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IS THE APPLICATION OF FOREIGN LAW AN IMPERATIVE? -PRINCIPLE OF PUBLIC POLICY IN NATIONAL LAWS AND INTERNATIONAL CONVENTIONS -

Abstract

Choice of law rules are of an imperative nature and their application is not dependant on the will of the parties. To that extent, we will apply national choice of law rules and even the foreign law to which they refer, even when parties prefer that their matter is resolved according to the national law. However, in particular situations, we will refuse to apply the applicable foreign law despite the reference of the choice of law rules of the forum, because the result of such application would not correspond to the principles of domestic legal system. For such purposes, we use the principle of public policy and by using its protective function, our application of the choice of law rules has corrective effects, whereas we do not apply foreign law, regardless of the fact that such law, according to the will of the legislator, is very closely connected to a particular case. Thus, if the results of foreign law application are incompatible with fundamental values of the national legal system, we must deviate from standard application of the choice of law rules and in a particular matter, find an alternative solution.

Key words*: foreign law application, public policy, deviation from standard application of choice of law rules.*

1. Introduction

In comparative law, public policy is usually defined as an institute which protects fundamental values of the national legal system, particular fundamental principles and vital interests[2] on which the national law is based. These fundamental values of the national legal system are contained in the fundamental principles as the underlying concept of the national legal system, but they can also be found in particular regulations

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[2] M. Wolff, *Private International Law*, Oxford 1950., 182.

which are a normative expression of these principles or bear their own significance.[3] Thus, when we speak about the content of public policy, we speak about particular legal principles and norms and we give precedence to their protection over standard application of the choice of law rules. The position of national law in relation to foreign law can be viewed in relation to the extent to which public policy is applied to eliminate the application of the letter.[4]

The principles we protect through the public policy provision are those which represent the epitomy of universal justice, that is, those which attain and protect internationally recognised values. By protecting these principles we prevent the effects, which are incompatible with the notion of the national state, from penetrating into the domestic territory. To that extent, we must not allow the application of foreign law which would negate the prohibition of slavery, prohibition of religious or racial discrimination, or prohibition of sex discrimination.

In addition to the aforementioned, the content of public policy is also comprised of the principles protecting political and social foundations of the national state. In this way, protected are particular forms of ownership, principle of monogamy, nullity of marriage, equality of spouses, equality between children of the marriage, children born out of wedlock and adopted children. Through these principles, the state points out the fundamental values which must be protected and they are incorporated in constitutions, that is, in particular legal texts.

In addition, public policy undoubtedly includes appropriate legal norms. Thus, for example, several provisions of Montenegrin Family Law[5] can be considered Montenegrin public policy. According to this Law, determining of paternity for the child conceived by means of artificial insemination of the mother is not allowed.[6] Additionally, this Law does not allow contesting of paternity after death of a child.[7] Thus, the content of these and so many other norms is such that it represents public policy and because of their aim, foreign law should not be applied because it produces the effects which are contrary to these regulations.

From the perspective of comparative law, it can be seen that numerous national legislations contain the public policy provision, and the same applies to international conventions. What they more or less have in common is that this doctrine is defined in general terms, whereas

[3] M. Živković, M. Stanivuković, *Private International Law, General Part*, Beograd, 2006., 309.
[4] N. Enonchong, Public Policy in the Conflict of Laws: A Chinese Wall Around Little England?", *International and Comparative Law Quarterly*, vol. 45, 1996., 634.
[5] Family Law of Monenegro, *Official Gazette of Monenegro*, no. 1/2007.
[6] Art. 112 of the Family Law.
[7] Art. 119 of the Family Law.

its content is left to the applying bodies.[8] Their task, in this particular case, is to fill the general definition with precise and clear content.[9] Thus, this is some kind of a blanket norm,[10] and the judge's task is to fill its content in each particular case.[11] In other words, it is a generalised clause which must be filled with values.[12]

2. Public policy in national laws – overview from the perspective of comparative law

In principle, the norm of international private law which defines the public policy calls attention to the rule of conduct in the situation when the norms of applicable foreign law, which should be implemented, offend national public policy principles. To that extent, Japanese Act on private international law prescribes:

> "Where a case should be governed by a foreign law but application of those provisions would contravene public policy, those provisions shall not apply. "[13]

The Law Decree on International Private Law of Hungary contains similar provision which stipulates that foreign law, which contravenes Hungarian public policy, shall not be applied.[14]

