

EXISTING LAW

Introduction

The tradition of the spoils going to the conqueror has had a very long history. Egyptian murals and Roman pillars record the despoliation of defeated peoples and this tradition has carried on during the last 2,000 years.

Mosques were turned into churches (Cordova) and churches into mosques (St Sophia, Istanbul), but during the last 500 years, it has attained even greater dimensions as European nations developed technology that allowed them to develop worldwide empires.

Most empires are structured like the spokes of a wheel. With the imperial capital at the centre and the countries conquered or assimilated on the rim. This pattern is not only one of trade but also of the migration of objects of cultural value towards the imperial centre.

Initially, this was just opportunistic and random, but increasingly in the 18th and 19th Centuries, it was a matter of deliberate policy, especially after the establishment of great museums and art galleries in London, Paris, Berlin and St Petersburg.

In the 19th Century and in the 20th Century, the desire to obtain objects that would be of scientific culture or artistic value reached its peak with:

- (a) The rapacious spread of imperialism by European countries and the westwards spread of the U.S.A. across the North American Continent.
- (b) The establishment of the great museums and art galleries in the USA as the financial wealth of that country expanded in the late 19th Century and the 20th Century.
- (c) The technological improvements in weaponry which placed non-European countries, and especially indigenous people, at a severe disadvantage.
- (d) The patterns of trade, with the European product being particularly technologically-advanced and attractive, and therefore receiving a highly valuable consideration.
- (e) The application of "Darwinian" concepts in justification.
- (f) The increasing amount, depth and variety of scientific study.
- (g) The belief that museums were storehouses of knowledge for the future.

Today, the legacy is not only loss of land and cultural heritage, but indigenous people often occupy social and economic positions at the margins in the non-indigenous societies they host.¹

Definitions

I take 'Indigenous Peoples' as meaning 'First Peoples'. The Draft Declaration of the Rights of Indigenous Peoples does not contain a definition of indigenous peoples, but it does provide in Article 32 the way in which such peoples define themselves. In many instances, who the indigenous people are is clear in practical terms, such as the Maori people of the main islands of

New Zealand. In other countries, it is much harder to work out. The population concerned is significant, in 1990 more than 300 million people were identifiable as Indigenous Peoples.²

Although I use 'return' in the title of this paper, it is a neutral word. Maori talk about 'repatriation of *taonga*' (treasures) and this gives the emotional and spiritual context which is so important.

Indigenous treasures include not only buildings, structures, sculptures, carvings, weapons, clothing and jewellery, but also human remains, (i.e; whole bodies, collections of bones, preserved tattooed heads). Some of these items were obtained for scientific study and some for curiosity value.

Genetic inheritance is seen as a cultural heritage treasure within the Maori world view because the *whakapapa* (genealogy) is handed down from one generation to the next. This is seen as a defining feature of Maori and other indigenous cultures.³ Intellectual property rights are also seen as cultural heritage treasures.

Finally, it is important to recognise that cultural heritage is also applied to land forms, especially mountains and rivers, by many indigenous peoples and some of the best examples of lateral solutions have arisen in relation to land forms, (for example; the proposed return of a mountain by the New Zealand Government to Ngai Tahu, an indigenous tribe, which will then gift it to all the peoples of New Zealand).⁴

Internal Returns

Although this paper primarily deals with the issues of repatriation/external returns, there is also the issue of internal returns. The treasures of indigenous people were often accumulated by national and local museums and private collectors. Sometimes the indigenous people will accept that holding by a museum is appropriate, subject to conditions, sometimes they will want the treasure to be returned. So many of the same issues, problems and potential solutions, will apply. Often internal returns can provide good examples of successful resolutions, (for example; the Canadian Museum of Civilization's return to the Kwakiutl people; or the settlement between the New Zealand Government, Otago Museum and the Ngati Awa).⁵

Legal and Practical Problems

These cultural heritage treasures were obtained by a wide range of methods: by gift, genuine trade, deception, theft, conquest and misunderstandings as to the nature of what was happening.

