

PUBLIC POLICY AND ITS ROLE IN CONTEMPORARY CIRCUMSTANCES

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Summary: *The paper deals with the issue of a public policy, predominantly as an instrument in the area of Private International Law, though it can be used in other fields of law. Describing the origin and a role of a public policy as a protecting mechanism in the process of application of foreign law, applicable under conflict of laws rules, in the process of recognition of foreign judgments and arbitral awards, as well as a mechanism for refusing to provide international legal assistance, the author contemplates about the role and place of this institute in contemporary world, when the differences between the national legal systems rarely can be seen as insurmountable obstacle for their application.*

Key words: *public policy, International Private Law, European Convention on Protection of Human Rights and Fundamental Freedoms, international public policy.*

1. INTRODUCTION

Public policy can be observed from the perspective of different areas of law. In the area of public law, that notion can be defined as: "...set of rules that secure social peace, i.e. exclude the use of force, except by competent authorities, and secure respect for the basic institutions of the certain legal order (normative content). It can also be defined as the factual behavior of the people as requested by mentioned rules (factual content). Accordingly, depending on how successfully public policy is sustained, the power of the corresponding state authority is measured (minimal use of state force shows great power of the state authority)"².

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² *Pravna enciklopedija* (Beograd: Savremena administracija, 1979), 487.

In the area of law on obligations, one of the rules that regulate mutual relationship between the participants and their party autonomy stipulates that the parties in the obligation are free within the limits of imperative rules, public policy (u.a.) and *bonae mores*, to regulate their relationship according to their will³.

The term “international public policy” is also used, but this issue will be discussed in the later text.

Regardless of the used terminology in defining the public policy, it is a wide accepted institute of the Private International Law, established in the national interest of the state, and its substance comes down to eliminating the foreign law, applicable pursuant to conflict of law rules, or eliminating the foreign judgments, in case that they are contrary to basic principles of legal and social order of the state.⁴

This paper will deal with the public policy from the point of view of Private International Law.

2. PUBLIC POLICY IN PRIVATE INTERNATIONAL LAW

Regulating private law relations with international element, by conflict of law rules that determine applicable law, carries a certain danger that the foreign applicable law will be potentially unacceptable, since its content will not be suitable for the interest or views of the state where that foreign law should be applied. Obligatory character of the conflict of law rules imposes the obligation to apply the applicable law *in abstracto*, without knowing its content in advance. This content can potentially be very adverse and cause serious disturbances in domestic legal system, or result in incompatibility of the results with general state and social views of the country whose court is deciding the issue.⁵ Also, it is possible that the domestic authorities face the same challenges when confronted with the foreign judgment or foreign arbitral award whose recognition is sought, as well as with the request for providing legal aid to foreign authority, for the purposes of the legal proceedings pending in that foreign state.

On the other hand, there is a strong need for developing international cooperation between the states, for the purposes of achieving expected and legitimate aims and interest of their citizens who enter into private legal transactions with

3 Article 10 of the *Obligations Act of the Republic of Srpska* (*Official gazette of SFRY* no. 29/1978, 39/1985, 45/1989, *Official Gazette of the Republic of Srpska*, no. 3/1996, 39/2003, 74/2004); In more details: Milan Pak, *Međunarodno privatno pravo* (Beograd: Naučna knjiga, 1989), 596, 597, 608.

4 *Ibid.*

5 German author Raape described this situation as “leap into the dark” (according to Tibor Varadi, Bernadet Bordaš, Gašo Kneževića and Vladimir Pavić, *Međunarodno privatno pravo*, 8th changed and supplemented ed. (Beograd: Službeni glasnik, 2007), 151.

international element, what is expressed through application of foreign substantive law, recognition of the effects of foreign court judgment or providing international legal aid. It is considered that the application of foreign substantive law by domestic authorities is one of the most significant achievements of the international legal cooperation.⁶

Establishing the fair balance between the interest of individuals and interests of the state, especially the stability and coherence of all states legal order, is possible to achieve also by the public policy, as a specific institute of the Private International Law.

