

## The Applicable Law to Cultural Property\*

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### **Abstract**

*Importance of cultural assets for humanity, requires to be passed on to the next generations. This situation requires to physical protection along with its protection within the place it belongs. Unfortunately, cultural assets changed hands for centuries as legal or illegal ways, destroyed and destructed. Once in Emperor Times the cultural assets were moved from the colonies to the emperor centers and today it continues as illegal cultural assets trade. Therefore, precautions of protecting the asset in source country, are inefficient once the artifact is outside of the country, and cultural assets are facing the variety of procedures in different law systems in international platform.*

*In this study, the applicable law to conflicts with foreign element regarding cultural assets which changing hands in the international area, will be examined. As is known, general principal in private international law, real rights to lex rei sitae (also called as lex situs) meaning the wherever the goods is that place law will be applied. This principal, is able to applied most legal systems today. So, is it that cultural assets should be bound to strict lex rei stae rule without an exception? It should be strongly noted that, due to the cultural assets are different than ordinary trade goods and the effect of international court decisions can be effective on illegal art trade, requires the handling of the applicable law in a different understanding.*

**Keywords:** Cultural Assets, Conflict of Laws, Lex Rei Stae (LRS), Applicable Law, Private International Law.

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## 1. Introduction

Cultural assets (goods) are objects which have a great importance in a way of historical, artistic, archaeological, scientific, and cultural for all humanity, or only a nation or a group. These articles are different from other articles as they carry a great value and build up bridges from past to the future. These unique artifacts which we call Cultural assets/goods, inspire us and help us to look at the world in a different way by the period they have witnessed or the values they represent.<sup>1</sup>

Concept of protection of the cultural assets, brings the countries which are poor as an economic way and rich as a cultural way and poor as a cultural way and rich as an economic way. Then trade of cultural assets, continue in illegal way to fill up the demand and the artifact removed from its origin may face legal procedure in another country law system. To be able to make the cultural assets a great value to all humanity it needs to be seen as well as good protection. For this reason the defenders under the universal opinion and supporting the changing hands of free trade of cultural assets; otherwise the defenders of nationalist opinions are bring the rules of protection of the cultural assets in their origin and stop the illegal trade.<sup>2</sup> Conflict of these two opinions are showing it affects in international conventions, as well as it shows its affects in debates in national legislation and the politics in decisions.<sup>3</sup> The point which came to a compromise is, to stop the destruction of cultural assets and see them as a part of world cultural heritage and pass them to the next generations. But the punishments in order to stopping the illegal trade is not always the ay as nationalists wants.<sup>4</sup>

The subject of protection of the cultural assets in international platform is becoming more in the agenda lately and took the attention of international public opinion and become a subject in international meetings and conventions<sup>5</sup>. Importance of this subject is too great for a country like Turkey as they have a great cultural assets and they are in great danger to lose them.

After acceptance of “Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property”, the subjects of this convention as stolen and/or legally exported cultural assets are growing its volume.<sup>6</sup>

The estimated value of illegal art and antique trade was about 1 billion US\$ in 1970’s, went up to 2 billion US\$ in 1990’s.<sup>7</sup> As 1990, theft of cultural assets, becomes second in worlds as a crime type after the drug traffic and its estimation around 2 – 6 billion US\$ volume. The artifacts stolen from Turkey alone has an estimation of 100 million US\$ annually.<sup>8</sup> Quarter of the all theft took place in America<sup>9</sup> and 90% of the

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<sup>1</sup>SibelÖzel (1998).UluslararasıAlandaKültürVarlıklarınınKorunması. İstanbul: AlkımYayınları, p. 1.

<sup>2</sup>SerapAkipek (1999).UlusalveUluslararasıHukukAçısındanKültür Malları. Ankara: TurhanKitabeviYayınları, p. 5; Özel, p. 3.

<sup>3</sup> See for tendencies: Marina Schneider (1990).Explanatory Report on the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Uniform Law Review, p. 26-98.

<sup>4</sup>Özel, p. 1.

<sup>5</sup> Janet Blake (2015). International CulturalHeritageLaw. Oxford: Oxford UniversityPress, p. 4-6.

<sup>6</sup>Akipek, p. 5.

<sup>7</sup> Judith Church (1992).Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts. Columbia Journal of Transnational Law, 30, p. 180.