For instance; treasures were sometimes lent to visiting important personages with the intention that they would be returned at a later date. Often the visiting personage did not understand or forgot the subtleties involved and their descendants now hold a tribal treasure as a freehold object, rather than something that had been lent. Numerous examples of this relate to Maori *taonga*, a mere (club) or greenstone *tiki* ornament could be given or lent and the manner in which it was (literally) handed over will be the deciding factor as to whether it was a gift or a loan.

There can be real issues over the provenance of these treasures. Some are in the hands of Government authorities, some with descendants of the original holders and some in the possession of collectors and museums.

Preserved tattooed heads are a good example of how a trade in human remains could develop in the late 18th and early 19th Centuries and cause ongoing anguish to the descendants. Not all human remains were the result of trade, some were removed by stealth and without permission from burial sites and sent to Europe.

However it was commonplace in the 19th century for the bones of indigenous people to be collected for scientific study. The process was often completely open. For instance in 1887 the Australian Museum issued instructions to scientists on the best way to get Aboriginal skeletons.⁶

The case of *Attorney-General of New Zealand v. Ortiz*⁷ of New Zealand provides a good illustration of the difficulties. There, a masterpiece of Maori carving was recovered from a swamp in New Zealand and reappeared some years later in the United Kingdom. It had been removed illegally from New Zealand and the Government of New Zealand tried to recover it. The case went to the House of Lords in England and the New Zealand Government was unsuccessful. The resulting inter-Governmental protests and discussions have led to the Commonwealth Scheme for the Protection of Material Cultural Heritage.⁸

It must be remembered that in this area of the law, the question of return of treasures to indigenous peoples cannot be kept separate from the whole issue of treasures that have been taken from a country, which now wishes to reclaim them. It is, therefore, part of a series of highly-contentious issues between countries, (for example; the Elgin marbles issue between Greece and the United Kingdom).

The case, *City of Gotha v Sothebys*,⁹ outlines similar complications arising from a painting allegedly unlawfully taken from Germany at the end of the Second World War.

It also links in with the claims for the return of cultural property seized during the Holocaust.

Not only can litigation be unsuccessful, but appeals to moral feelings can also be problematic, especially if linked with publicity. Sometimes this only results in an increase in the sale price of the treasure at auction. Governmental involvement can be useful in applying pressure if used in the right circumstances.

A Central Issue

A very critical central issue is the clash between those who seek the return of cultural heritage treasures to the original indigenous owners and the current holders of those treasures, whether they be museums, art galleries or private collectors.

The epicentre of the debate tends to involve the museums and art galleries because they have a public role and their holdings are more easily researched and accessed.

In response to the claims of indigenous peoples for the return of cultural treasures, the museums and art galleries put forward a number of arguments including:

- (a) they are storehouses of knowledge and information relating to civilization,¹⁰
- (b) they are able to preserve the cultural treasures concerned in the optimum conditions so far as security and temperature control,
- (c) in many instances the provenance of the items concerned means that they are an innocent third party in the arrangements which caused the cultural treasure to leave the indigenous people.

- (d) that being in a museum reduces the prospect of cultural treasures being destroyed either by war, neglect or iconoclasm. The most recent examples of iconoclasm being the Taliban government destruction of the Bamiyan Buddhas and more than 2000 sculptures, carvings and pottery in the National Museum of Afghanistan.

It is also true that indigenous people have added to their store of traditional knowledge where there has been a willing and constructive partnership between the archaeologists and tribal elders.

However strong the theoretical case that can be made for the return of cultural heritage treasures to the original indigenous owners, the practicalities are that many museums are reluctant to part with even part of their collections, let alone most. Therefore the possibility that the great museums of Europe and U.S.A. will be emptied is a unlikely one.

Can A Distinction Be Made Between Human Remains and Other Issues of Indigenous Returns?

