

# EVALUATING PUBLIC POLICY EXCEPTION IN PERSONAL STATUS MATTERS: A CRITICAL STUDY IN THE CONTEXT OF REGULATION AND LAW

Fayez Alnusair \*, Nour Alhajaya \*, Moustafa Elmetwaly Kandeel \*\*,  
Said Elsayed Kandil \*\*\*

\* College of Law, Al Ain University, Al Ain, UAE

\*\* *Corresponding author*, College of Law, Al Ain University, Al Ain, UAE;  
Faculty of Law, Tanta University, Tanta, Egypt

Contact details: College of Law, Al Ain University, P. O. Box 64141, Al Ain, UAE

\*\*\* Faculty of Law, Tanta University, Tanta, Egypt



## Abstract

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The amendments to United Arab Emirates (UAE) Federal Law No. 30 of 2020 altered Article 27 of the Civil Transactions Law to avoid excluding the application of foreign laws when these oppose Islamic law and public policy (Dubai Court of Cassation, Civil Chamber, Case No. 592/2023, 2024). This paper addresses the answer to a question related to the extent of the success of the Emirati legislator in achieving a balance between the supposed role of public policy exception and protecting the foundations, values, and principles of Emirati society when considering cases that contain a foreign element. To answer this question, we followed the analytical approach, where we analyzed the aforementioned legal amendments. In this paper, it is argued that these amendments contradict the role of public policy on issues of private international law. Alternative solutions are suggested which, while not entirely removing the concept of public policy, encourage a reduction in the applicability of the public policy. With these solutions, the judge would have the power to rely upon public policy when a minimum threshold is present in the judge's home nation, or through the application of the principle of proportionality between the provisions of foreign law and fundamental human rights (Al-Qudah, 2023).

**Keywords:** Public Policy, Emirati Law, Personal Status, Foreign Law, Islamic Law, Private International Law, Federal Civil Personal Status for Non-Muslim Foreigners, Federal Civil Law

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## 1. INTRODUCTION

The idea of a public policy in determining the law to be applied in a conflict is an essential part of the general theory of the conflict of laws. Tracing back to the 14th century, the idea of excluding an applied foreign law has a long history, although different interpretations have developed over time (Nord, 2003). The reason for using public policy as a defensive tool is to exclude the application of a foreign law that contradicts a nation's public policy. This enables the protection of the values and basic principles explicitly provided for in a national legal system which may conflict with the foreign law to be applied in a case (Yahya, 2019). A public policy can also protect the parties in a dispute from the potential application of foreign laws that do not respect human rights or the rights associated with legal persons (Abd Al-Karim, 2002).

The interconnectivity of economic and social relationships has made it necessary to balance complete openness to the other and the protection of the public policy of the judge's domestic legal system. By creating such a balance, the aim is to preserve the continuity of international relations and restrict the scope of the public policy to acceptable and reasonable limits, while also rejecting its implementation except in exceptional circumstances (Gannage, 2009). This leaves space for the creation of greater coexistence and harmony between different legal systems (Batiffol, 1956; Mayer, 2007).

The Emirati legislator addressed the idea of public policy in the old text of Article 27 of the Civil Transactions Law so that any foreign law that violates the requirements of public policy and Islamic law is excluded without any exceptions, which forced the Emirati judiciary to intervene to mitigate the severity of this rule. An example of this is the existence of a dispute in which a person professing Hinduism claimed inheritance from his Muslim son, which necessitated depriving him of the inheritance in implementation of the idea of public policy and the rules of Islamic Sharia, which do not permit inheritance between people of different religions, in accordance with the old text of Article 27 referred to Dubai Court of Cassation, Civil Chamber, Case No. 90/2006.

Recently, the United Arab Emirates (UAE) legislature amended its position on international public policy. Prior to recent amendments, Article 27 of the UAE Civil Transactions Law dismissed any foreign legal provisions that might contradict Islamic law, public policy, or morality. Currently, this defense is limited to exclusive situations, as mentioned in Article 27 (any provisions of any law stated in Articles 10, 11, 18-26 of this law shall not be applicable if such provisions contradict the provisions of Islamic Sharia or the public norms and morals of the UAE). The question at hand at this point concerns the extent to which the Emirati legislature has succeeded in achieving the required balance between the role of public policy in cases containing a foreign element, and the protection of the foundations, values, and principles of Emirati society. To answer this question, the study begins by outlining the practical challenges faced before and after the recent amendments in applying public policy in cases in which foreign law plays a role.

