María Julia Ochoa Jiménez

Rights of Indigenous Peoples and Communities

ABSTRACT: In Colombian private international law, which has strong territorial roots, the resolution of conflicts of laws is based on the application of the law of the Colombian state. Among other things, this implies a lack of consideration of the legal diversity linked to the existence of indigenous peoples and communities. Underlying this is a disregard of the fact that these peoples are holders of differentiated rights included in international legal instruments. Developments that led to the recognition of these rights have obliged the Colombian state to recognize them at the national level as well. The IADIP Draft Law tries to bring Colombian private international law into line with the kind of legal pluralism that lies behind the recognition of some of those rights, thus contributing to make such recognition more effective.

KEYWORDS: Colombia - private international law - indigenous peoples - indigenous communities - IADIP Draft Law

I. *Background*

Like other Latin American countries, Colombia is known for its biological and cultural diversity[1]. However, the country's private international law has traditionally ignored the diversity of indigenous normative systems that are essentially linked to its cultural diversity. This is related to the

1. Cfr. IWGIA (27 March 2023). The Indigenous World 2023: Colombia. Available at: https://www.iwgia.org/en/colombia/5082-iw-2023-colombia.html#_edn1 (last access: June 20, 2023). In Colombia, according to the 2018 national census; 3.4% of the total population (1,905,617 individuals) self-identify as members of different indigenous peoples, from which «some 58.3% live in 827 legally-constituted collectively-owned reserves [*resguardos, cfr. art. 63 Constitution*] covering an area of 29,917,516 hectares, while the remaining 41.7% of the population has, over the past few decades, migrated to urban areas».

fact that Colombian private international law has strong territorial roots[2], which leads to cases of conflict of laws being resolved by considering only the application of Colombian state law. This has occurred due to a conception of private law that exists in Latin America in general, which is centered on the legislative action of the state and is both uniform and hegemonic. Linked to the colonial history of the region, this is also interconnected to the complexities related to the reluctance to legal pluralism.

In historical perspective, it is worth considering, as Tamanaha points out, that many empires admit a certain degree of legal pluralism for their own benefit, since they

> use indirect rule and concentrate their efforts on political control and economic exploitation. This approach relies on coopting and rewarding local leaders while keeping intact much of the existing political substructure and prevailing laws[3].

This would perfectly fit what Machiavelli said in the 16th century: «[A]llow them to live with their own laws, forcing them to pay a tribute and creating an oligarchy there that will keep the state friendly toward you»[4]. It is also known that this same strategy was used by Romans several centuries earlier: «In principle, the Romans did not interfere with local communities if they could avoid it; everybody was left to live in his own traditional way by his own law»[5]. Such political approach was put into practice for centuries through conflict-of-laws mechanisms based on *personal law*, which was maintained until its displacement by the prevalence of *territorial law* that spread throughout Europe since the Peace of Westphalia[6]. Considering that such an approach to a kind of legal pluralism was adopted by the Spanish empire in the Americas allows us to understand its acceptance

2. J. Samtleben, *Internationales Privatrecht in Lateinamerika-Regionale Entwicklungen und nationale Kodifikationen (2001)*, in *Rechtspraxis und Rechtskultur in Brasilien und Lateinamerika*, coord. J. Samtleben, Aachen, Shaker Verlag, 2010.

3. B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021, 21.

4. Cited by B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*. Oxford University Press, 2021, 21.

5. Van den Bergh, cited by B. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021, 22.

6. M.J. Ochoa Jiménez, *Restitution of Indigenous Cultural Objects in Latin America: NAGPRA as a Model?*, in C.A. Malig Jedlicki - R. Christofoletti - N. Oosterman (eds.), *Colonial Heritage, Power, and Contestation: Negotiating Decolonisation in Latin America*, Springer (in press).

of the legal diversity that, due to the indigenous presence, existed in the American region in 1492 and certainly continues to exist today. Thus, the *Recopilación de leyes de los Reynos de las Indias*, in finding the legal rule applicable to a dispute, stated that the «order and way of living of the Indios» and «their good uses and customs» had to be recognized by authorities if they were not against the Spanish religion[7]. It can thus be said that «some colonial Spanish institutions adopted or coexisted with Indigenous legal developments»[8]. Some authors have explained this by saying that

> certain aspects of Spanish legal culture matched closely with preconquest customary law, including tribute payments, jointly held lands, slavery and other forms of forced labor, and special courts for particular classes of litigants[9].