As Justice Greig said *In the Estate of Tupuna Maori*¹¹, “there can be little, if any, dissent from the proposition that the sale and purchase of human remains for gain and for the purposes of curiosity is abhorrent to New Zealanders and, I hope, to any civilized person”.

There is likely to be more publicity and moral pressure in relation to the return of human remains than other treasures. Especially in relation to museums.

Two recent articles in this journal have dealt with the arguments involved in considerable depth. Charlotte C. Woodhead in her article comes to the conclusion “human remains can and should be treated separately from other more general debates on repatriation”.¹² Tristan R. Shek’s article ends by quoting the title of an article written by Bernard Levin: “If these bones lie at peace, civilisation can surely rest.”¹³

Charlotte C. Woodhead’s article quotes extensively the arguments of those who hold the view that the repatriation of human remains should be resisted. Some archaeologists have even drawn analogies between the reburial of human remains and “book burning”.¹⁴ The American Committee of Preservation of Archaeological Collections (ACPAC) has even stated “Anyone who takes these claims seriously has a level of credibility that makes them an ideal prospective purchaser of the Brooklyn Bridge [...]”.¹⁵

Comments like that are unlikely to be made by those who have been directly exposed to the genuine grief and suffering expressed by many Australian Aboriginals and Maori.

In relation to Maori claims for the return of tattooed heads, most of the heads are likely to have belonged to ancestors who died between 1760 and 1840, a very recent period in genealogical terms.

Who are the ancestors?

It is important to remember that not only human remains are looked upon as ancestors by indigenous peoples, for example; the *wharehau Mataatua* (meeting house) for the Ngati Awa. Some artefacts, like the carvings of ancestors, will carry great *tapu* (sacredness) for Maori because of the physical depiction they carry of the dead ancestors.

Time Limitation

Should there be a time limitation on claims for recovery by indigenous peoples? Some indigenous people, (for example; Maori), would **not** accept a time limitation but see the claim to recovery extending back indefinitely, especially in relation to human remains.

This issue becomes increasingly complicated the further back the cultural treasure or human remains are dated. The Kennewick Man debate and litigation is a prime example. There the issue relates to whether anthropologists should have the right to examine the skeletal remains or the Nez Perce tribal committee, within whose territory the remains were found, should have the right to determine what happens. This is a good example of the challenge between those who are searching after scientific information and the tribal committee which sees it as being “about basic decency and respect for human remains.”¹⁶

Identification of Claimants

There can be difficult questions of establishing which tribe or sub-tribe is entitled to the cultural treasure. For example; treasures are often hidden during an invasion, or civil war, or time of anarchy, for example; the carving in *A.G. v. Ortiz* was buried in a swamp and Roman coin treasure troves found in England.

Museums or private collectors can be confronted by rival indigenous claimants.

Sacred treasures returned to the wrong claimants will cause continuing ill-feeling and distress. Some sacred treasures can be dangerous in the wrong hands, anecdotal evidence of this is well-known in Australia and New Zealand. This is a really major issue that must be recognised.

There will be extra complications where the boundaries of countries have been changed over the centuries, or where an indigenous people overlaps state boundaries.

What Cultural Heritage Treasures Are Actually Held

The number of cultural heritage items involved is enormous, as The Native American Graves Protection and Repatriation Act 1990 (USA) is revealing.¹⁷

In most other countries, this identification exercise is not a statutory requirement and yet it is essential if real progress is to be made in resolving the outstanding issues.

CURRENT INTERNATIONAL SITUATION

The existing Conventions include:

- (a) The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970):
This Convention is of value as a preventative of further despoliation. Its definition of ‘Cultural Property’ is very wide, (Article 1). It encourages the States Parties to draft laws and regulations to protect cultural heritage and prevent illicit import, export and transfer of ownership of important cultural property, (Article 5(a)). It also encourages States Parties to establish and maintain a national inventory of protected property, (Article 5(b)), and organise the supervision of archaeological excavations, (Article 5(c)).

There is a provision relating to returns of cultural property imported after the entry into force of this convention in the particular States concerned, (Article 7(b)(ii)), but this provision has obvious restrictions, as it is not retrospective.

