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Introduction to Polish private international law: General Part

Non-unified legal systems: Problems posed for the Polish private international law

Poland is today a unitary state with a unified internal law system. However, we should realize that this is not a feature of all modern world countries. Quite contrariwise: the reverse situation seems to be a rule, i.e. the existence of various types of legal divisions within the state, which lead to the fact that in parallel, at the same time, more than one legal system applies on its territory. These divisions can have various causes and manifestations[1], as for example caused by—

• historical reasons - e.g. states transitionally maintaining the existing local law as the result of an international succession as to the territory (see Poland in the interwar period 1918-1939, applying civil law of Germany, Austria, Hungary, Kingdom of Poland under Russian rule, and the Russian Empire);

• federal system of the state (see countries such as the USA or Canada), although it needs to be emphasized that there is no simple relationship between the political system of the state and such divisions (cf. Germany and Switzerland, both federal and still largely unified in terms of their private law);

• granting autonomy to the parts of a politically unified state empowered to enact their own legislation (such as, for example, in Spanish Catalonia or in Chinese Hong Kong);

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[1] Cf. R. Graveson, *Problems of private international law in non-unified legal systems,* 141 *Recueil* Des Cours: Collected Courses of the Hague Aademy of International Law [1974-I], p. 190 et seq., 200.

• **political union**, when the countries becoming part of a unitary state keep each their own legal systems (e.g. England and Wales, Scotland, Northern Ireland, and some minor parts of the United Kingdom);

• **racial, ethnic or religious divisions** of the states' population (numerous Asian countries, especially in the Middle East).[2]

The heterogeneity of private law in a given country causes internal conflicts of its legal systems, which vividly resemble those between sovereign states. They may have the following character: (1) **interlocal/interregional** (between territorial units of the state); (2) **interpersonal** (between people with different legal status in the society)[3]; (3) **intertemporal** (quite obvious and legally important but, in the present author's view, unnecessarily discussed within the framework of private international law textbooks[4]).

Pursuant to Section 9 of the 2011 Private International Law:

If, in the state whose law is as applicable, there are different legal systems in force, the law of that state determines which of the legal systems should apply. If there is no such determination, the legal system that has the closest connection with the legal relationship in question applies.

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[2] Cf. I. Szászy, *Conflict of Laws in the Western, Socialist and Developing Countries*, Budapest 1974, p. 234, who, besides personal conflicts of laws, classified the following non-unified legal systems: (1) legal systems of the federations of states, or of the member states of personal and real unions; (2) legal systems of the member states of a federal state; (3) regional legal systems possessing judicial and administrative autonomy of politically united, yet organizationally or structurally 'plurilegislative' states (the UK); (4) particular legal systems of the legal regions void of autonomy developed in the course of history; (5) legal systems temporarily remaining in force in annexed territories; (6) particular legal systems of colonial territories.

[3] See M. Pazdan, *Prawo prywatne międzynarodowe*, 15th ed., Warszawa 2015, p. 70.

[4] Cf. M. Pazdan [fn. 3], p. 71.

The first sentence of the quoted provision contains a very simple general rule, accepted in private international law of many other contemporary jurisdictions[5]: the resolution of intra-state conflicts of laws should be left to the legal system of a given state. To this end, there should be a special set of conflict-of-law rules (interregional or interpersonal law of the state in question), which shall indicate the particular legal order of a territorial unit or of the societal group concerned. This situation is somewhat reminiscent of the so-called transmission (*renvoi au second degré*). A historical example of such a law in our country was the Polish Act on the law applicable to internal private relations (Private Interregional Law) of 2 August 1926[6]; similar rules of private internal law nowadays are in force, for instance, in Spain.[7] By the way, one should not overlook that such conflict-of-law rules for the internal matters need not be a piece of statutory law; they equally may result from the case law or even the customary law of the place. Eventually, they may be derived from the Constitution of a given country.

There are, however, states where strictly speaking there are no rules of private interregional or interpersonal law. Such is the case of two important common law states: the United Kingdom and the United States. Both—for different reasons—do not have particular provisions for solving inter-country/interstate private law conflicts.[8] For such cases the second

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[5] E.g. in the Dutch (Sec. 10:15 of the Civil Code), Belgian (Sec. 17 of the Code of PIL), or Ukrainian (Sec. 15 of the PIL Act) conflict-of-law codifications; for other examples, see W. Popiołek, [in:] M. Pazdan (ed.), *System prawa prywatnego*, vol. 20A, C.H.Beck: Warszawa 2014, p. 385–386.

