

Institute of International Law - Commission no. 4
Human rights and private international law

Working document of Rapporteur, Jürgen Basedow, no. 9 (January 2017)

Draft Resolution

The Institute of International Law,

Recalling the worldwide recognition of human rights in many global and regional instruments;

Aware of the evolving nature of human rights;

Considering that the effective reach of human rights, uniform in theory, depends on those mechanisms which seek to ensure that they are observed, which differ between the instruments mentioned above and among their Contracting States;

Considering that the Charter of the United Nations requires all States to promote universal respect for, and observance of, human rights;

Considering that this obligation cannot be limited to the domestic sphere and must also extend to cross-border relations;

Recalling that cross-border relations are regulated, if not by international conventions or uniform law, by treaty-based, regional or national rules of jurisdiction and of conflict of laws;

Convinced that rules of jurisdiction and of conflict of laws are to be monitored to ensure their compatibility with human rights;

Having regard to the horizontal nature of the relations with which private international law is concerned and the vertical nature of the relations the focus of human rights;

Adopts this Resolution:

I. General matters

Article 1: Definition

- (1) For the purposes of this Resolution, all rights and freedoms protected by a United Nations Convention, which relates to the Universal Declaration of Human Rights, as well as those protected by a regional convention are considered to be human rights.
- (2) A right protected by a provision of domestic law as a fundamental right, which takes priority in the legal system in question over and above other sources of law, may be considered as equivalent to a human right.

Article 2: Principles

- (1) States shall ensure that in cross-border relations between private persons human rights are respected by their governing bodies, including courts of general jurisdiction. These rights serve to control and correct, where necessary, the results produced by operation of rules of jurisdiction and of conflict of laws.
- (2) Restrictions on human rights can be justified if a Contracting State, relying on its margin of appreciation but without affecting the substance of the right in question, pursues a legitimate objective, all the while taking into account the principles of proportionality and the practical and effective protection of the right in issue.

Article 3: Human rights holders

For the purposes of this Resolution, natural persons and, where applicable, legal persons, whether profit-seeking or not-for-profit, as well as groups of individuals, are considered to be holders of human rights.

Article 4: Interpretation of instruments relating to human rights

In interpreting instruments adopted for the protection of human rights by international bodies and by Contracting States, account shall be taken of the universal nature of human rights and the need to promote the uniform application of the common core of these instruments.

Article 5: Interpretation of rules of jurisdiction and conflict of laws

- (1) The interpretation of conventions relating to human rights and private international law conventions must conform to articles 31 to 33 of the Vienna Convention on the Law of Treaties, and must aim for harmony with one another. Among contracting parties to a private international law convention, conventions relating to human rights constitute relevant rules of international law within the meaning of article 31(3)(c) of the Vienna Convention and vice versa.

- (2) The interpretation of a rule of jurisdiction or conflict of laws, whether national or adopted by a Regional Economic Integration Organisation, must aim to be in keeping with applicable human rights.

Article 6: Priority

If the interpretation of a rule of jurisdiction or conflict of laws in accordance with article 5 leads to an insurmountable conflict between that rule and a treaty-based provision relating to human rights, it falls to the forum's national law to determine which should prevail.

II. Human rights and immunity from suit

Article 7: Immunity from suit

The right of access to a court necessitates a strict interpretation of immunity from suit in civil matters.

III. Human rights and grounds of jurisdiction in international cases

Article 8: Heads of jurisdiction

- (1) Human rights, particularly the right of access to a court and the right to a fair hearing, do not require jurisdiction to be based on particular heads in international cases.
- (2) In establishing heads of jurisdiction in international cases, States must, absent a legitimate justification, respect the prohibition of any form of discrimination based on sex, religion or national origin.

Article 9: *Forum necessitatis*

If the application of the rules of jurisdiction or their exercise, among concerned States, leads to a denial of justice in a given case, the right of access to a court requires that a court in one of those jurisdictions must, as an exception, declare itself competent, if there is a sufficient connection with the State of the court seised.

Article 10 : Jurisdiction clauses

- (1) Any contractual clause that attributes exclusive jurisdiction to a court or an arbitral tribunal is incompatible with the right of access to a court if that attribution leads to a denial of justice.