This convention has been widely accepted. Ninety-seven States were parties as at 9th December 2002. There are some major exceptions - Germany, Belgium, and The Netherlands, but it is significant that major States, like Japan and the United Kingdom, joined in 2002.

- (b) UNIDROIT Convention on Stolen or Illegally-Exported Cultural Objects (1995):
This Convention provides for the restitution of stolen cultural effects and the return of illegally-exported cultural objects. The definition of 'Cultural Objects' is provided in the Annex to the Convention. This definition is the same as in the UNESCO Convention.

This Convention provides the basis for action over stolen and illegally-exported cultural objects. However, it is not retrospective, a number of its other provisions are not directed towards the concerns of indigenous peoples. For example; the time limitations in Articles 3 and 5, and the definition in the Annex.

The UNIDROIT Convention entered into force on 1st July 1998, between China, Ecuador, Lithuania, Paraguay and Rumania, with Peru and Hungary joining later in 1998. Countries continue to ratify or accede to the Convention in encouraging numbers.

Building on the UNESCO and UNIDROIT Conventions are:

- The European Communities Directive on the return of cultural objects unlawfully removed from the territory of a member State and the regulation on the export of cultural goods from member States of the European Community; and
- The Commonwealth Scheme for the Protection of the Material Cultural Heritage.

The United Nations' Draft Declaration on the Rights of Indigenous Peoples holds considerable promise for the future as it is written specifically to rectify the type of issues involved in the Returns of Cultural Heritage to Indigenous Peoples.

The Draft Declaration is seen as:

- (i) a triumph of indigenous solidarity; and
- (ii) a *tapu* (sacred) document.¹⁸

Article 12 provides "the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs".

Article 13 includes, "The right to the use and control of ceremonial objects; and the right to the repatriation of human remains".

Indigenous people, under Article 32, would have the right to determine their own citizenship in

accordance with their customs and traditions. This would allow them to provide their own definition of who belonged and who did not.

The Draft Declaration, like The Native American Graves' Protection and Repatriation Act (NAGPRA), is essentially Human Rights Law. As such, it traces its ancestry to the Universal Declaration of Human Rights, as evidence of international custom, and the International Covenant on Civil and Political Rights.

CHANGES PROPOSED

The issue of indigenous returns is one that is appropriate for international action and indeed, if the proposed Draft Declaration on the Rights of Indigenous Peoples is finalised, this will provide a good starting point once the sovereign states have ratified and introduced it into their legislation in accordance with Article 37.

The Draft Declaration on the Rights of Indigenous Peoples also envisages that the United Nations and specialised agencies would assist to carry out the terms of the Declaration, (Article 40). There is also a proposal in Article 41 for the creation of a body at the highest level, with special competence in the field of indigenous peoples and with direct participation of indigenous peoples.

MEANS OF CHANGE

The recommendations in the paragraphs following over the means of change are based upon acceptance of the validity of claims by indigenous peoples for the return of cultural treasures. Obviously there will be those who take the view expressed by some museums, galleries and archaeologists that no returns should be made at all. There will also be those who are prepared to deal with these issues on a case by case basis.

International Conventions

Provided the finalisation of the Draft Declaration on the Rights of Indigenous People is going to be accepted within a realistic timeframe, then this would be the keystone for an international structure.

However, should the Draft Declaration either be delayed or not adopted and implemented by the sovereign states, then consideration might be necessary to promote a separate declaration or convention solely on the rights of Indigenous Peoples in relation to the return of cultural heritage treasures. Reliance on the UNESCO and UNIDROIT Conventions is not sufficient because of the limitation of these conventions set out above. It would still be worthwhile to encourage states to become parties to the UNESCO and UNIDROIT Conventions and to implement schemes, like the Commonwealth Scheme for the Protection of the Material Cultural Heritage.

