Colonialism and German PIL (1) – Colonial Structures in Traditional PIL

This post is the first of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series **does not intent to automatically pass judgment** on a norm or method influenced by colonialism **as inherently negative** (I emphasise this because my experience shows that the impression quickly arises). Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first category, to be discussed today, relates to the (sometimes unconscious) implementation and later continuation of the colonial structure in PIL – now and then.

1. The Origins

a) Savigny's approach

One if not the core value of Private International Law is its neutrality and equality among legal systems. The main goal of German conflict of laws rules is to achieve "international justice" by associating legal matters with the most fitting law, independent of substantive legal values. These foundational principles are commonly attributed to Savigny, who shaped the basic structure of German conflict of laws rules by associating legal matters with their "seat". Savigny supposedly treated all legal systems as equal and of the same value. The supposed neutrality of PIL might suggest that it is devoid of, or at least shows minimal traces of, colonialism due to its fundamental structures and values.

However, examining Savigny's "neutrality" towards potential applicable laws reveals that it is only respected from the perspective of "law" as defined by Savigny. This definition includes only legal systems that share the same

“Christian” values. This, in essence, results in a devaluation of other legal systems deemed less valuable. Typically, these legal systems today would be those classified as “Western,” sharing the same value system as German law.

b) Conflict of laws and internal conflicts in relation to colonial states

In determining the applicable law between colonial states and colonies, usually the rules on conflict of laws did not apply but a conflict was regarded as an internal one. German colonies, for instance, were not considered part of the German Reich, yet not treated as a separate state, but as “protectorates.” Similar ambiguity existed for other colonies. This unclear legal status allowed different treatment of the colonies under conflict of laws rules, separating local laws in the colonies from the “mother system” and placing them in a hierarchical inferiority. The indigenous population was “allowed” to handle internal, especially family-related disputes through their pre-colonial customs. However, they were not allowed to determine on their own what constituted part of this legal framework or in which cases which rule applied. Colonial authorities decided which cultural elements of various groups seemed fitting as applicable. Furthermore, inter-local conflict of laws rules often only applied local laws when they did not conflict with the colonial legal system or its core values and did not involve members of the “mother system”. Thus, the legal system of the colonizers took precedence in cases of doubt, and the affected individuals from these local legal orders were not involved in the decisions. Consequently, the colonial authorities decided what was classified as “local law,” its scope and application, favoring their own legal system in cases of uncertainty. The decision regarding which law should prevail was unilaterally made by the colonial authorities.

c) The concept of “state“

Furthemore, an indirect colonial influence on the concept of state within conflict laws is notable. Non-state law, particularly religious or tribal law, was not considered law, neglecting the various communities or identities of individuals in the colonies. Norms within the framework of Savigny’s conflict laws referred exclusively to state law, assuming a state based on Western understanding. This reference indirectly affirmed the concept of the state attributed to Jellinek and the often arbitrarily drawn colonial state boundaries through these conflict norms. Simultaneously, by referring exclusively to state law, it marginalized or ignored other forms of legal orders since they did not represent “law” according

to the references. Again, this particularly affected religious or indigenous law.

d) Citizenship as connecting factor

Citizenship serves as a core connecting point, especially for personal matters in Continental European PIL, including Germany (even though it is not based in Savigny's PIL thinking but is usually attributed to Mancini or the reception of his doctrines). This connection to citizenship has roots in colonial thinking: Granting citizenship has historically expressed and continues to express exclusive affiliations that consciously exclude others. In cross-border private law relations, PIL perpetuates this citizenship policy, reserving certain rules of German law for German citizens.

This method of connecting legal matters to citizenship had implications in the determination of applicable law in colonial contexts. For instance, in the German Reich colonies, distinctions were made between *Reichsdeutsche* (Germans from the Reich), European foreigners (foreigners but non-natives), and natives. The latter had no citizenship, thus could not fall under a conflict of laws rule referring to citizenship. Similar categorizations and unequal treatment between French citizens, indigenous colony residents, and European foreigners living in colonies were present in French colonial law concerning inter-local private law and naturalization law. The differentiation's backdrop was the idea that natives were not entitled to French citizen rights. The (non-)granting of citizenship was generally associated with the notion of preventing equal treatment with supposedly inferior cultures or denying the legal guarantees of the colonial state to natives. Comparable exclusionary thoughts existed in "white" British colonies (Canada, New Zealand, etc.) that introduced their own citizenship, consciously isolating themselves from other (non-white) British colonies (e.g., India). The connecting factor citizenship was therefore also intented to exclude.

Additionally, in common law, domicile serves as a connection point with similar intent: The establishment of a domicile was intentionally tied to the requirement of the intent to remain and not to want to return to the original domicile (*animus manendi et non revertendi*). This was to prevent individuals of English descent, residing in colonial territories for long periods, from solely accessing English law while also enabling others to access this law.

2. Current German PIL Rules

Wondering whether the outlined principles under traditional PIL persist until today, it's now generally accepted that there's fundamental neutrality towards all legal systems without formal differentiation based on Christian or "Western" values. Therefore, Savigny's approach of solely recognizing Christian or "Western" legal systems is outdated. Although, in court rhetoric, some expressions hint that certain legal systems are considered unequal or "alien" to German law, particularly in cases involving non-Christian religious law, like Islamic legal institutes. Moreover, in migration law cases where PIL relates to preliminary issues, a stricter standard seems to be applied to individuals from "Global South" countries compared to those from the "Global North". These are trends and nuances that luckily occasionally, not systematically, appear.

