CASE NOTES
The Basel Decisions: Recognition of the Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin

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1 INTRODUCTION

In *Turkish Republic v. The Canton of the City of Basel and Prof. Dr. Peter Ludwig*,[1] the plaintiff, the Republic of Turkey, sought possession of five gravestones that had been found in Turkey and were displayed at the Antiquities Museum in the City of Basel. The plaintiff based its claim on Turkish statutes that provide that all antiquities found in Turkey are the property of the state.

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

The issue in the case was whether the Swiss courts should recognize and apply the Turkish law on antiquities. Each of the Swiss courts hearing the case (the trial court, the court of appeals, and the federal court) agreed that Turkish public law should be recognized by the Swiss courts but denied the Turkish claim to recover the gravestones in question for other reasons. In this article, I will examine the reasoning of each court, evaluating and discussing the various approaches taken. For contrast, I look briefly to the treatment of similar issues in U.S. courts and test the Swiss courts' decisions against the rulings in these cases. I then revisit Turkish law in order to demonstrate that the Swiss courts misinterpreted Turkish law and thus incorrectly rejected Turkey's claim of *ipso iure* state ownership.

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2 THE SWISS COURT DECISIONS

2.1 THE TRIAL COURT DECISION

The trial court found that the date of the excavation of the two gravestones seen and photographed by Professor Drew-Bear was uncertain. According to the court, Drew-Bear did not actually see the excavation of the objects; instead, 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 those materials had been excavated from a nearby field by a tractor a short time before. Details on the stones had not been cleaned. Drew-Bear later stated that, looking at the position of the gravestones, he thought the stones were being used as construction material or a ladder. The court concluded that this might mean that the dirt on the stones was a result of this contemporary use and not evidence of recent excavation and cautioned that the statements of the peasants might have been made to mislead Drew-Bear. For these reasons, the court refused to accept Drew-Bear's testimony, in the absence of additional, corroborating evidence, as adequate proof of recent excavation.

The trial court also examined Article 724 of the Swiss Civil Code (SCC), which is similar to Article 697 of the TCC. The analytical literature expresses two distinct positions with regard to Article 724. According to Leeman, newly found antiquities become the property of the canton *ipso iure*.[2] According to Liver, the ownership of a newly discovered object does not pass to the canton *ipso iure*, but rather the canton has a right to acquire the object, which it may choose not to exercise.[3] The trial court adopted Liver's opinion, concluding that Turkey had not exercised its right to acquire the objects in question in this case. Professor Drew-Bear saw two of the gravestones and notified the Turkish authorities in 1973; he saw them again in the 1980s in Switzerland and gave notice to Turkey of this sighting. Turkey only then initiated proceedings for recovery of the gravestones. The court held that Turkey had failed to exercise its power of acquisition over these two gravestones upon the 1973 notification by Drew-Bear, and that (because there was no evidence that they had been seen in Turkey) Turkey's power of acquisition was not proven for the other three stones; therefore, according to the court, Article 697 of the TCC did not apply.

Having foreclosed the applicability of Article 697 of the TCC, the trial court went on to examine other laws. As the objects in dispute had been seen (and therefore found) before 1983, the 1983 Law on the Protection of Cultural and Natural Property could not apply. For the 1906 Decree on Antiquities to apply, the state would have had to prove by expert evidence that the stones had been found between 1906 and 1926.[4] However, the court went on to find that the 1906 Decree did not render the gravestones the property of the Turkish State. According to the

court's reading, Articles 4 and 10 of the 1906 Decree explained what should be considered property of the Ottoman State. Under Article 11, artifacts found during clandestine excavations were to be seized by the State. Under Article 12, any artifacts that were brought to light during permissible excavations but had no museum value were to be transferred to the owner of the land. Under Article 31, the General Directorate of the Imperial Museums was entitled to buy any artifacts that he thought were important for the museum to possess. Although the court suspected that the translations of the 1906 Decree might be inaccurate, it nevertheless concluded that the Decree did not set forth an *ipso iure* acquisition of the ownership of antiquities.

The court also examined the 1973 Law on Antiquities.[5] In accordance with this law, anyone who finds a movable antiquity must notify designated state officers within ten days. Such notification must then be forwarded by the competent authority within a further ten days to the Ministry of National Education; the Ministry must then complete the required proceedings within a year. Under Article 20, these proceedings consist of registering the antiquities and arranging for their placement in museums.

Ultimately, the trial court decided that the Turkish law of cultural property does not provide *ipso iure* ownership for the state. Futhermore, Turkey could not have taken advantage of *ipso iure* ownership, even if the Turkish laws had so provided, since Turkey waived its ownership rights through inactivity, and where and when the gravestones were found was uncertain.

2.2 THE COURT OF APPEALS DECISION

The court of appeals upheld the trial court's decision on the narrow ground that Turkey had lost any rights that it might have had to the gravestones because of its inactivity.

First, the court of appeals decided which law would be applicable in the case. Article 100 of the Swiss Private International Law Statute (IPRG) provides that the acquisition and loss of *in rem* rights to movable property are subject to the laws of the state in which the item was located at the time of the actions from which the acquisition or loss is derived. Thus, the court stated that Turkish law should be applied as determined *ex officio* by the judge in accordance with Article 16/I of the IPRG.

The court of appeals then examined the legal nature of Article 697 of the TCC in order to determine whether a public law of this type could be applied in the Swiss courts. Having referred to the legal commentaries and Articles 13 and 19 of the IPRG, the court decided that Article 697 of the TCC should be applied to the case despite its public law character.

After briefly mentioning the specific Turkish laws regarding cultural property in addition to Article 697 of the TCC (such as the 1906 Decree, which was super-

FIGURE 1. TOMBSTONE OF BERONEIKE. WHITE MARBLE STONE, 147 X 56 X 18–24 CM
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seded by the 1973 Law on Antiquities, which was in turn superseded by the Law on the Protection of Cultural and Natural Property of 1983), the court of appeals discussed the question of which of the various laws were in effect when the gravestones were excavated from within the sovereign territory of the Republic. The court noted the possibility that the gravestones originally came from Phrygia, a part of Asia Minor within the territory of modern Turkey, but decided that their provenience had not been sufficiently proven. According to the court, the only important points were whether and when the stones were excavated within the territory of Turkey. The court considered the testimony of Professor Drew-Bear to be credible; therefore, the two gravestones viewed and photographed by Drew-Bear were assumed to be located in Turkey in the year 1973. During his examination, Drew-Bear stated that he had the impression that the stones had been excavated recently, just before 1973. The question of whether that was sufficient proof of a post-1926 excavation was left open by the court. As such, the court made no further comment regarding the three stones that Turkey was claiming solely on the basis of their stylistic similarity to the two stones that Professor Drew-Bear saw.