Nevertheless, having been, on the one hand, a mechanism of domination and, on the other hand, having existed only formally and neglected in practice, this somewhat pluralistic approach to conflict of laws adopted by the Spanish empire as part of its colonial rule in the Americas does not seem to fit fully as a model to be observed in present times. Certainly, today we can – and must – rethink the ways in which private international law relates to legal pluralism *vis-à-vis* the legal manifestations of indigenous cultures and worldviews. However, regarding the current legal situation, it is more directly relevant to look at the disregard of indigenous normative orders in the state-centered legal systems developed in Latin America since the emergence of the republics, in which Colombian private international law is still rooted to a large extent.

As explained in other place[10], after independence, the codification of private law, which included conflict of laws rules, was thought to establish order amid the existing legal chaos. This was crucial to consolidate the independence already reached. Though early codification attempts failed

7. Cfr. Book 5, Title 2, Law 22; Book 2, Title 1, Law 4.
8. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, 49.
9. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, 49; M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in *Critical Analysis of Law*, 8(2), 2021, 87-107 (see references cited there).
10. M.J. Ochoa Jiménez, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities*, in *Critical Analysis of Law*, 8(2), 2021, 87-107.

due to political instability and lack of funds[11], decades later in the mid-nineteenth century, not only constitutions but also private law codes were key to the new states laying the legal fundaments of sovereignty and nationalism[12]. Codification allowed them to consolidate independence in front of foreign states as well as to exert their power among the inhabitants of their territories. Thus, in private law codification, two streams come together. On the one hand, codification reflects the modern liberal thought that was the basis of the political organization of the new republics. Marked by the French Revolution, modern liberal thought followed rationality and individualism, which led to the development of an overemphasis on private property and to the bloom of contractual freedom. On the other hand, codification took place by making use of the Roman law tradition in its versions developed by glossators, especially the Bologna school[13]. In this context, Andrés Bello's work and the Chilean Civil Code of 1855 which he drafted stand out as an example of the influence of European legal institutions and legal ways of thinking in the field of private international law in Latin America[14]. Thus, as occurred throughout the region, legal conceptions based essentially on the uniform creation and administration of state law in the national territory characterize basic rules of private international law in Colombia, as they are in the Civil Code of the country since 1887.

II. *Current situation*

Today's private international law is called upon to respect the diversity of indigenous normative systems. This role of private international law can find a valid foundation in the configuration of international human rights law, as well as in the way in which these rights have been incorporated into the Colombian national legal system. Currently, it is undeniable

11. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004, 135; J. Kleinheisterkamp, *Development of Comparative Law in Latin America*, in M. Reimann - R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2006, 262-263.

12. J.H. Merryman - R. Pérez Perdomo, *La Tradición Jurídica Romano-Canónica*, Fondo de Cultura Económica, Mexico, 2014.

13. M. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, Austin, University of Texas Press, 2004; J.H. Merryman - R. Pérez Perdomo, *La Tradición Jurídica Romano-Canónica*, Fondo de Cultura Económica, Mexico, 2014.

14. J. Kleinheisterkamp, *Development of Comparative Law in Latin America*, in M. Reimann - R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, cit.

that indigenous peoples are holders of differentiated collective rights. At this point, it is worth recalling that collective rights are rights that «affect an identifiable group of people»[15] linked together by pre-existing relationships[16]. Thus, the rights of indigenous peoples are neither private rights nor diffuse rights, the latter being held by groups whose members are linked «only by the facts of a particular transaction or occurrence»[17]. Indigenous peoples'rights are included not only in international standards, such as the Declarations the Rights of Indigenous Peoples of the United Nations of 2007 (hereafter, "UN Declaration") and the Declaration of the Organization of American States of 2016 (hereafter, "OAS Declaration"), but also in binding international instruments, especially the Convention International Labor Organization No. 169 on Indigenous and Tribal Peoples, ratified by Colombia through Act No. 21 of March 4, 1991 (hereafter, "ILO Convention). This has also occurred in decisions by the Inter-American Court of Human Rights. The developments that led to the recognition of these rights at the international and regional levels have led the Colombian state to recognize them at the national level as well. At this point, it is worth noting that in Colombia the use of term "indigenous community" has a long tradition among both indigenous and the state[18], and that there are other ethnic groups in the country, namely Afro-descendants, Raizal, Palenquero and Rrom. As explained below, the Project of General Law on Private International Law for Colombia elaborated by the *Instituto Antioqueño de Derecho Internacional Privado* (IADIP) (hereafter, "IADIP Draft Law") only contains rules relating to indigenous peoples and communities, though.

