

Responsabilité, fraternité et développement durable en droit:

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Museums and the Repatriation of Indigenous Human Rights Remains

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Introduction

Vital to the identity of indigenous peoples and their political, economic and social growth, is the ability to sustain and protect their cultural heritage. The repatriation of human remains from museums to indigenous communities of origin signifies cross-cultural efforts to reconcile the immeasurable loss and inequality suffered under the legacy of colonial collecting practices. The concept of gesture, conceived as recognition through repatriation, lies in the middle of language and prompts new constructions for identity, descendancy, sovereignty and citizenship. I will trace events surrounding Saartjie Baartman (1789-1815) whose remains were repatriated to South Africa for burial in 2002. New international commitments have emerged since the 1980s and collectively they impart an obligation for museums to reconcile the past. Through such recognition, museums begin to occupy new collaborative spaces for dialogue and action in twenty-first century terms.

Law as a Desiring Process

I take as my starting point two proposals. Firstly, that law is a form of language, as James Boyd White states, texts constitute communities. According to White, the question of who should have the power to decide what the best result is, under what standards, and subject to what review becomes just as important as the legal consequences that flow from these decisions. He states,

“When we speak our languages we cannot help believing them, we cannot help participating, emotionally and ethically and politically, in the worlds they create and in the structures of perception and feeling they offer us. In time the soldier wants to go to war.”¹

Second, in searching to understand what lies at the heart of the issue of repatriation over cultural property, Daniel Shapiro explains its seeming paradox, “what is sought in repatriation is what makes a group who they are, yet it is not something that they possess or control – it is something self-defining yet missing.”² He describes this emotional connection as the need for recognition and respect from others, “cultural heritage is given at least part of its meaning through others’ responses to it and it is this aspect of repatriation that can be partially mediated by recognition even if what is sought is not ultimately returned.”³ From this it follows that if recognition of one’s heritage by others is key, then the “object is ultimately not a *sin qua non* of a people’s identity.”⁴ The real battle may be elsewhere, Shapiro concludes, it is not over the objects, but rather in our trying to understand others and ourselves.⁵ While I support these premises, in dealing with human remains, recognition is primarily achieved through gesture. To hand over, both in mind and spirit, such a potent object as human remains, is inextricably linked to identity.

The cultural appropriation of indigenous human remains as museum objects has suppressed

¹ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 50.

² Daniel Shapiro, “Repatriation: A Modest Proposal” (1998-1999) 31 N.Y.U. J. Int’l L. & Pol. 95 at 106.

³ *Ibid.* at 106.

⁴ *Ibid.* at 107.

⁵ *Ibid.* at 108.

their symbolic meaning as ancestors to living communities. Repatriation is defined as the physical return of an object of cultural patrimony from its present owner to its true owner or guardian, heirs or descendants.⁶ Embodied as a gesture, it affords a powerful symbol of recognition of the other, to lay bare the appearance of absence in the struggle for identity for indigenous peoples. It is here we may examine our relationship to ourselves and to each other. As James Boyle states, "uncoupled from subjects at the perceiving end, and objects at the end perceived, truth can only be seen as the matrix of social power that constitutes the reality *in between*".⁷ Museums, as outposts of dominant society, reflect our complicity in sustaining the objectification of indigenous peoples. The realization that we might desire the make believe subjugation of the other is disturbing, but only then may this realization allow us to re-envision these constructs and the degree to which we not only acquiesce to but actively participate in this process of objectification. Recognition can be a stand-in, or as Pierre Legendre describes, identity is a relation, "it is the metaphorisation of the other than the self and the other as self".⁸ This is the fundamental tension inherent in the price we make others pay, even ourselves, for us to *become* subjects. When applied to museums, they can be viewed as products of the establishment, representing its assumptions and definitions. As Michael M. Ames notes,

"[a] large public museum may express and authenticate the established or official values and images of a society in several ways, directly, by promoting and affirming the dominant values, and indirectly, by subordinating or rejecting alternate values."⁹

If we take the subject and object into the sphere of law, we can see that this conflicted state

⁶ Charlotte C. Woodhead, "A debate which Crosses All borders" The Repatriation of Human remains: More than Just a Legal Question', (2002) 7 Art Antiquity and Law 317 at 332-33.