The next step is to describe the amendments made to the application of public policy in the face of foreign law, as specified by the principles of national attribution, to determine whether the Emirati legislature has, through its amendments, been successful in overcoming these challenges. The study concludes by presenting possible solutions to the law found in comparative jurisprudence.

This new text in Emirati law does not correspond to another text in any of the comparative Arab legislation. We mention, for example, that Article 29 of the Jordanian Civil Code stipulates that: "The provisions of a foreign law specified by the texts may not be applied if these provisions contradict the public policy in the Hashemite Kingdom of Jordan".

The importance of this paper lies in the lack of sufficient jurisprudence treatment of the aforementioned amendments. This paper aims to highlight the difference between the old and new text of Article 27 of the UAE Civil Transactions Law in order to determine the feasibility of this amendment and the extent of its contribution to the application of foreign legislation.

This paper is structured as follows. Section 2 provides an overview of the literature on the theme. Section 3 explains the research methodology used. Section 4 highlights the main results of the study and reviews the main discussion surrounding the assessment of public policy exceptions in matters of personal status. Finally, Section 5 presents a comprehensive conclusion.

## 2. LITERATURE REVIEW

In an article by Yahya (2019), the author focused on the mechanisms used to give priority to foreign laws over internal public order in the field of private international relations. This paper is biased in favor of the theory that foreign laws should be given greater weight than national public order in the context of private international law. The author supported his idea with a number of special justifications and innovative mechanisms that would mitigate the idea of public order in favor of foreign laws. The author pointed out that this is not just a theoretical analysis, but rather a practical embodiment of consolidating economic and investment relations.

In another paper by Al-Qudah (2023), the author emphasized that if the rule of national attribution stipulates that foreign law is the governing law in a relationship involving a foreign element, this does not mean that the national judge is obligated to apply this law, but rather the judge must to determine whether the choice and application of foreign law is appropriate and does not conflict with the country's public order. The author went on to point out that when a foreign law is found to be contrary to public order and public order, then, under Article 29 of the Jordanian Civil Code, the judge must refuse to apply it and apply the national law instead.

In the paper by Al-Fahdawi and Al-Juboary (2022), the authors emphasized that one of the complex issues in private international law is the idea of public order, as there is almost no agreement among jurists on adopting a stable control for public order, and the texts of laws in

most countries do not include a comprehensive definition of public order. The authors pointed out that public order plays a fundamental role in shaping the legal system of each country, as there is a set of basic rules that must be applied to individuals definitively. Individuals may not agree to violate the rules related to public order, and thus this idea serves as a “safety valve” that protects the basic pillars of society.

Falahout’s (2022) paper indicated that the laws in the country of the judge who considers the disputes the safety valve responsible for protecting the fundamental principles and foundations prevailing in that country. The claim of public order raises many legal problems, including those related to determining the scope of the exclusion of the relevant foreign law if it partially conflicts with the requirements of public policy in the judge’s country, and including those related to determining the best options to fill the legislative vacuum resulting from that exclusion.

These papers were chosen as examples of previous studies based on their connection to Arab legal systems that strictly apply the idea of public policy with regard to excluding foreign law that is applicable in the event of violating the provisions of Islamic law.

Our paper differs from these papers in that these papers mostly and generally address the concept of public policy in comparative law and its role in the excluding of applicable foreign law, without these studies being linked to a specific legal system for a specific country. Our paper deals in particular with the UAE law, and in a more specific way with the amendments that were made recently to the Civil Transactions Law regarding the rules of attribution, the most important of which are the amendments to Article 27 of this law.

### 3. RESEARCH METHODOLOGY

In preparing this research, we have relied on the analytical approach, by analyzing the texts of UAE Federal Law No. 30 of 2020 amending some provisions of Law No. 5 of 1985 issuing the Civil Transactions Law, and in particular studying the amendment made by the legislator to Article 27 of this law. In this regard, we point out that the study focuses mainly on analyzing this legal text. We have not obtained any recent judicial rulings related to the application of this text due to its novelty.

