

An Analysis of Public Policy Intervention in the Recognition and Enforcement of Foreign Family Law Judgments under Turkish Private International Law

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Abstract

Respecting the judgments of other states and implementing the requirements of such judgments to the highest degree in the domestic area serves the general interests of international society. In Turkish law, one of the most important interventions which may set aside these interests is Turkish public policy. When it has been concluded that enforcement of a foreign family law judgment is contrary to domestic public policy, its enforcement is to be refused. Revealing when public policy intervention should occur and determining the criteria which require such an intervention are the main purposes of this paper. In this framework, it has been concluded limited and constant public policy intervention contributes to international family law. Another major conclusion is that the Turkish Supreme Court should amend its tendency to stipulate that certain subjects are directly linked to public policy.

Keywords: International family law, recognition, enforcement, public policy, divorce, custody, adoption.

Introduction

As relations between states increase, the different aspects of such relations reflect on the lives of individuals. One of the main areas where such a reflection occurs is certainly that of international family law. Marriages between individuals who have different citizenships or habitual residences, for instance, expose different laws and serious conflict of laws problems may emerge accordingly.

In this framework, it is among the main purposes of conflict of laws justice that a constant system is to operate which enables respect for different understandings of law and which satisfies respectively the interests of the children and the expectations of the parents during marriage or after the termination of marriage. In order to achieve such a purpose, an efficient recognition and enforcement mechanism with regard to foreign judgments plays an important role. Accepting and implementing foreign family law judgments as much as possible serves to ensure both the welfare of families and legal security at an international level; as a result, it serves justice. The subject has, therefore, a substantial importance at an international level.

From the aspect of Turkish private international law, one of the main obstructions to recognition and enforcement is the public policy of the forum. In this regard, if the enforcement of the foreign judgment violates the public policy of the forum, an application for its enforcement is rejected (Çelikel & Erdem, 2010). The above mentioned aims based on international harmony are then sacrificed at the expense of protecting the public policy of the forum. Therefore evaluating the criteria used in determining public policy intervention has not only national but also international importance.

In this study, the rejection of recognition and enforcement of foreign family judgments on the ground of being against public policy has been analyzed from the aspect of Turkish private international law. In this framework, a categorical analysis of the criteria used in practice has been presented, the pertinence of such criteria has been questioned, and our recommendations on the criteria have been put forth considering the doctrinal view. The subject has been analyzed keeping in mind that the main aim is to implement the foreign judgment as much as possible, starting from the principle that public policy intervention should occur only in exceptional circumstances.

1. Recognition and Enforcement under Turkish Private International Law

In Turkish private international law, recognition and enforcement procedure is subject to the Turkish Code on Private International and Procedural Law¹ (CPIPL), if foreign judgment is beyond the scope of an international treaty (Nomer & Şanlı, 2010)². However, if there is a specific international treaty with regard to the subject, the procedure is carried out according to the provisions of the treaty. Under the Turkish legal system, judgments such as “divorce or lineage” which have only decreative effects are subject to recognition (Şanlı, 1996). If the judgment also requires implementation, recognition would not be sufficient which means that the plaintiff is also required to apply for enforcement (Şanlı, 1996). As a result of these procedures, the foreign judgment gains the status of *res judicata* in Turkey. Also, the foreign judgment may then be implemented by the executive organs of the Turkish state.

This division between recognition and enforcement is crucial since their conditions differ: Under Article 58/1 of the CPIPL, in order for a foreign judgment to be recognized in Turkey, all the conditions for enforcement are required with the exception of “reciprocity.” This means that decreative kinds of decisions like divorce judgments are recognized in Turkey even if there is no reciprocity between Turkey and other states. In this regard, it is necessary only to overview the main conditions of enforcement, since they are all required for recognition also, except reciprocity. It should also be mentioned that the pre-conditions for recognition and enforcement are the same under the CPIPL.

1.1 Preconditions of Enforcement

The first precondition of the enforcement is that the foreign judgment should have been given by a “court” (Aybay & Dardağan, 2008; Çelikel & Erdem, 2010; Ruhi, 2003; Şanlı, 1996). Thus, for example, a divorce judgment rendered by a foreign municipality or an administrative organ cannot be enforced under the CPIPL. It is the law of the jurisdiction where the judgment was rendered that determines whether the organ which rendered the judgment can be qualified as a court or not.

The second precondition of the enforcement is that the judgment should not involve any criminal law character, otherwise the enforcement is rejected. Family law disputes do not usually involve criminal law, which means that this condition does not cause any problem in terms of enforcement.