⁷ James Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory" online: (1991) 62 U. Colo. L. Rev. 489 < http://www.law.duke.edu/boylesite/Subject.htm#N_3_> [Boyle, "Subjectivity"].

⁸ Pierre Legendre, "Introduction to the Theory of the Image: Narcissus and the Other in the Mirror" trans. by Peter Goodrich and Alain Pottage (1997) 8 Law & Critique 3 at 22.

⁹ Michael M. Ames, *Museums, the Public and Anthropology: A Study in the Anthropology of Anthropology* (New Delhi: Concept Publishing House; UBC Press, 1986).

is not of law's making, but reflexive of our own state as members of society. It has as much to do with form as it does content. Both elements shape the person as well as law itself. For we conceive law to be objective, rational, neutral and determinative. And when we lay claim to its subjectivity, it is usually to criticize an outcome as flawed. But the subject is transparent to our gaze as reflexive of dominant culture and can be seen to exist as an artefact, it produces a kind of society, a legal decision, or a professional practice.¹⁰ Therefore, we must acknowledge that it is not just objectivity that vests a kind of armour to protect our languages of power.¹¹

The polarization of the subject/object divide reveals our tendency to misconceive law as determined by a desire for some end, rather than a desiring process.¹² If law can be understood as a desiring process and repatriation, as the gesture of recognition, Giorgio Agamben, drawing on Aristotle and Varro, characterizes gesture as a third type of action, set apart from the purpose to act or to make. Gesture, rather, is the exhibition of a mediality: it is the process of making a means visible as such.¹³ It allows the emergence of the being-in-a-medium of human beings and thus it opens the ethical dimension for them.¹⁴ It is the communication of a communability, this being-in-language.¹⁵ And so, what Agamben terms as the moment of pure mediality, that is, of being in the middle of language, might offer us insight into the process of law itself, not as a means to an end, or an end in of itself, but rather for us to being to start desiring a means without end. For Agamben, it is [the] silence that is, a whole people finds itself speechless before its own destiny that is above all unbearable.¹⁶

¹⁰ Boyle, 'Subjectivity', *supra* note 7.

¹¹ *Ibid.*

¹² Nathan Moore, 'The Image of Law' Book Review of *Judging the Image: Art, Value, Law* by Alison Young, (2007) 20 *Int'l J. Sem. L.* 353 at 361.

¹³ Giorgio Agamben, *Means Without End: Notes on Politics* trans. by Vincenzo Binetti & Cesare Casarino (Minneapolis: University of Minnesota Press, 2000) at 57.

¹⁴ *Ibid.* at 57.

¹⁵ *Ibid.* at 58.

¹⁶ *Ibid.* at 123.

Identity as Relational

In some cases, repatriation has been plagued by doubts about the identities of the repatriated and of the community to which the remains are to be returned.¹⁷ At this difficult intersection is the cultural expression of identity and the legalities of sense of proprietorships and patrimony.¹⁸ Such disputes engaged both subjectivity and citizenship. As Shapiro notes above, it is a paradox, "cultural property only reveals its identity when it has been lost, as if alienation was an intrinsic property of identity, and loss an identifying element of possession."¹⁹ Does it complicate the enquiry that there can be no property in human material, save the exercise of skill to give rise to ownership?²⁰ Certainly, it stands to reason that under English common law, the true owner always trumps the possessor. The doctrine of *terra nullius* provides a useful critique to shift from questioning the responsibility of law, that is, to whom does the law respond, towards the source of law to query the founding myths that are responsible *for* law, "not to find but to found responsibility through law."²¹ For example the enlargement of the theory of *terra nullius* from uninhabited deserted lands, to land that was inhabited, constructed the Indian as barbarous to the absolute benefit of the Imperialist sovereign. The International Court of Justice in its 1975 advisory opinion on Western Sahara laid this expanded theory to rest. Judge Ammoun stated:

"[T]he ancestral tie between the land, or 'mother nature'— this link is the basis of the ownership of the soil, or better, of sovereignty— the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned."²²

¹⁷ Julian Jonker, "Excavating the Legal Subject, The Unnamed Dead of Prestwich Place, Cape Town" (2005) 14 Griffith L. Rev. 187 at 191 [Jonker, "Excavating"].