The court of appeals did not want to discuss the substance of the case and stated that the questions of whether the State acquired *ipso iure* ownership over newly found ownerless items, whether transfer of *in rem* rights over the item to the State as public property requires an appropriate deed of dedication, and whether the State merely has a right of appropriation which it must exercise to become the owner were not of decisive significance and could, therefore, remain unanswered. According to the court, even if the objects were covered by Article 697 of the TCC, it was still not certain that the Turkish State would, in fact, have exercised its right of ownership or acquisition, or whether it would have preferred to release the object in question. Such a release might occur if existing financial resources were insufficient for the required conservation and scientific work, if the appropriate space and professionally trained personnel were lacking, or if the object in question was not considered to have any particular scientific or artistic importance. The court suggested that, in the interests of law and order, the Turkish State was required to clearly inform any private persons involved (the finders and the owners of the land), in an appropriate form and within a reasonable period of time, whether it was asserting or waiving its rights of ownership or acquisition over the object found; otherwise, ownership of new finds could float in legal limbo for decades, which would be irreconcilable with the nature of ownership. The court of appeals concluded that this requirement of law and order was a part of Turkish law as early as the 1906 Decree. For example, under Article 12 of the 1906 Decree, objects that had no museum value were required to be returned to the owner of the land, presumably, in the court's opinion, within a reasonable period of time; also, specific procedures for keeping or returning objects were es-

tablished by Article 20 of the 1973 Law. However, the court left undecided which of the two laws was applicable to the gravestones viewed by Drew-Bear in 1973 and now in dispute.

In conclusion, the court of appeals stated that the issue of whether the Turkish State waived its *ipso iure* right of ownership or never acquired ownership because it failed to perform an act of acquisition was irrelevant to the determination of the case. According to the court, the plaintiff had lost all rights to the stones in dispute through inactivity.

2.3 THE FEDERAL COURT DECISION

The Turkish State appealed the case and had recourse to the *staatsrechtliche Beschwerde* in the federal court; it claimed that the Turkish legislation had not been interpreted properly, but rather that the Swiss rule had been applied in place of the Turkish rule. The federal court ruled that its legal competence was limited to the application of foreign law in non-proprietary cases. As the case related to a proprietary dispute, the federal court would not discuss whether Turkish law had been applied correctly in the court of appeals.

The plaintiff also had recourse to the staatsrechtliche Beschwerde under Article 4 of the BV (Federal Constitution of Switzerland). The Turkish Republic asked to have the previous judgment released and remanded to the court of appeals. However, the federal court stated that while the staatsrechtliche Beschwerde had the power to release the judgment, if the plaintiff's request was accepted, the trial court, rather than the court of appeals, would have to rehear the case.

In its petition, Turkey asserted that its rights under Article 4 of the BV had been violated. The plaintiff's claim was based on its position that the origin and the date of excavation of the gravestones were proven, despite the disagreement of the court of appeals. The plaintiff argued that it was invalid to distinguish between the two groups of gravestones without evidence that the three stones had not been buried or excavated around the same time. The federal court looked at the evidence that had been submitted, as indicated by the Beschwerde petition of the plaintiff, in order to determine which evidence was competent and upon which evidence emphasis had been placed by the court of appeals.

Turkey further asserted that it was untrue that the museum authorities had remained silent despite having been notified by Drew-Bear. In view of the evidence, the federal court ruled that the fact that Professor Drew-Bear had notified the Turkish authorities in 1973 was conclusive; the trial court found Drew-Bear's testimony to be credible, and he did not say that the authorities went to Gökçeler to take the stones. The plaintiff claimed that the testimony of the witness was inconclusive, because he had not been asked whether the authorities went to Gökçeler to seek out the stones, and, since Drew-Bear said nothing on this point, the case against the Turkish State was not proven. The federal court concluded that

FIGURE 2. TOMBSTONE OF TATIAS. WHITE MARBLE STONE, 157 X 85 X 82 CM
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new evidence could not be brought in the Beschwerde appeal for the violation of Article 4 of the BV; therefore, the court would not hear arguments that the court of appeals had improperly emphasized the testimony of Drew-Bear while giving no weight to the claims of the plaintiff.

In its petition, the plaintiff also claimed that the court of appeals' application of the law had been arbitrary and that antiquities found in Turkey pass into state ownership *ipso iure* and are not subject to private ownership. It simply is not possible, under Turkish law, to establish private property rights in antiquities through inactivity of the authorities, because the law requires a formal document stating that the State waives its proprietary rights over found objects. However, after considering Article 697 of the TCC together with Article 724 of the SCC, the federal court concluded that the manner in which Turkey acquired state ownership was still in dispute, and therefore it would not rule in favor of the plaintiff.

The federal court also examined the 1906 Decree and the 1973 Law and stated that ownership vested first in private individuals, so that it was necessary for the State to perform an act of appropriation in order to exercise its ownership rights. Article 20 of the 1973 Law requires that objects not included in the determination and registration proceedings be returned to the "owners." Noting the word "owners," the court declared that Turkish law conferred quasi-ownership but not state ownership *ipso iure;* it further held that the inactivity of the Turkish state, in this case, violated the legal rule that an object not being claimed by the State must be returned to the private claimant within a reasonable period of time. Therefore, the federal court declined the plaintiff's petition on the ground that the State's inactivity amounted to a constructive return of the gravestones.

3 COMMENTS

The three Basel decisions provide an interesting window onto the Swiss courts' jurisprudence on and attitude toward the concept of protecting cultural property, generally, and blanket legislation providing state ownership and export prohibitions, specifically, as a means of achieving this protection. The decisions all concluded that the inactivity of the state authorities was equivalent to returning an object, and thus state ownership, even if it had been acquired *ipso iure*, was forfeited. Despite their similar resolution of the ultimate issue in the case, the Swiss court opinions failed to illuminate many issues and exhibited differing legal mentalities.

The cases were concerned with the recovery of cultural property under the applicable law of the state of origin. The major point in dispute was whether the national government had proprietary rights in the object. The plaintiff's claim was based on legislation that vests ownership in the state of cultural property upon

discovery in or on its territory without the necessity of acquiring actual possession.[6] In other words, the state has absolute rights of proprietary ownership and possession at all times after discovery without performing any further act of appropriation. Despite some criticism,[7] blanket legislation of this sort has generally been respected by foreign courts.[8]

In fact, the aim of blanket legislation is to protect cultural property under an umbrella of state ownership before its discovery; that is, any object found in the state belongs to that state *ipso iure*, and if any such object is removed from the country without its knowledge, the object is considered to be stolen property. Typically, countries that have many archaeological sites, such as Turkey, Italy, Mexico, Greece, and others, prefer to enact such blanket legislation. Moreover, this same approach has been adopted by the United States in the Archaeological Resources Protection Act of 1979 (ARPA).[9] Under ARPA, the United States claims ownership of artifacts found on or under all land owned by the federal government and Native American tribes. Thus, the United States has enacted blanket legislation to protect its own cultural and archaeological resources.[10]

