

The Role of Public Policy in Rwandan Private International Law

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Abstract

The notion of public policy is evolutionary; it follows the movements of the society and the new legal needs that result from it. The notion of public policy in the field of private international law, particularly as regards the civil status of persons and the resulting disputes, is not easy to designate or define. Besides, the legislators allow themselves to determine its applications unless the competent judge can decide on this kind of dispute in the light of the legal provisions implemented in any country.

Public policy is based on several factors that are shared only in countries with similar legal systems and priorities. When it comes to adopting rules of law, they must be consistent with the values of the targeted society, which may include its religious, social, and cultural aspects.

In the case of Rwanda as a country with a painful history, public policy consists mostly of all values that unite Rwandans and future oriented mechanisms. In this case, Rwandan laws supported by the constitutional guidelines prohibit the application of any foreign

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laws that contradict public policy. In this work, we will establish the role of public policy in the application of conflict of laws in the Rwandan framework.

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I. INTRODUCTION

Given the vagueness of the concept of public policy, it is impossible to establish an exhaustive and limited list of the assumptions for putting into action. Moreover, the conceptions and fundamental values of a society are constantly evolving. What is prohibited one day as irreconcilable with public order may be admitted tomorrow.¹ However, we can still understand what is the meaning of public policy by first understand what is a policy for the first time. A policy is a rule made up and enforced to control a certain group's behavior; like a family for family policy, a workplace for example school policy, and a city, province, or a country for public policy. From this point of understanding, Public policy means whatever governments choose to do or not to do in dealing with problems of public interest.² Governments can do so many things but all sit at the same desk of serving their corresponding countries with things that aim to serve the public interest.

There is no definition of public policy in Rwandan legal frameworks. However, the Rwandan legislator has raised the question of public policy in private international relations. The law governing natural persons and family as well as provided that relations between persons, the foreign law is not applicable if it is contrary to public policy (public order), Rwandan legislator made public order a general principle and provided the following « *Foreign laws, judgments, international agreements and private agreements affecting foreign countries shall not have any effect in Rwanda when they are contrary to public order, social interest or Rwandan public morals*».³

¹ Meyzeaud-Garaud, M.: *Droit international privé*, 2nd. edu, Bréal Edition, France, 2008, pp 86-87.

² Thomas R. D.: *Understanding Public Policy*, Englewood Cliffs, NJ: Prentice-Hall, 1972, p.18

³ Article 5 of Law n°32/2016 of 28/08/2016 Governing Persons and Family, Published in the *Official Gazette n°37 of 12/09/2016*

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In practice, the history of private international law shows that the courts do not hesitate to refuse the application of the foreign law designated by the rule of conflict of laws, whenever the foreign law seems to be incompatible with the different solutions provided by the national law of the seized court. In private international law, this incident is a public policy exception;⁴ It is for the court to determine whether the effects of the actual application of foreign substantive law designated by the conflict of laws rule are acceptable to the court.

On the other side of this topic, we have private international law. In this term, we understand rules that govern the legal relationships of persons that involve more than one state. Since there is no law on an international level that prohibits states to protect their interests in private relations undertaken by individuals with a foreign element in their relation, the public policy takes its place. To this end, we will examine those Rwandan policies and their influence on the application of private international law in Rwanda.

II. DOCTRINE BEHIND THE EXCEPTION OF PUBLIC POLICY

The expression of pro-territorial sovereignty defended against the rest of the world is no longer really on the agenda. The current international situation prevents states like Rwanda from acting solitarily or egocentrically, with only its national interest in contempt of the common international interest. It is, however, master of the internal legal order and entitled to protect it. A question that may arise: to protect it against what?

According to a contemporary jurist Paul Lerebours-Pigeonnière, the first of the international public policy exception was to oppose foreign laws that disregarded the principles of law common to

⁴ Marie-Claire, F. : *Les familles maghrébines et la justice en Belgique ; anthropologie juridique et immigration*, Karthala éditions, France, 1994, pp. 31-32.

