Yugoslavian Private International Law at the End of the 20th Century: Progress or Regress?

By
Maja Stanivuković*

I. The Dilemma Between "Conflicts Justice" and "Material Justice" 461
II. The Conflict Between the Goal of International Uniformity and the Desire to Promote State or National Interests 463
III. The Tension Between the Goals of Legal Certainty and Flexibility 466
IV. The Antagonism Among, or Co-Existence of, the Multilateral, Unilateral, and Substantive Approaches 467
V. The Antagonism Between, or Co-existence of, Choice-of-Law Rules and Choice-of-Law "Approaches" 468
VI. The Antagonism Between, or Co-existence of, Jurisdiction-Selecting Rules and "Content-Oriented" Rules or Approaches 469
VII. State Policies or Interests, "False Conflicts" and All That 471
VIII. Developments Regarding the Doctrine of Renvoi 471
IX. Developments Regarding the Doctrine of Ordre Public 473
X. Developments Regarding Characterization or Qualification 475
XI. Developments Regarding the Depegage Phenomenon 477
XII. Other Developments that Deserve Note 477
XIII. Conclusion 478

I. The Dilemma Between "Conflicts Justice" and "Material Justice"

It has been a generally accepted premise in the doctrine of the Yugoslav Private International Law (PIL) throughout this century that the task of this branch of law is not to resolve the merits of the case, but only to select the law that should be applied to a case with a foreign (international) element. In that sense, PIL is considered as having a "technical" character,1 acting as a signpost that directs the parties and the court to the law that ultimately disposes of the merits of the case. The role of conflict-of-law rules is to resolve the "preliminary question" of determining the applicable law, when the facts of a case may

* Ph.D. Assistant Professor of Private International Law and Resolution of International Disputes, Novi Sad University School of Law, Yugoslavia.
1 Blagojević, Medjunarodno privatno pravo, Sukob (izborj) zakona kod gradjansko-pravnih odnosa sa elementom inostranosti (Private International Law, Conflict (choice) of law in private legal relationships with a foreign element) Belgrade 1950, p. 17.
justify the application of more than one law, without looking into the content of these laws or the concrete interests of litigants in the outcome of the case.\textsuperscript{2} It is left to the chosen law to determinate what is just in the case at hand. Conflicts justice is what is important, and that means in particular the guarantee to the parties and the countries concerned that their law may and will apply to the substance of the case, if there are adequate contacts. These contacts, the relevant points of attachment pre-determined in conflict rules, are taken as fairly reliable indicators of the legitimate interest of other countries in applying their law.\textsuperscript{3} Thus, the equal treatment of both the conflicting laws and the opposing parties by the local judge is ensured, at least theoretically, and justice in the abstract sense is served.

From this general premise, there are several important exceptions in the present "Yugoslav PIL Act,\textsuperscript{4} notably in the sphere of torts and divorce, where the judge is actually directed by the Act to look into the content of the conflicting laws. Other than these exceptions - which are discussed in section VI of this paper, \textit{infra} — there are no other examples of an overt search for material justice in the Yugoslav PIL system.

However, the way in which the conflicts rules are formulated in the Act reflects the prevailing understanding of what is just in this country. For example, with regard to issues of marriage, marital property relations, parenthood, parental care, etc., the legislator was careful to avoid rules that favor outright either of the sexes. The adopted solution was either a cumulative application of the national laws of the parties, as in the case of conditions for marriage (PIL Act, Art. 32) and reasons for divorce (Art. 35), or a search for their common law through several alternative points of attachment. For example, personal relations of the spouses (and, in the absence of a marital contract, their property relations, as well) are governed by the law of the country of their common citizenship. If the spouses are nationals of different countries, the law of the country in which they are domiciled applies. If the spouses have no common nationality or domicile, the law of the country in which they had their last common domicile applies. Only if the applicable law may not be determined in any of these ways, does the lex fori apply (PIL Act, Art. 36). Similarly, in relations between parents and children, the legislator


\textsuperscript{3} Varady, \textit{Pravčnost u Medjunarodnom privatnom pravu"} (Fairness in Private International Law) i \textit{Zbornik za drustvene nauke Malice srpske}, 1973 pp. 30-43.

considered it just and proper to apply their common personal law, and only if this could not be achieved (because of the lack of common nationality or domicile), to give preference to Yugoslav law if either the child or one of the parents was a Yugoslav national. If these points of attachment produce no result in the particular case, the final solution is to apply the law of the child's nationality (for example, PIL Act Article 40 on relations between parents and children, Article 45 on adoption). Thus, it may be said that children are slightly "favored" by the Yugoslav statutory conflicts rules. Of course, we realize that to formulate the rule in this manner does not guarantee that the child will be ultimately favored by the selected rules of law - the real outcome depends on the content of the conflicting laws in the particular case.

