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# THE CONCEPT OF JUSTICE IN CHOICE OF LAW RULES WITH REFERENCE TO ISLAMIC LEGAL THOUGHT

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## ABSTRACT

*The growth of cross-border transactions and the diversity of legal systems raises a fundamental question: which law should govern? Moreover, there is no single choice-of-law rule compatible with all legal systems worldwide, resulting in inequality. In response to this, formal choice-of-law rules have been considered as the basis of achieving justice. Nevertheless, adopting a global standard of justice poses a real challenge because what may be considered just for one party may not be so for another. Islamic law has articulated the concept of justice in multiple contexts. There are also differences among Islamic schools regarding the scope of applying the laws of non-Islamic countries. One view rejects the application of foreign law entirely, while another permits it so long as it does not conflict with Islamic law. Saudi law, as applied in an Islamic legal context, lacks explicit conflict-of-laws rules. Instead, Saudi courts rely on principles of justice and ijthihad to achieve outcomes consistent with Islamic law, particularly in family law matters. This study shows that conflict-of-laws rules are generally based on formal and procedural grounds, without treating justice as a determining factor in identifying the applicable law. Therefore, this article proposes adopting a provision in choice-of-law rules that gives judges discretionary authority to apply justice. There is a need to reevaluate traditional choice-of-laws rules by incorporating justice as a component of the law. In addition, a conceptual framework should be developed that combines formal conflict-of-laws rules and the concept of justice in private international law to achieve a balance between legal certainty and equity.*

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**KEYWORDS:** Choice of Law; Justice; Private International Law; Social Context; Islamic Legal Thought.

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## 1. INTRODUCTION

The expansion of cross-border transactions and the diversity of legal systems across countries has become a defining challenge. By the nature of this challenge, a fundamental question exists: which law should govern? Choice-of-law rules determine which national law applies in cross-border matters (Banu, 2021, p. 461). In countries that follow the civil law system, these rules are set out in civil codes, such as the Egyptian Civil Code (Egypt, 1948). They are also contained in civil transactions laws, such as the United Arab Emirates Civil Transaction Law, or in independent statutes, as in Kuwait's Regulation of Legal Relations with a Foreign Element (Emirates, 1985; Kuwait, 1961). In common law countries, choice-of-law rules are primarily found in judicial precedents and restatements, as is the case in the United States (American Law Institute, 1971).

There are three main factors underlying choice-of-law rules. The first is based on contract-related elements used to determine the applicable law, such as the place of contracting, the place of performance, and the place of negotiation (Hague Conference on Private International Law HCCH, 2015; Peari, 2024, p. 69). The second factor considers the parties' nationality, their connection to the forum, or their common nationality as a basis for identifying the governing law (Hague Conference on Private International Law HCCH, 2015). The third factor concerns the parties' will, also referred to as party autonomy (Hague Conference on Private International Law HCCH, 2015). Based on party autonomy, the contracting parties choose the applicable law and incorporate it into the contract through an applicable law clause, expressly selecting the law to govern their contractual relationship.

Countries around the world apply choice-of-law rules, with divergences in their hierarchy and details. There is no single choice-of-law approach compatible with all legal methodologies worldwide, resulting in inequality across cases (Mehren, 1977, p. 32). The general trend of legal systems worldwide has not explicitly recognized justice as an independent factor. Instead, the formal existence of choice-of-law rules has been considered as the basis of justice. This article proposes adopting a provision in choice-of-law rules that gives judges discretionary authority to apply justice.

Islamic law has articulated the concept of justice within different contexts (Ahmed, 2022, pp. 109–116). There are no identical rules in Islamic law corresponding to the choice-of-law rules previously discussed. However, many Islamic countries incorporate rules similar to those found in other legal

systems, in one form or another. Among Islamic countries, Saudi Arabia presents a different model. While most legal systems have codified their choice-of-law rules, whether in civil codes or judicial precedents, the Kingdom of Saudi Arabia is an exception, as it lacks explicit choice-of-law rules (Elbalti, 2023). Saudi Arabia relies on principles of justice derived from Islamic law, which may serve as a standard for applying foreign law where that law is considered more just.

### 1.1. Significance of the Study

This article is significant to the legal field and the formulation of choice-of-law rules in three ways. Theoretically, it frames justice as a concept requiring further investigation and considers the possibility of recognizing it as a principle within choice-of-law rules. Legally, it explores the tension between the strict application of choice-of-law rules and the need for substantive justice. The article seeks to improve the current choice-of-law frameworks using Islamic law as a key tool.

