INTRODUCTION

Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy

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The original laws, the fundamental principles, are in *Sé*. *Sé* has no beginning, it has always existed. It is spiritual existence, the spiritual principle of existence. *Sé* is not a person, not a thing. It is the sum of things. *Sé* is complex. *Sé* brought the material world into being, but it embraces far more than that. *Sé* organises everything so as to create harmony. When everything was dark, on a level which our view can not reach, the first spiritual Parents originated spirit and thought. They created everything in spirit, in the non material world. They were not people, not air, not anything, just idea. These "spiritual Parents" are the ideas which precede all others. That is why they are called "Parents." They are aspects of *Sé* – ideas in the realm of ideas. They translate into our way of speaking as axioms, like the axioms of geometry. They are the fundamental concepts from which everything else arises. The Axioms of *Sé* need to be understood before beginning to discuss ideas of right and wrong.[1]

Ramon Gil, of the Kogi, a pre-Columbian high civilization in the Sierra Nevada de Santa Marta, in the first chapter in Part I explains how, from the Law of *Sé*, the Kogi derive their political, cultural and ecological theory. For the Kogi, as for many other indigenous peoples, the spiritual is linked to the material aspects of culture – artistic and natural heritage is preserved because it is a living link to their ancestors and their history.

Western origins of the idea of art and cultural heritage preservation as a matter of public concern are traced to France in the year 1794, "when the revolutionary government asked one of its members, Henri Gregoire" (who is referred to as Abbé Gregoire), to construct a response to a proposal to destroy all traces of Latin inscription on monuments and other "tainted art." He responded by urging "a focus on the creator of the art rather than on the patron, to bring the individual to the forefront and to present works of art as examples of the free spirit – genius and talent realized – triumphant over political repression, error and superstition . . . Because the Pyramids of Egypt had been built by tyranny and for tyranny, ought these monuments of antiquity to be demolished?" His goal was not only to bind the new republic to the greatness of its past, but to repudiate the distorted simplifications of revolutionary rhetoric which, by equating the destruction of all "tainted" works with the promotion of equality and liberty, seemed to honor what Gregoire called "the axioms of ignorance."[2]

Gregoire identified the existence of a national patrimony, and called for its preservation by stating that "those who were willing to see these artefacts destroyed, or sold abroad as if the nation cared nothing for them . . . were imperilling the most important symbols of national identity, those things that spoke for what France should aspire to be."[3]

In the past 50 years, but particularly in the past several decades, it has become apparent that culture matters and that protecting it is the concern not only of a people, and of sovereign nations but of the international community.[4] That concern is sustained by the emergence of principles that increasingly place weight on the concept of "common interests" to balance and to redefine traditional notions of state sovereignty and private property rights with respect to the protection of cultural heritage.

When the then Taliban government of Afghanistan in 2001 announced that "in view of the fatwa [religious edict] . . . it has been decided to break down all statues/idols . . . [including the great stone Buddhas at Bamiyan] because these idols have been gods of the infidels,"[5] the world community was stunned. Despite desperate efforts on the part of many individuals and organizations, including the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Taliban destroyed the Buddhas. World reaction showed a remarkable universal consensus that the destruction of the Buddhas was wrong, whether the condemnation was justified on the basis of a violation of international law, the principle of humanity or the dictates of the public conscience, or a complex mix of the three.

After the Gulf War of 1990, there was a huge increase in global trafficking in Near Eastern art. Not surprisingly, archaeologists, art historians, and museum curators in the United States warned of the impact of another war on Iraq's cultural heritage when an attack by the United States in early 2003 appeared imminent. In the United Kingdom, the All-Party Parliamentary Group on Archaeology wrote to Prime Minister Tony Blair in February 2003 and asked that consideration be given to Iraq's sites and museums and their

[1] Gil, R., *Gozsezhi, 18 September 1998*, p. 2; translated by Ereira, A. See Chapter 2 this volume.

[2] Sax, J. L., *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*. 88 Mich.L.Rev. 1142, 1156 (1990).

[3] Id at 1146.

[4] International law is the universal body of law that applies to all states regardless of their specific cultures, belief systems, and political organizations. The sources of international law are treaty and custom. Where there is no treaty and no contending executive or legislative act or judicial decision, resort must be had to customs and usages of "civilized nations." A prevailing custom of international law is one that arises from "a general and consistent practice of states followed by them from a sense of legal obligation (opinion juris)." See Restatement (third) of Foreign Relations Law of the United States Section 102 (2) (1987).

[5] Taken from an edict issued by Mullah Mohammed Omar, 26 February 2001. The text of the edict is available at <http://www.afghan-politics.org> (*Associated Press* source).

status in terms of world heritage archaeological significance. As Lieutenant-Colonel Tim Collins told the Royal Irish Battle Group on the eve of the conflict, "Iraq is steeped in history. It is the site of the Garden Eden, the Great Flood, and the birth of Abraham. Tread lightly there."[6]

Reports of widespread looting of Iraq's museums and archaeological sites and the burning of the National Library which followed in the immediate aftermath of the United States' invasion in March 2003 confirmed that the warnings were well-founded and brought to the forefront the inadequacy of international law to protect cultural heritage in times of armed conflict. Although Iraq had been a party to the 1954 Convention for Protection Cultural Property In The Event Of Armed Conflict (The Hague Convention),[7] neither the United States nor the United Kingdom had become a party.[8] The international community was quick to react to protect Iraq's heritage. In May 2003, the United Nations Security Council passed Resolution 1483 urging member states to facilitate the safe return to Iraqi institutions of Iraqi cultural property allegedly removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Resolution 661 in 1990. Several nations, including so-called "market-nations" involved in the global art and antiquities market have taken steps to implement the Resolution. On 28 May 2003, the Swiss Federal Council imposed a ban that covers importation, exportation, and transit, as well as selling, marketing, dealing in, acquiring, or otherwise transferring Iraqi cultural assets stolen in Iraq since 2 August 1990, removed against the will of the owner, or taken out of Iraq illegally. It includes cultural assets acquired through illegal excavations. Such assets are presumed to have been exported illegally if they can be proved to have been in the Republic of Iraq after 2 August 1990.[9]

In the United Kingdom, the Iraq (United Nations Sanctions) Order 2003[10] brought these restrictions into effect on 14 June 2003. The Order prohibits the import or export of illegally removed Iraqi cultural property and creates a criminal offence with a maximum penalty of seven years imprisonment for "any person who holds or controls any item of illegally removed Iraqi cultural property . . . unless he proves he did not know and had no reason to suppose that the item in question was illegally removed Iraqi material."[11]

Initially, the United States left existing sanctions in place for illegally removed Iraqi cultural property when it lifted sanctions for most other commercial goods. On 19 November 2004, the United States Senate passed the "Emergency Protection for Iraqi Cultural Antiquities Act of 2004,"[12] which allows the President to impose import restrictions on any cultural materials illegally removed from Iraq. The legislation tracks Resolution 1483. At the time Senator Charles Grassley introduced the bill, he stated,

> I believe it is very important that we in Congress remain mindful of the need to take steps to protect Iraq's cultural heritage. Our bill will ensure that going forward we continue to adhere to the full spirit of Resolution 1483 and avoid any break in the protections afforded to Iraqi antiquities. Our bill also provides an important signal of our commitment to preserving Iraq's resources for the benefit of the Iraqi people.

