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Conflict of Laws and the Return of Indigenous Peoples' Cultural Property: A Latin American Perspective

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Abstract: In Latin America, conflict-of-law norms have not appropriately considered the cultural diversity that exists in their legal systems. However, developments towards the recognition of Indigenous peoples' human rights, at the international and national levels, impose the task of considering such diversity. In that regard, within the conflict-of-law realm, interpersonal law offers a useful perspective. This article proposes a conflict-of-law rule that can contribute to clarity and legal certainty, offering a sound way of dealing at the national level with Indigenous peoples' claims for restitution of property with a cultural value for them, which is framed in international instruments on human rights.

INTRODUCTION

Cross-border situations can be governed by two or more legal systems, whose application may lead to different results. This causes the so-called conflicts of laws, which are to be solved through conflict-of-law norms. Such norms aim to solve conflicts of this type by stating which legal system is applicable to a certain cross-border situation with reference to a national or a foreign legal system. Rooted in a civil law tradition, Latin American countries have codified conflict-of-law norms in different ways. Frequently, these codifications dictate that the legal system of the same state must be applied. In that case, conflict-of-law norms are expressions of

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territoriality; states keep for themselves the solution of situations that can actually be connected to legal orders that are beyond the scope of legal and political action.

The territoriality principle has underlain conflict-of-law norms in Latin America since the first codifications were created in the nineteenth century. From that time on, one can identify two dimensions of that principle, both of which have political connotations. The first dimension, which was meant to be a means of protection from the former colonial power and other states,[1] implied the non-application of foreign laws (external dimension). The second one, which has been less studied from the conflict-of-law perspective, translates into the non-recognition of normative systems of Indigenous groups living in their territories since pre-Columbian times (internal dimension). Manifestations of both external and internal dimensions of territoriality can still be found in Latin American legal systems. This article primarily aims to look at the internal dimension of the territoriality principle, considering Latin America's cultural diversity and some Indigenous peoples' human rights.

Consider the example of an Indigenous community in a Latin American country that has lost some cultural objects, such as textiles with a religious or cultural value for the community. The textiles were taken by local individuals who sold them to antiquities dealers. Then, the textiles were acquired by a museum or a private collector in another country. Years later, they were returned to the government of the Latin American country. The question here raises the issue of the absence of specific legal norms in Latin American countries that compel the state to consider the Indigenous communities while deciding the ultimate destination of such kinds of cultural objects.

One way of addressing how the internal dimension of territoriality negatively impacts the restitution of Indigenous peoples' cultural property will be proposed, having looked at the so-called interpersonal law doctrine. In the field of conflict of laws, the interpersonal law doctrine implies that in one country there are different legal systems for different religious or cultural groups. Thus, contrary to interstate law or interregional law, the selection of the applicable law in interpersonal law is made on the basis of religious or ethnic grounds, instead of geographical ones. As will be seen, the question about whether interpersonal law in this sense is already embodied in Latin American legal systems could be answered in two different ways: First, interpersonal law does not exist in Latin American countries, such that their conflict-of-law norms do not embody specific rules that refer to interpersonal law situations considering Indigenous peoples' law, and, second, interpersonal law does exist in Latin American legal systems because (1) Latin American states are part of several binding international instruments on human rights, such as the International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries,[2] which contain Indigenous peoples' rights to participation and to control their own

[1]Samtleben 2010a, 2010b.

[2]International Labour Organization Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 1650 UNTS 283.

economic, social, and cultural development; (2) based on ethnic/cultural diversity/pluralism, Latin American states recognize the basic rights of Indigenous peoples in their constitutions and legal regulations; (3) there exist the so-called Indigenous jurisdictions; and (4) the application of Indigenous law has been recognized by some national courts not only in criminal affairs but also in family and property matters.[3]

While the first answer is based on a strict conflict-of-law approach, the second answer is built upon a material, result-oriented perspective, which is focused on (justice based on) human rights. Both answers are right. Let us begin by saying that the second answer is correct because one can actually find in Latin American legal systems specific human rights material norms that permit Indigenous law to be applied to situations that are traditionally governed by states' law. But calling attention to the absence of codified conflict-of-law norms aimed at interpersonal law situations involving Indigenous peoples, as the first answer does, calls upon us to consider that codified conflict-of-law norms contribute to legal certainty, while, at the same time, they serve to accomplish the goals underlying the second answer, which is focused on (justice based on) human rights.[4] In this light, this article proposes a conflict-of-law rule, which includes features of the interpersonal law doctrine and can serve to appropriately satisfy some Indigenous peoples' rights regarding cultural property that are recognized in international public law instruments. Such a rule could be included in a legal instrument on cultural property matters.

TERRITORIALITY AND (CULTURAL) PROPERTY: THE *LEX SITUS* RULE IN LATIN AMERICA

Most conflict-of-law systems around the world follow a rule, according to which the creation, content, exercise, and transfer of property rights are governed by the legal system of the state where the property is located at the time of the transaction.[5] This rule is known as the *lex situs* rule. In Latin America, the Chilean Civil Code,[6] written by Andrés Bello and adopted in 1855, includes the application of the law of the location in Article 16, which applies to all kinds of property—movable or not—and is written in a unilateral way so that the Chilean law is applicable to every property located in Chile's territory.[7]

[3]Figuera Vargas 2011.

