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Introduction to Polish private international law: General Part

Public policy in the conflict of laws

From the beginning of the existence of private international law as an autonomous field of law (around the mid-nineteenth century), it was considered necessary to retain certain protective solutions against an unlimited intervention of a foreign law. It is obvious that states' legal systems generally differ from each other; sometimes these differences are superficial or trivial, in other cases serious, but still tolerable. However, it may turn out that a foreign legal rule produces an effect that is contrary to some absolutely fundamental legal principles of law of the forum state. There must then be a "safety valve", a mechanism that eliminates the threat that always exists when legal circulation in a country is left open to the outside world.

Such an instrument is the public policy exception, i.e. a special rule of the conflict of laws, which exceptionally and specifically corrects the result of the designation of the law applicable by preventing the court from applying a given provision (or provisions) of the foreign law[1], should the effects of their application in some way be incompatible with the basic principles

[1] At the beginning, 'public policy' had been identified with a set of basic mandatory legal rules (*ius cogens*) of the law applicable, which had been believed to be so important that they could not be ruled out by the courts by means of a conflict-of-law rule. The original clause can be considered to be modelled upon the term "law and order regulations" (*lois de police et de sûreté*), as expressed in Sec. 3 of the French Civil Code. Such regulations were applicable to all the residents of French territory; M. Sośniak, *Klauzula...,* s. 27.Only later—in the 20th century actually—was a different and more accurate method adopted; M. Sośniak, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym,* Warszawa 1961, s. 5 i n.

of the legal order in force at the seat of the adjudicating authority (that is to say, in our case: with the basic principles of the legal order of the Republic of Poland). The primary source of such a rule may be found in Sec. 7 PILA 2011—

A foreign law shall not be applied, if its application would lead to consequences that are ***incompatible with the fundamental principles of the legal system*** *of the Republic of Poland.*

—although it is also found in many other legal acts, especially in art. 21 Rome I Regulation and Art. 26 Rome II Regulation (and also in numerous international agreements).

In most such cases, the latter provisions prevent the court of a EU Member State (or a State-Party of an international treaty) from applying foreign law 'manifestly incompatible with the public policy' of the forum. This difference in the wording does not seem to bring any change as regards the effects of the public policy exception, since the very term 'public policy' can be equated with the basic principles of the legal order of a given state and, moreover, the discussed provision is never directed against foreign law as such but always against possible effects of its application, even if they are not explicitly referred to. This in turn means that the very same legal norm sometimes may be applied, while sometimes it is ruled out, depending on the context of the given situation.[2]

Example. Since most of the rulings regarding the public order exception necessarily concern family law, to illustrate the problem it is enough to refer to the rulings of the Supreme Court regarding polygamous marriages. Therefore, if a man from a Middle East state whose national law allows polygamy is unmarried, then of course, by itself, the possibility of entering into multiple marriages does not violate Polish public policy. If, however, the man had actually married another woman, his next marriage in Poland would have violated the principles upon which our family law is based (the principle of monogamy).[3]

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[2] M. Pazdan, *Prawo prywatne międzynarodowe,* 16th ed., Warszawa 2017, p. 106.

[3] Supreme Court order of 28 December 1979, III CRN 253/79, unpublished, LEX-Database No. 8210 ; contrariwise, cf. S.C. resolution of 22 June 1972, III CZP 34/72, OSNC 1973/4/52.

In the Polish legal language, the public policy refers only to what is traditionally referred to as an "international public policy" (the French concept of *l'ordre public international*). These are therefore some mandatory principles of the forum—so important that they have to be strictly protected against the law designated as applicable. What actually is the meaning of the 'basic principles of the legal system of the Republic of Poland'? It is undoubtedly a blank concept, and the entire provision of Sec. 7 PILA 2011 (and, similarly, of any other provision functioning in the same way) can be taken as a type of general clause. Admittedly, the reference to the clause in question is obligatory when the court notices an inacceptable contradiction of effects of a foreign substantive rule with its own law. Yet still, whether or not such a contradiction exists, is a matter of judicial assessment, which of course cannot be amounted to an exhaustive catalogue.

The phrase "basic principles" marks out a close relationship of Sec. 7 PILA 2011 with such principles that determine the legal identity of the state and society. As a model example, the constitutional principles, especially those contained in Chapters I and II of the Polish Constitution (e.g. the principle of social market economy—Article 20; human dignity—Article 30; individual freedom—Article 31; equality of all individuals before the law—Article 32 (1), or equal protection of property—Article 64 (1)) surely could be considered. It may be said, for instance, that the Constitution would justify not applying a foreign legal rule which would privilege the state-owned enterprises as to the debts enforcement or, quite contrariwise, set out an exceptionally short limitation period in cases of debts of the public sector entities).