"civilized nations". This author, however, known for his open-mindedness, testifies to the fear of the foreigner who reigned at the beginning of the 20th century in France when he explained that Western civilization should be protected against the weakening that could be caused by the penetration into Oriental customs.⁵

The reference to "civilized nations", officially introduced in the statutes of the Permanent Court of International Justice before being taken up by Lerebours-Pigeonnière, should no longer be used today. Besides the fact that it is no longer accepted as a politically correct expression, it carries with it an idea that international law must no longer embody: that of an unequal legal order. From the 1950s many anthropologists and ethnologists developed theses analyzing cultural relativism and gradually led to admit that all cultures were equal. The main target of the previous effort was to show with a strong sense that societies would be hierarchical and Western society were far better than others. The authors wanted to change the common mentalities towards accepting the idea that difference does not necessarily imply inferiority.

Non-Western societies must be recognized as different, but not inferior. Léna Gannagé will later determine the "relativism of values" that international law is currently facing. Societies must not be appraised by Western standard alone, it is important to understand that states can organize their political, economic, family, religious or cultural system according to certain values in which they believe, regardless of whether they are shared or not by the entire international community. There is no evidence today of an ideal standard society that all societies should comply with.⁶ Private international law has had to evolve with increasing international relations. The exception of

⁵ Yvon, L. et al.: *Droit international privé*, Précis Dalloz, Paris, 8th. ed., 2004, p.332

⁶ Léna, G.: *L'ordre public international à l'épreuve du relativisme des valeurs*, in *Travaux du comité français de droit international privé*, A. Pedone, Paris 2009, p.98

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public policy, the main guardian of the public order of the forum, is at the heart of this evolution. This offensive instrument had to stop defending the territory of the State against the application of foreign laws to be preoccupied to protect it, that is to say, to refuse only the unacceptable.

The public policy exception is the legal mechanism that allows the State to which the action has brought, to refuse the application of foreign law or the recognition of a foreign judgment when it seriously breaches the public policy of that State. The latter is a relative and evolving notion that must be appreciated at the time when the judge decides with a greater or less intensity depending on whether the case is more or less related to the *lex for*.⁷ The public policy exception is therefore not triggered in the same way depending on the disputes under litigation.⁸ The application of a foreign law contrary to the public policy of the forum can be tolerated in the territory of the forum when the situation it governs has few links with it. However, the same law could be squeezed out following the outbreak of the exception of public policy if the situation was very closely linked to the forum. There is no systematism, the judge appreciates the case in *concreto* to adjust the balance between the protection of the founding values of the society of the forum and the respect of the application of the competent foreign law. It is a material justice that is sought by the public policy exception since it is triggered only if the decision made abroad or the application of the foreign law gives an unacceptable result vis-a-vis the *lex for*.

⁷ ANCEL, B. & LEQUETTE, Y.: *Les grands arrêts de la jurisprudence française de droit international privé*, 5th ed., Dalloz, Paris 2006, p.527

⁸ Harvard Law Review, 1933, vol. 47, p. 173, quoted by Yvon Loussouarn, Pierre Bourel and Pascal de Vareilles Sommières in *Private International Law*, Précis Dalloz, Dalloz, 8th ed., 2004.

1. The existence of public policy exception and the development of modern methods of conflict

The public policy exception is a mechanism set up in the framework of the so-called traditional conflict method. It will be necessary for Rwandan law to detach from the mechanism of the exception and to focus only on its purpose. It will be appreciated through the broader idea of public policy intervention in the conflict process to analyze how this objective is fulfilled in the context of modern conflict methods, and then to understand why the public policy exception is not as successful when the conflict rule is modern as it may be when it is traditional.

The traditional conflict rule is the only one used in Rwandan law. Its essential postulates are that of Savigny, which provides for a rule of conflict indifferent to the concrete result of the application of the law designated and the equality of principle of the *lex fori* and the foreign law. This neutrality makes it necessary to have a rigid rule of conflict that the judge must apply in the abstract. Savigny is a German jurist who has put in place a method based on the syllogistic reasoning of civil law. The principle equality of the laws having the advantage over the search for material justice, explains that the result obtained is sometimes surprising. If the judge finds an obvious contravention of the public policy of the *lex fori*, he can then use the public policy exception to avoid the application of the foreign law and replace it with the *lex fori*. The foreign law is therefore rejected for material reasons,⁹ which goes against the first postulates of Savigny who precisely wanted a neutral rule of conflict and detached from any material consideration.

However, the judge could not reasonably allow foreign law to provide a shocking decision about the public policy of the forum to

⁹ Nathalie, J.: The notion of sufficient links with the legal order (Inlandsbeziehung) in private international law, LexisNexis, Litec, 2007, p. 141.