International jurisprudence commonly recognizes state ownership established by law, treating states as owners if their own law so designates. For example, the application of the National Stolen Property Act (NSPA)[11] in the criminal cases of *Hollinshead*[12] and *McClain*[13] in particular demonstrates the acceptance of the principle. The *McClain* court expressly stated that "possession is but a frequent incident, not the *sine qua non* of ownership, in the common law and the civil law."[14] In the U.S. civil action *Peru v. Johnson*,[15] the court affirmed the recognition of foreign legislation vesting ownership in the state. The opinion cites *McClain*, which stated that "the state comes to own property . . . when it declares itself the owner."[16] The Government of Peru lost its case because it was unable to establish with sufficient proof that the law vested ownership in the national government and that the objects in dispute were excavated inside the territorial boundaries of modern Peru.[17] In a more recent decision, *U.S. v. An Antique Platter of Gold*, the Federal District Court held that the Italian law vested ownership of a fourth-century (B.C.) gold phiale from Sicily in the state and that the phiale was therefore owned by the Italian government. When the phiale was imported into the United States, it was stolen property. Its import thus violated the National Stolen Property Act, and it could be seized and forfeited to the U.S. Customs Service.[18]

These cases demonstrate that a state claiming ownership in a U.S. court solely on the basis of its vesting legislation must meet the three requirements in order to recover objects removed illegally: the state's law must clearly establish state ownership of specified cultural property; the objects in dispute must have been found within the state's territory; and the objects in dispute must have been found while the legislation vesting ownership in the state was in force. Looking again to the Basel cases, these conditions appear to have been met.

3.1 IS TURKEY THE OWNER OF CULTURAL PROPERTY FOUND WITHIN ITS TERRITORY?

The Turkish state, which is founded on the lands of ancient civilizations, has utilized a state-ownership approach to cultural property found within its territory since the nineteenth century. In modern times, the Turkish state employs blanket legislation to achieve state ownership of cultural property. Before analyzing which Turkish law should have been applied by the Swiss courts in the Basel case, I will provide an historical overview of the Turkish laws relating to antiquities, discussing especially those provisions dealing with ownership.

The Ottoman state, the predecessor of the Turkish republic, enacted a number of laws relating to antiquities found within its territory. The first such measure was apparently the 1869 Decree on Antiquities.[19] This Decree acknowledged the importance of the protection of antiquities in its preface and stated:

> [T]here are antiquities everywhere in the Ottoman territory and sometimes very valuable ones are found. Those must be turned over to the museum founded in Istanbul. So far the law has been that when a pair of antiquities was found, one was to be given to the state, and upon satisfaction of that condition, permission to search for antiquities would have been given. However, pairs of antiquities have rarely appeared and some have been destroyed. It is obvious that this procedure has not fulfilled its purpose. Therefore, the museum has not been progressing. It has been necessary that better rules should be established for the search for antiquities.[20]

The 1869 Decree required that permission to search for antiquities be granted by the Ministry of Education. It further allowed free trade in antiquities within the Ottoman territory but prohibited exportation thereof and gave the state a right of preemption (Articles 1–2). Ancient coins, however, were exempted from the export ban in Article 4. Article 3 stated that anyone who finds an antiquity in his land shall be considered the owner. Thus, this Decree established private ownership over antiquities found within the Ottoman territory.

Having realized that the 1869 Decree was insufficient with respect to ownership, the Ottoman state promulgated a new decree in 1874.[21] This Decree adopted the position that undiscovered antiquities, wherever they were, belonged to the state. The 1874 Decree prohibited excavating for antiquities without the permission of the Ministry of Education and the consent of the landowner. In the absence of permission, the finds were to be seized by the state, and the finders were subject to imprisonment or fines under Article 7. However, those who found antiquities in legal excavations were entitled to keep one-third of the findings. The second third would go to the landowner, while the last third remained in the ownership of the state. If the finder was also the landowner, two-thirds of the find went to him (Article 3). It was for the government to decide whether the division

would be made *in res* or by value (Article 5). With respect to exportation, the Decree allowed finders to export antiquities left in their possession with the permission of the state (Article 32). Illegally exported objects, however, were to be seized at customs in accordance with Article 34. In sum, the 1874 Decree established state ownership for undiscovered antiquities but allowed private persons to retain a portion of antiquities found legally. On the other hand, those objects found in clandestine excavations were not allowed to become private property at all—they were to be seized by the state.

In 1884, another Decree on Antiquities was enacted.[22] In this Decree, the Ottoman state clearly declared itself the owner of all antiquities. In accordance with Article 3, antiquities discovered or to be discovered within the Ottoman territory, or those which appear within the sea, lakes, and rivers, belong entirely to the state. Therefore, there was an absolute prohibition on the exportation of antiquities found within Ottoman territory (Article 8). Article 12 unequivocally stated that antiquities found in legal excavations by permission of the state authorities belong to the Imperial Museum; those who participate in such excavations can have only photographs and moulds. Objects found in clandestine excavations were to be seized, and if any objects were destroyed, the finder was required to compensate the state for the lost value (Article 13). The Decree made an exception to state ownership for those objects found fortuitously in or on private lands. Under Article 14, one-half of antiquities fortuitously found in or on private land during the construction of irrigation canals, conduits, buildings, and so on would be given to the landowner. The state, however, could choose the pieces it wanted and had the ability to buy even those pieces given to the landowner. Thus the only exception to state ownership under the 1884 Decree was for antiquities accidentally found in private lands.

The 1906 Decree on Antiquities, the last measure regarding antiquities enacted in the Ottoman state, remained in effect in the Turkish republic until 1973.[23] The 1906 Decree went a step further than the 1884 Decree, setting forth the principles that were to become the model for the republic's laws relating to antiquities. With this Decree, the state declared itself clearly and unequivocally to be the owner of antiquities found within its territory. Article 4 of the 1906 Decree provided that

> [a]ll monuments and immovable and movable antiquities situated on land and Estates belonging to the Government and to ordinary citizens and different communities, the existence of which is known or will hereafter become known, are the property [*malidir*] of the Government of the Ottoman Empire. Consequently, the right to discover, preserve, collect and donate to museums such objects/works of art belongs to the Government. The provisions of this Article apply as well to all movable and immovable Islamic antiquities.

The ownership established by Article 4 of the 1906 Decree is an *ipso iure* ownership; that is, upon discovery, the antiquities became state property by operation of law, without a further act of acquisition. Since the Decree was not retroactive, antiquities already in private hands in accordance with the pre-1906 decrees remained private property. Nevertheless, after 1884, antiquities found in excavations in or on public land, and, after 1906, antiquities found in any manner whatsoever in or on private or public lands within Ottoman territory became state property by operation of law (*ipso iure*).

