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Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey

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The modern Turkish state arose from remnants of ancient civilizations. The remains of these civilizations represent Anatolian history and reveal much about life in ancient times.

In its many excavated sites, Turkey is much like an open air museum. However, there are still some archaeological sites to be explored. Preserving and protecting this rich cultural heritage is a monumental task. In this respect, Turkey believes that its own cultural heritage should be protected and preserved in Turkey. Unfortunately, Turkey's cultural heritage has suffered severely in modern times from plunder and pillage. In this respect, it is similar to other culturally rich but economically poor countries. Many Turkish monuments have been dismantled and destroyed, and precious cultural objects have been removed from its lands, only to reappear in Western museums and in private collections.

In the case of the recovery of cultural property by the country of origin, a major problem is whether the plaintiff can prove ownership rights in the object. The plaintiff's claim is typically based on legislation that vests ownership over the object in the state upon the object's discovery. This happens without the necessity of acquiring actual possession. In other words, the Turkish state has absolute rights of ownership and possession at all times after discovery (even before discovery) without performing any further affirmative act of appropriation.

Such laws are generally known as blanket legislation or umbrella statutes. Countries that have many archaeological sites, such as Turkey, Italy, Greece, and Mexico, prefer to enact such blanket legislation. Under the Turkish blanket legislation, once an object is covered by law, it becomes state

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property. If the object is removed illegally from the country, it is considered to be stolen property.

International jurisprudence recognizes state ownership established by law and treats states as owners if their legislation so designates. In this respect, two requirements have to be fulfilled. First, the legislation of the the country of origin must clearly establish state ownership of specified cultural property. Second, the object in dispute must have been found within the state's territory. If the country of origin could not prove these requirements in the foreign court, its action to recover the item will fail. In this respect the attitudes of foreign courts are vital. When foreign courts do not interpret the legislation of an art-exporting country as it is adopted in the country of origin, the court will not compel the return of the cultural object.

Turkey has had various experiences with repatriation of its cultural objects. For example, Turkey's legislation relating to cultural property has been recognized in US Courts; however, it has been denied in Swiss Courts.

Before 1869 the legal status of antiquities was regulated only by Islamic jurisprudence. The first such decree specifically regulating antiquities was adopted on February 13, 1869.¹ This decree required permission, when requested, to search for antiquities. It allowed free trade in antiquities within the Ottoman territory but prohibited exportation. The finder of antiquities on his land was considered the owner. So, the 1869 decree allowed private ownership over antiquities found within the Ottoman territory – within limits.

Having realized that the 1869 Decree was insufficient in terms of state ownership, the Ottoman State promulgated a new decree in 1874. This decree adopted for the first time the principle of state ownership of *undiscovered* antiquities on Ottoman soil. The 1874 decree prohibited excavating for antiquities without the permission from the Ministry of Education and the consent of the landowner.

On the other hand, the decree provided that one-third of antiquities discovered in legal excavations was to be kept by the State, while one-third was to be given to the land owner, and the remaining one third to the finder.

¹ See Özel, Sibel: Uluslar arası Alanda Kültür Varlıklarının Korunması, İstanbul 1998, s. 69 vd; Özel, Sibel and Ayhan Karadayi, "Laws regarding the Protection of the Cultural Heritage of Turkey", in : THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE : PROTECTION, TRANSFER AND ACCESS, Evanston, IL : Kalos Kapp Press, 1998. Chapter: 20.

If the finder was also the landowner, two-thirds of antiquities found on his land was to be given to the landowner-finder. The state also had the right to decide whether the division was to be made in res or by value.

In sum, the 1874 decree established state ownership for undiscovered antiquities, but allowed private ownership for some portion of legally excavated antiquities. On the other hand, the objects found in clandestine excavations were to be seized by the state.

In 1884 another decree on antiquities was enacted. In this decree, the Ottoman state declared itself the owner of *all* antiquities. Therefore, there was an absolute prohibition on the sale or transfer of antiquities found anywhere within Ottoman territory. Antiquities found in legal excavations belonged to the Imperial Museum. Those who participate in such excavations could retain only photographs and moulds.

The decree made one exception to state ownership for those items discovered fortuitously in private lands: one-half of such antiquities fortuitously discovered on private land during the construction of irrigation canals, buildings and so on would be given to the land owner. The state could choose the pieces it wanted and could buy even those pieces given to the land owner. Thus, the 1884 decree adopted state ownership for all antiquities found in the Ottoman territory, but it made only one exception for those accidentally found on private land.

A major change occurred in 1906 with the adoption of a new decree on antiquities. The 1906 decree declared for the first time that all antiquities found in or on public or private lands were state property and could not be taken out of country. As a result, all newly discovered antiquities became state property by operation of law, *ipso jure*, at the time of discovery and no further act of acquisition was needed. Since the decree did not apply retrospectively, antiquities already in private hands in accordance with the pre-1906 decree remained private property.

After the formation of the Republic of Turkey in 1923, the Turkish Civil Code was adopted in 1926. Even so, the 1906 Decree was maintained in full force and effect until 1973. The 1973 law preserved the same principle of state property. It again declared that all antiquities discovered in or on private or public lands in Turkey were the property of the state.