International Recommendations

Recommendations should be made to as many bodies as possible to assist. Most of the key bodies are outlined in the inventory, pages 4 to 8 of the Cultural Heritage Law Committee Report to the International Law Association, Taipei Conference (1998).

Model Legislation

It is probably premature to speculate on what model legislation might be necessary or appropriate, until such time as the issue of the appropriate International Conventions has been resolved.

However, the issue of identification and tabulating of what cultural heritage treasures are held by museums, art galleries and universities, etc. will probably require legislation like NAGPRA and discussions should begin on working out what legislation will be appropriate in each country.

A number of United Kingdom museums say that they would require Parliamentary intervention before they would be able to make any significant returns to indigenous peoples.¹⁹

Codes of Ethics/Conduct

I believe Codes of Ethics can be very beneficial and, if worked out in conjunction with museums, the organisations representing collectors, and indigenous peoples, could well facilitate and speed up the return of cultural heritage treasures, including human remains.

The existing Codes of Ethics of those professions involved with cultural heritage issues should be reviewed to see if they can do more to assist in the return of cultural heritage treasures to indigenous peoples. Often the codes of ethics of key organisations will influence comparable organisations in other countries, so it is important to concentrate on these key organisations, like the Society of Professional Archaeologists (USA).²⁰

Varying Solutions

It is essential to remember that different indigenous peoples may have different views on what should be done over cultural heritage treasures. There are already a wide variety of solutions, many of these are listed in the Cultural Heritage Law Committee Report to the Taipei Conference (1998).

Draft Principles

These could be very valuable provided they are worked out in partnership between the indigenous peoples and the bodies currently holding the treasures.

Draft Protocols

Again, these could be very useful in regard to developing practical issues. Draft protocols can provide the basis for parties to work through and record their solutions.²¹

This can equally apply to Governments, indigenous peoples, museums and the private holders of cultural heritage treasures.

Mediation

This should be used to assist in resolving disputes and finding solutions.²² The names of affordable, respected and effective mediators and facilitators should be accumulated into directories and recorded on websites and infobanks.

Research

Research should be encouraged into cultural heritage returns, problems and solutions and whether the solutions reached continue to be beneficial long-term. Researchers need to be sensitive to the cultural values of the indigenous people concerned in carrying out their research.

Funding

Funding will often be critical in enabling research and mediation. This will need to come not only from organisations like the United Nations and UNESCO, but also from sovereign Governments.

Commercial organisations and philanthropic foundations should also be encouraged to contribute to funding, either in cash or services, (e.g; air, land or sea transportation).

Specialist charitable organisations should be created and encouraged to provide funding to help repatriate Cultural Heritage treasures. The National Art Collections Fund carries out this function, with flair and determination, so far as retaining art treasures in the United Kingdom which would otherwise be exported. Many of these art treasures originated outside the United Kingdom and this illustrates that a treasure may belong to the cultural heritage of more than one nation or indigenous people. A current example is the Art Fund campaign to retain the portrait of Omai (from Huahine near Tahiti) by Sir Joshua Reynolds.

Draft Legal Documents

Lawyers should be encouraged to provide draft documents as precedents to aid resolutions, (e.g; a draft release form or deed of settlement).

Creation of Websites and Infobanks

Information on cultural heritage returns should be recorded as comprehensively and as soon as possible, so that the knowledge can be shared effectively. Where possible these websites and infobanks should record all the information available on model legislation, draft codes of ethics, draft protocols and principles, draft legal documents, directories of mediators and facilitators and the research into cultural heritage issues and the outcome of negotiations, mediations and litigation.

RESPONSIBILITY FOR CHANGE

Draft Conventions

It would seem that the United Nations has the primary responsibility in relation to the Draft Declaration on the Rights of Indigenous Peoples. UNESCO and UNIDROIT could also be valuable in relation to the other Conventions.

Organisations which represent museums and collectors **must** become involved in the dialogue on these issues. Organisations representing the major auction houses are also critically important.