It is the institute formulated as a general clause (legal standard) or enumeration of principles or/and rules enshrined therein, with the purpose of closer defining its content, but in both cases we talk about national and not about internationally agreed and accepted category or its content. Therefore, above mentioned term “international public policy” has a primary goal to indicate that the institute of public policy is applied in resolving the private international legal relations, in which case it is possible to apply foreign law, unlike in relations that do not cross the borders of one state and which are subjected only to the domestic imperative rules (internal public policy).⁷

Impossibility to define this institute more precisely, as an instrument of rejecting foreign applicable law, foreign court (arbitral) decision, or denying international legal aid, is completely understandable. Principles and values protected by this institute, change in time and space; it is impossible to predict all the possible situations that could be affected by the public policy clause, having in mind that there are almost two hundred different legal orders and any limitation in that respect could be detrimental for the state which would resort to such normative limitation of its scope.

Instead, the legislator rather resort to general clauses with different formulations (the most usual is the use of the technical term “public policy”) or list the most important principles that are included in the public policy content, to achieve easier implementation and more legal certainty (e.g. basic principles of morals and law; basic principles of legal and social order of the state; basics of the social establishment as set in the constitution; basic values of the society, etc.).

In any case, defining the actual substance of the public policy, inside the general clauses, lies on the courts or other competent authority, what can ultimately result in different effects, whether to “...correct the regressive law pro-

6 Tibor Varady, „O mogućnosti dosledne primene kolizionih normi“, *Jugoslovenska revija za međunarodno pravo*, 1-3 (1981): 69.

7 Krešimir Sajko, *Međunarodno privatno pravo* (Zagreb: Narodne novine, 2005), 252; Pak, *Međunarodno privatno pravo*, 606; Mirko Živković, Maja Stanivuković, *Međunarodno privatno pravo* General part (Beograd: Službeni glasnik, 2006), 306.

visions or to act regressively in comparison to general social development”⁸, because in case of the application of this corrective mechanism instead of the foreign law which is contrary to public policy, the law of the home state will be applied. Some authors use the term of “safety valve” that prevent the application of foreign law which is “repugnant” to basic principles and moral standards of the domestic court.⁹

It is clear that the possibility of applying domestic law instead of the foreign law which is contrary to public policy hides potential danger of too wide interpretation of this institute. It is much easier for the courts to apply their own law instead of the foreign one. Therefore, they could be tempted to easily proclaim applicable foreign law to be contrary to public policy, i.e. to infringe the basic principles and values in with the consequence not to apply it.

Such scenario is even more likely in cases of the use of public policy in the area of recognition of foreign court or arbitral decisions, since these issues are decided in situations where the debtor is domestic natural or legal person and the property situated on the domestic territory is the object of the enforcement. In case that the foreign decision is proclaimed as contrary to public policy, domestic court will reject its enforcement, and therefore the creditor will have no possibility to enforce the foreign decision but will be obliged to initiate new proceedings before the domestic court against the same defendant. Such situation entails that the creditor will be subjected to additional court expenses and to wait for the uncertain outcome of that new proceedings.

These “conveniences” of easier application of domestic law, or rejection of the foreign judgment, should by no means motivate the courts to easily declare that the substance of a certain foreign law, or foreign decision, is unacceptable, i.e. contrary to public policy. Only after objective and thorough evaluation of the content of a foreign applicable law and its effects in the domestic legal order, effects of the recognition of foreign decision, the court could conclude if the basic principles and foundations, protected by the public policy, have been infringed.

In that process a number of factors should be taken into account, especially the consequences of application of foreign law or foreign decision in concrete situation, the intensity of the connection¹⁰ between the legal relationship and

8 *Ibid.* Invoking the public policy clause, foreign law that allows polygamy or forbids concluding a marriage between the persons of different religious affiliation, discriminates legitimate against illegitimate children, husband/wife, father/mother in family relations, succession law and other private law relations, can be rejected.

9 Tu Guangjian, *Private International Law in China* (Singapur: Springer, 2016), 43.

10 Maja Kostić-Mandić, *Međunarodno privatno pravo* (Podgorica: Pravni fakultet Univerzitet Crne Gore, 2017), 99. Also, Živković, Stanivuković, *Međunarodno privatno pravo, General part*, 313, 314.

effects of the application of foreign law or foreign decision to the complete system of the state of the court.