The last pre-condition of the enforcement is that the judgment should be “final” under the law of the court that rendered the decision (Akıncı & Gökyayla, 2010; Çelikel & Erdem, 2010). From the Turkish law approach, a judgment’s finality in substance means that the case cannot be filed again with the same parties, the same reason and subject (Aybay & Dardağan, 2008; Çelikel & Erdem, 2010; Nomer & Şanlı, 2010; Tiryakioğlu, 1996). Being final in procedure means the entire procedure before the inferior and the appeal courts is complete (Aybay & Dardağan, 2008; Nomer & Şanlı, 2010; Tiryakioğlu, 1996).

Finally, for recognition and/or enforcement there is no requirement that one or more of the parties of the case should have Turkish citizenship³. The only requirement for the parties is that they should have a legal interest in recognition and/or enforcement of the foreign judgment (Demir Gökyayla, 2001).

1.2 Main Conditions of Enforcement

After the pre-conditions are satisfied, the first main condition for enforcement under Article 54/1/1 of the CPIPL is that there should be reciprocity between the Turkish state and the state whose court rendered the judgment⁴. The reciprocity between the states might be ensured by an international convention, a provision of law or *de facto* application⁵.

¹ Code No. 5718, Date of Acceptance: 27.11.2007, Official Gazette: 12.12.2007-26728.

² Bilateral agreements on the recognition and enforcement of foreign judgments are also reserved.

³ Similar view: with regard to the citizenship of the parties while enforcing the judgment of a German court: Supr. Court, 2. Chamber, E. 2007/20375, K. 2008/4214, 27.3.2008 (Retrieved January 12, 2012, from <http://www.kazanci.com>).

⁴ With regard to the recognition and enforcement of foreign judgments, Turkey has signed bilateral agreements with many countries, including; Albania, Algeria, Austria, Azerbaijan, Croatia, Egypt, Georgia, Iraq, Italy, Kazakhstan, Kuwait, Macedonia, Moldova, People’s Republic of China, Poland, Romania, Tajikistan, Tunisia.

⁵ Since it had not been researched thoroughly by the court of first instance whether there was any legal provision or factual application with regard to enforcement of foreign judgments in North Carolina, USA, the judgment of the court of first

If there is a convention, the recognition and enforcement conditions are determined within the context of the convention. If the provisions of the convention are more demanding than those of the Turkish CPIPL, the conditions stated in the CPIPL will apply. That is, the existence of the convention does not prevent the application of the enforcement provisions of the CPIPL when the latter's conditions are more flexible (Şanlı, 1996). If there is no such convention with regard to reciprocity, it is necessary to search for the existence of a legal provision. Reciprocity is a condition which is considered by the judge on her own motion and there is no requirement for the parties to establish reciprocity. It is also worth mentioning again that reciprocity is required only for enforcement and not for recognition.

The second condition of enforcement is that the subject matter of the foreign judgment should not be a subject on which Turkish courts have exclusive jurisdiction. In exclusive jurisdiction cases, the Turkish courts have the sole authority and there is always a competent court in Turkey (Ruhi, 2003; Şanlı, 1996). For example, when the foreign court has given a judgment related to immovable property in Turkey, such a judgment cannot be enforced because only Turkish courts can render such a judgment. Since family law cases like divorce, custody or adoption cases are not among the exclusive jurisdiction cases (Ruhi, 2003), foreign judgments that concern these cases may be enforced in Turkey.

The third condition is related to "connection", indicating that there should be a connection between the individual dispute and the foreign state whose court rendered the judgment. For example, this condition is satisfied for divorce cases when one of the parties is a citizen of the state where the court that rendered the judgment is located. Having a habitual residence in that country can also be a connection. This condition cannot be considered by the Turkish judge on her own motion, so the non-existence of such a connection should be alleged by the party against whom the enforcement is sought in Turkey. Therefore, unless there is such an objection, a lack of connection between the foreign court and the case does not impede the enforcement of the judgment.

Another condition of enforcement is connected to the defense rights of the party against whom the enforcement is sought. Such a party should have been summoned to the foreign court with due diligence and should have been duly represented. This condition also may not be considered by the judge on her own motion, the onus is on the party concerned to raise it.

The condition of enforcement which has the utmost importance for our study is that the enforcement of the foreign judgment should not contradict Turkish public policy. Judgments that are against the main social, political and economic principles of Turkish society, its basic ethics, rights, or freedoms, might be approached within this framework (Dayınlarlı, 1988; Demir Gökyayla, 2001; Gürzumar, 1994; Ruhi, 2003). As the relations of foreign judgments with the Turkish state increase, the public policy intervention occurs more often (Bayata Canyaş, 2012; Doğan, 2010; Tiryakioğlu, 1996).