Individual Governments

Individual Governments have their own individual responsibility and should be encouraged to take positive steps to explore the issues properly.²³

Individual Museums, Art Galleries and Collectors

Those who hold the treasures of indigenous peoples have their own responsibility to review what they hold and face up to the consequences of that review.²⁴

Procedures - Involvement of Indigenous Peoples

Often in the past, indigenous people were the last to be consulted (if consulted at all) over what was being done. It is vital that efforts to resolve the problems should not proceed in the same way. Therefore, proposals must be developed in partnership with the indigenous peoples and their organisations.

UNDERSTANDING OTHER CULTURES

Parties must work towards understanding each others cultures. It is important to avoid surprises which will result in recriminations. The onus will be on the holders of the cultural treasures to find out clearly what is intended to be done with them, if that is a matter of concern. Likewise the onus is on the indigenous people to explain clearly what is intended. This certainly is a concern for some museums in relation to human remains, some would accept preservation in a sanctuary, but not reburial. Burial is also not necessarily restricted to human remains but can apply to other treasures.

CHANGING ATTITUDES

Just as technological methods of archaeology evolve, so do attitudes. In the early nineteenth century, Giovanni Belzoni used a battering ram while investigating tombs in the Valley of the Tombs of the Kings, Egypt. That kind of approach has long been outdated. In underwater archaeology, behaviour that was common up until the 1990's is now widely considered inappropriate and the pressure is on to change the way in which underwater archaeology is carried out. This is embodied in the Convention on Underwater Cultural Heritage adopted by UNESCO in November, 2001.

The changing attitudes that have been apparent in North America, Australia and New Zealand over the last 10 – 20 years over the handling of the cultural treasures of indigenous people, are beginning to be reflected in changes of attitude in the UK and Europe, especially during the last 5 years, particularly in the area of the return of human remains. The setting up of the UK Working Group on Human Remains is an indication of this change. How far the change will go will depend on many circumstances, not least what is in the report and how the British Government responds to it.

During the last five years, a number of important instances of the return of human remains have occurred, several of these have been in relation to New Zealand Maori tattooed heads. One of the most important returns were the remains of 87 Larrakia people who were

ceremoniously brought home to their relatives in Darwin, Northern Territory, Australia in August 2002.

The remains of Saartjie Baartman, a member of the Khoi – San tribe of the Cape of Good Hope, South Africa, were returned home in May 2002 from the Musee de l'Homme in Paris. Sara was a slave taken to England in 1810 and displayed in an animal cage as the “Hottentot Venus”. Later after her death in France, she was dissected and her remains displayed in a glass cabinet at the museum until 1974 when public pressure forced the officials to remove her skeleton from display. This return has had important symbolism, not only by identifying the person who was treated so shamefully, but also by drawing attention to the dehumanising way in which slaves were treated.

Not all European countries are moving at the same pace, which is well illustrated by the attitude of the Spanish museum officials and ambassador over the return of the African bushman known as ‘El Negro’ from the Darder Museum in Spain to Botswana when only part of the human remains were returned.²⁵

Even within the United Kingdom there are considerable differences in viewpoint. Some museums such as the University of Edinburgh return all remains when requested to do so by the appropriate group or individual. Others are reluctant or unable to do so by statutory or other restraints.

It is critical that if museums do become enthusiastic about returning human remains, that they make sure that they are returned in an appropriate way to the right indigenous people. Otherwise they will only redouble the original injury and cause ongoing distress. The knowledge held by the indigenous people, often in their oral traditions, will be critical, so also will the use of scientific technology, such as DNA identification, where the key parties involved agree that it is appropriate. This is a controversial area and time, effort and patience will be needed to work out responsible and sensitive protocols.

THE WAY AHEAD

Maori have the concept of *Whanaungatanga* - relationships are everything! Joe Williams points out that this is critical when looking at the issue of the rights of indigenous peoples.²⁶

Therefore, the process of resolving the issues of returns of treasures to indigenous peoples will often be as important as the result. If the right relationships can be created, whether they are between indigenous peoples, a sovereign Government, a museum or a private collector, then the right result is much more likely and it is also likely to be a result that is both enriching and long-lasting.