This demanding process of evaluation can be additionally complicated by the lack of proper or insufficiently precise legislation in the domestic state regarding some issues that can arise in the practice.¹¹

In any case, the application of the public policy instrument should be limited only to exceptional situations and only when it is indispensable to keep the stability of domestic legal system and protect “most sensitive values”¹² of the relevant state but at the same time to allow the application of the foreign substantive law, recognition and enforcement of a foreign court decision (arbitral award) and provide international legal aid.

Application of foreign law, though it may be different in its substance from the domestic law, should be allowed and the threshold of tolerance or the level to which the differences are tolerated (as long as they do not endanger the basic values of the domestic legal system) is evaluated in the practice of the competent authorities.

In the sense of what has been said above, it is very important to provide an adequate education of practitioners who represent the competent authorities, i.e. who act on behalf of the state when applying foreign law, because their behavior significantly influence, not only correctness and fairness of the decisions rendered, but also the stability of established relations with international element and, moreover, the reputation of the state.

Though aware that it is not possible to obtain complete uniformity in practice, we think that the most possible degree of coherency in that sense is essential in the state where the principles of the rule of law are obeyed (i.e. the quality of laws and their application, lack of arbitrariness and lack of legal uncertainty).

11 Possible example is the issue of accepting foreign public documents attesting the lawfully concluded homosexual marriage of foreign citizens abroad (about some practical problems and the lack of adequate legal framework in that regard see in more details in Gašo Knežević, Vladimir Pavić, „Homoseksualni brakovi u međunarodnom privatnom pravu“, in *Zbornik prispevkov Evropski sodni prostor* (Maribor: Pravni fakultet Univerzitetu u Mariboru, 2005). 79-87).

12 Pak, *Međunarodno privatno pravo*, 607.

3. ORIGIN AND DEVELOPMENT OF THE PUBLIC POLICY

Beginning of thought about public policy can be found in 11th century, in the theory of glossators, theoreticians who studied and commented the Digest¹³ by Justinian and later in the school of postglossators (commentators) in 12th century¹⁴.

Theory according to which the rules of the then cities oblige only their citizens, introduce us to the problem of the conflict of rules of that cities, in situations when their citizens entered into relationships outside their city and outside of the scope of application of their city regulations, so called statutes.

Offering solutions for those conflict of laws, studying the texts of the Roman Law, which was considered common to all cities and superior to them, postglossators use the term “statuta odiosa” (unfavorable statutes), which will not be applied outside the territory where they have been adopted.¹⁵

Later, this institute has been discussed by the representatives of “Dutch school of statutes” in 17th century, especially by Ulrich Hubert and by Savigny and Mancini in 19th century.¹⁶ Therefore, opinions that every state has a sovereign right to demand that rules concerning political organization but also public morals, interest and public order be obeyed certainly could be understood as the further elaboration of the idea of public policy, born by the glossators.

Having in mind that legal texts do not contain precise, descriptive, enumerative definitions of the principles and/or rules which protect public order, it is clear that concretization of that institute is the task of the legal practice, with the help of legal theory.

From the historical point of view, the French courts were particularly active in this respect, applying the relevant provisions of the French Civil Code (Code Civile) of 1804 (Art. 3, Para. 1 and Art. 6). Those provisions provide that police laws and laws on security oblige all the habitants of certain state and that laws regarding public order and good customs cannot be derogated by conventions¹⁷.

In the General Property Code in Montenegro of 1888, public policy is defined as following: “Foreign laws will not be recognized before the Montenegrin courts when they are contrary to Montenegrin laws of public order and

13 Ihering, who was the first to read and comment Digest, is considered to be a founder of the schools of glossators. For more details see Obrad Stanojević, *Rimsko pravo* (Sarajevo: Magistrat, 2000), 110-113.

14 Postglossator Bartholus especially studied the conflicts of particular laws, and is considered the founder of Private International Law.

15 Sajko, *Međunarodno privatno pravo*, 21.

16 Ibid., 35, 36, 251.

17 Very exhaustive analysis of the case law of the French courts in applying the public policy clause see in Milorad Ročkomanović, „Ordre public in private international law of France“, *Anali Pravnog fakulteta u Beogradu*, 3-4 (1994): 321-338.

public security. Foreign laws will also not be recognized if they are contrary to justice¹⁸ or would support any inhumane practice (e.g. slavery) which is not tolerated in Montenegro.”

