VIII.

Law versus Justice?
An Intercultural Approach to the Problem of European Collections of Colonial Provenance

Droit vs. Justice ?
Une approche interculturelle du problème des collections européennes de provenance coloniale

Introduction

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Introduction

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The title of this section describes the field of tension that encompasses the various questions relating to how colonial takings should be dealt with today. Strictly speaking the formulation "law versus justice" is an oversimplification, because even the concept of law is by no means as unambiguous as non-lawyers or even some lawyers believe.

From an historical perspective, "law" and "justice" originally had to be identical, before law began to be seen by contemporaries as a manmade instrument for pushing through political aims and was still viewed as a sacred "law of the forefathers", which was based on traditional values, or even as a law not of human but of divine provenance. This applied not only to Europe but also to Africa and other continents.

In Europe it was not until the modern era, after personalised power structures had been replaced by nation-states which had a monopoly on the use of force that could be territorially imposed and after all legislative power and law enforcement had been placed with the sovereign state, that law came to be viewed as an instrument of pushing though concrete political aims for the benefit of some and to the detriment of others, which was independent of tradition and could be changed at any time. From then on, contemporaries began to learn that law and justice can sometimes be in complete opposition. However, until well into the 20th century, only a few European contempo-

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raries had the greatness of figures like the German poet of Enlightenment Christoph Martin Wieland (1778) who viewed "justice" not as a legitimising force but as a critical authority on colonial legal and power structures (*Meder*). Moreover, the pluralistic understanding in modern-era Europe of legal frameworks in indigenous legal systems was for a long time lost in social contract theories and centralist philosophical ideals (*Meder*).

The papers presented here show that applicable law played and unfortunately continues to play very different roles in the context of looted artefacts. In the past, law sanctioned not only the taking of artefacts but, following the Berlin (or Congo) Conference of 1884/1885, also the bloody colonial suppression and partitioning of the entire African continent (*Taku*). While Europe, following the philosopher Hugo Grotius (1625), one of the founders of international law, began to link looted artefacts, particularly those of religious provenance, with the notion of injustice quite early-on and saw this as a wrong that should be righted by legal means, the legal obligation to repatriate cultural goods looted in wartime, an idea that had been developed since the peace treaties after the Napoleonic Wars (1815), remained limited to the so-called "civilised nations" (*Campfens*) even in the first half of the 20th century, and therefore did not apply to colonial artefacts in European museums and collections.

Deeply rooted in long-standing racist ideology that was widespread throughout Europe, such double standards put a heavy burden not only on colonial law in the past but also on how colonial injustice is dealt with to this day (*Kamerdeen*). This applies both to the legal systems of nation-states in Europe and to many current international legal regimes that are based on Eurocentric sources, which lay down the universal principles of repatriating looted cultural goods only in respect of the present and future, but not of the colonial past (*Kamerdeen*, *Mecke*). The cry for justice (*Taku*), therefore, is also a cry for respect from the former colonial powers towards the colonised communities that were victimised by the double standards mentioned above.

Four fundamentally different legal approaches to the repatriation of cultural heritage of colonial provenance can be distinguished in current national and international law (*Mecke*).

The most innovative approach among these is the human rights approach. Instead of the traditional focus on states and inter-state law in Europe, it aims to take into account the interests of non-state ethnic communities. The

exclusive ownership interests of the descendants of the colonised or the colonisers are replaced by plural collective rights and shared identities of source communities, scientists, artists and other individuals.

Most importantly, the human rights approach dispenses with the historical proof of the unlawfulness of the colonisers' deeds and instead endeavours to justify and support the interests of people of today, in the source communities and beyond. Instead of general binding rights of possession, equitable solutions are sought for each individual case. In summary, the human rights approach shifts the interest away from the colonisers of the past to the social, cultural and religious functions of the artefacts in the present (*Campfens*).

The approach seems to be appealing from today's European perspective as an alternative to both the unconditional repatriation of goods and the complete refusal to do so. However – and this must be stressed here – it does deviate from the expectations of many of the direct descendants of the victims of colonisation.

In his paper, Chief *Taku*, as an international lawyer and great-grandson of Bangwa King Fontem Asonganyi, who was abducted and detained by the German colonists, in fact calls for the restitution of the formerly exclusive ownership rights of the once colonised Bangwa people in Cameroon as a first step on the way to making amends for all colonial injustices of the past.

The papers presented here can only highlight these diverging perspectives of the different courses of action, they cannot resolve them. However, it was in this respect that the PAESE research project, as part of which the 2021 conference in Hanover took place, pointed the way towards the future. The encounters so eloquently described by Chief Taku and the respectful discussions between the descendants of the colonisers and those of the colonised as part of the PAESE project showed that, while the egalitarian intercultural dialogue (*Taku*) which has been set in motion is no guarantee, it is the first and most important step towards finding solutions for the future that are *jointly* developed rather than those of the past which were forced on the colonised communities by the European side.