In modern German PIL, traces of colonialism persist methodologically in the insistence on referring to a state legal order while deciding when such an order exists. This presents challenges concerning the law of states not recognized under international law. While the prevailing opinion emphasizes that recognition by international law is not decisive, certain parts of legal practice and literature still assume this recognition as a prerequisite. Moreover, the status of non-state law, especially religious or tribal law, remains weak. Whether such laws qualify as "law" according to conflict of laws rules generally relies on territorially bounded jurisdictions and the corresponding state according to a European-Western understanding of state law. Non-state law becomes relevant within German PIL only when referred to by the state legal order, e.g. by interlocal or interpersonal conflict laws. Similarly, the acknowledgment of foreign decisions and the recognition of foreign institutions as "courts" under German International Procedural Law depend on their incorporation within the (foreign) state's legal framework.

Additionally, the use of citizenship as a basis in PIL has shifted away from the exclusion of individuals from German rights. Nevertheless, the question of who can obtain citizenship remains politically contentious. Citizenship continues to serve as a core basis for many classical conflict of laws rules (such as capacity, names, celebration of a marriage) and is gradually being replaced by habitual residence.

3. Room for Improvement or Decolonialisation – the Treatment of Local Law

The reference to state law, which excludes other non-state law unless there is interlocal or interpersonal referral, unconsciously continues colonial thinking. It can be seen in the tradition of colonial rulers and post-colonialism, overriding indigenous law in favor of one's own legal order. However, abandoning the basic structure of conflict law that refers to a state legal system seems impractical. One could consider introducing a separate (German) conflict norm for tribal or religious law, thus bypassing the reference to the state legal order. However, if interlocal or interpersonal referral is abandoned within a state legal system, and local law is applied based on domestic principles, German PIL ignores the foreign state's decision to which legal order reference is made, applying local law only under specific circumstances or not at all. This approach would also be colonialist, as German conflict law would then presume to know better than the state how to apply its internal law.

An exception may apply if the state deciding against a referral to local law is domestically or internationally obligated to apply this law and fails to fulfill this obligation adequately.

Some national constitutions recognize and protect indiginous rights, e.g. Canada, as a North American country, South Africa and Kenya, as African countries, just to name a few. In Nigeria, the inheritance rights of the firstborn son of the Igiogbe tradition are qualified as internationally mandatory norms and are therefore always applied (critically assessed here).

An international legal basis could be the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries from 1989. The convention includes provisions to consider and respect the customary rights of indigenous peoples (Article 8). E.g. the Inter-American Court of Human Rights, in her evolutionary interpretation of the Inter-American Human Rights Convention, elevated tribal and customary law partly to human rights within the scope of the Inter-American Human Rights Convention (e.g. Yakye Axa vs. Paraguay, 17.6.2005; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 31.8.2001; Sawhoyamaxa Indigenous Community v. Paraguay, 29.3.2006; Xucuru Indigenous People and its members v. Brasil, 5.2.2018; Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, 24.11.2020; Moiwana Community v. Suriname, 15.6.2005). See also this article by Ochoa.

Also, the African Commission on Human and Peoples' Rights, interpreting the

African Charter on Human and Peoples' Rights, has protected indigenous law through the charter (Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois), 4.2.2014 – 276 / 2003). However, it is disputed whether the commission's interpretation results are binding (see a discussion here).

Thus, although there may be a state obligation to respect local rights, there may have been a failure on the national side to refer to this right. For example, in judgments of the Inter-American Court of Human Rights, it can be observed that implementation into national law is only partially carried out. Also, regarding the interpretation results by the African Commission on Human and Peoples' Rights, it has been shown that states are not always willing to implement recommendations despite official commitment to it. In these cases, while the state has the obligation to apply non-state law, the referral needed by conflict law is missing. In this case, indigenous law should not be ignored by a German court.

As a result, the basic technique of PIL, referring to state law, should remain untouched. Nevertheless, courts might include foreign local law at least when the state in whose territory the affected community lives is internationally or constitutionally obligated to respect indigenous or religious law, or has obligated itself to do so. Methodologically, recourse can be made to giving "effect" or "consideration" to foreign law in substantive legal application, known particularly in institutes such as foreign mandatory law (Art. 9 para 3 Rome I or Art. 17 Rome II) but also in substitution, transposition, or adaptation. German courts usually give foreign non-applicable law effect within the application of substantive law, such as the interpretation of norms, especially general clauses (good faithc, bonos mores etc.).

A court typically has discretion on whether to "consider" non applicable foreign law, as it is not a classic application of law. Therefore, the discretion to give effect to non-state foreign law should only be used exceptionally when the state law to which it belongs does not apply it, although there is a state obligation to apply it.

Guiding the discretion should be (in my opinion):

- whether the application of non-state law is in the party's interest (1),
- whether there is a foreign state obligation to give effect to this non-state law (2),

- the role of non-state law in the home state (3),
- and whether there is an international obligation on the German side to integrate or not integrate the law, perhaps because it may violate fundamental values of German law (4).

Particularly in the third point, it would be desirable for more anthropological-legal comparative work to be done so that integration into legal practice can work without leading to ruptures with the state from whose territory the law originally comes.

This has been a long post, the next three will be shorter. As writen in the introduction, these are some initial thoughts and I welcome (constructive) feedback from the whole international community!