II. The Conflict Between the Goal of International Uniformity and the Desire to Promote State or National Interests

The Yugoslav doctrine of PIL recognizes that the goal of international uniformity of decisions in the conflicts field is a highly idealistic goal that cannot be attained at the present state of affairs. This is so because of the absence of an international legislator and the predominantly national character of conflicts rules. The different legal traditions and the strong national interests underlying the various national conflicts rules prevent the formulation of uniform rules that would lead to the application of the same law in a civil case regardless of forum. In 1938, Bartoš, a distinguished Yugoslav legal scholar, wrote that the conflictual method was undergoing a crisis and that PIL should look for alternative methods for regulating private international relationships. In almost every private international law relationship with a foreign element, two important interests are involved: the interests of the forum for the application of its own law and the interest in maintaining a harmonious international community and international cooperation that enables trade and circulation of people across the state borders. To resolve the conflict between these two interests is ultimately to resolve all the basic issues of PIL. However, the view that the national interest (the interest of the forum state)

5 Bartoš, "Idealistička i teritorijalistička koncepcija — dva antipoda ili dva dopunjujuća pojma u MPP" (Idealist and territorial concept - two antipodes or two complementary notions in PIL), Arhiv za pravne i društvene nauke, no. 1-2, July-August 1932.

6 Bartoš, "Krisa Međunarodnog privatnog prava" (The Crisis of Private International Law), Arhiv za pravne i društvene nauke, 1938, year XXVII vol. 6.

should be given general preference simply because it may be impossible to attain international uniformity, has never gained much ground in the Yugoslav doctrine. On the contrary, the quest for a uniform law (both substantive and conflictual) was seen as worthwhile and achievable through international solidarity and interdependence among the countries with similar legal and social backgrounds. The conflictual method was never completely discarded. Rather, it was understood that the task of each national lawmaker (in the absence of an international one) - be it a judge or a legislator - was to try to comply with the basic tendencies that constitute the existent uniform PIL at its present state of development.

The Yugoslav doctrine of PIL was preoccupied with the policies embodied in the conflicting substantive laws only in the period immediately after the Second World War when the communist ideology was still overwhelmingly strong and influential in all spheres of life and law. At that time, the justification for a wide application of the lex fori was found in the thesis that the socialist law granted more substantial rights and better protection to individuals, whether they were women, children, or parties to the contract, than the capitalist law. Therefore, material justice was to be better served if the socialist law were applied in each case coming before the Yugoslav authorities. In the words of one author, "by application of the lex fori, we will contribute the most to the general improvement of the position of man in society". Following the example of the USSR, the application of the lex fori was advocated in many fields, such as the effects of marriage, divorce, relations between parents and children, adoption, custody, and even contracts (in the absence of a choice-of-law clause). This was also partly a result of the legal vacuum that appeared after the Second World War in the private international law field.

But even in those instances where there was a statutory conflicts rule, as in the case of bills of exchange, the goal of promoting national interests would occasionally emerge in the form of a call to disregard the foreign rule if it was unfavorable to the domestic party.

8 A good example of this approach is found in the first post-war PIL textbook written by a distinguished author, Borislav Blagojević, op. rit. note 1. This book is full of remarks on different policies embodied in the socialist and capitalist laws respectively.

9 Ibid. p. 307.

10 Although the courts had the theoretical option of relying on the conflict rules of the laws that were in force in Yugoslavia prior to the War (the 1811 Austrian Allgemeines Burgerliches Gesetzbuch, the 1944 Serbian Civil Code and the 1888 General Property Code of Montenegro), the courts rarely utilized this option. Varady, "Some Observations on the New Tfitgoslav Private International Law Code", Rivista di diritto internazionale private e processuale, number 1, 1983, pp. 69-86, 73. For a description of the state of Yugoslav doctrine and practice of PIL before the War, see Peritch, "Conception du droit international prive d'apres la doctrine et la pratique en Yugoslavie", Recueil des cours, vol. 28, pp. 299-447.

11 For example, the Law on the Bill of Exchange and Promissory Notes of 1946 (as subsequently amended) and the Law on the Check (as subsequently amended) provide in Arts. 94(2) and
Yugoslavia

After this short period of self-complacent national egoism, Yugoslavia was soon back on the track of international cooperation and joined other countries in striving to attain international uniformity. One way to achieve such uniformity was seen in adherence to international conventions that were aimed at unifying and harmonizing the substantive and conflictual rules. In line with that, Yugoslavia ratified eight Hague PIL Conventions\(^\text{12}\) and many other important international conventions in this field.\(^\text{13}\) In addition, it entered into a number of bilateral conventions that contain conflicts of law rules.

The other way to promote uniformity was to create a system of statutory choice-of-law rules that would represent a clear statement of the internationalist position of the country towards resolution of conflicts of law and would align its conflicts rules with the rules of other countries, as much as possible. In the seventies, when the federal laws containing the rules on conflict of laws were drafted, ample attention was given to the comparative law experience. Thus, the solutions adopted in those statutes reflected the prevalent trends in the PIL of Continental countries at the time. Most conflicts rules were phrased in multilateral terms, aiming to avoid any appearance of bias and to provide a solution for all possible factual situations. The exception of public policy which

\(^{23(1)}\) (15), respectively, that if a person lacks capacity to undertake an obligation under one of these instruments pursuant to his personal law \(\text{(lex nationalis)}\), the obligation will still be valid and binding if he had capacity under the law of the country in which the instrument was executed \(\text{(lex loci actus)}\). Blagojevi\u0107, supra, note 1, at p. 365, suggested that this rule should not be applied to Yugoslav citizens lacking capacity under Yugoslav law, who undertook obligations under bills of exchange \(\text{(promissory notes)}\) in a foreign country. No such limitation is advocated, however, by any of the contemporary authors. The right of each country to make such a limitation is provided in the 1930 Geneva Convention designed to regulate certain conflicts of laws relating to bills of exchange and promissory notes, ratified by Yugoslavia in 1935, \textit{Službene novine} \textit{(Official Gazette)} 1935, number 24/IV.