[4]Choice-of-law rules can be designed to produce a particular substantive result, as Symeonides (2001) has pointed out.

[5]Fincham 2008, 115.

[6]Chile's National Congress passed the Civil Code on 14 December 1855.

[7]In the nineteenth century, the reception of the territoriality principle in the Latin American region was favored by two circumstances. On the one hand, there was the need to reaffirm, in front of Spain and the rest of the states, the sovereignty of the republics that had just achieved their independence, of which Bello had been a supporter (Samtleben 1982, 168). On the other hand, the principle of territoriality had historical roots in Latin America, whose origins go back to the Spanish law of the colonial period (Samtleben 2010a, 345). That principle was used in Spain first in the seventh century to deal with the legal atomization produced by the use of Roman law and laws of Germanic groups and later in the Middle Ages to face a similar situation deriving from the existence of numerous local codes of laws (*fueros*) (Samtleben 2010b, 371–72).

The main reason why it was formulated in that way was to impede the application of foreign laws.[8] However, it also has consequences internally, to the extent that it does not recognize differences based on traditional property and ownership conceptions of Indigenous peoples, which are expressions of the cultural diversity of Latin American countries.

The 1855 Chilean Civil Code was taken as a model by most Latin American states, and it still influences conflict-of-law norms in the region today. The same is true in relation to the territoriality principle it contains, of which the *lex situs* rule is an expression.[9] Thus, in addition to Chile, most Latin American conflict-of-law codifications still contain a unilateral formula of that rule. The *lex situs* rule can undermine the success of Indigenous peoples' claims for international restitution of cultural objects in several ways, for instance, because of the protection of good faith acquisitions or on account of statutes of limitations in the states where such objects are currently located. In this sense, problems related to the *lex situs* rule emerge not only in relation to Indigenous peoples' claims for restitution of cultural property but also in relation to claims made by the government of the states of origin themselves or even by private individuals—in spite of the fact that usually the country of origin's laws declare state ownership of some cultural objects (for example, archaeological objects) and private individuals can hold ownership rights protected by private law. But the *lex situs* rule is also problematic when it exists in states for which the cultural objects are destined, to the extent that the rigidly territoriality-based way in which the *lex situs* rule is formulated in Latin American international private law systems leaves no room to consider Indigenous people's rights in the conflict-of-law framework, including their rights to cultural property.

CONFLICT OF LAWS AND CULTURAL DIVERSITY: THE INTERPERSONAL LAW DOCTRINE

The interpersonal law doctrine presupposes the existence of states with pluri-legislative systems. Pluri-legislative systems are classified into two groups. In both types of pluri-legislative systems, there can be situations that, in principle, are governed by several laws—that is, there can be internal conflicts of law. The first group includes those systems based on geographical (territorial) grounds. Systems in this group could adopt a variety of forms—for example, they can be multi-local, multi-state, or multi-regional, depending on each state's internal territorial and political division and organization. The second group is formed by those pluri-legislative systems based on personal grounds. Here, different laws are applicable to different

[8]Bello (1873, 64n. 3) said that "the foreign law is not law among us." In the same vein, the Chilean Constitution of 1812 stated the following: "No decree, providence or order emanating from any authority or tribunals outside the territory of Chile shall have any effect; and those who try to give it value will be punished." Samtleben 1982, 168.

[9]Samtleben 1982, 167.

religious or ethnic groups, irrespective of geographical (territorial) divisions. Thus, interpersonal law rules deal with the way in which one should select the law that must be applied to a situation, to which several laws—including different ethnic or religious laws—could be applicable, in principle. Generally speaking, there are two main perspectives from which interpersonal law rules can be conceived and, then, embodied in legal systems.

First Perspective: Diversity in a Foreign Legal System

In many countries, interpersonal law rules are conceived as those rules that answer the question about how to apply the law of a foreign state that has a pluri-legislative system based on personal grounds when the application of such a law is ordered by a conflict-of-law norm.[10] In other words, these countries consider the remission to the law of a foreign pluri-legislative system. This is the case in international private law codifications in Latin America. Article 2056 of the Peruvian Civil Code,[11] for instance, states as follows: "When in the applicable foreign law various legal systems coexist, the conflict between local laws will be resolved in accordance with the principles in force in the corresponding foreign law." The same rule is included in the International Private Law Act of Venezuela[12] (Article 3). Article 2595, letter b, of the Argentinian Civil and Commercial Code[13] is similar, although it additionally refers to the law with the closest connections:

> If there are several legal systems in force with territorial or personal competence, or different legal systems are followed, the applicable law is determined by the rules in force within the state to which that right belongs and, in the absence of such rules, by the legal system in dispute that presents the closest connections with the legal relationship in question.[14]

[10]Usually, remissions to states with pluri-legislative systems based on both geographical (territorial) and personal grounds are dealt with in the same norm, as done in Art. 4, para. 3, of the Introductory Act to the German Civil Code, version promulgated on 21 September 1994, *Federal Law Gazette* (*Bundesgesetzblatt*) I, 2494, last amended by Art. 17 of the Act of 20 November 2015, *Federal Law Gazette* I, 2010. English translation at https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0013 (accessed 30 September 2019).

[11]Legislative Decree no. 295, 24 July 1984.

[12]Official Gazette no. 36511, 6 August 1998.