### 1.2. Research Questions

- To what extent do traditional choice-of-law rules achieve justice in cross-border transaction disputes?
- Does the formal application of choice-of-law rules necessarily lead to substantively just outcomes?
- How can the principles of justice derived from Islamic law serve as a normative tool to evaluate and improve choice-of-law rules outcomes?

### 1.3. Methodology

Three methodological approaches are employed in this article. First, critical analysis is used to examine choice-of-law rules, clarify their foundations, and assess their relationship with justice. Normative analysis evaluates the outcomes of these rules and highlights the gap between formal choice-of-law rules and substantive justice. Finally, a comparative approach is adopted to contrast civil law, common law, and Islamic law systems.

## 2. CONCEPT OF JUSTICE IN CHOICE OF LAW

Choice-of-law rules require the existence of a foreign element (Husserl, 1940, p. 244). Examples include parties from different countries or transactions connected to multiple jurisdictions. As a result, the concept of justice varies across jurisdictions, raising fundamental concerns

regarding the fairness of applying rigid choice-of-law rules in cross-border disputes.

Such rules are rigid procedural mechanisms that do not give judges any discretionary authority (Avraham & Hubbard, 2020, p. 883). Legislators do not permit their modification on a case-by-case basis. This rigidity reflects the practical nature of legal rules in general. Parties to legal transactions are aware in advance, whether through actual knowledge or constructive notice, of the existence of such rules. However, the neutrality of a legal rule comes from its general and abstract character. Such neutrality does not necessarily ensure justice in practice. In response to this limitation, some legal systems have adopted justice as an explicit corrective principle in cases where the law does not provide a clear solution to the issue at hand. An example of this is Article 4 of the Swiss Civil Code, which states: "Where the law confers discretion on the court or makes reference to an assessment of the circumstances or to good cause, the court must reach its decision in accordance with the principles of justice and equity." (Swiss Civil Code, 1907). However, the Swiss Civil Code confines the application of these principles of justice to specific situations.

Comparably, the Egyptian legislator adopted a similar approach to the Swiss Civil Code in Article 1 of the Egyptian Civil Code, which states: "(1) Provisions of laws govern all matters to which these provisions apply in letter or spirit. (2) In the absence of a provision of a law that is applicable, the judge shall decide according to custom, and in the absence of custom, in accordance with the principles of Islamic law. In the absence of such principles, the judge shall apply the principles of natural justice and the rules of equity." (Egypt, 1948). The Egyptian legislator likewise introduced the principle of justice as a guide to be applied in the absence of an applicable provision.

However, when examining several countries over different geographical regions and legal systems, it becomes difficult to unify them under a single principle, as cultural and social values differ. The diversity makes it challenging to define a global standard of justice within choice-of-law methods and highlights the need for a framework that can assess legal outcomes beyond simple procedural rules.

### 3. ISLAMIC LEGAL THOUGHT AND JUSTICE IN CHOICE OF LAW

Justice in Islam has four principles: equality, moderation, trust, and solidarity (Qureshi, 1982). The Holy Qur'an, the primary source of Islamic law, links judgment among people to the obligation of justice.

It states, ﴿الْمُقْسِطِينَ يُحِبُّ اللَّهُ إِنَّ َ بِالْقِسْطِ يَبْتَهِمُ فَاخُكُمْ حَكَمَتْ وَإِنْ﴾ Qur'an 5:42, Surah Al-Ma'idah. The translation of this verse is, "If you judge, judge between them with justice. Indeed, Allah loves those who act justly." (Abul-Qasim Pub. House, 1997). This command makes justice not only a moral value, but also a binding legal obligation for those exercising judicial authority.

Islamic law adopts a different approach to the choice-of-law rules, distinguishing between the application of law to Muslims and to non-Muslims (Ahmed, 2022, p. 117). Religion is therefore used as a basis for determining the applicable law. Islam considers applying the rules of Islamic law to non-Muslims to be inconsistent with justice in some cases.

