

NEUVIEME COMMISSION
Différences culturelles et ordre public en droit international privé de la famille

NINTH COMMISSION
Cultural differences and ordre public in family private international law

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RESOLUTION

The Institute of International Law,

Noting that at the present time, population movements make the contradiction of laws emanating from different legal cultures very frequent, particularly in the field of family law ;

Noting that the opposition between various legal cultures is a consequence especially of the conflict between secular and religious doctrines ;

Considering that the systematic reciprocal exclusion of laws from different cultures by the invocation of public policy fails to take into account the need to coordinate legal systems ;

Considering that respect for cultural identities has become a goal of international law, a goal which must find an expression in private international law ;

Recalling nevertheless the primacy of the principles of equality and non-discrimination, particularly in relation to gender and religion, recognised by customary international law, and proclaimed by numerous international instruments, universal or regional, notably the International Covenants of the United Nations of 19 December 1966, the Convention of 7 March 1966 on the Elimination of all Forms of Racial Discrimination, the Convention of 1 March 1980 on the Elimination of all Forms of Discrimination against Women, the Convention of 20 November 1989 on the Rights of the Child, as well as the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, the American Convention on Human Rights (San Jose Pact) of 22 November 1969, the African Charter of Human and Peoples' Rights of 27 June 1981, and the Arab Charter on Human Rights of May 23, 2004;

Considering that the right of everyone to freedom of religion, thought and opinion includes the right not to have a religion and to change religion ;

Recalling its 1987 Cairo Resolution on the Duality of the Nationality Principle and the Domicile Principle in Private International Law;

Adopts the following provisions:

A. General principles

1. States shall avoid using religion as a connecting factor for the purpose of determining the law applicable to the personal status of foreigners. They should make it possible for the latter to choose between their national law and the law of their domicile in cases where the State of nationality and the State of domicile differ.
2. Public policy should not be invoked against the applicable foreign law on the sole ground that this law is religious or secular.
3. Public policy should be invoked against the normally applicable law only to the extent that, in the circumstances of the case, the application of that law would infringe the principles of equality, non-discrimination and freedom of religion.

B. Marriage

1. States shall guarantee respect for freedom of marriage. This means that, for the purposes of private international law, States shall invoke public policy against foreign laws that restrict that freedom on racial or religious grounds, and recognise the validity of a marriage celebrated in violation of the religious prescriptions of the normally applicable law.
2. States should not refuse to recognise marriages celebrated abroad, even when they involve their nationals, on the ground that their mode of celebration, religious or secular, is unknown in their law. They will not be bound to recognise marriages celebrated abroad in a way that is not recognised by the law of the State where the marriage was celebrated.
3. States should not invoke public policy against the recognition of polygamous unions celebrated in a State allowing polygamy. They will not be bound to recognise such unions if both spouses had their habitual residence at the time of celebration in a state that did not admit polygamy or if the first spouse has the nationality of, or her habitual residence in, such a State.

C. Divorce

1. Subject to point 2, public policy should not be invoked to deny recognition to a divorce pronounced or registered in a foreign State by an authority competent under the law of that State on the ground that the procedure followed is unknown in the recognising State.
2. Public policy may be invoked against the recognition of the unilateral repudiation of the woman by her husband if the woman has or has had the nationality of the recognising State or of a State not allowing such repudiation, or if she has her habitual residence in one of these States, unless she has consented to the repudiation or if she has benefited from adequate financial provision.

D. Filiation

States may invoke public policy against foreign laws forbidding the establishment of filiation outside marriage, at least when the child is linked through nationality or habitual residence to the forum State or a State allowing the establishment of that filiation.

E. Succession

States may invoke public policy against foreign succession laws containing discrimination based on gender or religion when assets part of the deceased's estate were located in the forum State at the time of death.

Adopted on August 25, 2005.