¹⁸ *Ibid.* at 192.

¹⁹ *Ibid.* at 194.

²⁰ *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474, CA; *R v Kelly and another* [1998] 3 All ER 741, CA (where Rose LJ stated: "Parts of a corpse are capable of being property within s.4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes."). See Art. 16-1 C.c.F.; Art. 3 C.C.Q.

²¹ *Ibid.* at 195.

²² *Western Sahara*, Advisory Opinion [1975] I.C.J.Rep. 62 at 86. See *Mabo v. Queensland*, (1992) 175 CLR 1 (Aust. H.C.) at 40.

Julian Jonker's examination into the rediscovered burial grounds in Cape Town²³ serves as an interesting framework when applied to the context of the museum, whereby cultural appropriation as objects of patrimony for another, has concealed the symbolic meaning of human remains to which identity suffers from. Both are contested sites. Both are, in their own way, claims of space as place. In recent years, there has been growing awareness that museum collecting and preserving objects did not intend to address or serve the needs of the peoples from whom the materials originated.²⁴ The gesture of repatriation cannot void this memory but it may reconcile the desire of habit and inhabiting space as place. Habit, as a corporeal form of memory is something that we forget into the body.²⁵ As Freud states, "the patient does not remember anything of what he has forgotten and repressed, but acts it out...[h]e reproduces it not as a memory but as an action, he repeats it, without of course, knowing that he is repeating it."²⁶ Here is a very different response to 'direct descendancy', one that looks instead for phantoms as embodied in the unconscious.²⁷

The seemingly forgetful habit is thus a gesture of incomplete forgetting or of incomplete mourning. One plausible theory as Jonker explains, in some South African cultures, one need not visit a grave in order to respect the ancestors, who are always present; one instead carries 'a grave in the mind'.²⁸ In this sense, in order for mourning to be completed, this 'grave in the mind' must be *named*.²⁹ Martha Minow suggests that most legal treatments of identity questions fail to acknowledge that identity of a person is not simply intrinsic, but rather emerge from relationships

²³ Jonker, 'Excavating', *supra* note 17 at 187-190.

²⁴ Peter H. Welsh, 'Repatriation and Cultural Preservation: Potent Objects, Potent Pasts' 25 U. Mich. J. L. Reform 837 at 845 [Welsh, 'Potent Objects']. See James Clifford, *The Predicament of Culture, Twentieth-Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988) at 187-252.

²⁵ Jonker, 'Excavating', *supra* note 17 at 206.

²⁶ Sigmund Freud, *Psychopathology of Everyday Life*, trans. By A.A. Brill (New York: The Macmillan Company, 1914).

²⁷ Derrida, Jacques, *The Gift Of Death* (Chicago: The University of Chicago Press, 2005) at 64.

²⁸ Jonker, 'Excavating', *supra* note 17 at 207.

²⁹ *Ibid.*

between people in negotiations and interactions with others "the relative power enjoyed by some people as compared to others is partly manifested through the ability to name oneself and others and to influence the process of negotiations over questions of identity".³⁰

In this way, repatriation gives voice to an idea of embodied authority, to speak an otherwise silenced heritage. What is at stake finally, according to Jonker, is an attempt to re-imagine descendency in a way that goes beyond the legislative language of 'direct descendance'. Repatriation reintroduces the object as a body, as a person. The work of naming becomes a work of re-imagination, the means to speak the unspeakable, and of mourning the unnamed dead. Repatriation thus becomes a gesture of constitutive proportions, capable of unearthing the relationships between the memory of the past and the juridical self. These remains symbolize 'bare death' in so far as they continue to be excluded by the law and from the law as persons in any juridical sense.³¹ Repatriation prompts new ways of conceiving of the descendency, sovereign and citizenship not only for the dead, but inextricably linked to the constitutive force of living communities.

