Revista Direito e Praxis

[Dossier: Decolonial comparative property law]

Indigenous Institutions of Collective Property in Comparative Perspective: a decolonial comparative study of the territorial identities of the Mapuche people of Chile and the Xukuru people of Brazil

Instituições Indígenas de Propriedade Coletiva em Perspectiva Comparada: um estudo comparado decolonial das identidades territoriais do povo Mapuche do Chile e Xukuru do Brasil

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Article received on 05/10/2025 and accepted on 11/10/2025.

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

Resumo

Esta pesquisa tem o objetivo de desenvolver uma análise comparada decolonial do direito de propriedade coletiva e das dinâmicas culturais-territoriais de dois povos indígenas: Xukuru de Ororubá, no Brasil, e Mapuche, do Chile, por meio da tradução do conceito de propriedade coletiva para identidade territorial. A pesquisa mostra como o direito comparado decolonial pode aproveitar a análise neo institucional para promover um diálogo intercultural.

Palavras-chave: Povos Indígenas; Identidade Territorial; Direito Comparado Decolonial

Abstract

This research has the purpose of developing a decolonial comparative analysis of collective property law and the cultural-territorial dynamics of two indigenous peoples: Xukuru de Ororubá, in Brazil, and Mapuche in Chile, through the translation of the concept of collective property to territorial identity. The research shows how decolonial comparative law can take advantage of neo-institutional analysis to promote an intercultural dialogue.

Keywords: Indigenous Peoples; Territorial Identity; Decolonial Comparative Law.

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

1. Introduction

This article[1] proposes to develop a comparative analysis of collective property law from a decolonial perspective, through learning about the ancestral knowledge of two indigenous peoples located in Latin America: the Xukuru de Ororubá people, in Brazil, and the Mapuche people, in Chile. To this end, a decolonial translation of the concept of collective property law into the right to territorial identity is carried out, through the investigation and understanding of this real institution, understood as a factual, applied and embedded and part of the subjectivity of each people, including their diversity.

The contribution of this analysis is justified by the fact that it deals with two indigenous peoples from the Global South, both from Latin America, who resisted the European colonial imposition of private property by asserting their right to territorial identity, even in the face of the models of *aldeamento*[2] and *reducciones*[3] to which they were subjected. These are peoples who experienced, in similar periods, Portuguese colonization (Xukuru people) and Spanish colonization (Mapuche people), with common historical traits (Silva, 2017; Muñoz; Perez, 2023). Even after the "formal decolonization"[4] of their States, the Xukuru and Mapuche peoples, each in their local context, are leading initiatives to reoccupy their traditional territory in violent land disputes, in conflict with the rights of indigenous peoples.

For the Xukuru and Mapuche indigenous people, the land is sacred, related to the spirituality, good living (*buen vivir*) and cultural identity of their people. The experience of

[1] We would like to thank Alejandra Urrutia, an indigenous member of the Mapuche people; Francis Rain, an indigenous Mapuche facilitator at the Legal Clinic of the University of Chile; Guilherme Xukuru, an indigenous member of the Xukuru do Ororubá people; Iran Xukuru, an indigenous member of the Xukuru do Ororubá people; as well as the reflections provided by researcher Ana Amaral from CIMI-NE, Prof Juan Faundes from UA Chile, Chilean anthropologist Gemma Rojas, and Brazilian legal anthropologists Sandro Lobo Calheiros and Mônica Gusmão. Research developed within the scope of the Institutional Design Research Laboratory and the academic partnership between the Human Rights Clinic ASIDH of the Federal University of Pernambuco and the Intercultural Clinic of the Autonomous University of Chile, which provided researchers with a closer experience of the topic. We are grateful for all the comments received at Decolonial Comparative Property Law Workshop and Springer School, especially those from Kwamou Eva Feukeu. The event to discuss the paper was organized in 2024, by the Max Planck Institute for comparative and international private law.

[2] In Portuguese, the term 'aldeamento' originally referred to missionary settlements and the colonial model of organising indigenous peoples into villages in north-east Brazil. Initially, this process involved the destruction of indigenous culture. However, later it became a 'locus' of ethnic survival for some indigenous groups who had survived and resisted. The Xukuru people are a paradigmatic example of this non-passive resistance to colonisation process (Nóbrega & Lima, 2021, p. 356).

[3] In Spanish, the term 'reducciones' represented the colonial model of missionary settlements for indigenous peoples in Chile.

[4] Lena Salaymeh and Ralf Michaels (2022, p. 169) warn that Eurocentric comparative law participated directly and indirectly in reinforcing colonialism by perpetuating neocolonial domination in law, even after formal decolonisation.

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

the Xukuru people is also paradigmatic for Latin America, as it represents the first condemnation of the Brazilian State, in 2018, by the Inter-American Court of Human Rights (IACtHR) in an indigenous case involving the protection of the right to collective property, with binding effects on both Brazilian and Chilean jurisdictions (Nóbrega *et al*, 2023b). The Mapuche people have also historically faced serious institutional violence for the exercise of their territorial identity, with a dynamic of division and expropriation of their territory, as will be explored in the academic production.