<sup>8</sup>ÖzgenAcar& Mark Rose (1995).Turkey’s War on the Illicit Antiquities Trade. Archaeology, March/April, p. 45.

stolen artifact would never be found, and the percentage of retrieved artifacts to their original owner is around 5-10%.<sup>10</sup>

The main problematic of conflict of laws, a legal event or transaction contains foreign element and for this reason the contact of one or more countries' law and the determination of how or which way or according to which country' substantive law will be applicable to be able to resolve the dispute.<sup>11</sup>In this study, the applicable law to conflicts with foreign element regarding cultural assets which changing hands in the international area, will be examined. Firstly, the subject will be discussed in terms of the general problems of the law of conflict of laws. Then, will be focused on various theories regarding law to be applied that transfer of ownership on cultural assets. The study will end with the conclusion of containing the conclusions we have reached.

## 2. In Terms of The General Problems of Conflict of Laws

### 2.1. Characterization

First step of the conflict of laws is to characterize the subject relation. In the application and the doctrine of conflict of laws *lex fori* characterization is generally accepted. Result of the characterization, subjected dispute, for example, is it a contractual relation, is it a relation of real right, is it tort, etc. will be determined which one is related. After this point the contract, real rights, tort, etc. will be related to its own law which it belongs.<sup>12</sup>

Cultural assets which subjected to this dispute is it movable or immovable can be the matter of characterization. At this point characterization *lex situs* meaning general acceptance of whichever the place artifact stayed longer that places law will be applied.<sup>13</sup>

Characterization of dispute in a case about cultural assets will be effective on applicable law to legal transaction and event. Dispute is related to transition of ownership (rights in rem), therefore applicable law to real rights is the first solution comes in mind. However, if some decisions take into consideration, we might see the characterization is made as a tort even if its exceptional.<sup>14</sup>

Courts which cases are commenced by the real owner to retrieve the stolen artifacts, as you can see the below mentioned examples, evaluated the subject as returning the movable ownership, they applied the rules of conflict of laws according to this. This situation showed itself not only in Continental Europe law system but in also, *Anglo Saxon* law as well.

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<sup>9</sup> Steven A. Bibas (1994). The Case Against Statutes of Limitations for Stolen Art. Yale Law Journal, 103, p. 2452; Andrea E. Hayworth (1993). Stolen Artwork: Deciding Ownership is no Pretty Picture. Duke Law Journal, 43, p. 339.

<sup>10</sup> Hayworth, p. 340; Sydney M. Drum (1989). DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?. New York University Law Review, 64, p. 911.

<sup>11</sup> Ergin Nomer (2015). Devletler Hususî Hukuku. (21. ed.). İstanbul: Beta Yayınevi, p. 3 et seq. (e.s.); Aysel Çelikel & Bahadır Erdem (2016). Milletlerarası Özel Hukuk. (14<sup>th</sup> ed.). İstanbul: Beta Yayınevi, p. 8-10 (MÖH).

<sup>12</sup> Gülören Tekinalp & Ayfer Uyanık (2016). Milletlerarası Özel Hukuk: Bağlama Kuralları. (12. ed.). İstanbul: Vedat Kitapçılık, p. 34 e.s.

<sup>13</sup> Raymond Smith (1993). Conflict of Laws, Corporate & Commercial Law Series. London: Cavendish Publishing Limited, p. 168; Tekinalp, p. 251 e.s.

<sup>14</sup> Özel, p. 332.

For example, in *Elicofon* case, *New York* court characterized as conflict of real right of the case which museum filed for retrieving subjected *Dürer* paints, and verdict was movable ownership transition is belong to the law of the place was painting went during transport. In this case the defendant *Elicofon* bought the paintings from *New York* and for this reason *New York* law has been applied.

In *Winkworth* case British court, characterized the demand of stopping the sale and recognition of ownership right on the collection of the plaintiff as ownership conflict. According to the court, transition of movable good ownership, is belong to the law of the place which was the goods were in during transportation.<sup>15</sup>

## 2.2. Renvoi

In the theory of renvoi, firstly, judge will find out the application law to the situation according to the principles of his own conflict of rules. Then, the conflict of law rules of forum will take the solution to the other countries' domestic law rules.<sup>16</sup>

In the doctrine of conflict of laws, there are varieties of negative and positive opinions about renvoi theory. The opinions which defend the renvoi theory claim that by accepting the renvoi in international private law will result the harmony of international verdicts. This result may be true as some certain cases, may not be relevant for some other cases. Because the every country' conflict of laws rules and connecting points they foreseen for a transaction might be different. On the other hand, there is a possibility that not every country conflict of law rules will accept the renvoi.