Case Study: Saartjie Baartman

Saartjie Baartman (1789-1815) an indentured Khoekhoe domestic worker taken to England in 1810 where she was exhibited to the public in a cage for the amusement of paying crowds. Shortly thereafter she was taken to Paris, where she became known as the Hottentot Venus. Sold to an animal trainer, he exhibited her in the Rue Neuve des Petits-Champs for 3

³⁰ Martha Minow, 'Identities' (1991) 3 Yale J. of Law & the Humanities 97 at 98-99.

³¹ Jonker, 'Excavating', *supra* note 17 at 205.

francs and hired her out for dinner parties.³² French scientist, Baron Georges Leopold Cuvier took an interest in her observing, "the most disgusting part of this woman was her face, which displayed the characters of both the Negro and the Mongole countenance in its different features."³³ He equally commented that "she was gay, she had a good memory for faces, and she spoke Dutch, a little English, and a smattering of French."³⁴ She died in wretched circumstances around 31st December 1815, and Cuvier was granted permission to study and dissect her body. He made a plaster cast, painted in her likeness, before preserving both her brain and her genitals in jars. The plaster cast, her full skeleton, her brains and genitals would be on display in the National Museum in Paris for over 150 years until 1974.³⁵ Briefly in 1994, the cast was exhibited at the Orsay Museum as an example of 19th century ethnographic sculpture.³⁶

With the fall of apartheid, President Nelson Mandela raised the issue of Baartman's repatriation with President Francois Mitterand during a state visit to South Africa in 1995. Following a series of requests and attempts at negotiation, Professor Henry de Lumley, then Director of the Musée de l'Homme and the Muséum National d'Histoire Naturelle in Paris, remained vehemently opposed to the proposed repatriation. For a substantial period of time, officials had told researchers and journalists, even enquirers from the Senate, that the specimens were no longer in their possession and possibly destroyed.³⁷ André Langaney, Director of the

³² Jatti Bredekamp, "The Politics of Human Remains: The Case of Sarah Bartmann" in Jack Lohman and Katherine Goodnow, eds., *Human Remains & Museum Practice* (London: UNESCO and the Museum of London, 2006) at 26 [Bredekamp, "Bartmann"].

³³ Cuvier, Georges. "Extrait d'observations faites sur le cadavre d'une femme connue à Paris et à Londres sous le nom de Vénus hottentote," *Mémoires de Muséum d'Histoire naturelle* 3 (1817), 259-274, cited in Bredekamp, "Bartmann," *ibid.* at 26.

³⁴ Carmel Schrire, *Digging through Darkness: Chronicles of an Archaeologist* (Charlottesville: University of Virginia Press, 1995) at 177.

³⁵ 2nd Session, French National Assembly of 21 February 2002. Discussion of the Bill adopted by the Senate: Research Minister Roger-Gerard Schwartzberg speech, Official translation at 3 [French National Assembly], cited in Bredekamp, "Bartmann," *supra* note 32 at 26-27.

³⁶ French National Assembly, *ibid.* at 6.

³⁷ Sylvie Briet, "Les Tribulations de la Vénus hottentote" *Libération* (21 February 2002), online: Libération <<http://www.liberation.fr/sciences/0101403877-les-tribulations-de-la-venus-hottentote>> [Briet, "Tribulations"].

Biological Anthropology Laboratory at the Muséum National d'Histoire Naturelle explained
[n]ous avons des consignes de nos supérieurs de dire qu'ils n'étaient plus en notre possession
pour éviter de répondre à toutes les demandes.³⁸

Nicolas About, Senator for the Yvelines in France, had heard about the museum's refusal
to accede to South African's requests and came across a powerful poem, 'I have come to take
you home' by Diana Ferrus³⁹, a Khoisan poet, which was written while in Utrecht, Holland as an
exchange student. It was read in the French Senate as About proposed the bill and argued that
article 16-1 of the *Code civil français* (C.c.F) based on Bio-ethics Law No. 94-653 of 29 July
1994, on respect for the human body, should be applied to the Baartman issue, namely that 'the
human body, its elements and products cannot be subject to property rights.'⁴⁰ Research Minister,
Roger-Gerard Schwartzenberg argued in support stating that 'human remains are not the subject
to appropriation and therefore cannot be a State's or a public body's property [t]hey cannot be
elements of a national heritage.'⁴¹ However, he clarified that the bill was case-specific and could
not set a precedent that would be applied generally and automatically. In this particular case, he
argued, Parliament should support repatriation on the basis of 'total lack of scientific interest of
the remains in question' and in order to 'do justice to Saartjie who was subject during her life
and even after, as an African and as a woman, to offenses resulting from long-prevailing ills, i.e.
colonialism, sexism and racism.'⁴² The law was passed in March 2002.⁴³ A small delegation

³⁸ *Ibid.* (We were told by our superiors to say that (the remains) were no longer in our possession to avoid dealing
with all the requests).

