Chapter 13: Jurisdiction. Procedure and dispute settlement. Conflicts of law (the anthropology of jurisdictional justice, of procedural justice, and of conflicts justice)

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Outlines, Issues, Suggestions

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Chapter 13: Jurisdiction. Procedure and dispute settlement. Conflicts of law
(the anthropology of jurisdictional justice, of procedural justice, and of
conflicts justice)

As mentioned in the foreword, Chapter 13, in addition to presenting general aspects of
procedure, deals with the legal anthropology of conflict of laws as a novelty that will be
discussed at greater detail using Native American material for sake of illustration. Comments
concerning, heuristic law finding, culture-specific maxims of legal procedure, and the context
of material, substantive procedural, and jurisdictional law, are also included.

I. Introductory remarks

Justice often cannot and should not be rendered at once. Quick justice may be injustice. Lynching is
a matter for the mob, not for the court. When dictators resort to speedy trials because they are often not
interested in justice. For example, to oppress opposition, Hitler used so-called Schnellgerichte (quick
courts).

1. Justice and time. Heuristics

The reason why justice takes time lies in the difficulty to ascertain what the just solution to a given case
should be. Following Malinowski customs are usually are self-evident and therefore followed by a people
as a matter of course, whereas law quite often is subjected to doubt and dispute, and therefore asks for a
decision. Unlike law, custom, to Malinowski, is a psychological must. a „social machinery of binding
force“ (p. 55). Law, however, has to be ascertained. It takes time to reflect on the case and the
consequences of the decision, time to let the plaintiff prepare his or her case, time to give notice to the
defendant, time to hear the parties making their case, time to examine the witnesses, to weigh the
evidence, to prepare, pronounce and give reasons for the decision, and last but not least to grant appeal for
review.

On the other hand, justice should not be delayed beyond a reasonable span of time: Protracta iustitia,
negata iustitia. Justice needs to be „prompt” to make it comprehensible to the parties and the
public. Justice done too late is no justice at all. Thus, there must be an appropriate time frame for justice.
This appropriateness is expressed as procedural justice.

There are people who think they have a hunch for the law so that they know the just solution
without much ado. The history of legal science shows repeated attempts at reducing
“complicated” legal deliberation and conclusion to the sudden brainwave that churns out the
result of an intricate case on the spot. The most recent attempt is a book by Christoph Engel
and Gerd Gigerenzer on “Heuristics and the Law”.

1 Hence the importance of legal effects research (Rechtswirkungsforschung), e.g., R. Gmür,
Rechtswirkungstendenzen in der Privatrechtsgeschichte, Bern 1981. F. ank K. von Bena-Bekmann
(2007).

2 The term hunch in law is attributed to J. C. Hutcheson, The Judgment Intuitive: The

3 Christoph Engel and Gerd Gigerenzer (eds.), Heuristics and the Law, 94th Dahlem
MIT Press. A description of the earlier attempts such as Phénomène Magnaud, Freirechtsschule,
Scandinavian “law as fact”, some American legal realist notions, is contained in W. Fikentscher, The
Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking, Background Paper No. 6,
Next to history, comparative law can contribute to this issue. Of Harun-al-Rashid, the Great Caliph, many stories are told of how he decided difficult cases having seen the proverbial flash in the pan. Max Weber believed this lack of general rules and the ensuing piece-by-piece subsumption of facts under these rules to be the general style of Sharia proceedings and coined the derogatory term of “Khadi justice”.  

Biographers of Justice Oliver Wendell Holmes, Jr., report that after the Chief Justice had assigned a case to Holmes to draft a decision for the panel, Holmes became nervous and fidgety for quite a while until he had in his mind “hit” the decision which he was now convinced to be the right one. Only then he calmed down and wrote down the draft decision for his colleagues. Holmes’ conviction was that principles and rules do not decide cases, but history, experience, and political power expressed, for example, by sovereignty. 

These “heuristic” methods of “hitting” the right solution to a case never took hold in most legal systems of the world. They stayed proposals connected with the names of single judges and certain “schools”. That law consists of principles and rules to be applied to a case is by far the dominant opinion everywhere. In 1952, Leopold Pospíšil asked the Kapauku (New Guinea highlands) who had watched a proceeding going on before big man and village, whether they found the judgment just, and if not, why. Three reasons for holding a judgment to be unjust were given: (1) the big man had applied the wrong rule to the case; (2) the big man had applied the correct rule to the case, but in a wrong manner, for example by not being impartial, or not listening close enough to the witnesses; (3) the rule was correctly chosen, and also correctly applied, but the rule seemed no longer to be just, and should therefore be dropped or changed. The answers reveal a lot: The Kapauku distinguish norm and fact, and understand the subsumption of the facts under principles and rules (norms). They also understand the difference between material and procedural law. And they conceive of a distinction between law and justice.

Different from economics, philosophy, sociology and all other social sciences, law needs to come up, at the end of the day, with a decision that changes the lives of the parties and possibly of many more persons. This decision has to be linked to facts of life. To whom shall the chance be given to bring the facts that will underlie the decision, to the judge(s), to the parties, to both, or to third persons? This problem is solved in very many different ways in the hundreds of legal systems all over the world. The principles of procedural justice depend on these possibilities.

in: Engel & Gigerenzer (as above), at 207 – 237, at 220 – 224, with references, the idea of momentarily heuristic law finding is refuted there, too. See also idem, Juristische Heuristik?, in FS Canaris, Munich 2007, 1091 – 1106.

5 W. Fikentscher (1975b), 161 – 222, e.g., at 181, 194, with references.
7 See notes 1101 f., above, and accompanying text.
8 See Chapter 1 III, at the end.
9 For a summary of principles of civil procedure see, e.g., Friedrich Lent & Otmar Jauernig, Zivilprozessrecht, 28 ed. Munich 2003, Chapter 2.
2. Maxims

All principles of procedural justice are culture-specific. Among the culture-specific principles of procedural justice are two that are of special interest here: (1) *iura novit curia* (the parties do not have to tell the law to the court), and (2) *ne eat iudex ultra petitum partium* (the judge should not go beyond the claims of the parties). Here are four examples: European Continental law applies both maxims: a plaintiff who forgets tort and only mentions contract can rely on the judge’s experience also to examine tort; but the judge will never decide on a point outside of the case (*Streitgegenstand*). In the USA, a judge will leave it to the plaintiff whether he/she wants to sue under contract or tort or both; the responsibility of the attorney is much higher; and the judge is limited by the pleas of the parties. In Islamic law, as well as in Japanese law, the judge applies the full extent of the law and the parties do not have to ask him to look for all possible foundations of the claims and defenses: the judge is free to make a decision that may surprise the parties because it regulates something the parties have not thought of. In Japan, this maxim is called *otoshi-dokoro* (to let the decision drop from above on a spot which may lie outside of the original case (*Streitgegenstand*). Traditional Pueblo courts may apply none of the two maxims: neither are they bound to check the whole body of the law before they decide, nor do they feel limited by the parties’ claims.  

These are the combinations of only two culture-specific procedural maxims. There are additional maxims (such as *audiatur et altera pars*, the work of the French juge d’instruction, the prohibition of *ex-post-facto* laws, etc.), and many more combinations. The student of the cultural anthropology of legal procedure has to be aware of this, in order to respect the diverse traditions and needs. It is impossible to discuss all variations here. Research in comparative legal procedure is rich and has to be consulted in the given situation (see bibliography, below).

3. Kinds of collisions between legal systems

Conflict of laws is best understood as part of a broader field of law which may be called “collisions of law”. Note that there do not have to be real collisions between legal systems. It is enough that there is a doubt as to which of several systems of law should apply whenever a case points to more than one. So a more precise expression would be “possible collisions”. There are five possible collisions of this sort: (1) Collisions as to “rank”, or “pre-emption”; (2) Collisions as to time (“intertemporal law”); (3) interreligious law; (4) interpersonal law; and (5), the field of interest here: interterritorial conflict of laws. No complete overview of this field of law can be given here. The focus is on interterritorial conflict of laws involving tribal law.

To (1): By virtue of “rank”, or “pre-emption”: federal statutory law that contradicts federal constitutional law can be nullified. Also, federal law ranks higher than state law in cases

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10 Sometimes also dressed into the words: *da mihi factum, dabo tibi ius* = (the judge says: ) you give me the facts, I’ll give you the law, so you don’t have to tell me the law.

11 The reason is the close-knit society of a pueblo: people know each other; Joe Sando (communication in 1996); for the similar Japanese *otoshi dokoro* principle, see notes 493 f., above. Otoshi dokoro means that the decision of a judge is *not* bound to the frame which is demarcated by the parties so that *ne eat iudex ultra petitum partium* does not apply.

12 In US law, the higher rank of the constitution in relation to federal statutory law follows from the US Supreme Court’s power to strike down Congressional laws that are contrary to the federal constitution, Marbury v. Madison, of February 24, 1803, 5 U.S. 137; 1 Cranch 137; 2 L. Ed 60
that concern a federal question or involves diversity of citizenship.\textsuperscript{13} EC law, as far as it goes, renders the law of the member-states of the European Union inapplicable\textsuperscript{14}. Art. 31 of the German Constitution of 1949 “breaks” state law, as the term goes. Especially in a federally organized country, this collision of rank is usually solved by constitutional provisions. Tribal law within the US is, generally, not on a lower rank than federal or state law.\textsuperscript{15} Ranking issues between federal and state law on the one hand and tribal law on the other are usually set aside by the law of jurisdictions.\textsuperscript{16} There are some marginal ranking issues also in regard of tribal law that are discussed under III (3) and (4), supra.

To (2): \textit{Intertemporal} law is frequent, and has a place, as a rule, at the end of an enactment. This law determines what happens to the legal situation as it existed until now (for example by granting “grandfather clauses”), the exact time when the new law will enter into force, and which cases belong to the old and which to the new regime.\textsuperscript{17} If the legislator overlooks this issue, the courts have a hard time assigning the cases to the old or the new law. The constitutional prohibition of an \textit{ex-post-facto} law contains an important principle of intertemporal law that in turn forms an essential part of a rule-of-law democracy.\textsuperscript{18}

Sometimes, intertemporal law has to be read into substantive law provisions. An example is 9 Navajo Nation Code, § 212 where the property regime of a married couple, for which Navajo law applies, automatically changes to Navajo law when the couples moves to live on Navajo territory. Navajo marital property consists of four categories: Her and his separate property, communal property, and customary Navajo marital property of the wife.\textsuperscript{19}

To (3): \textit{Interreligious} law solves possible collisions between different religious laws, as far as these laws go. For a valid marriage, some religious laws require the same religion for both

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\textsuperscript{13} The higher rank of federal law in relation to state law in diversity cases is regulated in 28 U.S.C. § 1332. On the higher rank of federal law in cases of federal question, see 28 U.S.C. § 1331 or 1343, or 27 Ruling Case Law 76. See also Canby (2004), 216 – 222.

\textsuperscript{14} Albert Bleckmann, Europarecht, 6\textsuperscript{th} ed. Cologne etc. 1997; Heymanns, § 1 V.

\textsuperscript{15} That state law ranks lower than federal law is one of the reasons why the „three sovereignties theory” does not work; however, see Judith Resnick, Dependent Sovereigns: Indian Tribes, States, and Federal Courts, 56 Univ. of Chicago Law Rev. 672 (1989); Sandra O’Connor, Lessons from the Third Sovereign, 33 Tulsa Law Journal 1 (1997); idem, Lessons from the Third Sovereign: Indian Tribal Courts, 9/1 Tribal Court Record 12 – 14 (1996); Gloria Valencia-Weber & Christine P. Zuni, Domestic Violence and Tribal Protection of Indigenous Women in the United States, St. John’s Law Review (1995):91, also in: Joe Carillo (ed.), Readings in American Indian Law: Recalling the Rhythm of Survival (1998). This theory integrates the tribes into the federal system of the US, however, the constitutional case law of the US Supreme Court, in accordance with the treaty power under art. II, sec. 2, cl. 2 of the US Constitution, does not regard the tribes as constituent parts of the US federal system; to this effect R. D. Cooter & W. Fikentscher (1998), at 295, note 27.


\textsuperscript{17} See Gerald Stourzh, Wege zur Grundrechtsdemokratie, Wien & Cologne 1989: Böhlau, at XII, note 2.

\textsuperscript{18} See Commentary to 9 NNC § 212.
husband and wife. A marriage between an Israeli and a Christian wife has to be performed in
Cyprus. For countries that follow the Islamic sharia, similar rules are in force. Erroneously, the Restatement (Second) assigned as late as 1971 the law of Native American tribes in toto to the category of religious law, and therefore does not discuss conflict of laws in Indian country. Very probably, there is religious law in Indian country, but the bulk of Indian private, remaining criminal, and public law is of course secular and therefore accessible for secular conflict rules. We do not discuss here Indian interreligious law which exists as far as Indian religious law extends.

To (4): “interpersonal law” has a long history and is probably the oldest of all collision laws. In the Frankish Empire (ca. 500 to 950 A.D.) many nations lived together. The Frankish rule was: Quislibet vivit sua lege (everybody lives under his or her tribal or similar law): the Franks under Frankish law, the Burgundians under Burgundian law, the Saxons – as far as Frankish permission went - under their law, the Langobards under Langobardian law, the Italians under modernized Roman law, the Gallic peoples under Gallic law, the Church under traditional Roman law, etc. This kind of legal pluralism is still important for some developed, developing and transient nations today. Interpersonal law could also be called the collision law built on tribal descent. It is interesting to note that the Franks treated the Christian Church and its personnel as a tribe. Modern interpersonal law exists, e.g., in form of so-called long-arm jurisdiction, which is in use, e.g., for serving purposes.

To (5): What is of interest to the present discussion is the law of conflict of laws of territorial states and state-like geographic areas. The First Restatement of the Law of Conflict of Laws starts from the premise that every state has its own law of conflict of laws. The Restatement of the Law, Second, Conflicts of Law 2nd, vol. I and II, states that “the world is composed of territorial states having separate and different systems of law” Thus, the prevalent rule in the modern world relies on territorial areas and their sovereignty systems, not on religions, nor on tribal descent.

This is reason enough to speak of conflict of laws in Indian country. “Choice of law” would be an expression equivalent to “conflict of laws” without a choice, as we have seen. Therefore, the expression “conflict of laws” is

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20 This information is from 1964. The law may have changed since.

