

The Path of Transnational Civil Procedure

In the Middle East

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Introduction

There is always a process to make a dream come true: At first, man dreams then makes a wish in order to get to the dream; Next step would be to hope and after that, making attempts is necessary to achieve the initial goal. Just at that time, we may claim that our project is accomplished.

Globalization has always been a goal to lawyers and there's been many attempts to make it happen; In this direction, The joint project of ALI/UNIDROIT on the Principles of Transnational Civil Procedure (PTCP) has been one of the most leading projects concerning harmonizing and approximating the civil procedural laws worldwide; However, this project has just passed through the dreaming, desiring and hopping and so much attempts are still needed to be taken. Also, it is too early to judge its success further.¹

The Middle East for its regional, political and economic situation has always got a unique context so it has to be dealt with from different aspects. In response to one of the general

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¹ DODSON, Scot: "The Challenge of Comparative Civil Procedure" in: Alabama Law Review, Vol.60, note 5 at p.134,2008.

themes of this outstanding conference, I would be dealing with this project in the Middle East region. Although the borders of the Middle East are disputable, this paper aims more to focus on the Muslim nations of this region.

A. Historical-Comparative View

The Middle Eastern procedural justice has not been developed as much as its substantive justice. The Islamic judges traditionally considered the procedural rules as obstacles to his way to get to the truth and solve the dispute. For this reason, they were not so interested in using the procedural rules. For example, from the Islamic point of view, the final judgments were not appealable. This approach was one of the obstacles to the procedural development in the Middle East.

The Middle East legal systems always have had a glance at the Civil Law system, especially at the French legal system. The reasons are as follow: one, the Middle East's Arab countries all together were the inheritor of the Ottoman Empire and have traditionally kept their relations with French legal system after the colonization; Two, the Middle East's non-Arabs like Iran has been influenced by the French procedural system considering the long-standing relationship with France and the simple technique of the codification. Therefore, in the light of both colonization and codification, France has had a strong and lasting influence on the Middle East procedural systems' concept, norms and institutions.

The Middle Eastern nations believed (and sometimes still do) the Shariah laws are so comprehensive that there is no need of other law provisions. They also used to believe there would be less difficulty with accepting the procedural than the substantive laws considering the procedural laws as nothing but the disciplinary norms which might not consequently be against the Shariah Rules. For the same reason, Napoleon Code of Civil Procedure (1806)'s model, norms, concepts and institutions were followed by most of the Middle East procedural systems with less difficulties and disapprovals.

Since any development would need to be comparative and take account of European procedures, why was the French so influential, as compared with German and English, which were the two other possibilities? This question could be answered by noting that the English "adversarial" model depended on a judge being neutral and advocates carrying

principal burden, and this was inconsistent with Islamic tradition that judges were the central; on the other hand, Judges are having the central role in the French and others.

As between French and German, French was very influential from time of Napoleon (modern code) and German modernization itself developed only toward end of 19th century. The French influence thus had existed at time, in late 19th century, when modernization began. So the French Codes was the historically "natural" source of comparison².

To sum up, on the point of historical-comparative's view, the Civil Law system, particularly the French one, should be considered as a standard for testing the Middle Eastern tendency to PTCP.

B. Concerns about the Project in the Middle East

Before the Project was finalized, some proceduralists had expressed some concerns about the project's outcomes to the developing countries. The summary of their reasons were as follow:

First, a developing country under the dominance of the world trading requirements and international competition's rules and also under the pressure of the foreign investment, will no longer has any optional right.³ But, at the same time, it must be taken into consideration that the political, economic and social instability of such countries, out of necessity, persuade the western investors to seek for the procedural guarantees and the judicial protections.

Second, the past forty-year experience in Asia and Africa shows that the more such countries would be forced to accept these Rules, the more strongly they refuse to do so; The rules which are not so corresponded to their culture and religion, particularly when the

² Some believe that the Middle Eastern legal systems, particularly Iran, would have made more development if Such systems had followed the German legal system rather than the French one. They argue that the German law is more rationale than the French as well as the German researching institutes, prominently the Max-planck institutes, provides the scholars with more financial support. The scholars at criminal law more than private law scholars show the tendency to this approach. The Max-Planck Institutes have been playing in a positive role in strengthening this approach.