³⁹ <http://www.hottentotvenus.com/index2.htm> (a collection of audio recordings made by author surrounding the
legacy of Sara Baartman. See Diana Ferrus for audio recording that includes her poem, 'I have come to take you
home').

⁴⁰ Bredekamp, 'Bartmann', *supra* note 32 at 28. See Art. 16-1 C.c.F.

⁴¹ French National Assembly, *supra* note 31 at 8, cited in Bredekamp, 'Bartmann', *supra* note 32 at 29.

⁴² *Ibid.*

⁴³ 'Loi 2002-323 06 mars 2002 ó Loi relative à la restitution par la France de la dépouille mortelle de Saartjie
Baartman à l'Afrique du Sud. En vigueur depuis le 07 mars 2002. A compter de la date d'entrée en vigueur de la
présente loi, les restes de la dépouille mortelle de la personne connue sous le nom de Saartjie Baartman cessent de
faire partie des collections de l'établissement public du Muséum national d'histoire naturelle. L'autorité

including Diana Ferrus accepted the remains in person in Paris and together they arrived home in South Africa on 3rd May 2002. The author was present at the private ceremony when Baartman's remains returned home on 3rd May 2002.⁴⁴ After a consultative process by the South African government with Executive Committee of the Council of the National Khoisan Consultative Conference, she was buried on the bank of the Gamtoos River on 9th August 2002.⁴⁵

What is significant in Baartman's case is firstly, the persuasion of a poem read aloud in the French Senate as evidence of her people's desire to lay her to rest, to put an end to her continued subjugation and humiliation in life and in death. Secondly, inviolability of the human body, codified under article 16-1 C.c.F. was the basis to which the imperative legislation for repatriation was made. Extracted from the status as object for another, Baartman's remains transformed into bodily dimensions as the subject of legal rights. The legislative imperative is a rare example of a cross-border return of human remains, mandated by statute against the express wishes of museum officials. Nine years later, the French Parliament has only passed one other similar bill in recent years, this time for the repatriation of 16 Maori heads to New Zealand.⁴⁶

The Anthropology Laboratory of the Musée de l'Homme in Paris in 2002, was said to list 30, 000 remains, including 600 skeletons, 16,000 skulls, many of which are from the 19th century.⁴⁷ The recently opened Musée du Quai Branly inherited the collections from both the

administrative dispose, à compter de la même date, d'un délai de deux mois pour les remettre à la République d'Afrique du Sud.' (Act relating to the restitution by France of the remains of Saartjie Baartman to South Africa. This Act will enter into force on 7 March 2002. As from the date of entry into force of this Act, the surviving remains of the person known as Saartjie Baartman will cease to form part of the public collections of the National Museum of Natural History. The administrative authority has a time limit of two months, starting from the date of entry into force, within which to deliver the remains to the Republic of South Africa.).

⁴⁴ <http://www.hottentotvenus.com/index2.htm> (See Professor Philip Tobias for audio of his speech made upon Baartman's return to South Africa on 3rd May 2002).

⁴⁵ Bredekamp, 'Bartmann', supra note 32 at 29.

⁴⁶ Loi No. 2010-501 du 18 mar 2010, J.Q. 20 May 2010 (visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relatives à la gestion des collections)[Loi No. 2010-501]. See Christina Okello, 'French Parliament Approves Return of Sixteen Maori Heads', Art Daily (May 4, 2010) online: Art Daily <http://www.artdaily.com/index.asp?int_sec=11&int_new=37850&int_mod=1>[Okello, 'Parliament'].

