PROOF OF MUNICIPAL LAW IN INTERNATIONAL PROCEEDINGS

by
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International courts and tribunals in the course of adjudicating the disputes which have been brought before them may sometimes find themselves in a position in which they may have to apply a law other than the **lex fori** in order to reach a proper solution.

The application of municipal law in international proceedings creates difficult problems. Whether, how and when the court and the litigants are to be informed of the applicable municipal law and how that law is to be determined are complex questions.

At first sight, the relevance of municipal law in international proceedings may not immediately be obvious. It is sometimes suggested that the functions of international courts and tribunals do not necessitate the application of municipal law. This suggestion, however, is not entirely subtantiated by international judicial practice and it is intended in this article to examine the context in which, and the extent to which, municipal law may become applicable in international proceedings, and to consider some of the questions that may arise in connection with its determination.

1. Proof of Municipal Law Before Institutionalized International Courts

Although in international procedings the maxim **jura novit curia** is generally regarded to be applicable[1], there should be an exception, as in private international law, in favour of foreign law whereby any law

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1. "... The Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries." Brazilian Loans case, 1929, P. C. I. J., Ser. A, No. 21, p. 124.

other than public international law would be capable of being proved by the party relying on it [2]. "If the Court were to decide the case in disregard

of the relevant institutions of municipal law it would, without justification, invite serious difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has ... not only to take cognizance of municipal law but also to refer to it.. [3] Alternatively, an international court must be allowed to be in a position in which it can investigate **proprio motu** any aspect of the matter before it which necessitates a recourse to municipal law[4].

The jurisprudence of institutionalized international courts does not provide a clear indication as to whether municipal law, if applied, can be said to have been applied as 'a fact' [5]. Neither the Permanent Court of International Justice nor the International Court has developed any body of rules requiring municipal law to be applied as a fact in the manner in which foreign law is applied in a municipal court. Distinct from this question, but not totally unrelated to it, is whether there are certain definite principles which an international court may rely upon in order to determine whether what has been adduced by a party as evidence of municipal law can be admissible as such in the international proceedings. Although here too the answer is in the negative, it is important to note that on a number of occasions the Permanent Court have had the chance to elaborate its attitude with respect to the admissibility of certain acts which the litigants had relied upon as evidence of municipal law. Thus in the German Interests in Polish Upper Silesia case the Court was in-

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2. See ibid. Cf. the dissenting opinion of Judge Klaestad in the Nottebohm case (Second Phase), I. C. J. Reports, 1955, p. 29.
3. Barcelona Traction case (Second Phase), I. C. J. Reports, 1970, p. 37.
4. "The Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken." Brazilian Loans case, 1929, P. C. I. J., Ser. A, No. 21, p. 124. See also Brownlie, Principles of Public International Law, 1979, p.42.
5. According to Jenks "it is neither necessary nor desirable to describe municipal law when so applied as 'a fact'. It is applied as the proper law of the particular transaction in virtue of international law; as such it constitutes a part of the law applied by international courts and tribunals and an essential element in the promotion of the rule of law in world affairs." See Jenks, The Prospects of International Adjudication, 1964, p. 603; also Brownlie, op. cit. pp. 41-43.

clined to ascertain the validity of title to land by reference to an entry in a land register provided that the entry had not been annulled by a competent local court [6]. In the Serbian Loans case the Permanent Court appeared to have suggested that it would assess the fulfilment of a loan agreement on the basis of opinions by French jurists which had been cited by the parties [7], but having decided that it must take into consideration the decisions of the French Court of Cassation, it is questionable if the Permanent Court's consideration of the value which these opinions might otherwise have had was necessary. In the Lighthouses case the Court referred to the legal opinions by a Turkish jurist which were appended to the French memorial for the purpose of showing the implications of extraordinary legislation in Turkish constitutional practice [8]. The Lighthouses case is interesting also in that it demonstrates the instances in which proofs of municipal law submitted to the Court were treated in varying degrees of admissibility. In one instance a piece of Turkish legislation was referred to by the Court as "the complete official translation produced to the Court by the Greek Government" [9]; in another it was referred to as "a translation, from a Turkish official source, summitted by the Greek Agent" which "encountered no objection on the part of the French Agent" [10], whereas in yet another instance the Turkish Constitution was cited as the French "translation which the Parties have agreed to accept" [11]. The case which is of greatest interest, however, is the Peter Pázmány University case which highlights the various issues concerning the admissibility of different kinds of proof of municipal law before international courts and the weight which these proofs carry in the international proceedings. In this case the Permanent Court referred in its judgment to the fact that the Hungarian Government had produced a certificate from the Royal Ministry of Justice which was issued under statute to certify that "there is no law, or other written regulation in force in the country governing a given legal situation" [12]. The Court's reference to this certificate and, presumably, its attachment of some weight to it supports the view that an international court must rely upon the evidence, which under municipal law is accepted as proof of a certain act, when such proof becomes relevant in an international proceeding in