[13]Law no. 26994, 7 October 2014. Art. 2595 (translated by the author).

[14]Conflict-of-law codifications in diverse matters in different regions of the world and at the international level contain remissions to the law of a foreign state with a multi-legislative system. Examples are Art. 4, para. 3, of the Introductory Act to the German Civil Code; Art. 12, para. 5, of the Spanish Civil Code (Madrid Gazette no. 206, BOE-A-1889-4763, 25 July 1889); Art. 37 of the European Union (EU) Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, in Succession Matters, 4 July 2012; Art. 34 of the EU Regulation 2016/1104 on Property Consequences of Registered Partnerships, 24 June 2016; Art. 34 of the EU Regulation 2016/1103 in Matters of Matrimonial Property Regimes, 24 June 2016;

Second Perspective: Diversity in the National Legal System

Interpersonal Law in Pluralistic Legal Systems

Interpersonal law may also consider pluralistic internal legal systems, which are pluri-legislative on religious or ethnic grounds and exist because of the "coexistence of several racial groups or tribes, each of which is governed by its own laws."[15] In this sense, it refers to "conflicts [of laws that] may arise from the coexistence of several racial groups or tribes, between adherents of particular religious communities, between members of splinter groups within the same faith, or between classes."[16] In other words, it implies that "irrespective of space, conflicts [of laws] occur also as a result of a coincidence of groups."[17] Those diverse laws are not an exercise of sovereign powers; in fact, their recognition by the state is the condition for their effective operation.[18]

The interpersonal law doctrine from this perspective was developed in the former Dutch East Indies (currently Indonesia), where a non-uniform, but pluralistic, system of civil law was created. This system was valid for the main population groups identified by the state: Europeans, foreign Orientals, and native Indonesians.[19] Its rules aimed to determine which law has to be applied to situations in which peoples of different groups enter into legal transactions. Such situations could concern any legal matter, such as contracts, marriage, agrarian law, or unlawful acts.[20] The interpersonal law doctrine developed in Indonesia was later introduced to some African countries, where there already existed a native administration of justice in self-governed lands, in which conflict-of-law situations had to be solved.[21] In the form of interreligious law, interpersonal law can still be found in different parts of

and Art. 49 of the Hague Convention on Parental Responsibility and Measures for the Protection of Children, 19 October 1996, 35 ILM 1391 (1996). Some international private law conventions of the Organization of American States (OAS) include norms that look similar to the above-mentioned norms (Maekelt 2005, 207), but they are different. These norms dictate that states with several territorial units, each of them with a different legal system on the matter dealt with in the respective convention—that is, states with a pluri-legislative system based on territorial grounds—have the option to declare to which of such units the convention will apply. One can find this type of norm, for instance, in the 1975 Convention on International Commercial Arbitration, adopted at the first OAS Specialized Conference held in Panama (Art. 11), the 1989 Convention on International Restitution of Children, adopted at the Fourth OAS Specialized Conference held in Uruguay (Art. 34), and the 1979 Convention on General International Private Law Norms, adopted at the second OAS Specialized Conference held in Uruguay (Art. 15). Such clauses, which are called "federal clauses" (Maekelt, Hernández-Bretón, and Madrid 2015, 19–20), can also be found in other international treaties (Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457, Art. 14, para. 1 [UNIDROIT Convention]).

[15]Lipstein and Szászy 2011, 3.

[16]Boparai 1985, 783–85.

[17]Lipstein and Szászy 2011, 3.

[18]Lipstein and Szászy 2011, 4.

[19]Gouw Giok Siong 1965, 549.

[20]Gouw Giok Siong 1965.

[21]Schiller 1962, 430.

the world, especially in Asia and Africa. It has actually gained in importance in the last two decades,[22] contrary to the situation four decades ago.[23]

In countries with pluri-legislative systems based on personal grounds, interpersonal law solutions have been developed from both jurisdictional—that is, the indication of the competent court—and applicable law perspectives. Depending on the recognition and regulation in each state's legal system, these solutions can take place either in conflict-of-law rules adopted by the state itself or through the recognition of the group's own regulatory system.[24] In this sense, the following three types of solutions have been identified:

1. Systems that operate within their own sphere, separately from the state and other legal systems—this happens with religious normative systems, as in the case of canon law in the Catholic Church and laws of other Christian churches.
2. Systems that are enforced by state courts—this modality is found in countries such as Egypt, Tunisia, Algeria, Morocco, Sudan, Greece, Indonesia, India, Pakistan, Bangladesh, and Malaysia.
3. Systems that are administered by the authorities within the group itself, which exercise jurisdiction based on delegation made by the state, as in Syria, Iraq, Jordan, Libya, Lebanon, and Israel.[25]

Although pluri-legislative systems based on personal grounds may be tied in some way to a territory, the territorial element is not essential to them.[26]

Situation in Latin America

After Latin American countries obtained their independence in the nineteenth century, a variety of norms of national and Spanish origin were applicable. The solution to that kind of legal chaos was to create uniform laws in each of the new republics.[27] In the independence process, some states became federalist so that these countries incorporated pluri-legislative systems on geographical grounds, but, from the personal—religious or ethnic—viewpoint, laws were uniformly established.[28] Thus, conflict-of-law rules were included in the codifications also on a uniform basis.