In the Introductory Law to the Law on Civil Procedure of the Federal Peoples Republic of Yugoslavia¹⁹ of 1956, the procedural private international law was regulated. There is a provision about public policy in the part related to recognition of foreign judgments. The Law uses classical technical term “public policy”, without any further elaboration or its limitation, not even in respect of reduction of its application. Therefore, it has been provided that foreign judgment shall not be recognized if its recognition would be contrary to public policy of Yugoslavia (Art. 18, Para. 1, p. 2).

In the Succession Law of the Socialist Federal Republic of Yugoslavia (SFRY)²⁰ of 1965 there is one provision about public policy which also uses technical term, without invoking constitutional principles or social establishment, what will be the case later, when the legislator will adopt the first law in which the most of the substance of Private International Law will be codified in 1982, what will be discussed later. Accordingly, in Art. 159, Para. 1 it is envisaged that the provisions of the foreign law shall not be applied insofar as they are contrary to public policy of SFRY.

In the Law on Civil Procedure of the Socialist Federal Republic of Yugoslavia of 1976²¹, public policy is mentioned in Art. 181, Para. 2, in relation to the possibilities of denying international legal aid to foreign court: “...if the requested activity is contrary to public policy of SFRY”, as well in Art. 182, that provides that the activity requested by the foreign court can be performed in the manner asked by the foreign court, if such activity is not contrary to public policy of SFRY.

In Art. 230, Para. 1 of the Law on Obligations and Property relations in Air Navigation of the SFRY²² of 1977, public policy is also mentioned, with the same technical term as in Law on Succession, but with certain flexibility, using the formulation: “Provisions of foreign law will not be applied if the effect of the application is manifestly contrary to public policy of SFRY.”

18 For the purposes of the present Code, these rules imply “...simple humanity and fairness, those that cannot always be enforced by the state power but which are condemned by public conscience...” (Art. 785) Cited according to Kostić-Mandić, *Međunarodno privatno pravo*, 103.

19 „Official Gazette of the FNRJ” no. 4/1957.

20 „Official Gazette of the SFRY” no. 43/1965.

21 „Official Gazette of the SFRY” no. 4/1977.

22 „Official Gazette of the SFRY” no. 22/1977.

4. VARIOUS TERMINOLOGY IN COMPARATIVE LAW AND “MODERATE EFFECT” OF PUBLIC POLICY

In comparative law, different formulations are used for the public policy as a protection mechanism in the area of Private International Law.

Regardless of the differences in formulations, it is obvious that legislators are trying to find the most suitable term for this institute, defining it more closely and making it easier to apply. Nevertheless, one should also be aware of certain danger coming from precise formulation of this institute and the limitation of this institute only to the enumerated instances. The core purpose of this institute can be endangered by the precise formulation, since contradiction to public policy can only be recognized when the contact with the certain foreign law (foreign decision) occurs²³. In that sense, general formulation is desirable as it serves the purpose better.

Thus, public policy implies: general principles of law; principles of social and state organization; good practice or custom; public law of the state; laws that protect general interest or public morals; public and social interest; basic values of public order; basic principles of law; fundamental rights; fundamental principles of legal order, etc.²⁴

Those who are familiar with Private International Law, completely understand why this institute does not have to be defined in details, and prefer the use of technical term “public policy”, that encompasses all the values and principles of domestic order that could be invoked when confronted with foreign applicable law (foreign court or arbitral decision).

Refusal to apply foreign law, since it is incompatible with public policy, results in the application of domestic substantive law to the relationship with international element. Therefore, this institute must be used very rarely, having in mind that its frequent and unrestricted use can be detrimental to basic principles of Private International Law, i.e. international stability of private law relations with international element, respect for the justified and legal expectations of parties in those relations, freedom of movement and international cooperation²⁵.

Also, one should take into account that refusal of the specific foreign law provision application does not mean that other rules of the same law could not be applied (i.e. refusal of the provision that does not allow children born out of

23 Živković, Stanivuković, *Međunarodno privatno pravo*, General part, 311.

