

SOUTH AFRICAN ARTS LAW UPDATE
**THE RETURN OF ‘CULTURAL PROPERTY’ AS A MEANS OF FACILITATING NATIONAL
HEALING AND THE RIGHTING OF PAST WRONGS**

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[231] South Africa is a culturally diverse society, a fact which manifests itself in a wide variety of languages, traditions and customs. Proof of this given is to be found, for instance, in the constitutional recognition of 11 official languages as well as the provision for the establishment of a Pan South African Language Board entrusted with the duty to develop and create conditions for the development and use of all 11 official languages as well as the Khoi, San and Nama languages and even sign language).² However, cultural diversity presents its own particular challenges, notably those of recognition, understanding and accommodation.

Little more than a year after the political transformation of South Africa from white minority rule to a constitutional democracy, Beyers Naudé, one of the staunch critics of the old system, described this very theme of multi-cultural understanding and the appreciation of differences as ‘cornerstones of diversity’.³ The *leitmotiv* of his speech was the necessity to move away from the hegemony of the known framework of a society based on cultural values such as paternalism, elitism and the emphasis on [232] difference — which created many frustrations and contributed to the marginalisation of people — towards a transformative and culturally accommodating society. Through the process of transformation healing also takes place. Healing is one of the results of transformation; one of its many guises is the righting of past wrongs.

The righting of past wrongs within the context of the concept of ‘culture’ is playing an ever increasingly important role in the domain of international relations, particularly in

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² Section 6 (Ch 1, ‘Founding provisions’) of the *Constitution of the Republic of South Africa* 108 of 1996. The Board is also entrusted with the duty of promoting and ensuring respect for all languages commonly used by communities in the country, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu, and Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

³ Speech delivered at the University of South Africa, Pretoria on 15 September 1995 entitled ‘Culture as a challenge in the new South Africa — our common cultural task in a culturally diverse society’.

the face of the new reality of globalisation,⁴ which brings its own particular problems for the ongoing 'North-South' debate — the relations between the so-called 'first world' and 'third world'. However, although this fact is generally acknowledged and taken into account, any 'enquiry into its [that is, culture's] content and meaning in particular contexts, in other societies and in different periods of time' is still rather sparse.⁵

One particular facet of the North-South relations discourse in its cultural context relates to the tangible and visible, that is, to the action of 'returning' examples of the cultural heritage to their places of origin as a way towards both the righting of past wrongs and the reappraisal of the rights of indigenous peoples. Through this process, an awareness of the importance of cultural sensitivity can be highlighted as well as created.

Problem of definition

It is notoriously difficult to define or to give content to the term 'culture' (in itself an abstract term) and the concepts 'cultural heritage' or 'cultural property' or even 'cultural treasures'. Moreover, the concepts are generally and indiscriminately used in any context imaginable. The problem is compounded by the use of the concepts within different ideological and political points of view.

When the question is asked: 'What is cultural property?' John Merryman's answer is crisply: 'The term refers to objects that have artistic, ethnographic, archaeological, or historical value'.⁶ The notion of 'cultural property' has been challenged, however, and it has been suggested that the term has been superseded by the term 'cultural heritage' for two reasons: it does not carry with it the problems associated with 'property' as value, and most importantly, it incorporates concepts of a duty to preserve and protect.⁷

⁴ 'Globalisation' is not an easy concept to define. More or less the only aspect writers agree about globalisation is that it is a process characterised by what A Giddens calls 'the intensification of worldwide relations which link distant localities in such a way that local happenings are shaped by events many miles away, and vice versa' (quoted by J Habermas, 'The European Nation State. Its Achievements and its Limitations. On the Past and Future of Sovereignty and Citizenship' [1996] *Ratio Juris* 125, 135). See too A Paolini, 'Globalization' in P Darby (ed), *At the Edge of International Relations: Postcolonialism, Gender and Dependency* (1997) 33–60 and sources referred to by him.

⁵ Darby, above n 4, 5.

⁶ J H Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000) 27.

⁷ L V Prott and P J O'Keefe, "'Cultural Heritage" or "Cultural Property"?' (1992) 2 *International Journal of Internal Property* 307.

However, the term predominantly used remains ‘cultural property’ particularly when used in the context of the return of cultural objects.

Yet another term has appeared on the horizon, one used in the sphere of international law and the relationships between states, that is, the notion of ‘cultural treasures’. A *caveat* accompanies the use of the term, though, that a ‘narrow frame of reference should determine what constitutes cultural “treasure”, for the purposes of return. This would include only exceptional or unique landmark objects.’⁸ According to Jeannette Greenfield, the issue of return of cultural property should be determined on the basis of two main criteria: ‘(1) the means of acquisition; and (2) the nature of the object.’⁹ As to the ‘means of acquisition’, her examples are logically mainly those involving underhandedness in its many manifestations as well as force.

