Heinz-Peter Mansel, Die kulturelle Identität im Internationalen Privatrecht, in: Pluralistische Gesellschaften und Internationales Recht, Berichte DGVR Bd. 43, Heidelberg 2008

Summary

Cultural Identity in International Private Law

by Prof. Dr. Heinz-Peter Mansel, Köln

1. According to an individualistic understanding cultural identity means the self-conception of a person based on objective characteristics to belong to a group the members of which are different from other groups because of socially acquired factors (e.g. language, religion, philosophy, traditions, conventions, customs) as well as other intellectual factors.

2. Even though the factors that may constitute the cultural identity of a person need to be taken into account in the context of the balancing of the different connecting factors required by Art. 3 Grundgesetz, concrete choice of law rules may not be inferred from these factors.

3. The controversy between the principle of nationality and the principle of residence as well as the question whether or not to establish a connection with a cultural identity may not be resolved in a general way by deductions from the Grundgesetz. The decision has to be taken on the basis of policy considerations. The cultural identity of a person is merely a general argument which should be taken into account when creating choice of law rules.

4. The application of the lex patriae, which is determined by nationality, as the law reflecting the cultural identity of the person of contact, is less convincing the more the integration of immigrants into the pluralistic society progresses and the looser the connection with the state of origin becomes.

5. In the cases of biculturalism and transnationalism neither nationality as an indicator of cultural identity nor the connecting factor of residence seem to be convincing. Both reflect only a part of personal identity.

6. The ECJ's Garcia Avello decision and the decision of the Federal Constitutional Court of 2006 concerning the personal scope of the Transsexuals Act suggest that self-defined cultural identity is of particular importance.

7. In its decision concerning the grant of social benefits for spouses of same-sex partners the UN Administrative Court recognized that the connecting factor of nationality in personal and family law matters was due to the respect for the state sovereignty and personal sovereignty. The Court regards nationality as an indicator of the law a person is culturally most familiar with and, despite the intervention of numerous states in that particular case, abstains from an ordre public control of the law thus determined. In view of the neutrality towards the member states the Court as a supranational institution aspires to, these principles apply only to a limited extent to national norm creation.

8. In favour of a principle of nationality based on cultural identity one may argue that the law, particularly family law, is often the expression of cultural identity. However, this argument is convincing only in ideal type cases.

9. For an increasing number of residents the state of their nationality is no longer the state in the history and culture of which they find their cultural identity. Thus the princi-

ple of nationality may not be justified merely by considerations of cultural identity. Further explanations are necessary. One may refer to the possibility of political participation.

10. The principle of nationality ensures that a person who may shape a legal system by means of voting, is subjected to that legal system in private law matters. The ability of nationals to exert influence by participating in parliamentary elections allows them to perceive the law of the state as their own law.

11. The prohibition of discriminatory practices under Community law does not challenge the establishment of a connection with the nationality provided that the use of the connecting factor is justified by special circumstances. As a justification one may rely on the consideration that the nationality identifies the law in relation to which the connecting person typically has a special connection.

12. One notes that habitual residence dominates the legislative works of the European Community. One of the reasons may be the policy orientation towards integration into the state of residence which is related to mobility within the internal market. Furthermore habitual residence is an appropriate criterion for determining jurisdiction so that the establishment of a connection with the residence may ensure parallelism between the applicable law and jurisdiction.

13. Residence and nationality are typifying connecting factors. They both fail in pluralistic societies because here the connection with cultural roots in the state of residence or the home country is broken for important parts of the population.

14. One should be able to depart from the general rule establishing the connecting factor with nationality and respectively with residence by providing for an option for the connecting person to choose as personal statute the law determined by the other connecting factor.

15. With regard to the personal statute no distinction should be drawn between situations with a third country dimension and purely Community-based situations but uniform choice of law rules should be introduced. The creation of European interstate conflict of law rules should be rejected.

16. As far as a correction of the application of the foreign law under the ordre public is in question, the designation of the law of an EU member state raises doubts whether the existing national particularities of family and succession law may always be attributed to cultural imprint serving identity development. Cultural conflicts touching the legal subjects at the core of their socio-cultural identity typically occur only in cases of religiously motivated state regulation, which is rare in the European Community.

17. On a global level one may observe a politicization of religion with the consequence that religious communities increasingly seek to help enforce the authority of religious law over state law. Thus, an area of conflict opens up between the necessary consideration of the legal subject, who perceives religion as an element serving the development of his identity, and the freedom of others guaranteed by the state.

18. If the foreign law provides for government enforcement of the practice of religion this always amounts to a breach of Art. 6 EGBGB. The German judicial act of state

would infringe the negative freedom of the unsuccessful party to practise his religion. As an example one may refer to so called get statutes.

19. Religious law is not democratically legitimised. However, this does not result in a general prohibition of its application in Germany. A correction under the ordre public is only possible when the substantial outcome results in an infringement of a fundamental right.

20. When establishing an infringement upon ordre public one must exercise restraint. The ordre public-control does not involve a value judgement of the foreign law but determines the requirements of its application within the home country by national authorities. This is because German public authorities (courts, registrars) are bound by Art. 1 sect. 3 and Art. 20 sect. 3 Grundgesetz when they apply foreign law. Thus the purpose of the ordre public-control is to avoid that national authorities infringe upon the domestic legal order when applying foreign law. When a restriction of a fundamental right is in question the cultural identity of all the persons concerned by the decision to the extent that it may fit into a relevant category of fundamental rights, such as the general right of personality, the freedom of religion or freedom of marriage, human dignity etc., has to be taken into account in the balancing of interests.

21. No separate assessment of the intensity of the domestic element is required for fundamental and human rights. However, the assessment of the domestic element is already part of the determination of an infringement of a fundamental right or a human right, since it needs to be taken into account as a criterion when determining their international scope.

22. The appropriate resolution of cultural conflicts in purely internal situations requires a substantive law to be culturally open. One may also aim for this by using the interpretative and constructive scope of the lex lata. The creation of special legal concepts will have to be considered. An extension of the right to resort to arbitration to the whole of family law could provide a possibility for respecting religious law in a different cultural environment of the law. In this context the guarantee of fundamental rights must always be ensured.