24 Bulgaria, Czech Republic, Albania, Peru, China, Austria, Germany, Poland, etc. For detailed overview of around hundred different private international law acts see Mirko Živković, *Međunarodno privatno pravo, I book* (Beograd: Službeni glasnik, 1996).

25 Also Edin Muminović, *Međunarodno privatno pravo* (Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 2006), 108,109; Zlatan Meškić, Slavko Đorđević, *Međunarodno privatno pravo I, General part* (Sarajevo: Privredna štampa, d.o.o., 2016), 133.

wedlock to inherit their parents, does not mean that provision which regulate the order and portion of succession rights of that same law cannot be applied).

This “moderate effect” of the public policy clause should be applied when it is used as a national law category only, for the purpose of promoting freedom of movement of goods, services and persons, as well as for the purpose of advancement of international cooperation.

Due to the risk of potentially excessive use of this legal standard, especially when it is widely and generally formulated, we advocate for the formulations that contain certain limitations in its use. Accordingly, it would be necessary to estimate the degree of danger and seriousness of consequences of the application of the substantive foreign law in the concrete situation, relevance and the role of the certain principle that is allegedly endangered by the application of the foreign law, and especially the intensity of the connection between the legal relationship and domestic order (citizenship, domicile, habitual residence of parties, the fact that the legal relationship has been constituted abroad but produces its effects in the domestic state or it is constituted in the domestic state, the fact that the effects of the foreign law will have permanent effects in the domestic legal system²⁶, etc.). Sole difference between the contents or used formulations in the foreign legal texts should not have decisive importance in comparison to the result of the application of foreign rule (or foreign decision) in specific case, i.e. specific time and place.

Such limitations can be found in comparative private international law formulated as follows: foreign law will not be applied if its effects are contrary to public policy; application of foreign law is excluded if it leads to the result that is manifestly incompatible with public policy; if the effect of the application of foreign law is contrary to public policy; if the consequences of the application of foreign law are contrary to public policy; the foreign law shall not be applied if its effect is manifestly contrary to public policy or manifestly contrary to public policy, etc.²⁷

Some authors suggest the use of this institute by applying “absolute approach”, when the application of foreign law shall in no case be allowed because of the importance of the principle infringed and by applying “contextual approach”²⁸, the later concept being close to the already mentioned “moderate effect” of the public policy, since the closeness between the domestic state and

26 Mirko Živković, Maja Stanivuković, *International Encyclopedia of Laws, Serbia and Montenegro* (Hag: Kluwer Law International, 2001), 94. The term „weakened public policy“ is also used (Pak, *Međunarodno privatno pravo*, 609).

27 Turkey, Italy, Canadian province of Quebec, Slovenia, Macedonia, Montenegro, Croatia.

28 E.g. Adrian Briggs, *The Conflict of Laws, 3rd edition* (Oxford: Oxford University Press, 2013), 210. Terms „universal justice“, „internationally recognized values“ are also used (Živković, Stanivuković, *Međunarodno privatno pravo, General part*, 315).

effects of the foreign law application are examined. In both cases, public policy implies basic values of the domestic law²⁹ but also notions, ideals, sense of justice and decency³⁰.

Appropriate and useful formulation the public policy clause is used by the Private International Law Code of Belgium of 2004³¹, since it contains useful instruction as to how to limit the excessive use of this institute and prevent arbitrariness. That Law gives instructions to the competent authority how to assess incompatibility of the foreign law with the domestic public policy. In Art. 21 of the mentioned Law it is stipulated that: "The application of a provision of the foreign law designated by the present statute is refused in so far as it would lead to a result that would be manifestly incompatible with public policy. In determining this incompatibility, special consideration is given to the degree in 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...." In Art. 25, Para. 1, p. 1 of the same Law, where the issue of refusing the recognition of foreign decision is mentioned, the Law uses the term "seriousness of consequences" (u.a.) of the recognition and not about the significance. However, the same consequence may result in both cases, regardless of the formulation used in the text.

Also, the Introductory Law to the Civil Code of Germany³² in Art. 6 provides that the provisions of the law of the foreign state will not be applied if its application would lead to the result which is manifestly incompatible with basic principles of the German law, Especially the incompatibility shall be regarded to exist if the application of foreign law would be incompatible with basic civil rights.