[22]Gallala-Arndt and Winkel 2017, 1023.
[23]Tier 1976.
[24]Lipstein and Szászy 2011.
[25]This classification has been made by Lipstein and Szászy (2011), who offer a detailed explanation on how the different systems work in each case.
[26]See, e.g., the Constitution of Colombia (Constitutional Gazette no. 116, 20 July 1991), Art. 246: "The authorities of indigenous peoples may exercise jurisdictional functions within their territories, in accordance with their own rules and procedures, provided they are not contrary to the Constitution and laws of the Republic" (translation by the author).
[27]Lira Urquieta 1981, xiv.
[28]In general terms, these solutions were based on the 1804 French Civil Code (Code Napoléon), by which Andrés Bello was inspired to write Chile's Civil Code.

However, particularly during the last three decades, Latin American cultural diversity has been recognized in constitutional and legal orders. This recognition has been related to debates on Indigenous issues in the international arena as well as to the inclusion of Indigenous peoples' rights in international public law instruments, especially the ILO Convention no. 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[29] Before this development began to consolidate, the diversity of normative systems did not lead to the existence of real conflicts of laws— Indigenous and non-Indigenous—within national systems of Latin America. Indigenous authorities' competence to apply their own normative systems was not recognized by the state, nor did state courts apply those norms.[30] Since the complexities derived from the existence of Indigenous normative systems were not fully recognized by states, they could not operate effectively. One consequence of such a scenario was that the internal legal diversity of Latin American countries has not been studied from an interpersonal law point of view, and conflict law literature in general has neglected this issue. It can be said, then, that the relevance of the interpersonal law doctrine in Latin America would go hand in hand with the development of Indigenous peoples' rights at the international level as well as with the constitutional changes that have taken place in the countries of the region during the last decades.

From the conflict law perspective, it does not seem possible to ensure that the legal norms that recognize and develop the rights of Indigenous peoples at the national level can properly be considered conflict-of-law norms in the sense of choosing the applicable law. The verification of this latter assertion requires an exhaustive analysis of each of the normative instruments. But, for now, it can be said with certainty that Latin American legal systems have used the method of attribution of jurisdiction to the authorities of Indigenous groups themselves.[31] An example of this is a decision by the Second Court of First Instance in Civil, Commercial and Agrarian Matters in the state of Anzoátegui in Venezuela on 22 April 2008, which concerned the rights on improvements to a property. Both the claimant and the defendant were members of an Indigenous community. The Court declined the jurisdiction to hear the case, staying the Indigenous authorities' jurisdiction and competence, according to constitutional and legal provisions.[32] Other examples relate

[29]United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, UN Doc. A/RES/61/295, 13 September 2007.

[30]According to Lipstein and Szászy (2011, 4), if these three scenarios are presented, there is no conflict of laws, from the point of view of the interpersonal law doctrine.

[31]See, e.g., the Political Constitution of Colombia, Art. 246.

[32]Arts. 119–26 of the Constitution of the Bolivarian Republic of Venezuela, 15 December 1999; Arts. 27, 130, 131, 132, 133 of the Law on Indigenous Peoples and Communities (Juzgado Segundo de Primera Instancia en lo Civil, Mercantil, Agrario y Transito de la Circunscripción Judicial del Estado Anzoátegui – Venezuela), Juez Provisorio: Jesús Gutiérrez Díaz, Interdicto Restitutorio, 22 April 2008 (reprinted in Figuera Vargas 2011, 178–80).

to divorce[33] and adoption.[34] Reference can also be made to a decision regarding the succession of the Nasa community in the department of Tolima, Colombia. After the death of the father, a piece of land was to be divided among the heirs. According to the traditional laws of the Nasa people, descendants who leave the family for more than 10 years lose their inheritance rights. Such rights are recognized only for those who, having left for justified reasons, continue to "fulfill their community obligations as indigenous and help their families ... when parents die, descendants agree and seek to the indigenous authority ... to carry out the division of inherited property." In this case, a descendant, who left the community 25 years ago and had not attended to her parents during their old age, sued her brothers before the ordinary state courts,[35] against which the other descendants resorted to the special Indigenous jurisdiction. The Indigenous authority decided to assume the competence to carry out the distribution of the inherited property according to community norms.[36]

Thus, the pluri-legislative nature of Latin American states, based on personal—religious or ethnic—grounds, seems to be uncontestable today. Nevertheless, besides new codifications and regional developments (for example, in the framework of the Organization of American States), conflict-of-law rules currently maintain characteristics of those adopted in the nineteenth century. As shown, while some conflict-of-law codifications of the region take into account the pluri-legislative nature of foreign legal systems, they do not consider their own domestic legal systems as pluri-legislative systems themselves. In this context, the attempt to give Indigenous peoples' normative systems an autonomous and absolute character seems to have produced the effect of dividing instead of uniting.[37] In terms of effectiveness, as well as clarity and legal certainty, it would be advisable to promote integration through state legislation.

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[33]An Indigenous authority in Colombia approved the divorce between two members of the community and decided, according to Indigenous (Wayuu) law, that the wife's family was obliged to compensate the husband's family with some money and a necklace. Oficina de Asuntos Indígenas de Uribia Guajira, 29 August 1989, reprinted in Figuera Vargas 2011, annex.