Without getting into detail about renvoi, lets look for an answer of the question is when a situation occurs about returning the stolen cultural assets with a foreign element will the judge apply the renvoi? If the legal system which court is belong to not accept the renvoi there is no problem about it. However, if legal system which the court belongs to accepted the renvoi, there will be again no problem in our opinion. Because in some exceptions, the renvoi do not work. Above, we have mentioned that in cases were filed to returning the stolen cultural assets courts evaluated the relation as returning the movable ownership, and applied the related conflict of laws rules. Rule of conflict of laws applicable to real rights (*lex rei sitae*) is a classical rule of conflict of laws accepted by almost every all legal systems and reach the international level. In a case of this the renvoi does not work.

The 2007 Turkish Private International Law and Procedural Law Act (PILA), only accepted renvoi in disputes relating to family law and personal status law in Turkish law. Thus, returning the stolen cultural assets with a foreign element occurs, renvoi does not take place. Judge must apply provisions of substantive law of referenced law.

## 3. In Terms of Applicable Law Ownership Transition on Cultural Assets

### 3.1. Generally

General principal in private international law, real rights to *lex rei sitae* (also called as *lex situs*) meaning the wherever the goods is that place law will be applied. This principal, is able to applied most legal systems today.<sup>17</sup>

Acceptation of *lex rei sitae* (LRS) rule there are variety of reasons: First of all provides foresight. Ownership, will be applied according to the law of where the good is so the sides can foresee the law will be

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<sup>15</sup>Özel, p. 335.

<sup>16</sup>Nomer, p. 143 e.s.

<sup>17</sup>Çelikel/Erdem, MÖH,p. 319 e.s.; Nomer, p. 296 e.s.; Tekinalp, p. 251.

applied.<sup>18</sup> In the meantime LRS, has control over the movable. Courts or officials of wherever the goods in can decide distraint, interim injunction or delivery of the good easily.<sup>19</sup>

Due to LRS rule based on one point which is the location of the good it brings some inconvenience along. First of all, it is a strict rule which can not be flexible so it does not take into consideration of different laws different purposes. On the other hand it might be co-incident or temporary that the good is in that place, it might be no relation between legal transactions with *lex situs*.<sup>20</sup> In this way, the *lex situs* which has weak relation and temporary with legal relation applied unexceptional as criticized even for normal goods and suggest to support it with some criterions. According to this there has to be a choice by using the criterion of the place of the good was in during the procedure and distance that place from the goods final place.<sup>21</sup>

Is it that cultural assets should be bound to strict LRS rule without an exception? Rule accepted with different interpretation in different decisions: One of these is the law of the place where the goods were during the case and the other is the law of the final place of the goods ownership transition.<sup>22</sup>

### 3.2. The Law of The Place Where The Goods Were During The Case

One of the interpretation of *lex rei sitae* rule is the law of the place where the goods were during the case. Then, the place of the goods was in during the case or was used during the case, as important as the place of contract. In a sales contract the purpose is to put the goods in buyers control area and to use the goods in distinctive place. During the contract for the goods is also in the place by co-incident makes the connection weak. For this reason the law of the place of the movable during the case would prefer the law of the goods were in during the contract.<sup>23</sup>

This interpretation did not find much application place. In France, case of *Stroganoff-Scherbatoff v. Bensimon*, court applied the law of France which goods were in France at that time. In the case Russia Revolution Government took over the artifacts in 1918 which belong to the defendant's family and sold to the Defendant in Berlin by Soviet Government in 1931. Court did not applied the German law which the goods were sold there but applied the France law which goods were in France at that time.<sup>24</sup>

### 3.3. The Law of The Final Place of The Goods Ownership Transition

Another interpretation of *lex rei sitae* rule which finds the interpretation so often, is the law of the place which movable is in during the procedures which allows the movable transportation.<sup>25</sup> This interpretation is accepted in variable legal systems and new statutes of private international laws.

<sup>18</sup> Thomas Pecoraro (1990). Choice of Law Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law, Virginia Journal of International Law, 31(1), p. 10.

<sup>19</sup> Aysel Çelikel (1972). Menkul Eşya Üzerinde Ayni Haklardan Doğan Kanunlar İhtilâfi. İstanbul, p. 22 (Ayni Haklar).

<sup>20</sup> Yvonne Marcuse (1982). International Choice of Law: A Proposal for a New "Enclave" of Federal Common Law. Fordham International Law Journal, 5(2), p. 327.

<sup>21</sup> Çelikel, Ayni Haklar, p. 63-64.

<sup>22</sup> Özel, p. 338.

<sup>23</sup> Çelikel, Ayni Haklar, p. 37.

<sup>24</sup> Lyndell V. Prott & Patrick O'Keefe (1989). Law and Cultural Heritage. Vol. 3. London: Butterworths, p. 417.