FOOTNOTES

1. New Zealand Human Rights Commission, *Komihana Tikanga Tangata Tirohia, Quarterly Newsletter*, (November 1997) p. 22.
2. United Nations Centre for Human Rights - Fact Sheet No. 6, The Rights of Indigenous Peoples, (May 1990) p.1. Defining Indigenous Peoples is becoming a subject for increasing academic debate. Professor Jeremy Waldron's Quentin – Baxter Memorial Lecture at the Victoria University Law School on 5 December 2002 explores the issue in depth. (see 26 *The Capital Letter* 3 at 1187).
3. Tamarapa Lloyd illustrates this as follows:
 This can perhaps be seen within the definition of the Maori word for grandchild, which is mokopuna. Moko is a distinctive facial tattoo that was used as an identifying marker of status, family and occupation. Puna is a pool of water. Picture a child looking into a pool of water and seeing the face of their grandfather. Conveyed within the word is the reflective nature of genealogy as one generation inherits the genetic taonga of generations past.
4. As part of the Ngai Tahu claim settlement, the sacred mountain known as *Aoraki* (Mt Cook) was agreed to be handed back to the Ngai Tahu Tribe, who then agreed to gift it to all New Zealanders. Sections 15 and 16 of the Ngai Tahu Claims Settlement Act 1998 (NZ). The actual date for handing over has yet to be agreed upon.
5. A summary of these solutions is set out on page 9 of the *Cultural Heritage Law Committee Report* to the Taipei Conference of the International Law Association, held in 1998.
6. Displayed in Death: The Last Taboo exhibition at the Australian Museum, Sydney August 2003.
7. *Attorney-General of New Zealand v. Ortiz* [1984] A.C. 1, [1983] 2 All E.R.93 (House of Lords). Lord Denning's judgment in the Court of Appeal [1982] Q.B. 349, [1982] 3 All E.R. 432 strongly puts forward the view that English Courts should not enforce legislation prohibiting the export of Works of Art based on decisions going back to *Don Alonso v Cornero* (1611) Hob 212. Justice Thomas has commented in [1999] *NZLJ* 92 at page 94, in an otherwise enthusiastic and appreciative reflection on Lord Denning's career, that this judgment "falls not far short of jingoism".
8. See Dr Patrick O'Keefe (January 1995) Volume 44, *International and Comparative Law Quarterly* 147.
9. *The Times*, 8 October 1998, p. 592.
10. See the ringing, if somewhat dated, phraseology from the preamble to The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, "considering that the interchange of cultural property among nations of scientific, cultural and educational purposes

increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations".

11. *In the Estate of Tupuna Maori, late of New Zealand, Warrior Deceased.* unrep., 19 May 1988, H.C. Wellington.
12. Charlotte C. Woodhead "A Debate Which Crosses All Borders" The Repatriation of Human Remains: More than Just a Legal Question (2000) VIII *Art Antiquity and Law* 317 at page 346.
13. T. Shek, 'Can Dust Remain Dust? English Law and Indigenous Human Remains' (2000) v *Art Antiquity and Law* 265 at p 293.
14. See L. Zimmerman, 'When Data Become People: Archaeological Ethics, Reburial and the Past as Public Heritage (1998) 7 *International Journal of Cultural Property* 69.
15. ACPAC Newsletter July 1989.
16. The Times, 20 June 2001. The litigation itself is currently on appeal.
17. See Nafziger, J. and Dobkins, R. 'The Native American Graves Protection and Repatriation Act in its First Decade' (1999) 8 *International Journal of Cultural Property*, pp. 77 – 107.
18. Te Atawhai Tairaroa, M.Solomon, and J.Williams, in A.Quentin-Baxter, ed., *Recognising the Rights of Indigenous Peoples*, (1998) pp. 54-59, 60-81, 189.
19. The British Museum and the Natural History Museum, London are governed by the British Museum Act 1963, which prevents disposing of items in their collections except within narrow conditions. The original act was the British Museum Act 1753.
20. In January 1999, the New Zealand Archaeological Association endorsed and adopted a revised version of the (1976) Code of Ethics and Standards of Research Performance of the Society of Professional Archaeologists (USA).
21. The protocols used between the McLeod family and the University of Otago researchers to govern medical tests on the family to discover a mutant gene causing stomach cancer in one Maori family, are considered a good example of co-operation that can benefit all concerned, and help to pioneer important medical research.
22. Experience with Treaty of Waitangi claims has resulted in a paper setting out proposals by Morris Te Whiti Love, Director of the Waitangi Tribunal, entitled "A *Claims Facilitation and Dispute Resolution Service for Treaty of Waitangi Claims*" - LEADR Conference, Waipapa Marae, Auckland University, 25 March 1999. These proposals provide very valuable guidance.
23. The British Government in May 2001 set up a Working Group on Human Remains which has been preparing its report. When this article went to print its report was expected by mid November. The Department for Culture, Media and Sport intends to publish the report on its website www.culture.gov.uk .