In 2023, the researchers of this article began comparative comprehension based on learning from the Xukuru people (Pernambuco, Brazil) and the Mapuche people (Araucanía, Chile), through the exchange between the Legal Clinics of the Federal University of Pernambuco and the Autonomous University of Chile [5], which have interdisciplinary activities and indigenous intercultural facilitators. Secondary data were obtained through bibliography on ethnographic, socio-historical and legal studies on these peoples. Using case study methodology and neo-institutional analysis, the research compared the institutional experiences of these peoples with a focus on territorial identity. The research approached indigenous territorial identity from a decolonial perspective, linking it to associating it with the legal concept of collective property. Comparative analysis explored themes such the force of nature, the notion of good living (*buen vivir*), socio-political organization and sacred elements, highlighting the meanings of territorial identity and the right to collective property. The study was based on decolonial comparative law, interculturality and historical neo-institutionalism, aiming to understand the two realities without hierarchizing them and respecting their specific contexts.

Based on the above, this study seeks to answer the following question: how do the institutions embedded in the epistemologies of the Xukuru indigenous peoples of Ororubá in Brazil and Mapuche of the Araucanía region in Chile converge and diverge in their relationships with their territories, considering their respective contexts and interactions with formal legal systems and other social groups?

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https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

2. Assumptions of neo-institutional analysis applied to decolonial comparative property law

First, we propose neo-institutionalism as a promising approach for analyzing comparative law studies from a decolonial perspective. This approach prioritizes the investigation of real institutions over merely apparent institutions[6]. This can be achieved through interdisciplinary studies and participatory methodology as well as by listening to and considering the narratives of historically marginalized actors and social organizations, such as indigenous peoples. The paradigmatic turn in the social sciences towards rethinking institutions as a set of working rules that operate in practice (Nóbrega, 2018, p. 86), whether formal or informal, paved the way for studies on informal institutions, in comparative research in Latin America (Teixeira; Nóbrega, 2023 p. 97), potentially reaching the comprehension of the real institutions. Thus, the neo-institutional, when combined with a decolonial lens applied to law (Nóbrega; Peixoto; Lamenha, 2023, p. 80), does not lend itself to homogenization but to advancing in the contextualized approach, considering institutional interactions and diversities.

Lena Salaymeh and Ralf Michaels (2022, p. 170) develop a decolonial critique of the most prominent schools of traditional comparative law, challenging the perspective of nationalist methodology, in which non-state law, such as customary law and religious law, is disregarded[7] (Salaymeh; Michaels, 2022, p. 171). For Legrand (2021, p. 204), the comparison should not have a unifying effect, but a multiplier one. Reflections by Olive Sabiiti (2024, p. 133) point to the innovative and interdisciplinary potential of neo-institutional research for a deeply critical comparative law. Here, we present a neo-institutional analysis, which, by incorporating the institutions of indigenous peoples that do not emanate from official state channels, is fundamental to decolonial comparative research in the South-South axis. This is because these institutions allow us to rethink

[6] In her 2007 political science thesis, 'Between formal Brazil and real Brazil,' Flavianne Nóbrega developed the concept of 'real institution' as opposed to 'apparent institution,' based on neo-institutional analysis. Real institutions are understood as institutions that effectively operate in practice, with a comprehensive role of culture and the socio-historical context, requiring a multidisciplinary and intercultural approach. Apparent institutions are the "shell" and "appearance" of the formal institution, with an approach limited by rationalist and dogmatic analysis of the Law. For more information, see Nóbrega (2018) and Nóbrega (2023a).

[7] For indigenous peoples in the Northeast of Brazil, the expression "spirituality" is used as a decolonial term instead of religion. To confer the indigenous narrative in the intercultural and interdisciplinary context, see the debate "Desconstruindo conceitos ocidentais: o estigma linguístico e cultural referente aos povos indígenas", promoted by the ASIDH outreach community Program of the Federal University of Pernambuco (Gomes; Silva; Alcântara, 2022, p.26).

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

property law by seeing the unique way in which each indigenous people interacts with their territory, involving the maintenance of life, communal governance, custom, and spiritual practices, and thereby warning of the dangers of loans or legal transplants.

Pozzatti Junior (2016, p. 45) highlights the perspective of decolonial comparative law as a necessary "theoretical-practical engagement". The decolonial approach is linked to a feedback process (Herrera Flores, 2009, p. 142), in which practice is umbilically linked to empirical studies, as in neo-institutional analysis (Nóbrega, 2018). In the process of colonization of indigenous peoples, what Walter Mignolo (2017) called "border epistemology" emerged, that is, the control of knowledge by colonizers, limiting and invalidating other forms of knowledge. This contributed to the disappearance of indigenous people's institutions regarding the use of the territory or to a need for a remodeling of these institutions as a form of resistance to the "coloniality of power".

It is also necessary to understand how national law reinforced the informal institutionalization of the practice of assimilationism in relation to these peoples. There is a need to investigate how these real institutions (set of working rules, Ostrom, 2020, p. 109) are reinforced by *enforcement* mechanisms*,* which are sanctions inside and outside the official channels of the State. Therefore, we analyze how the Xukuru and Mapuche peoples were sanctioned (punished and impacted), directly and indirectly in the ways they dispose of their territories and profess their beliefs, customs and social organization.

Decolonial comparative law thus emerges as a means of building bridges and promoting an understanding of diverse legal and cultural perspectives—such as the collective property rights, which are here translated by the neo-institutional analysis as the indigenous institutions of the territorial identities. Beyond the comparison of formal legal constructions, the neo-institutional approach grounds the analysis in lived reality and yields deeper insights, more accurately capturing, for instance, the sacred nature of territorial identities and their interaction with formal institutions.