\(^{12}\) These conventions are: Conventions Relating to Civil Procedure (1905 and 1954); Convention Abolishing the Requirement of Legalization for Foreign Public Documents (1961); Convention on Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961); Convention on the Law Applicable to Traffic Accidents (1971); Convention on the Law Applicable to Product Liability (1973); Convention Facilitating International Access to Courts (1980); and Convention on the Civil Aspects of International Child Abduction (1980). However, the Permanent Bureau of the Hague Conference does not consider the present-day “Yugoslavia” as the successor of the former Yugoslavia in these conventions.

\(^{13}\) For example, the Vienna Convention on the contract for the international sale of goods (1980), The Warsaw Convention for the unification of certain rules relating to international carriage by air (1929), Convention on the contract for the international carriage of goods by road \(\text{(CMR)}\) (1956), International Conventions concerning the carriage of goods by rail \(\text{(CIM)}\) and of passengers and luggage by rail \(\text{(CIV)}\), Bern Convention for the protection of literary and artistic works (1886), Universal Copyright Convention (1971), Paris Convention for the protection of industrial property (1883), Vienna Convention on civil liability for nuclear damage (1963), International Convention on civil liability for oil pollution damage (1969), Convention on the recovery abroad of maintenance (1956), five multilateral conventions relating to international commercial arbitration, etc.
could potentially serve as an excuse for promoting national interests was narrowly framed (see infra, Section IX). *Lex nationalis* was chosen as the primary connecting factor for matters of status, family law, and succession. This was seen as a legitimate way to promote national interests, because Yugoslavia, as a country of extensive emigration, had a good reason to adhere to this traditional connecting factor rather than to domicile.

III. The Tension Between the Goals of Legal Certainty and Flexibility

Legal certainty has been one of the primary goals of the Yugoslav doctrine in proposing, and of the legislature in enacting, the 1982 Federal PIL Act. Statutory conflicts provisions that existed in Yugoslavia before the enactment of this law were scattered in various laws that regulated different issues of private law (marriage, succession, etc.). The Yugoslav conflicts scholars initiated and drafted the Federal PIL Act. There was a clear goal of covering all issues that might arise before the judge or other governmental authority charged with application of law. Still, some of the issues remained beyond the scope of this law (e.g. applicable law to bills of exchange and promissory notes, checks, maritime and air navigation contracts, and bankruptcy).14

The statutory conflicts rules that were enacted have a mandatory character. The judge is obligated to apply them, and if they lead to the application of foreign law, the judge is, likewise, obligated to apply that law, as its own. Failure of the judge in this duty may lead to appeal on the point of law.

Most of the rules are worded in a manner that does not leave much discretion to the judge in their application. This is not so, however, in the field of contracts. The primary connecting factor for the law applicable to contracts is the will of the parties. One may say that this connecting factor promotes both certainty and flexibility because the parties by their choice pre-determine the issue of the applicable law in a way that suits them best. In the absence of such choice, the Yugoslav legislator marked the contacts, i.e. points of attachment that will lead to the applicable law for every particular type of contract.15

---

14 These issues are treated by separate federal laws: the 1946 Law on the bill of exchange and promissory notes, the 1946 Law on the check (see, supra note 11), the 1998 Law on maritime and inland navigation, Official Gazette of the SFRY, no. 12/98, the 1998 Law on obligations and basic property relationships in air navigation, Official Gazette of the SFRY, no. 12/98, and the 1989 Law on compulsory settlement, bankruptcy and liquidation, Official Gazette of the SFRY no. 84/1989, 37/1993, 28/1996).

13 There are nineteen such points of attachment for specified contracts in Art. 20 of the Federal PIL Act (cited, supra note 4) and a twentieth point of attachment for all other contracts, not explicitly mentioned; for the majority of contracts the relevant contact is the domicile/principal place of business of the party performing the characteristic obligation, except in the
but left discretion to the judge to apply some other law "if special circumstances of the case point to a different law". This solution is the result of a compromise reached in the process of enacting this statute, between the proponents of the theory of the "center of gravity" of the contact, and the partisans of traditional, firm conflicts rules. Some flexibility in the choice of law is also provided to the judge in the field of torts (see infra, Section VI).

IV. The Antagonism Among, or Co-existence of, the Multilateral, Unilateral, and Substantive Approaches

The predominant method in Yugoslav PIL is the conflictual method. All conflict-of-law rules in the Federal PIL Act are formulated as multilateral rules. There are some unilateral rules in other federal laws, however. For example, in the Federal Law on Maritime and Inland Navigation (1998), the parties to a contract are given freedom to choose the applicable law (Art. 1038), subject to a limitation that certain issues of the contract on the exploitation of a ship are to be regulated exclusively by this law, such as the issue of carrier liability for the damage, loss, or shortage of cargo, provided that the port of loading or the port of destination is in Yugoslavia and the issue of liability towards the passenger, in case the passenger would be put into less favorable position by application of some other law (Art. 1039). A similar provision is contained in the Federal Law on Obligations and Basic Property Relationships in Air Navigation (Art. 185). Mandatory norms of this nature which explicitly require their own application although the legal relationship is also connected to another country, may be found in some other laws, particularly in the Law on Foreign Investment (1994 amended in 1996) and the Law on Foreign Trade (1992).
The substantive law approach is also present in two fields that are considered as part of PIL in the Yugoslav doctrine: (a) the property rights of aliens and their rights to conduct commercial activity in Yugoslavia; and (b) the rights of domestic persons to enter into legal relationships with foreign elements and to conduct commercial activity abroad. Some of the cited laws contain rules regulating directly the requirements for and conduct of parties and Yugoslav authorities in case of international trade and investment connected to this country.