⁴⁷ Briet, 'Tribulations', supra note 37.

Musée de l'Homme and the Musée National des Arts d'Afrique et d'Océanie, is said to hold 350,000 pieces in its collection, most of which include human remains.⁴⁸ According to French law, all museums and institutions are barred from deaccession as all such objects form part of the national patrimony. It is difficult to reconcile the possession of such vast collections of human remains, each severed discriminately from any notion of extra-patrimonial rights. Here, we have as much to learn about the law from those who find themselves outside it as from those who enforce it, wield it, or study it.⁴⁹ The internal struggle in France with respect to museum collections is played out between the Senate, the Minister of Culture and museum officials. The recent legislation to repatriate Maori heads to New Zealand also widened the mandate for the scientific commission to now include politicians under Article 4.⁵⁰ Perhaps this change will prove beneficial and place more emphasis on France's obligation to acknowledge, and give respect to the wishes of indigenous communities. French Senator Catherine Morin-Desailly said the approved bill "confirms France's moral responsibility as a country of human rights; there are some things which are above art and which should remain sacred."⁵¹ As customary international law is evinced by state practice and *opinio juris*, its evolution over time is guided by our collective mores within society. As outposts of museum practice traces this evolution.

⁴⁸ Sally Price, *Paris Primitive: Jacques Chirac's Museum on the Quay Branly* (Chicago: University of Chicago Press, 2007) at 224.

⁴⁹ Mary Joe Frug, "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am. U. L. Rev. 1065; *c.f.*, Martha Minow & Elizabeth V. Spelman, "Outlaw Women: An Essay on Thelma & Louise" (1991-1992) 26 New Eng. L. Rev. 1281 at 1283, 1296.

⁵⁰ Loi No. 2010-501, *supra* note 46 at Art. 4.

⁵¹ Okello, "Parliament", *supra* note 46.

Building New Constituencies for Museums

Most intimately, the engagement of museum officials requires a more considered response to integrate the rights, beliefs and interests of indigenous stakeholders. The incorporation of the indigenous voice within the museum presents the opportunity to forge new partnerships and new constituencies. When tasked with the challenge to mount these human remains on display, certain public gestures by museum professions have revealed an internal dilemma described as a crisis of cultural authority.⁵² In May 2008, professionals at the Manchester University Museum in Britain took it upon themselves to cover each of the three Egyptian mummies on display in the name of respect for ancient bodies. After protests from local audiences and the media, the museum uncovered the mummies but stated that it wanted to promote conversation about how to respect human remains.⁵³ To recall White's words, the essence of the problem remains, to whom does the museum want to promote dialogue with? Indigenous populations have been historically precluded from giving voice to this dialogue within the museum for the last two hundred years.

Paradoxically, Baartman's plaster cast was exposed in full form for over 150 years to the viewing public in Paris, however, once removed from public eyes, in storage it was draped with a demure cloth, hidden inside the crate.⁵⁴ The plaster cast was excluded from items repatriated to South Africa and remains to this day, an object of national patrimony for France.⁵⁵ These actions reveal that the meditative role between competing positions, that is, of making collections available while opening the door to respect the wishes of indigenous communities has resulted in a struggle to assert what was once thought to be an unassailable role as arbiters of cultural

⁵² Tiffany Jenkins, "Contesting Human Remains in Museum Collections: The Contribution of A Crisis of Cultural Authority," *Material World* (2 January 2011) online: *Material World* <http://blogs.nyu.edu/projects/materialworld/2011/01/contesting_human_remains_in_mu_1.html#more>.

⁵³ *Ibid.*

⁵⁴ Briet, "Tribulations," *supra* note 37.