<sup>25</sup> Prott/O'Keefe, p. 27.

According to the cultural assets in *Danusso* case<sup>26</sup>, Torino court analyzed the rule in detail. In that case Government of Equador, filed a case for the archeological artifacts bought illegally and took out of the country and taken to the Italy by Italian citizen *Danusso*. During the case also penal prosecution continued and archeological objects were sustained. In this situation an argument occurred about is that the Equador law will be applied because the objects taken from Equador or an Italian law will be applied because objects brought to the Italy. Court, in case of movable transported from one country to another according to the previous *lex situs* about the ownership right earned, determined that this law will continue. Because archeological objects first were in Equador, according to statutes of Italian, Equador law will be applied.<sup>27</sup>

In Switzerland Statute of Private International Law the Article 100 states clearly that earning the rights or real rights on movable goods or lost, procedures took place resulted that this earn or lost law will be applied according to the place of movable. Article 21 of Turkish Private International Law and Procedural Law Act (PILA) does not states so clearly on the movable and immovable but only state that the law will be applied law of the place where the property is located. The statement of “the place where the property is located” in here, accepted as “transaction moment”.<sup>28</sup>

In American and British Law *lex rei sitae* rule is applied as the place where the goods are during the transportation. In *Elicofon* case the court accepted to New York Law which where the good was during the transportation. Defendant *Elicofon* bought the painting in New York and kept it in his residence in New York. New York Law which was where the movable does not accept the returning the goods in good faith from the thief the case resulted in against *Elicofon*. In the meantime the court evaluated the claim that the paint was not actually stolen but being giving to the architect *Fassbender*, for this reason returning the good in good faith from him by evaluating the German Law and decided that the *Fassbender is not possessory*, and for that reason the returning the good in good faith is not applicable. From this point deciding if there is a theft or not the theft law (*lex loci furti*) there is a difficult to result a general principal. Then the court only rejected the defense of the defendant if the paint is being stolen or not.

Application of the rule *lex rei sitae* applied in *Danusso* and *Elicofon* cases resulted of the favor of the true owners and resulted for returning the cultural assets turned to its owners. But the same rule in *Winkworth v. Christie* case resulted against the real owner. In the case a Japanese miniature collection being stolen from *Winkworth* who lived in England and taken to Italy and sold to *Markiz Paolo Da Pozzo*. Later on *Markiz* sold the collection to the *Christie's* in London, *Winkworth* asked for stopping the sale and returning the collection to his possession and filed a case. The law will be applied whether English or Italian creates a very different results. According to the Italian law there is a possibly returning a good faith from thief, according to the British law this is not even a question. Court decided real rights on the movables during the transport will be attached to the law of the place the goods in (Italian law), this rule has five exceptions and this situation is not one of them. In this case a collection stolen from English citizen in England is taken out of the country against his will and sold to the third party and later is returned to England again, despite the fact the right of ownership, is not related to the English law which has more relation with the situation, but applied as in Italian Law which the LRS principal applied in no exception. In this point LRS rule and it's no exception principal brings the critics.<sup>29</sup>

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<sup>26</sup>See for decision: Prott/O'Keefe, p. 628 e.s.

<sup>27</sup>Prott/O'Keefe, p. 629-630.

<sup>28</sup>Nihal Uluocak (1989). Milletlerarası Hukuk Dersleri. İstanbul, p. 163; Çelikel/Erdem, MÖH, p. 319; Tekinalp, p. 251 e.s.

<sup>29</sup>Çelikel, Aynı Haklar, p. 37, 71.

#### 4. Change of Status

Passing one situs to another for a movable good means change of status. In this case the real rights on movable attaches the rules on LRS and new *lex situs* determines the real right and contains limit. According to the previous *situs* earned rights still valid in new *situs* in principal<sup>30</sup>. Case of *Winkworth v. Christie's* is a typical example to this. Collection being stolen from England and taken to the Italy and sold there was brought back to England but still the ownership was passed to Italian owner and for that reason this right was not removed when the artifact came back to Italy and real owner *Winkworth* was not taken the real credit for that.

