From Past Injustices to Today's Unlawful Consequences / Eurocentric legal systems with a global social claim to validity?

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From Past Injustices to Today's Unlawful Consequences

The Claim to Eliminate the Unlawful Consequences of State Action (Folgenbeseitigungsanspruch) as Legal Basis for Restitution Claims

By Natalia Loyola Daiqui

One of the most noticeable voids left in formally colonized communities are the innumerable cultural objects and human remains that were taken by the colonizing powers to be exhibited in museums or used as objects of (racist) scientific research. Thus, claims for restitution or repatriation have been at the heart of many negotiations concerning reparations for colonial injustices.

Such restitution or repatriation claims are sometimes voiced by nation states. More often than not, however, they are brought forward by communities or individuals who demand that their ancestors' remains and cultural, spiritual objects be returned to them. In the case of Germany, most human remains and a big part of (looted) cultural objects are held in publicly owned museums or collections. That is, they are in the possession of *state actors*. Therefore, restitution and repatriation claims of formerly colonized communities are subject to German administrative law.

The Issue of Intertemporal Law

One of the main issues in legally addressing the aftermaths of colonial crimes is the principle of intertemporality as laid out in the Island of Palmas case. According to this principle, the (il)legality of an act can only be judged by the law in force at the time the act occurred. Since the colonial powers were the ones making the law and also the ones writing the historical documents used as proof of ownership today, it is oftentimes difficult if not impossible to prove the unlawfulness *at the time of the taking*.

For this problem, German administrative law offers a tangible solution: the *Folgenbeseitigungsanspruch*, which roughly translates to "the claim to eliminate the unlawful consequences of state action". The *Folgenbeseitigungsanspruch* is a well-established legal figure in German administrative law. Its scope of application can be summarized as follows: If state actions lead to an unlawful situation – that is, a situation which it interferes with the rights of individuals – the state is obliged to eliminate these unlawful consequences of its actions. This obligation applies irrespective of whether the initial state action was lawful or unlawful. It only focuses on the unlawfulness of the current situation.

That way, the issue of proving that the initial taking of the human remains or cultural objects was unlawful at the time of the taking can be circumvented. The focus shifts from a (hard to prove) past injustice to today's unlawfulness, based on our current laws and interpretations.

Utilizing the Folgenbeseitigungsanspruch as Legal Basis for Restitution Claims

The *Folgenbeseitigungsanspruch* has three requisites: An action or omission by a state actor has to interfere with the rights of the plaintiff (1), this unlawful situation has to be ongoing and be attributable to the state actor (2), and finally no grounds for exclusion and/or statute of limitations may apply (3). Thus, to enforce a restitution claim in that way, the following prerequisites have to be met:

(1) Act or omission by a state actor that interferes with rights of the plaintiff

For restitution or repatriation claims, the act or omission by a state actor can be seen in the public museum's taking of possession of the human remains or cultural objects as well as its refusal to return them. In doing so, the public museum interferes with (constitutional) rights of the plaintiff.

In the case of repatriation claims concerning the human remains of the plaintiff's ancestors, the refusal to do so violates the plaintiff's right to bury and commemorate their deceased ancestor. Additionally, it infringes on the post-mortal right to dignity of the deceased which can be claimed by the plaintiff on behalf of their deceased ancestor. In the case of restitution claims concerning cultural objects, it can be argued that the museum's refusal to restitute interferes with the plaintiff's right to access their culture as established in international human rights law. Certainly, the plaintiff's legal standing in these cases is not unequivocal and thus requires further elaboration, cf. here.

(2) Continuing unlawful situation which can be attributed to the state actor

The infringement on the plaintiff's rights may not be justified. Here, the material burden of proof lies with the museum. That is, if it remains unclear whether a justification for said infringement exists, the court will simply assume that there is no justification. Further, the resulting unlawful situation has to be ongoing and needs to be attributed to the state actor, the public museum. The plaintiff's rights are continually being violated as long as they are unable to bury their ancestors according to their customs and traditions, or as long as they cannot access their cultural heritage, respectively. In refusing to restitute and keeping the human remains or cultural objects in its possession, the public museum is directly responsible for said unlawful status.