Similar model has been used in the Draft Code on Private International Law of Serbia of 2014³³, while new laws adopted in other countries of our closest surroundings, keep the technical term "public policy", without any useful clarification in its application³⁴.

29 *Ibid.*, 209.

30 Geoffrey Chevalier, Cheshire and Peter Machin North, *Private International Law* (London: Butterworth & Co (Publishers) Ltd, 1987), 131.

31 <https://socioedip.files.wordpress.com/2013/12/belgica-the-code-of-private-international-law-2004.pdf> (accessed on 26.12.2018.).

32 Federal Official Gazette, p. 2494/1994, changes published on p. 2010/2015.

33 <https://www.mpravde.gov.rs/files/Nacrt%20ZMPP%20-%20Ministarstvo.doc> (accessed on 26.12.2018.).

34 Art. 5 of the *Private International Law and Procedure Act of Slovenia* („Official gazette of Slovenia“ no. 56/1999 and 45/08); Art. 5 *Private International Law Act of Macedonia* („Official gazette of Macedonia“ no. 87/2007 and 156/2010); Art. 9 of the *Private International Law Act of Montenegro* („Official gazette of Montenegro“ no. 1/2014, 6/2014, 14/2014 and 47/2015), Art. 12 of the *Private International Law Act of Croatia* („Official gazette of Croatia“ no. 101/2017).

5. NATIONAL, EUROPEAN OR INTERNATIONAL PUBLIC POLICY

There is no dispute about the fact that the public policy is primarily the national legal institute and that it reflects the specific features of the environment in which it is applied and to which protection it serves. This institute reflects the understanding of the concrete environment about what is considered acceptable, appropriate, moral, legal, just, etc. In the final analysis, it is the instrument for the protection of domestic order and the state of the competent court, from the negative effects of the application of foreign substantive law or foreign decision. That is the reason for the constant change of the content of the public policy in different space and time.

Nevertheless, contemporary global development imposes on the states the obligation to include common values and principles which define them as “civilized nations” when they define their public policy as primary national category. This is especially the case with the extensive number of international sources of law that safeguard numerous human rights and freedoms on the universal (global) and also on the regional (especially European) level.

Sources of international public law, such as Universal Declaration of Human Rights of 1948, as legally non-binding but very powerful instrument adopted by the United Nations, European Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe of 1950, Covenant on Civil and Political and Covenant on Economic, Social and Cultural Rights of 1966, UN Convention on Elimination of All forms of the Discrimination of Women of 1979, Convention on the Rights of Child of 1989, and numerous sources adopted by other international organizations (especially by the European Union), represent a growing set of rules on human rights which states are obliged to respect, under the supervision of international monitoring mechanisms.

Influence of those international rules and especially the case law of the monitoring mechanisms established on the international level, impose the obligation on the member states to, when creating internal legal solutions, and applying them, take into account if they are consistent with international sources of law on human rights and freedoms, and with the interpretation of those sources of law in the practice of international monitoring mechanisms.

Therefore, some authors speak about “...creating the European identity in the area of human rights protection...”³⁵; or claim that “...provisions of the European Convention on Human Rights today constitute the core of fundamental human rights of member states of the European Union and determine the content of

35 Ljiljana Mijović, „Uticaj odluka Evropskog suda za ljudska prava na pravne sisteme država članica Vijeća Evrope s posebnim osvrtom na Bosnu i Hercegovinu“, *Godišnjak Pravnog fakulteta Univerziteta u Banjoj Luci*, 31/32, (2010): 243-246.

their public policy...”³⁶; that commonly accepted principles in the international community are binding for the states as its members, regardless if they have stipulated them into their internal laws. There is a “common system”³⁷; existence of the international public policy which exists parallel to the public policies of individual states³⁸; as well as that there is an “Europeization of public policy”.³⁹

Others are of the opinion that the term “international public policy” in the European Union law is used to make the difference between the national public policy of member states of the European Union and the one that exists and is common for all the members, the later implying the basic human rights protection provisions, but also basic principles on which the European Union is established (subsidiary principle, proportionality principle, freedom of movement of goods, services, capital and persons, etc.).⁴⁰

This intertwining of the different sources of international law and their supranational character may cause practical problems and dilemmas if the state is a member of more international sources of law which are, according to different international monitoring mechanisms, not in compliance with each other.⁴¹

For the states members of the European Union the Court of Justice in Luxembourg is the final authority in interpreting the community law. Therefore its interpretations are applied by the national courts. The same is with the case law of the European Court of Human Rights, whose judgments are the source of law for the member states of the Council of Europe, especially its interpretation of the content of the human rights and freedoms safeguarded by the European Convention on Human Rights and Fundamental Freedoms.