6. See P. C.I. J., Ser. A, No. 7, p. 42.
7. See P. C.I. J., Ser. A, No. 20, pp. 45-46.
8. See P. C. I. J., Ser. A/B, No. 62, p. 22.
9. ibid, p. 20.
10. ibid. p. 23.
11. ibid, p. 21.
12. P. C. I. J., Ser. A/B, No. 61, p. 230.

which the international court is applying that municipal law. In the same case the Permanent Court refrained from attaching great weight to the political opinions of various writers and politicians [13], but was receptive to contentions as to the probative value of certain entries in land registers which it accepted as proof of juridical personality under the municipal law at issue [14]. The Permanent Court was also willing to accept the **ratio legis** of various municipal legislations by relying upon the statements which accompanied them [15]; it was, however, reluctant to attach any significance to **obiter dicta** of doubtful relevance included in the municipal judicial decisions [16].

Although the judgment of the Permanent Court in the Brazilian Loans case acknowledges the possibility that the Court could obtain evidence of the relevant aspects of the applicable municipal law "by means of any researches which the Court may think fit to undertake or cause to be undertaken" [17], the practice of the Court does not provide any indication as to the nature and the extent of these researches. Insofar as the international bench includes a judge who is familiar with the municipal lawin question, no difficulties should arise Such a situation, however, may not occur frequently. In the Danzig Legislative Decrees case the Permanent Court decided that the fact that it was requested to give an advisory opinion on a matter concerning Danzig law did not entitle Danzig to appoint an **ad-hoc** judge [18], and the same principle would apply in a contentious case in respect of any state whose law becomes relevant in the international proceedings, if that state is not actually a party to the said proceedings.

The practice of institutionalized international courts does not provide example of cases in which such courts have had to resort to experts in order to obtain proof of the municipal legal aspects of the questions at issue. Neither the Permanent Court of International Justice nor the International Court has in any case sought the ascertainment of municipal law by experts. On one occasion [19] a state whose law was relevant

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13. ibid. p. 231.
14. ibid, pp. 234-235.
15. ibid. p. 235.
16. ibid.
17. Supra, p. 34, n. 4.
18. See P. C. I. J., Ser.A/B. No. 65. pp.69-71.
19. German Settlers in Poland, Advisory Opinion, P. C. I. J., Ser. B, No. 6. Cf. N. Feinberg, "La juridiction et la jurisprudence de la Cour Permanente de Justice Internationale en matière de mandats et de minorités", Rec. des Cours, Vol. 59 (1937 I), p. 587 at pp. 643-647.

was invited to appear in the advisory proceedings but in the German Settlers in Poland case the invitation by the Permanent Court to Germany [20] seems to have been made on the basis of Germany's political interest in the case rather than its willingness to appear **amicus curiae** to furnish information on German law. Neither the Statute of the Permanent Court nor its Rules of Court contain any provisions in respect of **amicus curiae** appearance of third party states in proceedings in which the laws of those states are relevant.

i. The Impact of Municipal Judicial Decisions on the Application of Municipal Law by International Courts

When a matter of municipal concern becomes relevant in international proceedings there arises in the first place the question of the extent to which the international court will take into consideration, if at all, the application of the pertinent municipal law. The answer to this question is relatively simple if it is to be found in an international agreement [21] or a rule of customary international law [22]. The real difficulty arises in the absence of an international agreement or custom in cases where an international court is faced with the task of determining whether in taking into consideration the relevant municipal law, it should also take into consideration the construction which the municipal courts have placed upon that law in the local proceedings. Here the problem is how far the international court would be bound by the interpretation of a municipal law by municipal courts in reaching its own conclusions as to that law's effects on the subject-matter of the international dispute.