21 This may require the conversion of the non-Mulim partner to Islam.

22 Restatement Second, vol I, Chapter 1, Introduction, § 2, Comment c.


24 See Chapter I IV., above.

25 E.g., Israel, South Africa, Navajo, especially in family and probate legal matters.


29 The Restatement Second, in spite of its title, prefers to speak of choice of law.

30 E.g., in property, inheritance, and tax law.
4. The structure of Chapter 13

Because of the multitude of topics addressed in this Chapter, some words on its structure are in order. The first seven chapters of this book discuss general issues of law and anthropology, such as social norms as possibly conflicting forums, attributes of the several cultures, and the analyses of foreign cultures. The discussion of the material contents of legal ethnology began with Chapter 8. A judge who is confronted with a case that involves legal-anthropological issues will begin to study here. The material contents of legal ethnology covers five fields (discussed in Chapters 8 through 12): family, personhood and constituted societal and social order, contracts, property, torts and crimes, and procedure. These five main areas together form what may be called the material law (discussed anthropologically and ethnologically in this book). However, material law does not enter reality by itself, but rather most often by procedure, because courts are needed to try to transpose material law into real life. These courts, personified by their judges, will ask themselves whether they should take up the case in the first place, in other words whether they have jurisdiction. After a tourist is mugged, she may go to the local court at the place where the attack took place, and might hear the local judge tell her: Go home to your country and try your luck there. Thus, jurisdiction is the point where a judge begins legal thinking. Then follows the procedure which should be followed to solve the case, and only then the material law which decides the case enters.

There is no world law. Thus, in terms of geography, on all three levels just mentioned the laws will be different (and often they are): There are differing material laws, differing procedural laws, and differing rules of jurisdiction. In a transborder case, usually the material laws, the procedural laws, and the laws governing jurisdiction, as to contents, conflict. Therefore, every legal system (US, California, Rhode Island, Navajo, Picuris Pueblo, Germany, France, Kyrgyzstan, etc.) has legal rules to decide these conflicts. These fields of law – existing in every legal system - are called “conflict of laws”. Hence, in a transborder case there there are jurisdictional conflict of laws, procedural conflict of laws, and material conflict of laws. This results, in a transborder case, in six steps that have to be taken to decide it: considering (1) conflict of jurisdiction, (2) correct application of the rules of jurisdiction, (3) conflict of procedure, (4) due decision in favor of a certain procedural system, (5) conflict of materials laws, and (6) application of the pertinent material law to the case at hand. To repeat: this six-step process is the line of thought the judge has to perform in a transborder case. In legal anthropology, a transborder case is present whenever the facts of the case affect more than one culture.

For the last issue no.(6), reference is to be made to Chapters 8 through 12 of this book. Chapters 8 through 12 above deal only with material law (6). This means that the issues (1) through (5) have to be dealt with in this Chapter 13. From this follows the structure of Chapter 13: (II) Conflict of jurisdictions; (III) appropriate jurisdiction; (IV) conflict of procedural laws; (V) laws of procedure; (VI) conflict of (material) laws. To illustrate, the cases will be mainly taken from Native American (“Indian”) law, as studied by Robert D. Cooter’s and myself.

The Restatement Second uses the following outline: “Conflict of laws” comprises three subfields: (1) judicial jurisdiction and competence; (2) foreign judgements, and (3) choice of law. We accept the distinction between judicial jurisdiction and choice of law which we call, for reasons just mentioned, conflict of laws. Foreign judgments are a matter of procedural conflict of laws, along with other matters, see below IV C; Restatement Second, vol. I I, Chapter 1, Introduction § 2.
5. Aspects of justice

This is no jugglery with concepts of law. The title of this Chapter aims to indicate, that this involves serious issues of justice, there are serious issues of justice starting with the justice when accepting a case that is troublesome enough for the parties to care for a legal decision. A judge may not say that the case is to be dismissed because it would be too much work to decide it. To decide on the appropriate jurisdiction is a matter of justice, an aspect that may be called jurisdictional conflicts justice. Moreover, the rules of the chosen jurisdiction should be justly applied because there is an inherent jurisdictional justice. Next there is a justice issue determining the appropriate procedural system and thus a procedural conflicts justice. Of course, the procedure as such should correspond to the requirements of substantive procedural justice which, for instance, is denied when witnesses are not heard whose statements are relevant for the case. Picking the wrong material law may cause grave injustice, for example, when a divorce case from a matrilineal tribe is decided in a state court used to apply patrilineal state divorce law. Following Gerhard Kegel, this kind of justice may be called (material) conflicts justice, or collision justice. Finally, deciding a case even under the correctly applicable law can end with an unjust decision.

To conclude: When a case is a cross-border case, for instance transnational, or affecting the law of more than one state, or affecting both tribal and state(or federal) law, the rules of conflicts of law have to be examined and applied. There are conflicts rules for jurisdiction, for substantive procedural law, and for the material law that is to decide the case under law of a certain nation, tribe, regional entity such as the European Union, the law of nations, religious law, etc. To every jurisdictional, procedural, and material law belongs a set of rules of conflicts of law. Thus, all three sets of rules of conflicts of law are national, tribal, or regional: There is no “world law” or “universal law”, neither on jurisdiction, nor on procedure, nor as to the material law, nor of conflicts rules for either one of those three. International jurisdiction follows the conflicts rules that determine the applicable material law. Procedure almost always follows the lex fori, the procedural law of the forum, that is, of the court of jurisdiction, so that a federal court will, for its procedure, apply the federal rules of civil or criminal procedure, a New Mexico court will apply the procedural rules of the State of New Mexico, and a tribal court the court rules of that tribe. As to what material law will decide the case (Arizona or Swiss or Paraguayan law), is determined by the substantive conflicts of law rules, for example the conflicts rule of the State of South Dakota that for a deceased Dakota the funeral rites of his tribe apply.32

II. Conflict of jurisdictions

Distinctions not easily understood by non-lawyers are to be made between jurisdiction substantive procedural law, and the material law which decides the case. As discussed, all three concepts underly the dichotomy of having to solve the conflicts issue first, and then the substantive issue. This leads to the six-step process already mentioned The first question a judge asks himself before accepting a case for decision is whether there is jurisdiction. “Why exactly does the plaintiff, and why does the defendant answering the plaintiff, exactly come to me?” says the judge. Thus, the issue of jurisdiction answers the question why the case

lawfully should go before the court to which it is addressed. It would be unjustified if a Belgian court would assume jurisdiction in an Australian adoption case the facts of which have no relation to Belgium. Doctrine would speak of forum non conveniens, of unfitting jurisdiction (see below).

Thus, the theories and the jurisprudence of jurisdoction are not negligible. They are important indeed because without them one of the pillars of a rule of law state would be damaged: the rule that everyone has a constitutional right to her or his appropriate judge. It is a part of this constitutional right to the appropriate judge that this judge does not content herself or himself to merely look at the lex fori, but meets the duty, herewith included, to look out for the appropriate material law (see VI. 8., below).

III. Appropriate jurisdiction

Jurisdiction can have, as indicated above, many different meanings. In Indian country, jurisdiction is to be understood as the authority of a government to govern. In Indian country adjudication, similar to US federal and state law, a practice has developed according to which three elements must be met in order to give a court judicial jurisdiction: Under US substantive jurisdiction law, jurisdiction has to be subdivided into three categories, personal, subject matter, and territorial. There seems to be no fixed, prescribed order by which the three requirements are to be examined. The “the three pillars of jurisdiction” in Indian court practice are:

1. **Person.**

   Personal tribal jurisdiction requires a personal relationship to a tribe to be determined, such as membership, domicile, residence, abode, or presence in passing. Federal and tribal law work together to define a person in the sense of this requirement. Personal jurisdiction implies that the judge has the legally prescribed relationship to the parties, plaintiff and defendant. A federal judge who is asked to decide a custody dispute between a Navajo husband and wife would say that there is no personal jurisdiction, and a Sandia Pueblo tribal judge asked to sit in a federal tariff case would say the same.

2. **Subject matter.**

   Again, federal and tribal law together help defining whether a subject matter belongs to a certain tribal jurisdiction. Here, a negative approach (“minus method”) is often helpful. Tribal jurisdiction does not cover the crimes of the Major Crimes Act. Neither does it apply to admiralty in case of a landlocked tribe, nor to immigration to the US.

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33 Justice Felix Frankfurter once said that there are at least fourteen different meanings of the term jurisdiction. What follows in the text is a condensed description of the meaning and working of jurisdiction in comparative legal perspective for the purpose of an anthropological presentation. All legal doctrinal niceties are left aside.


Tribal jurisdiction has been cut down by Congress and case law. For example, in the Crazy Horse Malt Liquor Case, Hornell Brewing Co. v. Seth Big Crow Judge Stanley E. Whiting of the Rosebud Reservation tribal court ruled that the Crazy Horse family has a "post mortem right of publicity" in the name of Crazy Horse, even though Crazy Horse (Indian name: Tasunke Witko, d. 1877) did not commercialize his name during his lifetime. This led to an apology to tribal members by several brewery companies in 2001. After an eight year legal battle, the Stroh Brewing Company, owner of G. Heileman Brewing Company, one of the original defendants, settled with the Estate of Crazy Horse and the Rosebud Sioux Tribe. The settlement agreement provided for a public apology and acknowledgment of the Estate's right to protect the name of Crazy Horse, and for delivery of culturally appropriate damages in form of seven race horses and thirty-two Pendleton blankets, braids of tobacco, and sweet grass, in compensation for the insult, and the defamation to the spirit of Crazy Horse. However, the Estate's claim that the tribe has jurisdiction for injunctive and declaratory relief under tribal law was rejected in Hornell Brewing Co. v. Rosebud Sioux Trial Court of Nov. 17, 1998, 133 F. 3d 1087 (CCA 8th, Judge Lay writing for the court; no dissents) on the ground that under Montana v. United States, 450 U.S. 544; 101 S. Ct. 1245; 67 L. Ed. 2d 493 (1981) the Estate lacks subject matter jurisdiction for "claims against the non-Indian breweries". The U.S. Supreme Court in Montana had decided that a tribe has no subject matter jurisdiction over on-reservation hunting and fishing activities of non-Indians on on-reservation fee-lands owned by non Indians, unless there are consensual relationships with the tribe or its members, or the activities amount to a conduct threatening the political integrity, economic security, health or welfare of the tribe. The Federal Court of Appeals held that the breweries' use of the name and memory of an Indian chief for the manufacturing of malt liquor was such an activity of non-Indians, with neither exception applying. Since the liquor was not sold on the reservation, no health risk existed.

Hornell overexpands Montana in several respects: The CCA decision leaves open which claim it addresses: a claim under the federal Arts and Crafts Act in eventual combination with the tort of breach of statutory duty, a right of publicity claim, an intellectual property claim, or a right of privacy claim. Rather, the decision uses subject matter jurisdiction, like a fence around the reservation against all kinds of claims, thus contributing to a containment policy contemporarily rising in strength (see text near note 1142, below). However, it is doubtful whether jurisdiction can be used this way. Jurisdiction is a set of requirements for the validity of a distinct claim. Also, Montana discusses administrative law, while Hornell concerns a civil matter. Regarding the merits of (any such possible) claim it is furtermore questionable whether it is good constitutional law that an Indian tribe and its members are barred from defending themselves against commercial torts committed by outsiders through curtailing tribal jurisdiction. To refer the tribe and its members to federal or state courts ( as Hornell does) is no convincing remedy since these outside courts may speak for a business-minded culture to which the tribe may not belong. Finally, Montana applies to fee-land and tortfeasors on this land. Both circumstances lack in Hornell, not to speak of the difference between hunting/fishing and abusing a deceased person's name and memory. Hunting and fishing on a limited territory is different from abusing a deceased chief’s name and memory nation- or worldwide, and the Rosebud reservation is no fee land but tribal land. Thus, distinguishing from Montana would have been closer than stare decisis.

3. Territory

Tribal jurisdiction ends, as a general rule, at the border of the reservation. Off-reservation
events or things cannot be tried courts. However, it is enough that the effects of an act, which may have been performed outside, takes place inside. Territorial jurisdiction means the competence of a court to decide within its correct precinct, so that an Alaska court will not hear an Oregon divorce case, for example.

IV. Conflict of procedural laws

A conflict between several procedural laws that offer themselves for consideration usually is promptly to be decided under the internationally accepted rule that a judge may apply the procedural rules applicable to his or her court (lex fori). Conflicts doctrine says that in substantive regard procedural law follows the law of the place of the court. In special transborder cases, this does not prevent the judge to make rare concessions to foreign rules of procedure when the application of lex fori alone would lead to unacceptable results (for example in cases involving a statute of limitation).

1. V. Substantive laws of procedure

Thus, once jurisdiction is established, the case is tried according to the lex fori rules of civil, administrative, or criminal procedure. These are the substantive procedural rules. They govern, for instance, how documents are served, hearings are conducted, witnesses are sworn in, appeals are made, etc.

VI. Conflict of (material) laws. A critique of lex fori in substantive conflict of law rules cases

Alongside jurisdiction and substantive procedural law, there is a third category of legal norms – the most important ones for the outcome of a cross-border case: the substantive rules of conflict of laws, for example the conflict-of-laws rule that assigns a contract case to the intent of the parties instead of to the language in which the contract is made. A conflict-of-laws rule attaches a cross-border case to a certain legal system for decision.

On the one hand, there is material law, that is, national, tribal, denominational, etc., law telling about the material contents of law (a promise must be kept, a thief goes to jail, etc.). On the other hand, there is a body of a less conspicuous number of rules that tells about the conditions under which the principles and rules of the material law ought to be applied whenever one national, tribal, denominational, etc., law collides with another. If a Frenchman is married to an Italian woman, and their three children live in Norway, California, and on the Blackfoot Reservation, and the Italian mother dies leaving real estate in Austria and in the Netherlands, the French widower and the children will want to know whether the probate rules of France, Italy, Norway, California, the Blackfoot Nation, Austria or the Netherlands’ apply, and should more than one of the laws apply which one prevails.

Legal rules and principles that govern these issues called collision laws, and the most important field of these collision-solving norms is called “conflict-of-laws”, or, taking a part for the whole: “international private law” (there is also international criminal law, international tax law, etc.), or: “choice of law” (but in many areas of conflicts-of-laws there is no choice, only binding law). “Conflict-of-laws” is less conspicuous than “substantive law” because many cases develop with one and the same legal system, stay there and no collision with another
legal system takes place. But growing exchange and developing trade have led to an increase of the number of collision cases. Thus, the question whether tribal law includes conflict-of-laws rules is not academic.