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the litigation submitted to it. This is why some authors consider that the exception of the public policy comes to support the rule of neutral and abstract conflict when its application leads to an undesirable result. This mechanism allows the coherence of the legal order of the forum and the protection of the values constituting its public policy. Thus, the public policy exception should not be seen as a tool reflecting the imperialism of the State of the forum.¹⁰ Its implementation was necessary for the proper functioning of the traditional conflict rule. Without being supplemented by the exception, the Savigny method would probably not have had the same influence as it has because states would not have taken the risk of threatening their public policy at each international dispute resolution.

Common-Law lawyers prefer to pursue material justice by establishing a tailor-made solution for each dispute. Thus the exception of public policy hardly finds its place within the new methods. In theory, it could still play if the application of the designated law leads to a result contrary to the public policy of the forum. However, it is not clear in which case this situation would happen since the public policy of the forum and the content of the foreign law are both taken into consideration by the judge when choosing the law. The intervention of public order in the conflict process is advanced in modern methods compared to the traditional method. Indeed it does not need to intervene in the form of reserve a second time since it is already appreciated at the first stage of the reasoning. Public policy can thus serve as the sole and unique criterion of attachment to the application of the law of the forum.

¹⁰ Rémy, L.: *L'exception d'ordre public en droit international privé*, in *L'ordre public à la fin du XXème siècle, thèmes et commentaires*, Dalloz, Paris 1996, p. 67.

2. The contours of the public policy exception

The public policy exception is a legal mechanism designed to protect the public policy (public order) of a State. We will therefore devote this part to public policy, without which the exception would lose all reason to exist. In Rwanda, no definition seems to be used to define this notion, although the judges and authors have tried to delineate its contours. The existence of the concept, however, has never been questioned. Rwanda is therefore free to determine the values that underlie its public policy while being constrained or influenced by the higher legal order of the dual-level structure to which it belongs (East African Community or African Union). This state origin of international public policy necessarily entails a spatial variability of the notion, the content of the public policy being modified as soon as one passes from one State to another. Even within the forum, public policy varies with time, adapting itself to the evolution of society. This Spatio-temporal variability makes the public policy a relative notion.

2.1. The public policy with its impossible definition

The whole of the civil law doctrine agrees that there is no such thing as a definition of public policy.¹¹ While the majority of authors have tried to establish one, no attempt has so far been conclusive. Henri Batiffol does not seem surprised when he says that "*all attempts to define this notion have naturally failed*".¹² This obsession with the definition is a feature of civil law, and the consequence of a need for lawyers to frame and base concepts to conceptualize them. Not a

¹¹ CHONG, A.: The Public Policy and Mandatory Rules of Third Countries in International Contracts, *Journal of Private International Law*. 2, (1), 27-70. 2006, Research Collection School of Law. Available at: http://ink.library.smu.edu.sg/sol_research/881

¹² Henri B.: *Philosophical aspects of private international law*, Dalloz, Paris 2002, p.159.

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common law manual cares to give his reader a definition of public order. At best, the authors point to it, as David D. Siegel introduces his paragraph on public order by "It is impossible to define a state's public policy ".¹³ The definition does not exist, but authors and readers agree on the approximate concept of public order in question. This is sufficient for common law jurists to use the term public policy and directly introduce the public policy exception mechanism. The approach is more "efficient", more practical, and less theoretical than in civil law.

The public policy represents the heart of any legal order because that it brings together all the values and principles that the state is committed to defending. This set is vast, bringing together all types of moral, social, economic, or political values which found the society of the forum and are reflected in its legislation. There is no matter of public policy, but each subject is imbued with public policy. It sets the limit of the threshold of sensitivity and tolerance beyond which a state can not accept the application of non-compatible foreign laws.¹⁴ Faced with the impossibility of establishing an exhaustive list of the components of public policy, Pierre Mayer and Vincent Heuzé distinguished three main ones¹⁵:

- The great values deriving from "natural right", subject to the relative feeling of just and unfairness.
- Principles which, without pretending to universality, constitute the political and social foundation of the state.

