SCIENTIFIC THEFT OF REMAINS IN COLONIAL AUSTRLIA – A POSTSCRIPT

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In volume 11.1 of AILR I sought to appraise the adequacy of the British Museum of Natural History's approach to negotiating the fate of the remains of 17 Tasmanian men and women in the custody of the Museum since the late 1940s. Reviewing the historical circumstances in which these remains were originally procured and some of the more salient legal dimensions to the negotiations between the Tasmanian Aboriginal Centre (TAC) and the Museum, I sought to highlight how disadvantaged the TAC and other Australian claimants remain in seeking to fulfill customary obligations to their dead because of judicial recourse to Western conceptions of ownership and the privileging of Western scientific practice. While the Museum had agreed to repatriate the remains in question in late 2006, it did so on the condition that they would remain at the Museum until 31 March 2007 and undergo a range of scientific procedures, some involving the removal and destructive analysis of minute amounts of teeth and bone. The Museum made clear that it saw this as the only way that it could meet the demands of the TAC without forsaking its obligation to avoid the loss of what might be new knowledge of benefit to humanity. The TAC found the Museum's position unacceptable and repeatedly informed Museum representatives that if they undertook further analysis of the remains they would knowingly be violating ancestral religion and law.

In concluding my article, I observed that it seemed difficult to imagine how the remains could be returned without destructive sampling of teeth and bone unless the Museum Trustees could, through mediation, be convinced of the profound anguish such testing would cause. Given legal precedents in deciding ownership and control of human remains that had become scientific specimens it seemed likely that court proceedings would be costly and the outcome probably unfavorable to the TAC. However, as it transpired, on 11 February 2007 the TAC's legal counsel successfully gained an interim injunction to suspend the collecting of scientific data. After deliberation the Museum Trustees agreed to limit the scope of scientific inquiry to non-destructive CT testing, photography and measurement with the result that the injunction was lifted on 22 March. The following week the Museum offered to enter into mediation with the TAC.

Two eminent jurists very experienced in mediation met in the second week of May in an attempt to resolve the impasse. Sir Lawrence Street QC represented the TAC, while Lord Woolf, a former Chief Justice of England and Wales, represented the Museum. Australian Government officials attended as observers.

By the time mediation began non-destructive research on the remains of four of the 17 individuals had been completed and the remains had been released into the care of the TAC. The outcome of mediation was an agreement that the Museum Trustees would immediately hand over the remains of the 13 Tasmanians still in the control of the Museum to the TAC on the condition that samples and other information obtained from the remains would be preserved for possible future scientific use under the joint control of the TAC and the Museum.

On the face of it recourse to mediation appears to have resulted in a balanced recognition of Indigenous ancestral obligations and rights in respect of the dead and the validity of scientific aspirations to enhance our knowledge of human diversity and origins. However, it is hard to predict what implications the compromise reached by the TAC and the Natural History Museum has for other Australian Indigenous communities and their representatives still working to secure the return of ancestral remains from British museums and scientific institutions that have, to date, made it clear that they cannot risk their loss to science. It is likely that Cambridge University and other institutions that to date have opposed the return of remains will adopt a 'wait and see' attitude, arguing that it will only be safe to allow repatriation if the samples and

related data now under the joint control of the TAC and the Museum of Natural History are indeed made freely available to interested researchers. Here it needs to be noted that there is no guarantee that Indigenous community representatives and scientific personnel will agree on how the data derived from the remains returned to Tasmania will be used. If the experience of Australian researchers over the past decade is any guide, scientific research may well occur, but only if researchers are amenable to Indigenous communities having the right to appraise, approve and perhaps determine the aims of the research.

Given how deeply ingrained within Western scientific practice the belief is that research cannot hope to establish truth if it is influenced or constrained by culturally specific considerations, it seems probable that communities still seeking the return of the dead could find themselves engaged in negotiations as protracted and distressing as those experienced by Tasmanian Aborigines over the past year. The return home to ancestral country of the remains from the Museum of Natural History is an important moment in the history of Tasmania. But the events leading up to it serve to underscore, as legal scholars McEvoy and Conway have compellingly argued,[1] how conceptually and ethically deficient the law remains as a means of justly coming to terms with our colonial past.

Endnotes

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1 Kieron McEvoy and Heather Conway, 'The Dead, the Law and the Politics of the Past' (2004) 31 *Journal of Law and Society* 539.

COURT AND TRIBUNAL DECISIONS