

Application of Law by the Judge

Nevzat Kırmızı

According to Article 76 of the Turkish Code of Civil Procedure, “the judge applies *ex officio* Turkish laws.” It is understood from the law that the judge chooses the law applied in a dispute personally. This provision provides a guarantee to the parties involved in the dispute in case they don’t bring up any causes of action in the court or the causes of action are faulty.

In such cases, the judge shall find the right legal rules and practice the law *ex officio* to prevent the parties from harm caused by insufficient legal expertise. The obligation of the judge in this case is closer to the duty to investigate the rules that should be enforced and their meanings personally.

Independence of the Judge from the Causes of Action

In a pending lawsuit, the judge is obligated to classify the case legally by interpreting the statements of the parties in the bills of complaint and bills of answer. For that reason, demonstration of one or more causes of action or none by the plaintiff or the defendant should not bear results against their interests.

The Court of Cassation has ruled that the practice of law and evaluation of evidence can only be exercised by the court. The judge fulfills this responsibility by taking the claims and agreements of the parties into account without dependence on them.

In some disputes, it may be necessary to apply more than one law because of the case’s special characteristics. In such cases, the court may apply the laws which the party chose and demanded be applied or it may apply laws the party didn’t specify.

According to the Turkish Code of Civil Procedure, the plaintiff and the defendant have to demonstrate the causes of action which are the bases of their claims and defenses in their pleadings. Even though this obligation seems contradictory to the principle demonstrated above, the true reason for this is to simplify the judge’s work.

The judge is neither dependent on the causes of action introduced by the parties nor without recourse where the party doesn’t introduce any causes of ac-

tion. Because of this, it is very important for the judge to classify the case properly, identify the causes of action which are the bases of the legal dispute, and to state the proper material facts.

As part of the investigation and the application of the law *ex officio* by the judge, the judge is responsible for demonstrating the legal grounds taken into account in a decision. But that doesn’t mean that the judge is obliged to accept a lawsuit with more than one legal reason. The same case applies to the rejection of a lawsuit.

The judge isn’t obligated to give all the legal reasons when rejecting a case, but rather can make a decision upon finding a reason to justify the acceptance or rejection. According to the principle of judge’s application of law *ex officio*, the judge may make a decision based on a law which wasn’t stated.

The plaintiff may file a claim with alternative pleading according to the Code of Civil Procedure. This situation may seem to restrict the principle of judge’s application of law *ex officio*, because in this situation the court shall first investigate one demand, and will investigate a second demand if and only if it decides the first demand is not justifiable. Even if the plaintiff hasn’t sorted the demands in the same order, the judge may investigate the cause of action *ex officio*, and may decide according to the plaintiff’s secondary demands.

The judge’s independence from the causes of action

submitted by the parties does not mean independence from their demands. The judge cannot issue a ruling which is greater than the party's demand or different from it.

It should also be taken into account that it is the duty of the parties to bring up evidence and prove it. The judge will only perform the legal classification and apply the law.

The judge's application of the laws ex officio doesn't mean the parties cannot influence the court or that they can't submit their opinions on this account.

In addition to the right to demonstrate material facts, parties also have the right to submit their opinions to the court about the causes of action.

Judgment Based on Judge's Personal Conviction in Accordance with the Constitution and the Law

Judges decide based on their conviction in accordance with;

- (i) the Constitution,
- (ii) the statutes and
- (iii) the law.

The judge shall apply legal rules in this order. In this process, the judge is obligated not to apply a legal rule which is contradictory to a higher order legal rule.

In addition, if there is a special norm in a statute, that special norm shall be applied. If there is a contradiction between a special statute issued earlier and a general statute issued later, the lawmakers' intention should be considered.

Ex Officio Application of Judicial Opinions of the Higher Court by the Judge

The courts take the new orders on the unification of judicial opinions into account when ruling on pending adjudications. Even if an order issued on a lawsuit has been sent back by the Court of Cassation, and the court of original judgment's compliance has already created a procedural claim, the court is obligated to comply with the new order on the unification of judicial opinions, and investigate and make a decision in accordance therewith.

Unification of judicial opinions is necessary when

there are at least two contradicting Court of Cassation judgments. Orders on unification of judicial opinions are principal orders and they restrict the decisions of the Court of Cassation offices and general assemblies, as well as the courts of original judgment.

The principle of application of law ex officio is also recognized in the judicial opinions of higher courts. Similar judgments between the courts of original judgment and the higher courts on similar cases prevent contradictions between the judgments of courts on similar cases. If the decisions of the Court of Cassation don't concur then this situation has to be resolved to maintain the uniform application of law throughout the country; and this is possible through the unification of judicial opinions.

Application of Foreign Laws by the Judge

Situations in which the judge is to apply foreign jurisprudence are defined by the Turkish Code of Private International Law. According to this law, the judge shall research the applicable foreign law ex officio. The judge may approach the parties for help determining the contents of the foreign law. But if it is not possible to determine the rules of the foreign law applicable to the case, Turkish law will be applied.

In Turkish procedural law, it is not compulsory for the parties to assert that a foreign law should be applied to the case. The judge will determine the foreign law which shall be applied ex officio, just as for substantive law.

Because it is compulsory for the parties to enunciate the material facts in this jurisdiction, and forbidden for the judge to consider or raise facts which aren't asserted by the parties, the parties have to assert and prove the relevant facts determining whether the foreign law will be applied. Therefore, if it is necessary to verify some facts to determine whether the foreign law will be applied, then this should be proven and the burden of proof is on the party which will benefit from the use of this law.

If the judge who is obligated to apply the foreign law cannot obtain this information despite having conducted research using all available resources, then the application of the foreign law is dependent on the party which will benefit from it. The party has to provide this information or bear the consequences if it cannot be obtained.

If it is impossible to determine the rules of the foreign law which could be applied to the case, Turkish law will be applied.

Application of an Un-enacted Law by the Judge

An un-enacted law can be applied when an applicable rule is not available in the statutes. According to the Turkish Civil Code, the “judge shall decide in accordance with un-enacted law if there is not an applicable rule in the code.” Legislators accepted that ambiguities in the law should be filled in with the rules of un-enacted law, anticipating the substantive rules of civil law would be insufficient. In other

words, legislators see un-enacted law as a secondary resource to fill in any vagueness in the statutes.

Conclusion

Assertion of the facts which support the causes of action is the obligation of the parties, according to the principles of procedural law. On the other hand, the judge is obligated to investigate all the facts from all possible legal points of view and apply the law. Thus, the parties are protected from possible harm caused by their lack of legal expertise. Application of international private law and un-enacted law is also included in the duty to apply the law ex officio.