Editorial

DOI | 10.14195/2184-9781_2_0

The protection of cultural Identity

Postmodernism in comparative and private international law

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ABSTRACT

This editorial signals the legal importance of cultural identity mainly with regard to cultural objects. The issue of "nationality" of art objects is addressed in connection with the increasing claims for restitution of cultural artworks, without forgetting that pluralism is also a concept that frames the cultural identity of persons themselves.

KEYWORDS

Postmodernism, cultural identity, cultural objects,pluralism, narrative discourse

I. Postmodernism

The second volume of the Coimbra Journal for Legal Studies deals with the determination of cultural identity and conflict of Values. The legal importance of cultural identity regards mainly cultural objects, from buildings to movable art, but also persons and communities organized in States, cities and international organizations.

If we look at the legal history of the last five decades, we may note a shift: while in the years of the "revolution", - the author studied at the University of

California, Berkeley in the years of 1965-1966 –, human rights for all persons without regard to their origin and nationality had become the main issue of modern law, which also meant the unification of private substantive law; later on, in the years after 1980, the differences between legal orders became increasingly important. As to private law, unification remained a significant goal, but legislators and legal science turned back to private international law and the conflict of laws, particularly in Europe. Postmodern law was based on the cultural identity of persons and goods such as art objects: not unification, but differences between legal orders became of particular relevance.[1]

The development of comparative law showed a certain parallelism between law and art history. Postmodern art – architecture and paintings – can be characterized by the return of descriptive objects: a railway station and a church had different appearances according to their different functions. In addition, some buildings made reference to classic examples, particularly in Berlin, the new capital of united Germany, where parts of the palaces of ancient Rome appeared in private buildings planned by the architect Renzo Piano. The main characteristic of postmodernism became "narration".[2] The painters turned to the description of real objects and persons and paintings even showed parts in writing.

The same development which prefers narration is also noticeable within law. Postmodern law is characterized by narrative norms that do not compel but inform what should or could be a solution. One prominent example is the non-binding Washington Principles on Nazi–Confiscated Art released in connection with the Washington Conference on Holocaust-Era Assets (December 3, 1998).[3] The field of the new art law was mainly based on the idea of cultural identity of art objects to justify the national export and import control of such goods.

To give some examples. A Canadian Court had to deal with the following problem: a Toronto based auction house sold a painting by the French impressionist Gustave Caillebotte ("Iris Bleus") to a commercial art gallery in London. [4] The question arose as to whether the export of this painting from Canada to the United Kingdom could be permitted.[5] The case outcome

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1 See Jayme (1995, 9 ss.).

2 See Jayme (2014).

3 Text in IPRax (1999, 285 ss.)

4 Attorney General of Canada v. Heffel Gallery Limited (2019).

5 Jayme (2021, 198 ss.)

was that the painting had to remain in Canada. Several reasons for this decision were not articulated clearly in the decision: French culture is part of the identity of Canada, and Canadian impressionists studied in France. The painting, finally, was acquired in Canada for the Art Gallery of Ontario in Toronto. The basis for such decisions that do not allow the export of art objects is the protection of the state's or nation's cultural identity.

It is interesting to see that such limitations on international commerce may also result in import restrictions. To give a recent example from German court practice: a German buyer had acquired a buddha- statue in the United States. When this art object arrived in Germany, it was sequestrated because of the lack of export permission from the State of cultural origin.[6] Therefore, the question arose of which State had to be taken into consideration. The German court, however, allowed the import because it was not certain which State's cultural heritage was at issue: China, Myanmar or others. Since the experts did not agree as to the origin of the statue, the court allowed the import of the buddha sculpture to Germany.

2) The "nationality" of art objects

The two above mentioned cases show that for the business in art objects, the cultural identity of the object may be decisive for the question of export or import control. In legal history, we can trace this idea back to Antonio Canova, who invented the nationality of art objects during his participation in the Paris conference in 1815, claiming the Roman and Italian art objects which Napoleon had taken in Italy and brought to Paris, seeing that the Louvre was to become, at that time, a world museum. Italian art returned to Italy, a fact which led to the general question of how the nationality of an art object is to be determined.[7]

Nowadays, a similar problem regards the restitution of cultural artworks of indigenous populations from European Museums to their places of origin.[8] In the German Land of Baden-Württemberg, an interesting case unfolded: the government of the Land, as well as the Stuttgart Linden Museum, had

[6] IPRax (2021, 380).

[7] See Jayme (1991).

[8] See Jayme (2021/2022, 5 ss.).

planned to return some objects taken by German collectors in the German colony of South West Africa to the State of Namibia. The Nama population association brought an action in the Constitutional Court of the Land Baden Württemberg claiming their restitution to this association, Namibia being a modern State not in existence at the time when Germany had taken this object. Unfortunately, the Court did not follow this argument.[9] The main legal problem of whether the Nama Association may be considered, under public international law and international procedural law, as a legal person who could be a party in a civil action abroad has not been mentioned in the decision of the German court.

3) The cultural identity of persons

Pluralism characterizes postmodern societies. In addition, people tend to change their residence many times during their lives, a fact which, in turn, has been the bases for postmodern legal theory[10], which also shows the influence of the writings of Michel Maffesoli.[11]

In private international law, nationality as a connecting factor has lost its importance for determining the applicable law in family and succession matters in favour of the habitual residence of the person involved.

While it is relatively easy to determine a person's citizenship, the concept of habitual residence has been the object of many studies and theories.[12] The question has arisen as to whether the determination of one's habitual residence has to consider not only territorial facts but also the cultural relations of the person involved. For example, Germans tend to spend their later years on Spanish islands such as Mallorca. Does this mean that, under European conflicts law, succession will be based on the Spanish law in force in the autonomous islands of the Baleares, such as the island of Mallorca, even if the German person did not speak Spanish or Catalan, had no *vecindad civil* to the Baleares and had even not been able to read the local newspaper?

[9] IPRax (2019, 413 ss.).
[10] Jayme (2012).
[11] Maffesoli (2010).
[12] See Welöler (2014, 225 ss.).

4) Volume II of the Coimbra Journal of Legal Studies

The Coimbra Journal of Legal Studies volume II has as its thematic core: Cultural identity and Conflict of values. The six articles deal with polyculturality as a problem of a legal order and describe "undecidabilities", suggesting possible solutions. Most interesting is the look at the history of literature and art, where moral pluralism also leads to practical conflicts.

The editors thank the authors cordially for their rich articles, which add new arguments to the solution of classical legal problems.

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