In determining the legitimacy of public policy intervention, its exceptional character should be considered. The primary principle is to acknowledge and give effect to the foreign court's judgment as far as possible. If a part of the judgment that is against the public policy can be isolated, the rest of the judgment may still be enforced. Thus under Turkish private international law, the partial enforcement of foreign judgments is possible. For example, the divorce part of the judgment may be recognized whereas the custody part, which restricts one of the parent's personal relations with the child without any reasonable grounds, may not be enforced. In this way, the judge would be acting in a way that accords with the aim of giving effect to the foreign judgment as far as possible.

Moreover, it should be kept in mind that for recognition and enforcement under Turkish law, there is no *révision au fond*. As a matter of principle, during the enforcement proceedings, "the foreign judgment is not reviewed again in substance or procedure" (Nomer & Şanlı, 2010, p. 480). The subject of the enforcement review is the final paragraph of the foreign judgment, that is to say, the legal consequence which has been achieved as a result of the foreign proceedings (Nomer, 1984). However, under certain circumstances it may not be adequate only to review the final paragraph of the foreign judgment in order to justify the public policy intervention.

In such a circumstance, for the purpose of determining whether the foreign judgment is in conflict with domestic public policy (Nomer, 1984), the judge may make a limited analysis of the merits of the case (Demir Gökyayla, 2001) as an exception to the prohibition of *révision au fond*⁶.

2. Public Policy Intervention

The interpretation of public policy by Turkish courts may be assessed by some examples of international family law from court decisions together with the doctrinal approach in order to conduct a deeper analysis of the subject matter. With regard to public policy intervention in the recognition and/or enforcement of the foreign family law judgments, the main possibilities, inter alia, can be categorized as follows:

2.1 Assuming That Particular Subjects Are Automatically Linked to Public Policy

Public policy intervention should not automatically occur just because the foreign judgment is based upon a different understanding than the law of the forum where enforcement is demanded (Öztekin Gelgel, 2005). Only if there are intolerable infringements of public conscience, of fundamental ethical principles, or of the values of the society, should the public policy exception come into question (Dayınlarlı, 1988; Demir Gökyayla, 2001; Gürzumar, 1994). Conflict of laws justice also requires such an approach. Also, certain subjects should not automatically be considered as directly connected to public policy. Every case should be assessed individually. Assuming that some subjects are connected to public policy is also contrary to the methodology of conflict of laws.

However, it has been observed that the Turkish Supreme Court automatically accepts that some subjects are directly linked to public policy and the enforcement of such judgments which are based on rules contradicting Turkish compulsory rules has been rejected. In these cases, it has not been questioned or shown from what point of view the judgment violates the Turkish public policy. In the sample judgments below, the public policy approach of the Turkish Supreme Court can be strongly criticized:

2.1.1 Final Judgment under Turkish Law

For instance, in a decision of the Supreme Court⁷, when the court applied the final paragraph of Article 134 of the Turkish Civil Code the procedure followed by the foreign court was found to be against public policy. Therefore enforcement of the foreign judgment was rejected. The Supreme Court asserted that the procedure which should be followed under Article 134 of the Civil Code is both compulsory and linked directly to public policy.

According to Article 134, “a time limitation is required for the parties to be able to file a suit again when the already filed divorce suit has been rejected and the rejection judgment has been finalized.” The required time limitation is “three years” starting from the time the previous judgment on the subject becomes final. In imposing such a time limitation, the legislature has considered the possibility that the spouses might reunite.

In this particular case, the foreign court based its judgment on the Turkish court’s previous judgment. However, since the Turkish judgment had not been notified to the claimant it was not a final judgment.

This means that the foreign court acted in a way contrary to the compulsory rules of the Turkish law and based its judgment on a Turkish court’s judgment which had not been finalized. The main problem occurred at the stage of enforcement. Enforcement of the foreign court’s judgment was rejected on the ground of public policy. The Supreme Court stated that “finalization” is a subject which is linked directly to public policy and has to be taken into consideration by the judge on her own motion.

⁶ A court in Sonderberg, Denmark, entrusted the custody of Kenneth, Tobias and Yannick to their father, terminating the custody right of their mother. Enforcement of the judgment was demanded before a Turkish court depending on the European Convention on Recognition and Enforcement Regarding Custody of Children (Luxembourg, 20.5.1980, Turkish Official Gazette, 2.11.1999-23864). Under Article 9/3 of the Convention, foreign judgments cannot be reviewed on the merits. In this framework, the judge of the enforcement court cannot review the procedural, substantial and legal determinations of the foreign court. Therefore, it cannot be seen as a reasonable ground to refuse enforcement that the foreign court did not consider the compulsory provisions of the Turkish law or applied them in an inaccurate way: Supr. Court, 2. Chamber, E. 2004/10683, K. 2004/13120, 4.11.2004 (Retrieved December 27, 2012, from <http://www.kazanci.com>).