Every material law has its little sister, a set of conflicts rules. Even the solution of a seemingly merely “national” case, such as buying a softdrink in a restaurant, or a “lemon” from a used car dealer around the corner, has an invisible short chapter to be placed before the decider gets into conditions, warranties, small print, etc.: This sales case has to be decided under Michigan (Ohio, Hawaii, Jicarilla Apache, etc.) law.

Only after such an attachment has taken place, the material law which decides the case can be looked up and applied, for example the law of contracts, the law of torts, administrative law, or constitutional law (see Chapters 8 through 12, above).

1. General considerations of reasons for conflict-of-laws rules, especially in Indian country

A local court sometimes needs to apply foreign law to resolve a dispute. Tribal codes increase the possibility that a non-Indian court may apply tribal law to resolve a dispute. This enhances the identity of the tribe whose law is applied. Triggered by an ongoing globalization of life, cross-border-cases currently considerably increase in number, worldwide and in Indian country.. For example, if a French couple who live in Berlin dispute over a divorce, the Berlin court will apply French law to decide the dispute. Similarly, if two Navajos who are married and live in Berlin owning a rug shop seek a division of their marital property from a Berlin court, the court has to consult Navajo marriage property law to resolve the case, which makes more sense than applying German marital property law to a Navajo marriage, or sending the couple home onto the reservation. To do so in Berlin, the parties have to argue Navajo law before the Berlin judge, which is difficult unless they can refer to Navajo law in a way that is accessible and comprehensible for the judge. A Pima Maricopa couple living and working in Paris wants a divorce there. Is it just to submit them to French divorce law? Or should the French judge send them home to Sacaton, AZ? “Conflicts justice” requires the French judge to investigate Pima Maricopa divorce law and apply it to the parties as (materially) just as possible. A Hausa mother from Nigeria living in Heidelberg asserting the validity of a Hausa child adoption and will entrust the decision to a German judge who may be required to study Hausa adoption law

When two Navajo, as plaintiff and defendant, are involved in a car accident that occurred on the Hopi reservation, which law applies: Navajo or Hopi? When a member of the Jicarilla Apache tribe buys a car in Santa Fe, NM, and refuses to pay the installments claiming that the car does not properly work, and the dealer sues the Apache for the remaining balance of the price, or for repossession of the car, should the dealer do this in a New Mexico court, or in Jicarilla Apache? And in either legal system, which substantive law applies, New Mexican or Jicarilla Apache? In such a case can, or should, the New Mexico court apply Jicarilla Apache sales law, or the Jicarilla Apache court New Mexican law, or each court its own law? May one, or all, courts involved deny to decide and refer the case to the other? When a Lakota tribal leader dies in a South Dakota hospital located outside the reservation, can his relatives claim the body for having an appropriate tribal ceremony inside the reservation land? In this case, is the claim that has to be examined by the court a claim under Lakota law, or does South Dakota state law apply? And which court should apply what law? Can either court involved refer the case to the other jurisdiction?

a. If Americans followed the European example, state and federal courts in America
would in such cases apply tribal law to decide cases. Similarly, tribal courts would sometimes
decide cases by applying the law of another tribe, state, or the federal government.
Unfortunately, the tribes and the state and federal courts have done little to develop the
document of conflicts of law as applied to tribal law. The application of foreign law by a court
implicates national identity. In our example, a court in Berlin that applies Navajo law to
decide a divorce case recognizes the power of the Navajo Nation to make law. Conversely, a
court’s unwillingness to apply foreign law withholds recognition of the power of the foreign
nation to make law. Thus the development of the doctrine of conflict of laws contributes to
the strengthening of national identity.

(1) Besides raising an identity issue, conflict-of-laws rules imply an issue of justice.
“Collision justice” is the general term, applied to cross-border cases “conflict justice” is the
more specialized expression. Both types of justice are different from the justice the parties
appeal to when the applicable law is to be applied to their case. “Conflict justice” deals with
the question whether it is just to refer to a certain legal system for deciding a case. It does not
deal with the question whether the application of a rule taken from a given legal system to a
particular case is just. To illustrate: If a car has been sold by an Albuquerque car dealer to a
Navajo on the Navajo reservation, and the car is repossessed from Navajo territory because
the Navajo asserting that the car didn’t work properly allegedly did not pay the installments,
what corresponds to “conflicts justice” more: the – easily accessible - sales laws of New
Mexico, or the - less-known - sales law of the Navajo nation? This justice issue has to be
decided, and the decision should hopefully be the same whether a New Mexico state court or a
Navajo court decides the case according to New Mexico or Navajo conflicts law respectively.
Identifying a culture, and hereby a law, calls for rules that decide such conflicts-of-law or
choice-of-law. These rules exist, because every identifiable law must have them in order to
declare when it wants to be applied, and when not. In Indian cases, two types of conflict-of-
law rules are discernable: (1) conflicts between the laws of more than one tribe; (2) and
conflicts between the law of a tribe and federal, state, international (e.g., UN) law or the law
of a country other than US.

(2) The resort to conflict-of-law rules prevents what in crossborder cases is one of the most
unsatisfactory solutions: that a court indiscriminately applies its own law (the lex fori, the law
of the court). Conflicts rules recognize the truth that “conflict justice” often requires the
application of a foreign law instead of the lex fori (a discussion in 8., below)

For a court to be able to apply a foreign law, the latter must be known. Legal systems differ in
how to inform courts of foreign laws. Some oblige the judges to assemble the necessary
information, others treat foreign laws as facts that have to alleged and proven by whosoever
wants to have them applied. Both methods imply that an identifiable foreign law exists.
Having a law means having a culture. Therefore, rules of conflict-of-law are an infallible test
for the acceptance of an identifiable foreign culture. Reversely, accepting a foreign culture,
conflicts justice requires – in appropriate cases – to apply foreign law.

(3) Crossborder cases may bring about the application of a foreign law in a country whose
courts, or other (e.g. administrative) agencies, are bound by conflicts rules to do so, or prefer
without being bound to, applying the foreign rules. This is not an inroad to the sovereignty of
the country whose courts apply the foreign law, because declaring a foreign law applicable is
nothing but the exercise of one’s own sovereignty The same holds true for legal sanctions. It
is within country B’s sovereignty to refer to the law of country A. It is also within B’s
sovereignty to hold applicable the law of country A and A’s eventual legal sanctions to be
executed, or otherwise followed, in the country B. The application in B of the sanctions under A’s law can be handled in either two ways: (1) giving executable effect to the foreign sanction, a method called “full faith and credit” to be given to the foreign sovereignty’s legal order, or (2) choosing the weaker form, called “comity” (Latin comitas, comradeship), when A may reject the idea of granting full faith and credit to B’s decision, but grant that B’s sanctions become respected in A. Both ways exist for reasons of good international, federal, or state-tribal cooperation.

(4) There is, of course, the often raised objection that it is too cumbersome to work with that many laws. A lay person may be confused by realizing that all nation states of the world, about 200, have different laws (also called, in this context, legal systems), and that each law has its set of norms of conflict-of-laws implemented by procedural rules both in general and concerning full faith and credit, and comity, in particular, and all this preceded by choices of jurisdiction. Why not one world law, might this person ask.? Confusion may increase further once it is realized that many of these 200 nation states are homes of a plurality of legal systems (see Chapter 1 IV.). The plurality may exist vertically (constitution, regional, state, sub-state units) or horizontally as in a federation. Moreover all these sub-national legal systems own their respective body of conflicts rules. Thus, the US have more than 50 different laws. English, Scottish, and Northern Irish laws are different. Spain possesses her “foral laws”. Germany knew “interzonal law” from 1945-1990. Canada and Australia have provincial laws.

(5) In some tribes, Indian Code law itself may concern conflict-of-laws in Indian country (such as in White Mountain Apache, and in Navajo). Relevant code provisions are not frequent, and material discussing them is even more scarce. Still, conflict-of-laws in Indian country exist and is an important field of tribal law. It deals with the situations in which the case under consideration reaches into more than one jurisdiction, and therefore into more than one substantive tribal law. Another name for conflict-of-laws in Indian country is cross-border tribal law.

(6) Theory and practice of conflict-of-laws ought to be placed into the wider setting of possibilities to avoid collisions with competing systems of law when a case reaches into more material laws than one. It is not a conflict-of-law case whenever one law for want of an applicable rule within its own system borrows legal rules from another or several other systems of law. This may be the case when one tribal law lacks applicable law on the issue at hand and the judge looks around to find a fitting rule in other systems of law, for example state, or federal, or tribal.

(7) A general division of collision cases can be made by distinguishing pre- and post-decree tools of bringing the case under another jurisdiction and/or material system of law. Sometimes a judge sees her or his own jurisdiction and/or material law unfit for the decision of the case. Instead of taking on the case and searching a fitting foreign material law, a judge may refer the case to another jurisdiction for forum non conveniens, or by rule of comity (especially “judicial comity”). This occurs before the decree is envisaged. If however the judge takes on the case and is incontent with the application of own law for reasons of conflicts justice, the rules of conflict-of-laws are the appropriate remedy.

The judge is then referred to another legal system. Hereby, a distinction will have to made: If that reference is meant to include the conflict-of-law rules of that other legal system, thesrules may refer the judge back to the own system, or to a third system. Then the issue must be decided when and where these references should be stopped. About this “breaking
off” of the reference, pertinent conflicts law may be available. However, if the judge is merely referred to another material law, this law decides the case and no further references, back, or to a third legal system, take place.

Post-decree collisions occur when at least in one jurisdiction a court decision has been produced, and the questions arises whether this decision unfolds effects in one or more other jurisdictions, and which these effects are. Full faith and credit is one means of avoiding conflict, comity another. Asymmetric solutions will have to be paid attention to. Another instrument of recognizing decisions from other jurisdictions is the acceptance of concurring jurisdiction. However, concurring jurisdiction may lead to different kinds of result:

(8) Concurring jurisdiction may mean that decisions from more than one jurisdiction concerning one and the same case coexist and support one another. Concurring jurisdiction can also lead to decisions from more than one jurisdiction concerning one and the same case contradicting each another in their outcomes. Then, for example, a marriage valid in one legal system, and at the same time made invalid or divorced in another; a child may be marital in one tribe and born out-of-wedlock in another; or a corporation may exist in one country and can do its business there, but not in another for want of being legally existent. For the parties and third persons involved, such as creditors or debtors, these “limping” legal relations may be quite troublesome.

(9) One purpose of conflict-of-law rules is to avoid them. In this sense the following remarks should be seen with regard to a comparison between pre- and post-decree instruments of avoiding or straightening out collisions of laws. Conflict-of-laws in Indian country is not safe from these collisions.

Conflict of Laws in Indian Country and tribal or national identity are closely connected (for identity see Chapter 3 I. 4., above). Most of what is called “law” in this world is attached to nation states and comparable sovereign units36. If a group of humans have a law, they are somebody. If not, few people will recognize them as an entity, politically, culturally, as having rights. Having no law often means having no rights. Legal practice teaches that the first question in solving a case is whether the case has to be viewed under British, Spanish, Brazilian, German, Dutch, EU, federal US, Ohio, Hawaii, Navajo, Mohawk, etc., law. Law attached to non-states and comparable sovereign units exists, but it is not as common as national laws: United Nations law, international public law, canon law or law of any denomination, gypsy law37, etc..It follows that speaking of law usually requires a qualification: British law, EU law, Navajo law, gypsy law, etc. Each law of this kind consists of numerous binding social norms, called rules, each rule being composed of a set of requirements (if……, and if…..) and a sanction (……, then ……..). The rules can often be grouped together to principles38. Together these rules and principles make up what is called the substantive law of a nation, tribe, denomination, etc.

36  Sovereignty in this sense is the power to make binding, social norms for a number of people. Their binding

nature  is derived from an authority (which distinguishes law from morals).


It is evident, that conflict-of-laws is *no international law (nor a part of it)*, but *national law or part of any other of the many legal systems*. The term “international private law” for the non-substantive-law part of a legal system is misleading. Not the law is international, the cases are. Conflict-of-laws is just as national law as is material law. By consequence, conflicts-of-law norms of one legal system may be different from those of another, and indeed, they often are. Navajo conflict-of-laws rules differ from New Mexican and from Arizona conflict rules. There have been many attempts to make conflict rules more uniform because differing conflict rules lead to contradicting applications of rules of material law, and this again to disparate, non-uniform decisions. New Mexico follows the 1st Restatement of the Law, which grew from European tradition, whereas Arizona follows the 2nd Restatement, the modern US (“interest”) tradition. In all, these attempts were far from successful.

c. There are consequences of the fact that every legal system of necessity contains *its own set of conflicts rules*: Although a truism, it had to be learned, as may be gathered from the anecdotal history of this book: When Robert D. Cooter and I decided, in 1988, to join previously individual efforts in the anthropology of law in order to study and to make available interior laws of North American Indian nations, this is what we had in mind, and we still hold to it: Like single persons, certain groups of persons may exist as identifiable units. A cinema audience, and a bus load of people are examples of such groups, but they are not identifiable as units. Nations, tribes, peoples, clans and certain other groups are identifiable units. Social scientists list various conditions that have to be met before a group of persons can be named a nation, tribe, clan, such as a common name (which may be different whether given from outside – Navajo – or from inside – dinee), a common history, a language or dialect, or common beliefs. These and other requirements are debated. One unquestionable requirement for holding a group of people to be a nation, tribe, clan, lineage, etc., an identifiable unit is a common law. Whenever you may call a legal system “your own”, you are an entity that may have duties and rights.