The 1906 Decree was considered by both the trial court and the court of appeals, but Article 4 of the Decree, which conclusively settles the issue of what rights the state has over antiquities found in its territory, was apparently not taken into account. The trial court referred to Articles 10, 11, and 12 and the court of appeals to Article 12 of the 1906 Decree. However, none of those articles supports the courts' conclusions that the state has no *ipso iure* ownership rights over the antiquities found, but rather hold that it is necessary for the state to perform an act of acquisition in order to become the owner.

Article 10 of the 1906 Decree reiterates the general rule set forth in Article 4. The Article states:

> *All* movable and immovable antiquities, yet situated on or in lands within Imperial Lands, *are the property of the Government*. Whether those antiquities are located on State lands or lands belonging to natural and juristic persons, the right to make searches, soundings, and excavations belongs exclusively to the [General] Directorate of Museums and Antiquities. However, the Ministry of Education is authorized, after consulting the General Directorate of Museums and Antiquities, to grant permission to scientific societies and foreigners who are experts [in archaeology], and, upon their request, to execute soundings and searches and excavations in any part of the Imperial Lands or in locations approved by the Ministry [of Education]. (Emphasis added.)

The conclusive language and exclusive rights articulated in this provision can hardly be interpreted as support for the courts' conclusions.

Article 11 provides for the imprisonment of those who conduct searches, soundings, and excavations without the permission of the authorities. It states further that objects found during clandestine excavations shall be seized and delivered to the museum; anyone who destroys such objects shall be required to pay their value to the state. Thus, this provision is based on the principle articulated in Article 4 and reiterated in Article 10. The severity of the penalties imposed indicates the state's seriousness with regard to its ownership and control over the search for antiquities. The provision for state seizure must be read in conjunction with "clandestine." Because excavators are required to get permits in order to excavate, the state's ownership over objects found in legitimate explorations is as-

sured; seizure is required where a clandestine excavation is discovered because it is presumed that the persons involved intended to engage in illegal acts and would not give their finds to the government voluntarily. Therefore, the Article should not be read to imply private ownership over antiquities; on the contrary, it stresses state ownership.

Another provision of the 1906 Decree referred to in the decisions is Article 12. When antiquities are turned over to the museum to be preserved, the landowner may be awarded a sum, the amount of which is set by the General Directorate of Antiquities and Museums; these awards should be understood as a reward, rather than payment of a purchase price or compensation. Article 12 provides that excavated antiquities that the General Directorate of Antiquities and Museums does not consider worthy of being preserved for scientific reasons will be given to the landowner. The state thus revokes its ownership rights or "undedicates" the object. Article 12 has nothing to do with granting property rights to private claimants. Article 4 sets forth the rule of state ownership; Article 12 only provides rewards for the landowner if the artifacts are worthy of being preserved in the museum.

Under Turkish administrative law, an object could be made public property by an act of dedication.[24] Here, Articles 4 and 10 of the 1906 Decree perform the act of dedication to the public. Beyond these statutory declarations, therefore, no further act of dedication is required in order for any antiquity, found or to be found within the Ottoman empire, to become state property. The state has an absolute right of ownership by operation of law at all times once an artifact is found. Certainly the state can revoke its *ipso iure* rights of ownership by an act of disposition, such as a statement of the General Directorate of Antiquities and Museums that a particular object is not worthy of being preserved in the museum and the subsequent delivery of that object to the landowner. However, unless or until such disposition is clearly made, any object found in the Ottoman empire remains state property, regardless of where it is located. Thus, the Decree clearly established state ownership by operation of law, and the court failed to give a convincing reason for its conclusion to the contrary.

The trial court also referred to Article 31, holding that the Article defines a state right of acquisition over antiquities. The Article provides that

> [t]he General Director of Antiquities and Museums is entitled to buy any of the said antiquities that are considered to be necessary for the museum collection and to sell and export the rest.

The "said antiquities" mentioned in the article are antiquities imported to the Ottoman state. The importation of antiquities is exempted from custom duties (Article 28), and imported antiquities can be re-exported or transported from one place to another by permission of the General Director of Antiquities and Mu-

seums (Article 29). Antiquities found within the Ottoman state are not to be exported (Article 27). Thus, Article 31 is irrelevant to the question of whether the state has the right of ownership over newly found antiquities *ipso iure* or by an act of acquisition. The Article deals only with state purchase of imported antiquities in private hands.

In 1926, during the period of the republic, the Turkish state adopted its Civil Code (TCC), which was derived from the Swiss Civil Code (SCC). Article 697 of the TCC, taking the approach set forth in the 1906 Decree, declared the Turkish state to be the owner of antiquities found within Turkish territory. The Article states:

> Rare natural objects and antiquities which nobody owns and are of significant value are the property of the Treasury (State). The owners of land in which such objects are found are obligated to give permission for necessary excavations in return for full compensation of any damages and losses ensuing from such activities. If the find qualifies as a treasure, then the discoverer and the owner of the land where it has been found can ask for an adequate reward not exceeding its value.

That article was construed in a different way in the Swiss courts than in the Turkish courts. The trial court chose to examine Swiss law construing Article 724 of the SCC, the Swiss equivalent of Article 697 of the TCC, and adopted Liver's opinion that the ownership of finds does not pass to the canton *ipso iure*, but rather that the canton has an optional right to acquire ownership. The conclusion drawn by the court with respect to the application and interpretation of the law to the dispute is both surprising and prejudiced. Since Turkey asserted ownership under its own law, the court should have examined the text of and Turkish commentary on the Turkish statute. The derivation of the TCC from the Swiss code does not mean that every provision of the TCC is precisely the same as the corresponding provision of the SCC; nor, moreover, does it mean that the interpretation should be the same as construed under Swiss law, even if the provisions are identical. Article 697 was not intended to change the assertions of *ipso iure* state ownership found in the 1884 and 1906 Decrees; rather, it should be read to be consistent with prior Turkish law.

Actually, Article 724 of the SCC may be read as being virtually identical to Article 697 of the TCC. Article 724 states that

> [w]here natural curiosities or antiquities are found which have no owner and are of considerable scientific value, they become the property of the Canton in whose borders they are found.
>
> The owner of the land in which such objects are found is bound to permit all necessary excavations, but must receive compensation for all damage caused thereby.

> The finder of the object and, if it is a treasure trove, the owner of the property on which it is found, [have] the right to a suitable reward which, however, should not exceed the value of the object found.