We analyzed the position of the Emirati legislator regarding his position on the international public policy exception. After the exception for public policy leads to the exclusion of any foreign law designated by the UAE attribution rules, this exception has become limited to certain cases in which foreign law is determined through legal rules that were referred to in Article 27 of the Civil Transactions Law.

In addition to the above, we have studied and analyzed the position of the French judiciary, which balanced the desire for the continuity of legal situations arising abroad with the basic rights of individuals, by adopting the principle of proportionality. We also studied and analyzed the European jurisprudential and judicial approach to applying the principle of proportionality, which aims to

determine whether the final result of applying foreign law is consistent or not with basic human rights, and on this basis, foreign law is excluded or applied.

An appropriate number of legislation, general and specialized references, and judicial rulings were used in preparing this paper. Some legislations were used, as well as 10 general references in defining the general and main ideas of the research and the idea of public policy, in addition to 15 specialist references in the role of the idea of public policy in excluding the applicable law, and this jurisprudential study was supported by 14 judicial rulings issued by the Emirati judiciary and the French judiciary.

## 4. RESEARCH RESULTS AND DISCUSSION

### 4.1. Reasons for amending Article 27 of the Civil Transactions Law

An investigation of why Article 27 of the Civil Transactions Law was amended requires discussing the practical challenges connected to public policy before considering how judges in the UAE have dealt with these challenges.

#### 4.1.1. Lack of clarity in public policy actions

##### *The position of foreign law*

The approach of comparative jurisprudence to foreign laws has developed gradually over time. French jurists have seen the role of public policy as a way to confront foreign laws that conflict with the general values of “civilized nations” (Loussouarn et al., 2013). This position is untenable today as it is discriminatory and an unacceptable way to evaluate societies based on their closeness to, or departure from, for example, eastern or Arab culture. Several French authors have suggested that this does not imply an inferior position for other legal systems, with some preferring to use the term “relative values” in connection to private international law (Gannage, 2009). This approach coincides with the notion that there is no perfect society with which others must be in harmony. Therefore, the role of public policy must be restricted to instances of extreme contradiction with fundamental human rights and values in the judge’s native law. Certain principles might be considered in contradiction with the concept of public policy within the French jurisdiction for more information (Arafa, 1991; Chihani & Si Youcef, 2021). The scope of this defense is limited in private international law to achieving the primary goal of resolving a conflict of laws, by applying the most appropriate law to the dispute that complies with the expectations of the parties involved (Yahya, 2019).

Previously, the Emirati legislature considered foreign law to be a mere fact, but its unequal treatment of national and foreign law has now altered. To explain what is meant by a “mere fact”, we can consider the pre-amendment wording of Article 1(2) of the Federal Law No. 28 of 2005 regarding Personal Status (Personal Status Code), which states that: “This law is applied to citizens of the UAE so long as there are no special rules for non-Muslims among them related to their sect or

creed. This law is also applied to non-citizens as long as they do not seek the application of their law”.

This wording shows that foreign law was only considered to be a mere fact and that those who adhered to it must provide evidence for its existence. This was followed in the UAE, where the Dubai Cassation Court ruled that: “[...] if a foreign citizen residing in the UAE wishes to apply [their] foreign law, [they] must clearly reference it in front of the court of first instance. Furthermore, [they] must present to the court a copy of that law, and it is not permitted for [them] to call upon it in front of the appellate court, as it contains the unfair advantage of a degree of litigation against [their] opponent” (Dubai Court of Cassation, Civil Chamber, Case No. 96/2011, 2011).

Later, the Emirati legislature amended this position, and Article 1(2) of the Personal Status Code was amended by Federal Law No. 29 of 2020, to state that: “This law is applied to non-citizens, as long as they do not seek to apply their law”. This does not negate the rules found in Articles 12-17 and 27-28 of the Civil Transactions Law issued as Federal Law No. 5 of 1985. In so doing, the Emirati legislature has prioritized the application of the rules on conflicting private laws, according to the necessary conditions, in cases of marriage, divorce, spousal and relative maintenance, custody, guardianship, and inheritance. In each of these fields, Emirati law is applied in cases when no litigating party seeks to use their own private law.