It is worth noting that, with the use of the term "institutions", it is not intended to reduce ancestral practices and indigenous worldviews to theories of Western origin. On the contrary, the objective is to promote a dialogue considering the institutional plurality of the peoples analyzed here, based on the tools of decolonial comparative law, in order to also contribute to the neo-institutional theory as enhanced with the learning of traditional cosmologies. Therefore, it is necessary to thoroughly understand the

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

corazonamientos [8] of each people, as Ruales (2024) narrates, in respect of their relationship with the territory, its meanings, and their own ordering.

Therefore, two methodological paths are suggested to find an adequate approach to decolonial comparative law: the construction proposed by historical neo-institutionalism and interculturality as analytical tools. In the first, formal and informal institutions are seen as products of the historical experiences and context, i.e., their origin lies in the historical construction as well as the interactions derived from these institutions (North, 1990). The second approach, interculturality, offers a comparative approach that avoids institutional hierarchies, favoring dialogue. In this case, we have analyzed both the formal institutions of the States and those of the indigenous people themselves as well as those that arise between them and non-indigenous individuals.

3. The meanings of the territory of the Xukuru do Ororubá and Mapuche indigenous peoples

3.1 Territorial identity as a foundation of intercultural analysis

Initially, before considering the conception of territory for the indigenous peoples studied here, it is necessary to understand how the formal conception of property is defined in the Brazilian and Chilean legal systems. In Brazil, in addition to Article 231 of the current Constitution (CF/88), which establishes the right of indigenous peoples to land ownership, there are the provisions of Articles 20, XI, and 22, XIV. These provisions established that the lands traditionally occupied by the indigenous people are the property of the Federal Union; therefore, only this entity can legislate on the matter, and there must be administrative procedures for the demarcation of the territories, according to other normative acts.

The current Brazilian Civil Code deals with property rights from article 1225 onwards, although the possessory protections of this legislation and the Brazilian Code of Civil Procedure do not apply, as the latter refers to private property and is not consistent with the way in which the territory is disposed of by the indigenous people. With regard to the Chilean Civil Code, the provisions on property are contained in book two of the

[8] *Corazonamiento* is a concept from decolonial theory that refers to a way of knowing and acting through feeling, listening, and relational connection with others and the Earth, in contrast to Eurocentric rationalism.

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

legislation (“On property, domain, possession, and use”), in Article 565, and property (domain) is provided for in Article 582. This provision is also not used to deal with indigenous lands, but by the country's Indigenous Development Law, to be explored later.

It is important to highlight the article in which Nóbrega and De Lima (2021) develop a decolonial understanding of collective property rights from the case of the Xukuru people versus Brazil that was ruled on by the Inter-American Court of Human Rights. In *an amicus curiae* brief submitted by the Human Rights Clinic of UFPE before the Federal Supreme Court, Brazil, in the case of general repercussion on the territorial rights of indigenous peoples, the authors' production on the decolonial comparative law of collective property was referenced, based on the case of the Xukuru people in the Inter-American Court of Human Rights, in order to extend the protection and promotion of rights to all indigenous peoples in Brazil (Nóbrega et al., 2022, p. 127). The concept was relevant to go beyond the concept of private property, since the construction of its new meaning took place in dialogue between the law and the demand brought by indigenous peoples. This decolonial achievement was the result of this mobilization of indigenous activists and critical scholars in Latin America who promoted an "indigenization of the human right to property" (Merino, 2024, p. 418) in the Inter-American Human Rights System. This is a new dimension in the relationship with territories, considering their necessarily collective character — belonging to an entire people — their non-economic and non-extractive income as well as the right to free determination and prior consultation in relation to projects and measures that affect collective property and the sacred relationship with the territory.

It is worth emphasizing, in this sense, how the Western paradigm of property should not be the center of the analysis of the relationship between territory and indigenous peoples. The forms developed by these people predate the State and coloniality, and their ontological paradigms and forms of land appropriation should be recognized as having this quality. The present research within this context of an epistemological resumption of discussions about the meanings of territory, access to land, and rules established and enforced by indigenous peoples regarding land and their spirituality, as well as about the role of the State and coloniality in this area. Property is, therefore, a plural category, and this study is a contribution to this plurality of ontologies about land and its sacredness (Ruales, 2024).

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Considering the lessons taught by the institutions of the Xukuru and Mapuche indigenous peoples, the term decolonial *territorial identity* is proposed for comparison, in the sense also put forward by authors such as Le Bonniec (2002) and Urra (2002). According to Le Bonniec (2002), the idea of territorial identities initially presented by traditional peoples of Lafkenche, in the Province of Arauco, corresponds to more than territoriality; it refers to types of structures common to a group that allow it to identify itself and distinguish itself from others. It is, therefore, a territorial, socio-political and collective historical reference for its inhabitants and also for its neighbors, who give the territory meanings and identity. The land, therefore, is a space for the reconstruction of indigenous identity, in which the territory has several dimensions, both social and spiritual (Otarola, 1995) – and for, of approximation between nature and culture, which is in line with Bonnemaison's (2005) notion of social and symbolic aspects of the territory. The relationship with the territory is also being built over time, as the interactions of Mapuche society with other social groups change (Le Bonniec, 2002).