³ GUINCHARD, Serge; "La procédure mondiale modélisée: le projet de l'American Law Institut et d'Unidroit de principes et règles transnationaux de procédure civile"(la rapport de synthèse) en: RECUIL DALLOZ, 2003,no 32, p.2188.

religion is as significant as the legal norms.⁴ Nonetheless, it should be considered that on one hand, this project handles just the commercial transactions and in this matter the Middle East legal systems have originally followed the European Codes, and on the other hand, the traditional matters such as family law, inheritance and etc are still taken in the framework of their traditional culture and religion.

Third, all of the Middle Eastern states are parties to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (1958)⁵ and therefore there would be no benefit in introducing PTCP to those. However, in this regard, it may be looked in a way that the development and advancement of such project may still look useful: One, most of commercial transactions in the Middle East are highly controlled by the state and the public entities; the Constitutions and the laws of some states in this region have conditionally forbidden the public enterprises to refer their cases and disputes thereof to the arbitration.⁶ Two, the New York Convention includes only the final judgments and the interim measures like injunction excluded from its scope, while PTCP covers both ones. Three, parties can choose the applicable procedural law to their case in an arbitration proceeding and PTCP might be chosen as the applicable one.

C. The Project Position In the Middle East

Bernard Lewis, the distinguished British orientalist, believe that in the Middle East, Arabic is the language of religion and law, Persian the language of love and of polite letters, Turkish the language of command and rule.⁷ However, though in law, the Arabic language is the dominant one in the Middle East⁸, there is no Arabic version of this project on UNIDROIT's

⁴ *ibid*, p.2189.

⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYC_Convention_status.html 07/12/2011

⁶ For example, Principle 139 of the Iranian Constitution provides that recourse to arbitration in relationship with disputes about public and governmental property requires the approval of the council of ministers and informing of the Islamic Consultative Assembly (the Parliament) as well. In cases where the adversary party is a foreign national or where the subject of dispute is determined by law as important, the approval of the Islamic Consultative Assembly is also required. The same provisions may be found in other states laws of the Middle East, for example Government Resolution of 1963 and Art.3 of the Saudi Arbitration Regulation 1983 (Saudi Arabia). See: SANDERS, Pieter: "Arbitration", in: Cappeletti (Ed.), International Encyclopedia of Comparative Law, Vol. Civil Procedure (Chap. 12), p. 81, 1996.

⁷ Bernard Lewis, "The Multiple Identities of the Middle East", Phoenix, 1998, p.53

⁸ www.jurisglobe.ca/eng/langues/index.php

website yet.⁹ It looks that the translation the project into Arabic and then posting it on the different websites, such as the UNIDROIT, certainly encourage and persuade the Arab scholars to work and study on it more and more.

Among the common languages in the Middle East, up to now, the project of PTCP has been translated just into Turkish and Persian as we can find them on UNIDROIT's website.¹⁰ As far as IRAN is concerned, in many law faculties, the project itself, the Principles and the Rules have been taught, analyzed and compared with each other and with the national laws at both levels of postgraduate and PhD. Furthermore, some students have expressed interest to work on this particular subject and we will be expecting to see their study's results.

The transnational civil procedure is not so unknown in the Middle East. Many of the region's countries have the bilateral and multi-parties Agreements and conventions with each other and other states. These Agreements aim to regulate the judicial relations, specially the civil and commercial matters.¹¹ Many Articles provided in such Agreements are the same PTCP. For instance, *Judicatum solvi* being recognized as one of elements against "Procedural Equality of the Parties"¹², is not found in such Agreements and according to the principle of reciprocity, the nationals of the states to these Agreements are exempted from providing security for the costs. Whereas, at the same time, the Middle Eastern states have still kept such notions in their own national laws.¹³ Although there are still some difficulties with accepting certain concepts, especially with the "discovery" and "disclosure". However, How

⁹ While, at the same time, we can find an Arabic version of "The Principles of Int'l Commercial Contracts" on the website of UNIDROIT; See www.unidroit.org/english/contracts/main.htm

¹⁰ www.unidroit.org/english/principles/civilprocedure/main.htm

¹¹ The Act of Agreement of the Legal & Judicial Assistance in the Civil and Commercial Matters between I.R. Iran and U.A.E. (2010), The Act of Agreement of the Legal Cooperation in the Civil and Criminal Matters between I.R. Iran and The Republic of Turkey (2010), The Act of Agreement of the Judicial Cooperation between I.R. Iran and I.R. Afghanistan (2009),.....