⁷ Supr. Court, 2. Chamber, E. 1997/12692, K. 1997/14130, T. 24.12.1997.

In a dissenting judgment in this case, together with some other objections, it was stated that the Supreme Court's approach of assuming that certain subjects are directly linked to public policy cannot be accepted.

We agree with the dissenting opinion. Particular subjects like "finalization" should not directly require public policy intervention. Unless enforcement of the foreign divorce judgment would violate Turkish public policy, like being against the basic family values of the society, the judgment should be enforced. Since such a contradiction did not occur in the particular case, just not being finalized according to Turkish law does not justify non-enforcement.

2.1.2 Adoption

The Supreme Court's approach in assuming certain subjects are directly linked to public policy also occurs in the enforcement of foreign judgments on subjects like adoption or custody where the interests of the children are especially at the forefront.

In many judgments of the Supreme Court⁸, the capacity and conditions of adoption have been assumed to be directly linked to public policy. For instance, enforcement of a foreign adoption judgment has been rejected on the ground of public policy that the age difference between the adoptive parent and adopted child was less than 12 years and the adoptive couple already had children. Under the Turkish Civil Code, the age difference is 18 years and, subject to certain conditions, the adoptive parents should not have any other children. This means that the compulsory rules of the Turkish law have been accepted as directly linked to public policy again.

The main and privileged interest in the adoptive relationship is the interest of the "adopted" (Nomer & Şanlı, 2010). Therefore, public policy intervention should mainly be assessed in the framework of the interests of the adopted child. Let us assume that an orphan living under very difficult conditions has been adopted, such an adoption might have brought the child a warm family environment. How then can it be alleged that such a judgment conflicts with public policy only because it is against the compulsory provisions of Turkish law?

Just the opposite, the non-enforcement of the foreign adoption judgment might jeopardize the child's feelings of belonging and might cause her to feel insecure. Therefore, without questioning such aspects, rejection of enforcement of a foreign adoption judgment only on the ground that it is against the compulsory provisions of the Turkish Civil Code is not appropriate. As long as the foreign judgment is for the benefit of the adopted, there is no reasonable ground for public policy intervention. Certainly, if a foreign judgment were found to violate the interests of the adopted child, public policy intervention may occur.

2.1.3 Joint Custody

A similar approach has been accepted in the enforcement of foreign joint custody judgments. According to the Supreme Court, pursuant to Article 336 of the Turkish Civil Code, it is compulsory that custody of the child should be granted to only one of the spouses as a result of divorce and this subject directly relates to public policy. Therefore, the Supreme Court has concluded that a foreign joint custody judgment that entitles both parents to custody rights cannot be enforced in Turkey.

Hence, just like adoption, compulsory provisions of the Turkish Civil Code have been deemed to belong to public policy, and foreign custody judgments which contradict these compulsory provisions have been ruled unenforceable. Therefore, without questioning whether joint custody is for the benefit of the child, its enforcement has been rejected. However, in many research studies (Hardcastle, 1998-1999; Schulman & Pitt, 1982; Steinman, Zimmelman & Knoblauch, 1985) it has been concluded that despite the divorce, if the parents are still able to communicate and cooperate in a civilized manner, joint custody serves the interests of the child. Therefore, if such a couple has been granted joint custody rights and if the interests of the child are protected it is irrational to think that enforcement of such a judgment is against public policy (Çelikel & Erdem, 2010).

⁸ For instance, enforcement of an adoption judgment of a German court was rejected since it conflicted with the compulsory provisions of the Turkish law because capacity and conditions of adoption relate to public policy. In the particular case, the adoptive parent had two children and the age difference between the adoptive parent and the adopted child was only 12 years: Supr. Court, 2. Chamber., E. 2003/13654, K. 2003/15160, T. 22.05.2003. Similar approaches were taken in judgments like Supr. Court, 2. Chamber, E. 2004/9169, K. 2004/10282, T. 1.5.2003; Supr. Court, 2. Chamber, E. 2003/8317, K. 2003/9830, T. 30.6.2003; Supr. Court, 2. Chamber, E. 203/8317, K. 2003/9830, T. 22.11.2002.