These meanings aim to understand the sacred and ancestral relationship of use and enjoyment, the modes of disposition and the meaning of the lands in which the two indigenous peoples under study live. Therefore, the present work does not approach property from a Eurocentric paradigm. But the insufficiencies of this model of private property, from a narrow Eurocentric paradigm which was imposed by the colonizer and employed with the aim of erasing different conceptions that indigenous peoples have about the territory. A central conception is that thet do not solely occupy the territory, because the territory is integrated with the maintenance of their existences and spiritualities. It is worth noting that territorial identities are multiple, even within the same indigenous people.

Elinor Ostrom's (2000) neo-institutional study on the management of communal property is also relevant because it considers the proper institutions (and not only state institutions) associated with the autonomous management of the territory and the resources available in a given community, including an analysis of the social rules of reciprocity to understand the daily problems that arise in the territory (Ostrom, 2000, p. 12). This research incorporates the utilization of analytical tools in order to understand territorial identities, their social rules of reciprocity in respect of communal management, and their relationship with the territory.

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

The aim of the present comparative study is to bring the tools of decolonial comparative law closer to those of neo-institutionalism and to establish dialogue between the institutions – understood as rules observed in reality, in addition to the formal institutions emanating from the state – of collective property and the territorial identities of the peoples analyzed here. Churihuentro (2002) referred to the rules established by the Mapuche people as customary law. The case studies conducted in this research also enabled us to discuss the appropriation of the category of commons and the theoretical possibilities for its adaptation to the study of territorial identity and collective property, as will be explored in the sections below.

3.2 The Xukuru do Ororubá and Mapuche indigenous territorial institutions in a comparative perspective

The Xukuru de Ororubá people live in a region with a predominantly semi-arid and hot climate, in the Agreste region of the State of Pernambuco, Northeast Brazil, between the municipalities of Pesqueira and Poção, approximately 200 kilometers away from the state capital, Recife (Silva, 2017). On the other hand, the group studied by the research on the Mapuche people (which has several subgroups and divisions, including in other countries) lives in a temperate and cold climate region in southern Chile, mainly in the Araucanía region, located about 684 km from Santiago (Herrmann, 2006).

A first point of dialogue between the Xukuru de Ororubá peoples and the Mapuche of Araucanía that can be highlighted is the diversity and demographic density of these peoples. The Mapuche people represent the largest indigenous population in the country (Loncón, 2021, p. 132). The indigenous people of the Northeast, in turn, are the second largest indigenous population in Brazil, and the Xukuru are the largest indigenous population in this region (Instituto Brasileiro de Geografia e Estatística, 2023).

Another element of connection in the sense of territorial identity is the fact that both see the land as something sacred (Melin; Mansilla; Royo, 2016; Araújo, 2021), which can be perceived in the indigenous terms linked to the meaning of territory or territoriality. The etymology of the word “Mapuche” reveals this connection: in the indigenous language Mapagundun, “mapu” means land and “che” means people, so ‘Mapuche’ means “people of the land” (Muñoz; González-Perez, 2023). There are also several Xukuru de Ororubá expressions that refer to the sacred relationship and to good

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

living (*buen vivir*) with the peoples' territory; among these terms are "sacred agriculture", 'enchantment' and "Limolaygo Toype" — a philosophical concept related to the name Land of the Ancestors of the Xukuru de Ororubá. Such terms portray the cooperative relationship with nature and connect each member to their ancestral roots (Araújo, 2021, p. 227).

Araújo (2021) uses the theory of geographer Joel Bonnemaison to describe the relationship of the Xukuru de Ororubá with their territory. The author explains that the conceived relationship has two aspects: one being a social function (what is produced by the land) and the other a symbolic function (of the cultural and religious issues experienced in that land) (Araújo, 2021). Thus, for the Xukuru de Ororubá people, there are cultural spaces with historical and symbolic meanings, and in these spaces they also develop their own agricultural practices.

As examples, we can point out Mother Zenilda's seed house, the good living (*buen vivir*) tent, the agro-food farm (*roçado agroalimentar*), and the sacred ground (*terreiro Sagrado*) of Boa Vista (Vieira, Araújo, Maciel; Ordônio, 2020; Araújo, 2021). Such spaces are, for the indigenous people, sacred places for the exchange of collective experiences and knowledge as well as for healing; they are based on a model of solidarity economy and reciprocity and constitute part of their territorial identities (Teixeira; Lima, 2024). A similar idea was expressed by Le Bonniec (2002).

The expression "Limolaygo Toype" was adopted by the Xukuru to describe practices of good living (*buen vivir*) that guide their connections with nature and the sacred world of enchantments (Araújo, 2021). These people have several agroecological techniques which make them responsible for the restoration and preservation of local nature. This sacred relationship is also part of the Mapuche territorial identity, an identity that acknowledges the beings – called Gen – who that are not necessarily visible called Gen, considered the owners of the Mapuche's belief and religiosity and who protect the people and the space (Melin; Mansilla; Royo, 2016).

It is worth noting that there are other activities that are full of symbols and meanings related to the territory and that are performed by the Xukuru de Ororubá, such as the Meeting of the Xukuru Wise Men and Women – *Long Abaré*, which aims to allow indigenous farmers to share their experiences with nature and explain how they interpret the signs of the sacred, which guide their agricultural practices (Vieira, Araújo, Maciel, and Ordônio, 2020). In addition, the Xukuru Assembly, an annual event held in May in the

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

village of Pedra d'Água, can also be highlighted. In 2023, the theme of the assembly was “Limolaygo Toype: Mandaru preparing minds to spread seeds” (Ororubá Filmes, 2023).