V. The Antagonism Between, or Co-existence of, Choice-of-Law Rules and Choice-of-Law "Approaches"

If we accept the premise that law consists of rules, then every system of PIL that has pretensions to being called a law must contain rules of some kind. Otherwise, what would be the substance of that law? The so-called "approach" contains in itself a relaxed rule that gives freedom to the judge to determine the applicable law in each particular case by taking into account the specified criteria. The problem with such a rule is that it does not reveal enough information. It becomes impossible for another country to know when and to what kind of situations its law will be applied, because this depends on the evaluation of all relevant factors by a particular judge in a particular case. Therefore, the potential for international cooperation in this field is diminished and the proclaimed readiness to apply foreign law is lost in uncertainty.

In cases covered by previously set firm rules (either by the legislator or judge), this kind of uncertainty is limited to an acceptable measure. It is reduced to cases where the judge applying the conflicts rule considers that his country has a particularly strong interest to defend. In such cases, the judge must justify his departure from the rule by invoking the doctrine of public policy. But, such departure should be an exception and in the majority of cases the conflict rule provided by the statute or precedent should be applied.

The Yugoslav Federal PIL Act contains a comprehensive set of rules on choice of law intended for various legal relationships, or certain issues within legal relationships. These rules are sometimes simple and sometimes complex, but usually give a straightforward answer to the question of what law should be applied. If the issue arising in a case with a foreign element is not covered by the provisions of the Federal PIL Act, or any other Federal statute or

cont.

with international element), Novi Sad, 1989. See also, Varady, Private international Law, op. cit. note 2, pp. 127-134, Sajko, "Uloga javnog prava u medjunarodnom privatnom pravu" (The role of public law in PIL), Pfivreda i pravo, no. 9—10/1986, p. 405; Dika Knežević. Stojanović, Komentar Zakona o medjunarodnom privatnom i procesnom pravu (Commentary of the Statute on PIL and International Civil Procedure), Belgrade 1991, p. 76.
international convention (this will be a rare occasion, but may arise), the Act gives a general instruction to the court on how to find the applicable law. In such a case, the court should apply by analogy the provisions and principles of the Federal PIL Act, the principles of the legal system of the Federal Republic Yugoslavia, and the general principles of private international law (Article 2 of the Federal PIL Act). In other words, the court is given a mandate to create a conflicts rule that it deems appropriate to that particular case, drawing from the stated principles. No such general principles are enumerated in the Act however. One may perhaps call this an approach.

Although the rules of the Federal PIL Act are mandatory, it should be noted that they are sometimes disregarded by judges who simply apply the *lex fori* to situations with a foreign element, without explaining the reasons for doing so. In the words of an author writing in 1991, "the provisions of the 'new' PIL Act [1983] are 'terra incognita' for the majority of judges of district courts whose judgments we have consulted, and the very substance of PIL is an unpleasant and uncomfortable field which is best avoided by application of the *lex fori*". But, as the same author remarks, in most of the cases in which the statutory conflicts rules were disregarded, the outcome would have been no different had the judge applied these rules - they would have led to the application of the domestic law. This may explain why the parties themselves did not raise the issue of applicable law in these cases.

VI. The Antagonism Between, or Co-existence of, "Jurisdiction-Selecting Rules" and "Content-Oriented" Rules or Approaches

As we have seen, the Yugoslav legislator was predominandy inspired by conflicts justice and formulated conflicts rules that do not take into account the content of conflicting laws. There are some notable exceptions to this statement, however. The most important one is in the area of torts. Article 28 of the Yugoslav Federal PIL Act provides that non-contractual (tort) liability shall be governed by the law of the place where the tortious act was committed or by the law of the place where the injury occurred, depending on which of these two laws is more favorable to the tort victim. Thus, in cases where the conduct and injury are in different states, the judge is directed to give preference to the interests of the presumably weaker party, the victim of the tort. The choice of a law more favorable to the victim encompasses also a choice between

20 The author limited this remark to the practice of courts in Serbia excluding the province of Vojvodina. The analyzed judgments were predominandy from the field of family law. Živković, Poveravanje dece na čuvanje vaspitanje u medjunarodnom privatnom pravu (Child custody in PIL), Nis 1991.
different statutes of limitation, because that issue is governed by the same law as that which is applicable to the merits (PIL Act, Art. 8).