On 17 October 2003, UNESCO General Conference adopted the Declaration Concerning the Intentional Destruction of the Cultural Heritage.[13] The text emerged mainly in response to the destruction of the Bamiyan Buddhas, but its language is broad enough to cover the destruction by rampant looting of Iraqi cultural heritage.[14] The Preamble begins, "[r]ecalling the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole."[15] The text then continues with the recommendation that the Member States commit to fight against the intentional destruction of the

[6] House of Commons, Select Committee on Culture, Media and Sport (First Report), Sec. 71, 2 December 2003. The full text is available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcumeds/59/5905.htm>.

[7] Convention for Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 ("Hague Convention"); Second Protocol to Hague Convention (The Hague, 26 March 1999). The Hague Convention expanded protection for cultural property from "war" to all armed conflicts. The Hague Convention also designated an international symbol for nations in order to protect cultural property. Finally, the Hague Convention created an International Register of Cultural Property Under Special Protection. The Hague Convention was drawn up with World Wars I and II in mind, but since then there has been an increase in the internecine strife, often along ethnic or religious divides, and the time-honored obliteration of an enemy's identity by destruction of its cultural heritage has become a frequent war aim. This failure of the Convention to prevent the loss or destruction of cultural material during times of war led to the formulation of a Second Protocol in 1999. Among its many provisions, it establishes that the destruction or appropriation of cultural material is a war crime, and includes a chapter that deals specifically with civil wars. <http://www.unesco.org/culture/laws/hague/html_eng/page1.shtml>.

[8] The strength of the Hague Convention principles was evident during the Persian Gulf War in 1990 ("Operation Desert Storm"). During Operation Desert Storm, the coalition forces adhered to its principles as tenets of customary international law. Kuwait, France, Egypt, Saudi Arabia, and other coalition members, as well as Iraq, are parties to the Hague Convention.

[9] Ordinance on Economic Measures against the Republic of Iraq of 28 May 2003, SR 946.206, available at <www.kultur-schweiz.admin.ch/arkgt/kgt/e/e_kgt.htm>.

[10] The Iraq (United Nations Sanctions) Order 2003, Statutory Instrument 2003, No. 1519 (UK, The Stationery Office Limited [TSO] 2003), ©Crown Copyright 2003. The Order inverts the burden of proof that usually applies in criminal prosecutions. Normally, the object is "innocent until proven guilty." In the case of Iraqi cultural property, the object is presumed guilty unless proven otherwise.

[11] The Order inverts the burden of proof that usually applies in criminal prosecutions. Normally, the object is "innocent until proven guilty." In the case of Iraqi cultural property, the object is presumed guilty unless proven otherwise. The British Art Market Federation reported to the House of Commons in 2004, that legitimate trade in Mesopotamian antiquities had collapsed to virtually nothing in the aftermath of the Iraq war and the related establishment of the specific legislation aimed at preventing illicit trade in cultural property sourced in Iraq.

[12] "Emergency Protection for Iraqi Cultural Antiquities Act of 2004," The House of Representatives, H.R. 1047, Title III, Iraqi Cultural Antiquities, Sec. 3001.

[13] UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, October 17, 2003. The full text of the Declaration is available at <http://unesdoc.unesco.org/images/0013/001331/133171e.pdf#page=68>.

[14] The U.S. Department of State, through its Bureau of Educational and Cultural Affairs, maintains a constantly updated Web site on Iraqi cultural heritage at <http://exchanges.state.gov/culprop/iraq.html>.

[15] *Ibid.* fn. 13.

common heritage in any form so that it may be transmitted to succeeding generations.[16]

What obligations, if any, do the Hague Convention and the First Protocol place on an occupying force to safeguard antiquities, museums, and sites in situations such as those that occurred in Iraq, both before and after the declaration of the end of military operations? Do the principles of the Hague Convention apply once a war has been declared at an end? With the end of hostilities following the end of operations, the greatest threat to Iraq's cultural heritage is not from the "collateral damage of war," but from the civil disorder and the ensuing looting and destruction of museums, monuments, and sites.[17]

Professors Francesco Francioni and Federico Lenzerini, in their chapter entitled "The Obligation To Prevent And Avoid Destruction Of Cultural Heritage: From Bamiyan To Iraq," trace the evolution of the protection of cultural property in times of war and consider whether and to what extent contemporary international law protects cultural heritage of great importance for humanity against deliberate destruction perpetrated by a state in whose territory such heritage is located. They further consider the duty to prevent and avoid devastation of cultural heritage on the part of occupying forces, particularly with respect to the Iraqis' cultural treasures.

Beyond the question of cultural vandalism, Iraq introduces the reader to two other significant concerns in the development of cultural heritage policy: the illicit traffic in cultural property and the restitution to its place of origin of illicitly removed cultural property.

The illicit traffic in antiquities from Iraq followed a predictable path from the art-rich, usually extraordinarily poor nations – so-called "source nations" – to wealthy collectors and museums in so-called "market-nations" like the United Kingdom, Switzerland, and the United States. Our various authors lead others to the fact that looting archaeological sites and stealing artworks from museums and ethnological objects from rural areas have become frequent events the world over.

Although the looting of archaeological sites is hardly a recent phenomenon, it has grown dramatically, to crisis dimensions. Several generations ago, professional looters provided a select clientele of private collectors and well-known art museums with a modest but steady stream of minor archaeological treasures. Today, thefts of art and antiquities are reported to join drugs, money laundering, and the illegal arms trade as one of the largest areas of international criminal activity, although Interpol's Web site states, "we do not possess any figures which would enable us to claim that trafficking in cultural property is the third or fourth most common form of trafficking in an amount of five billion dollars, although this is frequently mentioned at international conferences and in the media."[18]

The ramifications of such looting go far beyond the theft of the object in question. Neil Brodie, in chapter 3, "An Archaeologist's View of the Trade in Illicit Antiquities," observes that archaeological sites and monuments are a source of historical information, often the only source, and when they are destroyed in the search for saleable antiquities the information is destroyed, too. An object taken from its cultural and geographic context may be stripped of its meaning and its significance lost to human knowledge. Thus Brodie argues that removing a cultural object from its place of origin is an affront to the common heritage of mankind.[19]

The problem of looted "cultural goods" that were plundered in wartime through acts of violence, confiscation, or apparently legal transactions, unfortunately remains part of human history even at the beginning of the twenty-first century. Such plundering occurred throughout the ages, but became more acute during the nineteenth and twentieth centuries. During World War II, cultural goods were looted on a massive scale never before seen.