From our studies in certain localities (Cooter: Papua New Guinea, Warm Springs, Tohono O’odham; Fikentscher: Ojibway bands, San Juan Pueblo, Thailand, South Korea, Japan), we knew that law is an important factor for a group’s self-identification. But knowledge of the laws of North American Indian nations appeared to be very limited, and access difficult. Of course, there was “Indian Law”. But soon it appeared that this is federal or state law for Indians, not interior tribal law of Indians. Lawyers to whom we talked often had this reaction: Indians? Do they have law at all? Sure, they have primitive religions and their way of doing things. But law? Never heard of it. We have brought law to them. It’s called Indian Law. You have to look there. This attitude behind this and similar statements was not confirmed by our observations after we made it our business, in 1988 to visit Native American tribal courts and ask.

d. While it is true that every legal system, in history and presence, of necessity owns its conflicts-of-laws rules and principles, and if it is further correct that a legal system is an essential part of a nation’s, tribe’s, or other group’s identity as a unit, the inclusion of a

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40 Our first publications surveyed the unwritten legal customs of 37 nations, mainly in the North American southwest. In 2000, we turned to Indian tribal code law, see Cooter & Fikentscher (1998; 2008).
conflicts-of-laws regime is part of this identification. In other words: Since you have, as part of your law, rules and principles of conflicts-of-laws, you are somebody. Being able to handle multi-jurisdictional cases, as to the applicable law and its procedural side: jurisdiction, you are a respected member of the community of law-possessing nations, etc. Professor Christine Zuni Cruz, of the University of New Mexico Law School, former Judge in Taos and now Appellate Judge in Isleta Pueblo, once remarked that tribal law, as the interior law of the tribe, has a life of its own and is invisible to outside courts and the legal science. This may be one of the reasons why Indian nations and tribes including the Pueblos are less respected than they could be, especially in view of their often highly developed legal culture and their economic importance, not to speak of what may be called the rule of respect for other cultures and the rules of intercultural justice. It is necessary, but not enough to say that Indian tribes have their own laws (customary or codified). One should point as well to the fact that every substantive law is accompanied (and, logically, made applicable) by a sub-system of conflicts rule. This calls for a treatment of Indian tribal conflicts-of-laws rules and principles, in connection with what is to be said in this Chapter about procedure and applicable law.

2. Importance of conflict-of-laws rules

The realization that the Indian nations own – without exception – collision laws, in the form of conflict-of-laws rules and principles, has two important effects:

a. The first is the application of the laws of other legal systems by tribal courts
Every tribal court must be willing, and equipped, to apply another (tribal, state, federal, or foreign) law whenever the principles or rules of the own conflicts-of-laws regime, for decision of a pending case, point to the applicability of that other law. This may be difficult, cumbersome, and unusual for a tribal judge (to learn a foreign law, experts need to be heard, etc). There are other situations in which a tribal court may be called to apply outside law, and they will have to be distinguished from the conflict-of-laws instructions to apply outside law; see below. We are here concerned only with the legal duty to apply the appropriate law, as imposed by conflict-of-laws rules. It is possible that the conflict-of-law regime of a nation or a tribe limits itself to one single provision or custom law rule: the application of the lex fori. This means that the own legal system does not want to deal with any non-own law. Where the court is, the law valid at this place decides. The judge may say: I apply only our own law and nothing else –the rest of the legal world does not exist for me. This is possible, and legal

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41 W. Fikentscher (2004); on the issue of national, tribal etc. identity from a theoretical point of view, see Ch. 3 II.4., above.
42 See Postscript, below.
43 Our materials on conflicts-of-laws are mainly drawn from Navajo, White Mountain Apache, Pueblo, and Lakota sources, implemented by occasional references to other tribal laws, customary or codified.
44 “That other law” may again include a conflicts-of-law regime, or the reference to “that other law” may point to its substantive law only. Whether the former or the latter applies depends on the interpretation of the conflicts provision of the former. This is the intricate field of renvoi: Zurückverweisung (“return reference” = sending the case back to the original legal system which may accept or not accept the return), and Weiterverweisung (“third-legal-system reference = sending the case to a third legal system which again may accept or not accept the third-legal-system reference).
45 Qui eliget iudicem eliget ius (choice of judge means choice of law).
under the rules of sovereignty, while quite often unjust to the parties. If it opposes the
international and interlocal policy of uniformity of results – whenever possible, it is unusual
and illegitimate. It runs against rules such as full faith and credit, and comity. A car
repossession, for example illegal under Navajo law, should not be decided according to New
Mexico, or Arizona, law, but according to Navajo law, not only by a Navajo court, but also
when the case is pending before a New Mexican, or Arizona, court\textsuperscript{46}.

b. The second consequence of conflict of laws in Indian country is the \textit{application of tribal
laws by courts of other legal systems}. This is the other effect of realizing and acknowledging
the tribal conflict-of-law regimes on the other side of the fence: Since every legal system of
the world has its own conflict-of-law regime, anyone of them may point to the applicability of
another nation’s or tribe’s law. This philosophy implies to let any court in the world decide a
tribal case under the law of that tribe, and to let either the court investigate that law (e.g.
according to § 286 German Civil Code of Procedure or a comparable provision) or the
plaintiff prove, and the defendant disprove, the applicable tribal law if necessary. The same
philosophy lies at the bottom of Allen Jim v. CIT Financial Services Corp; 87 N.M. 362 (of
April 2\textsuperscript{nd}, 1975). In that case – already mentioned above - the Supreme Court of New Mexico
instructed the District Court to find out whether Navajo or New Mexican sales law was
applicable under the New Mexican conflicts-of-laws rules. At least in the European tradition,
a French, Dutch, Italian, etc. court, would not hesitate to decide a case under Picuris Pueblo
or Jicarilla Apache law, whenever the conflict-of-law provisions points to it. The US
American legal tradition is no different, in theory and practice. Lacking, however, is the
knowledge of the tribal laws in the US, including their conflict-of-laws regimes. The respect
for Indian (and any) tribal law will grow when the acknowledgement of tribal conflict-of-laws
principles and rules becomes commonplace. He who respects tribal laws will respect tribes.

3. \textbf{Cultural justice, and intercultural justice}

\textit{Cultural justice} and \textit{intercultural justice} are other aspects. It is of legal-philosophical nature
and starts from the fact that every nation owns its substantive and collision law, “nation”
standing for modern nation states, their supranational combinations such as the EU, as well as
for traditionally ordered nations, tribes, peoples without states such as the Kurds, the Gypsies,
and etically recognized religious denominations. Every one of these entities has its own
culture\textsuperscript{47}. The desire of all people assembled in one of these entities to possess their own way
of life that distinguishes them from other such entities deserves – if pursued in tolerance of the
others - to be respected and protected. This includes the protection of their name, history,
language, economy, law, and belief system, in short, their culture. The sense of justice,
inherent in any kind of law\textsuperscript{48}, commands rendering justice to any culture. This justice due
to any culture has been called “cultural justice”:\textsuperscript{49}. Cultural justice includes both respectful

\begin{itemize}
\item \textsuperscript{46} Allen Jim v. CIT Financial Services Corp; 87 N.M. 362 (of April 2\textsuperscript{nd}, 1975), for a discussion
of the case see Cooter & Fikentscher (1998), FN 121.
\item \textsuperscript{47} On the concept of culture see Chapter 5 I.
\item \textsuperscript{48} There are some problems hidden here. One issue is whether the concept of law requires a
direction towards the sense of justice or not. Contra, e. g. Pospišil; pro: e. g. Fikentscher, cf., Chapter I
IV. 6., text near note 51, above.
\item \textsuperscript{49} W.Fikentscher, The Sense of Justice and the Concept of Cultural Justice: Views from Law
and
\end{itemize}
distancing from interferences into other tolerant cultures, but also criticism of and resistance against violent and intolerant cultures that try to disturb mutual respect.

This attribution of the sense of justice to taculture, for example a tribe, leads to another step of attribution of the sense of justice: If *every* nation or tribe may claim justice owed to itself, the network consisting of these duties, to treat cultural entities with their respective justice, may be called “intercultural justice”. From the inherent ownership of nations, tribes, and comparable entities in a material law and its conflict-of-laws regime follow (1) the duty of the courts of a tribe to apply outside law whenever appropriate under the own conflicts rules, (2) the duty of all legal deciders in the world to apply the inside law of that tribe in any reverse situation, (3) the duty to provide cultural justice to any culture – both respectful and critical, and (4) the legal and moral rights and duties in conformity with the principle of *intercultural justice*.

4. Conflict-of-law reference and gap-filling references

The recognition of tribal laws as laws fit for conflict-of-laws should not be mistaken for a reference from one law to another law. This is *gap-filling* by seeking guidance in norms of other tribal or non-tribal legal systems, not a conflicts issue. A conflict-of-law issue exists when the principles and rules of any conflict-of-laws regime prescribe the application of a law other than the law of the decider; then, a Swedish court may have to apply Mescalero Apache law, and vice versa. However, this is not so in certain other situations where a court applies foreign law, and these situations have to be distinguished from conflict-of-laws. There are four “other situations” in this sense.

a. Express reference in one legal system to another legal system, or parts of it, as binding law within the first legal system, for example when a tribal constitution declares state law as one of its sources of law.

b. Without express reference, and as a softer instrument, compared to (1), the use of outside law “for guidance” because the own legal system is mute on and thus contains a gap which must be filled.

c. State law binding the tribe and thus binding the tribal court to apply it; and (4) federal law binding the tribe and thus binding the tribal court to apply it. For each of these four possibilities (see, for example, Section 8 of the New Mexico Gaming Compact with Native American tribes, new Mexico Statutes 11-13-1, however Pevar (1983) 99ff, 141 ff.).

d. Federal acts and rules for policy reasons, e.g., in full and faith reciprocity situations (see Laurence 1998, 28).

Therefore, it is not necessarily a matter of conflicts of law when a tribe accepts as its own law (1) references to outside law, (2) guidance by outside law, (3) state compact and other provisions on the generation of which the tribe had an influence, and (4) federal acts and rules for policy reasons. It should be noted that all four variations of outside law as inside law

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involve genuine interests of the receiving legal culture.

5. A historical sketch (except for the footnotes\textsuperscript{51} and\textsuperscript{52} and their references, this text of mainly theoretical interest is not included)

6. The present state. The limitations theory

In the US, including Indian Country, is therefore conflict-of-laws examination superfluous?

a. To answer this question, the difference between material, procedural, and jurisdictional laws should be accepted. Checking the three fields of civil procedure, conflict-of-laws, and Indian law, for the purpose of answering the question what role conflict-of-laws might play in Indian and tribal law adjudication, conclusive results are scarce. Writers of civil procedure and jurisdiction, and cases from these fields, show little interest in conflict-of-laws, or Indian or tribal law. The same may be said of the other side. Indian and tribal law have their established jurisdictional patterns, but these patterns are not linked to general jurisdictional theory. An integrating theory appears to be lacking.. Federal and state procedural laws differ in fact as to their approaches to jurisdiction, and Indian and tribal laws differ as well.\textsuperscript{53}

b. Native American and Indian Country jurisdictions may work as “limitations” to federal and state law. One may assume that there are at least three types of “checklists” for establishing jurisdictional requirements: one federal, one for each state, (with varying details), and one for tribal adjudication (also varying, possibly, from tribe to tribe). As far as I could ascertain, an attempt at comparative jurisdiction of this type has not yet been made\textsuperscript{54}. Because of the complexity of the “very significant limitations on the jurisdiction of the state courts, and even federal courts by reason of the United States Constitution, federal law and treaties relating to Native Americans and Indian Country”, “this area has been largely ignored by conflict of laws scholars. Nevertheless it is of extreme and growing importance”\textsuperscript{55}. The Restatement, Second, calls conflict of laws as such an “abstrusive (?), elusive subject”\textsuperscript{56}. The problems multiply when one considers conflict of laws together with Indian and tribal laws.


\textsuperscript{52} See below under l., and VI. 1. d. (1), above.

\textsuperscript{53} Canby (2004), 207 ff.

\textsuperscript{54} Most helpful was Canby (2004), Chapters VII and IX.

\textsuperscript{55} Eugene F. Scoles & Peter Hay, Conflict of Laws, 2nd ed., St. Paul, MN, 1992: West, 388. This justifies any interest to bring some light into this area.

The prevalent line of thought prevalent in US theory and case law is that there is federal and state law of jurisdiction in all their possible variety as more or less fixed complexes, and that carved out from both, there is Indian jurisdictional law, by virtue of federal constitutional legal limitations, set for the federation itself and for the states. This, for example, is the approach in one of the leading case and text books on conflict-of-laws, by Professors Eugene F. Scoles and Peter Hay. Accordingly, the usually applicable state jurisdictional rules may be altered if American Indians are involved. Historically, Congress has implemented its powers and obligations by exempting Indians and tribal governments from the operation of state laws. Thus, as a general matter, state law is generally preempted in Indian country where federal and tribal laws govern. For example, state legislative jurisdiction does not extend to Indian country so that Indian tribes and individuals are not subject to state taxes, zoning requirements, property laws, and other regulatory laws …….. State judicial jurisdiction in Indian country is also limited ….., and ….. restricted”\(^{57}\).

This “exemption”, “preemption”, or “restriction theory”, as well as this “plus-minus approach” to the relation between federal and state jurisdiction on the one hand and tribal jurisdiction on the other may be called, seems to be the generally accepted point of view. Of course, it would be possible, and may be less ethnocentric, to place federal/state jurisdiction and tribal jurisdiction side by side and for both sides list their respective requirements. The “dependent sovereignty” of the tribes might point away from a “100 % - minus” approach and towards a coeval positive approach. Tribes are not, and given their human and economic potential certainly no longer, the exemption from a rule of non-tribal society. Regardless of the approach, the question remains whether both jurisdictional issues and conflict of law rules have a place in tribal adjudication.

7. Legislative and judicial jurisdiction (this short and not central text is not included here)

8. A discussion of \textit{lex fori} exclusivity

a. A basic question is whether a court, including a tribal court, should be permitted to apply the law of its own place exclusively. Technically, the question is whether the only law to be applied is the \textit{lex fori}, the law of the place. When this question was raised in our conversations with judges of Native American courts, there was an immediate understanding of what the solution of this issue means to the practice of the court, both on the reservation, and in state court. Most of the judges in the Pueblos of New Mexico expressed their discontent with any pure \textit{lex fori} approach, although the own local law would decide in most cases. However, the possibility of deciding, in one Pueblo, according to the laws of another Pueblo, seemed to these judges preferable if this would lead to better justice.

b. As mentioned before, Gerhard Kegel of the University of Cologne School of Law, coined the term “conflicts justice”, implying that for a just-as-possible result of a legal case justice is to be sought not only on the merits of the case, but also concerning the most appropriate legal system that is used to decide it, providing for the rules that have to apply. Kegel’s concept found entrance into authorities of conflict of laws in US\(^{58}\). Even if the Pueblo judges to whom

\(^{57}\) Scoles & Hay, op.cit., 390.

\(^{58}\) Scoles & Hay, op.cit., 33.
we talked had not studied these source of legal theory, their displeasure with a 100 % *lex fori* rule was based on the same idea.

c. One argument in favor of a 100% *lex fori* application is simplicity: the court does not have to consider foreign principles and rules of law. Another argument is time. An expeditious handling of the case, usually desirable for at least one of the parties, and certainly desirable for an efficiently functioning court system, may suffer if the judges follow a collision rule that sends them to a foreign legal system, with different legal culture traits such as rules of precedent, of interpretation, or just day-to-day practice. It may be cumbersome to call witnesses, for instance elders, ask experts, or to do research in comparative law. These imagined burdens of a conflict of law regime argue against statutory or customary references to other legal systems and plead in favor of the court’s “own local law”.