¹³ David, S.: *Conflicts*, West Nutshell series of West publishing co., 2nd ed., 1994, p.166

¹⁴ Bucher, A.: The social dimension of private international law, General course, The paperbacks of the Hague Academy of International Law, Adi-poche 2011. p.228

¹⁵ Mayer, P. & Heuzé, V.: *Droit international privé, Domat droit privé, Montchrétien*, 9th ed., Paris 2007, p. 199.

- Principles to safeguard certain legislative policies of the state.

The contours of the first category of values mentioned above had already been delimited by Lerebours-Pigeonière and Batiffol, which gave an almost identical definition. According to them, this set reflects the international aspect of public order. On the other hand, the authors distinguished only a second category; this time corresponding to the national aspect of public policy, composed of principles intended to defend national imperatives; which would be the consequence of a reflex of self-defense of a legislative politics of the state.¹⁶ This category would include the last two proposed by Pierre Mayer and Vincent Heuzé. As each State is the legislator of its private international law and public policy, it seems difficult not to take into account consideration its interest. States then allow themselves to refuse to apply a foreign law that would so strongly upset the foundations of their societies that the national interest should prevail over the international solidarity that they impose in principle.

One question may be asked; is it really necessary to fix a definition of a notion that extends and retracts to the discretion of the courts? The approach would be understandable if it was possible to establish a transnational public policy, which should necessarily be delimited to be known by the different States responsible for its protection. However, the definition does not appear to be indispensable. States are free to determine the content of their public policy and to make it evolve according to societal changes.

2.2. Public policy and Lawmaking power

In the East African Community, the power to legislate for choice-of-law belongs to the states. States are thus free to establish

¹⁶ Yvon at al.: *Droit international privé*, Précis Dalloz, Dalloz, 8th ed., Paris 2004, p.121

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their own conflict rules, both in terms of conflicts of laws and conflicts of jurisdiction. Conflict management does not need to be approved at the community level, whether the dispute is between member states of the East African Community or with foreign states. Thus, the inevitable consequence is that States are in a position to appreciate the times when the application of the foreign law contravenes their public policy and triggers the public policy exception. There is no common public order in the community East African states, each state decides on the values and principles it wishes to be protected in the name of its public order. However, states are all obliged to respect the provisions of the Charter and Community laws.¹⁷ The public order they build without being able to go beyond those limits that came from a superior legislative order is then indirectly governed by community power. Community laws lay down the limits between which the legislative freedom of States is expressed.

In Europe as an example, the principle is the same as in East African Community since the content of each public policy is also freely determined by the Member States. This is true even when the right to use the international public policy exception is provided for by a European treaty, as is the case with Article 16 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.¹⁸ Even if the exception is triggered within the scope of the

¹⁷ Article 14(1) of The Treaty For The Establishment Of The East African Community, stipulates that: *“The Council shall be the policy organ of the Community.”* The same article in subsection 3(a) emphasizes that the council of the East African Community shall *“make policy decisions for the efficient and harmonious functioning and*

development of the Community”

¹⁸ According to article 21 of the 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) *“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly*

European text, the protected public order is that of the concerned State and it is up to it to justify the eviction of the relevant foreign law.¹⁹

Being already a difficult concept to grasp which is influenced by the superior legal orders (community), public policy is, also, a concept variable by nature. It is relative because it varies according to whether one apprehends it according to such or such time or concerning a forum rather than another.

2.3. The temporal and spatial variability of international public order

Public policy is a variable concept both because it evolves and it was necessary to fix the moment of its existence to which it is relevant that the judge appreciates it because it is related to a forum and varies in space.

a) Variability over time: the actuality of public policy

Andréas Bucher states that "*public policy reflects the actuality of the law*" in the positive law, and a *fortiori* protected values in the notion of public policy, is constantly adapting to the evolution of society.²⁰ Nothing would be more absurd than a law that is out of time with the society it governs, and it is public policy that is the defender of this timeliness of the law. Public policy would therefore have no meaning if it were a kind of rigid and fixed notion in time. Society evolves and thus are the values it defends.

incompatible with the public policy (ordre public) of the forum". Available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> accessed on 21 November 2018.

¹⁹ Yvon at al., *Droit international privé*, p.120

²⁰ Bucher, *The social dimension of private international law*, p.228

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Nothing better than examples to testify to the variability of public order, particularly striking when used for the protection of the forum's legislative policies. A public policy regarding marriage only allows one man to marry one woman.²¹ In case polygamic or same-sex marriage happens to be allowed it would be a change in public policy, something that is certainly deviant to the current public policy.