In the 1960s and 1970s, the plundering of African cultural heritage assumed gigantic proportions, with dealers in ethnographic art organizing full-size expeditions into remote parts of Africa. Professor Folarin Shyllon in his chapter describes how light aircraft would land as close as possible to the cities, later leaving packed full of antiquities and other *objets d'art*. They flew to Mali's capital, Bamako, the headquarters for most of the illicit dealing, or to Senegal or Cote d'Ivoire, from where objects were sent to Paris or sold to the local dealers who shipped them to the United States.[20]

By 1970, thefts were increasing both in museums and on site, particularly in Latin American countries, with their wealth of archaeological sites of pre-Columbia material. In the North, private collectors and sometimes official institutions such as museums, were increasingly offered works that were fraudulently imported or of unidentified origin and buying them. In response to the crisis, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO").[21] The 1970 UNESCO was conceived

[16] In Section II, the Declaration defines the meaning of "intentional destruction" as "an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law."

[17] See Franconi and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," Part I, this volume. Lehman, Jennifer N. Note: The Continued Struggle with Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Convention, 14 Ariz. *J. International and Comp. Law* (Spring 1997) 527, 537.

[18] <www.interpol.com/Public/WorkOfArt/conference/meeting04/recommendations.> Interpol has held numerous interdisciplinary conferences on the illicit traffic in cultural property and works closely with ICOM and UNESCO.

[19] Brodie, Neil. "An Archaeologist's View of the Trade in Illicit Antiquities," this volume.

[20] See Shyllon, F. "The Nigerian and African Experience on Looting and Trafficking in Cultural Objects," Part II of this book.

[21] United Nations Educational, Scientific & Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, Art. 1, 823 U.N.T.S. 232, 234–6. <http:www.unesco.org/culture/laws/1970/html_eng/page1.shtml>. Dr. Lyndel Prott, former

as the lynchpin of an international legal framework for controlling traffic in illegally exported or stolen cultural property and is based primarily on an essentially public international law and administrative law model.

Among other things, the final version of the 1970 UNESCO requires signatories to take appropriate steps to "prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned." The 1970 UNESCO also calls for an embargo on cultural property "stolen from a museum or a religious or secular public monument or similar institution in another State Party . . . provided that such property is documented as appertaining to the inventory of that institution." In addition, it allows a member state whose cultural property is in jeopardy to request other member states to "participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned." The 1970 UNESCO is not retroactive, and enters into force three months after a state's ratification. It is, thus, not available for colonial and World War II claims.

Principally, 1970 UNESCO works at the level of government administrations: governments are required to take action at the request of a State party to the convention to seize cultural property that has been stolen. They must also collaborate to prevent major crises in the protection of cultural heritage, such as those now occurring in Iraq and Afghanistan.[22]

For example, in 1985, at the request of the Peruvian government, Canadian customs officers and investigators seized a large group of pre-Columbian objects, including ceramic pottery dating from 1800 B.C. to 1400 A.D. Illicitly exported from Peru, the objects were imported in violation of the Canadian Cultural Property Export and Import Act, and were destined for the United States. After having returned a first group of artefacts in 1997, Canada returned the remaining fifty-nine objects to Peru in April 2000.[23]

Requests for the restitution of cultural property are not a new issue in international law. In the famous case of the so-called "Elgin[24] marbles," or "Parthenon marbles," Lord Byron was among the first to criticize the removal of the collection of marble figures and a frieze from the Parthenon by Lord Elgin, who offered them for sale to the British Parliament in 1816. The formal request by Greece in 1983 by Melina Mercouri, its then Minister of Culture, for the return of the marbles remains the best known and most discussed paradigm in academic and political fora. Indeed, the Greek delegation included in its statement to the UNESCO Intergovernmental Committee for the Return of Cultural Property to its Country of Origin that all countries have the right to recover the most significant part of their cultural heritage lost during periods of colonial or foreign occupation.

With the independence of African nations, requests for restitution[25] and return of cultural objects had moved center stage at international meetings. In 1973, the United Nations General Assembly passed the first of a series of resolutions on the subject of Resolution 3187 (XXVIII) entitled "Restitution of Works of Art to Countries Victims of Expropriation." Amadou M'Bow, Director General of UNESCO, in 1978, issued a "Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It."[26]

> The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces, but also robbed of a memory which would doubtless have headed them to greater self knowledge . . .

Wars, colonialism, missionary and archaeological expeditions, looting, fraudulent "purchase," and even legitimate trade in antiquities thus led to a situation in which many nations and victims of war find their national and cultural heritage in foreign museums and private collections.

Requests for return or repatriation of cultural property may be placed in the larger context of an independence/post colonial universe. For example, the Icelandic demand for the return of the Codex Regius of the Poetic Edda and the compendium Book of Flatey (Flatey jarbok). The latter is a magnificent collection of the Icelandic sagas; the "former" contains the oldest text of the Edda, the most precious source of knowledge of ancient Norse myth and epic. The two books were the most valuable of thousands taken to Copenhagen by an Icelandic scholar, Arni Magnusson, in the eighteenth century. They became a focal point of the movement for Icelandic independence from Denmark, and demands for their return in Iceland began to be heard as early as 1830, reaching a level of intense and impassioned public debate in Denmark during the 60s. The Danes viewed the manuscripts held in the public Royal Library as well as those held in the private Arnamagnean Collection as a part of Danish cultural heritage. It took more than a quarter of a century before the books, reverently carried through Reykjavic by Danish sailors, finally came home.

Chief, Legal Standards UNESCO, has stated that it must be understood that the 1970 Convention did not emerge suddenly within the context of UNESCO. It was the end product of a long line of efforts to stop the pillaging of archaeological sites and the theft of cultural property of extreme importance.

[22] In 1988, of the market nations, Canada and the United States had passed legislation implementing the 1970 UNESCO Convention. As of May, 15 2005, 107 states had ratified UNESCO. See introduction to Parts II and III, this volume.

[23] See UNESCO's "No to Illicit Traffic in Cultural Property: Recent Examples of Successful Return of Cultural Property."

[24] The French have coined the term of "Elginisme." 2 Grand Larousse De La Langue Francaise, 1528 (1972) n.m. (du n. de Bruce conte d'Elgin (1766–1841), diplomate anglais, qui constetua par des moyens parfois douteux d'importantes collections d'objets d'art etrangers.)

[25] Some scholars distinguish between restitution based on violations of the prohibition of theft and pillage imposed by binding law and repatriation, which dates back to the nineteenth century when cultural heritage ended up outside its place of origin because of change of boundaries or loss by an ethnic group. See, for example, W. W. Kowalski Claims for Works of Art and their Legal Nature in Resolution of Cultural Property Disputes, Hague Peace Papers, 2004.

[26] See also Shyllon, F., in Part II, this book for a discussion on "The Nigerian and African Experience on Looting and Trafficking in Cultural Objects."