Finally, as seen in the sample cases, the tendency of the Supreme Court to assume that some subjects are directly linked to Turkish public policy cannot be accepted. Public policy intervention should be analyzed on the basis of every individual case and which aspect of the foreign judgment is against public policy should be revealed (Nomer & Şanlı, 2010). In custody or adoption cases, the main interest is the interest of the child or the adopted and if the foreign judgment protects such interests, its enforcement should not be rejected and the reasoning given for the rejection should not be simply “public policy.”

As a result of such an interest-oriented approach, parties who have acted in accordance with the foreign judgment will not encounter a shocking non-enforcement decision. Also, their expectations with regard to the judgment will be protected. Since the interests of the party who is at the center of the relationship (often the child) are protected, such an approach will enhance justice in the conflict of laws.

2.2 Cases with Regard to the Personal Status of Turkish Citizens and the Changeability of Public Policy Conceptions

One of the main features of the public policy concept is that it may change over time even in the same society (Gürzumar, 1999). This feature also has an influence in evaluating the foreign judgment at the enforcement stage. With regard to changeability, a very vivid example has been encountered in Turkish private international law in the enforcement of foreign divorce judgments. This tendency to change has emerged as a result of the abolition of a provision upon which the public policy intervention had been based in earlier cases.

According to Article 38/e of the former CPIPL⁹, a specific condition had been brought for the cases with regard to personal status (like divorce cases) of Turkish citizens. This condition was that the foreign court should have applied the law prescribed by the Turkish conflict of laws rules. The onus was upon the “defendant Turkish party” to raise an objection that the foreign court should have applied the law prescribed by Turkish conflict of laws rules. If such an objection had not been made during proceedings in the foreign court, it was not possible to raise such an objection at the enforcement stage in Turkey – otherwise, the Turkish court would become an appeal court rather than the enforcement court. Since divorce is one of the main legal matters related to the personal status of Turkish citizens this condition has played an important role in the enforcement of foreign divorce judgments.

The target group of the legislature in introducing such a provision was the Turkish citizens who have been living and working abroad starting from the 1960s. Some of these workers, whose connections with their spouses have diminished over time, have applied for a divorce abroad and the judgments have been rendered in the absence of their spouses. The workers then applied for recognition and enforcement in Turkey. Therefore, by stipulating such a provision, the Turkish legislature aimed to grant the spouses “a right of objection” to the foreign judgment which has been rendered in their absence (Çelikel & Erdem, 2010).

In this framework, enforcement of some foreign divorce judgments has been rejected on the ground of public policy, because the law which has been prescribed by the Turkish conflict of laws rules had not been applied¹⁰. The approach adopted by the Supreme Court in these judgments can also be criticized. Hence, public policy intervention cannot occur automatically in a situation where the onus is on one of the parties to raise an objection¹¹ because public policy intervention is scrutinized by the judge on her own motion and there is no onus on the parties to seek public policy intervention (Nomer & Şanlı, 2010).

Moreover, enforcement should not be refused automatically without the court revealing in what respect the non-application of Turkish conflict of law rules causes an infringement of public policy.

⁹ Code No. 2675, Date of Acceptance: 20.05.1982, Official Gazette: 22.05.1982-17701. Repealed by the CPIPL dated 27.11.2007, which is still in force.

¹⁰ In Australia, the Family Court in Parramatta did not consider the Turkish conflict of laws rules and applied Australian law in a divorce case. Therefore, the enforcement of such a foreign judgment is against public policy: Supr. Court, 2. Chamber, E. 1990/6312, T. 21.0.1990.

¹¹ In an enforcement decision on the subject, a different and a more appropriate approach has been adopted. The foreign court did not apply the law prescribed by the Turkish conflict of laws rules and the defendant did not object to the enforcement on that ground. The Supreme Court concluded that the foreign judgment may be enforced unless it violates public policy: Supr. Court, 2. Chamber, E. 1999/14491, T.07.02.2000.

For instance, if under the foreign law the right to file a divorce suit is only granted to the husband in cases of adultery, and if the foreign judgment is based on such a provision, the enforcement of such a judgment in Turkey may be refused on the ground of public policy, because enforcement of such a judgment is contrary to gender equality which is a main principle of Turkish law. However, without revealing such a reasonable and obvious violation of a main principle, refusal of enforcement is not appropriate. The Supreme Court has again made the mistake of accepting certain subjects as directly related to public policy. The court has ignored the fact that every individual case should be scrutinized on an individual basis.

A very important amendment on this subject was introduced in the CPIPL which is now in force. According to this Code, there is no condition of enforcement stipulating that the law prescribed by the Turkish conflict of rules should be applied in disputes related to the personal status of the Turkish citizens. Let us assume a divorce case where one of the parties is a Turkish citizen and the other is a foreign national. The foreign court has not applied the law stipulated by the Turkish conflict of rules (joint national law or law of joint habitual residence or Turkish law respectively; it should also be considered that *renvoi* has been accepted in Turkish private international law to the second degree), but has applied another law to the dispute. In such a case, the foreign court's judgment may be recognized and enforced in Turkey under the CPIPL in force.