This was a pertinent problem which was effectively resolved by the Permanent Court in the Serbian Loans case. In this case the Court had to deal with the French claim that "gold franc" bonds issued by the Serbian Government and sold to French investors before the First World War should be paid back to them in gold francs rather than in paper francs whose value had depreciated during the war.

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20. See P. C. I. J., Ser. B, No. 6, p. 13; also P. C. I. J., Ser. C, No. 3, pp. 592 et seq.
21. Indeed, it may be that an international court may find guidance in the special agreement establishing its jurisdiction as to the weight it should attach to the provisions of the laws of the contracting states.
22. Cf. C. Weselowski, Les conflits de lois devant la justice internationale, 1936, pp. 63-64.

Among others, the Court held that i. as to the substance of the debt, Serbian law was the applicable law and under that law gold clauses were valid; and ii. as to the "modes of payment", i.e. payment in the currency of France, French law was the applicable law. The Court then proceeded to show that even if the law of the place of payment, i.e. French law had been the proper law of the loans, there would have been no obstacle in that law, as was contedend by the Serbian Goverment, to the implementation of the gold clause. In order to reach this conclusion the Court was forced to make a decision as to what construction should be placed upon existing French law. At the time, gold clauses were unenforceable in France under statutes establishing "cour forcé" (compulsory tender). However, French courts construed the statutory prohibition as applicable only to domestic transactions, to the exclusion of international transactions similar to the loans at issue.

The question was whether the Permanent Court should undertake its own construction of French statutory law or, in applying the French law, the Court should take into consideration the construction placed upon that law by the French courts. The Court opted for the second solution :

"For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself - and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.

"In these circumstances, the Court will confine itself to observing that, according to the information furnished by the Parties, the doctrine of French courts, after some oscillation, has now been established in the manner indicated by the French Government, and that consequently there is nothing

to prevent the creditor from claiming in France, in the present case, the gold value stipulated for"[23].

The inclination of the Permanent Court to take judicial cognizance of the decisions of municipal courts in matters in which the Court was faced with the task of making its own construction of the municipal law in question was displayed even more cogently in the Brazilian Loans case. In this case, the Special Agreement between France and Brazil provided that "In estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts"[24]. The Court had to consider on this occasion whether under this provision it possessed a discretionary power, i.e. the power to be able to apply the municipal law in the manner in which that law was applied by the municipal courts, or whether it should adopt an attitude independent of that of the municipal courts and proceed solely on the basis of its own interpretation of the relevant municipal law. The Court held that :

"Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems to be no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.

"Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. To compel the Court to disregard that jurisprudence

23. P. C. I. J., Ser. A, No. 20, pp. 46-47.
24. See P. C. I. J., Ser. A, No. 21, p. 123.

would not be in conformity with its function when applying municipal law"[25].

The principle that an international court should accept as evidence of the content of municipal law the decisions of the courts of the country involved deserves approval[26]. Otherwise international courts would in effect become appellate courts, capable of going into the merits of decisions which are **res judicata** in the country concerned[27]. Another question, of course, is that of the conformity of municipal law, as judicially applied and construed, with international law. As to this, an international court must have full freedom of judgment and be guided solely by international law.

ii. Inquiries and the Use of Experts

It is apparent from the Serbian and Brazilian Loans cases that where two states have agreed to refer to the Permanent Court a question concerning municipal law, there existed no provision in the Statute preventing the Court from exercising **ratione materiae** jurisdiction under the agreement. According to the Court "Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility. All that can be said is that cases in which the Court must apply international law will, no doubt, be the more frequent, for it is international law which governs relations between those who may be subject to the Court's jurisdiction"[28].