Article 724 states that the canton becomes the owner when the antiquities are found without any further act of acquisition, nor is there anything to imply the requirement of such an act. Only Liver suggests that the canton does not become the owner *ipso iure* but has an optional right to acquire found objects, which it may choose not to exercise.[25] However, Steinauer has refuted Liver's position, finding it to be inapposite with respect both to the text of Article 724 and to the Swiss legal system more generally.[26] In fact, most Swiss writers emphasize that the canton's ownership of found objects accrues automatically at the moment of discovery.[27] Taking into account this intrepetive consensus in favor of *ipso iure* ownership, it cannot be said conclusively that Article 724 requires an act of appropriation by the state. However, even if Liver's reading of Article 724 is accepted by the Swiss courts, this does not affect the meaning of Article 697 of the *Turkish* Civil Code and its interpretation *in Turkey*. Turkish commentators have unanimously agreed that Article 697 of the TCC vests the state with ownership *ipso iure* of newly found antiquities when they are discovered; no further act of acquisition is required.[28] Therefore, it is unwarranted and unjust that the trial court did not consider the accepted interpretation of Article 697 of the TCC but chose instead to apply a disputed interpretation of Article 724 of the SCC to strip Turkey of her property.

The court of appeals also overlooked the import of Article 697 of the TCC. According to the court, Article 697 merely determines the permissible reason for acquisition without addressing the manner of acquisition. Moreover, the court held that it was by no means certain from the statute whether the Turkish state would, in fact, exercise its rights of ownership or acquisition in any given situation. While it is true that the state might choose to release a particular object because it lacks scientific value, this is a factual determination that should not be relied upon to change the meaning of Article 697 in a way that would make it inconsistent with both the letter of the law and its spirit.

Article 697 of the TCC does not mention the manner of acquisition of ownership, precisely because it does not require any act for state ownership apart from the dedication performed by the statutes. The determination as to whether the object has scientific value is made by the authorities later on, but the ownership rights of the state begin at discovery by operation of law irrespective of the finder's knowledge of whether the object has or lacks scientific value. On the other hand, Article 697 gives no discretion to the state authorities to release the object because of a shortage of money or of personnel, as argued by the court. If the object found is of scientific value, it is state property *ab initio.* The finder may not contend that the object is not an antiquity owned by the state, since the determination of

the competent authority is binding, conclusive, and based on objective criteria. Where an object is considered to be an antiquity, the state would not choose to release it because it is too expensive. On the contrary, expensive and valuable objects are cultural property requiring protection in the museums.

Allowing objects to remain in legal limbo, subject to state ownership rights but not yet owned by the state, is an invitation to illicit exportation of cultural property. The main purpose of blanket legislation vesting the state with *ipso iure* ownership over antiquities is to protect national cultural heritage by not allowing important objects to remain ownerless until the state acts to acquire them. Once an antiquity is covered by law, it becomes state property without being reduced to the state's possession, and it remains so until the state revokes its ownership. Otherwise, the country would never be able to claim ownership when an object not yet reduced to state possession is removed from its territory, since, even under its own law, such a state would not have performed a further act of acquisition.

Thus, the conclusion of the Swiss court of appeals not only is an incorrect interpretation of the law, depriving the Turkish state of the benefit of its blanket legislation, but also turns the blanket legislation on its head, creating the very situation that provoked its adoption in the first instance.

In 1973, Turkey enacted special legislation on antiquities,[29] rescinding the 1906 Decree. However, the new law reinstated the same regime, employing similar language. For example, Article 3 of the 1973 Law states that

> [a]ll movable and immovable antiquities, and every kind of monument situated on land and estates belonging to the State or owned by natural and juristic persons, whose existence is known or to become known, are State property. The discovery of such works by means of excavations, their preservation in their original places, and the collection of movable antiquities in the museums will be effected in conformity with the present law.

But although Article 3 substantially and unequivocally answers to the question of state ownership, it was not cited in the case by any of the Swiss courts. It is obvious from this Article that after 1973 (as before) the state is the owner of antiquities found within Turkey by operation of law.

The trial court referred to Articles 4 and 20 of the 1973 Law. It read these Articles as providing in effect that first a find was to be registered and then later the state would decide whether it would accept it under Article 20, which was in conformity with the court's interpretation of Article 724 of the SCC. The court of appeals left undecided whether the 1906 Decree or the 1973 Law was applicable to the case. The federal court took note of the word "owners" in Article 20 and declared that the state had quasi-ownership, but not ownership. None of these arguments can be supported by Articles 4 and 20 of the 1973 Law. They do not undercut the state ownership established by Article 3; on the contrary, they confirm it.

Article 4 of the 1973 Law deals with the obligation of the owners or the possessors of land on which antiquities are found and of the finders of such antiquities to notify the state authorities of new finds. It states that

> [t]hose who discover antiquities, and those who know or learn that such antiquities exist on the land they own or use, are obligated to notify the nearest museum directorate or, in villages, the headman or, in subdistricts or districts, the highest local official at the latest within 10 days.

Article 20 describes the procedures that follow the required Article 4 notification. It provides that

> [a]ntiquities which have been given to the disposal of the organization of museums by the Ministry of National Education in conformity with Article 4 will be classified, registered, and taken by the museums accordingly. Those [works] among them which have been left out of classification and registration since they are not antiquities will be given back to their owners or possessors. Those which have not been taken by their owners or possessors can be sold by the state accordingly.

However, ownership does not pass to the state after the classification and registration, as the trial court asserted. Rather, the state's Article 3 *ipso iure* ownership is revoked only if the object is rejected by the museums, which is a ministerial act. Thus, only after a ministerial act of "undedication"—that is, revocation of the dedication to the public stated in Article 3—can newly found objects be subject to private ownership. Those objects that are not returned by a ministerial act to the owner or possessor of the land in which the objects were found remain the state's property at all times. Article 20 of the 1973 Law neither negates the principle anchored in Article 3 nor implies anything at all about an act of appropriation.

The arguments set forth by the federal court are based on a flawed reading of Article 20 also. The court concluded that private persons who find objects on their land become the owners of said objects; in its opinion, therefore, the state could only obtain ownership through an act of appropriation. The court based its conclusions on the second sentence of Article 20, which reads, "Those objects that are left outside the scope of the classification and registration because they are not antiquities will be returned to the owners and possessors." Although the court believed this phrase referred to the "owners and possessors" of the objects, the words actually refer to the owners or possessors of the *land* on which the objects were found. Article 20 refers to and must be construed together with Article 4. Article 4, which defines who must notify the authorities of found antiquities, places this obligation on the owners and possessors of the *land* on which the antiquity is found. Article 20 indicates to whom the objects are given if they are not retained by the state museum, and these are the same "owners and possessors"

mentioned in Article 4. Accordingly, the court's wrongly placed emphasis upon a single word caused it to jump to the conclusion that Article 20 makes newly found antiquities private property, even though this reading is inconsistent with, and is indeed contrary to, Article 3. If Article 20 were intended to establish private ownership and abrogate the principle established in Article 3, it would have had to do so expressly and clearly, but it does not. It simply deals with the delivery of objects which are not taken by the museums because they are not classified as antiquities in the first place.

Although it is not determinative of the case at issue, the Law on the Protection of Cultural and Natural Property, enacted in 1983[30] and currently in effect, demonstrates Turkey's continued commitment to a policy of *ipso iure* state ownership of antiquities. For example, Article 5 of the 1983 Law provides that

> [m]ovable 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 juristic persons that are subject to the provisions of private law, qualify as State property.