(3) No grounds for exclusion and/or statute of limitations may apply

Lastly, the claim may not be excluded due to actual or legal impossibility, i.e. the museum has to be physically able to and legally allowed to restitute. Also, the restitution efforts may not demand a disproportionately high effort which would constitute unreasonableness under the law. The material burden of proof for this lies with the state actor.

A relevant obstacle to enforcing restitution claims is the statute of limitations; it is – among others – linked to the taking of possession by the public museum which in most cases dates back a long time. The German Museums Association however, strongly recommends to not invoke the statute of limitations in these cases.

(4) Legal consequence: Folgenbeseitigungsanspruch

As a result, the plaintiff has a claim against the state actor to eliminate all direct consequences of the state action. That is, the human remains or cultural and spiritual objects have to be returned to the plaintiffs for them to bury them or to utilize them in cultural rituals, respectively. In that way, the unlawful consequences of state action, i.e. the unjustified violation of the plaintiff's rights, are remedied.

A First Step Towards Legally Enforceable Restitution Claims

Many questions remain unanswered: What does restitution entail? Where does it take place, in Germany or in the former colony from where the objects were taken? Who are the valid plaintiffs, and can communities collectively claim restitution?

However, establishing that the *Folgenbeseitigungsanspruch* is a valid tool to legally enforce restitution claims can be a first step towards a decolonial application of the law. For the next step, new laws are needed that address these unsolved issues and that unequivocally state that restitution claims are a legal matter, not merely a moral one.

Eurocentric legal systems with a global social claim to validity?

The Claim to Eliminate the Unlawful Consequences of State Action (Folgenbeseitigungsanspruch) and Other European Legal Constructs as Guarantors of the Maintenance of Colonial Conditions

Response by Sebastian-Manès Sprute

That the search for an appropriate legal basis for the restitution of looted cultural heritage and human remains from former colonial territories has recently gained popularity is undoubtedly commendable. However, in view of the fact that the colonial era has now officially ended for some time, it must be surprising that the legal processing of such a far-reaching and ongoing man-made catastrophe takes so long, when far less serious crimes against humanity were legally punished much more quickly.

In addition, it is also surprising that in the course of the search for an appropriate legal system to settle the injustice, it has not yet been possible to overcome Eurocentric perspectives. A recourse to the *Folgenbeseitigungsanspruch* taken from German administrative law would thus revive the asymmetrical colonial power relationship and force those affected to negotiate the injustice inflicted on them according to the rules of the perpetrator Historical and contemporary legal systems of affected societies in the former colonial territories would be completely negated and deprived of their scope of application in unbroken continuity.

The persistent ignorance of colonial injustice

The inclusion of legal forms that did not emerge from the European legal tradition holds great potential, as it could undoubtedly refute serious misconceptions such as the one that colonialism was not unjust at the time. Contrary to certain claims, it is a commonplace today that colonialism was not beneficial for the vast majority of colonised societies and was accompanied by numerous inhumane crimes.[1] Moreover, the justification strategies put forward at the time have proven to be baseless and only served to mask the rampant political oppression and economic exploitation. It was not even the case that colonialism was not seen as a crime in the European context of the time, because even then there was no monolithic notion of justice, as numerous voices critical of colonialism from all walks of life attest.[2]

In the meantime, it has also been proven in many places that the actions of the European colonial masters in the colonies went beyond the morally justifiable behaviour of the time in many respects. The numerous violent and sadistic excesses of individuals or the collective warmongering that led to the almost complete destruction of many indigenous societies would have been legally branded as intolerable crimes against humanity if the European public had been aware of their full extent. It is not for nothing that the few so-called "colonial scandals" that have become known have always resulted in a public outcry,[3] a revision of the atrocities on the ground and, not infrequently, an adjustment of the legal situation to be able to exclude such cases in the future. But it was precisely these reactions to the atrocities committed by European actors on the ground that led very early on to the informal creation of a "law of silence" among the colonial rulers, which continues to make it difficult to come to terms with the events on the ground today. At the same time, the "culture bringers" of the time were aware of their criminal and inhumane actions towards the indigenous population. It would only be fair if the perspectives of those affected could be included in the negotiations to the same extent.