In the seeds, we find the enchantment of the Xukuru people that is associated associated with indigenous knowledge, practices and wisdom (Teixeira; Lima, 2024). Indigenous people, for example, are considered seeds, and in the same way, when they die, people are not simply buried, but "planted", and are enchanted, and their bodies are food for the earth (Iran Xukuru, Continente Magazine, 2021). The Mapuche people also have a ritual related to death, called Eluwun, which is closely linked to their relationship with the territory and the cycle of life (Curihuentro, 2002).

It can also be observed that the Xukuru people have several agroecological techniques which make them responsible for the restoration and preservation of local nature. In order to illustrate how the Xukuru people perceive ancestry, one can cite their correlation of strength with nature. According to Iran Xukuru (Revista Continente, 2021, 2021), nature has several points of strength, where a stone, a river, a tree, or the sacred *jurema* plant represent points of reconnection between humans and the world, as well as their ancestors. This relation can also be linked to another important element of Mapuche territorial identity, which are beings – called Gen – who are not necessarily visible; they are considered by the Mapuche to be the owners of their beliefs and religiosity, also interacting with space and with what can be understood as collective property. The Gen deliver messages and announcements, according to the belief of the people, and allow all forms of life to find their balance and endure over time. When they are not respected, it is understood that they go to other places, so that threatened life forms are under their protection — and this disrespect has been happening with violations of territorial identity and the environment (Melin; Mansilla; Royo, 2016).

In the Mapuche territorial identity, according to Siqueira Filho (2009), indigenous peoples organize themselves into groups called *lof*, which still constitute the smallest territorial unit today (Melin, Mansilla & Royo, 2016). All these relations, as highlighted by Oyarzún (2002), and rights and obligations relating to land and resources are regulated by the so-called *Admapu* (Mapuche law), based on this system of rules specific to the people, each family has the right to develop gathering or agricultural activities in a given area in a communal manner so as to preserve them for future generations.

In the seeds, there is the enchantment of the Xukuru people that is associated with indigenous knowledge, practices and wisdom (Silvestre Teixeira; Lima, 2024). In this

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way, people are also compared to seeds that, at a certain time, can germinate. Indigenous peoples, for example, were seeds when they were exploited as farmhands by local farmers or factory workers, before awakening to sacred agriculture and recognizing their indigenous identity. In the same way, when people die, they are not simply buried, but rather "planted," their bodies becoming food for the earth, as Iran Xukuru points out (Revista Continente, 2021). This understanding reflects the deep connection of the Xukuru people with the land and the life cycle, as pointed out by authors such as Le Bonniec (2002) in the sense of the construction of a territorial identity, in which social and spiritual practices are linked to the land. The Mapuche people also have a ritual related to death, called Eluwun, which is closely linked to the relationship with the territory and the cycle of life (Curihuentro, 2002).

With regard to the community management system of the Xukuru people, their territory is organized into 24 villages, and the political and social structure includes the Xukuru Indigenous Community Association, which, in turn, is composed of several collectives (Mendonça, 2013). The Mapuche organization is composed of 14 community management spaces, with Admapu (Mapuche Law) governing internal relations (Ceballos et al, 2012).

In addition to these guidelines for the political and territorial organization of *Mapu*, one cannot forget sacred elements that are essential for understanding the territorial identity of the indigenous people. As pointed out by Melin, Mansilla & Royo (2016) and Orzayún (2002), the spatial orientation of the people is based on the *Meli Wixan Mapu*, which relates to the four cardinal points present in the Mapuche orientation system: *Puel mapu* (east), *Pikun mapu* (north), *Gülu mapu* (west) e *Willi mapu* (south). From these directions, elements are formed that are part of the Mapuche belief system and that are related to their fundamental roots, from which they descend, and to the winds, their announcements and their consequences, as well as to the seasons of the year, which, in turn, is related to various aspects of life, including reproduction. The directions also guide the *fütanmapu*, establishing decisions. Thus, there is a connection between territorial identity and the life and existence of indigenous peoples, including the three dimensions of land: physical space, subsoil, and elements of spiritual interaction (Melin; Mansilla; Royo, 2016).

It should be added that the Xukuru people went through a similar process of internal political disputes, due to the land conflicts that had existed since 1987, which

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

generated dissidence among the people, their being divided into Xukuru de Cimbres and Xukuru de Ororubá. According to anthropologists, the reasons for this disagreement include disputes over resources that were allocated to each village, external alliances made with government agencies and local landowners, and a lack of methodology on the part of indigenous agencies as regards intervention in indigenous societies (Fialho, 2011).

It is also worth noting that the Mapuche people's interaction with natural elements and their use of conservation practices recalls *Admapu*'s notion of community management of resources. Ceballos *et al* (2012), for example, highlight 14 ecological spaces of cultural significance, such as the *Menoko*, which is a place considered sacred with water and living land, according to the description of an indigenous person. There are also rivers, such as the *Lewfu*, where spiritual beings live who can cause death if they bathe in the river at inappropriate times and/or transgress rules, or the *Wiñoko*, a river that changes course and where medicinal plants grow, a clear point of connection between sacred entities and practices, territory, and territorial identity. In the *Mallin*, a humid floodplain, sacred beings also live and take care of the water, although such sites can also be created by indigenous people.

It should be added that both the Xukuru people and the Mapuche went through a similar process of internal political disputes, due to the existing land conflicts, which generated disagreement between them (Melin; Mansilla; Royo, 2016). Such conflicts are also important for the dynamic conformation of territorial identities, to the extent that the interaction between indigenous and non-indigenous people is relevant to the conformation of the latter's worldview.