This law employs the term "qualify as State property" rather than "are State property." In the Turkish language they both indicate the same result: the state is the owner.

As seen above, the Turkish laws have provided for state ownership by operation of law of antiquities found within Turkey since 1906, and even since 1884 with only a few exceptions. Every provision of law relating to antiquities found within Turkey has reiterated the declaration of state ownership by operation of law, and no contrary interpretation has been made in Turkish jurisprudence. Therefore, it is clear that the Swiss courts' interpretations of Turkish law are wrong, unfounded, and biased.

3.2 WERE THE GRAVESTONES IN DISPUTE FOUND WITHIN TURKISH TERRITORY AND ILLEGALLY EXPORTED?

In this case, two of five gravestones in dispute were seen and photographed by Professor Drew-Bear in the village of Gökçeler in Turkey shortly before 1973. This fact is certain. The other three stones had stylistic similarities with the two stones that Drew-Bear saw. The Republic of Turkey claimed that all five gravestones came from Phrygia, a part of Asia Minor within the territory of modern Turkey. Thus, the evidence of Turkish origin, albeit mostly circumstantial, was strong, but the courts disregarded it.

The trial court surprisingly held that where and when the objects in dispute were found was uncertain. The court also stated that the date of the excavation of the two Gökçeler gravestones was uncertain, because Drew-Bear had not actually seen them

being excavated. Even though Drew-Bear's impression—based on his own observations and the peasants' comments—was that the gravestones had been excavated recently, the court declined to accept the plaintiff's arguments, since it did not consider Drew-Bear's testimony credible on this point without corroborating evidence.

The court's approach is strange and incomprehensible. It is obvious that at least two gravestones were found, seen, and photographed in Turkey.[31] Neither the exact date of excavation nor a witness who could testify to having seen the objects being excavated should have been necessary for the plaintiff to be successful in making its case: the critical issue is whether the relevant objects were found within its territory. It is not always possible to determine specifically on what date, or even in what year, and by whom, archaeological objects have been brought into the light of day. However, the fact that at least two stones were viewed and photographed by Drew-Bear within Turkey in 1973 should have been sufficient.[32]

The court of appeals also held that the only issue of importance was whether and when the stones had been excavated from the plaintiff's sovereign territory. Although it declined the other evidence submitted by the plaintiff, the court of appeals rejected the trial court's position and adopted the testimony of Professor Drew-Bear as credible but left the issue of whether the two gravestones were excavated after 1926[33] an open question. In other words, the court of appeals accepted the testimony that the two gravestones were located in Turkey in the year 1973. Since the court also acknowledged that the witness was under the impression that they had been excavated recently, there is no dispute that the gravestones were found in Turkey. Having determined where the stones were found, we must then determine the applicable law in order to decide whether they belong to Turkey.

3.3 WERE THE GRAVESTONES IN DISPUTE FOUND AND EXPORTED WHEN THE LEGISLATION VESTING THE STATE WITH OWNERSHIP WAS IN FORCE?

The issue of when an object is found is central to determining the applicable law, since a law covers only those events that occur after its effective date. In this case, the two gravestones were located by Professor Drew-Bear in 1973. Drew-Bear had the impression that they were excavated shortly before 1973. Therefore, the plaintiff set forth in the complaint that the five gravestones were excavated within Turkish territory shortly before 1973 and, in any case, after 1926. As the 1973 Law went into force on 6 May 1973 and the gravestones were assumed to have been excavated before 1973, that law does not apply in this case.[34]

Which laws were applicable before 1973 with respect to antiquities found within Turkey? There were, as discussed, two key measures: one was the 1906 Decree and the other was Article 697 of the TCC, which is still in effect at present. The two measures were in conformity with each other; they both make antiquities state

property by operation of law. Thus, since the two gravestones were found when these two laws were in effect, they became state property *ipso iure*. Attempting to refute the testimony of Drew-Bear, the trial court implied that the gravestones seen and photographed in Gökçeler might have been excavated before the laws providing for state ownership came into force. However, that conclusion would require proof that the gravestones had been excavated before 1906 (or even 1884, provided that they were not found fortuitously on private land[35]) and had remained in Turkey since then. As there appears to be no evidence to that effect, the date supported by Drew-Bear's testimony should have been accepted.

3.4 THE ARGUMENT SET FORTH BY THE COURTS: INACTIVITY

Although my analysis shows that the Turkish laws established state ownership over antiquities found within Turkish territory by operation of law[36] and that the gravestones in dispute were found in and illegally exported from Turkey, the courts rendered their judgment on the narrow ground of inactivity.

According to the courts, Professor Drew-Bear saw the gravestones in 1973 and notified the authorities. In the 1980s, he again saw them in Switzerland and gave notice to the Turkish State once again, after which Turkey initiated legal proceedings for their recovery. In the view of the trial court, the Turkish State failed to exercise an act of acquisition and, therefore, waived its ownership rights by inactivity. The court of appeals adopted this approach as well, finding a link between the nature of ownership and the requirement of an act of acquisition. According to the court, it was necessary that the Turkish State clearly inform private persons involved (the finders and the owner of the land), in an appropriate form and within a reasonable period of time, whether it was asserting or waiving its right of ownership or acquisition over the object found; otherwise ownership of the object would float in legal limbo for decades, which status would be irreconcilable with the nature of ownership. The federal court, affirming this reasoning, stated that negligence with regard to such notice was equivalent to the return of the objects to the private finder. The court held that the inactivity of the State violated the general rule that an item not being claimed by the State must be returned to the private persons involved within a reasonable time.

Before discussing the allegation that Turkey was inactive in asserting its ownership, I would like to assess the court's approach. If it is assumed that the court's approach is correct, there is still the question of who the private person was to whom the gravestones should be returned. Is it Professor Drew-Bear, who notified the authorities of the find? According to the court, the inactivity of the State made the right of ownership uncertain. This is also irreconcilable with the nature of ownership and the concept of legal security, which is the reason given for why the Turkish State was not considered as the owner. If the court established private ownership for the gravestones, who then was the owner, and were the objects re-

moved from Turkey legally? Those questions were not even asked in the case, and the basis for the acquisition of the gravestones by the Museum of Antiquities of the City of Basel remained unexplored.

If the two gravestones brought to the attention of the state by Professor Drew-Bear are assumed to have been left outside the scope of classification and registration because of inactivity, the question of to whom the gravestones should have been returned would be unanswered. Since there was no private person who claimed the ownership of the gravestones, whose interest was violated because of the inactivity of the State? Even if it is accepted that inactivity of the State had waived the State's right of ownership, the gravestones would still be ownerless items, and anyone could claim a proprietary right in them by means of an original acquisition under private law. But the validity of that kind of acquisition relies on the recognition of the acquisitive conduct by the Turkish law as *lex situs*. Under these circumstances, the Basel decisions are unfounded, since Turkish law does not allow the acquisition of antiquities by private claimants by means of purchase or prescription, nor does it allow revocation of state ownership without a clear statement by the authorities.