The application of the principle of the actuality of public policy does not pose a problem in case it has been relaxed since it allows to benefit from the liberalization of the public policy of the foreign situations which were contradictory to in upon their creation. On the other hand, the actuality of the public policy is more difficult to implement in the opposite case when hardening because the evolution suddenly transforms situations valid under the civil law at the moment of their creation in situations contrary to public policy.²² The difficulty is to arbitrate between the will of the legislator to protect certain values that he considers essential and the legal predictions of the foreign litigants, in particular by respecting their acquired rights.

b) Variability in space: the apprehension of the differences of the foreign law

As we have seen in the previous section of this part, States are free to determine for themselves the values they intend to protect under the control of their public policy. Thus a public policy exists only because it is attached to a given territory. The notion of public policy is relative because it varies from one State to another and has

²¹ Article 26 of the 2003 Rwandan Constitution provides that "*Only civil monogamous marriage between a man and a woman is recognized. However, the monogamous marriage between a man and a woman contracted outside Rwanda following the law of the country of the celebration of the marriage shall be recognized.*"

²² Ancel, B. & Lequette, Y.: *The major judgments of the French jurisprudence of private international law, Great judgments, Dalloz, 5th ed., Paris 2006, p.538.*

authority only for the state that created it. The confusion being easy, it is necessary to distinguish well between the internal public policy of a State and its international public policy. Although they are not completely independent of each other, domestic public policy laws are not the same in international public policy.

If only by their name, it is easy to understand that the States' internal public policies are specific to each forum. But it is the international public policy with which we are dealing here, which can exist in as many versions as there are states. The contents of public policy overlap frequently, especially in Western countries. This is largely due to the universal vocation of the values defended in the name of human rights, often strongly protected by supranational legal orders. Some writers criticize this aspiration to the universalism inherent in the notion of Human Rights by arguing that it "*tends to undermine the spirit of relativism and openness appropriate to private international law*",²³ posing as defenders of the diversity of public orders and a world of diversified societies.

There is no unity or standardization of public policy internationally, in the same way, that there is no unity of laws. It is then necessary to study how States respond to the difficulties arising in the event of excessive differences between the law of the forum and the foreign law to be applied or the origin of the situation to be recognized, without it being possible to be judged as a violation of public policy.

III. ROLE OF PUBLIC POLICY IN RWANDA

In Rwanda like any other nation, public policy consists of three principles: the principle of nationality, the principle of the autonomy or right to self-determination of parties, and the principle of

²³ Mayer & Heuzé, *Droit international privé*, p. 199.

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sovereignty. We will apply these principles in the Rwandan private law to see how public policy influences this domain.

3.1. Nationality principle

Nationality is the criterion that allows persons to participate in the life of the state, whether by vote or by demonstrations to express their opinion. It also enables them to benefit from state protection in the context of international conflicts. It will thus be able, at least in principle, to have its national law applied to these conflicts, which will always be more favorable in this context. However, the criterion of nationality also has a political dimension insofar as it allows the State to continue to infringe its sovereignty through its subjects vis-à-vis other States. For a long time, the criterion of nationality was regarded as the criterion of attachment by excellence, however, in the implementation, it can be very complex and altogether artificial because it does not always reflect the realities. A situation particularly favored by globalization, and by the regionalization of the law seems to be the current trend. In the light of these considerations, one is then entitled to ask whether nationality is still a criterion of fable connection if it still allows a fair assessment of the relationship of rights that may arise between individuals in private international law.

We will first recall the state of international law in this area on the eve of the Second World War. In principle, each state freely determines the conditions of attribution of its nationality. However, it cannot arbitrarily impose this bond of allegiance.²⁴

In Rwanda, once someone is granted a Rwandan nationality; he or she has to respect Rwandan public policy to keep it.²⁵ However, with

²⁴ Weiss, P.: Nationality and Statelessness in International Law, London 1956, p.11

²⁵ Article 20 of Organic Law N° 30/2008 of 25/07/2008 Relating To Rwandan Nationality, provides the reason of the deprivation of Rwandan nationality among them to betray the country and violating the public policy is one of the reasons.

also a public policy of sustaining child interest whatever the cost; the action of depriving nationality of parents does not have any effects to children even to one of the spouses if only one was in question. In the preliminary of the Rwandan civil code (persons and family) once they have a Rwandan nationality, whether living in Rwanda or abroad; Rwandan laws regarding status and capacity of persons govern them. The same applies to foreigners who live in Rwanda, their laws will apply unless they are contradicting public policy. However, when their nationalities are unknown, Rwanda laws will apply.