In accordance with a special law passed by the Danish parliament and confirmed by its Supreme Court 1 April 1971, the first manuscripts, the Codex Regius and the Book of Flatey arrived on 21 April 1971. A committee of Danish and Icelandic scholars was appointed to determine which manuscripts were to be included for return under the provisos of the laws, which Solomonically divided the treasures based on closest links to Iceland or Denmark, and in 1986, the manuscript collection was finally fully divided. The return of the manuscripts was fully completed in 1997. After the division of the Arnamagnæan Collection, around 1,400 manuscripts and fragments remain in Den Arnamgnæan Samling in Copenhagen. The two Arnamagnæan institutes worked with close cooperation under the guidance of a committee consisting of two representatives from each institution.[27]

Iceland's successful negotiations opened the door to former colonies worldwide to petition for redress against historical imbalances of power that permitted the removal of valuable goods. However, the unique and complex relationship between indigenous and Western cultures makes the status of claims for returns and repatriation difficult to assess. Obviously, there are cases of outright theft and looting, but other documented situations of trade, barter, or gift suggest that good title passed.

In November 2004, Italy decided to end a long-standing feud with Ethiopia by returning one of Ethiopia's most cherished relics, the Obelisk of Axum, taken by Italian troops for political reasons as a spoil of war in 1937.[28] Axum (a town 350 kilometers northeast of Gonder) was Ethiopia's oldest city, 1000 years B.C. the capital of the Queen of Sheba and later the capital of the Axumite Empire. More than that the Ethiopian Orthodox Church was founded there in the fourth century, thus Axum became the holiest city of the country. The stele dates back to the 4th centry and is 24 meters high. It is supposed to range among the most outstanding examples of African stonemason art of its time.

For the transport to Rome in 1937, the stele was cut into three parts and shipped from Asmara. Mussolini erected the stele in front of his Ministry of Africa which later became the United Nations Food and Agricultural Organization, close to the Circo Massimo. In 1947, Italy signed an agreement for its return to Ethiopia. But it took close to 60 years to return it, despite the Italian commitment to send it back to Ethiopia.

Mr. Massimo Baistrocchi, Chief of the Italian Foreign Ministry's Art Recovery Section, reports that the obelisk was dismantled by Italian experts in 2004 at a cost of € 6m($7.7m), but due to "technical difficulties" more than another year was necessary to transport to Axum the ornate 24-meter obelisk (the largest and heaviest object to ever be transported by air). First of all the 160-ton monument had to be broken into three pieces, then the Axum's airstrip had to be improved and upgraded, also with installation of a radar, to handle the Antonov-124 aircraft, one of only two airplanes in the world large enough to carry the stones, one stone at the time. (The obelisk could not be shipped because Asmara is now part of Eritrea.)

The monument is scheduled to be re-erected in September, 2005; but, some other difficulties are now emerging. Near the car park site where the Axum obelisk is to be reconstructed, archaeologists using imaging equipment have found a vast new complex of royal burial chambers, older than the obelisk itself.

The British Museum prides itself on "holding in trust for the nations of the world" one of the finest collections of art and antiquities. According to critics, however, the museum's role as a primary custodian of world heritage was attained at the expense of the people whose treasures were raided, with the result that museums in the country of origin are obliged to display photographs and replicas of the cultural objects. In the face of mounting pressure, the British Museum has begun seriously to consider Ethiopia's request for repatriation of tablets known as the Magdala Treasures, looted by Britain from Ethiopia in 1869. The ten wooden tablets are regarded by the Ethiopian Orthodox church as representing the original arc of the covenant which housed the Ten Commandments. Ethiopia has been lobbying for their return for more than 50 years. What is remarkable is that the tablets are locked in a basement room underneath the British Museum and are covered in purple velvet. No member is permitted to access the room because of the sacred nature of the tablets. As a sign of the seriousness with which the British Museum is taking the case for restitution, in 2004, Neil MacGregor, the director of the British Museum, visited Addis Ababa to hear arguments in favour of return.[29]

Separate and apart from the moral and legal issues involved in restitution or reparation claims, the return of sacred or ritual objects raises particular issues for cultural policy makers, in particular museum staff: What is the proper response to claims for return of ritual, ceremonial, or religious objects, which in many cases, if returned, may be exposed to the elements or, if protected, kept in sacred places, unavailable for public viewing, or may be destroyed or allowed to deteriorate in accordance with spiritual policy.[30] A spokesperson for

[27] Before the manuscripts were returned, they were restored, photographed, and stored on microfilm to ensure that good reproductions were still available in Denmark for research and study purposes.

[28] On May 17, 2005, Massimo Baistrocchi reported another return. A stolen Gold Mask of the King of Sican (Peru) was given back to Peru. It was recovered in an artist collection in Turin and the widow of the artists, who bought it in good faith more than 20 years ago, donated it to the Italian State. The mask was shown at an exhibition at the Quirinale Palace, Rome, at the request of Peru, President Ciampi returned the mask at the end of the exhibition. There was another ceremony in Lima in April 2005.

The British Library will give back to the Arhibishopry of Benevento an ancient Codex (Messale) stolen during the Second World War. The decision was taken by a specially constituted panel on restitution which recognized the claim and recommended its return. By law, the British Library cannot relinquish any of its treasures, specific legislation must be enacted by Parliament. Of course, this will take a long time, but the Manuscript will be sent back under a loan.

[29] See comment by McGregor, N. in "The Universal Museum," Part VIII of this volume, "Museums and Cultural Heritage."

[30] Issues dealing with the intangible aspects of the display and collection of objects in museum collections are discussed in Part VIII, "Museums

the British Museum indicated that it is considering a loan to the Ethiopian Orthodox Church in London, renewable every five years to "circumvent issues of title and setting a precedent for return, which has only happened over Nazi era items."[31] This solution, as opposed to their return to a church in Ethiopia, is being proposed in part because of fear as to their proper preservation and conservation. Several other items, including the Emperor Tewodros I's crown and an amulet removed from his body after the battle of Magdala have already been returned to Ethiopia. The British Library currently holds 350 manuscripts from Magdala, and other artefacts are held by Cambridge, Edinburgh, the Royal Collection, and private collections.

The development of fair and equitable means to resolve the difficult issues posed by these examples is a significant challenge for museums in the twenty-first century and the subject of much thoughtful and provocative discussion in Part VIII of this book.[32]

With the fall of the Berlin Wall and the opening of archives in Eastern Europe and Russia, the world became aware of the enormous quantities of art, manuscripts, and antiques looted during the Second World War.[33] Although national laws adopted after the war in Switzerland, Belgium, France, Germany, Greece, Italy, and the Netherlands in recognition of title difficulties caused by gaps in provenance created a presumption in favor of the original owners of property looted during this period in title disputes, most of these national laws have lapsed. Thus, many of the legal hurdles faced by the claimants in a number of high-profile cases in Europe and the United States involving artwork stolen during the Second World War are similar to those faced by source nations seeking to recover artefacts lost during the colonial period: adverse possession, laches, provenance,[34] statutes of limitation, and the bona fide purchaser defence. Several contributors discuss whether special rules of evidence and a change in the traditional burden of proof may be appropriate in the context of the resolution of disputes involving art and "cultural property."