In addition, as highlighted by Herrmann (2006), with regard to the Mapuche people, there is also a sacred relationship with the araucarias, araucaria, the evergreen trees called *pewen*, which are part of the Mapuche worldview and are even seen as an extension of the indigenous family. This relationship is also reflected in the other elements described, seen as beings, a central element of territorial identity. To use fruits and seeds of the plant, it is necessary to ask permission from nature, and one finds as well a ritual to ensure a good harvest. There is also knowledge related to araucaria management techniques, as well as to their conservation. Such constructions are also placed by Otarola (1995) in his definition of ethnoterritories, in the sense of the approximation between human beings and nature and the latter's subjectivity. For the Xukuru people, there is also a sacred relationship, but with the plant called "Jurema

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Sagrada", a species of legume common in northeastern Brazil. The Jurema, for them, has the royal gate, granting access to the enchanted world. She is not only a mother, but also not a guardian and the Xukuru world (Revista Continente, 2021).

In visits to the territories of both indigenous peoples, it was possible to observe the connection of both peoples with the space and with the forms of organization in the territories; one also saw indicators of their respective historical contexts and spaces for the exercise of their sacredness, rituals, and traditional practices. Each people has its own institutions in terms of division, cultivation, and relationship with the environment.

In the case of the Xukuru people, an assembly is held annually, in the day of the murder of the previous *Cacique*[9], it is done to keep the memory alive and transform the territory into a center of discussions on the rights of indigenous peoples. For the Mapuche, on the other hand, the dynamics of migration are very much alive today, transforming their relationship with the territory as a consequence of challenges they face in guaranteeing their rights.

3.3. The historical evolution of formal legislation and the repercussions for the effectiveness of the right to territorial identity

Having characterized the main elements of the territorial identities of each people – in a non-exhaustive way – and highlighting points of connection and others specific to each one, it is important to understand how these institutions of indigenous peoples coexist with formal and other existing institutions. Understanding this interaction is essential for understanding the contemporaneity of territorial identities and obstacles to their full exercise.

Thus, to understand how different institutions interacted and interact, the organizations — groups of individuals who act as actors represented by the state and non-state agencies and by the other individuals present in the dynamics of social organization — with the territorial identities of the indigenous peoples studied, we mainly took into account the dissonances in the way of meaning the usufruct, possession and property of the Brazilian and Chilean legislation in relation to Indigenous conceptions.

[9] *Cacique* represents the political leader of the Xukuru indigenous people, who guides them in difficult times and helps them when they need to strengthen themselves. In the Xukuru people, the *Cacique* is neither elected nor chosen by lineage; he is chosen by the Enchanted Ones.

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In the first half of the 19th century, before the Chilean and Brazilian states were formed, the independence of these countries was marked by tensions described in extensive literature (Nóbrega; Lima, 2021; Silva, 2017; Almeida, 2018) regarding the imposition of private property and the disaggregation of territorial identities. The interaction of the Mapuche people with the Spanish weakened the communal management character of the property, as it encouraged the indigenous people to become cattle ranchers and traders, which – when it did not mean the establishment of private property to the detriment of territoriality – stimulated internal conflicts among *lonkos*[10] (Oyarzún, 2002).

In Brazil, an important milestone in this area was the Land Law of 1850. This regulation established that the lands of indigenous people who were considered "integrated" into Western standards of society would be incorporated into the Public Heritage; furthermore, it classified some indigenous peoples as being mixed with European populations with a view to disregarding their territorial identity. According to Almeida (2018), even though the legislation established some level of protection for indigenous people who were not considered "assimilated" – that is, stripped of their culture and spirituality – in practice the Law itself created obstacles; one example related to the registration of such lands, especially considering the expansion of private property and the tension of this model with that of collective property and with that of indigenous identities (Nóbrega et al, 2021; Marés de Souza Filho, 2010).

In Chile, it is possible to observe in the Civil Code of 1857 issues that parallel the Brazilian reality of the same time. This legislation required property titles and registrations in Western molds, with no recognition of indigenous territorial identities — something which paved the way for the appropriation of these lands by non-indigenous people, as in Brazil. Despite the existence of formal rules that prohibited the acquisition and leasing of indigenous lands in the country at this time, in practice such rules were ineffective. It is noted, therefore, how assimilationism can be considered an informal institution, given the lack of any assurance of a full exercise of territorial identities. This worsened the situation, and in 1866 a law was created that established successive divisions of the Mapuche territory, dividing it into three categories: indigenous, private territory and fiscal territory, belonging to the State (Villarreal, 2021).

[10] *Lonkos* are the traditional leaders of the Mapuche people, holding political and social authority over their community.

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This regulation was accompanied by policies of reduction and liquidation, between 1883 and 1927, with a significant division of the indigenous territory and the delivery of the so-called *merced* titles, although relating to much smaller portions of the land. With the transformation of collective property into private property of third parties, policies aimed to further disaggregate territorial identities, modifying their ways of life (Oyarzún, 2002). Further policies of division and 'individualization' of property were added to this, generated by the Mapuche Community Division Law of 1927. This law promoted new divisions of reduced indigenous lands, establishing that they would be subject to the private property regime and be able to be sold. This resulted in fewer property models that allowed for collective property (Villarreal, 2021).