Before the real right earned on movable if movable transports to another place now the new *lex situs is in charge about real rights*. This case show itself with redound prescription. Possessor came through from *situs* will still be valid in new situs. In Germany law the period of redound prescription is 10 years, in Turkey-Switzerland law is 5 years according to that if a good was in Germany for 7 years when brought back to Turkey they will accept that the 5 years of prescription is over<sup>31</sup>. Switzerland court in *Koerfer v. Goldschmidt* case analyzed the effect of the returning the goods by redound prescription on cultural asset and the change of status. In that case *Koerfer*, bought the Goldschmidt paintings which sustained by Berlin Government in 1941 and in 1944 he sent these paintings to his wife in Switzerland. Against the *Goldschmidt* ownership claim, court concentrated on the situation of if ownership was returned by redound prescription or not. According to the court the paintings was held in Germany between 1941-1944 and as a rule of *lex situs* German rule shall applied. But during this period *Goldschmidt* had no change to oppose the *Koerfer* being possessor according to the German law returning of the paintings by prescription is not possible. Without the ownership is returned if the movable changes place in principal determination of if returning of the movable by prescription is possible or not and if deduction can be made of possessor from the previous according to the old place law will be resulted by the new place law. In this case the paintings was in Switzerland since 1944 the prescription for the Switzerland law started in 1944 and until the 1956 which is the date of case *Koerfer* earned the ownership of the paintings. Federal Court did not take the opposition of Goldschmidt in seriously due to the possessor time passed in Germany (1941-1944) Goldschmidt was no condition of opposing. Base of the verdict stated in Statute of Switzerland Private International Law article 102: "When a movable brought to Switzerland and the loss or gain of the real rights did not take place in a foreign country, situations happened in foreign countries will be taken like it happened in Switzerland".

Internal law's foreseen of short term redound prescription times and bring different organizations for cultural assets, with the application of *lex situs* rule will be resulted as the real owner will lose his ownership rights. Bringing the artifacts in a country which has appropriate prescription period and cleared here is a very important element for the matter of protection of the cultural assets.

#### 5. Applicable Law to Real Rights on Transported Goods (Res in Transitu)

During the transportation of movable from one place to another if the real right will be given LRS rule is losing its application. Then, this situation finding place of movable remains unknown or even if it's known this place will be co-incident or temporary. From this angle there is another connecting rule is made

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<sup>30</sup> Albert V. Dicey & J. H. C. Morris & Lawrence Collins (1993). *The Conflict of Laws*. (12<sup>th</sup> ed.). London: Sweet & Maxwell, p. 970 e.s.; Smith, p. 177; Nomer, p. 302; Tekinalp, p. 258 e.s.

<sup>31</sup> Nomer, p. 303-304; Tekinalp, p. 259; Çelikel, Ayni Haklar, p. 76-77.

instead of LRS rule. Generally accepted opinion, is the application of destination place law (*res in transitu*).<sup>32</sup>

In *Goldberg* case the court making the analyze of rules of Switzerland conflict of laws rules his decision was the judge of Switzerland shall apply the *Indianapolis* laws, exception of bringing the *LRS* rule of *res in transitu* accepted in this situation. According to the court mosaics were transported from *Munich* to *Geneva* and kept in *Geneva* Airport 4 days before it sent to *Indianapolis*. Mosaics which never passed through the *Switzerland* customs were there temporarily. For this reason everybody should accept the fact that mosaics were transport and law of the place of destination should be applied which is *Indianapolis* law in this case. This interpretation brought several critics along.<sup>33</sup> To be able to accept this good was in transport the goods supposed to move during the transport and there should not be a connection between the goods and its location. If the goods were not in transport vehicle during the transport (vessel, plane or in a land transport vehicle) and if there is a connection between the goods and its location therefore we can not accept that the goods were in transport (*in transitu*).<sup>34</sup> This circumstance did not happened in *Goldberg* case.

During the sale to *Goldberg* mosaics were not in transport, but kept in the free zone in *Geneva* Airport. During the 4 days of sales procedures was happening the mosaics were there and then transported to *Indianapolis*. Even the mosaics were in *Switzerland* temporarily, *res in transitu* exception were not possible to apply. If sides made the agreement during the mosaics were flying to *Indiana* then we might talk about the goods are in transport.

## 6. Criticism of Lex Rei Sitae (Lex Situs) Rule

Even the application of the *lex rei stae*(*LRS*) rule resulted as the favor of real owner in *Elicofon* case, in *Winkworth* case it resulted in favor of the good faith buyer. Reason of that in *Elicofon* case *New York* law being applied which was having the points of in favor of real owners; in *Winkworth* case there was *Italian* law being applied which was in favor of good faith third parties. For that reason **even the connecting points are the same, substantive law has the different provisions and it changes the result.** Therefore there was opinions saying that by changing the conflict of laws no solution can be brought to the matter and there should be protective changes of the cultural assets in substantive provisions.<sup>35</sup> However, since there is no possibility that the all internal laws can contain the same provisions and since there should be an internal law to apply according to the connecting rule of conflict of laws, we can not say the *LRS* rule id not bringing result. Then, in *Winkworth* case the *LRS* rule, if interpreted as movable location law or if the most strict law principal were applied, than application of the *English* rule would have done instead of an *Italian* one.