Somewhat different but nevertheless related obstacles may arise when cultural heritage claims are made by indigenous groups within their country of origin. Ancient human remains of a man who hunted or journeyed through the Colombia Plateau at least 8,340 to 9,200 years ago, dubbed "the Kennewick man," were discovered at an Army Corps of Engineers work site on federal aboriginal land along the Columbia River near Kennewick, Washington, in the United States. Five Native American groups (hereafter, the "Tribal Claimants") demanded that the remains be turned over to them for immediate burial at a secret location "with as little publicity as possible," and "without further testing of any kind." The Tribal Claimants based their demand on the Native American Graves Protection and Repatriation Act[35] ("NAGPRA"), enacted in 1990.[36] Under NAGPRA, "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States. On 13 January 2000, the Department of the Interior announced its determination that the Kennewick remains are "Native American" as defined by NAGPRA. The decision was premised on only two facts: the age of the remains, and their discovery within the United States. The agency's opinion stated: "As defined in NAGPRA, 'Native American' refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and irrespective of whether some or all of these groups

and Cultural Heritage." See also Rosoff, Nancy B., "Integrating Nature Views in Museum Procedures: Hope and Practices of the National Museum of the American Indian." *Museum Anthropology* 22 (1998) 33–42.

[31] The Independent/The New Zealand Herald, 20 October 2004.

[32] See the discussion in part VIII, "Museums and Cultural Heritage" in particular, the statement of nineteen museum directors in "The Declaration on the Importance and Value of Universal Museums" and the comments thereon. See also the article by Lewis, G., "The Universal Museum: a Special Case?"

[33] For example, one million items – almost eighty percent of the Hungarian art treasures – were lost during the Second World War and its aftermath, either to Germany or the Soviet Union. See generally, Part I of this book "International Legal Tools and Viewpoints," and especially Carducci, G., "The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions, and EU Regulations"; Part III, "International Movement of Art and Cultural Property: Perspectives of the Market Nations," Hoffman, B., "International Art Transactions and the Resolution of Art and Cultural Property Disputes: The United States Perspective," Parkhouse, A., "The Illicit Trade in Cultural Objects: Recent Developments in the United Kingdom," and Raue, P., "Summum ius suma iniura – Stolen Jewish Cultural Assets Under Legal Examination."

[34] The words "provenance" and "provenience" are often used interchangeably but in the context of museum and archeological studies, they have different meanings. "Provenance" in both the art world and the museum world refers to the "history of ownership." Provenience refers to the geographical or geological origin or source of an artifact.

[35] 25 U.S.C. §3001 *et seq.*

[36] Although some consider claims for repatriation under NAGPRA as issues of sovereignty; others view repatriation as cultural property rights or human rights legislation, in particular based on spiritual and religious beliefs. When NAGPRA was passed, nearly 200,000 Native American remains were held in museums in the United States. Many Native Americans believe that reburial of disinterred remains is essential for the spirit of the deceased to return to rest. A controversial subject that surfaced repeatedly throughout the enactment of NAGPRA was the issue of what disposition should be required for prehistoric remains that have no discernable affiliation with any present-day Native American tribe or organization. Native American groups argued that these remains should be made available to them for reburial. Anthropologists believed they should be retained as valuable resources for scientific studies. Congress delegated the task of resolving the issue through rulemaking to the Interior Department. See Robert W. Lennon (22 Harv. Evntl. L. Rev. 369, 1998). NAGPRA requires *inter alia* federal agencies and museums that receive federal funds to inventory and, if requested, to repatriate Native American cultural items to lineal descendants or culturally affiliated Native American tribes and Native Hawaiian organizations. Cultural items under NAGPRA include human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. "Cultural objects" on federal land become the property of the tribe with the closest affiliation. Although human remains and funereal objects must be returned as right, the material is more nuanced regarding material of less cultural sensitivity. For an excellent discussion of NAGPRA, see Isaac Moriwake, "Critical Excavations: Law, Narrative and the Debate on Native American and Hawaiian Cultural Property Reparation," 20 Hawaii L. Rev. 261 (1998).

were or were not culturally affiliated or biologically related to present-day Indian tribes."

In response to arguments that scientific study could provide new information about the early history of people in the Americas, the Confederated Tribes of the Umatilla asserted, "We already know our history. It is passed on to us through our elders and through our religious practices. From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do."

Dr. Robson Bonnischen and other noted scientists challenged Secretary of the Interior Bruce Babbitt's interpretations of "Native American" and "cultural affiliation" and claimed further that the use of oral history to determine cultural affiliation violated the Establishment Clause of the First Amendment of the United States Constitution.[37]

Ultimately, after eight years of litigation, the Ninth Circuit Court of Appeals agreed with the scientists.[38] In the final outcome, the court set aside the decision awarding the remains to the Tribal Claimants, enjoined transfer of the remains to the tribes, and required archaeologists be allowed to study the remains. With respect to NAGPRA, the court said,

> "The term 'Native American' requires, at a minimum, a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States . . . The evidence in the record would not support a finding that Kennewick Man is related to any particular identifiable group or culture, and the group or culture to which he belonged may have died out thousands of years ago. . . . Congress did not create a presumption that items of a particular age are 'Native American . . . ' No cognizable link exists between Kennewick Man and Modern Columbia Plateau Indians."

The court concluded that no reasonable person could conclude by a preponderance of the evidence on this record that Kennewick Man is "Native American" under NAGPRA. The court also rejected evidence of oral tradition in this case as just "not specific enough or reliable enough or relevant enough to show a significant relationship." As the district court observed, 8,340 to 9,200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.[39]

In response to the Court's interpretation of NAGPRA as requiring that tribes must show a direct relationship to these human remains before they claim authority over them, Rob Roy Smith, attorney for the tribes, stated "that's the exact opposite of what Congress wanted. It places on the tribes the burden to prove the remains are Native American."[40]

The *Bonnischen* case presents the reader with themes discussed by several of this book's contributors relevant to the understanding and development of responsible and coherent cultural heritage policies. First, the world view of Native Americans and other indigenous peoples differs significantly from that of western industrialized societies. Second, how do we determine that an object is a "cultural object," and should "cultural affiliation" trump a more scientific definition of inheritance? Or, to put it in other terms, is the proper inquiry not whether commercial or scientific interests should be permitted to outweigh cultural property claims of indigenous peoples, but by what criteria and by whom is the decision made.[41] Once "Kennewick Man" was determined to be "ordinary bones," without tribal affiliation, scientists were at liberty to conduct their examination.[42]

Related to the determination of property rights in cultural objects is the issue of the type of evidence relevant to the proof of such claims. Similar to the case of source nation and World

[37] *Bonnischen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002) aff'd and remanded 367 F.3d 864 (9th Cir. 2004).

[38] *Id.* 367 F 3d864 (9th Cir. 2004).