[233] **What constitutes ‘return’ or ‘restitution’?**

Having determined — rather briefly — what constitutes cultural property and its acquisition, the next question is: ‘What constitutes “return” or “restitution”?’ When one considers acquisition mainly by underhand means, ‘return’ means ‘restitution’. As Greenfield explains:

[T]he merits of return ought to be evaluated not only according to historic disapprobation but in accordance with the sense of cultural property ‘going back’ (*renvoyer*) usually to its homeland, for aesthetic and historic reasons.¹⁰

The fact remains, however, that ‘return’ always has wider implications, usually associated with righting past wrongs. Hence the idea of ‘return’ not merely as ‘a bringing back’ but also in a restorative sense, implying a process of healing.

The ‘chronicles’ of Saartje Baartman

It has been averred that a particular facet of the North-South relations discourse in its cultural context relates to the action of cultural return. Such return plays an important role both as a restorative and as a creator of an awareness about cultural sensitivity among people. The return becomes even more important in the process of healing when

⁸ J Greenfield, *The Return of Cultural Treasures* (1995) 256.

⁹ *Ibid.*

it is the return of the human remains of a person belonging to a particular group of people. This is particularly true when the particular person was during her life subjected to the most grossly undignified treatment through being paraded as an 'attraction' at fairs in Europe as living proof of the difference between the people of the north (the western world) and the south (the non-western world).

According to Susie Prestney,¹¹ the narrative of Saartje Baartman, known in England and France as the 'Hottentot Venus', personifies to a large degree the emphasis on difference between north and south. Prestney follows the life and times of Saartje Baartman and accounts how her particular physical attributes served posthumously to explain differences (grounded in sex, sexuality and race) between peoples from the north and the south, medically or scientifically. Thus Saartje Baartman's history largely encapsulates the complex issues of European racial prejudice, coupled with sexual fascination with and about indigenous people from non-western countries.

Saartje Baartman, a woman of Khoi descent, was born in 1789¹² in the Eastern Cape and migrated to the vicinity of what is today known as the 'Cape Flats' a few years later. In 1810 she met a naval doctor, William Dunlop, who was fascinated by her (for him), curious appearance¹³ and he persuaded her to accompany him to England to be subjected to scientific research. However, the 'scientific research' took the form of a 'reign as a popular attraction'.¹⁴

She was paraded at shows at 225 Piccadilly, at Bartholomew Fair and Haymarket in London:

[234] As an exhibit, she was displayed on a small stage with a cage at the end of it, and clothed in a tight-fitting dress of a colour as nearly resembling her skin as possible so that the exact form of her body could be seen by the viewing public. When ordered to do so, it

¹⁰ Ibid 257.

¹¹ See, eg, S Prestney, 'Inscribing the Hottentot Venus: Generating Data for Difference' in Darby, above n 4, 86.

¹² Quite ironically the year of the French Revolution with its battle cry of 'Liberty, Equality and Fraternity' none of which were accorded to Saartje Baartman.

¹³ Notably, in today's medical terms, her 'steatopygia' (excessive fatness of the buttocks). See *Collins English Dictionary: Millennium Edition* (1998). Also her large genitalia, notably her 'elongated labia minora or nymphae': Prestney, above n 11, 92.

¹⁴ Prestney, above n 11, 90.

is said that she would come out of the cage and parade herself before the audience, who became fascinated with what they saw as her most intriguing feature.¹⁵

According to archival records, she was taken to Paris in 1814 (by whom is not mentioned) and again paraded as a curiosity. In March 1815, Georges Cuvier, a social anthropologist and according to historians the ‘father’ of the science of comparative anatomy, arranged for her to be examined by physiologists and even zoologists. Saartje Baartman died towards the end of 1816, probably of either smallpox or syphilis, given that the records indicated that she drank heavily and worked as a sexworker in Paris. However, Saartje’s humiliation and dehumanised treatment continued after her death. Cuvier obtained official permission to dissect her. He made several plaster casts of her body, ‘including separate replicas of her skeleton and brain, along with a waxen mould of her genitalia’ and ‘his finishing touch to his dissection of the Hottentot Venus was to present her actual anus and genitalia to the French Academy of Medicine’.¹⁶