Therefore, it is not surprising that human rights and freedoms, as enshrined in the European Convention on Human Rights and Fundamental Freedoms, are to be considered as a part of national public policies of the member states of the Council of Europe and member states of the European Union, what has been confirmed by the case law of the international supervisory mechanisms.⁴²

This is especially important having in mind that if the infringement of the national public policy is a result of violation of the provisions on human rights and freedoms, national courts should give less importance to the connection of

36 Sajko, *Međunarodno privatno pravo*, 262; Vilim Bouček, *Evropsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava* (Zagreb: private edition, 2009), 134; Kostić-Mandić, *Međunarodno privatno pravo*, 100.

37 Pak, *Međunarodno privatno pravo*, 607.

38 Đuro Vuković, Eduard Kunštek, *Međunarodno građansko postupovno pravo* (Zagreb: Zgombić and partners, 2005), 467.

39 Meškić, Đorđević, *Međunarodno privatno pravo I, General part*, 131.

40 Kostić-Mandić, *Međunarodno privatno pravo*, 106.

41 More details in Valerija Šaula, „Mogući problemi u primjeni međunarodnih izvora (međunarodnog privatnog) prava“, *Pravna riječ*, 55 (2018): 521-539.

42 Krombach case, (C-7/98), decided by the European Court of Justice (judgement of 28 March 2000).

the legal relation with the country of the court as the usual prerequisite for the application of this legal standard, which means that more serious obligations for the states arise from the human rights provisions than from the legal and factual authorization of third parties⁴³.

6. PUBLIC POLICY IN THE LEGISLATION OF THE REPUBLIC OF SRPSKA

Private International Law in the Republic of Srpska, as well as the public policy, is regulated by the Code on Resolution of Conflict of Laws with Rules of other Countries in Certain Relations (hereinafter referred to as “PIL Code”)⁴⁴.

Notwithstanding the fact that during the preparatory work on the PIL Code there was a proposal to use the technical term (“public policy”), legislator took the different approach with the intention to precisely define this institute in Art. 4 as follows:

“The law of foreign state shall not be applied if its effect will be contrary to foundations of the social system as established by the Constitution of the SFRY.”

In Art.91, which mention the public policy as a reason for refusing the recognition of foreign court judgment, it is prescribed: “Foreign court judgment shall not be recognized if it is contrary to the social system established by the Constitution of the SFRY.” Also in Art.99, Para.1, p. 3it is prescribed that: “... the recognition and enforcement of a foreign arbitral award shall be refused if determined that it would be contrary to the social system established by the Constitution of the SFRY.”

Finally, in Art. 415, Para. 2 of the Law on Civil Procedure of the Republic of Srpska⁴⁵ it is provided that “...the court will deny legal aid to foreign court if the requested action is contrary to public policy of Bosnia and Herzegovina, i.e. Republic of Srpska...”

Except the fact that the existing PIL Code contains outdated provisions and terms from the former social state system, since it has not been amended after the disappearance of the SFRY, it should be stressed that the used formulations are not adequate because they lack preciseness and limit the scope of the application of this very important institute.

43 Bouček, *Evropsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava*, 144.

44 *Zakon o rješavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima-ZMPP* („Official Gazette of the SFRY“ no. 43/82 and 72/82). This Code has been taken over into the legal system of the Republic of Srpska according to Art. 12 of the *Act Promulgating the Constitution of the Republic of Srpska* („Official gazette of the RS“ no. 21/92) and was not changed so far.

45 „*Official Gazette of the Republic of Srpska*“ no. 58/03, 85/03, 74/05, 63/07, 49/09, 61/13.