In practice, some questions have arisen regarding the application of this provision. Since the provisions of the Yugoslav Federal PIL Act are *ius cogens*, i.e. the judge is bound to apply them to any case in which there is a foreign element, the question has been posed whether the court should apply the law more favorable to the tort victim on its own initiative or only at the motion of the victim. The view presently held by the courts is that the victim is entitled to choose the law that he or she considers more favorable, but that the court should not make the choice on its own initiative. The victim is allowed to change his or her choice during the proceedings and to invoke the more favorable law until the closing of the main hearing. The victim cannot request the court to combine the provisions of the two applicable laws in order to reach the most favorable solution.\(^21\)

Another example of a content-oriented rule is found in Article 35 of the Yugoslav Federal PIL Act, which provides as follows:

Divorce shall be governed by the law of the country of citizenship of both spouses at the time of filing of the divorce suit.

If the spouses are citizens of different countries at the time of filing of the divorce suit, both laws of citizenship shall apply cumulatively.

If the marriage could not be divorced pursuant to the law determined in accordance with paragraph 2 of this article, the law of the Federal Republic of Yugoslavia will govern the divorce, if one of the spouses was domiciled in the Federal Republic of Yugoslavia at the time of filing of the suit.

If one of the spouses is a citizen of the Federal Republic of Yugoslavia who is not domiciled in Yugoslavia, and marriage cannot be divorced pursuant to the law determined in accordance with paragraph 2 of this article, the divorce shall be governed by the law of the Socialist Federal Republic of Yugoslavia.

This rule gives a clear instruction to the judge to look into the content of the conflicting rules and to choose Yugoslav law if the law of the chosen country provides an unjust solution in the understanding of our legislator, i.e. it forbids divorce. Personal freedom of the spouses to dissolve their marriage is here viewed as a just cause for deviating from the primary conflicts rule. Still, certain contacts have to exist with the case in order for the Yugoslav law on divorce to apply, that is, at least one of the spouses must be a Yugoslav citizen or domiciliary. It should be further noted that the Yugoslav judge is not allowed to depart from the foreign law of divorce, if both spouses are citizens of the same foreign country whose law prevents the divorce. Furthermore, if the foreign law allows divorce, but under stricter conditions than Yugoslav law, the judge is not authorized to apply the domestic, supposedly more flexible, law on divorce, even if one of the parties is either a domiciliary or citizen of Yugoslavia.

VII. State Policies or Interests, "False Conflicts" and All That

The concept of "false conflicts" has not explicitly entered the "Yugoslav doctrine of PIL." However, the way that renvoi is explained resembles this concept somewhat. The existence of a foreign conflicts rule that refers back to the lex fori is seen as an expression of lack of desire on the part of the foreign country to apply its law. As for the courts, none of them has so far indulged in discussion of the possible desires or interests of foreign countries to apply their laws.

VIII. Developments Regarding the Doctrine of Renvoi

Before the enactment of the present Federal PIL Act, only two acts provided for the application of the doctrine of renvoi - The Law on Bills of Exchange (1946), and the Law of Succession (1965). There was no explicit rule for applying renvoi in other fields. The opinions of legal doctrine on this point were perhaps inconsistent, but understandable. They were mostly in favor of renvoi if the foreign conflicts rule refers back to domestic law, and against it if the rule points further to another foreign law. There was an interesting but isolated view, to the effect that the court is free in its decision whether or not to apply the doctrine of renvoi. When making this decision, the court should look at the substantive rules of the potentially applicable laws and determine which law is "more progressive". The criterion for evaluating "progressiveness" was to be found in the basic principles of the UN Charter.

In spite of the fact that major PIL scholars supported the selective application of renvoi, the solution adopted by the 1982 Act was surprisingly in favor of full renvoi. The Federal PIL Act provides in Article 6(1) that, in every case when its provisions point to the foreign law, the conflicts rules of that law should be taken into account. The second paragraph of this article provides that if the foreign conflict rules refer back to the law of Yugoslavia, this law shall be applied without taking into account its conflict rules.

Some differences exist in the doctrine with regard to the scope and manner

---

22 But a hint of this concept may be found in an article published in 1930 by Milan Bartos, op. tit. note 7.
23 See the critique of this approach in the commentary of the Federal PIL Act written by Dika, Knežević, Stojanović op.tit. note 19, p. 25.
24 Blagojević, op.cit. note 1, pp. 174-175, Eisner, Medjunarodno privatno pravo I (PIL I), Zagreb 1953, pp. 71—73. In favor of full application of the doctrine of renvoi even in cases when there was no explicit statutory rule, see Cigoj, Medjunarodno zasebno pravo (PIL), Ljubljana 1966, p. 58.
25 Jezdić, Medjunarodno privatno pravo I (PIL I). Belgrade 1976, p. 211. Conversely, this may be taken as another example of the content-oriented approach in the selection of applicable law in the Yugoslav doctrine.
of application of Article 6 of the Federal PIL Act. There are authors who think that this provision must be applied without limitation to every legal relationship regulated by the Act, even if the applicable law was chosen by the parties.\textsuperscript{26} (by its own terms (Art. 1), the Act regulates the applicable law for status, family, property, and other substantive legal relations with an international element). Other authors opine that renvoi should be excluded in contracts when the applicable law is the one chosen by the parties or is selected on the basis of the "closest connection".\textsuperscript{27} There are also differences of opinion regarding the mandatory nature of Article 6. While the majority of authors take the view that the article is mandatory, one author interprets it as an enabling clause giving judges the freedom to assess in each case whether or not to apply the doctrine of renvoi\textsuperscript{28} Another author expresses the view that the rule is non-mandatory in the field of contracts and is to be applied only at the request of the parties.\textsuperscript{29} Finally, different solutions to the problem when the renvoi operation leads to a "vicious circle" have been offered. Some authors think that the technique of "renvoi in one step" should be followed. This means that the conflicts rule of the country chosen by the conflicts rule of the forum should decide which substantive law should be applied. If that rule refers back to the law of the forum, the substantive law of the forum should be applied; if it points to a third law, the substantive law of that third country should be applied.\textsuperscript{30} The other view is that the court should follow the chain of conflicts rules until: a) it finds a law that points back to the domestic law, or b) it finds a law that demands its own application. Thus, the court should apply the substantive law of the forum, pursuant to paragraph 2 of Article 6, whether this came as a result of the reference from the conflicts rule of the first or some subsequent law in the renvoi chain.\textsuperscript{31} In the second alternative, the court should apply the substantive law of the country whose conflicts rule provides the same choice as the preceding conflicts rule in the chain. If no solution can be found in this way (in case of successive references to and from), the court should apply the substantive law of the country to which the first reference was made.