Saartje Baartman’s remains — including the plaster cast of her body, parts of her skeleton and her brain and genitalia (preserved in formaldehyde) — were kept in the *Musée de l’Homme* (‘Museum of Man’) in Paris. There her remains were put on display and fascinated the public till 1975 (more than 150 years after her death). It was only during that year that the museum’s curators removed her remains to the museum’s archives where ‘[i]n a more profound sense, they constitute a case of frozen imperialism: a contemporary reiteration of nineteenth-century ideas about racial and cultural hierarchies’.¹⁷

The return as ‘laying the past to rest’

Shortly after South Africa’s political change to a constitutional democracy, a campaign was launched in 1995 by the National Khoisan Consultative Conference — a body representing Khoisan and Griqua peoples, the true ‘First Nation’ of South Africa — for the return of the remains of Saartje Baartman to her place of birth. (The campaign, incidentally, coincided with the nineties being designated by the United Nations as the

¹⁵ *Ibid.*

¹⁶ *Ibid* 90–1. Of this ‘presentation’ Prestney concludes (93): ‘Thus, when Cuvier presented the anus and genitalia of the Hottentot Venus to the French Academy of Medicine, he was effectively offering up, in the name of science, what was held to be anatomical evidence which established both the inherent abnormality and the inferiority of the black race’.

decade of the indigenous or 'first' peoples.)¹⁸ Thus Saartje Baartman became at last (one hundred and eighty years after her death and twenty years after her remains were removed from the public gaze to the archives of the 'Museum of Man') a positive political cause through becoming a symbol for her people for asserting their place in South African society. The campaigners enlisted the help of persons such as the first democratically elected president, Nelson Mandela, and the well-known paleoanthropologist, Philip Tobias, as well as the Minister of Arts, Culture, Science and Technology, for the return to South Africa of the remains of Saartje Baartman. The (then) president, Nelson Mandela, broached the subject of her return when the (then) President of France, François Mitterrand, visited South Africa. During that visit the South African Minister of Arts, Culture, Science and Technology, Ben Ngubane, also mooted the matter of the return of the remains at a press conference attended by the French Minister of Co-operation, Jacques Godfrain.¹⁹

[235] Yet it took another seven years for the remains of Saartje Baartman to return to South Africa to be a reality since amendments to French museums and heritage laws were required. It has also been averred that the French were initially reluctant to 'open what they saw as a Pandora's box that could lead to plundered artefacts from across the globe, and now filling museums, being returned'.²⁰ On Thursday, 21 February 2002, the French National Assembly voted unanimously in favour of the 'Baartman bill' piloted through the National Assembly by the Minister of Research, Roger-Gerard Schwarzenberg to 'repatriate' the remains of Saartje Baartman to South Africa.²¹

Newspapers reported on the return of Saartje Baartman with the words: 'She's home at last after 192 years of public humiliation in Europe' and 'Some dignity at last for

¹⁷ Ibid 102.

¹⁸ 'Bring back the Hottentot Venus', *Mail and Guardian*, 15 June 1995 accessed at <www.sn.apc.org/wmail/issues/950616/wm950615-12.html> Incidentally, the Khoisan, the people from whom Saartje Baartman descended, was recognised by the United Nations as an indigenous 'First Nation' in the mid-1990s.

¹⁹ Press release, 'Discussions to retrieve Saartje Baartman from France' accessed at <www.polity.org.za/govdocs/pr/2002/pr0223.html>.

²⁰ C McGreal, 'Coming Home', *The Guardian*, 21 February 2002.

²¹ J Henley, 'France Sends Home Freakshow Remains', *The Guardian*, 20 February 2002. See too the press release issued by the South African Embassy in Paris on 23 February 2002 entitled 'French parliament adopts legislation on repatriation of Saartje Baartman' accessed at <www.polity.org.za/govdocs/pr/2002/pr0223.html>.

Saartje.²²

Perhaps the end to the chronicle of Saartje Baartman is best summarised in the words of Cecil le Fleur, a Khoisan-rights activist:

Saartje Baartman is a symbol of the oppression and subjugation, not only of women and the Khoisan people, but of all First Peoples. We will give her a decent burial. Her grave will be in a prominent place that will stand as a memorial against humiliation and injustice everywhere.²³

²² L Oliver, 'Cape the Final Resting Place for Saartje', *Pretoria News*, 4 May 2002 1; and G Crook, 'Some Dignity at Last for Saartje' *The Star*, 30 April 2002, 3.

²³ P Hawthorne, 'Laying the Past to Rest: As a Tribal Woman's Remains are Returned to Africa, Two Centuries of Colonial Prejudice come to a Close', *Time*, 22 April 2002.