II.1 *International law*

At the international level, a whole array of rights has been recognized to indigenous peoples, from the right to self-determination through cul-

15. G. Mac Dowell, cited by C. Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, in *Indiana Journal of Global Legal Studies*, 27(1), 2020, 78.

16. Weninger, cited by C. Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, in *Indiana Journal of Global Legal Studies*, 27(1), 2020, 78.

17. *Ibidem*.

18. F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 765.

tural, health or labor rights. Such rights can enter national systems through constitutional channels in the form of fundamental rights. Among all these rights, there are some that relate more directly to the rules proposed by the IADIP Draft Law, which can be organized into two groups. The first group involves some rights that are basic to the protection of indigenous peoples'ways of life, including living according to their own legal institutions. Thus, the UN Declaration contains «the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions» (article 5), which is derived from the more general right to self-determination, in whose exercise they «have the right to autonomy or self-government in matters relating to their internal and local affairs» (article 4). Additionally, the way in which the UN Declaration entails the right to access to justice includes the consideration of their «customs, traditions, rules and legal systems» (article 40). In similar terms, article 8 of the ILO Convention states as follows: «In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws». This Convention also understands that such a right presupposes indigenous peoples' «right to retain their own customs and institutions», considering fundamental rights as the only limits, what also occurs within the framework of the UN Declaration (article 46). Such rights are also included in the OAS Declaration[19]. Before the adoption of this instrument, the main organs of the Inter-American human rights system, i.e., the Commission and the Court, developed an important jurisprudence that was especially triggered through the Court's decision in the Awas Tingni vs. Nicaragua case in 2001[20]. To a large extent, decisions of the Inter-American human rights organs deal with article 21 of the American Convention on Human Rights (Pact of San José), that contains the human right to property of individuals, and interpret it considering that indigenous peoples have a special relationship with their lands from which a collective right emerges.

19. See articles VI, XIII (3), XXI (2), XXII.

20. Mayagna (Sumo) Awas Tingni Community v. Nicaragua was decided by the Inter-American Human Rights Court (IAHRC 2001). See also: Yatama vs. Nicaragua (2005); Comunidad Moiwana vs. Surinam (2005); Comunidad Indígena Sawhoyamaxa vs. Paraguay (2006); Comunidad Moiwana vs. Surinam (2006); Comunidad Indígena Yakye Axa vs. Paraguay (2006); Pueblo Saramaka vs. Surinam (2008); Comunidad Indígena Xákmok Kásek vs. Paraguay (2010); Pueblo Indígena Kichwa de Sarayaku vs. Ecuador (2012); Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano and their members vs. Panama (2014); Pueblo Indígena Xucuru and its members vs. Brasil (2018); Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina (2020).

As explained below, article 5 of the IADIP Draft Law does not establish the direct application of indigenous normative systems, but rather provisions aimed at protecting the rights of indigenous peoples and communities. Specifically, article 5 refers to rights related to «natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use of resources and plant varieties»[21]. Thus, the second group of rights of indigenous peoples recognized at international level that directly relate to article 5 of the IADIP Draft Law are those that take consideration of the relationship of these peoples with the environment. In this regard, the following articles of the UN Declaration can be highlighted: article 25 (right to maintain spiritual relationship with their lands and other resources), article 26 (right to lands and resources), article 29 (right to the conservation and protection of the environment and the productive capacity of lands), article 32 (right to determine and develop priorities and strategies for the development or use of their lands and other resources) and article 31 (right to maintain, control, protect and develop their traditional knowledge), which is in relation to article 24 (right to traditional medicine and health practices). Relevant provisions of the OAS Declaration are in articles VI and XXV (rights to their lands, territories, and resources), in article XXVIII (right to traditional knowledge associated with genetic resources), as well as in article XIX (right to measures to mitigate adverse ecological, impacts of the implementation of development projects). In the ILO Convention, apart from general rules in article 4 (measures for safeguarding environment) and 7 (right to decide on development that affect their lands), rights that take consideration of the relationship of these peoples with the environment are included in Part II (articles 13-15).