In Brazil, from 1910 onwards, formal institutions were established to assist indigenous people, such as the Indian Protection Service (SPI). However, these initiatives were precarious and did not prioritize the preservation of the socio-cultural practices of indigenous peoples; they had as their main objective the integration of indigenous people into the rural population, and they abolished communal property management.

These institutions carried with them the intention of promoting the assimilation of indigenous peoples into the dominant society at the time (Alves; Vieira, 2018, p. 92; Nóbrega *et al*, 2021, p. 88). In 57 years, the SPI demarcated only 54 indigenous areas, whereby the territorial reserves had the de facto functionality of attracting labor (Alves and Vieira, 2018), such reserves being constituted for the sole purpose of maintaining the government's reputation and not actually fulfilling the assigned function (Brinks; Levitsky; Murillo, 2019).

In 1934, a new Brazilian Constitution was promulgated; the Constitution recognized the possession of indigenous lands, but in practice rights remained precarious. The constitutional text also expressed the idea of "integrating" indigenous people into the national communion, perpetuating discriminatory terms. The Indian[11] Statute of 1973 reinforced this idea, introducing criteria of acculturation and integration, as well as promoting discrimination and civil limitations. In 1967, FUNAI replaced the SPI, maintaining remnants of the previous indigenist policy. Initially linked to the Minister of

[11] "Indian" is a colonial expression used by the Portuguese to refer to the indigenous people, natives of Brazil. When the Portuguese "discovered" America, they nominated the natives as Indians. Today, the word 'Indian' is still present in legal norms such as Constitutional Law and the Indian Statute, as well as in state bureaucracy and some judicial decisions in Brazil. However, the Xukuru people and other indigenous people, who resisted colonisation, have replaced the colonial word 'Indian' with the decolonial expression 'indigenous people'. (Nóbrega; Lima, p. 356, 2021).

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the Internal Affairs during the military dictatorship of the 1960s, FUNAI evolved over the years, presenting advances in health and agriculture policies in the 1970s (Alves; Vieira, 2018; Oliveira; Lima, 2022; Nóbrega *et al*, 2021).

In Chile, as highlighted by Churihuentro (2002), the agrarian reform policy between the 1960s and 1970s was important for the restitution of a portion of the lands that the indigenous people owned. However, this public policy was geared toward land decentralization, without the necessary focus on territorial identities and the meanings of indigenous territory. Furthermore, part of these restituted lands were lost again in the context of the Chilean military dictatorship, a period of repression – as was the case in Brazil – with widespread violations of the rights of indigenous peoples (Silva, 2017; Melin; Mansilla; Royo, 2016).

The 1988 Constitution in Brazil brought new rights to indigenous peoples, marking the abandonment of guardianship and formally prohibiting the imposition of degrees of integration, which led to a prevailing view in scholarship that to conclude that the Indian Statute was no longer accepted. Although the judiciary still uses the law in some cases – making reference, for example, to the notion of the "acculturated Indian" – the Constitution highlights, in articles 231 and 232, aspects such as the right of self-determination, land disposition, and social organization. But it does not recognize indigenous peoples' right to property, maintaining the lands instead as public property of the Union and giving these peoples only a right of usufruct and possession, rights which are formally granted only after the long demarcation process provided for in Brazilian legislation (Silva, 2021; De Medeiros, 2023).

In Chile, the Indigenous Development Law (Law No. 19,253/1993) can be highlighted for its introducing the concept of indigenous property as a formal institution, moving away from the previous approach of assimilationism. The law recognizes the customs of indigenous peoples and prohibits the sale or lease of indigenous lands to non-indigenous people. In contrast to the Brazilian approach, in Chile legislation recognizes the ownership of territories as belonging to indigenous peoples, while in Brazil there is only possessory use, while in both countries there are similar challenges related to the recognition of occupation, territorial identities, and effective protection against threats.

This dynamic of reclaiming territory in a context of formal institutions that guarantee territorial identities is quite emblematic, as there are still many obstacles to the full exercise of rights by the Mapuche and Xukuru peoples (Nóbrega, 2021; Villarreal,

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2021). Formal change is only the beginning of a process of struggle that aims to retake such territories, composing an important part of the territorial identity of peoples today, observing what Le Bonniec (2002) says about the transformation of identity, as well as the fact that the claim to a territory is placed in a context of threat.

During a visit to the city of Pitrufquén in Chile in September 2023, banners could be observed expressing the Liucuyin community's claim to Mapuche territory: "*19 años de tramites: recuperación de tierra Ya*" (19 years of lawsuits: retake the land now).

Mapuche student Alejandra Urritia, from the Indigenous Intercultural Clinic at UA Chile, said that this was just a small example of a much larger historical conflict over land reclamation and that many other Mapuche communities face the same problem. Anthropologist Gemma Rojas, from Clínica Intercultural, explained that most of the lands claimed as indigenous are in the hands of non-indigenous individuals, with some of these lands in the hands of the State. She reported that the indigenous law considers some restitution mechanisms, such as purchase from private parties for delivery to indigenous people, but it is far from being sufficient to ensure ancestral rights.

In December 2023[12], the delegation from the Indigenous Intercultural Clinic[13] came to Brazil and accompanied us on visits to indigenous sacred sites and also the *aldeia* Caípe in the Xukuru territory, the latter of which has been claimed by non-indigenous individuals (Nóbrega, 2023b). *Cacique* Marcos Xukuru said that the Caípe village was the second to be retaken by the indigenous people: located in the heart of the Xukuru territory, it was seen as being strategic for the resistance of the Xukuru people in the struggle for the exercise of their territorial rights. Guilherme Xukuru recalled that the *aldeia Caípe* is expressly referenced by the Inter-American Court of Human Rights decision that condemned Brazil in 2018[14] and that the Court's concept of indigenous collective property rights has become present in the Xukuru discourse.