Islamic law contains several schools of thought, the four main Sunni schools being Hanafi, Shafi'i, Maliki, and Hanbali. The Hanafi school allows the application of foreign law in cases involving non-Muslims, particularly regarding family law (Ahmed, 2022, p. 110). The Shafi'i and Hanbali schools permit the application of foreign law when the matter is prohibited for Muslims but permitted by other laws for non-Muslims (Ahmed, 2022, p. 111). In contrast, the Maliki school holds that Islamic law should always be applied to both Muslims and non-Muslims, without exception (Ahmed, 2022, p. 111).

An example of a transaction permitted under Islamic law, when the parties agree, is the contract of sale. The Qur'an states ﴿الرِّبَا وَحَرَّمَ الْبَيْعَ اللَّهُ وَأَحَلَّ﴾, which translates as "Allah has permitted trade and has forbidden Interest" (Abul-Qasim Pub. House, 1997). From this verse, Islamic jurisprudence derives the general rule that all trades are lawful unless expressly prohibited (Al-Mu'aydi, 2017, p. 48). Therefore, in the absence of an explicit religious text prohibiting a matter, there is no objection to the application of foreign law.

Many Islamic countries have entered into international agreements that govern contractual transactions. These agreements are not necessarily inconsistent with Islamic law. For example, they acceded to the Convention on Contracts for the International Sale of Goods (CISG) (Pace Law Albert H. Kritzer CISG Database, n.d.-b). Certain countries have made reservations under Article 92, opting out of Part II due to its provisions on interest (Pace Law Albert H. Kritzer CISG Database, n.d.-a). The remaining provisions, which govern contract formation, parties' rights, and obligations, are generally consistent with Islamic legal principles.

Some Islamic scholars link justice in Islamic law to *ijtihad*, viewing it as a legislative and judicial source that drives justice (Alwazna, 2016, p. 252). *Ijtihad*

refers to the effort made by judges to reach a judgment (Alyusef, 2009, p. 23). In the context of choice of law, it enables judges to identify and apply the most just legal rule in a given case, taking into account relevant circumstances. Ijtihad introduces flexibility into otherwise strict legal rules.

### 3.1. Saudi Arabia as an Islamic Country

As a practical example, Saudi law is based on Islamic law in the adjudication of cases before Saudi courts. The Basic Law of Governance of the Kingdom of Saudi Arabia, which is equivalent to a constitution, provides that "The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. The Kingdom's religion is Islam, its constitution is the Quran and the Sunna of the Prophet, peace be upon him, ...." (Basic Law of Governance, 1992). Similarly, the Saudi Law of Civil Procedure states that "The Kingdom's courts shall have jurisdiction over cases filed against non-Saudis who have no general or designated place of residence in the Kingdom in the following cases: a) If the lawsuit involves property located in the Kingdom or obligation considered to have originated or is enforceable in the Kingdom." (Law of Civil Procedure, 2013). This article establishes jurisdiction for the Saudi judiciary in transactions with a connection to the Kingdom, even where an individual is a foreign national. Article 27 of the Law of Civil Procedure also gives jurisdiction to the Kingdom's courts "against a non-Saudi Muslim who has no general or designated place of residence in the Kingdom" in matters of family law (Law of Civil Procedure, 2013). Accordingly, Saudi courts have assumed jurisdiction over some cases involving non-Saudis. While Saudi law does not contain explicit choice-of-law rules, there are court precedents related to this type of provision in family law matters. The following case illustrates how these principles operate in practice.

The following case illustrates how Saudi courts have applied principles of justice in the absence of explicit choice-of-law rules. In this case, a foreign plaintiff filed a lawsuit against the heirs of her deceased Saudi husband (Collection of Judicial Rulings for the year 1435 AH, 2013). She sought a judgment to add her name to the official deed of inheritance. When the case was presented, the heirs' representative denied any knowledge of the deceased's marriage to the plaintiff. The court requested that the plaintiff provide evidence. She submitted a marriage contract authenticated by a court outside Saudi Arabia. The heirs' representative challenged the validity of the marriage contract. He argued that the contract did not fulfil the mandatory

conditions required for marriage contracts under Saudi law and was therefore invalid. The judge ruled in favour of the plaintiff's marital status to the deceased. The decision was based on the finding that the marriage contract satisfied the conditions prescribed by the foreign law, despite it being inconsistent with Saudi law. The Court of Appeal upheld the judgment (Collection of Judicial Rulings for the year 1435 AH, 2013). This decision highlights the Saudi court's approach when explicit legal guidance is absent, which will be further examined below.