In *Winkworth* case the removal of plaintiff ownership rights, resulted of questioning the validity of *LRS* rule in cultural assets area.<sup>36</sup> *LRS* rule provides the both side predicting the result therefore it shows a specific feature. Yet in *Winkworth* situation the collection is stolen in *England*, changed hands in *Italy* and

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<sup>32</sup>Tekinalp, p. 259 e.s.;Çelikel, AyniHaklar,p. 39; Uluocak, p. 173.

<sup>33</sup> See: Quentin Byrne-Sutton (1992). The *Goldberg* Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects. *International Journal of Cultural Property*, 1(1), p. 162.

<sup>34</sup>Çelikel, AyniHaklar,p. 38-39.

<sup>35</sup>Peter Carter (1985). *Transnational Trade in Works of Art: The Position in English Private International Law*. In: P. Lalive (Ed.), *International Sale of Works of Art*. Paris, p. 330.

<sup>36</sup> M. Jefferson (1980). An attempt to Evade the *Lex Situs* Rule for Stolen Goods. *The Law Quarterly Review*, 96, p. 508.

when finally it back to England the ownership right of defendant *Winkworth* was removed. Taking the collection to Italy which has a law to give the ownership right to the good faith buyer was enough clear the stolen goods. Therefore the clarity factor that we think LRS rule provides is disappeared. LRS rule, provides the certain parties to choose a specific way and make the goods proceed legally by removing the illegal activities on stolen goods.

Principal lies under the LRS rule is to provide safety in trade and provide a free travel for the goods. Protection of the good faith buyer is considered a very important point as bringing the safety rule in reality. But for the cultural assets which is very different than common objects how much is true to apply LRS rule without an exception and without looking at the result? Application of the LRS rule for the cultural assets strictly will not stop illegal cultural assets traffic on the contrary will take a place to support it. For this reason there are some alternatives proposed to LRS rule. On the other side not only cultural assets area but the all areas in private international law for judge not applying the connecting rule automatically and look to the purpose lies under the rule is an opinion gets stronger each day.<sup>37</sup> Special condition of cultural assets and works to returning the cultural assets where they belong and stopping the illegal trafficking, required other connecting points instead of strict LRS rules.<sup>38</sup>

## 7. Alternative Connecting Points to The LRS Rule

### 7.1. Source Country Law (Lex Originis)

Considering the results may occur against the real owner caused by LRS rule it has been proposed to use the law of the source country. Meaning of the source country is the country the theft took place.<sup>39</sup> According to this in the case of *Winkworth v. Christie's* if the source country law were applied it would be England law which the theft occurred and as a result verdict would be in favor of real owner. However, there are situations which the source country law may not determine. This connecting point which is very easy to certain cultural assets which kept in certain places becomes unspecific for unregistered artifacts or discovered by illegal archeological studies.

Critic brought for the source country law, to the people who acts in good faith can not be known by them. In our opinion this critic is not enough to eliminate source country law. In this way it is not possible to know where the artifact being stolen or what are the laws of source country by the good faith buyers and it does not affects the result. In different way of saying accepting a connecting point does not related that the buyers should know and accept the law before they buy anything. Purpose of the conflict of the law is to be result is clear, predictable and provide the result monotony.<sup>40</sup> For this reason the important point is not to know applicable law but able to see the result. In cultural assets trade wherever the sale is take place knowing the protective provisions of the source country will be applied is important to know the result and provide it.

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<sup>37</sup>Marcuse, p. 321 e.s.

<sup>38</sup>Özel, p. 348-349.

<sup>39</sup>Jayme, Erik (1994). The Status of Cultural Property in German Private International Law. Jayme, E. (Ed.), German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens (pp. 87-96). Heidelberg: Müller Jur. Verl., p. 94.

<sup>40</sup>Willis L. M. Reese (1964). Discussion of Major Areas of Choice of Law. Academia de Droit International Recueil Des Course, 111, p. 347.

Law of the source country, proposed by International Law Institute as well. In a meeting took place on 3 September 1991 there is a decision being took for “The International Sale of Works of Art from the angle of the Protection of the Cultural Heritage”. According to this decision article 2 states that the law of the source country will be applied on artifact transition for ownership which belongs to cultural legacy.