In the doctrine of conflicts of law, this legal-political attitude is called “forum preference”\(^5\). Brainerd Currie’s (1912-1965) ideas and those of his followers, focusing on governmental interest, interests of the parties, and national self-esteem, influenced US American attitudes to take a different direction\(^6\). *Lex fori*, the courts “own law”, became the rule, not just to make the judge’s job easier, or for avoiding embarrassment\(^6\), but as a principle. But the pendulum now seems to swing back. Scoles’ and Hay’s opinion that the application of the forum law should be “weighed”\(^6\), the general development towards a globalized world, in legal, economical, and other cultural respects, and last but not least an improved information technology concerning the access to foreign law, rather point to a “multilateral” approach that respects foreign legal systems as of comparable legal standing. Modern sovereignty concepts include the reference to foreign laws to be applied by the courts *at home* when this serves better justice *at home*. Thus, “forum preference” and “homeward trend” are principles much less favored today than ten or twenty years ago.

d. A rather convincing argument against a *lex fori* nexus that automatically follows jurisdiction is based on the interpretational concept of *purpose*. Interpretation of a legal provision according to its legislative purpose is an accepted tool in all legal systems, at least since *Rudolph von Ihering*’ “Der Zweck im Recht”, 1878. The English translation of the book, by I: Husik, has the title “Law as Means to an End”\(^6\). What is the purpose of rules of jurisdiction? To find out the appropriate judge, that is, the judge or the panel of judges most fitting to decide the case.

\footnote{Robert A. Leflar, Luther L. McDougal III, & Robert L. Felix, American Conflicts of Law, 4\textsuperscript{th} ed., Charlottesville, VA, 1986: Michie. The German term IS “Heimwärtsstreben” (homeward trend).}


\footnote{Scoles’ & Hay’s translation of the German word „Verlegenheitsanwendung“, op. cit. 33.}

\footnote{Scoles & Hay, op.cit., 30ff.}

substantive law most fitting for the decision of the case at hand. Against the background of these obviously different purposes, it cannot be upheld that the proper judge will always apply the proper law. The search for the proper judge is to be distinguished from the search for the proper law. This distinction reflects the fact, discussed above, that every legal system has its own set of prescripts of conflict of laws, or choice of law. If choice of jurisdiction and choice of law were one and the same, there would be no difference between procedural and substantive law. Since nobody would deny this distinction, the one between jurisdiction and appropriate substantive law follows as a matter of course. Hence, jurisdiction does not preempt the collision between more than one legal systems.

e. In accordance with this conclusion is Rule 44.1 of the White Mountain Apache Tribe code “Constitution and Bylaws”, Rules of Civil Procedure, of 1987, p. 91, on conflict of laws: “A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, max consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Rules of Evidence. The court’s determination shall be treated as a ruling on a question of law.” It follows that the WMAT courts, having assumed jurisdiction, are prepared to apply a foreign material law to decide the case. In terms of legal policy, the result of this investigation is both positive for the states and for the tribes: both have their conflict of law regime as parts of their law, and negative: jurisdiction does not preempt principles and rules of law that regulate conflict of laws. Or, as one tribal judge put it with whom Robert D. Cooeter and I discussed this issue: “Jurisdiction does not preempt or define conflicts, and proper judge and proper law are not the same”.

9. Practical applications of conflict-of-laws rules in Indian country, and Canby’s survey

It is not possible to report on all private laws of all North American Indian nations and tribes, let alone to keep such a report up-to-date. Too much is going on in the tribal laws in force on and off the reservations (“off”, for example by virtue of “long-arm jurisdictional” devices such as for serving and Indian outside her or his reservation). Likewise, it is impossible to report on all conflict of laws principles and rules of all Indian tribes. Only selected examples can be given, to explain that and why tribal laws on conflicts of laws exist, conceptually independent from judicial jurisdiction, and how they work.

a. This is not the place to rehash the long story of jurisdiction in Indian country, divided by tribal courts, federal courts, and state courts. A historical background has been given in an earlier article, and in a reader. A number of excellent presentations may help orient the student of jurisdiction in Indian country. A condensed version, relying on the historical

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64 Some call it “the better law”. On this and the problem of the “better law approach”: to avoid impressionist nexuses, see Scoles & Hay, op.cit., 37, text near note 16.


67 W. Fikentscher, Law and Anthropology, Law 265.7 & LS 190, University of California at Berkeley, School of Law, Spring 2000, at 381 ff.

origins, has been prepared by one of the leaders in this intricate field, the Honorable William C. Canby, Circuit Judge on the US Court of Appeals, Ninth Circuit, and Professor at Arizona State University School of Law.\textsuperscript{69}

(1) Based on Canby’s condensed “primer” text, the tribal courts have jurisdiction in criminal affairs only to a limited extent:

“Federal criminal jurisdiction. Some federal crimes, such as treason or theft from the mails, are applicable to everyone throughout the United States, in Indian country or out of it. These are not our concern here. Within the reservation, more specific federal jurisdiction covers:

\textit{Crimes by non-Indians against Indians, and crimes by Indians against non-Indians.} Most of these crimes fall within the General Crimes Act, 18 U.S.C. § 1152, except for specified crimes by Indians that fall within the Major Crimes Act and happen to have been committed against non-Indian victims. When the General Crimes Act applies but there is no federal statute covering the crime, state law is adopted for the federal purpose under the Assimilative Crimes Act, 18 U.S.C. § 13.

\textit{Major Crimes by Indians.} Included are such crimes as murder, kidnapping, and aggravated assaults. They are set forth in the Major Crimes Act, 18 U.S.C. § 1153.

Tribal criminal jurisdiction. Tribal criminal jurisdiction arises from the tribe’s inherent sovereignty, and includes:

\textit{Crimes by Indians against Indians.} For crimes covered by the federal Major Crimes Act, this jurisdiction is concurrent with federal jurisdiction. The tribes customarily leave prosecution of the most serious major crimes to the federal authorities.

\textit{Victimless crimes by Indians.}

State criminal jurisdiction. In some states, a congressional statute known as Public Law 280 (18 U.S.C. § 1162 (criminal), 28 U.S.C. § 1360 (civil)) has led to an assumption of general criminal (or civil) jurisdiction by the states in Indian country. Arizona is not a Public Law 280 state, and that statute can be ignored. The state’s jurisdiction arises from common law. Arizona exercises exclusive criminal jurisdiction on Indian reservations over:

\textit{Crimes by non-Indians against non-Indians.}

\textit{Victimless crimes by non-Indians.}”\textsuperscript{70}

(2) \textit{Civil} jurisdiction is broader, but less well-defined than criminal jurisdiction. The division of civil jurisdiction described here applies to subject matter (torts, transactions) located or occurring on the reservation. Long-arm jurisdiction, however, blurs the lines somewhat. As to federal civil jurisdiction, the federal government has not carved out any special area of

\textsuperscript{69} See preceding note.

\textsuperscript{70} Canby, op. cit. (primer), 36, with the footnotes.
civil jurisdiction for itself in Indian country, as it did in criminal matters. Federal courts thus exercise their regular federal question and diversity jurisdiction. Whether a tribe has jurisdiction over a case may present a federal question, but the federal court will abstain and permit the tribal court to be the first to rule on the extent of its own jurisdiction. National Farmers Union Inc. Cos. v. Crow Tribe (471 U.S. 845 (1985)). Similarly, when a federal diversity case could also be brought in tribal court, the federal court will abstain and let the tribal court proceed first. Iowa Mut. Ins. Co. v. LaPlante (107 S. Ct. 971 (1987)).

Tribal civil jurisdiction. Tribal courts have unlimited civil jurisdiction over:

Suits against Indians, based on claims arising in Indian country, whether the plaintiff is a Indian or a non-Indian. See Williams v. Lee (358 U.S. 217 (1959)).

Suits against Indians domiciled or resident on the reservation, based on claims arising off-reservation, when the tribe chooses to exercise such jurisdiction.

Suits by Indians against non-Indians for claims arising on the reservation, if the tribe chooses to exercise such jurisdiction. The propriety of such jurisdiction may present a federal question, but a federal court will abstain until the tribal court has ruled on the issue. National Farmers Ins. Cos. V. Crow Tribe (footnote: 471 U.S. 845 (1985)).

Child custody and adoption, not only for Indian children domiciled on the reservation, but also for those off-reservation. This jurisdiction is the subject of an unusual federal statute, the Indian Child Welfare Act of 1978 (footnote: 25 U.S.C. §§ 1901-1963). Under the Act, the tribe’s off-reservation jurisdiction is shared with the states, but the state must transfer the case to the tribe upon petition of either parent, the child’s Indian custodian, or the tribe, unless the state court finds good cause to keep the case or a parent objects to the transfer.

State civil jurisdiction. When claims arise off-reservation, states exercise their normal plenary jurisdiction, except for restraints imposed by the Indian Child Welfare Act. (See previous paragraph).

States exercise the following civil jurisdiction over claims arising in Indian country:

Suits by non-Indians against non-Indians.

Suits by non-Indians against non-Indians, if the Indian plaintiff chooses to bring the action in state court. Three affiliated Tribes of the Fort Berthold Reservation v. World Engineering, P.C. (467 U.S. 138, 148 (1984)). Notice that the reverse is not true, the state is precluded from jurisdiction when the Indian is a defendant. Williams v. Lee (358 U.S. 217 (1959)).

According to this survey, whenever there is tribal jurisdiction, does from this follow that the tribal court will bring to hear (?) upon the case before it (?) its own tribal law? This is the question to be decided here. The answer to this question has an important implication for the whole area of conflict of laws in Indian country.

If tribal courts, by virtue of their judicial jurisdiction, apply their own local law always and as a matter of course, to all cases before them, it may be said that the lex fori principle of Indian tribal conflict of laws – which as such exists? – is tribal Indian common law, valid not only for certain tribes but supposedly for all Indian tribes. Lex fori would then be a thorough-going

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71 Canby, op. cit. (primer), 36 f, with footnotes.
72 On lex fori (the Restatement, First and Second, uses as a translation from Latin “own local law”), see 8., above.
73 This point is the goal of VI.
legal-cultural principle of tribal law, similar to the principle of the free taking of evidence (including hearsay), or the principle of non-compensation of pain and suffering\textsuperscript{74}.

It would lead, with some evaluative inner logic of analogy, that neither state nor federal courts would in conflict ever apply any tribal law. Rather, federal and state courts would also apply the principle of the \textit{lex fori}, unless instructed otherwise by federal law\textsuperscript{75}. The \textit{lex fori} would be the generally accepted legal principle in Indian affairs.

The opposite is that tribal courts, by virtue of their judicial jurisdiction, apply the principles and rules of conflict of laws and disregard their own local law, applying instead another tribe’s law, or state or federal law as a matter of conflict of laws. This application of foreign substantive law would not occur as a matter of reference to outside law, guidance by outside law, state compact and similar provisions, or of full faith and credit reciprocity and similar situations\textsuperscript{76}. But it would occur as a consequence of the fact that there is conflict of law in Indian country.

In turn, this would lead, with the same evaluative inner logic of analogy, to the result that states and federal courts do apply the principles and rules of conflict of laws not only in non-Indian legal affairs, but also in cases having reference to Indian country. States and federal courts would then apply, if the law of conflict of laws applies, tribal law\textsuperscript{77}. Therefore, much depends on the answer to the question whether jurisdiction in Indian law preempts conflict of laws, to the effect that Indian courts always follow the principle of \textit{lex fori}.

\textbf{10. Acoma v. Laguna, and Jim v. CIT}

Robert D. Cooter and I found at least three cases in which foreign law was applied. In the first, the District Court of New Mexico applied Laguna Pueblo contract law.\textsuperscript{78} The judge held valid a loan contract between the Pueblos of Acoma and Laguna and ordered the Pueblo of Acoma to return a saint’s canvas, holy to the Lagunans, that Acoma had borrowed from Laguna, and afterwards refused to give back. The case might also have been decided under Acoma contract law, but since the picture was borrowed by Acoma from Laguna, in all probability the loan was agreed upon where the canvas was, Laguna. In the venerable case, the New Mexico court did not delve into conflict of laws issues. It was sufficient that a valid loan contract existed. But this could only have been a contract under tribal law. New Mexican law was certainly not referred to in a loan of a holy canvas.

In another case, Allen Jim v. CIT Financial Services Corp. 87 N.M. 362 (of April 11, 1975), the Supreme Court of New Mexico remanded the matter to the District Court instructing it to find out whether a car sale was agreed upon under Navajo or New Mexican state law. If it was

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{74} Cooter & Fikentscher (1998), 552.
\item \textsuperscript{75} General jurisdiction on Indian affairs in the US Constitution: Art. I, sec. 8, cl. 3; art. II sec. 2, cl. 2.
\item \textsuperscript{76} See III, at the end, supra.
\item \textsuperscript{77} Tribal law in this sense includes tribal conflict of laws \textit{and} tribal substantive law. As a rule, the reference to another than one’s own law by the law of conflict of laws implies \textit{renvoi}, i.e., the applicability of the choice of law rules of another state, Restatement Second, vol. I 1, ch. 1, Introduction, § 8. \textit{Renvoi} could only be avoided by tribe-state compacts, not by mere federal law, see text at notes 997 and 1055, above. Tribal sovereignty includes the tribal conflict-of-laws regime.
\item \textsuperscript{78} Cf., Cooter & Fikentscher (1998), 558 ff.; Pueblo of Laguna v. Pueblo of Acoma, 1 New Mexico Reports 220 (Jan. 1857, printed in 1911).
\end{enumerate}
\end{footnotesize}
Navajo law – and the facts clearly pointed in this direction – the Supreme Court said it would be Navajo law which was to be applied by the New Mexican Courts. The case ended with an out-of-court settlement. From the Supreme Court’s reasoning it follows that Navajo law would have to be examined and applied by a state court. Jim v. CIT is often quoted as a case of full faith and credit. But there was no decree yet. The suit was still in the pre-decree phase. Full faith and credit could have only played a role in a “prospective manner”: If it was a Navajo sale, Navajo courts would have jurisdiction, and since decisions by Navajo courts enjoy full faith and credit in New Mexico, New Mexican courts would enforce Navajo decisions. This is the application of a foreign substantive law by way of dictum, combined with the declared expectation to respect the outcome of a foreign law during the pre-decision phase during the post-decree execution phase. It is only a small step from here to relying on Navajo law in the first place, that is, during the pre-decision phase. Thus, the idea that conflict of laws has a meaning for handling cases relating to Indian country, is not totally foreign to state case law. The third case, Lonewolf v. Lonewolf, 99 N.M. 300, 657 P.2d 627 (1982) is also based on a a dictum and shows other similarities to Jim v. CIT.