II.2 *Domestic law*

The relatively broad recognition of rights in favor of indigenous peoples in the 1991 Political Constitution of Colombia has been paradoxi-

21. Although the protection of these rights may indirectly lead to the application of indigenous norms. An example may be the environmental administrative norms that apply in indigenous territories, according to which land use in indigenous territories must be done following their own zoning and territorial planning, for which their own norms and procedures apply. This example is based on the Land Use Planning of the Department of Beni, in Bolivia; cfr. Department of the Beni Act, October 17, 2019, that approves the Land Use Planning of the Department of the Beni (PLUS – BENI), and Administrative Resolution 129/2020 of 2020 by the Audit and Social Control Authority for Forrest and Land of the Ministry of Environment and Water, that approves the Manual to Prepare Land Use Planning.

cally associated, on the one hand, with the relatively low participation of indigenous peoples in the total population[22] and, on the other hand, with the fact that the date of its adoption was close to the celebration of the 500th anniversary of the Spanish conquest[23]. In any case, the aforementioned rights have become part of Colombia's national legal system. Thus, an article 7 of the Political Constitution «the State recognizes and protects the ethnic and cultural diversity of the Colombian nation». Such recognition extends to the language of the different ethnic groups (article 10), to the protection of such diversity in educational processes (article 68), to the definition of indigenous territories as territorial entities (articles 286, 329, 330) and to indigenous jurisdiction (article 246), as will be explained below.

The recognition of indigenous peoples'rights in the Political Constitution of Colombia occurred hand in hand with the so-called neo-constitutionalism. This has made at least two specific contributions in this context, the first contribution being the possibility of including international instruments recognizing the rights of indigenous peoples in the national legal system through the block of constitutionality[24], which is contained in article 93 of the Political Constitution of 1991:

International treaties and agreements ratified by Congress that recognize human rights […] have domestic priority. The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia […].

In this regard, article 94 adds as follows:

The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them.

22. F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 762.

23. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 15, available at https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

24. Cfr. Decisions of the Constitucional Court SU-510/98 and T-606/01.

In addition, the recognition of rights of indigenous peoples by the Colombian Constitutional Court has taken place through copious decisions. Such decisions have made clear, for example, that the indigenous community is a collective legal subject and not a mere accumulation of individual subjects who share common interests. In addition, the Constitutional Court expressly lists among the fundamental rights of indigenous communities the right to communal land ownership, to participate in decisions and measures that could affect them, related to the extraction of natural resources in their territories[25], as well as to the recognition and protection of traditional medicinal practices[26].

III. *The rights of indigenous peoples and communities through the prism of private international law*

Beyond discussions as to why or how legal pluralism in general can take place in this context, private international law is called upon to respect the diversity of indigenous normative systems and indigenous peoples'rights. Private international law is equipped with viewpoints and concrete legal mechanisms that can serve the configuration of a legal pluralism that, rather than confronting the control of the state in certain areas and confining the indigenous to some thematic fragments or some territorial spaces, sees the relations of indigenous peoples with state institutions in a general framework that is characterized by a certain horizontality[27]. As mentioned above, this role of private international law is based on the aforementioned rights, which have been internationally recognized and incorporated into the Colombian national legal system.

Taking into account such rights, if a case relates to an indigenous people or community, it may be necessary to consider the application of indigenous rules and practices. If this issue is approached from the perspective of the general theory of private international law, this may take place *as if* indigenous rules and practices were foreign law. In Latin

25. Decision of the Constitutional Court SU-510/98; see also art. 300 of the Political Constitution of Colombia.

26. Decisions of the Constitutional Court C-377/94 and T-214/97; see F. Semper, *Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional*, in *Anuario de Derecho Constitucional Latinoamericano*, II, 2006, 765.

27. M. Coyle, *E Pluribus Plures: Legal Pluralism and the Recognition of Indigenous Legal Orders*, in P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*, Oxford University Press, Oxford, 2020, 805-832.

American private international law codifications, the way foreign law must be applied is usually contained in a special rule that reflects the theory of juridical use (*uso jurídico*), which was largely supported by Werner Goldschmidt[28]. Thus, the Inter-American Convention on General Private International Law Rules states in article 2 that:

> Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable.

In national codifications a similar rule has been included, e.g., in the Civil and Commercial Code of Argentina (2014) (article 2595), the Private International Law Act of Uruguay (2020) (article 2) and the Civil Code of Peru (1984) (article 2055). Following such path, the IADIP Draft Law contains the following provision in article 3: «The interpretation of the competent foreign law shall be made in accordance with the foreign law itself». Thus, if indigenous rules and practices were considered *as if* the were foreign law, their interpretation had to be conducted in a way that is respectful of their customs and traditions of the peoples or communities involved.