[6] Polish title: *Ustawa z dnia 2 sierpnia 1926 r. o prawie właściwem dla stosunków prywatnych wewnętrznych (Prawo prywatne międzydzielnicowe)* (*Dz. U.* No. 101, Pos. 580, as amended), repealed: 31.12.1964.

[7] Cf. Sections 13-16 of the Spanish Civil Code (*Código Civil*) of 25.07.1889, BOE A 1889, 4768, as amended.

[8] See K.J. Hood, *Conflict of Laws Within the UK*, Oxford: OUP 2007; as the U.S. is concerned, every state has its own private international law applied in both truly international and interstate legal commerce, and since there is no federal powers in this respect (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)), all the courts follow the 'diversity of jurisdictions' rule; see S. Symeonides, *American Private International Law,* Kluwer Law International: Alphen aan den Rijn 2008, p. 43–44 (§§ 68-70).

sentence of Section 9 of the 2011 Private International Law Act foresees a residual solution, amounting to the application of the law 'most closely connected *with the legal relationship in question*'.

The concrete result depends on a court's decision but still, it should not be arbitrary but rather based on the thorough examination of the facts of the case. The closest connection should be based on the prevalence of connecting factors with one state, such as e.g. the nationality and/or habitual residence of the parties, the situation of assets, etc. Some typical solutions of the legal system in question might also be of importance in this respect.

Let us discuss two illustrative examples of the application of law in non-unified legal systems.

Example 1. A 17-year-old British national, resident of Edinburgh and temporarily present in Warsaw, enters into a consumer (non-commercial) contract with a Polish entrepreneur. Section 11(1) of the 2011 Private International Law designates 'British' law as applicable for the former's capacity to contract, because of the connecting factor of the nationality used in this provision. However, there is no 'British' legal system, and there are completely separate private laws of England and Scotland (not to mention other parts of the UK). Which of them comes into play?

Example 2. A divorce case is pending before a Polish court for two Syrian nationals. The plaintiff wife belongs to the Chaldean church (an eastern Catholic rite), while the defendant husband is a Muslim Shiite. There is a common nationality (cf. Section 54(1) of Polish PIL Act). According to the general Syrian family law (*viz.* Legislative Decree No. 59/1953 enacting the Personal Status Code), the divorce is admissible, generally rather at the request of a husband; however, by virtue of the norms of internal law, Christians are subject to particular norms (more precisely: the provisions of the Canonical Code of the Eastern Churches – *Codex Canonum Ecclesiarum Orientalium*), where there is no such institution at all. Should it be possible for the Polish court seized with the case to hand down a divorce decree?

Answers: Example 1. In the first case, there are no conflict-of-law provisions in the UK law; thus the Polish court could not apply Section 9, first sentence of the 2011 Private International Law, and it applies the second sentence, looking for the closest connection. As the person concerned comes from Scotland, there might be almost a natural tendency towards application of the law of this UK country, including its private international law (in order to know whether there is, or not, a remission—*renvoi*—to the Polish law under Sec. 5(1) of the 2011 PIL). As the Scottish conflict of laws is concerned, there is a division of contracts into two distinct categories: mercantile and personal ones, the capacity to conclude the latter category being subject to the law of the place of the person's origin or permanent residence (law of one's *domicile*).[9] There is no *renvoi*, and the result will be the application of the Scottish substantive law.

Example 2. There is no *renvoi* to the Polish law, because Syrian law prefers the connecting factors of spouses' nationality just as the Polish one does. As to the internal conflict of laws, its solution in Syrian law relies on the criterion of spouses' religion, which basically is a customary rule, very popular and common in the Near East. If both spouses were Christians, the religious law (*Codex Canonum* for the eastern Catholics) would have applied to a divorce case, instead of the Syrian Code of Personal Status, which formally is a general law applied irrespective of religion but still systematically addressed only to the Muslim population.[10] Here it is the husband's faith that constitutes a conclusive connecting factor (among the religions, Islam is privileged), hence the divorce should be possible and subject to the rules of Personal Status Code.