⁵⁵ See Chief Basil Coetzee's discussion on this subject at www.hottentotvenus.com.

authority. As Peter H. Welsh states, the repatriation issue has caused us to recognize some fundamental contradictions in the ethical and philosophical principles that have guided museums,

“First, [museums] attempt to preserve collections in perpetuity and yet desire to make them accessible to everyone. Second, they strive for new understanding, yet speak in the simplest terms to their audiences. Third, they encourage scientific inquiry, but rarely do it. Fourth they attempt to foster cross-cultural respect, yet are thrown into turmoil when faced with representatives of another culture calling for the return of an object for use with a religious purpose.”⁵⁶

From the museum perspective, assertions have been made that the remains have scientific value and should be retained in institutional collections. These remains have the potential to provide anthropologists with data about such things as past diseases, diet, social practices, population movement and human evolution.⁵⁷ For example the use of prehistoric human remains has helped in the study of syphilis by providing humankind with “one of the best documented records of the complex origin, spread, and reinfestation of a population by a contagious and deadly disease” helping to further understand other forms of communicable diseases.⁵⁸ Therefore, actions which impede the search for new knowledge by destroying data through reburial for example, sacrificing the ability to generate information unavailable from any other source for the benefit of humankind.⁵⁹

Indigenous communities have responded that many of these remains had lain unused for decades and if there should be any claim to scientific value it is up to the scientific community to prove this.⁶⁰ Museums that have not received any requests by scientists to study the remains

⁵⁶ Welsh, “Potent Objects”, supra note 24 at 847.

⁵⁷ Patricia M. Landau & D. Gentry Steele, “Why Anthropologists Study Human Remains”, in Devon A. Mihesuah ed., *Repatriation Reader: Who Owns American Indian Remains* (Lincoln: University of Nebraska Press, 2000) at 74-5

⁵⁸ *Ibid.* at 77.

⁵⁹ Douglas H. Ubelaker and Lauryn Guttenplan Grant, “Human Skeletal Remains: Preservation or Reburial?” (1991) 32 *Y.B. Physical Anthropology* 249 at 250-255.

⁶⁰ Jane Hubert and Cresside Fforde, “The Reburial Issue in the Twenty First Century” in Gerard Corsane ed. *Heritage, Museums and Galleries: An Introductory Reader* at pg 107. See also the Vermillion Accord

within their collections ought to reinforce repatriation efforts.⁶¹ Moreover, the continuation of a cultural system, in a manner determined by the people of that culture, supersedes the scientific quest for knowledge.⁶² Nonetheless, polarization that pits indigenous communities against scientists and archaeologists is disingenuous. A multiplicity of views has been expressed on both sides, including collaboration.⁶³ Repatriation offers museums a tremendous opportunity to participate in cultural preservation efforts initiated by indigenous peoples. Museums, however, will need to reconcile their long-standing perceptions of cultural preservation with those of indigenous communities, otherwise the interests of all groups might be frustrated.⁶⁴

Since the mid-1980s, it is becoming increasingly apparent that international law accords indigenous groups special rights vis-à-vis the state on whose territory they reside.⁶⁵ The World Archaeological Congress brought international focus onto human remains under the Vermillion Accord in 1989.⁶⁶ It is the first of its kind to deal with human remains at the international level. It also sets out the need for respect for human remains and calls for the wishes of the dead as primary.⁶⁷ Respect for scientific concerns are to be respected if it can be demonstrated.⁶⁸ That same year, specific indigenous rights deserving of protection were outlined under the International Labour Organization's *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169).⁶⁹ It calls on state parties to provide indigenous peoples with means for the full development of [their] own institutions and initiatives, and to allow

⁶¹ Such was the case with the Manchester Museum, which repatriated skulls and other human bones to an Australian Aboriginal community in the summer of 2003.

⁶² Welsh, 'Potent Objects', supra note 24 at 847.

⁶³ Larry J. Zimmerman, 'A New and Different Archaeology? With a Postscript on the Impact of the Kennewick Dispute' in Devon A. Mihesuah e., 2000, *Repatriation Reader: Who Owns American Indian Remains* at 294, 301-2, 12 Sw. J. L. & Trade Am. 122 (2005-6) at 122.

⁶⁴ Welsh, 'Potent Objects', supra note 24 at 847.

⁶⁵ Joseph P. Fishman, 'Locating the International Interest in Intranational Cultural Property Disputes' (2010) 35 *Yale H. Int'l L.* 347 at 350 [Fishman, 'Intranational'].

⁶⁶ World Archaeological Congress, *The Vermillion Accord on Human Remains* (South Dakota, U.S.: WAC, 1989).

⁶⁷ Arts. 1-3

⁶⁸ Art. 4.