### *Connecting the public policy to the rules of Islamic law*

A crucial problem in the application of public policy in Emirati law can be found in Article 27 of the Civil Transactions Law, which previously stated: “It is not permissible to apply the rules of a law specified in previous articles if these rules are contradictory to Islamic Law, public policy, or the morals of the UAE”. From this, we conclude that Emirati law seeks to exclude the application of foreign laws that contradict public policy and the morals of the UAE, as well as those that contradict Islamic law. However, there is a question as to whether the categories of Islamic law and public policy are synonymous. To answer this question, we must turn to Article 3 of the Federal Decree by Law concerning Promulgating the Commercial Transactions Law, which states: “Public policy refers to the rules connected to individual personal status and other principles and foundations the society is based upon. This includes [rules] that do not contradict the peremptory rulings and the foundational principles of Islamic Law”. What this article indicates is that the peremptory rulings and foundational principles of Islamic law are considered to be part of public policy constituting a domestic understanding that differs from the international interpretation of public policy.

In domestic law, public policy is connected to the established legal principles that the parties to an agreement may not contradict; that is, the role of public policy here is to limit and define the absolute will of the individual. In international relations, public policy refers to the exclusion of those foreign laws, referred to in the principles of attribution, which contradict the principles and foundations

upon which a society is based. Put another way, public policy in international relations is a check on foreign laws that protects the legal system of the judge (Abd Al-Karim, 2002).

The content of public policy is, at the international level, more restrictive than domestic public policy due to the unique nature of cross-border relations. Therefore, what is part of domestic public policy is not necessarily relevant when there is a conflict of laws. For example, a conflict of law related to the capacity of a Jordanian national in front of an Emirati judge will be determined according to the Jordanian laws that determine adulthood at 18 years, although the rules of capacity are part of domestic public policy (Article 1(11) of the Emirati Civil Transactions Law). It is, therefore, possible to define public policy as one that excludes the application of a foreign principle of law that conflicts with the values, principles, and foundations of the societal, cultural, economic, and religious composition of the society of the judge, replacing it with national legal principles. In conclusion, the previous wording of Article 27 conflated domestic and international public policy in that the principles of Islamic law, although part of domestic public policy, are not in their entirety considered the principles and foundations upon which the society is based. As a result, there is no harm in applying a foreign law that contradicts Islamic law as long as it does not rise to the level of conflict with the more important principles of society.

The justification for this is based on the conception that not all the principles derived from Islamic law can be deemed part of international public policy. Saying otherwise would necessarily lead to the exclusion of foreign law in most cases, and cause observers to question the purpose of placing rules for attribution on issues of personal status in the first place. If the Emirati legislature truly wished to exclude foreign laws that contradict Islamic law, it would need to annul all of the principles of attribution related to personal status and state that Islamic law is applicable to all issues of personal status, regardless of the position of the parties to a legal relationship (Abdel Aal, 2004).

What confirms our position is that Article 1(2) of the Personal Status Code does not absolutely refuse the application of laws contradicting Islamic law if the case relates to non-Muslim Emirati citizens and creates special rules pertaining to their sect or creed (Article 1(2) of the Personal Status Code). If the legislature has permitted the application of special rules that contradict Islamic law for non-Muslim citizens, it is even more valid for the UAE to accept the application of such contradicting foreign law upon non-Muslim foreign nationals. Since it is difficult to place the text into practice in its old form, as this would simply mean not applying foreign law, we will next consider how the Emirati judiciary has dealt with this challenge.

The previous standpoint of the UAE legislature from those of other Arab legislations, such as the Egyptian and Jordanian legislations, has always been the historic source of the UAE’s Civil Transactions Law. Both (Article 28 of the Egyptian Civil Law) and the provisions of Article 29 of the Jordanian Civil Law conclude that the provisions of a foreign law shall not be applied if they contradict rules of public policy and morality.

This stance aligns with the standpoint of both legislatures by not including Islamic law (Islamic Sharia) within public policy, as the concept may differ on the local/national and international levels.