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[9] E.A. Frederiks, *Contractual capacity in private international law,* Universiteit Leiden: Leiden 2016, https://openaccess.leidenuniv.nl/handle/1887/41425, p. 72 et seq., with further references (last visited 20/03/2020).

[10] See E. van Eijk, *Pluralistic Family Law in Syria: Blame or Blessing?,* 2 Electronic Journal of Islamic and Middle Eastern Law (EJIMEL) [2014], http://www.ejimel.uzh.ch/, p. 73 *et seq.* (last visited 20/03/2020).

It is disputed whether the Sec. 9 of the 2011 PIL Act should apply to all cases where the law in a given jurisdiction is not unified, or only when a given conflict of law provision cannot be solved as the result of the reference to an appropriate conflict-of-law rule. Negative views are expressed in the literature on this subject; according to *Wojciech Popiołek*, there are no grounds for seeking in the Act on Private International Law of 2011 regulations requiring the direct application of the law in force in a given place (or in relation to specific persons), thus bypassing the rules arising from Sec. 9; in other words, an obligation to apply appropriate conflict-of-law rules in force in a country with non-unified law is absolute an may not be at any rate disregarded by a judge.[11]

However, one can question this viewpoint. Firstly, in the literature under the previous Polish Act on Private International Law of 1965, it was noted that territorial connecting factors which point to a specific place on the territory of the state (as e.g. the seat of the stock exchange, a place of public fairs or a venue of conclusion of the contract) should lead to the application of the legal order in force in this place without the intermediation of other norms of the Polish PIL Act.[12] This proposal meets the needs of legal practice, and at the same time is consistent with the will of the Polish legislator to apply specific law as the proper one for a given relationship. Moreover, from a purely practical point of view, in practical terms there is only one situation when the heterogeneity of laws in a given jurisdiction raises doubts: namely, it is when the Polish law indicates the law of the country of nationality of a natural person.[13] Other cases may reasonably be solved on the basis of the specific legal provisions, and thus reference to Sec. 9 becomes somehow superfluous.

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[11] W. Popiołek, [in:] M. Pazdan (ed.), *System...,* [fn. 5], p. 390; cf. J. Poczobut, [in:] J. Poczobut (ed.), Prawo prywatne międzynarodowe. Komentarz, 1st ed., Warszawa 2017, p. 254 (marg. No. 8), who believes that a direct designation of the law applicable by the specific rules of the Polish PIL is possible when in the law of the state designated as applicable there are no appropriate provisions on the internal conflicts of laws.

[12] Cf. e.g. M. Sośniak, *Précis de droit international privé polonais*, Wrocław-Warszawa 1976, s. 63.

[13] K. Przybyłowski, *Prawo prywatne międzynarodowe. Część ogólna*, Lwów 1935, p. 149.

Non-unified law is also treated by some instruments of international and European law. Particularly extensive provisions are contained in the Hague Protocol of 2007 on the law applicable to maintenance obligations[14]—

***Article 16**. Non-unified legal systems - territorial*

(1) In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Protocol apply in different territorial units -

a) any reference to the law of a State shall be construed as referring, where appropriate, to the law in force in the relevant territorial unit;

b) any reference to competent authorities or public bodies of that State shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

c) any reference to habitual residence in that State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;

d) any reference to the State of which two persons have a common nationality shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the maintenance obligation is most closely connected;

e) any reference to the State of which a person is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the person has the closest connection.

(2) For the purpose of identifying the applicable law under the Protocol in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Protocol, the following rules apply -

a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

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[14] Annexed to the Council Decision No. 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ L 331, 16.12.2009, p. 17).

b) in the absence of such rules, the law of the relevant territorial unit as defined in paragraph 1 applies.

(3) This Article shall not apply to a Regional Economic Integration Organisation.

***Article 17**. Non-unified legal systems - inter-personal conflicts*

For the purpose of identifying the applicable law under the Protocol in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Protocol, any reference to the law of such State shall be construed as referring to the legal system determined by the rules in force in that State.

The Rome I Regulation[15] in turn resolved only the issue of interregional conflicts of legal systems within one state—

***Article 22**. States with more than one legal system*

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation. [...]

Obviously, such provisions of either international or European origin (by the way, quite numerous) always rule out the provisions of the autonomous private international law and have an absolute priority over the latter under Article 91 of the Polish Constitution.

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[15] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).