[34]The authority of the Nasa-Páez Indigenous community, in the Cauca department in Colombia, permitted the adoption of an abandoned child by a couple, based on the love they had bestowed upon him. Resolution no. 002: Cabildo del resguardo indígena de Vitonco, Cauca, 17 September 1999, reprinted in Figuera Vargas 2011, 165.

[35]The succession process was open in the Juzgado Promiscuo Municipal Rioblanco, Tolima Department, which is the local court competent in such kinds of issues in the state's jurisdictional system. Resolution no. 001 2002, Jurisdicción Especial Indígena Nasa, Barbacoas Community, Cabildo Indígena de Barbacoas, Rioblanco, Tolima Department, Colombia—Reparto tierras herencia (Consejo Superior de la Judicatura 2006, 130–37). There is no information available about whether a final decision on this case was made by that state court.

[36]Resolution no. 001 2002, Jurisdicción Especial Indígena Nasa, Barbacoas Community, Cabildo Indígena de Barbacoas, Rioblanco, Tolima Department, Colombia—Reparto tierras herencia (Consejo Superior de la Judicatura 2006, 130–37).

[37]"While it is true that state-enacted or controlled, interpersonal conflicts rules balance and stabilise clashes between the laws of the various communities, the autonomous or absolute character of personal legal systems divides rather that units despite any such intervention by the central authority; and recent developments have shown that integration is promoted best by central legislation." Lipstein and Szászy 2011, 26.

However, it must be taken into account that, when recognizing Indigenous peoples' rights at the national and international levels, it has not been the purpose of the Latin American states to modify or supplement Indigenous legal systems. In Latin American countries, as in other countries with an Indigenous population, the codification of Indigenous peoples' normative systems has been rejected, based on different arguments, but especially because of the risk of petrifaction. Colombia is perhaps the country in Latin America where most attempts have been made to systematically address the cultural and legal diversity recognized in constitutional and legal norms. This has taken place in judicial decisions and literature mainly from the criminal law perspective,[38] not from the conflict-of-law viewpoint. Nevertheless, there has not been a clear systematization of Indigenous peoples' normative systems, their relationship to each other, or their relationship with the state's legal system. This situation has called into question the existence of a true legal pluralism in Colombia.[39]

Additionally, from a legal—rather than political or anthropological—point of view, cultural (and legal) diversity has been observed only within the framework of public law, particularly within the sphere of international public (human rights) law or within the sphere of constitutional law. Although the recognition of Indigenous peoples' rights takes place in those spheres, and their limits are drawn there, it does not seem enough to see cultural (and legal) diversity only from these perspectives. Each of these legal spheres has its own theoretical and normative tools, which are different from those that have been constructed within the conflict-of-law framework. Conflict-of-law norms are also called to respect and to materialize human and fundamental rights in cross-border situations between private subjects, whether individuals or collectivities. As shown, the doctrine of interpersonal law has been developed in the conflict-of-law sphere in the legal systems of the above-mentioned countries. Thus, observing cultural (and legal) diversity from the conflict-of-law perspective can offer the possibility of analysis, where specific legal tools may be found to respond not only to Indigenous peoples' restitution claims but also to accomplish states' obligations contained in international human rights instruments.

INDIGENOUS PEOPLES' HUMAN RIGHTS REGARDING CULTURAL PROPERTY

Histories and characteristics of Indigenous peoples around the world are similar in many senses. Along with several shared circumstances, such as uprooting or extreme poverty, stands the fact that their sacred and cultural objects are stored in foreign museums and private collections, which is, to a great extent, the result of colonization and exploitation[40] or, in general, the consequence of an asymmetrical

[38]See Benítez Naranjo 2002.
[39]Figuera Vargas and Ariza Lascarro 2015.
[40]Kuprecht 2010, 193.

history.[41] Nowadays, Indigenous peoples' interests in their cultural property have to be observed through the prism of human rights. However, it has to be taken into account that, although the 2007 UNDRIP constitutes a milestone in the international recognition of Indigenous rights, it has a non-binding character. That is why in this section reference will be made to the ILO Convention no. 169 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as international binding instruments.[42]

Certainly, the function, or main goal, of pluri-legislative systems based on personal grounds, and of interpersonal law rules that address conflicts of law emerging in such systems, is not to protect minorities but, rather, to recognize each social group's particulars.[43] However, it does not mean that they cannot serve such a goal, satisfying not only formal justice, in the realm of conflict of laws, but also material justice, in the realm of human rights. Indigenous peoples do not lose the rights they hold according to international human rights instruments as a result of the fact that cultural objects valuable for them are now in the hands of a third person or institution or in a foreign country, if such a situation has occurred without their consent.[44] Indigenous peoples' consent for using their cultural patrimony has to be seen as an expression of their right to self-management, which is included in Article 7, paragraph 1,[45] and Article 8, paragraphs 1 and 2,[46] of the ILO Convention no. 169, which has been ratified by 15 Latin American countries,[47] as well as an expression of the self-determination principle.

More specifically, it is necessary to attend to the protection of cultural diversity within the framework of the right to participation in cultural life, included in Article 15, paragraph 1(a), of the ICESCR, which has been ratified by all Latin American countries. The article states: "1. The States Parties to the present Covenant

[41]This has been recently noted, for instance, in relation to African cultural objects held in French museums. Sarr and Savoy 2018, 4.

[42]International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (ICESCR).

[43]Maekelt 2005, 207.