#### *4.1.2. Application of public policy before the amendments*

In light of the old wording of Article 27 of the Civil Transactions Law, the Emirati legislature's implementation of public policy has been based on connection, meaning that the judiciary has not implemented the international public policy in situations when the conflict is strongly related to the implementation of foreign law in opposition to Islamic law. Alternatively, the courts have implemented this defense when the conflict is clearly connected to Emirati law or the parties of the agreement are non-Muslim (Dubai Court of Cassation, Civil Chamber, Case No. 90/2006, 2007). The reason for this is that the legal system of the judge is not fundamentally threatened because the relationship of the judge's law to the conflict is less significant than the much greater importance of the foreign element in the claim (Bihannic, 2017).

We can observe a partial application to the public policy based on a connection in the rulings of the French Court of Cassation (FCC), Civil Chamber 1, No. 89-21.997 (1993), FCC, Civil Chamber 1, No. 06-16.886, 2007). We can also see the impact of this concept in the second paragraph of Article 3-370 of the French Civil Code, which states that an underage foreign child cannot be adopted if their personal status law prohibits it, except if they were born or currently residing in France. Therefore, the foreign law that bans adoption is not considered contradictory to the public policy of France. This, of course, changes if the child was born or currently resides in France (Article 370-2 of the French Civil Code, para. 2).

The Dubai Cassation Court has ruled that: "[...] If the inheritance is between two foreign and non-Muslim parties, the law of the deceased's citizenship at the time of his death, if one of his descendants seeks to rely upon it, must be applied. This is only if Islamic law is not harmed in its application due to the conflict of the rules between determining who can inherit and their proportion with Islamic law in this matter, so long as the deceased or one of his descendants is a citizen or a Muslim foreigner" (Dubai Court of Cassation, Civil Chamber, Case No. 90/2006, 2007, p. 125).

In another judgment related to the degree to which Hindu law permits the possibility of inheritance between descendants of different religions, the same court ruled according to Emirati public policy, stating that: "It is accepted that the fundamental principles of inheritance in Islamic Law, based on clear legal texts, whether applied to citizens or foreigners, are part of public policy" (Dubai Court of Cassation, Civil Chamber, Case No. 182/2006, 2006, p. 1804).

From the above, the conditions that must be fulfilled for a judge to exclude foreign law and apply the concept of public policy due to conflicts of law are:

- 1) the presence of a relative foreign law;
- 2) the contradiction of that law with the fundamental public policy of the judge's domestic law;

3) a connection between the conflict and the domestic law of the judge.

When the Emirati judiciary relies upon the concept of public policy based on connection, this is a means of escaping the application of a law. This escape is subject to criticism due to the difficulty of determining when the application of foreign law will not harm Islamic law. The rules of Islamic law cannot be changed or substituted. As a result, the application of the old wording of the law necessitated the exclusion of any foreign law that is contradictory to Islamic law. Indeed, French jurisprudence struck the first blow in criticizing the concept of public policy grounded on connection for several reasons, which in summary are that the theory does not seek to protect the fundamental values and principles of the judge's law nor act as a principle of attribution. Relying upon public policy exceeds its proclaimed goal: that private international law is not to be disrupted (Bihannic, 2017).

In conclusion, the concept of public policy based on connection is delusory as it facilitates the application of laws that contradict clear rulings in Islamic law, using the justification that these rights are not connected to the judge's law. Therefore, it would be more appropriate to amend the Civil Transactions Law, and this is precisely what occurred.

## **4.2. Position of Emirati legislation following the amendment of Article 27**

### *4.2.1. New position of Emirati law on public policy*

In 2020, the Emirati legislature issued Federal Law No. 30, which amended some articles of Federal Law No. 5 of 1985 on Civil Transactions. The core of these amendments was related to the conflict of laws in personal status cases, and the most important are linked to Article 27. The article now states: "It is not permissible to apply foreign laws as specified in Articles 10, 11, 18, 19, 20, 21, 22, 23, 24, 25, and 26 of this law if they are contradictory to Islamic law, public policy, or the morals of the UAE".