Assuming that The private collection stolen from Turkey and sold to a good faith third party buyer in New York, in the case is filed by the real owner to the at present possessor no positive result will be taken if Turkish laws will be applied as a source country. Because there is no protective provisions for artifacts belongs to private possessions in Turkey. These artifacts just like the other movables are in the area of prescription. Therefore a good faith possessor which has the artifact for 5 year without a break will be the owner of artifact. Besides, the prescription starts from the loss of the artifact against the good faith possessor. However in New York law binds the prescription time in demand and reject rule, does not except the good faith return from the thief and does not bind the rule of paying the sales price to return an article. In this situation clearly seen that law of New York brings the verdicts in favor of real owner compared to the Turkish law and application of this rule brings deterrence of the illegal cultural assets trade.<sup>41</sup>

Source country law even a positive step as a starting point, aside of determining the source country, in case of substantive law of the source country does not bring provisions in favor of good faith buyer acceptance of the rule will not mean anything. However, from the country who accepted government ownership, application of the source country law for illegal cultural assets trade will provide the elements which government ownership gave will be recognized by the foreign countries as well.

## 7.2. The Law Which Has The Closest Connection of The Relation

In *Goldberg* case court qualified the relation as tort and find the connection between tort place and relation weak and determined the law will be applied as “closest connection” criterion. According to that investigation took place to find out if the relation were closer in Switzerland or with Indiana and accepted the application of Indiana law.

In the evaluation that the court made they qualified the possessor of the mosaics by the *Goldberg as a tort*, deed of confliction is the sales process. Thereby the situation which caused the dispute between Southern Cyprus and *Goldberg* is the sale of mosaics and this sale took place in Switzerland. For this the center point of dispute is Switzerland. On the other side the court considered such, side’s business places, credit taken from Indiana bank and mosaics whereabouts during the case and decided the application of Indiana law. All these efforts seen as the effort of application of the forum law. Critics being made also show that the criterion of the closest connection will vary from different evaluations from different angles. According to CROWELL center point of the relation is Switzerland; which the sale took place there. According to the court the law of Indiana has the closest connection with relation.

In USA in the area of conflict of the laws the criteria of analyzing the interest requires the calculation of purposes lies under the substantive laws. According to that only a country can benefit if they apply their own law. CROWELL, in *Goldberg* case accepts applying the Switzerland law instead of Indiana also for these criteria.

Criteria of closest connection require evaluation about cases. In this evaluation may change from one court to another so this criterion will cause difficulties in cases of returning the cultural assets if accepted as a general principal. Then the relation will be put in lawful position according to the courts point of view.

In *Elicofon* case the court along with the LRS rule also applied the closest connection criterion, decided to apply law of New York. Painting stolen in Germany was not related with the prescription time for the

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<sup>41</sup>Özel, p. 352.

good faith buyer. Then the procedure took place outside the borders of Germany. On the other hand in many ways the case was more related to New York. Evaluation of the court was criticized in so many ways. Due to painting was made in Germany and the all situation occurred in Germany, brings the German law more closely than the New York law.<sup>42</sup> In here instead of looking for the sale contact should be looked in to which law is closer to the dispute.

Also different interpretations in doctrine shows, criteria of closer connection, despite the strict LRS rule is a very flexible and brings all the argued evaluations with it.

### 7.3. Supporting The LRS Rule With “Essential Element” Criteria

Due to conflict of law the rule of source country is not specific in variety of situations, resulted of the proposal sticking with the classical LRS rule.<sup>43</sup> But when considered the negative result of this rules strict application, by *REICHEL*T along with the LRS rule also proposed “essential element” criteria as a connecting point<sup>44</sup>. According to that it should preserved as classical rule of conflict of laws. When there is an issue of international illegal trade of art about the transition of ownership both sides should get an freedom of will and this freedom of will should accepted as a connecting point. When there is an issue of lost or stolen cultural assets, if there is no essential element which connects the relation to another law LRS rule should be valid.<sup>45</sup> *REICHEL*T in this way shows the article 15 of Statute of Switzerland PIL. According to that article as an exception, after considering the all situation, clearly the EVENTS has the weakest connection with the related law, on the other hand if understood that it has more closer connection with another law, no law according to that rule will be applied. This condition is not valid in choosing law.

*REICHEL*T proposed “closest connection” criteria and LRS rule should combined together and find a middle way. Like that in *Winkworth* case instead of Italian law which is *lex situs* English law can apply which has more connection with the situation. But if collection was not taken to England and stayed in Italy or if taken to USA can we still say the highest connection is England? In *Goldberg* case along with the *lex situs* was co- incidental was the relation really had a higher connection with Indiana law or is it necessary to consider the law of Southern Cyprus which is also a source country? Thereby subjected suggestion will not create deterrent effect on illegal trade of cultural assets and will result as a different courts will give different decisions.