As we have seen, although the Supreme Court has rejected the enforcement of some foreign divorce judgments on the ground that the foreign court did not apply the law prescribed by the Turkish conflict of law rules and concluded that such a result is against public policy, since such a provision is not included in the new Code, there is not such a possibility of public policy intervention. That is to say, a subject which was formerly linked directly to public policy has lost its meaning (Çelikel & Erdem, 2010), proving the unstable nature of the public policy exception. The legislature no longer finds it necessary to protect the defendant Turkish citizens by stipulating such a provision (Çelikel & Erdem, 2010).

The changeability of the public policy concept has also occurred in cases where both spouses have mutually agreed to divorce. According to the now abolished Turkish Civil Code¹² of 1926, it was not possible for spouses to divorce by mutual agreement. With regard to the enforcement of foreign divorce judgments based on mutual agreement, the Supreme Court was not acting in a harmonized manner. The enforcement of some foreign divorce judgments¹³ was rejected on the ground of being against public policy because divorce by mutual agreement was not accepted under Turkish law. However, some other foreign judgments were enforced¹⁴. Pursuant to Code¹⁵ No. 3444 and Article 166/3 of the Civil Code¹⁶ which is now in force (dated 2001), spouses are granted the right to divorce by mutual agreement. Therefore, the legal basis of the public policy intervention in rejecting the enforcement of such foreign judgments has disappeared, demonstrating once more the instability of the public policy concept. Since divorce by mutual agreement has been accepted by the Civil Code now in force in Turkey, the public policy intervention on the subject has lost its meaning today.

The changeability and dynamic features of the public policy concept again emphasize the requirement that it has to be applied exceptionally. Hence, as seen in the above-mentioned examples, the public policy understanding may change over time even in the same society. Therefore a cautious approach is required with regard to the non-enforcement of foreign judgments which are based on provisions that are different than and contradict the compulsory provisions of Turkish law because a legal position similar to that of the foreign law may be adopted by the Turkish legislature in time.

2.3 Being Contrary to the Compulsory Provisions of Turkish Law

In many divorce cases before the Turkish courts, it has been emphasized that the foreign judgment's being contrary to the compulsory provisions of Turkish law is not an impediment to enforcement and it does not require public policy intervention. Such an approach has also been adopted in doctrine (Çelikel & Erdem, 2010; Gülin, 2008; Gürzumar, 1999).

¹² No. 743/ 17.02.1926, Official Gazette: 04.04.1926, No. 339.

¹³ For instance, Supr. Court. 2. Chamber, 15.51982: Çelikel & Erdem, 607; Nomer, 1984, 94.

¹⁴ For instance, Supr. Court. 2. Chamber, 25.6.1986, E. 3520 K. 5471; Çelikel & Erdem, 2010, 607.

¹⁵ No. 3444/ 04.05.1988, Official Gazette: 12.05.1988, No. 19812.

¹⁶ No. 4721/ 22.11.2001, Official Gazette: 08.12.2001, No. 24607.

Therefore just being contrary to the compulsory rules of Turkish law does not require public policy intervention. It has to be revealed how such a contradiction violates public policy. The approach of the Supreme Court is praiseworthy and it ensures respect for the other legal systems which stipulate different provisions than *lex fori*. Such an approach also serves private international law justice.

The following enforcement decision¹⁷ of the Supreme Court is a good example of this approach: The Turkish Civil Code which was in force at the time the foreign judgment was given did not grant children the right to file a suit to reject lineage. However, the foreign judgment had been given as a result of the case brought by the child herself. The Turkish Supreme Court concluded that the foreign court's judgment which contradicted the compulsory provisions of Turkish law was not contrary to Turkish public policy and it may be enforced. This sample enforcement decision is also an appropriate case to represent the relationship that should exist between "the compulsory rules of the forum and the public policy intervention" in terms of ideal law (Çelikel & Erdem, 2010; Gülin, 2008; Gürzumar, 1999).

2.4 Wrong Interpretation and Application of Turkish Law

What if the foreign court has interpreted Turkish law incorrectly and passed a divorce judgment accordingly? Will such a judgment be enforceable in Turkey? There is not a clear provision on this issue among the enforcement conditions. Although it has been stated in some decisions on enforcement¹⁸ that incorrect interpretation of Turkish law prevents enforcement, since such a judgment would be contrary to public policy, we do not accept such an understanding.

