in the Court of Cassation’s judgment - that adhering to foreign law is nothing more than a mere material fact that must be evidenced in response to practical considerations with which it is not possible for the judge to be familiar with

the provisions of that law, because the basis for applying this rule is that the foreign law is foreign.” On the authority of the judge, it is difficult for him to stand on his rulings and access his sources, but if the judge knows its content or his knowledge of it is assumed, then there is no point in adhering to the application of that rule. Appeal No. (9139) of 84 Judicial Court - Civil and Commercial Judgments Department - on 6/22/2015, Technical Office 66, Rule No. (141), p.: 941; This principle was approved by the Court for the first time on 6/2/1984, then it was repeated in the rulings of the Court of Cassation with the same meaning.

<sup>28</sup> For example, Tunisia explicitly stipulates cooperation between the judge and the litigants, according to the Journal of Private International Law of 1998; whereas, Chapter (32) stipulates that “[t]he judge can automatically establish evidence of the content of a specified foreign law on the basis of attribution within the limits of his knowledge, and within a reasonable period of time with the assistance of the parties when necessary...”.

<sup>29</sup> In accordance with the rules stipulated in Article 13 of Federal Law (10) of 1992 regarding the issuance of the Law of Evidence in Civil and Commercial Transactions, which reads as follow “[d]ocuments issued outside the state and certified by its representatives and official authorities are accepted as proof in the country in which it was issued.

<sup>30</sup> “From an office licensed by the Ministry of Justice in accordance with the provisions of Article 7 of Federal Law No. 6 of 2012 regarding the organization of the translation profession”. See, Appeal No. (470), Personal Status Department, Session date: 12/22/2021.

<sup>31</sup> See, SOURANI, Amal, 2013, the Application of Foreign Law before the National Judiciary, Master Thesis, University of Aleppo, Faculty of Law, p.:33.

<sup>32</sup> Appeal No. (470), Personal Status Department, Session date: 12/22/2021.

<sup>33</sup> OXEL, Soumya, The Application of Foreign Law in Light of National Attribution Rules, 2016, Master Thesis, Larbi Ben M’hidi University - Umm El-Bouaghi - Faculty of Law and Political Science, p. 25.

<sup>34</sup> SALAMA, Ahmad Abd al-Karim, Knowledge of the Rule of Conflict and Choice between among Canons, p.: 521; Rather, His Excellency decides - before - that "experience is the preferred, if not the only, means for revealing the content of foreign law"; P: 520.

<sup>35</sup> Appeal No. (449) of 2018 Judicial Court - Civil and Commercial Department, dated 10/11/1998, Technical Office 20, Part (2), Rule No. (162), p.: 930.

<sup>36</sup> Resolution No. (71), dated 6/7/1963, Judicial Bulletin 1964, p. 24; Referred to by: Okasha Muhammad Abdel-Al, Conflict of Laws, p. 367.

<sup>37</sup> For more details, see MANSOUR, Sami Badie, 1994, Mediator in Private International Law, (Beirut: Dar Al-Uloom Al-Arabiya, vol. (1), p.: 678 et seq.

<sup>38</sup> Sadek, Hisham, Abdel-Aal, Okasha, and Al-HADDAD, Hafiza Al-Sayed, 2006, Private International Law: Conflict of Laws - International Jurisdiction - Nationality (Alexandria: New Publications House, p. 171.