## 8. Conclusion

Modern growth in conflict of laws area may be the most important area needed to be considered is cultural assets law. Different characteristic of cultural assets requires different substantive norms as well as, requires the rules of the conflict of laws also different. Just like the precautions protects the worker, consumer, tenant the real owners of the cultural assets needs precautions. As long as the purpose of protecting the good faith buyer in common objects trade, is not applicable in cultural assets trading, can not be defend this purpose also should applied for cultural assets. For this reason according to the cultural assets substantive law as well as the conflict of law rules needs special arrangements.

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<sup>42</sup>Garro, Alejandro (1985). The Recovery of Stolen Art Objects From Bona Fide Purchasers. In: P. Lalive (Ed.), International Sale of Works of Art. Paris, p. 512; Marcuse, p. 363 e.s.

<sup>43</sup>Pecoraro, p. 16-17.

<sup>44</sup>GerteReichelt (1985). International Protection of CulturalProperty”, UniformLawReview, 13(1), p. 91, 127.

<sup>45</sup>Reichelt, p. 127.

The problem of the cases which filed for stolen cultural assets is to determine the applicable law of the ownership transition. In this determination accepted LRS rule taking as base, principal, without looking at the result will accept the law of place where the property is located were during the process, in some cases will result in favor of the real owner and some cases do not. One of the base points in the matter of protecting the cultural assets is whether protect the real owner or the good faith third party. If all substantive law voted the same decision in a case we can not really talk about the conflict of laws. But if one of the laws related to the connection protects the real owner and the other protects the good faith third party buyer, there is a literally conflict of laws and one of these laws needs to be chosen.

Classical conflict of laws system without looking at the result determines a connecting point and put the relation in a law order. Against this classical method the improved doctrines in USA law and parallel to that in the system of Continental Europe, considered related substantive law norms and determining the applicable law is a growing opinion. We have an opinion that even we are not in the existing statutes of private international law but, starting from the area of the tort in American doctrine, affecting the other areas principal of preference or result selective method way should be followed. According to that court, when a case filed with the claim of ownership, will analyze the rules suggested to follow and will choose the rule which made to create a certain purpose. Because of the rules brought to protect the real owner serves the purpose of protection the cultural assets, *lex situs* or source country will be insignificant.

This method we accept which protects the real owner rights not only in every aspect conflict of law but only in the stolen or lost cultural assets and returning to them to their origin Instead of an already determined connecting point which called Choice principal of preference or result selective method. This situation will not create a reform in existing conflict of laws system and also will not change the accepted base of statutes of private international law. Only for the situations which never made a special arrangement but in the area of this special arrangements needed for existing needs, meaning returning of the stolen or lost cultural assets, there will be no application of very strict and does not care about the result LRS rule, instead, will be choose to one who protects the real owner among other possibilities. There is no comment can say that this is against the conflict of law bases and therefore cannot be applied. Existing rules are brought arrangements for common trade objects and there are no special arrangements for stolen cultural assets. In special cases like this in Turkish law, due to there are blanks in the law system Turkish Civil Code article 1 judge is able to make provision just like a law maker.

In approach we accepted the transition of ownership for the stolen, lost or misappropriation cultural assets, will be attached to the law which protects the real owner rights. This connecting point just like *lex situs* does not base to a specific law at first but after the dispute occurs according to the relation from the laws which conflict each other will choose the one who protects the real owner rights. In this case we recommend adding a special provision to article 21 of PILA for the real rights on cultural assets. However, without doing that, in a case in Turkey the judge still might choose the law who protects the real owner. Because, *lex situs* rule in the article 21 of PILA is for common objects and there are no rules for the cultural objects which has a special category.

Protection of cultural assets and preventing the illegal cultural assets trade the result selective method we suggested to be able to returning the cultural assets to where they belong, not only for the cases subjected to the cultural assets only for stolen, lost or misappropriated cultural assets and the cases filed for their real owner. Since the government does not have the ownership right and only to the assets which has forbidden export procedures, in case of such assets taken outside of Turkey without a government's permission, during the return claim of the source country is not based on ownership right but its own forbidden export procedures. In that situation real matter is not that if the real owner or good faith third party will be chosen but if the public law characterized export restrictions will be recognized by the foreign country or not. At

this point we only say that there is no need to bring special connecting on the case that ownership rights of the illegally exported cultural assets the main point is if the public law characterized export restrictions will be recognized by the foreign country or.

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