It is necessary to reveal how the incorrect application and interpretation of Turkish law violates public policy. In this framework, if the enforcement of the foreign judgment that has been given as a result of incorrect application of Turkish law is to harm the basic ethics of society or justice in Turkey seriously, then public policy intervention may occur. This is the understanding in many decisions of the Supreme Court. Therefore the approach of the Supreme Court in this regard is highly pertinent and it serves as a model.

For instance, a German court applied Turkish law to a divorce case¹⁹. While applying the Turkish law, the foreign court concluded a different result than the result adopted in Turkish law. Therefore, the interpretation of the foreign court was wrong from the aspect of Turkish law. However, the claim of incorrect interpretation of Turkish law should have been raised during the proceedings before the foreign court. An issue which had not been raised before the foreign court cannot be alleged during the enforcement stage as if the Turkish court were an appeal court. Also, such a wrong interpretation does not require public policy intervention.

2.5 Trials in the Absence of Defendant and Denial of Rights of Defense

Under Article 54/ç of the CPIPL, if the foreign judgment had been given in the absence of the person against whom enforcement is sought, that person may object to enforcement in the Turkish court. The objection of the concerned party is required, the Turkish judge cannot act on her own motion and cannot determine whether the defense rights of that party have been violated or not.

However, if the infringement of the defense rights of that party constitutes a violation of Turkish public policy, the judge should act on her own motion and there is not an onus on the party to allege the violation of defense rights. For instance, if the defense rights within the framework of the "right to fair trial" stipulated by the European Convention on Human Rights (Article 6/3), to which Turkey is also a signatory, have been violated, public policy intervention may occur (Nomer & Şanlı, 2010).

¹⁷ Supr. Court, 2. Chamber, E. 2009/6063, K. 2009/8609, T. 4.5.2009. Similarly, in the particular case, a German court in Cologne rendered a divorce judgment with accompanying decisions on trial expenses and allocation of matrimonial property, but did not state its reasoning. In Turkish procedural law, it is compulsory to state the reasoning of the judgment. Although such a foreign judgment contradicted the compulsory provisions of Turkish law, its enforcement did not require public policy intervention: Supr. Court, 2. Chamber, E. 2006/2612, K. 2006/9147, T. 8.6.2006.

¹⁸ For instance, Supr. Court, 2. Chamber., E. 1995/10281, K. 1995/11167, T. 27.1.1995.

¹⁹ Supr. Court, 2. Chamber, E. 2000/12536, K. 2000/14410, T. 20.11.2000. Similar view: Supr. Court, 2. Chamber, E. 1995/10281, K. 1995/11167, T. 27.10.1995. An English court applied the compulsory provisions of Turkish law in the wrong way; however, such a mistake did not violate public policy: Supr. Court, 2. Chamber, E. 2005/1149, K. 2005/4090, T. 16.3.2005.

Therefore, although the correct procedures have been implemented under the foreign legal system, if the defense rights of the party against whom enforcement is demanded have been violated, public policy intervention may occur. So, if there was notification only by way of announcement and the proceedings were held in the absence of that party, causing her to be deprived of her defense rights completely, then public policy intervention may occur.

This is also the understanding of the Supreme Court. In one case, for instance²⁰, the domicile of the defendant woman was in Turkey. However, the husband filed the divorce suit in Belgium. In his petition, the husband showed the woman's address as an address in Belgium. As a result, the Belgium court rendered judgment in the absence of the woman and the judgment was finalized. Enforcement of the Belgian court's judgment was demanded from the Turkish court. The Supreme Court concluded that the defense rights of the woman had been completely restricted and such a result was contrary to public policy. Also, according to the reasoning of the Supreme Court, it conflicts with one of the main principles of Turkish law which is the principle of honesty (Article 2 of the Turkish Civil Code) in that the husband had filed the suit in Belgium knowing that the wife had a domicile in Turkey and he gained the divorce order by way of fraud. As a result, the Turkish court rejected the enforcement of the foreign court's judgment.

The Supreme Court, in the above mentioned sample decisions, assessed each case on an individual basis. It has been revealed how the enforcement of the foreign judgment violates, for example, a fundamental principle of law or ethics. Such an approach should be extended and prevail for all possible enforcement judgments, and individual assessment of each case should be the main method in determining public policy intervention. That is to say, some subjects should not be automatically accepted as directly connected to public policy.

2.6 *Talaq* (Unilateral Divorce)

Divorce by only one of the spouses is known as “*talaq*” (unilateral divorce) (Çelikel & Erdem, 2010; Nomer & Şanlı, 2010). For instance, in countries where Islamic law applies, divorce may occur as a result of the husband's intention alone. What happens if enforcement of such a divorce judgment is demanded before the Turkish courts?