Within its public policy of removing refugee status²⁶ on a very Rwandan, Rwanda has allowed anyone with Rwandan origin to acquire nationality easily without long procedures. The role of this policy has also benefited foreigners who were linked to Rwandans because they have also acquired nationality without delay.

3.2. Autonomy Principle

The choice of law applicable to the contract may be express and result from a choice of law clause, or tacit and be revealed by the facts, circumstances, and terms of the contract. In the absence of choice, the Rwandan judge applies the law of the place of conclusion of the contract.²⁷ This last criterion is however competed by a bundle of indices resulting from other elements whose proximity to the contract makes it possible to designate the applicable law. These elements include the nationality of the parties or the place of performance of the contract.

The advantage of the principle of autonomy lies in the predictability, which favors the development of international trade through the conclusion of international contracts offering a large

²⁶ Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011, p.110 para.4 (a), 7-8 December 2011, available at www.refworld.org/docid/50aca6112.html

²⁷ Article 10 of the law Governing Persons and Family.

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margin of maneuver to those who develop them. The parties can indeed choose the law whose content is perfect for their project. When the parties designate a law, it is a legal order which is designated and if the rules of this order come to be modified during the execution of the contract, these modifications apply to it. They cannot demand that the rules applicable to the contract by the choice they make be frozen and remain dependent on any changes in the legal order adopted ab initio. The existence of an express choice of law clause dispenses to consult other elements: The judge must stick to the choice expressed during the formation of the contract or even later, to the extent that this choice can be made at any time. This change in applicable law must not, however, harm third parties²⁸ or call into question the rights acquired by a party, such as those of the employee about employment contracts.

Many rules of form are necessary laws of application. Most often they are laws designed to protect one of the parties deemed weaker. The legislator who asked them does not want them to be evaded by the choice of another law. This is the case of the formalism attached for example to the conclusion of a contract of employment or the procedure of dismissal. A Rwandan notary can therefore receive a will in a foreign form, providing for certain obligatory mentions or the presence of several witnesses, but he is also obliged to fulfill all the formalities provided for by the Rwandan law which confers on the act its authenticity.²⁹

There are more and more limits whose aims are mainly to protect the "weak" parties to the contract and to ensure respect for Rwandan public policy and morality. Some content is prohibited like the sale of

²⁸ Article 117 of Law n° 45/2011 of 25/11/2011 Governing Contracts in Rwanda provides with a third party to the contracts a right to claim (*Where the intended third party beneficiary has a claim against the promisee, he/she can request the court to order either the promisor or the promisee or both to perform the obligations owed to him/her.*)

²⁹ Article 7 of the law governing persons and family

drugs; There are cases in which one is obliged to contract like vehicle insurance, Some people cannot contract freely example of minors and some contracts must comply with rules of the form (law of the contract in Rwanda). The imposition of public policy against the autonomy of the will concluded in a contract has its role in protecting the third person who may be a beneficiary to that contract, protecting the weak side of the contract, and respecting the formality rules as basic of making contracts anytime there is a conflict of laws.

3.3. Sovereignty Principle

The concept of sovereignty has been forged to summarize this singular power which is posited as the distinctive sign of the state, an abstract entity constructed as a repository of social identity and a source of all authority: it means that the state has supreme power of domination, that is to say, an irresistible and unconditioned power which, not only imposes itself on the subjugated, without them being able to escape from it but also escapes any link of subordination, to any relationship of dependence. Sovereignty then supposes that the State knows no power superior to its own: sovereignty designates a power which is, in essence, unlimited, which is not bound by any pre-existing norm; as Carré de Malberg says, the state is sovereign "*in so far as it is master of constantly fixing the rules which are of a nature to limit it*".³⁰ This assertion of the sovereign power of the state will manifest itself internally: the state legal order will gradually impose its supremacy, by substituting itself, or at least by superimposing itself, on pre-existing legal orders and by becoming the only legal framework of reference for the entire community; the state tends to become the "total legal order" that integrates and brings back all others.³¹

³⁰ Carré de Malberg , R.: *Contribution à la théorie générale de l'État*, 2 tomes, Sirey, 1920- 1922.