Once it is accepted that an international court can be seised of cases requiring the application of municipal law, the question may arise as to the extent to which the court can take the necessary steps under its constituent instrument to establish the truth impartially in regard to the

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25. ibid. p. 124.
26. This principle was affirmed by the International Court of Justice. In the Fisheries case the Court referred to the judgment of the Norwegian Supreme Court interpreting a Norwegian decree as providing "final authority for this interpretation." See I. C. J., Reports, 1951, p. 134.
27. See Jenks, op. cit. pp. 592-593. Cf. Lipstein, "Conflict of Laws Before International Tribunals", Transactions of the Grotius Society, Vol. 29 (1943), p. 62.
28. The Serbian Loans case, P. C. I. J., Ser. A, No. 20, p. 20.

disputed facts of municipal law and to obtain the requisite technical information in order to be able to appraise them correctly. In this connection, Article 50 of the Statute of the International Court of Justice, which is the identical version of Article 50 of the Statute of the Permanent Court, provides an indispensable basis [29]. According to this article "The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion" [30]. Clearly, this is a useful provision by virtue of which the International Court can obtain information on any aspect of the municipal law relevant in the proceedings [31]. However, neither the International Court nor the Permanent Court have at any time resorted to this provision for this purpose. A pertinent question would be whether the International Court can rely on Article 50 of its Statute with a view to approaching a municipal court in order to obtain expert opinion on the application of a municipal law. Insofar as this kind of an approach implies the shifting of the burden of making determinations on matters of law to the municipal court which normally carries it, it has its advantages. However, the wording of Article 50 does not include a reference to municipal courts and it is doubtful whether in the absence of such a reference, this article can be construed as enabling a co-operation between the International Court and a municipal court.

Article 67, paragraph 1 of the 1978 Rules of Court of the International Court of Justice states that "If the Court considers it necessary to arrange for an inquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the inquiry or expert opinion, stating the number and mode of appointment of the persons to hold the inquiry or of the experts, and laying down the necessary procedure to be followed..." Under this article the International Court may empower any person or expert, whom it may appoint pursuant to Article 50 of the Statute with the task of ascertaining or evaluating the content of a municipal law, to call for the production of any kind of evidence which he may consider useful for his task [32]. The Court may stipulate that requests by these persons be addressed to the Regis-

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29. Cf. the dissenting opinion of Judge Gros, in Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I. C. J., Reports, 1973, p. 166 at p. 265.
30. For the legislative history of this article, see G. White, The Use of Experts by International Tribunals, 1965, pp. 36-38.
31. See ibid. p. 48.
32. Cf. Chorzow Factory (Merits) case, P. C. I. J., Ser. A, No. 17, pp. 100-102.

trar of the Court [33] so that they can be effected in accordance with Article 44 of the Statute.

The provision of Article 44 of the Statute may also be utilized when efforts are made by the Court, independent of Article 50 of the Statute, to obtain information on municipal law. When the required information takes the form of testimony or documents, the procedure involved is similar to that which is involved in the taking of testimony or the gathering of documentary evidence outside the international **forum** generally.

2. Proof of Municipal Law Before **Ad-Hoc** International Tribunals

The attitude of **ad-hoc** international tribunals towards the question of the application of municipal law and, in particular, of the extent to which such law can judicially be construed in the international proceedings has been similar to that of the institutionalized international courts. **Ad-hoc** international tribunals have frequently taken judicial notice of the various particularities of municipal laws and, when necessary, have on their own initiative undertaken to ascertain these particularities whenever they became relevant in the international proceedings.

Among **ad-hoc** international tribunals an examinantion of the practice of the mixed arbitral tribunals which were set up under the peace treaties terminating the First World War reveals the manner in which these tribunals have had to deal with the problems connected with the ascertainment of municipal law. The law which the mixed arbitral tribunals applied was, in most cases, laid down in the peace treaties themselves. In some cases the applicable rules were derived from the municipal laws which the arbitral tribunals had to choose according to the principles of private international law. The extent of the relevance of municipal law in the proceedings of the mixed arbitral tribunals often led to the circumstances in which these tribunals were regarded as performing a function normally performed by the municipal courts, in spite of the fact that they retained their distinct character of being organs established under international law. It was this fact, however, which distinguished certain features which were peculiar to the procedure of the mixed arbitral tribunals.

First, and in contradistinction to the usual procedure which is followed when a foreign law is applied in municipal proceedings, in proce-

33. See Art. 26, parag. (a) of the 1978 Rules of Court.

edings before the mixed arbitral tribunals the party relying on a rule of municipal law did not have to prove the rule in question. By their composition the mixed arbitral tribunals were presumed to be familiar with the municipal laws of the parties, and in case the existence or relevance of such laws was challenged, could decide for themselves [34].