11. Navajo conflict-of-laws rules

Turning from tribal case law to tribal code law, the conflict-of-law provisions of the Navajo Nation Code (NNC) may be used as an example. They are proof of principled a reliance of a tribal law on a tribe-specific conflict of laws regime. Title 5 A Navajo Nation Code § 1-105 provides for that when a transaction bears a reasonable relation to the Navajo Nation and also to another state or nation, the parties may agree that either the law of the Navajo Nation or of such state or nation shall govern their rights and duties. This is a true “choice-of-law” rule, providing for an autonomy of the parties to agree on an applicable legal system. Failing such an agreement, the Navajo Nations Code applies to transactions bearing an appropriate relation to the Navajo Nation.

Under § 1-105 B. it is said that where one of the following provisions of this Code specifies the applicable law, that provision governs the cross-border case, and a contrary agreement is effective only to the extent permitted by the law (including the conflicts-of-law rules). As examples for such limitations on “party autonomy” regarding transactions in Navajo, § 1-105 B., second sentence, lists rights of creditors against sold goods (Section 2-402), and perfections provisions of the Article on Secured Transactions (Section 9-103). We would add to this at least one more example, the regulation of repossession in Title 7 § 107.

Title 5 A Navajo Nation Code, § 1-105, is part of the Navajo Uniform Commercial Code which adopts to a wide degree the model code of the UCC into Navajo tribal law, with some significant omissions, changes, and additions. In practice, the abbreviation for this code is NUCC. There is an important piece of tribal conflict of law legislation. The NUCC is not

79 Note the distinction, made between reasonable and appropriate relation. The first circumscribes to applicability of Navajo conflict of laws rules for cross-border and other more-than-one legal systems situations; the second, indicating an stronger than only “reasonable” tie to Navajo law, works as a default rule (ius dispositivum).

80 By the conflict of laws rules, 5 A NNC § 1-105 obviously thinks of nexuses obligatorily prescribed by Navajo conflict of law rules (here is no choice of laws in a field of law that is colloquially often called “choice of laws”). From this it seems to follow that the Navajo conflict of law regime acknowledges and accepts renvoi.

81 However, § 1-110 limits the application of the NUCC to transactions worth more than $10,000. Below this amount, Navajo customary law applies, Official Comment to § 1-110.
only a legislative reference to the UCC, a technique used by other tribes in order to integrate the UCC into their law. Rather, the re-worked text of the UCC is full and plain Navajo tribal code law.

5 A NUCC, § 1-105, would permit, for example, that three German jewelry traders, in an agreement to jointly establish an export-import agency for Navajo arts and crafts, would place this agreement, made in Düsseldorf/Germany, under Navajo law. Moreover, the agreement would not only refer to NUCC as the applicable governing the agreement, but also to other Navajo law, existing or to be developed by Navajo legislation or Navajo court precedents.

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82 Lummi are one of the “other tribes”.

83 5 A NUCC § 1-102 and Commentary:

A. The Code shall be liberally construed and applied to promote its underlying purposes, and policies.

b. Underlying purposes and policies of the Code are:

1. To simplify, clarify and modernize the law governing commercial transactions;

2. To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

3. To make uniform the law of commercial transactions throughout the Navajo Nation.

C. The effect of provisions of this Code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Code may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

D. The presence in certain provisions of this Code of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (C).

E. In this Code unless the context otherwise requires:

1. Words in the singular number include the plural, and in the plural include the singular; and

2. Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.”

Official Comment:

“Commentary. 1. Subsections (A) and (B) are intended to make it clear that:

This Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Code to be developed by the courts in the light of unforeseen and new circumstances and practices. [Note this interesting statement about the relationship of code law and case law in Navajo – author’s comment] However, the proper construction of the Code requires that its interpretation and application be limited to its reason.

The Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of its purpose and policy of the rule or principle in question, as well as of the Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (C) states affirmatively at the outset that freedom of contract is a principle of the Code: “the effect” of its provisions may be varied by “agreement”. The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Code seeks to avoid the type of interference with evolutionary growth found in Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926). Thus, private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in § 3-104; nor can they change the meaning of such terms as “bona fide purchaser”, “holder in due course”, or “due negotiation”, as used in this code. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Code. “Agreement” here includes the effect given to course of dealing, usage of trade and course of performance by §§ 1-201, 1-205, and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this Code and to supplementary principles applicable under the next section. The rights of third parties under § 9-301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the
The agreement would be judged in the light of special NUCC provisions of construction and interpretation.\textsuperscript{84}

There is no denying that, relating to conflict-of-laws, Navajo law is well organized and a circumspect piece of tribal regulation. Not only the substantive law of contracts but also other areas of Navajo tribal law can be said to own their respective conflicts of law regime, even if this is not expressly dealt with in Navajo legislation. Navajo common law of conflict-of-law applies\textsuperscript{85}. Furthermore, while the Navajo Nation undoubtedly possesses a conflict-of-laws regime, there is no reason why “other nations” and tribes, to which 5 A NCC, § 1-105A, points, should not have a conflict-of-law regime, applying to all areas of their respective tribal law. A law of conflict-of-laws cannot be attributed to one or several tribes and be denied to other tribes. If all tribes have their law, as can hardly be longer contested, they can only all have a law of conflict of law, or none of them has one. As the Navajo example shows – and there are more Indian nations who have enacted conflict-of-laws rules or adopted the UCC in one way or another including § 1-105 UCC – all tribes have a conflict-of-laws regime.

Another point in favor of tribal conflict of laws regimes can be made by a reference to legal-political criticism that has been levelled, with good reasons, against the present complicated system of federal, state, and tribal jurisdiction. The Honorable William C. Canby, Jr., describes the complexity of jurisdictional regulation of Indian affairs: “The above outline of jurisdiction, particularly in the civil area, is barebones; the practitioner will have to consult more detailed authority before proceeding. But the division of adjudicatory jurisdiction in Indian country does follow the path marked by our history. The tribes are self-governing; all-Indian cases presumptively go to the tribe. When no Indians (and thus no Indian interests) are involved in a crime or transaction, the states have jurisdiction. And when a crime between an Indian and non-Indian needs to be refereed, the federal government is the one to do it. Civil disputes between Indians and non-Indians are for the tribes, but the states share concurrent jurisdiction when a non-Indian is the defendant. It may be that few would design a system quite like this, but history has not left us with a clean slate”.\textsuperscript{86}

Proposals could be made – and have been made – to obtain more clarity. Such a “clean-up”

\textsuperscript{84} 5 A NUCC, § 1-102, Commentary, 1st alinea, phrase 2; § 1-104; § 1-106; § 1-109 (captions are part of the code).

\textsuperscript{85} On the history of the concept of tribal common law, see Cooter & Fikentscher (1998), 326 ff.

\textsuperscript{86} See note 1038, above.
would differ in regards to jurisdiction on the one hand and conflict-of-laws on the other. Judicial jurisdictional simplification could be arranged by assigning broader jurisdictional fields to federal (or, to be delegated from the Federation: states) and to tribal jurisdictions, by reducing the number of exceptions, and – politically – by setting greater faith and trust in the legal abilities of tribes. Conflict of laws could be simplified – in theory – by reducing the number of states within the union, by making uniform or at least harmonizing the substantive laws as such, or by uniforming or at least harmonizing the conflict-of-laws regimes, both in the states and the tribes. Streamlining jurisdiction appears to be something very different from harmonizing law. Jurisdiction is not in need of harmonization, and conflict of law would gain nothing from broader fields of application. The differences between the remedies toward simplification, are so great that the distinctive functions of jurisdiction and conflict of laws can no longer be questioned. From the angle of legal-political improvement, jurisdiction cannot serve as the undisputable assignment of the applicable substantive law.

Finally, there is a constitutional argument in favor of tribal conflict of law regimes as independent from jurisdiction. Within the state’s laws, largely based on common law, implemented by state legislation, conflict of laws is, as a rule, state common law. This part of state common law is, again as a rule, constitutionally not restricted or pre-empted by federal law. Thus, in principle, states enjoy the full range of their respective conflict of laws regime, unless restricted or pre-empted by federal law in certain fields. Under common law, this enables the states, and obliges their courts to make use of their legal conflict of laws regimes. Again, this does not stop at the threshold of a tribe’s legal system. Instead, the states and their courts have rights and duties under common law, to apply their respective legal conflict-of-laws regime onto the tribes, as onto any other legal system. This is the essence of what Jim v. CIT is about.\(^87\)

Inversely, while states may refer to tribal law and apply it in their own state courts, as illustrated by the above cases, by virtue of the sovereignty of each state of the federal system, the reverse is all the more admissible and necessary. Tribal courts may, and must under their law of conflict of laws, apply the law of the states, not as a matter of gap-filling, guidance, compact law, or binding federal law (about these possibilities see above), but as a consequence of their tribe’s conflict of laws principles and rules. Federal law does not exclude states or tribes from conflict-of-laws rules, so the inherent power to have law – and hence conflict-of-law principles and rules – prevails.

12. Pre- vs. post-decree tools of resolving conflict of laws involving tribal law: the double meaning of comity

An important distinction between two kinds of conflict of laws principles and rules should be made (in partial conformity with the outline of the Restatement Second, as mentioned). Any reconciliation between possibly legal systems can address either one of two stages of any court proceeding: the pre-, and the post-decree stage. What is here called the “decree” is the judicial act by which the first part of a court-proceedings ends: a judgment, a decision, a court order, or any otherform of court decree. In the pre-decree stage of a court proceeding the claims and the defenses are brought forward, by the plaintiff and defendant, and evidence may be taken. Judge and jury examine the “merits” of the case and evaluate the claim. A German

\(^{87}\) See note 1939, above.

\(^{88}\) That may or may not offer choices.
term for this period of the proceeding is Erkenntnisverfahren (knowing, or learning, procedure). This part of the procedure ends by any kind of decree (used in a wide sense of the word). It is followed by the execution (again, in the widest possible sense), because somehow the decree must be translated into observable reality.

Conflict of laws deliberations may affect the pre- or the post-decree stage, or both stages. As has been quoted from the Restatement Second, the Restatement distinguishes between “choice of law” (= the pre-decree stage) and “foreign judgment” (the post-decree stage, at least in one of several aspects). I will distinguish, under the encompassing concept of conflict-of-laws, the pre- (a.), from the post-decree (b.) phase.

a. The Pre-decree period concerns the time before a court decision is made. In Indian country, during this time span, there are four possible conflicts of law:

(1) between tribes: when Laguna Pueblo tried to have the holy canvas returned from Acoma Pueblo, there was a choice between Laguna and Acoma contract law. As far as the text is recorded, the New Mexico District Court did not expressly say which of the two applied. In all likelihood, the court referred to Laguna law. The result under Acoma, or New Mexican, law would probably not have been different. Therefore, this a case with no real “conflict”. However, if such a matter would be subjected to an appeal, it is always better to address the applied law precisely.

(2) between tribe and state: In Jim v. CIT the question arose whether New Mexican or Navajo sales law should govern the case. The Supreme Court of New Mexico remanded the case back to the District Court to determine this question.

(3) between tribe and US: In Wilson Halwood, Jr., and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce Williams, the Court of Appeals of the State of New Mexico decided that punitive damages (arising out of an illegal repossession of a car sold and repossessed on Navajo territory) are a matter of private, not criminal, law, so that Navajo law of sales applies, not federal law. The wording of the decision is dressed in terms of judicial jurisdiction, as is the usual approach in tribal, state, and federal courts. But in substance it is a conflicts of law case where the applicable material law is at stake, not who might be the proper judge. Within the doctrine of conflict of laws, the issue of whether punitive damages for breach of contract are a private or criminal law sanction, is called a “characterization” issue. In Cowboy, punitive damages were qualified as private law.

(4) between tribe and a foreign nation (outside of the US): I was informed, by the Governor of a Pueblo, that a joint venture was being prepared between that Pueblo and an Arabian state, for the establishment of a factory that was to produce a merchandise of interest for both partners. I proposed to have the question checked whether the joint venture was to be concluded under the law of the Arab nation, e.g., the shari’a, under the corporation law of the Pueblo, or that of the state surrounding the Pueblo (New Mexico).

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89 See Pueblo of Laguna v. Pueblo of Acoma, see note 1152, above.
90 Allen Jim v. CIT Financial Services Corp; 87 N.M. 362 (of April 2nd, 1975).
91 124 N.M. 77, 946 P 2nd 1088 (1997)
On another occasion, I was asked by artists of Zuni Pueblo, N.M., what to do in the following case: An American citizen traveling in the Philippines asked villagers to rename their village to “Zuni”. Then, he argued to the villagers, it would be possible to sell jewelry, made in that village, as “Made in Zuni”. He would take care of bringing to Zuni/Philippines models of jewelry from Zuni/New Mexico and of marketing the imitations. The imitated jewelry would sell well because Zuni jewelry is world famous and the Pueblo’s main source of income. The case involves issues of unfair trade practices, a field of the law of torts. In principle, under conflict of law rules, in the law of torts the applicable law is the law of the place of the wrongdoing (which poses further questions, e.g., as to the places of the act and of the effects of the wrong, and also of the law of international treaties covering these issues). A difficulty might arise with a view to the requirement of subject matter jurisdiction which, as discussed before in connection with the Crazy Horse litigation, has been curtailed by Congress and case law (see III. 2., above). But even if Montana would apply (which is unlikely because there is no fee-land involved), the exception of economic security and tribal welfare could be invoked. The Zuni artists were not happy with my answer.