During field visits, the impact of the interaction between indigenous peoples and other actors, notably the State, was clear, whether because of the insecurity or to also the impact of the Inter-American Court of Human Rights' decision in the case of the Xukuru people; or to the persistence of division and impoverishment of the Mapuche people, who often have to succumb to the logic of private property and sell parts of their

[12] See https://www.ufpe.br/agencia/-/asset_publisher/dlhi8nsrz4hK/content/id/5152421.

[13] See https://www.clinicajuridicaintercultural.cl/post/equipo-del-proyecto-fondef-de-cl%C3%ADnica-jur%C3%ADdica-intercultural-vista-el-territorio-del-pueblo-xukuru-d.

[14] See https://www.youtube.com/watch?app=desktop&v=eCYG29NjQ_I+.

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territory in order to survive. In the formal domain, significant challenges remain in fully guaranteeing the right to territory. Villarreal (2021) highlights obstacles such as the recognition of properties occupied during the colonial period or within contexts not recognized by law. There is also a judicial proceeding in which non-indigenous people have filed a claim of private ownership of part of the territory of the Xukuru people (Nóbrega, 2023b).

4. Final considerations

It can be concluded from the discussion and the data presented that the concept of property rights provided for in the Chilean and Brazilian legal systems and the concept of collective property as already established in the case law of the Inter-American Court of Human Rights were insufficient to reflect the Xukuru and Mapuche indigenous peoples' mode of property disposal. Therefore, we have proposed a definition of territorial identity in an attempt to capture and understand the ways in which indigenous peoples organize their territory. Such approaches will allow that indigenous institutions can be taken into account by non-indigenous people, notably in the context of academic research, and have their legitimacy considered by formal institutions, as a way of making collective property rights effective and decolonizing knowledge.

This decolonial comparative analysis has allowed us to draw parallels between territorial identities and the institutional arrangements that surround them, in the case of both the Xukuru and Mapuche indigenous peoples. Such dialogue and the recognition of common points – such as the sacred character and elements of the territory, as well as community management systems and dynamics of resumptions – have not stood in the way of an observation of the particularities of each context, in Brazil and Chile, whether at the level of indigenous institutions and practices or the level of formal legislative rules and their interaction with the indigenous organization. In this way, it has been possible to achieve the objective of carrying out a comparative study, as well as contributing to the research agenda on the right to collective property, on indigenous peoples, and on the scope of decolonial comparative law.

It should be noted that the neo-institutional approach — in the sense of understanding territorial identities as institutions specific to the social organization of

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indigenous peoples — has allowed comparative law to become more decolonial, respecting the realities of each culture and enabling dialogue to understand common problems. Based on an analysis featuring different sources of comparison – such as sociopolitical organization, notions of good living (*buen vivir*), forces of nature and the relationship with the sacred, agroecological practices and their intrinsic relationship with territorial identity – it has been possible to advance a description that is more in line with the lens of indigenous peoples and less with the colonial lens. In this way, it has been possible to respect each context and observe similarities and differences between each people so as to continue an ongoing debate.

Learning from and engaging in dialogue with indigenous institutions has also enabled advances in the discussion about institutions in the context of resources for common use. To the extent that the territory represents the ancestral identity of these peoples, its significance goes beyond the mere idea of a resource, including notions of borders based on inclusion rather than exclusion. Thus, in addition to observing their own systems of relation with the territory, it is also important to include in institutional studies notions that come from indigenous peoples, thereby including the discussion about territories as entities with subjectivity and personality that integrate the identity of a people, this being the starting point for their own institution's system, which for its part interacts and seeks to be ensured by the formal justice system of the State even though it is ancestral in relation to it.

It is important to be aware of the limitations inherent in case study research; whereas it enriches analysis through contextualization allowing for comparative analysis, it should not be misconstrued as a basis for generalization. This approach is specifically applied within the context of America and for Latin America.

Thus, this research also serves as a call for discussion on new ways of defining collective property, proposing the use of territorial identity and the neo-institutional paradigm to develop a more decolonial analysis that learns from the traditional knowledge of indigenous peoples.

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https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541

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Authorship Credits

The authors contributed equally to the conceptualisation, writing and revision of the article

Conflict of Interests Statement

There are no possible conflicts of interest in carrying out and communicating the research.

Funding Information

This article was written as part of the Decolonial Comparative Law programme, a programme hosted and run by Max Planck Institute for Comparative and International Private Law. This edition gave rise to two scientific events co-organised with Brazilian partners, one with the Catholic University of Brasília (UCB) and another one with the Federal University of Bahia (UFBA). The workshop conference leading to the finalisation of the article was funded by Max Planck Förderstiftung;

Data Availability Statement

Data sharing is not applicable to this article as no data / new data were created or analyzed in this study.

Statement on the Use of Artificial Intelligence

AI tools were not used in the development of this work.

Editors Responsible for the Evaluation Process and Editing

Carolina Alves Vestena e Bruna Bataglia.

This document contains an errata: https://doi.org/10.1590/2179-8966/2025/95630

https://doi.org/10.1590/2179-8966/2025/94541i | ISSN: 2179-8966 | e94541