However, it is worth making a brief clarification here, regarding the second paragraph of article 3 of the IADIP Draft Law, which seems to be unapplicable in cases that involve an indigenous people or community. Such paragraph, which contains the so-called "unknown legal institution", reads as follows:

> When the foreign law applicable to the case establishes institutions or procedures essential for its proper application not contemplated in Colombian law, the application of such law may be denied, provided that Colombian law does not have analogous institutions or procedures.

One can find this rule, with an almost identical wording, in article 3 of the Inter-American Convention on General Private International Law Rules. In this regard, one must bear in mind the cultural particularities of indigenous peoples and communities, and the different ways in which

28. W. Goldschmidt, *Derecho Internacional Privado: Derecho de la Tolerancia, Basado en la Teoría Trialista del Mundo Jurídico*, Depalma, Buenos Aires, 1990; P.B. Mosciati Olivieri, *La Aplicación del Derecho Extranjero: Teoría del Uso Jurídico*, in *Revista Chilena de Derecho*, 20, 1993, 39.

they can distance themselves from state law. Thus, there can be cases in which it is not possible to find in state law institutions or procedures that are analogous to those of indigenous peoples and communities. In such cases, the application of the unknown legal institution rule would mean refusing the consideration and application of indigenous rules and practices, what would ultimately lead to the cancellation of indigenous peoples'rights mentioned in Section II and would clearly go against the recognition of cultural diversity made in article 7 of the Political Constitution, as already mentioned.

Another way of observing indigenous peoples'rights from a private international law perspective is considering that they are fundamental rights. As already mentioned, in Colombia this is binding according to decisions of the Constitutional Court. In this sense, article 6 of the IADIP Draft Law includes the criterion developed by the Supreme Court of Colombia, according to which fundamental rights are part of the public order: «A foreign law that is manifestly incompatible with fundamental rights shall not be applied». Thus, rights recognized to indigenous peoples can also be part of Colombia's public order and so impede the application of foreign law that undoubtedly go against them.

Considering provisions that aim to protect indigenous peoples'rights as international imperative norms, which is another way to see such rights from a private international law perspective, will be presented below in the way it is included in the IADIP Draft Law.

IV. *IADIP Law Project*

IV.1 *General rules*

Article 5 of the IADIP Draft Law states as follow:

> Provisions to protect the rights of indigenous peoples or communities over the natural resources existing on their lands, traditional knowledge, the conservation of biological diversity, the sustainable use of resources and plant varieties have the character of internationally imperative norms.

This rule reminds legal operators of the imperative nature of the provisions that recognize the rights of these peoples and communities, particularly those related to the protection of the environment, preventing the application of any foreign law that may go against them. It

aims to bring Colombian private international law into line with the provisions recognizing these rights, its main objective being to make these provisions more effective. For a better understanding of this rule, it is worth referring to the interpretation given in another contribution to this publication, where article 5 is discussed in relation to article 4[29]. There, article 5 is seen taking consideration of the distinction between *Eingriffsnormen* and *Parteischutzvorschriften*, developed in German law, the former being equated with rules aimed at pursuing public interests (or imperative norm of "public policy of direction") and the latter being equated with provisions aimed at protecting private individuals (or imperative norm of "public policy of protection"). Based on this distinction, it is argued that when article 5 refers to provisions aimed at protecting the rights of indigenous peoples and communities, it is referring to imperative norms of "public order of protection" or *Parteischutzvorschriften* (that is, provisions aimed at protecting private individuals), that can however «be qualified as internationally imperative norms» when they are «predominantly aimed at pursuing public interests». Behind this interpretation of article 5 one can see the limitations of such sharp analytical exercises with respect to the rights of indigenous peoples and communities. Indeed, provisions aimed at protecting the rights of indigenous peoples and communities are neither *Parteischutzvorschriften* nor *Eingriffsnormen*, since they are protecting neither private nor public interests.

Following such an interest-based approach and considering the legal developments concerning the rights of indigenous peoples, for example, the doctrine established by the Constitutional Court of Colombia, what can be rightly argued is that the provisions aimed at protecting the rights of indigenous peoples and communities are intended to protect collective interests, i.e., the interests of certain (indigenous) groups. Put in other words, the protection of the rights of indigenous peoples does not need to be justified by referring neither to public interests (of the state) nor to the private interests of individuals.