(5) Judicial comity is a means to solve a conflict issue during the pre-decree period. In all legal situations described above under a., a tribal, state, or federal court may have to apply the law of a certain other legal system. In the pre-decree stage of a court proceeding, this may cause problems because it is often not easy to determine what the foreign law exactly says. Of course, the parties may offer expert witnesses. Tribal law, especially when it does not exist in codified form but as tribal common law, is traditionally known best by tribal elders. Should the elders of a tribe be invited to appear in a court of another jurisdiction to testify? This is not only a matter of practicality, but also of respect, politeness, tact, and etiquette. This was the situation in Mexican v. Circle Bear, 370 N.W. 2d 737 (S.D. 1985). In Mexican, a matter concerning the death of a Sioux medicine man, who was a tribal leader, the South Dakota District Court thought it more appropriate to let a Sioux tribal court decide the case. Members of the man’s family and the tribe disagreed whether the deceased should be buried inside or outside the reservation. Both the tribal court and the South Dakota court entered in proceedings. The Dakota court found tribal law to be applicable and for a while considered to hear tribal, but stepped back from deciding the case, and by way of “comity” declared that the tribal court should decide under tribal law, and the state court would accept the decision of the former, declaring itself as forum non conveniens. Henderson, J., in his concurrent opinion, called this reference by a state to tribal court and tribal law “judicial comity”. The approach in Mexican v. Circle Bear applies the jurisdictional device of forum non conveniens to solve a conflicts issue in the pre-decree period, freeing a state court from the necessity to investigate and apply a foreign (tribal) law. In this way, pre-decree comity avoids contradicting decisions.

(6) An additional difficulty in resolving conflict of laws involving tribal law lies in the possibility of the application of another law of conflict of laws. It has been shown that Navajo law accepts renvoi, that is, the application of principles and rules of conflict of laws of another legal system. This corresponds to the average international usage regarding renvoi (German law, as most others, distinguishes between two kinds of renvoi: Zurückverweisung (“return reference” = sending the case back to the original legal system which may accept or not accept the return), and Weiterverweisung (reference to a third legal system which again may accept or not accept the third-legal-system reference). To avoid renvois (they are always unpleasant for the court and one party involved), a uniform law of conflict of laws in Indian

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94 See text near note 1028, above.
country – at least in this regard – would be helpful. A compact would do. Such a law, for example by way of compact, can provide for that renvoi is altogether excluded, or that the first renvoi may take place but then the addressed legal system must accept it and cannot engage in a further renvoi. Without such a law, renvoi and its dogmatic difficulties are almost unavoidable.

(7) Applying the substantive law of another legal system raises problems, too. When, after all, the way has been cleared to an applicable law that is not the court’s “own local law”, and the court assumes to have the necessary knowledge of that other law, some attention should be given, by the court and the parties before it, to the essentials of conflict of laws. In principle, there are two approaches: (1) the classical, more or less “mechanistic” approach, grown from Roman Law, usus modernus, and European and international experience, tying a cross-border case to a distinct legal system by way of a “statute” (e.g., the marital property statute, the contract statute, etc.) or a “nexus” such as situs, place of the wrong, nationality, domicile, will of the parties (“atonomy”), etc., which is the philosophy of the first Restatement; and (2) the “modern US approach” that asks for the “most significant relationship” of the case to one of several legal systems (Brainerd Currie, and his school, Armin Ehrenzweig and his followers, and the Restatement Second). Case law shows a slow rapprochement between the two approaches, also under the influence of European and international developments. As a rule of thumb it may be said, that a court does not err from the path of virtue when it applies the classical nexus method which ties a case to a legal system by manageable, investigable criteria in the light of the “most significant relationship”, that is, controlled by practical, not mechanistic, deliberation. The Navajo conflict of laws system uses these tests, open to practice-related interpretation, by using the terms “reasonable relation” and “appropriate relation” in 5 A NNC § 1-105 A. Although these malleable tests are mentioned, in Navajo law, only in connection with the collision law of contracts, it is permitted to apply the same approach by way of analogy to other areas of Navajo conflict-of-law rules. Other tribal law could follow this example.

(8) At this point a closer examination of actual conflict-of-laws issues in Indian country could be ventured. For our purposes, however, some examples of the use of non-mechanistic “nexuses”, or “links” in Indian country conflict of laws will suffice. Some fields of tribal law will be mentioned, and it will be demonstrated how tribal law assigns (“links”) the appropriate applicable law to the specific substantive field of law. Most examples are taken from Navajo law. It – and other examples of tribal collision law – serve as models for demonstrating the issues of collision law in general, quite apart from tribal aspects (see th remarks in I. 4., above).

- Personal Status Issues

According to Navajo Nation Code 5, 1995 edition, title 17 § 1902, this is the law:

“A. The Courts of the Navajo Nation are vested with civil jurisdiction over all persons with respect to exclusion of non-members of the Navajo Nation from the Navajo Nation.

B. The Chief Justice of the Navajo Nation with the advice and consent of the Judiciary Committee, Navajo Nation Council, is empowered to adopt such rules as are deemed appropriate for exclusion proceedings”.

This means that membership issues, but also domicile issues of non-members, fall under the

95 See I. 3. at the end, above.
The scope of Navajo membership laws. The law of the public corporation (the Navajo Nation) governs issues of personal status.

- **Corporations**
  “personal jurisdiction over foreign corporations, according to modern expansions of the “minimum contacts” due process standard. Ibid.

- **Movables = Chattels**
  The applicable law for movables, at least in repossession cases, is determined by the land where the chattel is situated (“situs” of a thing). According to Navajo Nation Code (1995 edition), Title 7, § 607, personal property may not be taken from the territorial jurisdiction of the Navajo Nation (except in specially defined cases).
  A. Written consent to remove the property from the territorial jurisdiction of the Navajo Nation shall be secured from the Navajo purchaser at the time the repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Nation police officer or official upon proper demand.
  B. Where the Navajo purchaser refuses to sign, there is only Navajo law.
  The Court has jurisdiction over a non-Indian, non-resident business or individual which is alleged to have wrongfully repossessed………on Navajo land.  

- **Land Law**
  The Navajo Nation Code does not seem to contain conflict of laws rules for real estate. Internationally, the general rule is situs: land is legally governed by the law of the place. This seems so self-evident that the NNC does not regulate it.

- **Torts**
  In Navajo law, according to examples given in the code, torts are governed by the law of the place of the wrong. Neither membership, nor citizenship, nationality or domicile are of importance. Examples:
  - driving under influence: T 14 § 707: “any person on Navajo territory”
  - unattended vehicles, or causing damage by driving a car: T 14 § 220: “the driver of any vehicle…..” (Title 14 is the Navajo National Motor Vehicle Code).
  Jurisdiction: § 100: The District Courts of the Navajo Nation shall have exclusive original jurisdiction.

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See also Cowboy (Wilson Halwood, Jr., and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce William, 124 N.M. 77, 946 P 2nd 1088 (1997), where the place of the vehicle determines the applicable law, not the law of the sale by which the car was bought.
jurisdiction over all civil traffic infractions under this title by any person eighteen (18) years of age or older; and over all criminal misdemeanor offenses under this title, committed within their respective jurisdictions by Indian persons eighteen (18) years of age or older.

- Indian Gaming Compact between the State of New Mexico and tribes Native American tribes, New Mexico Statutes 11-13-1
This compact contains law applicable both in the state and on the reservations. It obliges the tribes to accept liability for eventual accidents in the casinos, not to invoke sovereign immunity, and to arrange for the necessary insurances, Sec. 8, D. There is concurring jurisdiction of tribe and state, and as to material torts law concurring liability under tribal law and state law for accidents on tribal territory.

- Cultural Resources
An interesting provision in the Navajo Nation Cultural Resources Protection Act (19 NNC §§ 1001-1061) is that the nexus for claims arising from the Act is not situs as in property (movables and land) cases, but a special nexus of “cultural properties” . Sec. 1011 A. defines “cultural properties” as buildings, districts, objects ……which are significant in Navajo Nation history, architecture, archeology, engineering and (=or) culture.. Sec. B. adds landmarks of “significance to the entire Navajo Nation”. From this it follows that the links between the facts and the applicable (Navajo) law need not be the geographic place where the object is found, but spiritual-cultural nexuses such as historical reports or sentiment of belonging. This provision is just as rare as it is useful, and should be recognized by conflict of laws doctrine in general, beyond Native American legal problems, for example for migration, cultural property, and repatriation issues.

- Family Law, Marriage, Divorce, Child Custody
Marriages are valid under Navajo law if they are valid by the laws of the place where they were contracted (NNC Title 9 § 1 A. A marriage performed in Navajo is valid if validly contracted under Navajo law(NNC Title 9 § 1 B.)

- Marital rights in property
Marital property rights are regulated in Title 9 § 212: They are controlled by the laws of the Navajo Nation when they are acquired after moving into Navajo Indian Country and when these rights in property are acquired in Navajo Indian Country.

For a divorce, the law of the place of the plaintiff’s residence is to be applied, if this residence has been established at least 90 days before the claim is raised.

- Child custody
Under the Navajo Nation Children’s Code, a “child” means “an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen (18) years”. Title 9 § 1002 F. A custody child must be a member, and a custodian must be appointed by a Navajo Family Court, Title 9 § 1002 L.
- Inheritance

Pursuant to Title 8 § 1 on Jurisdiction, the Family Court of the Navajo Nation has original jurisdiction over all cases involving the descent and distribution of deceased Indians’ unrestricted property found within the territorial jurisdiction of the Court.

The examples show how rules of conflict of laws connect a material rule for resolving a legal case with a legal system by way of a link or “nexus”.

b. The Post-Decree Period

Once a court has assumed jurisdiction and applied the appropriate procedural law, the conflicts regime and the material law fitting the case, it has decided the case. Now there is a decree which attempts to settle the dispute by some kind of order given to the parties. If such an order affects a legal system other than the one a court of which has issued it, the question is how to make effective the ordered sanction in that other legal system. Therefore, alongside rules of conflict of laws to be applied before such an order is issued, rules are also needed for the time after the decree. There are several ways to regulate post-decree conflict of laws.

(1) Full Faith and Credit

*Full Faith and Credit* is found in the US Constitution, Art. V. § 1. Full faith and credit exists, on this constitutional basis, among the states, and by (disputed) interpretation, between states and Indian tribes. It requires, with few exceptions, that foreign judgments be enforced. Reference is to be made to the discussions of the full faith and credit clause that are numerous and not without open questions. Full faith and credit, if applied between states and tribes, put both on the same level of legal-judicial sophistication. It is a welcome instrument for avoiding duplicate court proceedings and inter-territorial mistrust and absence of uniformity of decided cases. It can be abused by burdening upon the side that recognizes the decree that has been made on the other side, the details of executing it.

(2) Again: Comity

The second approach to an avoidance of post-decree conflicts is *comity*, again (see a. 5. a. (5), above). Comity here refers to the time after a “foreign judgment” has been made. According to Robert Laurence: “Comity is a more flexible requirement than full faith and credit, in which the receiving court shows a generalized respect for the issuing regime, but it is not commanded to enforce the judgment”. Four preconditions to enforcement of a foreign
judgment under principles of comity are: (1) subject matter jurisdiction and personal jurisdiction over the defendant in the foreign court; (2) no fraud by plaintiff against foreign court; (3) fair foreign proceeding in the foreign court; and (4) a broad consistency between the foreign judgment and local policy at the place of the enforcing court, so that the conscience of the community in which the enforcement is sought is not shocked by the enforcement.

Comity, taken from international law in Hugo de Groot’s tradition, says that sovereign states should respect each other as comites (= friends, fellows). When applied to state-tribal legal collisions, comity changes from a loosely-handled instrument of international law to a stricter instrument of mutual assistance in legal conflict. This is why Judge Henderson in *Mexican* prefers speaking of judicial comity. Judicial comity, in Judge Henderson’s sense, can be applied in the post-decree stage of any court proceeding. Then it works similar to full faith and credit, only more flexible.

At the pre-decree stage – as in the case of *Mexican v. Circle Bear* - comity refers to the material law needed to decide the case. Said simply: The court that feels farther away from the total appearance of the case refers it to a seemingly more appropriate legal system for decision, and therefore comity affects the material law to be applied. At the post-decree stage – this what Professor Laurence is discussing – comity refers to a jurisdictional element of execution. In the pre-decree period, a court says: the colleagues over there will decide alright, let’s send them the case. In the post-decree period a court says: The colleagues over there have decided the case alright. Let’s enforce their decision.

(3) Asymmetric solution

Ideally, full faith and credit is a symmetric solution to pre- and post-decree conflict of laws as it treats both sides alike. Either side can profit from the generosity of trust in the abilities of the other side. Post-decree comity may be asymmetric. The tribes may trust more in the results of state court proceedings than the states do in those of tribal adjudication. Or, reversely, the states may be tempted to have tribes carry the burden of execution on tribal territory (for example, in repossession cases this is of importance) and may thus be inclined to treat tribal decisions with full faith and credit or at least with comity through their courts. Therefore, an asymmetric solution can result by which the states use the tribes as execution agents (the reverse case is also thinkable). On the other hand, the degree of “asymmetry” is often hard to determine. Also this tool does not rule out post-decree conflict of laws. 

(4) Concurrent Jurisdiction and “Limping” Legal Relations

Other means of solving post-decree conflict do not seem to be available. Especially when there is concurrent jurisdiction, for example in gaming law cases, divergent outcomes of court proceedings are undesirable. Often the courts On the basis of concurrent jurisdiction the courts will often go to work with a view from the one to the other, and use full faith and credit, comity, or asymmetry, to reach compatible results. But if this is not the case, two

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100 Mexican v. Circle Bear, 370 N.W. 2d 737 (1985), where Judge Henderson developed the concept of „judicial comity“ in a concurring opinion, see text near note 1067.


102 See, e.g., the New Mexico Gaming Compact with Native American tribes, New Mexico Statutes 11-13-1
jurisdictions, concurrent or not, may end up with contradicting results that can be described as “limping”\textsuperscript{103}.

c. A Legal-Political Comparison of Pre- and Post-decree Procedural Tools

Such a comparison shows that pre-decree measures taken to avoid contradicting decisions are preferable. This means that the rules concerning conflict of laws in Indian country should be recognized, and not mistaken for jurisdiction. They could also prove useful for different legal systems (international, interregional, interlocal, interforal, interzonal, etc.) in the rest of the world.

13. Conclusion to conflict of laws

A culture is defined by several factors, among them law. As an indispensable corollary, every material law has a set of principles and rules of conflict of laws. North American Indian tribes have their own law, and their own conflict-of-laws regime. The fact that they are \textit{dependently} sovereign, has no influence on the tribes’ own material and collision law. Alongside an international law of conflict of laws, there are interlocal, interforal (Spain), interzonal (Germany 1945-1990) and intertribal laws of conflict of laws.

The law of conflict of laws responda to the question of the appropriate law to be applied to a case that has legally relevant factual connections to more than one legal system. In short: conflict of law is about finding the appropriately applicable law. Jurisdiction is about finding the appropriate judge to apply that law. The two are not congruent.