Although the view that Article 6 on renvoi is mandatory prevails in the

\textsuperscript{26} Knežević, "Praktični problemi uzvraćanja i upućivanja u našem pravu" (Practical problems of renvoi in domestic law), \textit{Pravni život} 6-7/1984, pp. 741-748.


\textsuperscript{29} Pak, \textit{Medjunarodno privatno pravo}, (PIL), op.cit. 27, p. 644.

\textsuperscript{30} See, Pak, ibid.; Matić, "Renvoi u novom jugoslovenskom medjunarodnom privatnom pravu" (Renvoi in the new Yugoslav PIL), \textit{Uporedno pomorskopravo i pomorska kupoprodaja}, 100/1983, p. 166; Varady accepts this approach only in the case when the application of successive conflicts norms would lead to a vicious circle and none of these norms refers back to domestic law. See, Varady, \textit{Medjunarodno privatno pravo} (PIL), op. cit. note 2, p. 77.

\textsuperscript{31} Dika \textit{et al}, op. cit. note 19, p. 28; Knežević, op.cit, note 26, p. 747; Varady, op. cit note 2, p. 78.
doctrine, the courts have not been so quick to accept it. In a commentary on
the Federal PIL Act published in 1991,\(^{32}\) not a single case was cited in which
renvoi had been applied.\(^{33}\) The only domestic case known to this reporter, in
which renvoi was applied, has been a recent case of intestate succession before
the Municipal Court of Novi Sad.\(^{34}\) It seems that this favorite topic of discus-
sion of Yugoslav PIL scholars has not managed to attract the attention or
imagination of our judges.

**IX. Developments Regarding the Doctrine of *Ordre Public***

Article 4 of the Federal PIL Act avoids the term public policy, although it calls
for the application of this doctrine. It states that the law of a foreign country
shall not be applied if its effects would be contrary to the fundamentals of the
social system embodied in the Constitution of the Federal Republic of
Yugoslavia. Most writers agree that, this being an exception clause, judges
should adopt a restrictive approach when evaluating whether the effects of a
particular foreign law are contrary to public policy.\(^ {35}\) At the same time, the
majority of authors agree that the above formula does not only include

\(^{32}\) Dika *et al.*, *op.cit*. note 19.

\(^{33}\) The casebook on PIL by professor Pak of the Belgrade School of Law issued in 1982 cites only
foreign court cases in illustration of the doctrine of renvoi. Pak, *Priručnik za primenu
Medunarodnog privatnog prava, drugo izmenjeno izdanje*, (Casebook for application of PIL,
second revised edition), Belgrade 1982. Likewise, the 1971 Collection of case law by the same
professor contains no case in point. See, Pak, *Zbirka propisa i sudskih odluka Medunarodnog
privatnog prava sa predgovorom i registrom* (Collection of laws, regulations and court decisions
of PIL with an introduction and index), Belgrade 1971.

\(^{34}\) Decision no. 0.481/97. The decedent, a naturalized citizen of the United States died intestate
in Yugoslavia where she had been domiciled since 1961. The real estate she left behind was
located in Novi Sad as was most of her personal property, except for savings in two bank
accounts in New York. All the heirs were Yugoslav citizens domiciled in Yugoslavia, except for
one who was a resident of Germany. Following the rule of lex nationalis which governs intestate
successions, the court applied the conflicts rules of the state of New York (the state in which
the decedent acquired US citizenship through naturalization—and where she was domiciled
until 1961). Those rules referred back to the Yugoslav law of succession (the New York conflicts
rule calls for the application of the law of the situs for immovables and the law of the decedent's
doctrine for movables). One could call this situation a false conflict because New York had no
interest in the application of its law in this case, having no significant contacts with the
decedent, with his heirs or with the property at the time of the decedent's death. It should
also be noted that the substantive laws of succession of New York and Yugoslavia provided
identical solutions — the distribution of the estate to the siblings of the decedent and to their
offspring by right of representation, since the decedent had no children, living spouse or
parents.