However, we do not know exactly upon which occasions the Turkish authorities remained silent when the court believed they should have acted. The plaintiff asserted that the Turkish museum authorities must have taken the notice provided by Drew-Bear in 1973 into account. Further, Turkey was not asked to give evidence of whether the authorities went to Gökçeler and searched for the gravestones, and Drew-Bear said nothing about the matter either way. In sum, it is not certain what exactly happened.

If there was no finder or owner of the land involved, and thus no private claimant, there would be no legal basis for adopting the position that the gravestones were relinquished by the state. On the one hand, there was no private person whose right of ownership was undermined; on the other hand, the State, in the court's view, had failed to perform the necessary act of appropriation. By this reasoning, the right of ownership of the gravestones was uncertain, which was contrary to the requirement of law and order. In fact, however, the gravestones became State property by operation of law, under the 1906 Decree, Article 697 of the TCC, and, if it applied, the 1973 Law, when they were unearthed; thus, the right of ownership was not uncertain even for a short time. The State's failure to include these objects in the classification and registration system in an appropriate way does not affect the nature of ownership, but only makes it difficult to protect cultural property situated in Turkey. In other words, the alleged inactivity of the authorities in this case did not cause harm to the interest of private persons, but instead caused harm to the concept of the protection of cultural heritage.

A country of origin enacting vesting legislation remains the owner of artifacts found within its territory until it expressly states that it has revoked its ownership.

Even if the cultural property is ignored, or is not known by the state authorities to exist, or is located in situ for some time, the state has proprietary rights over the said cultural property unless an unchallengeable act of undedication has occurred. From the very beginning, an object is covered by state ownership in accordance with the law, and that ownership is not subject to forfeiture because of so-called state inactivity. The situation, in this case, would have been different if the plaintiff had known that the gravestones were located in Switzerland but took no steps for decades and then decided to initiate an action for recovery. In that case, the plaintiff would lose its remedy. However, in this case, the plaintiff depended on its own legislation, which declared its ownership clearly and unequivocally, and there was no evidence that it had waived its rights over the objects in question. The so-called inactivity should by no means be equated with the release of the antiquities. In accordance with the Turkish law regarding antiquities, any find that lacks sufficient scientific value to be kept in the museum must be returned to the owner or possessor of the land in or on which it was found. This procedure requires a clear official statement. Otherwise, the object remains state property irrespective of the lapse of time between the date the object was found and the date the object was taken to the museum authorities.

4 CONCLUSION

The concept of the protection of cultural heritage in situ, where it belongs, is accepted in international instruments, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property[37] and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,[38] but its interpretation is tested in concrete cases. In the Basel decisions, the approach of the Swiss courts teaches that countries of origin will not achieve restitution of cultural property of theirs that has been the subject of clandestine excavation and illegal traffic without the efforts and support of the importing countries.

While it is true that importing countries are not required to enforce protective measures and export prohibitions imposed by countries of origin, this case did not involve an issue of export prohibition. Here, the *ipso iure* state ownership without actual possession established by Turkey's blanket legislation was simply not recognized, and the country of origin's laws were not construed correctly. Further, the courts of the importing country came to the conclusion that the country of origin waived its proprietary rights over the objects in dispute, which was contrary to the laws of the exporting country. The Basel decisions indicate the bias of the Swiss courts and the trend toward protection for the acquisitions of the state mu-

seum in Switzerland. The courts in this art-importing country did not want to give effect to the Turkish legislation providing state ownership over archaeological objects found within its territory.

Archaeological objects found in or on private or public lands are best protected by blanket legislation vesting state ownership *ipso iure*. As possession is not the *sine qua non* of the right of ownership, *ipso iure* state ownership is valid state ownership. Accordingly, if any archaeological object covered by the blanket legislation is removed from the country of origin without permission, it must be considered stolen property, and the exporting state must be able to enjoy its ownership rights in foreign courts by relying on its own legislation without a further act of acquisition.

State ownership by blanket legislation is recognized in art-importing countries such as the United States of America. Switzerland too, as an art-importing and transit country, should take responsibility for decreasing illegal traffic in cultural property and recognize the blanket legislation of countries of origin. In this respect, the signing of the 1995 UNIDROIT Convention by Switzerland is a hopeful advance in the international protection of cultural property. Article 3 of the Convention states that "for the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the state where the excavation took place." Thus, under this Convention it cannot be argued that blanket legislation vesting the state with ownership is ineffective, or that the state must reduce an object to possession or exercise its right of appropriation, or that an appropriate deed of dedication is required. An object found in and illegally removed from the country of origin will be considered as belonging to the requesting state and subject to recovery. It is to be hoped that art-importing and transit countries, such as Switzerland, will ratify both the UNESCO and UNIDROIT Conventions. This would provide uniform protection to the cultural heritage of nations with rich archaeological resources and remove such protection from the whims of and various interpretations of their laws by foreign courts.

NOTES

1. The decisions will hereinafter be referred to as "the Basel cases." The trial court delivered its judgment on August 16, 1993 (*Türkische Republik v. Kanton Basel-Stadt und Prof. Dr. Peter Ludwig*); the court of appeals affirmed the trial court decision on August 18, 1995, and the federal court rejected the appeal and *staatsrechtliche Beschwerde* on May 22, 1996. The decisions are unpublished.

2. Heinrich Leeman, *Berner Kommentar*, Bd. IV/I, Abteilung, 2 Auflage Bern 1920, N.13 zu Art 724 ZGB; Wieland, Kanuni Medenide Ayni Haklar, n.3 zu Art. 724 ZGB (translated by Hakki Karafaki, Ankara 1946).

3. Peter Liver, Das Eigentum, in *Schweizerisches Privatrecht*, Bd. V/1, Sachenrechts, Basel und Stuttgart, 1977, pp. 366–67.

4. The court used the year 1926, as the Turkish Civil Code came into effect in that year.

5. 25.4.1973 nr. 1710, RG. 6.5.1973 No. 14527.

6. This type of legislation is sometimes called "blanket" legislation or an "umbrella statute." *See* Paul Bator, An Essay on the International Trade in Art, 34 *Stanford Law Review* 275, 351, 353 (1982); Jonathan Moore, Enforcing Foreign Ownership Claims in the Antiquities Market, 97 *Yale Law Journal* 466, 467 (1988).

7. *See* Quentin Byrne-Sutton, The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects, 1 *International Journal of Cultural Property* 151, 155 (1992); Graham Dickson, The Need for a National Registry of Cultural Objects, 11 *Fordham International Law Journal* 839, 849 (1988); Richard Upton, Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Colombian Artifacts, 10 *New York University Journal of International Law and Politics* 569, 600 (1978).