All these provisions are rather general and speak about non-application of foreign law if it is contrary to the domestic public policy. However, there are examples of national legislations which speak about non-application of foreign law if its effects are contrary to public policy. This provision is contained, among others, in the laws on private international law of Germany, Switzerland, and Poland. Thus, German legislator stipulates:

> „A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. "[15]

[8] K. Sajko, *Private International Law,* Zagreb, 2009., 257.
[9] D. Klasiček, „Autonomija u međunarodnom privatnom pravu – novije tendencije", *Book of Abstracts of the Faculty of Law in Zagreb*, 56 (2-3), 2006., 696.
[10] M. Ročkomanović, *Javni poredak u međunarodnom privatnom pravu*, Niš, 1988., 14.
[11] A. Braucher, „Swastikas and Hit Lists: A Study of Public Policy Exception to the Draft Hague Convention on Jurisdiction and Enforcement of Foreign Judgments", 5 *Gonzaga Journal of International Law*, 2001-2002., 13.
[12] R. Lange, „The European Public Order, Constitutional Principles and Fundamental Rights", *Erasmus Law Review*, volume 1, issue 1, 2007., 4.
[13] Art. 42 of the Japanese Act.
[14] Law Decree on International Private Law of Hungary, § 7 pp. 1.
[15] Art. 6 of German Law.

Swiss law stipulates deviation from the standard application of the choice of law rule in the situation which, by its results, threatens its public policy, as follows:

> „The application of provisions of foreign law is excluded if such application leads to a result that is incompatible with Swiss public policy. "[16]

Austrian rule is, in its content, identical to German, and is only differently phrased:

> „A provision of foreign law shall not be applied where its application would lead to a result irreconcilable with the basic tenets of the Austrian legal order. "[17]

Such was the case with the former rule on public policy contained in the Yugoslav Law on Resolving Conflict of Laws with Regulations of Other Countries. This Law did not expressly speak about public policy. Instead it referred to the „fundamentals of the social system"[18], as follows:

> „The law of a foreign country shall not apply if its effects would be contrary to the fundamentals of the social system established by the Constitution of the Federal Republic of Yugoslavia."[19]

Quite similar to previous wording is the norm of a positive Montenegrin International Private Law Act which connects non-application of foreign law with the effects which are „manifestly contrary"to the public order of Montenegro.[20]

Among this second group of countries, which view the opposition to the public policy through the effects of a foreign norm, there is a prevailing opinion that foreign norm will not be eliminated if it is materially different but only if its application leads to the result which is incompatible with the main principles of domestic legal system. Certainly,

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[16] Art. 17 of Swiss Law.
[17] § 6 of the Austrian Law.
[18] On the criticism of terminology see V. Čolović, „Deviation of the Regular Application of the Choice of Law Rules („Correction" of the choice of law rules) – Need for Different Attitude", *Strani pravni život,* 3/2009., 39, 40.
[19] Law on Resolving Conflict of Laws with Regulations of Other Countries, *Official Gazette of SFRY,* 43/ 1982, 72/1982, čl. 4.
[20] International Private Law Act of Montenegro, *Official Gazette of Montenegro,* no. 1/14, 6/14, 11/14, 14/14, Art. 9.

this would be determined *in concreto*.[21] Therefore, the attention should not be focused on the text of a foreign law norm and the way it is styled and phrased but on its effects, that is, the result which it would produce in the domestic legal system. This is explicitly stated in the Belgian Code on Private International Law where it is prescribed that the application of a provision of the foreign law is refused in so far as it would lead to a result that would be manifestly incompatible with Belgian public policy. It is further stipulated that this incompatibility is determined by giving special consideration to the degree to which the situation is connected with the Belgian legal order and to the significance of the consequences produced by the application of the foreign law.[22]

In theory, comparisons of the method and manner of public policy application were made, and there are opinions that this institute is applied more in France[23] and Germany than, for example, in England.[24] However, one should not jump into conclusions and understand that English law is the law which more strongly seeks international cooperation and fulfilment of internationalist tasks than that of France and Germany. It seems that the answer lies in different ways in which choice of law rules are constructed because in England they are „forum-oriented" and lead, in many cases, to the application of the national law, whereas in France and Germany, foreign instead of national law would govern.[25] Thus, there is no need to activate public policy clause.[26]