- (2) Any contractual clause that allows only one of the parties, particularly by way of a unilateral option, to prevent the other party's access to the court is incompatible with the right to a fair hearing.

IV. Human rights and international judicial cooperation

Article 11: Fair hearing

- (1) In applying national rules of civil procedure to cases with foreign elements, account must be taken of the particular needs of the two parties in light of these elements and must be adapted in a manner consistent with the requirement of a fair hearing.
- (2) In matters of international judicial cooperation, the requesting State and the requested State must respect the right of private parties to a fair hearing, especially by completing the request within a reasonable time.

V. Human rights and conflict of laws

1. General principles

Article 12: Connecting factors

Connecting factors used to determine the applicable law must respect the principle of non-discrimination and, in particular, avoid any form of direct or indirect discrimination based on the sex of one of the parties.

Article 13: Party autonomy

In determining the applicable law, States should ensure that party autonomy is respected as long as it does not prejudice the interests of third parties or weak parties, or imperative norms.

Article 14: Imperative norms

- (1) In assessing the compatibility of the law designated by the applicable conflict of laws rules with rules of the *ordre public* and overriding mandatory laws (imperative norms), the court shall take into account human rights which form part of the forum's *ordre public international*.
- (2) In invoking the forum's imperative norms to reject the application of a foreign law, the court shall ensure that the forum's imperative norms are compatible with human rights; in particular, with the principle of non-discrimination.

2. Special rules

Article 15: Capacity

- (1) Every human has the capacity to acquire and hold rights and owe obligations; the modalities are determined by the applicable law.
- (2) Every entity, which has the capacity to acquire rights and owe obligations under the law of a State, must be entitled to appear before the competent courts of other States to enforce its rights and defend itself.

Article 16: An individual's name

- (1) An individual's name forms part of his or her personal identity which is protected by the right to respect for private life.
- (2) A change of name which has occurred by virtue of the applicable law, against the will of the name holder, violates the right to respect for private life if the change is not justified by objective reasons, such as the goal of uniformity in name within the family unit, implemented in a non-discriminatory manner.
- (3) The name of an individual registered with a State and fixed under the law applicable there must be recognised in another State without regard to its conflict of laws rules unless the name is manifestly incompatible with the public policy of that State.

Article 17: Marriage

- (1) A marriage agreed upon in the absence of the free and full consent of the two spouses is of no legal effect, unless the spouse who had been forced to marry later ratifies the marriage, acting freely and with full knowledge of its consequences.
- (2) In enforcing the forum's imperative norms which oppose the recognition of a marriage celebrated in a foreign country, the court shall take into account the right to marry and the right to respect for family life affected by non-recognition together with all of the circumstances of the case.

Article 18: Parentage

A parent-child relationship registered in a State in accordance with due process under the applicable law there must be recognised in another State without regard to its conflict of laws rules [*alternatively*: unless recognition would constitute a manifest violation of the forum's *ordre public international*].

Article 19: Adoption

An adoption completed in a State in accordance with due process under the applicable law there must be recognised in another State without regard to its

conflict of laws rules, provided that the adoption reflects social reality and is not the result of child-trafficking.

Article 20: International child abduction

Pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, a State's obligation to secure the return of a child to his or her State of origin after he or she has been wrongfully removed must be interpreted in a manner in keeping with the parties' right to the respect for their family life, taking into account the primordial importance of the well-being of the child, which necessitates a thorough examination of his or her situation.

VI. Human rights and the recognition and enforcement of foreign judgments

Article 21: The right to recognition and enforcement

The right to a fair hearing applies to the recognition and enforcement of a foreign judgment when a court rules definitively on civil rights. This right must be respected, in particular, during the *exequatur* procedure.

Article 22: Conditions for recognition and enforcement

(1) A regime which:

- (a) refuses to recognise and enforce foreign judgments in the absence of obligations created by international instruments;
- (b) requires proof of reciprocity as a condition for the recognition and enforcement of the foreign judgment; or
- (c) allows for the substance of the foreign judgment to be fully reviewed at the point of recognition or enforcement;

is incompatible with the parties' rights to a fair hearing in civil and commercial matters.

(2) A foreign judgment cannot be recognised or enforced against a party's will if the proceedings in the foreign court violated that party's right to a fair hearing.