8. *See* Barbara Rosecrance, Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act, 19 *Cornell International Law Journal* 311, 327 (1986); Moore, *supra* note 6, at 481; Leslie S. Potter and Bruce Zagaris, Toward a Common US-Mexican Cultural Heritage: The Need for a Regional American Initiative in the Recovery and Return of Stolen Cultural Property, 5 *Transnational Lawyer* 627, 666 (1992); Thomas Pecoraro, Choice of Law Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law, 31 *Virginia Journal of International Law* 1, 37 (1990).

9. 16 U.S.C. §§470aa–470cc (1988).

10. Moore, *supra* note 6, at 481; Pecoraro, *supra* note 8, at 37.

11. 18 U.S.C. §2314 (1990). The National Stolen Property Act, which is a United States federal statute, prohibits the transportation "in interstate or foreign commerce of any goods, wares, [or] merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

12. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

13. United States v. McClain, 545 F.2d 988 (5th Cir. 1977) (McClain I); United States v. McClain, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979).

14. 545 F.2d at 992.

15. 720 F. Supp. 810.

16. "The state comes to own property . . . when it declares itself the owner." 720 F. Supp. at 814.

17. 720 F. Supp. at 812, 814.

18. United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y., 1997), *aff'd*, 184 F.3d 131 (2d Cir. 1999).

19. Takvimi vakayi, tertibi evvel, nr. 1053, 1 Subat 1284–1 Zilkade 1285. Before this Decree, the legal status of antiquities would have been regulated by Islamic jurisprudence. See Ahmet Mumcu, Eski eserler Hukuku ve Türkiye (1969) Aühfd, c. 26, No. 3–4, s. 66.

20. As is seen in the preface, there must have been some measures relating to the search for antiquities before that Decree. I could not find the earlier measures on the subject.

21. 7 Apr. 1874, 26 Mart 1290/7 Nisan 1874 Düstür, I. Tertip, c. 3, s. 426–431.

22. 21 Feb. 1884. 9 Subat 1299/21 Subat 1884. Düstür 1. tertip. Zeyl 4, s. 89 vd.

23. Nisan 1322/23.4.1906. In 1965, the constitutional court held that the 1906 Decree was in effect a statute of the Republic (6.7.1965, E. 1965/16; K. 1965/41 in Anayasa Mahkemesi Kararlari Dergisi, 1966 v. 3, p. 142).

24. Gözübüyük/Akilloglu: Yönetim Hukuku, Ankara 1992, s. 207, Düren, Akin: Idare Mallari, Ankara 1975, s. 65; Gülan, Aydin: Kamu Mallari in Özay II Han: Günisiginda Yönetim, Istanbul 1996, s. 580.

25. Liver, *supra* note 3, at 366–67. The same was quoted by Rey, *Die Grundlagen des Sachenrechts und das Eigentum*, Bern 1991, N.1881 zu Art. 724.

26. Steinauer, *Les droits Réels*, Tome II, Bern 1990, p. 255 N.2115d.

27. Leeman, *supra* note 2; 724 ZGB; Wieland, *supra* note 2; Tuor and Schnyder, Das Schweizerische Zivilgesetzbuch, Gauflage, 1979, p. 624. *See also* Kurt Siehr and Cagla Ustün, Antike Grabstelen aus der Türkei bleiben in der Schweiz, 19 *Praxis des Internationalen Privat- und Verfahrensrechts* 489, 490 n. 8 (1999). The term "appropriation" is also mentioned in Haab, Kommentar zum Schweizerischen Zivilgesetzbuch, IV. Band, Das Sachenrecht, Das Eigentum (Art 641 bis 729), Zurich 1977, N.26 zu Art 723, 724, but it is not interpreted as an optional right of the canton to acquire. The canton becomes the owner when the object is reduced to possession of the finder. Even if the finder wants to keep the object for himself, the canton is considered to be possessor from the moment the finder knows his possession is wrongful and that he should deliver the object. However, it is necessary that the finder reduce the object to his possession in order for the canton to acquire ownership. *Id.*, N.26–27 zu Art. 723, 724.

28. Seref Ertas, *Esya Hukuku* (Ankara 1995), s. 388; Selahattin Sulhi Tekinay, *Menkul Mülkiyeti ve sinirli Ayni Haklar* (Istanbul 1994), s. 19; Fevzioglu, Doganay, and Aybay, *Esya Hukuku Dersleri* (Istanbul 1968) s. 169 vd; Mustafa Dural, *Esya Hukuku Dersleri* (Istanbul 1981), s. 113; Saymen and Elbir, *Türk Esya Hukuku Dersleri* (Istanbul 1963) s. 409; Hatemi, Serozan, and Arpaci, *Esya Hukuku* (Istanbul 1991) s. 332; Gürsoy, Eren, and Cansel, *Türk Esya Hukuku* (Ankara 1984) s. 684; Aybay and Hatemi, *Esya Hukuku Dersleri* (Istanbul 1996), s. 93; Hüseyin Hatemi, *Esya Hukuku Meseleleri* (Istanbul 1995) s. 89; Oguzman and Seliçi, *Esya Hukuku* (Istanbul 1997) s. 565; Jale Akipek, *Türk Esya Hukuku, II. Kitap, Mülkiyet* (Ankara 1971) s. 272.

29. 25.4.1973 nr. 1710, RG. 6.5.1973, No. 14527.

30. 21.7.1983 RG. 23.7.1983, No. 18113. Some parts of the 1983 law were amended on 17 June 1987 with the law nr. 3386. RG. 24.6.1987. No. 19497.

31. Despite the fact that it was a criminal case, the court in *Hollinshead* (*see supra* note 12) found it sufficient that the Machaquila Stela 21 was photographed and registered in the Guatemala jungle in the 1960s by Ian Graham.

32. In *Government of Peru v. Johnson*, the plaintiff had no direct evidence that the Pre-Columbian artifacts concerned came from Peru. Dr. Iriarte, the expert witness, admitted that Peruvian Pre-

Columbian culture spanned not only modern-day Peru, but also areas that now are within the borders of Bolivia and Ecuador, and that some items may have come from Ecuador, Colombia, Mexico, or even Polynesia (720 F. Supp. 810, 812 (C.D. Cal. 1989)).Yet, in this case, no other country is implicated by the claim that the gravestones belonged to the Phrygian civilization, which was located in Anatolia. Furthermore, the two objects were seen in Turkey.

33. The court took 1926 into consideration, as it is the effective date of the TCC.

34. Had it been applied in the case, it would have been held that the gravestones concerned were state property *ipso iure* under Article 3 of the 1973 Law.

35. *See supra* at section 3.1.

36. The Swiss courts interpreted the Turkish legislation to the contrary despite the clear and unequivocal text.

37. 10 ILM 289.

38. 34 ILM 1322.