In one case, for instance, the foreign divorce judgment was rendered as a result of the husband's intention (*talaq*) and the woman's view on the divorce was never heard. The Supreme Court²¹ rejected enforcement on the ground of public policy stating that: If the divorce judgment has been rendered without asking the woman her idea or despite her not wishing to divorce, then the public policy exception occurs, otherwise, gender equality and fair trial principles would be violated. Within the fundamental right to fair trial (Turkish Constitution, Article 36), the woman should be able to express her opinion and intention with regard to divorce (Ruhi & Kaplan, 2002). Any restrictions on these fundamental rights jeopardize justice and are contrary to public policy.

However, if the woman has been granted the right to express her ideas, to defend herself and to reveal her claims and demands; such a divorce judgment based on *talaq* does not give rise to a public policy exception (Ruhi & Kaplan, 2002). Thus, the Turkish Supreme Court did also not find that enforcement would be contrary to public policy where the foreign divorce case has been filed by the husband on the basis of *talaq*, but the Turkish wife was able to express her opinion and the divorce judgment has been rendered as a result of both spouses' wishes²².

The method of public policy intervention in these judgments is also appropriate. The Turkish court did not connect a certain subject, *talaq*, directly to public policy. The specific case was assessed on an individual basis and the judges questioned whether the defense rights of the weaker party were protected or not. Moreover, the approach (Bayata Canyaş, 2012; Doğan, 2010; Tiryakioğlu, 1996) stipulating that “where the connection between the specific case and Turkey is closer, public policy intervention becomes more possible” has been considered in these judgments.

²⁰ Sup. Court, 2. Chamber, E. 2009/8144, K. 209/12603, T. 25.6.2009. Similar view: Sup. Court 2. Chamber, E. 2005/10735, K. 2005/13428, T. 4.10.2005.

²¹ Supr. Court, 2. Chamber, E. 2001/13000, K. 2001/14704, T. 26.10.2001.

²² The divorce document prepared by the judge (*kadi*) of the court in Jeddah (Saudi Arabia) was based on a *talaq* declaration. The wife was a Turkish national whereas the husband was a national of Saudi Arabia. The man had declared his intention by way of *talaq* and the defendant woman had approved the divorce. Therefore both spouses revealed their intentions for divorce without any restrictions. In this regard, it cannot be thought that the enforcement of such a judgment is to be rejected on the ground of public policy: Kadikoy 2. Family Court, 07.02.1991, E. 1990/853, K. 1991/941; see Nomer (1991, 501).

The judges specifically questioned whether the defendant Turkish woman's rights with regard to divorce were protected or not. Thus, one of the parties being a Turkish national and having no defense rights before the foreign tribunal increases the possibility of public policy intervention. Considering the fact that gender equality is a main principle of Turkish law, denial of defense rights to the defendant Turkish woman justified the public policy intervention.

3. Conclusion

It should always be considered that the public policy intervention in the recognition and enforcement of foreign judgments has an exceptional character and should be started from the principle of enforcing the foreign judgment to the highest possible degree.

However, it is observed that the Turkish Supreme Court diverges from this main principle in some enforcement decisions. For instance, subjects like custody and adoption are treated as subjects directly connected to public policy, and foreign judgments which are based on provisions that contradict Turkish compulsory provisions are not enforced. In such cases, without questioning the conditions of every individual case and without revealing from what aspect enforcement of the foreign judgment is contrary to public policy, enforcement is automatically rejected.

However, the enforcement of an adoption judgment, for instance, should not be rejected only on the ground that it is based on foreign law provisions that are contrary to the Turkish compulsory provisions when the judgment is for the interests of the child. Therefore, we are of the opinion that the Supreme Court should amend its approach towards these cases. In this way, there would be an important contribution to legal security and cooperation would be ensured at an international level.

In some decisions of the Supreme Court, it has been observed that foreign judgments which are based on provisions contradicting Turkish compulsory provisions have been enforced. Such an approach should be the prevailing approach. For public policy intervention it should be revealed in what way the enforcement of the foreign judgment would violate the general principles of Turkish law, or general ethics or fundamental constitutional principles. If such a contradiction cannot be revealed, the foreign judgment should be enforced. Moreover, if the part of the foreign judgment which is contrary to these general principles can be separated, then only that part should remain unenforced; whereas the other parts which do not cause any violation should be enforced. Thus, partial enforcement has been enabled by the CPIPL. Turkish judges would thus act pursuant to the approach of Turkish law that the foreign judgment should be enforced to the greatest possible degree.

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