\(^{35}\) Varady, *op. tit*. note 2, p. 89; Ročkomanović, *Javni poredak u medunarodnom privatnom pravu*
(Ordre public in PIL), Niš 1988, p. 103.
constitutional norms and principles, but also may include other provisions of a mandatory nature contained in statutory acts that involve the fundamental values of Yugoslav society.36

There is no explicit instruction for the judge for cases where the foreign law cannot be applied because it is contrary to the fundamentals of the Yugoslav social system. This depends on the circumstances of the case. In some cases, the judge will simply refuse to apply a particular foreign legal provision that is offensive to public policy, and will apply the rest of the foreign rule of decision. An example given by one author is a foreign rule of succession that would prohibit illegitimate children from inheriting. Such a rule would be disregarded (i.e. illegitimate children would be treated like legitimate ones), but other rules of that country on the distribution of the estate (e.g. the rule apportioning the shares of particular heirs) should be followed.37 In the same example, the foreign rule will be applied if only its content, but not its effect in the particular case, is offensive to public policy (e.g. if the decedent had no illegitimate children).38 If none of these solutions work, however, the alternative will be to apply the lex fori instead of foreign law.39

Commentators of the Federal PIL Act have noted that the defensive (negative) employment of the doctrine of ordre public, i.e. its use to prevent the application of foreign law, is only the first step in the operation, which is usually followed by its offensive (positive) function - the application of domestic law. Whether that law is applied in order to fill the legal gap arising after the decision that the foreign law cannot be applied, or because it is characterized as a loi d'application immediate, is of no practical concern. Likewise, in every offensive employment of the domestic mandatory rules, there is also an inherent defensive function, because it excludes the contrary provisions of the foreign applicable law.40

The Yugoslav Federal PIL Act does not provide for the application of the mandatory rules of a third country whose law is not applicable under the domestic conflict rules but has a connection to the case and demands its own application. Nevertheless, some scholars consider that mandatory rules of a third country should be "taken into account" by the domestic courts, if the parties raise this issue.41

Part of the Yugoslav doctrine accepts the condition first introduced by Kahn,

---

36 Pak, op. cit note 27, p. 610; Dika et al., op.cit. note 19, p. 16, Rockomanović, ibid. pp. 101-123.
37 Pak, ibid. p. 599.
38 See, Varady, "Podloge za kompatibilnost i podudarnost u MPP" (Bases of compatibility and mutual correspondence in PIL), Jugoslovenska revija za medjunarodno pravo, br. 2—3/1986 pp. 189-203.
3 All these instructions are given by the doctrine, while the courts have been reluctant to resort to this instrument. There is only a handful of cases noted in the period from 1945 to 1997.
40 Dika et al. op. cit. note 19, p. 18.
41 Pak. op. cit. note 27, p. 615; Varady, op.cit. note 2, p. 134.
Yugoslavia

that there must be a certain "minimum connection" between the particular legal relationship and the forum state in order for the public policy exception to apply.\textsuperscript{42} Those who think that a minimum connection is necessary, give as examples for which such a connection may be found in the nationality, domicile, or habitual residence of the persons concerned,\textsuperscript{43} or in the fact that the application of foreign law would have permanent effects in the forum state.\textsuperscript{44} With reference to this, it should be noted that pursuant to Article 94 of the Yugoslav Federal PIL Act, foreign judgments involving the status of nationals of the rendering country are required to be recognized without any reference to public policy.

X. Developments Regarding Characterization or Qualification

Article 9 of the Federal PIL Act addresses the question of characterization and provides that the law of the foreign state should be applied according to its sense and respecting the meaning of the legal terms contained therein. This rule should be followed both in interpreting the foreign conflict rules, when renvoi is followed, and in interpreting foreign substantive rules designated as applicable. The statute is silent on the first step of characterization - determining and interpreting the primary conflicts rule that should be applied. In most cases, the \textit{lex fori} will determine the nature of the legal relation and the judge will apply the conflicts rule prescribed for that category of legal relations. But, if the relation is unknown in the domestic law, some other solution must be found. The judge may then look for the closest category of domestic law that performs a similar function or may classify the category according to \textit{lex causae}, i.e. the law that would be applicable if the category is so classified.\textsuperscript{45} Once the conflicts norm is chosen, there may still arise the problem of qualification of the connecting factor. In this case too, the \textit{lex fori} qualification will prevail, except in one important instance - when \textit{lex nationalis} is chosen as the connecting factor. Whether someone is a national of a particular country will be determined pursuant to the law of that country.\textsuperscript{46} The statute provides a solution for situations where a person has more than one nationality or lacks nationality. Thus, if the person is a dual national of

\textsuperscript{42} See Blagojević, op.cit. note 1, pp. 152-154; Varady, op.cit. note 2, p. 84. For a contrary opinion see Pak, op. at. note 27, p. 613.
\textsuperscript{43} Dika et al, op. at. note 19, p. 19.
\textsuperscript{44} Sajko, \textit{Medjunarodno privatno pravo}, Opći dio (PIL. General Part), Zagreb 1982, p. 107.
\textsuperscript{45} See, Dika et al op. at note 19, p. 40.
\textsuperscript{46} Mitrović, Odlučujuće činjenice, \textit{Enciklopedija imovinskog prava i prava udruženog rada}, II torn (Pointsof attachment, Encyclopedia of property and associated labor law, volume II), Belgrade 1978, p. 37.
Yugoslavia, and some foreign country, he will be considered solely as a Yugoslav national for the purposes of the statute. If the person is a national of two or more foreign countries, he will be treated as a national of the country in which he is domiciled. Finally in the absence of domicile, he shall be considered a national of the country with which there is the closest connection (PIL Act, Art. 11). In relation to stateless persons, the court shall apply the law of domicile instead of the lex nationals. If they have no domicile, the law of residence shall apply and, if that is also lacking, then the lex fori.