Namely, reducing the public policy only to the constitution or established foundations of the social system, is almost completely useless for the practitioners who are faced with the need of using this institute in the process of applying foreign law or recognition of foreign judgments/arbitral awards. That is because the constitution does not deal with the area of private law at length necessary for its principles to be used in resolving situations regulated by Private International Law. In that regard, formulation used by the PIL Code is regarded as unnecessary limitation of the scope of the public policy clause.

Although the basic principles are indeed usually contained in constitutions, especially human rights and fundamental freedoms, public policy can also contain other principles and imperative norms enshrined in laws, especially so called "systemic laws"⁴⁶, which relate to basic social values⁴⁷. Therefore, one of the authors of the PIL Code Commentary⁴⁸ considers the provision of Art. 4 of the PIL Code "...clumsy and too liberal postulate, whose consistent meaning handicaps courts in the application of those principles which are not contained in the constitutional level norms but whose application reflects the current state of spirit of the community of people, state of their mind, even state of morals."⁴⁹

Regardless of the fact that internal laws of the state members of the regional and global international organizations are more coherent and application of public policy clause is reduced, it is visible that also international conventions retain the public policy provision in their texts. The application of this instrument in those cases is exceptional since its extensive use would reduce freedom of movement and stability of the relations with international element that have already been established. Therefore, this instrument could only be used if "...it is obvious that an important provision or basic right of the country of the court has been violated in a manner that there is unacceptable contradiction between them."⁵⁰

It is certain that in future changes of the existing PIL Code, beside the corrections related to adjusting its provisions to the new names of the competent authorities and organization of the authorities in the Republic of Srpska, as well as to erase some obsolete terms from the previous social and political system, one should consider formulating the public policy clause in the manner that we can find in comparative law, with the intention to make the application of this important institute of Private International Law more efficient. In the context

46 Pak, *Međunarodno privatno pravo*, 609, 610.

47 Živković, Stanivuković, *International Encyclopedia of Laws, Serbia and Montenegro*, 93.

48 Mihajlo Dika, Gašo Knežević and Srđan Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu* (Beograd: Nomos, 1991), 16.

49 Gašo Knežević, Vladimir Pavić, „Homoseksualni brakovi u međunarodnom privatnom pravu“, 83.

50 Bouček, *Evropsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava*, 141.

of the existing need to change the existing legal framework in this field, it is desirable to consider the possibility of improving the existing formulation of the rule on public policy, with the view of making it more useful and easier to apply, to secure uniform application in practice and to leave as less space possible for unpredictability, uncertainty and arbitrariness.

7. CONCLUSION

Public policy is undoubtedly today a very important instrument of Private International Law and should be kept in internal legislation as a useful protection mechanism to refuse the application of foreign law which is in unacceptable contradiction with basic principles and values of legal order of the country of the court. Public policy also rejects the effect of foreign court judgments or arbitral awards on the territory of the country of the court, as well as refuses providing the international legal aid.

There is a need to preserve and develop national, European and international public policy. That is necessary protection mechanism in the application of foreign law or recognition of foreign decisions. The courts and other authorities should use it on their own motion. The moderate, exceptional and reasonable use of this institute, not just secure protection of domestic legal system, but can also contribute to future coherence of legislative solutions and better cooperation between the states, based on mutual respect and substantial equality of their legal orders, without which there is no equity and justice in resolving disputed private relations with international element.

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ЈАВНИ ПОРЕДАК И ЊЕГОВА УЛОГА У САВРЕМЕНИМ УСЛОВИМА

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Сажетак: *У раду се разматра питање института јавног поретка, прије свега као инструмента у области међународног приватног права, мада се исти појављује и у неким другим гранама права. Указујући на развој и функцију јавног поретка као заштитног механизма у процесу примјене страног права, мјеродавног према колизионим нормама, у поступку признања и извршења страних судских и арбитражних одлука, као и механизма за одбијање поступања по захтјеву за пружање међународне правне помоћи, аутор промишља о улози и мјесту овог института у савременим условима, када се разлике у националним правима све рјеђе могу видјети као непремостива препрека за њихову примјену.*

Кључне ријечи: *јавни поредак, међународно приватно право, Европска конвенција о заштити људских права и основних слобода, међународни јавни поредак.*

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