The current Turkish Law on antiquities was enacted in 1983. It is called the Law on the Protection of Cultural and Natural Property. This law law employs for the first time the phrase “cultural and natural properties requiring protection” instead of “antiquities.” Actually, they both include the same objects. The 1983 law preserves the principle of state ownership of newly found antiquities contained in the 1906 decree and the 1973 law. Art 5 of the 1983 Law states that:

Movable and immovable cultural and natural properties requiring protection that are known to exist or may be discovered in the future on immovable properties belonging to the State, public institutions and entities and natural and jurisdic persons that are subject to the provisions of private law, qualify as state property.

This time, Art 5 employed the term “qualify as state property” rather than “are state property”. But does it make any difference? Did the Turkish legislature want to change the concept of the principle of state ownership?

That was the argument advocated by the defendant in the Elmalı Hoard Case in the US courts. In this case more than two thousand ancient Greek and Lydian coins were found in a clandestine excavation in Elmalı, north of Antalya in April 18, 1984.² The looters were arrested and confessed everything.³

The hoard was removed from Turkey and in 1984 the defendant, Oaks Partners (Jonathan Kagan, Jeffrey Spier, William Koch), bought 1,746 coins for \$2.7 million. It began selling them in 1987. A dealer in Switzerland purchased 60 coins for more than \$1 million. He resold most of these to the Numismatic Fine Arts (NFA) Gallery owned by Bruce McNall. NFA was to auction ten of the coins in March 1988, and described them in its sale catalogue as “South Anatolia (Decadrachm) Hoard, 1984.” Lawyers for Turkey stopped the sale of the coins and McNall turned them over. McNall had advertised the source of the coins openly. As to provenance, at a conference at Oxford University, Sally Fried stated in her presentation that the origin of the find was somewhere in Southern Anatolia.⁴ Therefore the provenance of the coins was undoubtedly Turkey.

² See ROSE/ACAR: “Turkey’s War on the Illicit Antiquities Trade” *ARCHAEOLOGY*, March/April 1995 pp. 50, et seq.

³ *Ibid*, p. 52.

⁴ *Id*.

Turkey asserted its ownership rights over the coins and brought an action against the defendant for the recovery of the objects. As the provenance of the coins from Turkey was so clearly established, the defendant tried a different tactic. He claimed that the Turkish Republic had no ownership rights over the coins and therefore it had no standing to sue. The Defendant claimed that Art 5 of the Turkish law did not establish state ownership; rather, it provided mere export control because it used the term “*qualify as state property*” rather than “*are state property*.”

The Massachusetts court hearing the case decided that the issue of using the term “*qualify as state property*” rather than “*are state property*” was not relevant to the case. The court examined Art 4,24,25, of the law and concluded that Turkish law provided state ownership without actual necessity of possession and that the Turkish Republic had a direct and unconditional right to possession of the coins under the law; therefore, it had standing to sue.

The Massachusetts court construed the Turkish legislation correctly. The Turkish legislature never contemplated private ownership for antiquities found in Turkey. This has never been claimed in Turkey. Additionally, in the Turkish language, both terms mean essentially the same thing. Then end result is that the state is the owner. It is unfortunate that this case was eventually concluded by the agreement of the parties out of court, as any precedential value of the case was lost.

There is another US case which was settled by the parties. In the Croesus, Lydian or East Greek Treasure case, Turkey initiated a legal proceeding against New York’s Metropolitan Museum of Art for recovery of 363 artifacts-gold and silver vessels and jewellery, a pair of marble sphinxes, and wall paintings. The hoard, which came from sixth century BC burial mounds in the Manisa and Uşak regions of Turkey were plundered in early 1966. The looters were arrested and prosecuted. Some confessed, and later assisted in attempts to trace the hoard.⁵

The looted treasure was smuggled out of Turkey and sold to dealers in Switzerland and New York. The Metropolitan Museum purchased the antiquities between 1966 and 1970 for \$ 1.5 million. It made no formal

⁵ See ROSE/ACAR: “Turkey’s War on the Illicit Antiquities Trade” *ARCHAEOLOGY*, March/April 1995 pp. 46 et seq.

announcemant of the purchase, and provided no information about the hoard in its central catalogue.⁶

An article in the BOSTON GLOBE hinted that the museum had acquired a Lydian treasure. Upon the information contained in this article, Turkish authorities requested information from the museum; however, it did not reply. The museum displayed some pieces from the hoard in the show of “Masterpieces of Fifty Centuries.” Some pieces were omitted from the exhibition catalogue and were returned to the museum’s vault after the show closed. A second inquiry by Turkey also failed to receive a response.⁷

In 1984 the Metropolitan Museum finally displayed more than 40 of the objects as a group, labelling them “The East Greek Treasure,” and described them in a catalogue titled *A Greek and Roman Treasure*. The Turkish authorities then established that the museum pieces were Lydian and were similar to the objects they had recovered from thieves.⁸