Public policy content is of a changeable character and its structure differs depending on the country. Therefore, it is not only impossible to speak about public policy content in connection with several countries and in the long run, but it is also impossible to speak about the content of only one public policy for a longer period of time.[27] The essence of public policy can be determined only with very precise coordinates of space and time since its norms are characterised by relativity and changeability and, accordingly, what is today contrary to public policy does not necessarily have to be so tomorrow. Depending on the change in the content of domestic public policy it will be judged whether foreign law is contrary to public policy or not. In any case, the judge will pay attention to public policy only when it

[21] B. Bordaš, T. Varadi, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, Beograd, 2007., 158.
[22] Code on Private International Law of Belgium 2004 Art. 21.
[23] On the application of public policy in France see M. Ročkomanović, „Ordre public u međunarodnom privatnom pravu Francuske", *Annals of the Faculty of Law in Belgrade,* 3-4, 1994., 322-338.
[24] N. Enonchong, 636, 637.
[25] Some argue the opposite, that there are also situations where French and German norms are forum-oriented and that no simple conclusion can be drawn focusing only on English law.
[26] N. Enonchong, 637.
[27] B. Blagojević, *Međunarodno privatno pravo,* Beograd, 1950., 148.

is subject to the decision,[28] which is called the topicality principle of public policy.[29] International doctrine also agrees with this interpretation of public policy content i.e. at the moment when the matter is under consideration,[30] which means that the fact that public policy content is time-dependant is not prejudiced.[31] Otherwise, if public policy was to include those norms which are no longer its integral part, despite the fact that they used to be, this could lead to the situation in which two contradictory public policies are applicable on the same territory,[32] and that is absolutely unacceptable.

3. Public policy in international conventions

In the case of international treaties, we will differentiate between those bilateral and multilateral. Bilateral agreements almost never stipulate public policy clause.[33] This is because prevailing opinion is that there is no room for invoking public policy, that is, refusing to apply the solutions found in the implementation of international convention, because such action would mean a unilateral amendment to the content of an international treaty, which would be contrary to its purpose.[34] Essentially, bilateral conventions standardise the choice-of-law technique of the two countries and they are created with the aim to address the law of one or the other contracting state. This precludes the possibility to declare the applicable law, so determined, as contrary to the public policy of the state i.e. one of the contracting states which choice of law rules are being premised upon.[35] In addition, if we take into account the fact that after the ratification, the norms of an international treaty become an integral part of the domestic law of the contracting state, the refusal of their application would actually mean that our own law is negated.[36]

The conventions drafted under the auspices of the Hague Conference on Private International Law are somewhat different. They mostly contain the provision which stipulates that the application of the applicable substantive law may be refused if it is manifestly contrary to the public policy. Such norm is contained in the Hague Convention on the

[28] B. Bordaš, T. Varadi, G. Knežević, V. Pavić, 160.
[29] M. Živković, M. Stanivuković, 312.
[30] J. Maury, *L'eviction de la loi normalement compétente: l'ordre public et la fraude à la* loi, Valladolid 1952., 122; C. Gavalda, *Les conflits dans le temps en droit international privé*, Paris 1955., 224; M. De Angulo Rodriguez, „Du moment auqueil il faut se placer pour apprécier l'ordre public international", *Revue critique*, 1972., 369.
[31] M. Ročkomanović, (1994), 328.
[32] Ch. Knapp, *La notion de l'ordre public dans les conflits de lois*, Neushatel 1933., 175.
[33] K. Sajko, 260.
[34] B. Blagojević, 156.
[35] K. Sajko, 260.
[36] Position of *Batiffol* in relation to M. Ročkomanović, (1988), 52.

Conflict of Laws Relating to the Form of Testamentary Provisions,[37] the Hague Convention on the Law Applicable to Road Traffic Accidents,[38] the Convention on the Law Applicable to Product Liability.[39]

Within the European Union, the Rome Convention on the Law Applicable to Contractual Obligations also stipulates the public policy clause.[40] Today, it is replaced with the Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, which also stipulates that the application of a provision of the law of any country may be refused only if such application is manifestly incompatible with the public policy of the forum.[41] Public policy in the context of the Regulation certainly has to be interpreted in accordance with its content. Therefore, there is no room for extensive interpretation of public policy. In addition, since the subject of protection is the public policy of the forum state, this means that the application of the applicable law results will be upon the state which is to apply this applicable law, irrespective of the fact that the subjects of civil-legal relationships may be connected to more states.[42]