[44]This idea is similar to Symeonides's (2005, 1186) justification of the use of the law of the situs of origin by virtue of the rule he has proposed.

[45]"1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

[46]"1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."

[47]Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

recognize the right of everyone: (a) To take part in cultural life." This right has been interpreted by General Comment no. 21 on the Right of Every Person to Participate in Cultural Life (Article 15, paragraph 1(a)) of the ICESCR, which was adopted in 2009 at the forty-third session of the Committee on Economic, Social and Cultural Rights (CESCR). According to the CESCR, the first aspect that must be considered is that the right to take part in cultural life is interdependent of the right of all peoples to self-determination, which is established in Article 1 of the ICESCR. Additionally, it has to be taken into account that this right is a collective right so that it can be exercised individually or by a person in association with others,[48] considering that culture is "an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity … as the creation and product of society."[49] With regard to Indigenous peoples, the CESCR stresses that "[t]he strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, wellbeing and full development." In addition, it is worth noting that Indigenous peoples, as collective subjects, "shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination," as stated in Article 3 of the ILO Convention no. 169.

Another aspect to consider is that the right to take part in cultural life, as it has been interpreted by the CESCR, implies several obligations to states that have ratified the ICESCR, including Latin American states. Among these obligations, some are especially relevant regarding the existence of conflict-of-law rules referring to the law applicable to situations involving objects with cultural value for Indigenous peoples. Thus, within the framework of Article 15, paragraph 1(a), of the ICESCR, states must take measures to provide access to and preserve cultural goods.[50] That means that states shall ensure that Indigenous peoples and their members know and understand their own culture so that they can follow a way of life associated with the use of cultural goods as well as with "resources such as land, water, biodiversity, language or specific institutions" and benefit from their cultural heritage.[51] In particular, Indigenous peoples have "the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage."[52] All of this cannot be properly developed if Indigenous peoples are illegitimately deprived of cultural objects in whose return they are interested.

[48]From a practical point of view, this is still a difficult issue. For example, recently, it was not possible for the Nama people from Namibia to be recognized as the recipient of some cultural objects by the Constitutional Court of Baden-Württemberg in Germany (Jayme 2019). See *Verfassungsgerichtshof für das Land Baden-Württemberg*, 1 VB 14/19, 21 February 2019, https://verfgh.baden-wuerttemberg.de/fileadmin/redaktion/m-verfgh/dateien/190221_1VB14-19_Beschluss.pdf (accessed 30 September 2019).

[49]Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a) of the ICESCR), 43rd Sess, Doc. E/C.12/GC/21, 21 December 2009, 3.

[50]CESCR, General Comment no. 21, 2.

[51]CESCR, General Comment no. 21, 4.

[52]CESCR, General Comment no. 21, 9.

In general terms, the CESCR has underlined that

> the obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.[53]

In this context, a conflict-of-law rule, which indicates what law must be applied to Indigenous peoples' claims for restitution of objects with a cultural or religious value for them, could support the protection of the above-mentioned Indigenous peoples' rights and the fulfillment of those three facets of states' obligations in that respect.

INTERPERSONAL LAW DOCTRINE AND INDIGENOUS PEOPLES' CULTURAL PROPERTY: A PROPOSAL

The following proposal does not aim to offer a general solution to conflicts of law emerging from interpersonal law situations related to Indigenous peoples living in a particular country, although it could contribute to a future conception of a kind of "elliptical" conflict-of-law rule, following the terminology used by Symeon Symeonides.[54] Neither does it pretend to formulate a new version of interpersonal law for all Latin American countries. In particular, this latter point would be unrealistic. Its goal is only to offer a possible way of dealing with the return of Indigenous peoples' cultural property from a conflict-of-law perspective, in which one could find some features of the interpersonal law doctrine. As will be seen, our proposal serves to satisfy Indigenous peoples' repatriation claims, which were included in the 1993 Maatatua Declaration on Cultural and Intellectual Rights.[55] In this declaration, Indigenous peoples recommended to states, as well as to national and international agencies and the United Nations, that "Indigenous cultural objects held in museums and other institutions must be *offered back* to their traditional owners."[56]

[53]CESCR, General Comment no. 21, 12.

[54]Symeonides 2016, 228.

[55]This Declaration was adopted at the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane, New Zealand, 12–18 June 1993, https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf (accessed 30 September 2019).

[56]Quoted in Kuprecht 2010, 200 (Art. 2.14) (emphasis added). It is worth noting that in relation to human remains and burial objects the 1993 Mataatua Declaration states that they must be returned: "2.12 All human remains and burial objects of indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner." Cited by Kuprecht 2010, 200.

The better starting point to introduce our proposal is a hypothetical case, which can help us find a "hypothetical pattern."[57] Let us suppose that an Indigenous community lost a group of cultural objects, for example, wood sculptures[58] or textiles[59] with a religious or cultural value for the community.[60] The objects were taken by local individuals, who sold them to antiquities dealers. Some years later, the objects were sold in a country whose legal system allows the acquisition of movables property without regarding the legal provenance of the objects. One could think, for instance, of Article 464 of the Spanish Civil Code, according to which "possession of movable property, acquired in good faith, is equivalent to title," or Article 1153 of the Italian Civil Code,[61] which more specifically states: "The person to whom movable property is alienated by those who do not own it, acquires ownership through possession, provided it is in good faith at the time of delivery and there is a qualification suitable for the transfer of ownership."

