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Matthias Weller

Rethinking EU Cultural Property Law: Towards Private Enforcement

Nomos DIKE facultas

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Preface

The cross-border restitution of looted works of art and cultural goods triggers numerous, complex private international law questions, inasmuch as it often involves various national jurisdictions and substantive laws. So far, legislative actions in this particular area have been uncoordinated and fragmented. Additionally, national legislators have adopted different responses to certain legal questions, such as good faith acquisition and prescriptive acquisition in respect to cultural property. Finally, the current legislative framework does not offer adequate tools for private enforcement that could help victims to repair their harm. The European Parliament has identified those issues and decided to take action.

According to Article 225 TFEU, the European Parliament may request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. Such requests have to be based on a legislative initiative report by the parliamentary committee responsible. On 16 February 2016, the European Parliament Committee on Legal Affairs (JURI) was authorized to draft a legislative initiative report on cross-border restitution claims of looted works of art and cultural goods (rapporteur: Pavel Svoboda). A European Added Value Assessment (EAVA), which aims at examining the added value of a potential legislative action in a particular area, had to accompany said report. Accordingly, this task was delegated to the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament (administrator: Christian Salm). In order to prepare its Assessment, the European Added Value Unit requested this author to undertake an external Study, which constitutes the main part of the present book.

Said Study tackles the private international law issues that cross-border restitution claims of looted works of art and cultural goods may face. Additionally, it includes *de lege ferenda* recommendations. To be more specific, the Study highlights the shortcomings of Article 7 no. 4 Brussels Ibis Regulation (1); suggests possible improvements of choice of law in relation to cultural property such as the question of a "*lex originis*" as a potential variation to the *lex rei sitae* under certain circumstances (2); proposes

potential amendments on the level of substantive law such as e.g. the accession of the remaining Member States to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Goods or, alternatively, autonomous means of incorporating elements of this Convention or relevant provisions of the "Draft Common Frame Reference" by extending Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State (3); tackles the special issue of Holocaust related claims for restitution, including options for developing an adequate sales law (4); and recommends accompanying measures on EU level such as increasing data exchange of results from provenance research or setting up an EU Agency for the Protection of Cultural Property (5).

The structure of this book follows the chronological legislative developments on this topic. Accordingly, our Study is followed by the conclusions drawn by the European Added Value Unit (author of these conclusions: Christian Salm). Then, the Annexes include the Draft Opinion provided by the Committee on Culture and Education (rapporteur: Nikolaos Chountis), as well as its suggested amendments. Following the procedure established by the Treaties, the European Parliament will submit its motion for a resolution to the Commission that will in turn decide whether to regulate or not.

Acknowledgment: The main part of this book reprints, with kind permission by the European Parliament, the "Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure"[1]. This Study was prepared at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament. The Study was presented by this author to the JURI Committee in an oral hearing of 16 October 2017.

Bonn, April 2018 *Matthias Weller*

1 http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf.

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Part I:

Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure

Executive Summary

1. There are no reliable statistics on the precise scale of looting of cultural goods in armed conflicts and wars, nor on the scale of illicit trade with such cultural goods. Further investigations into the precise structures and scales should be undertaken. In principle, however, there cannot be any doubt that there is substantiated reason for deep concern.
2. Most current political initiatives and legislative measures to combat illicit trade with cultural goods looted in armed conflicts and wars focus on public, administrative and/or criminal law ("public enforcement"). In order to increase the effects of the regulatory framework on looting and illicit trade with cultural goods, private law must be taken into account far more than at present ("private enforcement").
3. On private enforcement of the protection of cultural goods against looting and illicit trade, effective claims of private litigants for the restitution of looted cultural property are central. This includes states acting in their capacity as private litigants based on their ownership of or proprietary interest in their looted cultural property. In order to effectuate such claims, the EU could consider the following measures:
4. Introducing a ground of general jurisdiction *in rem* (not only limited to cultural objects) as it was suggested by the Commission in its Proposal for the Recast of the Brussels I Regulation.[1] Such a provision would have a model in Article 98 of the Swiss Federal Act on Private International Law. At least, Article 7 no. 4 Brussels Ibis Regulation,[2] currently limited to certain cultural objects, should copy the definition of "cultural object" in Article 2 of the 1995 UNIDROIT Convention on

1 European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14 December 2010, COM(2010) 748 final, Article 5 no. 3.

2 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

the return of stolen property[3] in order to create a sphere of legal harmonization as far-reaching as possible.