[39] Although Dr. Bonnischen died on December 25, 2004 at the age of 64 on vacation in Oregon, the case is far from over. The Court has identified the issues remaining in the case as follows: (1) the Court must determine the scope of permissible studies of the remains under the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§470aa to 470mm. NAGPRA is Native American Law. ARPA deals with the rights of scientists to study archaeological resources on federal and Native American lands. (2) The Court must consider the appropriate remedy, if any, concerning the Court's finding that the Army Corp of Engineers violated the National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§470 to 470w-6, by reburying the discovery site, and (3) whether the Tribes have a continuing legal interest in both these matters so as to permit their status as Interveners. Colorado Republican Sen. Ben Nighthorse Campbell is attempting to broaden NAGPRA so that any ancient skeletons can be claimed by modern Native American Tribes.

[40] In fact, many scholars and lawyers believed NAGPRA had effectively created a presumption in favor of tribal possession of cultural patrimony. Although there is no case specifically on point, NAGPRA appears to circumvent state statutes of limitation by recognizing traditional Native American concepts of strict inalienability and providing a federal cause of action for collective claimants. Presumably also the equitable defenses of adverse possession and laches do not apply.

[41] Some commentators assert that NAGPRA allows Native communities to "define themselves and their lifeways, including their own legal system's definition of what is a sacred object, what is cultural patrimony, what property may be transferred by individuals, and what property can be alienated", Strickland, R., "Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony, *Ariz. St. L. J.* 24 (1992), 175, 180. For a more skeptical view, see Raines, J. C. B., "One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis," 17 *Am. Indian L. Rev.* (1992), 639, 658–63 (arguing that NAGPRA's value standards invite courts to rule against, as well as for, the interests of Native groups).

[42] See also Singer, G., "Unfolding Intangible Cultural Property Rights in Tangible Collections: Developing Standards of Stewardship" and other chapters in Part VIII, "Museums and Cultural Heritage." See also Isaac Moriwake, note 34, *supra*, discussing a dispute between two Hawaiian groups ("uttui malama"), and the City of Providence, Museum of Natural History, for the repatriation under NAGPRA of various culturally important items to their community of origin. The museum argues that the ki'i la'au is a utilitarian or decorative object and fails to meet the NAGPRA definition of cultural property. Even if NAGPRA applies, they argue that Hawaiian law and custom at the time of transfer did not render the object inalienable *per se*. In February 1998, after two years of litigation, under orders from the Rhode Island federal judge to mediate, the parties arrived at a settlement. In principle, the parties agreed to the repatriation of the ki'i la'au to the Hawaiians. The Hawaiian groups agreed to make a donation to the Museum to fund an exhibit in the Museum's Pacific Collection, where more than forty other Hawaiian objects remain. The Hawaiians and the City of Providence agreed to each select three representatives to sit on a six-member joint committee overseeing the proposed exhibit. In a provision deemed absolutely critical by the Hawaiian representatives, the agreement states that the Hawaiians are in no way, shape, or form purchasing the ki'i la'au from the City.

War II claimants, indigenous peoples have faced evidentiary burdens because of the passage of time in establishing title and provenance. In contrast to the rigid rules of ownership and proof under the common law, the repatriation criteria in NAGPRA arguably work in favor of the interests of the original owners. Although the court in *Bonnischen* rejected evidence of oral tradition as unreliable, NAGPRA declares that cultural affiliation may be substantiated by a preponderance of the evidence based upon "geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral, historical, or other relevant information or expert opinions." By considering "oral history" as potentially of equal weight to scientific history, NAGPRA opens the restitution process to radically different ways of understanding culture, history, and ownership.[43]

Finally, NAGPRA and *Bonnischen* introduce us to issues surrounding communal ownership rights.[44] Indigenous groups worldwide have had difficulty in asserting property claims because national legislation and the courts did not recognize collective rights in cultural property.[45]

This tension between private rights of ownership created by western intellectual property systems such as copyright and communal ownership held by artists and their communities is an issue that has received attention by various scholars, policy makers, and courts. Recognizing a link between the spiritual and the material causes us to focus on the relationship between an individual artist/author as a possessor of intellectual property rights and collective ownership rights. Different conceptions of "ownership" within copyright law, on the one hand, and customary laws and protocols, on the other, may intersect, particularly in those cases in which an indigenous artist is entitled to assert copyright to prevent infringement of his creation and is simultaneously subject to parallel customary rules and regulations. Although intellectual property rights confer private rights of ownership, in customary discourse, to "own" does not necessarily or only mean 'ownership' in the Western nonindigenous sense. It can convey a sense of stewardship or responsibility for the traditional culture, rather than the right to exclude others from certain uses of expressions of the traditional culture, which is more akin to the nature of many intellectual property rights systems.

The issue was directly addressed in the Australian case of *John Bulun Bulun v R and T Textiles*.[46] Mr. Bulun Bulun is a well-known artist from Arnhemland, Gonalbingu, and his work *Magpie Geese and Water lilies at the Waterhole* was altered and copied by a textile company. In 1996, Mr. Bulun Bulun commenced action against the textile company for copyright infringement.

The Ganalbingu people are the traditional indigenous owners of Ganalbingu country. They have the right to permit and control the production and reproduction of the artistic work under the law and custom of the Ganalbingu people. The art work *Magpie Geese and Water lilies at the Waterhole* depicts knowledge concerning Djulibinyamurr. Djulibinyamurr, along with another waterhole site, Ngalyindi, are the two most important cultural sites in Ganalbingu country for the Ganalbingu people. Mr. Bulun Bulun noted that, under Ganalbingu law, ownership of land has corresponding obligation to create artworks, designs, songs, and other aspects of ritual and ceremony that go with the land.

The pertinent aspect of the case related to a claim by the clan group to which Mr. Bulun Bulun belonged that it, in effect, controlled the copyright in the artwork, and that the clan members were the beneficiaries of the creation of the artwork by the artist acting on their behalf. Accordingly, they claimed to be entitled to assert a collective right with respect to the copyright in the work, over and above any issue as to authorship.

Justice Von Doussa said, "Whilst it is superficially attractive to postulate that the common law should recognize communal title, it would be contrary to established legal principle for the common law to do so." The court looked at the relevance of customary law and decided that evidence of customary

[43] See Robert H. McLauglin, "The American Archaeological Record: Authority to Dig, Power to Interpret." *International Journal of Cultural Property* 7, 2 (1998), 359.

[44] NAGPRA supports claims made by lineal descendents, federally recognized Indian tribes, and Native Hawaiian organizations. If a lineal descendant cannot be identified, federally recognized Indian tribes and Native Hawaiian organizations may claim the objects. Only Indian tribes and Native Hawaiian organizations can claim communally owned objects of cultural patrimony. In this way, the law recognizes not only the property rights of individuals for all but communally owned property, but also the unique government-to-government relationship that exists between the U.S. government and the various Indian tribes.