This situation refers to an object of cultural value for an Indigenous people, which is, or will be, returned from abroad. The question to answer here is which law should be applied to decide the final destination of the object. Thus, the domestic law of the state of origin, where the Indigenous people live, could include a conflict-of-law rule as follows:

> If an object of cultural value for an indigenous people (community) is (to be) returned to the national territory (of the state it inhabits), the final destination of such object is governed by the law of that indigenous people (community), unless that indigenous people (community) decide that it be governed by the national law of the state.

There can be two moments in the application of this rule. First, the situation is solved by means of Indigenous (substantive) law. Second, the situation is solved by means of (substantive) national law because of a remission made by the Indigenous law. This rule is built upon the recognition of the right to self-management,

[57]See Symeonides 2005, 1183.

[58]A well-known case referring to these kinds of objects is the Afo-A-Kom case. See Merryman 1989, 350–51; Jayme 1994; Siehr 1994, 98; Kurpiers 2005, 209.

[59]See, e.g., the Coroma case. R. v. Yorke, [1991] Nova Scotia Judgments no. 368, Action SCC no. 2573 (Nova Scotia Supreme Court, Appeal Division); R. v. Yorke, 112 NSR (2d) 240, (1992) 307 APR 240 (Nova Scotia County Court); R. v. Yorke, [1993] 3 SCR 647, (1993) 158 NR 3496 (Supreme Court of Canada), https://traffickingculture.org/encyclopedia/case-studies/coroma-textiles/ (accessed 19 June 2019).

[60]Other cases related to cultural property of Indigenous origin that have been profusely commented on are the "Nigerian case," decided by the Federal Court of Germany in 1972 (*Bundesgerichtshof*, 22 June 1972, 59 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (*BGHZ*) 82; see Bleckmann 1974; Roodt 2015, 332) and the case of the Lakota Ghost Dance Shirt (Carruthers 2005, 125), which was returned by the Glasgow City Council's Arts and Culture Committee in 1998 after direct negotiations with Lakota representatives. See UK Parliament. Memorandum submitted by Glasgow City Council, https://publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/0051808.htm (accessed 30 September 2019).

[61]Codice Civile Italiano, RD no. 262, 16 March 1942, Approvatione del testo del Codice Civile, Art. 1153 (translated by the author).

as it is included in the ILO Convention no. 169, which, more than a mere consultation, is an expression of the self-determination principle.

This conflict-of-law rule might bring more clarity and legal certainty not only to the domestic authorities, but also to the foreign ones, whose conflict-of-law systems could contain a norm such as the one included in the Introductory Act to the German Civil Code or in the Argentinian Civil and Commercial Code. Article 4, paragraph 3, of the Introductory Act to the German Civil Code,[62] for instance, contains a remission to the whole foreign law (*Gesamtverweisung*).[63] It is possible to consider that such a remission includes non-codified norms—for example, Indigenous law—as a part of the legal system, if it is so governed by the foreign law. Therefore, the application of such a law becomes easier if it is included in the codified legal system of the foreign state whose legal system is to be applied.

At this point, an important question is how the authorities of a country, whose legal system contains a conflict-of-law rule like the above-mentioned Article 2595, letter b, of the Civil and Commercial Code of Argentina, come to apply the law of the country of origin of the object of cultural value for an Indigenous people, instead of its own law or the law applicable according to the *lex situs* rule. This leads to consider the application of the *lex originis*.[64] In general terms, there are three possibilities for applying the *lex originis*. First, national courts may consider that the particulars (factual and legal circumstances) of the case lead to restitution based on the law of the country of origin—for instance, because it is the law with the "closest connection" to the case.[65] Such a solution has been recommended by the 1991 Resolution on the International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage, which was devised by the Institute of International Law.[66] One could also look at the rigid character of the *lex situs* rule and consider that there exists an axiological loophole because the *lex situs* rule does not take account of the protection of cultural property, which is a general value protected by binding international instruments—in particular, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer

[62]It states: "If referral is made to the law of a country having several partial legal systems, without indicating the applicable one, then the law of that country will determine which partial legal system shall be applicable. Failing any such rules, the partial legal system to which the connection of the subject matter is closest shall be applied."

[63]Rauscher 2017, 99.

[64]Literature about this subject, which is abundant, includes Reichelt 1989; Jayme 1990, 1991, 1994, 1999; Fincham 2008; Calvo Caravaca and Carrascosa González 2015.

[65]See United States v. McClain, 593 F.2d 658 (5th Cir. 1979); Republic of Ecuador v. Danusso, Trib. Turín, 25 March 1982. A more recent case is Government of the Islamic Republic of Iran v. Barakat Galleries, [2007] EWHC 705 (QB), [2007] EWCA Civ 1374, [2008] All ER 1177, QB 22 [2009].