5. In the case of loans of cultural property from one Member State to another Member State to exhibitions in the interest of public access and cultural exchange, ("collection mobility") despite pending conflicts about the loaned object in question, the special question arises, whether and to what extent claimants should be allowed to benefit from the temporary location of the loaned object in another jurisdiction ("forum shopping"), thereby bringing about a chilling effect on the mobility of collections and cultural exchange. The deeply fragmented national legislation on this issue ("anti-seizure statutes") amongst the EU Member States should be harmonized by an EU instrument of a plausible scope and reliable structure, in particular in respect to Nazi looted art.
6. In this context, Directive 2014/60/EU[4] should be clarified to the effect that the protection and support of collection mobility and cultural exchange by national anti-seizure statutes (or a future EU instrument of harmonized anti-seizure law) is not affected by the Directive.
7. Further, the EU should motivate, and join the Member States to acknowledge the rule under customary public international law, that cultural property of foreign states on loan for the purpose of cultural exchange in other states are immune from seizure. The aforementioned three measures (paras. 5, 6 and 7) will balance the interests of claimants with the interest of public access to cultural property, cultural exchange and collection mobility despite pending conflicts about the loaned object.
8. In virtually any litigation about contested cultural property, questions on choice of law arise. Therefore, the EU could consider enacting a harmonized choice of law rule. A possible model could be the Belgian choice of law rule in Article 90 of the Belgian Code of Private International Law. The EU could clarify, e.g. in a Recital to the harmonized choice of law rule, that there is no obstacle in principle to the applica-

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3 International Institute for the Unification of Private Law ("UNIDROIT"), Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

4 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast).

tion by EU courts of foreign cultural property law of non-EU states ("source states").

9. There are large and fundamental differences in the substantive laws of the Member States on good faith acquisition and prescriptive acquisition in respect to cultural property. Therefore, the law on these issues should be harmonized. However, at present, it appears to be impossible for the EU to become a Contracting Party to the 1995 UNIDROIT Convention, because this Convention allows the accession of States only. Therefore, the EU could seek, under Article 167 TFEU, to encourage those Member States to accede to the Convention that have not yet done so.
10. Alternatively, the EU could incorporate Chapter II of the 1995 UNIDROIT Convention as a new part of Directive 2014/60/EU. Alternatively, the EU could harmonize the rules on good faith acquisition and acquisition by a longer period of possession on the basis of the respective provisions in the Draft Common Frame of Reference ("DCFR"), Articles VIII.-3:101 DCFR and VIII.-4:102 DCFR, i.e. along the lines of international standards which many Member States have already endorsed by ratifying and acceding the UNIDROIT Convention. Again, such a measure could be inserted in (a recast of) Directive 2014/60/EU.
11. The special issue of Nazi looted art requires special solutions. Retroactive legislative measures that change the status of otherwise valid legal acquisitions of Nazi looted art in the past, e.g. by good faith acquisitions or acquisition by a longer period of possession after the Second World War, would not be in conformity with guarantees under the European Convention on Human Rights, the EU Charter of Human Rights and national constitutional guarantees.
12. In respect to future transactions about Nazi looted art, the EU should consider defining minimum standards for pre-contractual information on the provenance of the object to be sold, in particular whether and to what extent there is reason to suspect that the object is spoliated. The EU could further consider clarifying/harmonizing the buyer's remedies in case of non-compliance with the seller's pre-contractual duties to inform the buyer. These issues could be regulated e.g. in a Directive on certain aspects of the sale of (potentially) Nazi looted art, structurally mirroring Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.