Turkey rechecked the tumuli where the items were looted, reinterviewed the looters, and obtained the applicable US customs documents. Turkish authorities reached the conclusion that the Metropolitan’s treasure had indeed been removed from the tombs on Turkish soil. Wall paintings were measured and shown to match gaps in the walls of one tomb. Looters of the tombs described particular pieces at the Metropolitan that they had stolen. Minutes of acquisition committee meetings made it clear that the museum had known the objects were illegally excavated and removed from Turkey.⁹

The provenance of the hoard was clearly established to be Turkey; therefore, the Metropolitan Museum agreed to return the Lydian hoard to Turkey after a six-year legal battle. The museum had hidden the most important arcaeological artifacts for 25 years in its basement and prevented the public from seeing it. When Turkey proved that most of the objects were removed clandestinely from the tombs in the Uşak Region and some museum staff members were aware that their provenance was controversial¹⁰ the museum had to agree to return the objects before the court concluded the case.

⁶ Ibid, at 46.

⁷ Id.

⁸ Id.

⁹ Id., at 47.

¹⁰ Id., at 48.

Unfortunately, things did not work out in the same way in Swiss courts. In *Turkish Republic v. the Canton of the City of Basel and Professor Peter Ludwig*, Turkey sought possession of five gravestones that had been found in Turkey and were displayed at the Antiquities Museum in the City of Basel.¹¹ Turkey based its claim on Turkish legislation providing that all antiquities found in Turkey are the property of the state.

In the Swiss case, Turkey asserted that the five gravestones came from Phrygia (a part of Asia Minor now within the territory of modern Turkey) and two of them were actually seen and photographed by Professor Drew-Bear in the village of Gökçeler, shortly before 1973. Turkey claimed that under Art 697 of the Turkish Civil Code (TCC), all antiquities found in Turkey are state property and, therefore, the gravestones should be returned to Turkey.

The trial court found that the date of excavation of two gravestones seen and photographed by Professor Drew-Bear was uncertain because Professor Drew-Bear did not actually see the excavation of the objects. Rather, he saw the gravestones among a pile of excavated materials and this gave him the impression that they had been excavated recently. Peasants told him that the material had been excavated from a nearby field a short time before. The court concluded that there was no evidence of recent excavation and the statements of the peasants might have been to mislead Professor Drew-Bear.

Then the court examined Art 724 of the Swiss Civil Code (SCC). Why turn to the SCC? In an interesting turn, the Turkish Civil Code of 1926 had been derived in part from the SCC. Art 724 of the SCC was equivalent to Art 697 of the TCC. Under the SCC, most Swiss scholars agree that the canton becomes the owner *ipso jure* without any affirmative act of acquisition. There was one dissenting opinion in the Swiss Doctrine. According to Liver, the ownership of newlyfound objects does not pass the Canton *ipso jure*, but rather the Canton has a right to acquire the object. In this respect the Canton may choose to exercise its right or may choose not to exercise its right. The trial court adopted Liver's opinion and concluded that Turkey had not exercised its right to acquire the objects in question in this case.

¹¹ See Özel, Sibel: "The Basel Decisions: Recognition of the Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin" 9 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY, (2000) pp. 315-340.

The court went on to examine the 1906 decree and the 1973 law and came to the conclusion that Turkish laws on antiquities did not provide *ipso jure* ownership for the state. Furthermore, the court stated that even if Turkish law had provided *ipso jure* ownership rights, Turkey could not have taken the advantage of *ipso jure* ownership because Turkey waived its ownership rights through inactivity. The Swiss federal court also stated that ownership vested first in private persons, so that it was necessary for the state to perform an act of acquisition in order to exercise its ownership rights. The court concluded that Turkish law conferred quasi-ownership but not state ownership *ipso jure*.

This interpretation of blanket legislation is contrary to the protection of cultural property. If one were to adopt the Swiss interpretation, the country of origin would never be able to recover antiquities that were clandestinely excavated and smuggled to another country because it did not perform any affirmative act of acquisition for those objects. According to Swiss courts, Turkey lost its ownership rights through inactivity, because it did not inform clearly private persons involved in clandestine activities, and within a reasonable time, that it desired the return of looted and smuggled objects. The Swiss court's interpretation would thus encourage illegal trafficking of cultural property because the country of origin can never prove its ownership rights, since it never had possession in the first place.

This interpretation prompts many questions. Who are the private claimants in this case? To whom should the state return the gravestones? Is it Prof Drew-Bear? Did the current possessors of the gravestones acquire ownership legally? These questions have never been asked, and the legal basis of the acquisition of the gravestones by the Museum of Antiquities of the City of Basel has never been adequately explained.

In this case, state ownership established by Turkish blanket legislation was simply not recognized and the laws of the country of origin were not construed correctly. Further, the courts came to the conclusion that the country of origin waived its ownership rights for the objects in question, contrary to the laws of the country of origin.

To conclude, one can see from these cases that state ownership by law is a very important step for the protection of cultural property. Furthermore, blanket legislation must be recognized and interpreted correctly in the foreign courts. If courts fail to do so, plundered objects may never return to their countries of origin.