When a court decides to apply a law which is not his own, knowing that law requires expert witness expertise. Some tribes do not like to share information about their law, and how it is applied. They are not ashamed of having their own interior, local law, grown from tradition or modern needs, such as consumer protection. But their elders and representatives might tell you that for 400 years everything shared with outsiders has been turned against them, leading to loss of land and their way of life. Thus, information about tribal law may be difficult to come by. Therefore, when a tribe shares information about its own interior law, the court applying that law should be instructed accordingly. Whenever information about tribal law is hard to get, or inconclusive, a state or federal court should declare itself \textit{forum non conveniens} and, in the pre-decree phase, send the case to the appropriate tribal court, to decide under an anticipated full faith and credit rule, or in the post-decree phase, accept the tribal decision under full faith and credit, or judicial comity.

Inversely, the tribal courts should decide under state or federal law when tribal conflict of law rules say so. This is not borrowed law or guidance, but a sanction of conflict of laws. Tribal identity has many constitutive aspects. Having your own law is also a part of tribal identity. So does having your own conflict of laws principles and rules. Respect given to both, from within and without, gives a tribe the standing it needs in a globalized world.

Tribal code law is a well established part of most tribal cultures. It thus contributes identity

\textsuperscript{103} translation from German: \textit{hinkend}; see VI. 1. a. (8), above. “Limping” legal relations are particularly cumbersome, for the immediate parties as well a for third persons, and administrations. Deplorably, they are not infrequent; there are limping marriages, divorces, adoptions, partnerships, even corporations, etc.
affirmation as much as customary law does. By contributing to tribal identity, code and customary law relate to other tribes, to the states, to the federation of US, and to international organizations. This may give rise to conflicts of laws in cases where more than one legal system calls for application.

Underprivileged cultures struggle to survive, and they may do this by conceiving and maintaining their identity inversely, by calling other cultures “foreign”. Law helps in this process. If a mechanic from Taos Pueblo in New Mexico can tell his employer in Española, off the reservation: “I’m Taos, and Taos law requires us to observe the feast day, and that day they need me as police”, the employer should not fire him for taking a day off. A person who has a law to live with is somebody. Law may not be all that a culture involves, even if used in the wide sense of “our way”, as Indians are fond of saying. But law contributes to cultural identification, and thus to ownness, and foreignness. Stressing this point may be the second motive for learning the law of a lesser known nation.

A few more procedural issues of the anthropology of law should be briefly mentioned: the relationship of violence and and law, youth bulge, the theory that wants to reduce law to process, general dispute management, and mediation.

VII. Force and law. Feud (Pospíšil’s graph). The youth bulge phenomenon

Force can be lawful or illegal. The substance and process of law makes legitimate what otherwise might be brutal and senseless violence. According to Leopold Pospíšil lawful and illegal kinds of violence may be illustrated as follows:

Graph: Violence and law, see next page

For Pospíšil, the four constituents of law, in anthropology, are authority, obligatio, the intent of general application, and sanction. In a detailed discussion in this book, the constituents have been reduced to two, authorizingness, and sanction. From the graph follows, that Pospíšil himself lets two constituents suffice: authority and sanction.

A disputed topic is feud (also called “blood feud”, “vendetta”). Some claim that feud is an early form of law because it contains the element of reciprocal compensation. Pospíšil regards feud as an illegal exchange of force and thus not as early law. Wesel follows him.

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104 A broad spectrum of the anthropology of violence is describes in Jonathan Haas, The Anthropology of War, Cambridge 1990: Cambridge Univ. Press.
105 See Chapter 1 III., above
106 See Chapter 1 III. 5. and 6., above
Spencer and Malinowski take the opposite position.\textsuperscript{109} If the latter group were right, reciprocity would be an element of law because feud would lie at law’s beginning. But there is law without reciprocity, such as the forms of distributive justice. Of course, reciprocity is a frequent element of justice, but it is not all-pervading, which would have to be presumed if feud were a form of early law.

Other early forms of war and violence are youth bulge raiding, armed trading, and borderline fights.

In many societies, the second, third, fourth etc. sons start “hanging around”, “doing no good”, become lawless and, in early societies, begin raiding because the first son is to take father’s position and there is little to do for the following brothers. This phenomenon, dubbed “youth bulge” is held responsible for much warfare, raiding, suburban violence, even student riots. Its leadership issue, among Indians sometimes personalized as “war chiefs”, has been discussed.\textsuperscript{110} Youth bulge may have contributed to many conquests. Many a “clouded title” has its historic reasons in this practice.\textsuperscript{111} The raids of the Norman Vikings may have had one of their cultural roots here. Much of what has misleadingly been written about Indian “braves” and “chiefs” may be better understood in the light of this irresponsible pasttime that mixed hunting and raiding.

“Armed trading”, that is, engaging in commerce in full armour, is a practice reported from many parts of the world. The Normans traded though Northern Russia (where they were called Varangians, Waräger) all the way to the Black Sea.\textsuperscript{112} Similar stories are told of the Franks.\textsuperscript{113} In what is now the northwestern USA, the Chinook were armed traders along the Columbia River.\textsuperscript{114} In the Arabian desert, armed traders sought their way, being entitled to Bedouin hospitality of being permitted to stay for three nights without being harmed, and then having to leave because it was assumed that an enemy was following the trader at a three-days distance. The guest owed to his host not cause him trouble. The assumption was that if


\textsuperscript{110} See text near note 676, above.

\textsuperscript{111} See note 677, above.

\textsuperscript{112} Karl Vollgraff, Erster Versuch einer wissenschaftlichen Begründung sowohl der allgemeinen Ethnologie durch die Anthropologie wie auch der Staats- und Rechtsphilosophie durch die Ethnologie oder Nationalität der Völker, Marburg 1855: Elwertsche Univ. Buchhandlung, vol. 1, 744; Hans-Joachim Torke, Einführung in die Geschichte Russlands, Munich 1997: C.H. Beck, 29, where Torke says that Waräger means „confederates“: This is remarkable since Normans in general did not to participate in the Frankish pledge-of-fith system before they conquered Northern France. If “confederates” in this context means having taken the Frankish oath of cooperative confederation, the Normans did take their version of the Frankish superadditive societal structure not only to England (1066), but also to Novgorod and Pskow not much later.

\textsuperscript{113} Anton Kirchner, Geschichte der Stadt Frankfurt am Main, Teil 1, Frankfurt/Main: Commission der Jägerischen und Eichenbergschen Buchhandlungen, 5 ff.

\textsuperscript{114} Edward H. Thomas, Chinook: A History and Dictionary, Portland, OR 1970: Binfords & Mort
somebody is travelling, he is being hunted by somebody else. He who travels is wrong. In the
Indoeuropean languages, hospis (Latin for guest) and hostis (Latin for enemy) are
dissociations from the same stem (chost, Gast, guest) which indicates that originally the
foreigner was that ambivalent being that could be both an enemy and a guest. “Discovering
the other” was risky, potentially dangerous, and sometimes terrifying.\[115\]

VIII. Law as (mere) process : A post-modern view

Some legal theorists reduce law to process.\[116\] The underlying assumption is that there are no
reliable legal values as such but that it is exclusively the development of law in its procedural
nature which may lead to justifiable decisions. Legal skepticism is a valid basis for such an
approach to law. The question is whether and which degree skepticism as to workable legal
values in law is altogether justified. In strict analysis this is an ideological, if not religious
issue. It has scientifically be debated under these premises. The path followed in the present
text is epistemologically critical because, otherwise, empirical anthropology – the starting
point of this book – would not work. However, that path is not radically skeptical. It rather
assumes that different aspects of justice, commutative, distributive, compensatory, and of
course procedural, too, need to be evaluated and brought into balance. With this
presumption, law is tied to process, but it is not mere process. There is a debate on law as
mere process in legal philosophy.\[117\]

IX. Dispute settlement, general and in Indian country. Mediation

115 Bandelier (1890); Georg Elwert, Herausforderung durch das Fremde – Abgrenzung und
Inkorporation in zwei westafrikanischen Gesellschaften unter wechselnden evolutiven Bedingungen,
in W. Fikentscher (ed.), Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme,

Routledge & Kegan Paul; Niklas Luhmann, Legitimation durch Verfahren, Neuwied 1969:
Luchterhand.; a discussion: R. Zippelius, Legitimation durch Verfahren? Festschrift Karl Larenz,
Munich 1973, 205 –304. The law as process theory is part of a broader philosophical tendency in the
second half of the 20th century to proceduralize epistemology.

117 In defense of law as process: Jürgen Habermas: Faktizität und Geltung. Beiträge zur
Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt a.M. 1992; idem,
Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft
(Habil.), Neuwied 1962 (2nd ed. Frankfurt a.M. 1990); Theorie des kommunikativen Handelns (Bd.1:
Handlungsrealität und gesellschaftliche Rationalisierung, Bd. 2: Zur Kritik der funktionalistischen
Vernunft), Frankfurt a.M. 1981; idem, Drei normative Modelle der Demokratie: Zum Begriff
deliberativer Demokratie. in: Herfried Münkler (Hrsg.): Die Chancen der Freiheit. Grundprobleme der
Demokratie, München und Zürich 1992. S. 11-24., also in: Jürgen Habermas: Die Einbeziehung des
epistemology”, see the legal philosopher Arthur Kaufmann, who does not deny the importance of
discursive procedure to find truth, but holds that process alone cannot bring about substantive
propositions because this would reduce ontology to a subcategory of epistemology (a Spinozist
position that is generally recognized as a philosophical failure for not being able to produce
substantive results). Habermas has to my knowledge never answered this critique: A. Kaufmann,
Prozedurale Theorien der Gerechtigkeit, Sitzungsberichte der Bayerischen Akademie der
Wissenschaften, Phil- Hist. Klasse, Munich 1989: C.H. Beck (Commision); idem, Rechtsphilosophie
in der Nach-Neuzeit, Heidelberg 1990; Decker & Müller. On Spinoza and his philosophical
proceduralism W. Fikentscher (1977a), 626 ff.
Dispute settlement is an area of culturally highly diverse modes to bring a legal dispute to an at least preliminary end. In Chapter 14, dispute settlement among Native Americans is discussed in a short survey.

Ethnographic material on legal procedure is extensive.\textsuperscript{118} Trials are rather easily observed and discussed with native observers and by-standers. Here follow a few culturally specific examples:

- In the Nuer nation, a mediator walks back and forth between the homes of the parties trying to find an approproate compensation acceptable for both sides: the “leopard skin chief”. He is not a chief, rather a parley go- between.\textsuperscript{119}

- A Kapauku big man is silently sharpening the point of an arrow to indicate his sentencing of the defendant as having to leave the community (which in practice means the death penalty).

- Among the Pirana of Central Australia, the kandachi man executes the defendant who has been sentenced to death by a secret “court” of elders.\textsuperscript{120}

- In a Papuan society, the parties argue, each side with the aid of a speaker. The village community is listening. Every time a good argument is made, the listeners show their consent with the point, and the party who made the successful point is permitted to ram a pole into the ground on its side. At the end of the day, the poles are counted, and the party with the greater number of poles wins the case.\textsuperscript{121}

- Malinowski, in “Crime and Custom” (1926), describes suicide as consequence of Trobriand court sentences

- Inuit have been reported to “sing out” their case in a contest,. The “better” singer wins the dispute.\textsuperscript{122}

- The Germanic tribes “voted” by shouting and knocking their swords against the shields. The party making more noise wins.\textsuperscript{123}


\textsuperscript{120} See note 642, above.

\textsuperscript{121} communication Leopold Pospíšil (1986).

\textsuperscript{122} Knud Rasmussen is said to be the first reporter of Inuit song contests; similar contests are mentioned in Hann & Group (2006) 138 f, from Turkmenistan; in 2006, Irmgard and W. Fikentscher observed a sing-out at a show on the island of Saarema (Ösel); Estonia; the show represented a traditional island wedding and contained a half playful, half earnest song contest between friends and family of the bride who sang in her defense, and the arriving groom and his friends who tried to outsing the defenders. Singing for settling a case does not seem to be unusual.

\textsuperscript{123} Tacitus, Germania.
- Often a council of elders is involved and asked for advice or judgment. Canada’s “First Nations” (as the Canadian Indians call themselves) are said to practice “circle meetings” with juvenile perpetrators.

- In the Pueblo, sentencing was often done in the kivas. Cushing reports of the terror of the priesthoods (“of the bow”). Still today, the hunters’ or warriors’ societies may do the police service at Pueblo ceremonies.

An issue, a problem, a case is always a culture-specific concept. Therefore, comparative law cannot be outlined or structured by assembling and sorting issues. Lévy-Strauss reports how Bororo Indians from the South American rain forest try and decide their cases. The plaintiff and his side blame the defendant by not only telling what he “did” but also to which bad village, family or lineage he is coming. The defendant and his side not only deny the deed but also retort by telling negative stories of the plaintiffs village, family, or lineage. “Dirty laundry” is washed on both sides. The “case” (Streitgegenstand) possibly includes the history of two clans or villages. After the case is settled, all grudges between the two groups have been discussed and eliminated. The air between the groups is clean again.

The case is more serious when a split of opinions divides the entire village or tribe. In close-knit societies such basic differences in opinions are not frequent, but they occur so as to deserve further study. They are well remembered by the tribe and readily told to outsiders. They deserve future study. Examples may show the structure of such rifts: Modernists quarrel with traditionalists, such as in the Hopi village of Oraibi. In 1909, the traditionalists left and founded Bacavi (“Oraibi Split”). Should the tribe establish a casino? Many a Pueblo remember bitter fights on this issue. In Zia, evangelical radicals (“the holy rollers”) seriously damaged the inner peace of the Pueblo for years, so that a law had to made and applied that provided for banishment. A today deserted Pueblo, San Lazaro (near Santa Fe) seemed to have been disrupted by what may be called a double split: both sides left a place that had become unbearably unclean. The Tasadai tribe on the Philippines are that part of a split tribe that rejected modernity and wanted to live according to traditions. The rule seems to be that the modernists stay and the traditionalists leave (at the point when the modernists become the majority).

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125 See also Bandelier (1890).
128 Cf., text near notes 493 and 994..
130 Zia Custom Code of (about) 1945).
131 Fieldnotes 1995.
132 See note 1104, above.
In the absence the staff supported power of a chief (duke, king, queen, city government, modern state — see Chapter 9 for these series of forms of ruling - arbitration by a arbiter or umpire (appointed by the parties to decide) or mediation by a mediator (without a decisionary activity) are ways and of settling a case. This book is not the appropriate frame for describing the procedures and techniques of these “out of court” procedures. Literature both ethnological and “modern” abounds.

X. Bibliography


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