[45] *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 79 Inter-Am. Ct. H.R. (ser. C) (August 31, 2001), available at <http://www.corteidh.or.cr./seriecing/serie_c_79_ing.doc> revolved around efforts by the Awas Tingni and other indigenous communities of Nicaragua's Atlantic Coast to demarcate their traditional lands and to prevent logging in their territories by a Korean company under a government-granted concession. The Awas Tingni filed a petition with the Inter-American Commission on Human Rights (Commission), charging Nicaragua with failure to take steps necessary to secure the land rights of the Mayagna (Sumo) indigenous community of Awas Tingni and of other Mayagna and Miskito indigenous communities in Nicaragua's Atlantic Coast region. Evidence presented before the court included the oral testimony of members of the Awas Tingni community. Jaime Castillo Felipe, member of the Mayagna ethnic group, and lifetime resident of Awas Tingni, testified regarding the Tribe's ownership of the disputed territories. In explaining why he believed that the Tribe owned the land, he stated that they "have lived in the territory for over 300 years and this can be proven because they have historical places and because their work takes place in that territory." Other tribal members testified similarly regarding the significance of the land to the religion and cultural survival of the Awas Tingni people and their conceptions of collective ownership of the land and all the resources it encompasses. The Court ruled that the State violated, among others, the right to property as contained in Article 21 of the American Convention on Human Rights to the detriment of the members of the Mayagna (Sumo) community of Awas Tingni, and required the State to adopt measures to create an effective mechanism for official recognition, demarcation and titling of the indigenous community's properties. In particular, the Court acknowledged the Awas Tingni's communal form of property in the land and recognized the importance of the protection of this right to ensure the Community's cultural survival.

[46] 41 IPR 513. (1998) This case is one of the cases studied by Ms. Terri Janke in her study "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions," commissioned by WIPO, and available at <http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>.

law may be used as a basis for the foundation of rights recognized within the Australian legal system. After finding that Mr. Bulun Bulun's customary law obligations gave rise to a fiduciary relationship between himself and the Ganalbingu people, Justice Von Doussa stated:

> The conclusion does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations that arise out of it.

If *Bulun* raises the issue of whether and to what extent customary law may define property rights and whether traditional intellectual property law can accommodate very different notions of ownership, so as to protect traditional knowledge and designs, a final example looks at genetic resources and the traditional knowledge debate.[47]

There are increasing legal challenges to the patenting of traditional knowledge (TK) and its products such as grains, species, and traditional medicines. Two conflicting forces at the heart of this have been the attempts of nonindigenous individuals and organizations to claim ownership of indigenous knowledge for commercial gain; the other for indigenous peoples to seek means to protect their traditional knowledge or develop it in partnership with others.[48] The Neem tree, dubbed as the "corner drug store of rural India," is an integral part of India's cultural heritage. Known in Sanskrit as *Sarva Roga Nivarini*, "the curer of all ailments," Neem has been used in India for the past 2,000 years as an insecticide, fungicide, contraceptive, and antibacterial agent. Its twigs have been used as a tooth brush for time immemorial. An Indian cannot take a patent out on the Neem in India because Indian patent law restricts patentability to only process patents and not product patents. W. R. Grace obtained a U.S. patent on a pesticide derived from the seeds of the "Neem" tree in 1991. The patent was granted for an extraction process that produces a stable form of pesticide that could be stored and marketed globally. The patent was challenged on the grounds of "prior art" and "obviousness."[49] The U.S. patent office, however, denied the challenge; the European Patent office revoked the patent in November 2000.[50] South Asians claim that patents on the Neem tree involve "biopiracy."[51] A South Asian wrote that "an apt comparison to Americans patenting the Neem tree in the United States would be South Asians patenting the apple pie in South Asia."[52]

We have provided these examples as an introduction to the topics and themes discussed in *Art and Cultural Heritage: Law, Policy, and Practice*. A preliminary and fundamental question guiding the enterprise is to what extent traditional notions of property can provide an adequate framework to resolve the conflicts and contradictions presented by these examples.

Nonlawyers are accustomed to speak of the thing, the object itself, as "property." Although the term "property" is one that is often abused and seldom defined or subject to careful analysis, it is generally used to denote subject matter of a physical nature – a house, a car, or a cow.

As lawyers, however, we learn in the first year of law school, at least in the United States, that property is a concept, separate and apart from the thing. Property consists, in fact, of the legal relations among people in regard to a thing.[53] It is in this context that we may ask, using a traditional Western property analysis, whether the Ganalbingu people have a right to sue to protect their intangible property rights and if so, what is the scope of these rights.

In a complex society, individuals and the relations between groups of individuals are complicated. It follows that property

[47] These issues are discussed in Part VII, "Who Owns Traditional Knowledge?" Maui Solomon in "Protecting Moriori/Maori Heritage in New Zealand" questions whether the intellectual property system based on private property rights is adequate to protect traditional knowledge in the public domain.

[48] Whereas the international focus has been on the patenting of traditional knowledge, that topic seems today less important than the new thrust for claiming such knowledge from the herbal sector, which is experiencing a global boom. See Pickup, Z. and Hodges, C., "Recent Developments in the Regulation of Traditional Herbal Medicines" in Part VII, "Who Owns Traditional Knowledge?"

[49] The Indian government has created a Traditional Knowledge Digital Library (TKDL) to record systematically, in digital form, knowledge of Ayurveda, a traditional Indian system of medicine. The TKDL is perhaps the most self-conscious of the efforts to make traditional knowledge inalienable from the public domain, seeking explicitly to build the bridge between the knowledge contained in an old Sanskrit Shloka and the computer screen of a patent examiner in Washington, DC.

[50] The bioprospecting and patenting of Neem tree has parallels in Australia, as illustrated by the commercial exploitation of smokebush (*Conospernum*), an Australian plant commonly found in Western Australia. Smokebush has been used traditionally by Aboriginal peoples for a variety of therapeutic purposes. After initial unsuccessful tests by the U.S. National Cancer Institute in the 1960s, it was found in late 1980s that a substance called *Conocurvone*, that was isolated from smokebush, could be useful for destroying the human immunodeficiency virus in low concentrations. To develop this substance, in the early 1990s, the Western Australia goverment granted a license to Amrad Pty Ltd, a multinational pharmaceutical company. It has been suggested that Amrad has provided $1.5 m to gain access rights to smokebush. Further, the government of Western Australia would receive royalties exceeding $100 million by 2002 if *Conocurvone* is successfully commercialized. Aborigines, who have traditionally used the smokebush for its therapeutic and healing properties, would receive nothing from the commercial exploitation of the plant. See Professor Kamal Puri, Law School of University of Queensland, Australia, author's file.

[51] It should be noted that United States patent law, unlike many patent systems, does not utilize an "absolute novelty" rule for obtaining a patent, see *35 U.S.C. 102(a)*, but specifically permits the patenting of inventions known or used in foreign countries, so long as the invention is not patented or disclosed in a printed publication in the United States or a foreign country, the aim being to encourage importation of technology into the United States Claims of "biopiracy" are sometimes based on a misunderstanding of this facet of U.S. patent law.