In the field of the European Union we can speak about a so-called European public policy which protects fundamental rights of the Union.[43] Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that human rights in the convention field of application represent public policy of contracting states and applicable foreign law will not be applied if it is contrary to the provisions of the Convention.[44] The Treaty on European Union stipulates that fundamental rights, as guaranteed by this Convention, and as they result from the constitutional traditions common to the Member States, will constitute general principles of the Union's Law. The impact of this Convention was also important in the field of harmonisation of the laws of contracting states with the provisions it contains and thus, the provision of the Belgian Civil Code, according to which maternal affiliation of a child born out-of-wedlock and mother seemed to be dependent on the recognition of maternity is to be considered contrary to the European Convention and may no longer be applied.[45]

[37] Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Provisions, Art. 7.
[38] Hague convention on the Law Applicable to Road Traffic Accidents, Art. 10.
[39] Convention on the Law Applicable to Products Liability, Art. 10.
[40] Rome Convention on the Law Applicable to Contractual Obligations, Art. 16.
[41] See Art. 21 of this Regulation.
[42] V. Čolović, 42.
[43] K. Sajko, 268.
[44] *Ibid.,* 267.
[45] *Ibid.*

4. An alternative to foreign law

After we have concluded that in accordance with the choice of law rule of the forum the foreign law is applicable and when we have seen that the result of its application would potentially pose a threat to the national legal system, we should see what are the effects of the institute of public policy and how to deviate from the standard application of the choice of law rule.

The general effect of the public policy institute may be seen as the refusal to apply foreign law to which a national choice of law rule refers and as the application of another law to a particular case.[46] Failure to apply foreign law is qualified as negative effect, whereas the application of another law instead of the foreign law which is contrary to the public policy would be considered a positive effect.[47]

The central characteristic and basis of the existence of this institute is its negative effect i.e. power not to apply foreign law if the result of such application would be completely unacceptable for the national state. Negative effect contains very explicit power to shift the choice of law rule i.e. to deviate from its standard application. Sometimes this negative effect will be the only effect, that is, the circumstances of the case may be such that it is just sufficient to eliminate the application of the foreign law, without the need to find a new solution.[48] This is when we do not give any effect to the situations which occurred by the application of the foreign law, when we do not recognize such situations, or when we do not allow the situation to be established in the national state.[49] This would be the case in which we did not recognize and apply foreign discriminatory regulations which deprive the citizens of the national state of their property or, in another case, when we refuse to solemnise marriage in the situation when a person originates from the country which allows polygamy and already has one marriage solemnized.[50] In such situations, general effects of public policy doctrine are shown in their negative dimension because the national judge eliminates the application of foreign law only by not recognising legal situation based abroad, that is, by refusing to establish legal situation in the national state. Yet, positive dimension is missing, because this is not required by the circumstances of the case.

However, after deviating from the standard application of the choice of law rule i.e. the negative effect of public policy institute, the need will often arise to exercise its positive effects, that is, to find an

[46] M. Živković, M. Stanivuković, 316.
[47] C. David, „La loi étrangère devant le juge du fond“, *Bibliothèque de droit international privé*, vol. 3, Paris 1965, 84, 85.
[48] M. Živković, M. Stanivuković, 317.
[49] K. Sajko, 265.
[50] *Ibid*. 265, 266.

alternative law according to which a particular matter will be resolved. Foreign law, which is contrary to the national public policy, must be substituted and thus, the main dilemma is which law will be given the role of a substitute. Most common point of view is that foreign law is to be replaced by the national law,[51] despite the fact that provisions expressly prescribing this are rarely seen in legislations. Such exception can be seen in the Austrian law, where the legislator prescribes the following:

> „In place of foreign law, if necessary, the corresponding provision of Austrian law shall apply. "[52]

Similar provision is contained in the Hungarian Law Decree on International Private Law, which explicitly regulates the application of Hungarian law in place of foreign law:

> „In place of foreign law, which shall not be applied, Hungarian law shall apply. "[53]

These are most common actions in practice, regardless of whether there is an express legal wording or not. If in Montenegro an issue is raised as to the determination of the applicable law for the solemnization of marriage, and if according to domestic choice of law rule the judge establishes the applicability of the law which prescribes the prohibition of marriage solemnization due to religious differences, in such case not only will we refuse to apply such foreign law expressing the negative effects of public policy institute but we will apply its positive dimension by applying *lex fori* to the solemnization of marriage and thus protecting public policy from the result which would threaten the fundamental principles it is based on.