Conversely, this new wording indicates that the Emirati legislature now allows the application of foreign law if the case is related to Articles 12-17. These articles are related to personal status issues and are, in order: substantial and formal conditions of marriage, legal effects of marriage, maintenance of relatives, guardianship, custody, stewardship, inheritance, and wills. By creating this differentiation, the Emirati legislature has fundamentally altered the role of international public policy from excluding foreign law by making public policy an independent category whose application is based on the rules of attribution. As a result, the jurisdiction of Emirati law is expanded on specific issues and excluded from others. This approach finds some support in Western jurisprudence (Hammje, 2009). However, the question remains as to whether the practical challenges faced before these amendments were made have been overcome by this new wording, or whether new problems have been created.

#### 4.2.2. Evaluating the position of Emirati law following the amendments to Article 27

The demarcation adopted by the Emirati legislature of the situations in which international public policy can and cannot intervene has been both shocking and the subject of academic interest, as we find no traces of it in comparative law. As mentioned previously, the stance of both the Egyptian and Jordanian legislatures dismisses the provisions of foreign law if they contradict the rules of public policy and morality. They reject those provisions which may be contrary to the principles and values of society. In this regard, the judge has discretionary power to decide whether a foreign provision is contrary to public policy and morality; this is based not on personal criteria or beliefs but on the fundamental principles of the country and is inspired by the collective feelings of the group. The judge's discretionary power in this matter can be reviewed by the Court of Cassation as it is a matter of law to create certain unification of judicial solutions regarding such essential subject matter (Haddad, 2005).

Accordingly, the latest amendment of Article 27 of the UAE Civil Transactions Law is in clear-cut violation of the historic sources of the law, thus creating a very different stance. These amendments have created several legal problems which will now be summarized. The first concerns the wide and varied applications of public policy to issues of personal status, due to the significant variation between national laws in these matters. Therefore, the advance acceptance of foreign law enforcement, regardless of its content, is littered with risks.

Second, this demarcation has sometimes caused a foreign law that contradicts public policy to be applied to Emirati citizens, even if it contradicts the fundamentals of public policy in the UAE or the explicit rulings of Islamic law. This is justified by stating that the application of foreign law springs from the principles of attribution not mentioned in the laws and regulations referred to in the amended Article 27. For example, Article 14 states: "In the situations mentioned in the previous two articles, if either the husband or wife is an Emirati citizen at the time the marriage contract is entered, only the law of the UAE is followed, except for the condition of capacity to enter into a marriage".

If both parties to a marriage contract are foreigners when the contract is concluded, and one or both parties then become citizens, the article indicates that the law to be applied is that of the country in which the contract was concluded (Article 12(1) of the Civil Transactions Law). The same conclusion would occur if a deceased individual were an Emirati citizen and an inheriting descendant were a foreigner, as Article 17(1), states that the inheritance rules of the national law of the deceased at the time of their death are applied. In both cases, foreign law would be used even if it contradicts public policy or Articles 14 and 17 are inconsistent with Article 27.

Third, public policy in the realm of private international law is one of the most essential principles of private international law, as it is considered a correction to the negative consequences

arising from the application of the rules of attribution that are, by their nature, neutral and abstract (Arafa, 1991).

Fourth, with the recent amendments to the Civil Transactions Law and the Personal Status Code, Emirati law has fallen into a state of contradiction. For example, Article 1(2) of the Personal Status Code refers to the necessity of applying Emirati law to non-citizens, so long as they do not seek to apply their own law, without contradiction to Article 27 relating to the public policy; however, at the same time, Article 27, as shown above, excludes the application of public policy in personal status issues.

Fifth, and likewise, we find that the text of Article 27, which indicates that it is possible to apply foreign law that contradicts public policy in issues of personal status, does not achieve the goal for which it was established. This is because it mentions that foreign law cannot be applied when it contradicts public policy and Islamic law. As such, foreign law is mentioned in Article 26 of the Civil Transactions Law, which states that: "(1) if it is determined that a foreign law is to be used, only the domestic rulings of it may be applied, and not those related to private international law; (2) the law of the UAE is to be applied if it [the foreign law] refers in its principles to the texts of international law related to the foreign law to be applied".

