

RELATIONSHIP BETWEEN POLITICS AND LAW IN A PUBLIC POLICY CLAUSE IN DIFFERENT LEGAL SYSTEMS

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Abstract: Whenever scientists from different countries tried to figure out the legal content and meaning of the public policy clause, a pattern was discovered that made it difficult to achieve the desired result. When studying the public policy clause, the connection between law and politics is most clearly and vividly observed, and even more, the suppression of law by politics in a particular country.

Keywords: arbitration; choice of law; international commerce; public policy.

The research of the public policy clause really convinces that the law is a political measure, there is a policy. This political measure is not written in the law itself, but it is it that serves as the basis for the application of the public policy clause.

Trying to understand the relationship between politics and law in different legal systems. It is far from the same and, moreover, is subject to change with the coming to power in the country of one or another political party. At the same time, the greatest political overtones are always present in the activities of the court (arbitration court), and the greatest legalism is found in lawmaking and law as such.

The variety of legal systems in which there is an idea of the public policy of one's country depends, first of all, on the number of clauses on the protection of public policy in real spheres of law and specific laws serving them.

One of the most impressive examples of how a country's public policy clause prevents the application of foreign law when it is referred to by its own conflict of laws rule is modern Germany.

This country can rightly be called as a country with a legal system of a set of norms that protect its public order. A strict hierarchy of rules of public order has been developed here, which are placed mainly in the Introductory Law to the German Civil Code,^[1] as amended in 1986 (as amended in 2000), but also in a number of other laws of the country.

The public policy clause itself is formulated in Article 6 of the Introductory Law. It plays the role of the principle of German private international law (*lex generalis*) for the protection of the public policy of the country and is a blanket rule of general order. Its text is as follows: "A legal norm of a foreign state does not apply if its application leads to a result that is clearly incompatible with the basic principles of German law. In particular, it cannot be applied if the application is not compatible with fundamental rights."^[2]

It is quite logical to assume that these norms-principles in the courts of Germany and its doctrine are considered as an integral part of all other special

norms of German private international law, when the question arises of the application of a foreign substantive rule to which the German conflict of laws rule refers.

F. Savigny is the ideologist of the development of the norm-principle (*lex generalis*) of the protection of public order in Germany. It was under the influence of his fundamental eight-volume work “The System of Modern Roman Law”^[3] and on the basis of the idea expressed by him in this work that the very formulation of Article 30 of the Introductory Law to the German Civil Code arose: “The application of a foreign law is excluded if its application would be contrary to good morals or would violate the purpose of German law”.^[4]

40 years after the publication of this fundamental work of F. Savigny, L. Bar made a significant contribution to the development of the German doctrine of public order. It is he who deserves the merit of the legal justification for establishing the limit of the validity of the rules that protect the public order of the country.^[5] He argued that it is necessary to be wary of the consequences of an institution of foreign law, if these consequences are not in direct and obvious contradiction with local law.

Bar’s contemporary Ernst Zitelmann offered a useful outline of options for when a German court must apply a public policy clause. E. Zitelmann connected the understanding of the need for such a clause with the judge’s conviction that this particular link to foreign law is most appropriate for making a fair decision.^[6]

We can see that the norm-principle in the legal system of public order is the embryo of any special norm protecting public order in Germany, contained in other normative acts besides the Introductory Law to the German Civil Code.

These are the general features of the legal system of rules protecting public order. In addition to Germany, such a system also exists in Switzerland, Turkey, Russia and a number of other countries. Their distinctive feature is the presence

of a written norm-principle and many special norms, scattered in civil codes and in other normative acts.

In a number of countries, there is not a legal, but a legal-political system of norms that protect the public order of the state. Historically, France is considered to be its ancestor. Then it spread to Italy and other countries. To a greater extent than in the legal system, it is characterized by a combination of written norms of law, on the one hand, and doctrine and judicial practice, on the other. In their own text, the rules concerning the protection of a country's public policy (*legis specialis*) are quantitatively insignificant and generally very general.

The role of the norm-principle (*lex generalis*) in France is fulfilled by Article 6 of the Civil Code, which states: "it is not allowed to violate the norms of laws protecting public order and good morals by private agreements".^[7] When it was created at the very beginning of the 19th century, this article pursued the goal of regulating the purely domestic relations that were developing in France. The interpretation of this norm by the court and doctrine has led to the fact that, in addition to the purely internal, it also acquired international; private meaning.

At present, the understanding of Article 6 of the French Civil Code^[8] is a firm conviction of the legislator that in France there is a certain set of rules of law that, due to their inherent properties, should be applied even in cases where the French conflict of laws rule indicates the competence of the law of a foreign state, not France.

Conclusions

1. When analyzing the public policy clause, one can see an essential connection between law and politics, which in some cases in some countries suppresses the law, confirming the postulate that the law is a political measure. From the number of clauses protecting public order, it can be concluded that in the world there is a legal, legal-political and political system of clauses on the public order of the respective country.

2. The analysis shows that Russia and Germany can be attributed to the legal system. There is a hierarchy of rules of public order: the norm-principle (*lex generalis*) and many special rules (*legis specialis*) scattered in the Civil Code and other acts of Russia, in the Introductory Law to the German Civil Code as amended in 1986 and in a number of other laws of Germany.

3. In Italy and France, there is a legal-political system of norms that protect the public order of the country. It is characterized by the fact that there is a combination of written norms with judicial practice and doctrine. The role of the norm — the principle is fulfilled by Article 6 of the Civil Code of France, which says: “the norms of laws protecting public order and good morals cannot be violated by private agreements”. In addition, in this system, the role of the judge has been increased, who in some cases can subjectively interpret one or another law that protects the public order of the country. Here politics and law go hand in hand.

4. The political system of public order (England, USA) is characterized by the fact that there is no written blanket norm - the norm of principle (*lex generalis*). Moreover, in the countries of the Anglo-American legal tradition, the developer of the “public policy” doctrine (theorist of law) and the judge are usually one and the same person. As the French scholar Moldoran rightly noted: “There is no doctrine other than the one that is present in the court” and through the judgment fills the entire jurisprudence.

It can be argued that politics in such circumstances, through a socially determined decision of the judge, is everywhere attacking the law. It is politics that has the last word in determining the content of public policy.

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