³¹ Kelsen, H.: *Théorie pure du droit*, Dalloz, Paris 1962, p.393

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The hypothesis envisaged here is that where the judge, in the course of a dispute of purely private law, is led to settle an incidental question that falls within the exclusive jurisdiction of another State. The private nature of the main question of the law put to the judge calls for its settlement by application of the classic rules of private international law. But the latter, based on a privatist approach to private international law problems, reserve in the alternative to the denial of justice a legitimate title of the corrective mechanism of their dysfunctions, not only from a formal point of view but also from a material point of view. Thus, in the event of a dispute raising an incidental question that falls within the exclusive jurisdiction of another State, the judge will be required to apply the private international law rules of the forum, which will designate the law of the State involved. Admittedly, the judge may refuse to give effect to this law, because he can always exclude the law of foreign public law by invoking his annoyance to public policy.³²

It has long been considered that conflicts of laws are conflicts between States and that it is a question of dividing the situations of private law between the laws of the different States while respecting the best possible sovereignty of each one of them. The idea that prevails today is that the private nature of these situations requires the search for the solutions that best suit the interests of the people they concern.

Rwandan private law especially the law governing contracts in Rwanda stresses the importance of public policy over and over again in various articles of this law. A promise or other clause of a contract is unenforceable on the grounds of public policy if the law provides that it cannot be performed or depending on the circumstances, the public policy prevails over the interest in the performance of a

³² Manuel, J.: *Les rattachements en droit international privé*. Droit. Université Paris 1-Panthéon Sorbonne, 1988. Français. S.77

contract.³³ For one hand, in evaluating the interest in the performance of a contract, the following have to be considered: the parties' expectations; any prejudice that would result from the nonperformance; any public interest in the enforcement of the provisions of the contract.³⁴ On the other side, in evaluating a public policy motive that would hinder the performance of a contract, the following have to be considered: the weight of that public order motive, as manifested by Laws or court decisions; the seriousness of any misconduct involved and how it was deliberate; the connection between the misconduct and the provisions of the contract.³⁵ A public policy motive that can obstruct the performance of promises or other clauses of a contract may be established based on the following: a law relevant to such a public policy motive; the destabilization of the family; conflict with other protected interests.³⁶

If a party is prohibited from doing an act because of his/her failure to comply with a licensing, advertising, registration, or other similar requirements for motives of public policy, a promise made in consideration of his/her act is unenforceable.³⁷ If the promisee has substantially performed his/her obligations, a public policy motive does not preclude the performance of a promise because of improper use that the promisor intends to make of what he/she obtains unless the promisee acted with intention of such improper use or knew that the use involves grave social harm.³⁸

³³ Article 58 of Law governing Contracts

³⁴ Article 59

³⁵ Article 60

³⁶ Article 61

³⁷ Article 62

³⁸ NDAHAYO V RWANDA REVENUE AUTHORITY in case number: RCOM A00111/2017/CHC/HCC, Commercial High Court, 1 June 2017, p.12

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CONCLUSION

The exception of public policy is one of those correctives made to the traditional rule of conflict and used in Rwandan law. It finds its place in the big family of Civil law, where it stands out as the only way to avoid the application of foreign law or the recognition of a foreign decision that would contravene the public policy of the forum. Its corrective nature which only makes it intervene in the second plan of conflictual reasoning can be embarrassing because it points to an imperfection of the conflict rule used. In part, this drove the Common law doctrine to establish more flexible and subjective methods of conflict, allowing the public policy to be taken into account from the moment of the designation of the applicable law. Thus, a fix would no longer be necessary.

Each system has found a way to protect the public policy that corresponds to it. The Rwandan legal system responds to the exception of international public policy by following the application of the traditional rule of conflict, while the other countries in the same community (Uganda, Tanzania, and Kenya) with case-law system favor modern methods which make it possible to include public policy among the criteria influencing the judge's choice.

The protection of public policy is a major concern of States that they will not neglect. If for it to be assured, each legal system must find the method which is adapted to it, it is good that there are several. The public policy exception and modern methods of conflict can then coexist, and respond together to the common objective of protecting the public policy of the forum.



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