The second characteristic of the manner in which the mixed arbitral tribunals dealt with the problems connected with the ascertainment of municipal law was the tendency of these tribunals to allow themselves the utmost freedom of interpretation. Neither the precedents established by the municipal courts nor the opinions rendered by governments restrained the freedom of the mixed arbitral tribunals to interpret those rules of municipal law whose application were at issue in the proceedings [35].

In this regard, the principles underlying the procedures of the mixed arbitral tribunals show a substantial degree of divergence from those unperlying the procedures which were applied by the mixed claims commissions in general. The practice of the latter indicates that the determination of municipal law in the proceedings of these commissions was made in a manner which resembled the manner in which foreign law was determined in municipal proceedings. Thus, the mixed claims commissions have, on occasion, received evidence of the relevant municipal law as furnished by the parties [36], they have themselves undertaken researches to ascertain the same[37], and in a number of cases they have decided that they alone had the discretion to determine what evidence could be admitted and what weight could be given to it [38].

On very few occasions if any, have **ad-hoc** international tribunals resorted to expert opinion for the ascertainment of municipal law. It is suggested that it is unnecessary to call an expert before an international

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34. See Witenberg, "Les tribunaux arbitraux mixtes et le droit international privé", Clunet, Vol. 58 (1931), p. 991 at pp. 997-998.
35. ibid. p. 998.
36. See, e.g., George Pinson (France) v. United Mexican States, decision of 19 October 1928, R. I. A. A., Vol. 5, p. 327.
37. See, e.g., George W. Cook (U. S. A.) v. United Mexican States, decision of 5 November 1930, R. I. A. A., Vol. 4, p. 661.
38. See, e.g., ibid.; also Administrative Decision No. III, decision of the United States-Germany Mixed Claims Commission, dated 11 December 1923, R. I. A. A., Vol. 7, p. 64.

tribunal to make a finding as to the content of a municipal law [39]. The reason for this is that an expert opinion would not bind an international tribunal, which should base its findings on counsels' speeches and its own researches [40]. But if the finding is to be made in respect of issues which require technical knowledge which the members of an international tribunal may lack, there is no reason why the international tribunal should not seek expert opinion, so long as that opinion is not based on a reasoning which is contrary to the facts as they appear in the pleadings, or to common knowledge or, of course, to the law. An expert opinion is only one way of convincing an international tribunal. The tribunal, however, if ignorant of certain facts which it ought to know but which ,in fact, it does not know, can only be sure about them through the information furnished by the expert. In such circumstances all that should remain to an international tribunal is to ascertain that the expert did not, by chance, exceed the limits of his special field and enter the merits of the subject-matter of the adjudication, and that his opinion did not conflict with facts which were already known to the tribunal.

3. Conclusion

When an international court or a tribunal is confronted with the task of ascertaining or evaluating the content of a law other than its own and one which it has determined to be applicable to a right of action or a defence, it usually has at its disposal only some guidelines, often in the nature of municipal law analogies, by which to proceed. The insufficiency, and even the inadequacy, of the rules which international courts and tribunals utilize for the ascertainment of municipal law may be accounted for by the fact that the nature of international proceedings is such that, in contradistinction to municipal proceedings, only in a limited number of cases arises the necessity to weigh evidence on the legal rules which have a bearing upon the solution of the disputed issues.

As yet, there is no uniform solution to the problem of proof of municipal law before international courts and tribunals. According to Jenks this problem "will be most satisfactorily resolved if it is examined on its own merits in the light of the practical problems which may arise from

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39. See J. L. Simpson - H. Fox, International Arbitration, Law and Practice, 1959, p. 146.
40. ibid.

time to time"[41]. Although international courts and tribunals do not normally take judicial cognizance of municipal law and usually rely upon the parties to furnish the necessary evidence, there is nothing to prevent these bodies from undertaking their own research as to the issues before them. What seems clear, however, is that when evidence is to be adduced by the parties, the parties do not fail to supply it.

The probative value of the evidence obtained is determined by the international court or the tribunal itself. When such evidence is in the form of municipal court decisions, international courts and tribunals have generally been in favour of treating these decisions as authoritative in the country in question. As to whether a municipal law which is judicially construed and applied by an international court or a tribunal can, therefore, be said to be in conformity with international law is a question which must be decided by the international court or the tribunal itself. On this question, international law must provide the guiding principles.

41. See Jenks, op. cit. p. 590.