Foreign Law before the Spanish Courts: the Need for a Reform

In a previous post (under the title Spanish International Adoption Act, Law 54/2007, of December 28) I stated that, with the exception of the International Adoption Act of 2007, there is no Private International Law Act in Spain. For some years, under the direction of Professor Julio Gonzalez Campos, Spanish academics (almost all of us: we are still relatively few in this country) have been working on a bill of this nature. Sadly, Professor González Campos passed away in 2007, and his death has also brought an end to this endevour. However, many of us, if not all, believe that our autonomous PIL needs to be revised both in civil and procedural matters. A decision on some concrete points should be made with the utmost urgency: that's the case of the system of proof of foreign law before our courts.

In recent years the judicial application of foreign law in Spain has been suffering from a confusing and inconsistent practice before the lower Courts; the Supreme Court and the Constitutional Court have been called to clarify the matter, but the fact is, they themselves have not escaped dissension.

The Spanish regulations on the subject is contained in art. 12.6 CC ("Spanish conflict of laws rules will be applied ex officio"), supplemented by art. 282 LEC 2000 ("Content and validity of foreign law should be proved", and, though proofs are to be carried at the request of the parties, "the court may use any means of finding it deems necessary for the implementation of foreing Law").

The meaning of these articles is doubtful. The respective role of the parties and the judge in the applicability of foreign law are subject to discussion. Another issue under discussion, with particular acrimony, is the following: if foreign law is to be proved by the parties (completely or only to a certain point) , what happens if they fail?.

As for the former doubt, the prevailing view is that foreign law is to be considered as a fact that should be raised and proved by the parties at trial. However, the assimilation of foreign law to a fact is not absolute: it is for the courts to collaborate in its identification. But, what level of proof is required from the parties? In this respect, the Supreme Court sometimes requires strict means of proof and absolute certainty about the content of the law, whilst the

Constitutional Court only ask for a “beginning of a proof”. Furthermore, how deep should a court be involved in the ascertaining of the foreign law? How is its knowledge to be acquired? could the court’s private knowledge of foreign law overcome the passivity of the parties?

There are up to five Supreme Court rulings regarding the second doubt we have pointed out: whether foreign law should be disregarded if the parties fail to comply with their burden of proof. The main thesis supports the application of Spanish law when foreign law has not been proved. Another view that has also received doctrinal approval is the rejection of the claim (in the merits). The remaining possibilities would be: the rejection of the application (merits would not be considered); the return of the proceedings back to the time when foreign law should have been proved, but wasn’t; and an ex officio application of foreign law. None of the solutions are completely satisfactory: in particular, the replacement of foreign law by Spanish law implies breach of the mandatory nature of the conflict of laws rule. As for the rejection of the claim, it is probably contrary to the right to an effective judicial protection: according to the Spanish principles of procedural law, it means that if a party did not allege foreign law, or was unable to prove it, he/she will not be allowed to raise his/her claim again, even alleging and proving foreign law correctly.

In light of the above, our system may surely be said to be of an “open texture”; but, whilst for some Spanish authors this flexibility should be wellcome, for others (ourselves included) it is actually a source of chaos, therefore of legal uncertainty, and it is crying out for an urgent legal reform.