The judgment was issued by applying foreign law, despite the absence of explicit choice-of-law rules in Saudi law. The Saudi court's jurisdiction was established under Article 24 of the Saudi Law of Civil Procedure, which states: "The Kingdom's courts shall have jurisdiction over cases filed against a Saudi citizen even if he has no known general or designated place of residence in the Kingdom, except for cases in rem involving real property outside the Kingdom." (Law of Civil Procedure, 2013). Having established jurisdiction under Article 24, the court recognized the foreign marriage contract and applied principles of justice, as there was no explicit choice-of-law rule to the contrary. The foreign law does not contradict Islamic law. It may, however, differ from Saudi law due to variations among Islamic schools of jurisprudence. Saudi Arabia follows the Hanbali school, while other Islamic countries may adhere to different schools (Alanzi, 2020, p. 120). These differing interpretations and schools remain within Islamic law. Adopting one school's opinion over another is considered a legitimate exercise of ijtihad. In this case, the use of ijtihad led to a just outcome consistent with the general principles of Islamic law.

Determining the applicable law in family matters is primarily a matter of justice rather than a legal issue. However, when examining other case types, Saudi law has not enacted or codified provisions that reflect the principle of justice outside the context of family matters. The application of justice as a normative principle in Saudi law is limited to family matters, raising the question: can this principle also be applied to choice-of-law decisions in other areas of private international law?

### 3.2. Islamic Family Law Matters

Issues of justice often arise in family law, where rules on marriage, divorce, custody, and inheritance differ across countries and religions (Prettitore, 2015, p. 33). Each legal system or religion defines justice in its own terms, and scholars in family law hold differing views on justice. (Prettitore, 2015, p. 32)

Many Muslim scholars view justice as the application of Islamic law, though some allow other laws if they do not conflict with public order and Islamic principles. In Islam, there are two views on the applicability of non-Muslim law to non-Muslims. The first view is to apply foreign law to their dispute if it involves family matters (Audit, 2001, pp. 111–112). The other more common view holds that Islamic law should apply to all disputes (Abd al-Razzaq al-Sanhuri, 1942). Thus, Islamic law is applied territorially and recognizes only Sharia (Elbalti, 2024). Both previous views have agreed that disputes involving Muslims are always governed by Islamic law, regardless of nationality or origin. Countries that adopt Islamic law as a source of legislation give it priority as the governing law.

## 4. CONCLUSION

### 4.1. Findings

Based on the discussion presented in this article, it is clear that defining a standard of justice is challenging. What may be considered just for one party may not be regarded as such for another. In some legal systems, such as Swiss law, judges are granted discretionary authority. In such cases, the parties are effectively subject to the judge's conception of justice. However, the difficulty of defining a standard of justice does not justify abandoning its application in matters of choice-of-law matters.

Islamic law recognizes the concept of justice. There are differences among Islamic schools regarding the scope of applying non-Islamic countries' laws. One view rejects the application of non-Islamic law entirely, while another permits the application of foreign law as long as it does not conflict with Islamic law. Together, these differing perspectives reflect flexibility within the Islamic juristic framework.

Many Muslim countries have not implemented

justice as a substantive principle in choice-of-law. The existence of such rules in some Islamic countries provides a degree of justice for the parties. However, the absence of discretionary judicial authority to apply justice may result in conflicts in determining the applicable law. Saudi law does not contain explicit conflict-of-laws rules. Instead, Saudi courts rely on principles of justice and *ijtihad* to reach outcomes consistent with Islamic law, particularly in family matters.

This study proposes enacting a provision granting judges discretionary authority to apply justice in choice-of-law. The study showed that conflict-of-laws rules are generally based on formal and procedural grounds, without treating justice as a determining factor in identifying the applicable law.

### 4.2. Recommendations

1. There is a need to reconsider traditional choice-of-laws rules to ensure they are not limited to formal factors but also incorporate justice as an evaluative factor.
2. Encouraging the codification of clear principles in legal systems that do not contain choice-of-laws rules, while considering the integration of principles of justice.
3. Strengthening the interpretative role of the judge by activating *ijtihad* in cases where the application of choice-of-laws rules leads to unjust outcomes.
4. Developing a theoretical framework that combines formal rules and substantive justice in private international law, in order to achieve a balance between legal certainty and fairness.
5. Expanding comparative research between civil law systems, common law systems, and Islamic law to derive a normative model that may contribute to the reform and development of choice-of-laws methodology.

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