This comprehensive text indicates the requirement to apply a foreign law, regardless of the rules of attribution that have specified this law, because the text excludes the making of a second-degree reference to the foreign law. However, if the foreign law contradicts public policy or Islamic law, it must not be applied on the grounds stated in the amended text of Article 27.

From these points, we find that the new amendments do not comprise a comprehensive solution to the challenges posed by the previous version. Therefore, it is necessary to turn to comparative law to identify alternative approaches that balance the need to limit the application of domestic law while, at the same time, not canceling the advantages provided by the public policy.

#### 4.3. Solutions in French law

We can conclude from the points made above that the new position of Emirati law on public policy is subject to criticism. Likewise, the demarcation between issues of personal status and commercial cases is not based on solid foundations that guarantee its effectiveness or sustainability. Therefore, we must consider whether there are effective methods of balancing an acceptance of the other (foreign law) and preserving the self (domestic law). French jurisprudence, for example, balances the desire to maintain the continuity of foreign-created law and fundamental individual rights through the principle of proportionality (*le contrôle de proportionnalité*). In the following section, we show how French courts have applied this principle.

At present, we can say that in Europe there is both a juristic and judicial inclination to apply the concept of proportionality, which aims to specify whether the result of applying foreign law aligns with fundamental human rights or not. Put another

way, the concept determines if the outcome of a case is reasonable, both necessarily and proportionally. On this basis, foreign law is either applied or excluded (Legendre, 2020). In this area of law, the position of the FCC in surrogacy agreements is based on Articles 16(7) and 16(9) of the French Civil Code and is considered invalid. As a result, French couples conclude and execute surrogacy agreements outside of the country. The child is then born in another country, whose government then provides the documents necessary to obtain a French birth certificate and citizenship, and confirms the parentage of the "intended parents" (*les parents d'intention*). French courts initially rejected granting a French birth certificate to children who carry documents issued by a foreign country on the grounds of the invalidity of the surrogacy agreement mentioned in the French Civil Code, and because these agreements contradict French public policy (FCC, Civil Chamber 1, No. 10-19.053, 2011). Courts have also rejected granting a French birth certificate to these children because the parents have intentionally circumvented French law (FCC, Civil Chamber 1, No. 12-30.138, 2013). Because of this stance, France was criticized by the European Court of Human Rights (ECHR), which ruled that not granting documents constituted an apparent assault on the right to respect for private and family life (ECHR, n.d., Article 8).

This criticism from the ECHR resulted in a fundamental change in French jurisprudence, with the FCC ruling that the presence of a surrogacy agreement does not prevent the granting of a foreign birth certificate so long as the documents are valid and represent the facts (FCC, Plenary Assembly, No. 14-21.323, 2015). In 2017, the FCC issued several judgments that employed the principle of proportionality by accepting the establishment of lineage through the father and denying it through the mother. The FCC based this ruling on the idea that its absolute refusal to grant birth certificates was contradictory to Article 8 of the ECHR (n.d.) and Article 47 of the French Civil Code (FCC, Civil Chamber 1, 16-16.901/16-50.025, 2017). It ruled that denying a child's lineage through the mother did not significantly contradict the right to respect for private and family life.

In 2018, the FCC requested a consultative ruling from the ECHR regarding the possibility of acknowledging the connection between a child and its intended mother, although it differed from biological fact (FCC, Plenary Assembly, No. 10-19.053, 2018). The ECHR's response confirmed that the right to respect for private and family life as guaranteed by Article 8 of the ECHR (n.d.) requires that domestic law acknowledge this relationship in some form. Thus, for example, it may be mentioned in the birth certificate that the intended mother is the legal mother, or by granting the intended mother the possibility of adopting the child. The final stage of judicial development in this matter occurred in 2019 when the FCC accepted the establishment of parentage of the intended mother based on the child's best interests (FCC, Plenary Assembly No. 10-19.053, 2019; Bollée & Haftel, 2020). Therefore, the courts preserved the continuity of a legal reality in domestic law to achieve harmony and balance with domestic legal principles, particularly international human rights agreements.