Furthermore, some basic principles of international treaties, ordinary laws, and even customary rules may be the source of public policy. The formulation of their catalog, of course, does not make much sense, because the use of the clause does not consist in literally applying the provisions, but in referring to the axiology of the legal system as a functional whole. To be sure, such principles always belong to the sphere of legal, not moral precepts.[4]

Example 1. Let us think over an example of an application for entering into marriage between a man of 20 years and a twelve-year-old girl. No doubt it would lead to the so-

[4] See M. Pazdan, *Prawo*..., p. 105.

called *child marriage*. Even though there are states where such girls are allowed to marry, the prohibition of application of such foreign laws may be inferred not only from Article 72 of the Constitution, which is too general[5], but from the whole set of legal provisions in force. First and foremost, the reference could be made to the UN Convention on the Rights of the Child[6] and, which would have been even more adequate, to Article 2 UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[7], as well as to Polish national law, incl. first and foremost the Family and Guardianship Code[8] and the Criminal Code.[9]

Example 2. In a divorce case, a negative a negative premise of recognizing the effectiveness of a husband's private act of the repudiation of his wife (divorce by *talaq* practiced in many Middle East countries) may result from the principle of the protection of the permanence of marriage by public authorities (Article 18 of the Constitution) and the equality of women and men on the level of, *inter alia*, family relations (Article 33 of the

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[5] Cf. Article 72(1): *The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. [...]*

[6] Article 3(1), as an expression of the child's best interests as a general directive.

[7] Opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962, Dz. U. (Journal of Laws) 1965 No. 9, item 53; an English text, see https://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx.

[8] See Sec. 10(1) of the Code: *A person under 18 years of age may not marry. However, for important reasons, the family court may allow a woman of sixteen years to marry, provided that from the circumstances show that the marriage will be in accordance with the best interests of the established family.*

[9] See Sec. 200 of the Code: *Whoever interacts with a minor under the age of 15 or commits another sexual act against such person or leads him or her to undergo such acts or to perform them,*

shall be subject to imprisonment from 2 to 12 years.

Constitution); therefore, a divorce should not be allowed without the awareness and consent of both spouses.[10]

The scholarly opinions differ as to the question of autonomy of the European public policy, that is, the protection of the EU fundamental principles. Avoiding getting into the details, it is sufficient to state that the very principle of loyal cooperation (Article 4 (3) TEU) obliges the Member States and their judicial authorities to protect fundamental principles of the EU law against the law applicable to cross-border private-law relationships. The basic EU legal principles are therefore an important part of the forum's international public policy, not a completely separate concept.[11]

The same might be said about the so-called Strasbourg public policy, that is to say, the legal principles protected by the European Convention on Human Rights. The latter undoubtedly is one of the basic sources of the Polish public policy.[12] There are, however, convincing submissions in the foreign legal literature postulating a direct application of the rights enshrined by the ECHR against the law designated by the forum's-conflict-of law rules, without the intervention of the public policy exception. It has been argued that such a direct application may be necessary in order to avoid the Convention's violation.[13]

Public policy may have different effects, namely the so-called—

- Negative effect: the exclusion of the application of a foreign legal rule is sufficient to achieve the intended purpose of public policy

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[10] Order of the Court of Appeal in Katowice of 20 August 2009, I ACa 410/09.

[11] See M. Zachariasiewicz, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori,* Warszawa 2018, p. 314 *et seq*.

[12] M. Zachariasiewicz, *Klauzula porządku publicznego...,* p. 333 *et seq*.; P. Kinsch, *Les contours d'un ordre public européen: l'apport de la Convention européenne des droits de l'homme*, w: *Vers un statut européen de la famille*, red. H. Fulchiron, Ch. Bideaud-Garon, Paris 2014, p. 147 *et seq*.

[13] L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague 2010, p. 177.

- Positive effect: the excluded legal rule of an applicable foreign law must be replaced by another legal rule. The question remains, however, what legal system shall be competent as the replacement of the 'switched off' legal rule? It is subject to a scientific discourse. In most cases, of course, this must be a rule of the Polish law (*lex fori*). Nonetheless, there might be cases when it will be enough to apply a more general provision of the proper foreign law instead of a specific one which turned out to be inacceptable (e.g. instead of a special limitation provision, the Polish court would apply a general limitation period, held to be acceptable).

The result of applying the clause may be either permissive (when a party obtains a wider range of rights than it would have been the case had the court apply a generally competent foreign law) or prohibitive (when the sphere of someone's rights is reduced or the sphere of obligations of the party is extended, as the result of the application of the public policy exception).[14]

In the interest of the parties to the private-law relationships, conceptualizing the public policy requires setting some limits to its spatial operation. It is achievable in different ways. The most reasonable seems to be a method worked out in the German private international law, based on an assessment of the proximity of a private-law relationship in question and the law of the forum (*Inlandsbeziehung,* French: *ordre public de proximité*). The closer the relationship, the more intensive becomes the impact of public policy exception. Such an approach is recommended as appropriate in the Polish scholarly literature.[15]

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[14] M. *Sośniak*, *Skutki zastosowania klauzuli porządku publicznego w prawie międzynarodowym prywatnym*, 1 Studia Cywilistyczne [1961], p. 196; M. Pazdan, *Prawo...*, p. 107.

[15] M. Zachariasiewicz, *Klauzula porządku publicznego...,* p. 200 *et seq*.