Even though the interpretation referred here, which is made in another contribution to this publication, is trying to rescue «findings reached at the domestic level by Colombian scholars and courts»[30], in fact they are equating national legal thinking with the narrow European conceptions of the subject, which seem inadequate for cases involving indigenous peoples

29. See contribution on "Internationally Imperative Norms" by Ennio Piovesani.
30. *Ibidem*.

and communities, and eventually reinforcing the need to have in the country a special regulation of the subject that adapts to local particularities. In general terms, the contribution that entails such considerations is, however, a highly valuable input to discussions on the way imperative norms are included in the IADIP Draft Law. It thus correctly points to the fact that, according to article 5, provisions aimed at protecting rights of indigenous peoples and communities qualify as international imperative norms.

Finally, another rule of the IADIP Draft Law, namely article 68, deals with the international restitution of indigenous cultural property. The third paragraph of this article recognizes the developing the right of indigenous peoples and communities to decide about their cultural heritage. According to this article, they must decide about the destination of a property of cultural value to them when such a property is returned to the national territory from a foreign country. In such a case, the rights on the property are «governed by the rules of that people or community, unless such people or community decides that it should be governed by the law of the State of which it is a part». In practical terms, this might mean the need to provide for assistance of interpreters, translators, experts, and specialized lawyers[31].

IV.2 *Jurisdiction*

Under the IADIP Draft Law, situations involving indigenous peoples and communities may, in principle, be subject to the general rules of procedure (Chapter Four, articles 17-33). However, two clarifications are necessary in this regard. Firstly, in interpreting such rules attention must be paid to the rights of indigenous peoples contained in the Political Constitution, including those recognized in international law instruments, as well as the above-mentioned jurisprudence of the High Courts, in particular the Constitutional Court and the Supreme Court. Secondly, the preferent application of rules on indigenous jurisdiction that can be provided for in special laws is not excluded. In this respect, it is necessary to consider the following. Article 246 of the Political Constitution recognizes indigenous jurisdiction, which can be exercised in indigenous territories in accordance with the Constitution and the laws

31. A. Valiente López, *Acceso a la Justicia de los Pueblos Indígenas*, in J.C. Martínez - C. Steiner - P. Uribe (coords.), *Elementos y Técnicas de Pluralismo Jurídico. Manual de Operadores de Justicia*, Fundación Konrad Adenauer, Mexico, 2012, 64.

of the Republic, and provides that the implementation of indigenous jurisdiction, and in particular its coordination with the state judicial system must be regulated by a special law. This is also referred to in the Statutory Law on the Administration of Justice (article 12), where it is added that such law must also provide for the control of constitutionality and legality of the proceedings of the indigenous authorities. Nevertheless, such law has not yet been adopted[32]. There have been, however, judicial decisions that recognize indigenous jurisdiction, i.e., the Supreme Court of Justice[33] has recognized the «respect for the methods to which the [indigenous] peoples concerned traditionally resort for the repression of crimes committed by their members»[34]. Thus, there is no general regulation on the scope and content of indigenous jurisdiction, but rather a recognition of situations in a particularized manner, which mostly refer to criminal matters.

V. *Summary*

Indigenous peoples and communities are holders of differentiated rights that are included not only in international standards, such as the UN Declaration and the OAS Declaration, but also in binding international instruments, especially the ILO Convention, as well as in decisions by the Inter-American Court of Human Rights. The Colombian state also recognizes these rights at the national level, including them in the national legal system through the block of constitutionality (articles 93 and 94 of the Political Constitution), with the important contribution of the Colombian Constitutional Court. The IADIP Draft Law attempts to shape the role that private international law is called upon to play in this context in two ways: (i) by reminding legal operators of the imperative nature of the norms that recognize the rights of indigenous peoples and communities, particularly those related to environmental protection, preventing the application of

32. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 19, available at https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

33. Supreme Court of Justice, Cassation Judgment of August 14, 2000, rad.: 14711.

34. Corte Suprema De Justicia, *Justicia y Pueblos Indígenas. Jurisprudencia, Ritos, Prácticas y Procedimientos*, 2017, 20, available a https://www.jep.gov.co/Sala-de-Prensa/Documents/Justicia%20y%20pueblos%20ind%C3%ADgenas%20jurisprudencia,%20ritos,%20pr%C3%A1cticas%20y%20procedimientos.pdf (last access: June 24, 2023).

any foreign law that may go against them, and (ii) by recognizing right of indigenous peoples and communities to decide about the destination of a property of cultural value to them when such a property is returned to Colombian territory from a foreign country, what must be done according to their own normative systems.

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Colombian Draft Project on Private International Law

A cura di Margherita Salvadori
e Gilbert Boutin Icaza

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Colombian Draft Project on Private International Law

a cura di

Margherita Salvadori e Gilbert Boutin Icaza



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