¹² Principle 3-3 of PTCP: "A person should not be required to provide security for costs, ... solely because the person is not a national or resident of the forum state".

¹³ Article 144 of Iranian Code of Civil Procedure provides: "Foreign nationals whether they be the original plaintiff and/ or if they intervene in an action as a third party, must give suitable security for costs to compensate probable loss and damage and attorney's that may be convicted of, if the adverse party to the action so requests. Motion for security shall be accepted only from defendants who are of Iranian nationals and may be accepted by the court before the end of the first trial session".

interesting it is to learn that even the above-mentioned concepts have started to being introduced to Civil Law system for a time!¹⁴

Conclusion

The acceptability, expansion and infiltration of Principles & Rules of Transnational Civil Procedure into the Middle East to the great extent depends on how much the European Civil Law systems, particularly the French one, accept and absorb these Principles (and specially Rules) into it's their systems.

Unless obstacles and doubts of the acceptability, expansion of Principles and Rules in the Civil Law system would be obviated, we cannot really expect the Middle East legal systems to welcome this project. The Civil law system can play an important role in this matter.

Last but not least, for instance, "Class Actions" institution must basically be traced back to the Common Law system. However, with the varied considerations, the Civil Law system has been trying to adopt such institution since several years ago.¹⁵ Admittedly, at the same time, the Middle East's academic centers have also started to discuss this topic, knowing obviously the social developments require such steps.

Although the initial plan of this project was founded at the American Law Institute, We should avoid introducing it as an American project which could be a sensitive matter for some countries located at the region. This is a global project which was founded by cooperation between UNIDROIT as the representative of the Civil Law system and the ALI as the representative of the Common Law system.

¹⁴ Kuo-Chang Huang, "Introducing Discovery into Civil Law", Carolina Academic Press, Durham, North Carolina, 2003.

¹⁵ LIPSKIER, Mark, "Les entreprises peuvent-elles profiter de l'introduction des *class actions* en droit français ?" in: JCP/ La Semaine Juridique – Edition Entreprise et Affaires, no 18-19, 5 Mai 2005, p. 746.

Chronology of Civil Procedure Laws in the Middle Eastern Countries

1667	<i>Ordonnance Civile</i>
1806	French Code of Civil Procedure ¹⁶
1839	<i>Tanzimat</i> (or Imperial Edict for Reform included partial secularization)
1860s	Egyptian legal experts begin translating the French procedural codes into Arabic.
1861	Ottoman's Commercial Procedural Law
1874-5	Promulgation in Egypt of Commercial Procedure (influenced by French Law).
1877	Germany's Code of Civil Procedure (<i>Zivilprozessordnung</i>)
1877	Ottoman's Civil Code (<i>Al-Majallah</i>)
1880	Code of Civil Procedure enacted in the Ottoman Empire (based on the French Law)
1911	Iran's Code of Civil Procedure (Influenced by the French & Ottoman laws)
1927	Turkish Code of Civil Procedure (influenced by 1925 Swiss & Germany Codes)
1933	Lebanon's Code of Civil Procedure (drafted by the French jurists)
1939	Iran's Code of Civil Procedure
1952	Jordan's Code of Civil Procedure (replacing the Ottoman's Code 1296h.g 1880)
1953	Syria's Civil Procedure Code
1958	Afghanistan's Civil Procedure law
1976	French New Code of Civil Procedure
2000	Iran's New Code of Civil Procedure

¹⁶"France began the twentieth century under the 1806 Code which was, on the whole, a copy of the Great Royal Charter on Civil Procedure drawn up in 1667 and initiated by Colbert Under the reign of Louis XIV." See N. Picardi and A. Giuliani, i: *Ordonnance civile*, 1667 (Milan: Giuffrè edn; 1996) cited by Loic Cadiet, "Civil Justice Reform: French Perspective" in: *Civil Justice in Crisis*,