⁶⁹ 27 June 1989, 72 ILO Official Bull. 59, 28 I.L.M. 1382 (entered into force 5 September 1991).

indigenous peoples to exercise control, to the extent possible, over their own economic, social and cultural development.⁷⁰ In 2007, the *United Nations Declaration on the Rights of Indigenous Peoples*⁷¹ expressly calls for the right to the use and control of their ceremonial objects and the right to the repatriation of their human remains.⁷² It calls upon State to provide effective mechanisms for redress, including restitution, for cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.⁷³ To determine access and repatriation it urges fair transparent and effective mechanisms.⁷⁴ As of December 2010, the four countries that voted against it, namely Australia, New Zealand, Canada, and the United States, have now all moved to endorse it.

Taken as a whole, these and other instruments acknowledge, in variable form, a responsibility on governments, institutions and the scientific community to deal respectfully with human remains and to respect the rights, interests and beliefs of indigenous communities. They serve to create a climate of expectation and that such expectation is morally justified.⁷⁵ Museums have begun in recent years to acknowledge indigenous peoples as new constituencies deserving of more collaborative participation. In the process it has called into question the long-standing claim by museums, that objects collected from living and past cultural contexts were properly their possessions as objects of scientific inquiry.⁷⁶ Repatriation legislation has forced museums to recognize this as only one point of view and has necessitated new attitudes in museums about

⁷⁰ Arts. 6-7.

⁷¹ UNGAOR. 61st Sess., Annex Agenda Item 68, UN Doc. A/Res/61/295 (2007).

⁷² Art. 12(1).

⁷³ Art. 11(2).

⁷⁴ Art. 12(2).

⁷⁵ U.K. Department for Culture, Media and Sport, *Report of the Working Group on Human Remains* (November 2003) at 77.

⁷⁶ Welsh, *Potent Objects*, *supra* note 24 at 846.

their stewardship of the collections in their care.⁷⁷ Where disputes revolve around intranational issues, scholars have stressed that legislation is lacking⁷⁸; such legislation can guarantee that repatriation will occur in a timely and structured manner.⁷⁹ We do not shape the given world merely by material instruments; we create meaning and roles from it through language, art, and action.⁸⁰ The intervention of politicians, the development of legislation and the exposure of the media have helped bring the issue of repatriation of indigenous human remains into the global public arena where it continues to sustain attention to this day.⁸¹

Conclusion

Vital to indigenous peoples identity, and political, economic and social growth, is the ability to sustain and protect their cultural heritage. The gesture of repatriation gives recognition to re-imagine notions of identity, a dissected past and its sacred symbolism. In a juridical sense, repatriation breathes life into living communities, re-inscribing extra-patrimonial rights onto the body as the imperative legislation for Baartman's repatriation suggests. The repatriation of human remains prompts new ways of conceiving of descendancy, sovereign and citizenship, not only for the dead, but also, as a constitutive force of living communities. It offers museums a tremendous opportunity to build new constituencies with indigenous peoples. Museums, however, will need to reconcile their long-standing perceptions of cultural preservation with those of indigenous communities, requiring a more considered response to integrate the rights,

⁷⁷ *Ibid.* at 848 -852, see also Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000).

⁷⁸ See Katreina Eden "Where do the Dead Go? A Discussion of the Need to Enact More Specific Legislation in North America to Better Serve Native Americans' Rights to Indigenous Skeletal Remains" (2005-2006) 12 Sw. J. L. & Trade Am. 120.

⁷⁹ Hubert et al, "Reburial", *supra* note 60 at 110.

⁸⁰ Richard Gold, "Owning Our Bodies: An Examination into Property Law and Biotechnology" (1995) 32 San Diego L. Rev. 1167 at 1236.

⁸¹ Hubert et al, "Reburial", *supra* note 60 at 111.

beliefs and interests of indigenous stakeholders. There is growing consensus that some kinds of objects should never have been collected by museums in the first place. The gesture of repatriation creates and sustains respect for the wishes of the dead and their living communities. Museums might begin to occupy new collaborative spaces for dialogue and action in twenty-first century terms - one that is marked by indigenous voice, speaking aloud.