Likewise, the FCC ruled in 2019 that the lower courts had not violated the right to respect the private life of the family and child, mentioned in Article 8, by acknowledging the previous adoption of a child in Germany when a simple adoption became complete. This resulted in severing the relationship between the child and the biological father, against the latter's wishes. The FCC ruled that the German court's acceptance of the adoption acted as the implicit agreement of the biological father and that relying upon this ruling did not contradict French public policy (Court of Cassation, Civil Chamber 1, No. 18-17.111, 2019). Based on this judgment, it appears that the FCC felt that German law did not contradict Article 8 of the ECHR (n.d.) and that not applying German law would have constituted an assault on the child's right to the protection of Article 8. Thus, through this judgment, the FCC dealt directly with the law's compatibility with Article 8 of the ECHR (n.d.).

The principle of proportionality between the foreign law to be applied and the general principles of oversight is subject to review. In a recent ruling of the FCC, the court subjugated the principle of proportionality in a ruling issued by the Appellate Court of Oversight (FCC, Civil Chamber 1, No. 19-15.783, 2020). In this case, the Appellate Court ruled that the English law, which rejected a claim to establish parentage, was a clear violation of the right to respect for private and family life outlined in Article 8 of the ECHR (n.d.). The English court rejected a claim to establish biological parentage that conflicted with the parentage established by adoption, but the French court ruled that the right to know one's proper lineage is preferred to the continuity of a legal fact. The FCC rejected this ruling, stating that the Appellate Court had overstepped its role in balancing the rights of the child's biological family (which did not have a relationship with the child) and the rights of the adopted family. Therefore, the FCC ruled that the refusal to accept a paternity claim according to English law did not constitute a violation of Article 8.

Finally, it is important to mention that French law balances the application of foreign law, general principles specified by the ECHR (n.d.), and French international public policy. In a case dated March 17, 2021 (FCC, Civil Chamber 1, No. 19-26.071, 2021), the FCC decided that the Appellate Court had not considered all the legal foundations necessary to determine whether a foreign judgment had contradicted the requirements of international public policy. Among these foundations is Article 3 of the French Civil Code and Article 6(1) of the ECHR (n.d.). On these grounds, the FCC ruled that the Appellate Court had violated the articles mentioned above, and rejected the appeal (FCC, Civil Chamber 1, No. 19-26.071, 2021).

## 5. CONCLUSION

After describing the position of international public policy in Emirati law before and after the amendments to Article 27 of the Civil Transactions Law, we find that the Emirati legislature has unsuccessfully amended the law. This is because the amendments contain several contradictions. Observers of the new wording of Article 27 may initially conclude that

foreign law must be applied under Articles 12-13 and 15-17, related to issues of marriage, divorce, maintenance, protection of persons of diminished capacity, wills, and inheritance. This is the case even if these rules are contradictory to public policy and the explicit rulings of Islamic law, as the wording of Article 17 does not cover these cases. This interpretation is unconvincing and insufficient, as a country may not allow the application of a foreign law that violates the very principles and foundations upon which its society is founded.

Additionally, the wording of Article 27 contradicts the above interpretation, mainly because it excludes the foreign laws established in Article 26 of the Civil Transactions Law. This means that if a foreign law is to be applied, it only includes the internal regulations unless the law is assigned to UAE law (in the first degree). When not assigned to Emirati law, these rules must not contradict Emirati public policy and the explicit rules of Islamic law which comprise the basis of the UAE's legal system.

In conclusion, the amendment of the amendment to Article 27 did not go as far as to address

the many cases in which the applicable foreign law was excluded due to its conflict with public order and the provisions of Islamic Sharia. We, therefore, suggest that the Emirati legislature adhere to the old wording of the article. Furthermore, the judiciary should work to preserve the sound legal practice initially established abroad, so long as it does not conflict with the explicit rules of Islamic law that constitute the basic principles of human rights and are coincident with international principles of human rights and Emirati international public policy.

This research primarily focuses on an in-depth study of amending the text of Article 27 of the UAE Civil Transactions Law and the impact of this amendment in expanding the scope of the application of foreign law at the expense of the application of national law. In addition, the methodology of this study is analyzing the aforementioned legal amendments.

Finally, this paper opens the way for other researchers to study the judicial rulings that will be issued in the future based on the new text of Article 27 of the Civil Transactions Law.

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