24. *Pukaki a comet returns* by Paul Tapsell (2000) examines the issues leading up to the return of Pukaki from the Auckland Museum to the Ngati Whakaue of Te Arawa.
25. See N. Parsons and A.K. Segobye, *Missing Persons and Stolen Bodies: the Repatriation of 'El Negro to Botswana* in C.F. Forde; J. Hubert and P. Turnbull, *The Dead and their Possessions* (2002, London, Routledge).
26. J.Williams, (now Chief Judge of the Maori Land Court), in A.Quentin-Baxter, ed., *Recognising the Rights of Indigenous Peoples*, (1998), pp. 190-192.

CASE STUDY

IN THE ESTATE OF TUPUNA MAORI
High Court, Wellington, No. P580/88
Judgment of Justice Greig 19 May 1988 (Unreported)

This case is a very good example of where innovative legal thinking can combine with skilful negotiation and mediation to achieve a worthwhile result for all the parties concerned.

Background to the Matter

A tattooed Maori head (almost certainly of Tai Tokerau tribal origin) was coming up for sale at an auction in London. The New Zealand Maori Council wished to prevent the continuing humiliation and distress which this was causing.

A firm of Wellington solicitors were asked to take the necessary steps to prevent the sale. After considering the issue, they decided to make a standard application in Probate for the limited purpose of according the Deceased a proper burial, according to Maori lore and custom, and to prevent as far as possible further indignities being visited upon the Deceased.

An application was filed in the High Court, Wellington, and Justice Greig dealt with the matter immediately, as the auction was to proceed in London the next day. The application was made by Sir Graham Latimer, who was President of the New Zealand Maori Council, and a *Rangatira* (Chief) of the Deceased's likely *Iwi* (tribe).

After taking the evidence into consideration, the Judge decided that the Deceased, although not identified by name, or individuality, was a Maori warrior who died in New Zealand in or about 1820. The Judge therefore granted the application for the limited purpose of enabling legal proceedings to be constituted and commenced for the purpose stated earlier.

Armed with this Grant of Administration, the representatives of Sir Graham Latimer and the NZ Maori Council in London, applied to prevent the auction of the tattooed head proceeding. Through a process of negotiation and mediation, it was resolved that the head would be withdrawn from auction and presented to Sir Graham Latimer in London, and that Sir Graham would present to the previous owner of the head, a Greenstone *mere* (club), carved with considerable skill and of significant value. The former owner was apparently delighted with the outcome and Sir Graham returned with the head to New Zealand, where there was an appropriate burial in accordance with Maori lore and custom.

From a legal point-of-view, what was interesting was the use of an everyday standard procedure in an innovative way and the fact that the Judge was prepared to be so outspoken on the issue and to take decisive steps. However, the longer term resolution was the ability of the parties concerned to reach a solution that left them both satisfied and with dignity.