[66]Session of Basel of the Institute of International Law, 1991, Twelfth Commission, Rapporteur Antonio de Arruda Ferrer-Correia, Art. 3, in connection to Art. 1(b), http://www.idi-iil.org/app/uploads/2017/06/1991_bal_04_en.pdf (accessed 30 September 2019), according to which the "'country of origin' of a work of art means the country with which the property concerned is most closely linked from the cultural point of view."

of Ownership of Cultural Property[67]—that can be better secured by the *lex originis* of the object.[68]

Second, a national (or supra-national/regional) law can contain a specific exception to the *lex situs* rule in relation to cultural property. Versions of this option are diverse; for instance, remissions to the *lex originis* rule have been adopted in Belgium's Code of Private International Law[69] (Article 90); Bulgaria's Private International Law Code[70] (Article 70); and Directive 2014/60 of the European Union[71] (Article 13).

Third, a possible codified conflict-of-law norm, which could be included in an international public law instrument (treaty), could state that if an Indigenous cultural object is returned from one state to the state where the corresponding Indigenous people live, with both states having ratified the respective international treaty, the final destination of such object is governed by the national law of the last state. This remission should be to the whole law of the state of origin; thus, the intervention in the property concepts of states—what Karolina Kuprecht has seen as an obstacle to an international right to restitution—would be reduced.[72] However, at the international level, there could also be a direct remission to the application of Indigenous law, to the extent that, as Kuprecht says, "the international community is willing to work towards a privilege of indigenous peoples in cultural property issues including repatriations."[73]

In any of those three scenarios, a conflict-of-law rule in the national legal system of the state of origin, which refers to the direct application of Indigenous law, makes more sense. The latter scenario, which refers to the remission to the state of origin by means of an international treaty, would be preferable for three reasons:

[67]Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

[68]Calvo Caravaca and Carrascosa González 2015.

[69]Law of 16 July 2004 Laying down the Code of Private International Law, *Official Gazette*, 27 July 2004, Art. 90: "If an item, which a State considers as being included in its cultural heritage, has left the territory of that State in a way, which is considered to be illegitimate at the time of the exportation by the law of that State, the revindication by the State is governed by the law of that State, as it is applicable at that time, or at the choice of the latter, by the law of the State on the territory of which the item is located at the time of revindication. Nevertheless, if the law of the State that considers the item part of its cultural heritage does not grant any protection to the possessor in good faith, the latter may invoke the protection, that is attributed to him by the law of the State on the territory of which the item is located at the time of revindication."

[70]Law no. 42 of 2005, as amended by Law no. 59 of 2007 and by Law no. 47 of 2009, Art. 70: "Where a given corporeal object belonging to the cultural heritage of a specific State has been wrongfully removed from the territory of the said State, the request of the said State for return of the said object shall be governed by the law of the said State, except where the said State has opted for application of the law of the State in which the object is situated at the time of making the request for return."

[71]Council Directive (EU) 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and amending Regulation (EU) no. 1024/2012, [2014] OJ L159, Art. 13: "Ownership of the cultural object after return shall be governed by the law of the requesting Member State."

[72]Kuprecht 2010, 225.

[73]Kuprecht 2010, 226.

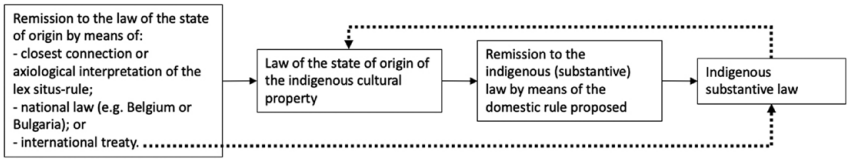

Figure 1: Scheme of remissions following the proposed rule

(1) an international treaty could also directly remit to the Indigenous (substantive) law, in similar terms as the rule that has been proposed to be adopted at the domestic level; (2) the international community has already expressed a will to protect specific Indigenous rights, like those referred to as cultural property; and (3) Indigenous people's interests have been recognized in the most important international treaty protecting cultural property from an international private law perspective—that is, the Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).[74] The UNIDROIT Convention does not contain a remission to the application of Indigenous law nor of the law of the country of origin. However, its Article 7, paragraph 2, does allow return claims on illegally exported cultural objects that were "made by a member or members of a tribal or Indigenous community for traditional or ritual use by that community and the object will be returned to that community," contrary to the general rule that prevents claims on those objects whose export is legal at the time of the claim and those that were exported during the lifetime of their creator or for a short period thereafter. Figure 1 serves to better illustrate the way in which the remissions to the law of the state of origin and/or to the law of the Indigenous community could work.

CONCLUDING REMARKS

As can be seen, territoriality has played an important role in the conflict of laws in Latin America. The way that territoriality has been rooted in conflict of laws has led to the fact that this discipline has torn apart the region's cultural diversity as well as the legal diversity related to it. This has also led to the neglect of, among other issues, questions referring to the restitution of cultural property of Indigenous peoples from the viewpoint of the conflict of laws. Additionally, the regulation of the *lex situs* rule, which has been identified as one of the main obstacles to the restitution of such kind of property, is attached to territoriality as well. Although some states in the region have introduced important reforms in their conflict-of-law codifications in recent years, such circumstances have not been taken into account so far. In any case, one has to concede that finding concrete ways to overcome such issues is a difficult task. However, the creation of legal mechanisms for recognizing Indigenous peoples' interests in getting back cultural objects is an obligation for states, according to international public law instruments, especially ILO Convention

[74]UNIDROIT Convention.

no. 169 and the ICESCR, which have a binding character and have been ratified by most Latin American states. To that end, introducing a conflict-of-law rule like the one proposed here seems achievable in the present general context of Latin American legal systems.

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