Despite the fact that the most accepted concept is the one according to which general positive effects of public policy institute are achieved by the application of national in place of foreign law, there are also other solutions. Thus, stipulated are the application of the corresponding provisions of applicable foreign law, provided that they are not contrary to the public policy of the national state; the combination between the norms of national and foreign law; or even the application of another law pointed out by other connecting points which are possibly contained in the choice of law rule.[54] Such solutions are prescribed by Portuguese

[51] A. Bucher, „L'ordre public et le but social des lois en droit international privé", *Recueil des Cours,* Academie de driot international da la Haye*,* II, 1993., 30-34.
[52] Art. 6 of Austrian Law.
[53] Hungarian Law Decree on International Private Law, § 7 par.3.
[54] M. Živković, M. Stanivuković, 317.

Civil Code[55] which stipulates the application of those norms which are most adjusted to the applicable foreign legislation or subsidiary norms of Portuguese national law, or Italian Private International Law Act which, in the event when it is not possible to apply foreign law due to its incompatibility with public policy, prescribes the application of the law pointed out by other connecting criteria which may be stipulated for the same normative hypothesis. If these additional connecting points do not exist, Italian law will apply.[56]

If the application of national law in place of applicable foreign law is made unambiguous, the dilemma remains whether we will fully replace foreign law or opt for its replacement only in the part of the norms which are contrary to public policy. To that extent, there are opinions which favour the differential application of foreign law which excludes only those provisions that are contrary to the public policy and that apply national provisions instead, and to all other matters they apply otherwise applicable foreign law.[57] However, this solution would be much more complicated for the court which would have to apply more laws to the same relationship and this would be more complex and time-consuming than the solution according to which applicable foreign law would be fully replaced by the national law.

5. Conclusion

Legislation and international conventions, as well as practice, share the same position that public policy must be protected. To that extent, public policy clause, that is, the institute of public policy, serves as an exceptionally suitable correction which provides the possibility not to apply the applicable law, despite the fact that the very choice of law rule makes it applicable, because its effect is contrary to the fundamental values of the national law.[58]

When national judge concludes that foreign law, that is, the result of its application is incompatible with the public policy of the forum, public policy clause has powers to refuse its application. In addition, it is important to note that such negative function of public policy is not aimed against the content of foreign law so determined, but against its application in that particular case.[59]

In the context of determining the applicable law, states widely

[55] See Art. 22 par. 2 of Portuguese Civil Code 1966
[56] Private International Law Act of Italy, Art. 16.
[57] M. Ročkomanović, (1994), 326, 327.
[58] N. Enonchong, 635.
[59] K. Sajko, 264.

accept reference to the choice of law instead of substantial reference according to which, when we apply foreign law referred to by the national choice of law rule, we also apply the choice of law rules of such foreign law. Thus, public policy represents the protection of national law not only from the foreign substantial law but from the foreign conflict of laws if such law is unacceptable for the forum state and thus, in case of application of the institute of *renvoi*, this law will not be applied.[60]

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DA LI JE PRIMJENA STRANOG PRAVA IMPERATIV? - USTANOVA JAVNOG PORETKA U NACIONALNIM ZAKONIMA I MEĐUNARODNIM KONVENCIJAMA-

Rezime

Kolizione norme su imperativne prirode i njihova primjena ne zavisi od volje stranaka. U tom smislu, primijenićemo domaću kolizionu normu pa i strano pravo na koje ona ukazuje, čak i ako bi stranke željele da se njihovo pitanje razriješi po domaćem pravu. Međutim, postoje i situacije kada ćemo, uprkos pravu na koje ukazuje koliziona norma foruma, odbiti da primijenimo strano mjerodavno pravo, zato što rezultati takve primjene ne bi odgovarali nazorima domaćeg pravnog poretka. U tu svrhu se služimo institutom javnog poretka, čija zaštitna funkcija omogućava da korektivno djelujemo na primjenu kolizione norme i da ne primijenimo strano pravo, bez obzira što je ono, shodno volji zakonodavca, najbliže povezano sa konkretnim slučajem. Dakle, ukoliko su rezultati primjene stranog prava nespojivi sa osnovnim vrijednostima domaćeg pravnog sistema, moramo odstupiti od redovne primjene kolizione norme i naći alternativno rješenje za konkretno pitanje.

Ključne riječi: primjena stranog prava, javni poredak, odstupanje od redovne primjene kolizionih normi.

[60] K. Sajko, 261.