Decolonisation of Eurocentric international law

In view of this situation, a sustainable decolonisation of the legal system seems more than overdue, especially since the legal system that was used by one part of humanity to legitimise the violent exploitation, oppression and destruction of another part of humanity has in many respects changed little to this day. Numerous principles of international law developed under the influence of imperialism and colonialism formally legitimised the violence and arbitrariness of the colonial system in the first place. However, the system of international law, which is profoundly Eurocentric in this respect, has not only promoted the enforcement and safeguarding of colonially based

[1] Cf. Césaire, Aimé: Discours sur le colonialisme, Paris : Présence Africaine, 1955.

[2] Cf. Tibi, Bassam: Kolonialherrschaft, Antikolonialismus und Dekolonisation. Das afrikanische Exempel. In: Neue Politische Literatur. Bd. 15, Nr. 4, 1970, S. 507–532.

[3] Cf. Bösch, Frank: Öffentliche Geheimnisse: Skandale, Politik und Medien in Deutschland und Großbritannien 1880-1914, München: DeGruyter, 2009.

economic and political interests, but also contributes to the concealment of these very crimes even today.

Thus, the pillar sanctuaries of the European rule of law such as the "principle of intertemporality" or the "prohibition of retroactivity" conceal the foundations and rules for maintaining the privileges and property relations of the old colonialist-imperialist world order. Even today, these legal constructs refer back to the idea of a European "civilising mission"[4] implicit in the legal concepts of the time and the associated racist devaluation of non-European populations. In legal terms, the ideological superstructure of colonialism served and still serves above all to deny the people in the colonies rights according to their needs and to overrule and delegitimise the applicable legal systems of their own political communities where they conflict with European interests. Even though legal views have certainly changed since colonial times, it cannot be denied that numerous legal principles have survived that in many respects uphold the privileges of the former colonisers and systematically disadvantage the citizens of the former colonial territories. The "victors" of the time not only rewrote history for their own purposes, but above all the laws they needed to legitimise, disguise and naturalise their power.

Today, international law is seen as a kind of global social contract, but it is by no means a result of equal global negotiation processes, nor is it a form of law that takes all people in this world into account to the same degree. Rather, it is a colonial foundation that has entrenched the inequality of the colonial system in parts up to the present day. Accessibility, use and benefit of international law thus remain largely denied to the mass of less privileged people from the former colonial territories. In view of the situation described, the question arises as to whether such a compromised system of international law, which promotes a legal pluralism based in part on Eurocentric and colonial racist presuppositions, represents a sufficiently global society-oriented understanding of law to be applied. Even though belonging to a different level, this consideration in principle also includes German administrative law and the claim to eliminate the unlawful consequences of state action.

Recourse to the German understanding of law would, as mentioned, only contribute to perpetuating the perspective of the colonial actors and to reproducing colonial power relations. However, decolonisation processes on the part of the formerly powerful colonial nations primarily go hand in hand with sharing privileges, relinquishing interpretive sovereignty and allowing multiperspectivity in legal terms as well. The question of which legal interpretation to base the evaluation of colonial events and their consequences on cannot be decided within the framework of one of the historical or contemporary legal models of European or non-European character, but must include aspects of both sides. Moreover, it cannot be done without the active and equal participation of the colonially affected non-European communities.

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[4] Cf. Anghie, Antony: Imperialism, Sovereignty and the Making of International Law, Cambridge, 2005.