[52] <http://www.thimmakka.org>. The Indian government was more successful. In a celebrated case, the Centre for Scientific and Industrial Research filed a reexamination in seeking revocation of a 1994 patent issued to the University of Mississippi (Patent 5,401,504), which claimed the use of turmeric for promoting wound healing. The Indian government argued that turmeric is a well-known traditional medicine used in India, and written about by Indian researchers as early as the 1950s.

[53] Some lawyers tend to forget that property represents this complex group of jural relations between the owner of the physical subject and other individuals. The result is a commodification of concept of the thing to the exclusion of a consideration of the relationship the object may have to others.

law as the product of society designed to maintain control over the use, allocation, and transmission of resources will be, too. The Anglo-Saxon notion of property can be best expressed as follows: "To the world: keep off unless you have my permission, which I may grant or withhold."[54] In the western world, property means private property. In the common law sense, "ownership" of ordinary physical things is often perceived of as private and unqualified. When you own something, it means you have title, benefit, exclusive use, and control. As Joseph Sax has opined, that concept enables owners to exercise unbridled power over owned objects, whatever the loss to science, scholarship, or art.[55]

For example, the reader may recall the story of Sue, "Tyrannosaurus rex," the best articulated fossil skeleton ever found – the "Mona Lisa" of dinosaurs. Sue was found in South Dakota, United States, by Peter Larson of the Black Hills Institute of Geological Research on federal land. Larson had paid Maurice Williams $5,000 to excavate the fossil. Williams, a Native American, had put his land in trust with the federal government under the Indian Reorganization Act of 1934. In 1992, a federal court had to decide who owned "Sue." That determination hinged on whether "Sue" was personal property, like a cow or tractor, or whether it was embedded in the land and thus the property of the United States government as trustee for Williams.[56] Three years and several court cases later, the courts ultimately found that "Sue" was part of the land and could be sold – that the fossil was once a dinosaur that walked the surface of the earth was irrelevant. Native Americans, as any other private landowner, were free to benefit by a sale to the highest bidder. Fortunately, in this case, it was the Field Museum of Natural History in Chicago for $8.36 million.

Contrast this with China's approach to fossils. In light of the large number of fossils discovered recently in China, and probably the loss of a great many of them to the growing international commercial fossil market, China amended its Cultural Relics Protection Law in 2002 ("CRPL") to provide more specific protection for paleontological fossils by defining them as "cultural relics." Like the French,[57] the Chinese government has a long-standing practice of grading "cultural property," and fossils fall within the category of objects of limited circulation.[58]

Intellectual property may be thought of as the use or value of an idea such as inventions, designs, literary and artistic works, and symbols, names, images, and performances. Most forms of intellectual property protection such as copyright, trademark, and patent law, grant exclusive proprietary rights to authors and artists in their creations. In the classic schema of intellectual property, the granting of private rights provides incentive for creation and invention and thus promotes knowledge and culture.[59] Intellectual property – like all property – remains an amorphous bundle of rights.[60] However, there are acknowledged limits to the bundle of

[54] Under the common law, property ownership begins with "first possession" and continues through subsequent owners in a "chain of title." In the case of "lost" or "mislaid" personal property or "chattel," either the finder or the owner of the premises gains the "right to possession" against all but the "true owner." The finder or landowner gains full title, however, to property classified as "abandoned." See Part VI, "Who Owns the Titanic's Treasures? Protection of the Underwater Archeological/Cultural Heritage," for a discussion of this concept as applied to the underwater cultural heritage.

[55] Sax, J. L., *Playing Darts with a Rembrandt*, p. 181, University of Michigan Press, 2002. Dr. Guido Carducci discusses Professor Sax's theory in "The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions, and EU Regulations" in Part I.

[56] Most Indian lands are held in trust by the United States for tribes or individual Indians. The United States holds "naked legal title" and the Indian landowners hold beneficial title. Indians have compensable property rights to mineral and timber resources on their trust lands, absent contrary indications in statute or treaty. In the same manner, historic properties, particularly archaeological resources, are attached to the land and belong to the landowner. As a result, Indian landowners hold beneficial title to, and "own," archeological resources on their lands. Paleontological resources, however, are not considered archaeological resources. In fact, fossils stand in a significantly different position to archaeological objects. Fossils are not human remains. Second, *in situ* preservation does not have the same importance to a paleontologist. Study of the fossils and knowledge of their location are important, but not necessarily their preservation *in situ*.

[57] See Gourdon, P., "Excerpts from the Memoire '*Le Regime Juridique et Fiscal Francais des Importations et Exportations d'Oeuvres d'Art*'" in Part III, "International Movement of Art and Cultural Property: Perspectives of the 'Market Nations'."

[58] Basic Principles of Civil Law 90 (William C. Jones, ed., 1989). According to the Civil Law, this property is not freely traded: it cannot be exported privately, it cannot be sold privately to foreigners, and it cannot be sold at a profit; therefore, it does not have the same characteristics generally attributed to the English term "property," quoted in Ann Carlisle Schmidt, "The Confuciusornis Sanctus: An Examination of Chinese Cultura," Property Law and Policy 23 B.C. Int'l Comp L. Rev 185 (2000). See also Michael Dutia, "How Much is the Ming Vase in the Window," 5 *Asian-Pacific L. & Poly'y J.* 62 (2004) for a detailed discussion of the 2002 CRPL.

[59] Modern copyright law derives its most fundamental principles from the Romantic conception of the author, a construct that emerged in the mid-eighteenth century and became the cornerstone for Western copyright law, establishing its structure and defining the parameters of the entitlements it extends to copyrightable works. Professor Jane Ginsburg of Columbia has asked, "Who is an author in copyright law?" Few judicial, decisions address what authorship means, or who is an author. Fewer laws define authorship. After studying legislative, judicial, and secondary authorities in the United States, the United Kingdom, Canada, and Australia, as well as in the civil law countries of France, Belgium, and the Netherlands, Professor Ginsberg's inquiry reveals considerable variation, not only in the comparison of common law and civil law systems, but within each legal regime. It is easier to assert that authors are the initial beneficiaries of copyright/droit d'auteur than to determine what makes someone an author. Jance C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law." 52 *DePaul L. Rev.* (2003), 1063.

[60] In the United States, §17U.S.C. 106 grants to authors six exclusive rights, including the exclusive rights (i) to reproduce the work, (ii) to prepare derivative works, (iii) to perform the work publicly, and (iv) to display and (v) distribute the work. Sec. 106A provides limited moral rights protection. The source of the U.S. Congress' power to enact copyright laws is article I, clause 8, of the Constitution. According to this provision, "Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." For "Progress in Science and useful Arts" to occur, the courts have stated that others must be permitted to build upon and refer to the creations of prior thinkers. The copyright law, thus, strives to balance the intellectual property rights of authors, publishers, and copyright owners with society's need for the free exchange of ideas. Accordingly, in addition to statutory exceptions, three judicially created doctrines have been fashioned to limit the copyright monopoly and promote its purpose. First, copyright law does not protect ideas but only their creative expression; second, facts are not protected, regardless