The most important cases of characterization in practice have been noted in respect to domicile. In the sixties, there was a large wave of migration from Yugoslavia to West European countries. The majority of the population that moved were workers in search of jobs and their moving was considered "temporary". It was hoped that these workers would return after a couple of years and continue their life in Yugoslavia. In the official Yugoslav political vocabulary, they were called workers "temporarily working abroad".

The issue of their domicile was important as a subsidiary connecting factor for determining the applicable law in many cases when the common citizenship of the parties was lacking, but also as the principal basis for international jurisdiction of domestic courts. If the domicile of the migrant workers was to be classified according to the laws of the countries in which they worked, those workers would in many cases be considered as domiciled there. Consequently, this could lead to the application of foreign law and the lack of jurisdiction of domestic courts. In contrast, if the domicile was classified by the standards of the lex fori, the courts could infer that the will for change of domicile was lacking, due to the "temporary" nature of the workers' stay, and conclude that the workers have kept their domicile within the country. This is exactly what was concluded in a judgment of the Supreme Court of Croatia. The Court was of the opinion that the Yugoslav citizens that leave the country in order to temporarily work abroad do not thereby lose their domicile in Yugoslavia. Contrary opinion was expressed in a ruling of the Supreme Court of Vojvodina. The Court concluded that the fact that both spouses and their children lived abroad for a considerable period of time was decisive in over-riding the presumption that the local domicile was kept. The court also suggested the possibility for a person to have two domiciles (contrary to the traditional view that a person can have only one domicile) in which case it would be possible to file a claim against such a person in both jurisdictions.

47 The classic understanding of domicile, according to which a person could have only one domicile consisting of an objective element (corpus - physical presence) and a subjective one (animus - will of the person to remain at a certain place as his home) prevails in the Yugoslav doctrine. Ibid. p. 39.
48 Judgment in case number R-325/81 dated December 9, 1981.
49 Gz. 4737/78, dated June 8, 1978.
Yugoslavia

Court of Vojvodina concluded that the parties lived and worked in the Federal Republic of Germany at the time the respective judgment was rendered and that accordingly they were domiciled there. In none of these cases did the court consult the foreign law for determining the domicile of the person in question.

XI. Developments Regarding the Depegage Phenomenon

The possibility of applying two or more laws to the same cause of action is provided under the Federal PIL Act, as well as under other Federal Acts that contain conflict of laws rules. For example, one law may be applicable to the substance of the contract, and another one to its form, pursuant to Articles 20 and 7 of the Federal PIL Act, respectively; in the absence of a different agreement of the parties, the manner of delivering a thing, and the measures to be taken in case of refusal to accept the thing, are governed by the law of the place where such thing is to be delivered, (PIL Act, Art. 23), etc. The possibility and desirability of depegage has been the object of some disagreement in the Yugoslav doctrine. Supposedly, the parties to a contract have a right to choose more than one law for various aspects of their contract.

XII. Other Developments that Deserve Note

The Federal PIL Act provides a rule for the situation when the conflicts norm leads to the law of the country with a plurilegal legal system (e.g. a federation in which constituent states have their own law in the specific fields). In such a case, the judge must apply the law system within that country to which the conflicts rule directly leads. If the conflicts rule does not directly lead to any specific law system within that country, the applicable law shall be determined according to the internal conflicts rules of that country. If this proves to be impossible (e.g. because there are no such internal rules at the federal level), the law system within that country that has the closest connection with the case should be applied (PIL Act, Art. 10).

50 See, in favor of depegage Varady, op.cit. note 2, p. 256; Eisner, op. cit. note 24, pp. 209-210; Blagojević, op.cit, note I, p. 14 and against it, Jezdić. Pak, Medunarodno privatno pravo III (PIL III), Belgrade 1982, pp. 146-147; Pak, op.cit note 27 p. 804. DI
51 See, Dika et at, op.cit. note 19, p. 75.
XIII. Conclusion

If one looks at the development of PIL in Yugoslavia this century, one can clearly see a constant and consistent doctrinal and legislative improvement. One can observe how the doctrine has moved through this century from more general topics and short outlines of our discipline to comprehensive works treating almost every existing issue of PIL, detailed monographs, and numerous law review articles on particular topics. The development of statutory norms is also noteworthy. Although some statutory rules were inherited from the 19th century codes that remained formally in force for a very long period, new rules were gradually framed during this century, first in the laws treating various fields of civil and family law and then, crowning this legislative effort, in the Federal PIL Act dedicated specifically to questions of conflicts of laws and conflicts of jurisdictions. Although this statute, like any other, has its imperfections, it certainly provides a firm foundation for further development of PIL in practice. Significant work has also been done on the plane of adherence to international bilateral and multilateral treaties. One area that still remains to be worked on, however, is certainly judicial awareness of the postulates and categories of our discipline and readiness to resort to the rules of PIL in every situation when the law so requires.