

Session of Wiesbaden - 1975

The Application of Foreign Public Law

(Twentieth Commission, Rapporteur : Mr Pierre Lalive)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Considering that ideas vary from one legal system to another as to the validity, criteria and effects, and even the existence, of the distinction between public and private law ;

Noting that in the field of comparative law this distinction is of a relative and evolving nature, that there is an increasing interpenetration of the two branches of domestic law, and that changes have occurred in fact and in concepts as to the role of the State, especially as regards the regulation and protection of the interests of individuals and the management of the economy ;

Taking account of the needs of an international society characterized at one and the same time by the diversity of conflict of laws, policies and State interests and by the aspiration for international co-operation and for coexistence or harmonization of national legal systems ;

Wishing to promote a just solution of questions of the conflict of laws whilst respecting the acknowledged principles of public international law, the legitimate interests of States and the rights or interests of individuals, a solution which also takes account of the desirable progress in the field of international co-operation ;

Having regard to the favourable effect which may result in this field from the awareness, on the one hand, of the need for peaceful co-operation and mutual assistance between States and, on the other, of the special solidarity that exists within groups of States united by close links of friendship, alliance or integration ;

Being of the opinion that it is opportune to state some principles likely to provide for or facilitate the solution of certain issues of the conflict of laws involving foreign public law,

Adopts the following Resolutions :

A.

I. 1. The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy.

2. The same shall apply whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into consideration.

II. The so-called principle of the inapplicability *a priori* of foreign public law, like that of its absolute territoriality, a principle invoked, if not actually applied, in judicial decisions and legal writings of certain countries :

- a) is based on no cogent theoretical or practical reason, and
- b) often duplicates with the principles of public policy,
- c) may entail results that are undesirable and inconsistent with contemporary needs for international co-operation.

III. The same applies for similar reasons to the inapplicability *a priori* of certain categories of provisions of foreign public law, such as provisions which do not concern the protection of private interests but primarily serve the interests of the State.

IV. The scope of the preceding rule and statements shall in no way be affected by the fact that foreign law which is regarded as public law is still applied less frequently for various reasons, and mainly :

- a) because the question does not arise owing to the nature of the social relationships referred to in the rule of conflict of laws or to the very subject of the foreign provision, or
- b) because the foreign provision is restricted in its scope to the territory of the legislator from whom it originates and because such restriction is in principle respected, or
- c) because authorities of the State of the forum often hold either that they have no jurisdiction to apply certain foreign laws which are regarded as public law, notably in giving administrative or constitutive judgments, or that they need not assist in the application of such provisions in the absence of treaties, of reciprocity or of a convergence of the economic or political interests of the States with which the situation is connected.

B.

Decides to reserve the question of claims made by a foreign authority or a foreign public body and based on provisions of its public law, and to continue discussion of the topic at a later session.

(11 August 1975)