

BENIN BRONZES: RESTITUTION AND REPARATION
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Comments of William Pearlstein

Genesis of Panel. My name is William Pearlstein. I am a partner in Pearlstein & McCullough LLP. We are a boutique New York law firm that practices solely in the international art market. I am a member of the Fashion Art Media and Entertainment advisory board of Cardozo Law School. My partner, Michael McCullough, teaches the art law class at Cardozo law. Between us we have handled disputes, transactions and regulatory matters involving art and artifacts from dozens of countries around the world, including Africa, the Near East, the Middle East, North America, Central America, South America, West Europe, East Europe, Asia and Oceania. So when David Rudenstine, former Dean of the Law School, asked Professor Barbara Kolsun, Director of FAME, to refer counsel to Deadrea Farmer-Paellman, David's former student, I volunteered and said we were qualified. David is a published historian of the British parliamentary reports that retroactively justified Lord Elgin's seizure and Britain's retention of the Elgin Marbles. When I nominated David to moderate this panel he protested that he knew nothing about the Benin Bronzes or cultural property disputes. I replied that he was eminently qualified because the issues raised by the Bronzes are more analogous to those raised by the Elgin Marbles than by the restitution of looted archeological objects. The sack of a defeated capital by a conquering empire presents different legal issues than the clandestine excavation of undocumented artefacts. I proposed this panel to David and Barbara because I believe that the interests of the African-American DNA Descendants deserve to be considered along with those of Nigeria and the US and European Museums. Thereafter the challenge was to bring together a group of panelists that could present, passionately and dispassionately, the positions of Nigeria, US Museums, European Museums, and the US DNA Descendants regarding their respective interests in the Benin Bronzes. I like to think we succeeded.

Background. About 32 million African-Americans are the DNA descendants of Africans sold into slavery during the Atlantic Slave Trade. European traders used bronze/copper "Manillas" as currency to purchase Africans captured in raids to the interior by other Africans from sellers at ports on the Benin Bight of the Nigerian coast. [https://en.wikipedia.org/wiki/Manilla_\(money\)](https://en.wikipedia.org/wiki/Manilla_(money)). The Kingdom of Benin melted down the manillas to create sculptures known as the Benin Bronzes. https://en.wikipedia.org/wiki/Benin_Bronzes. The British looted the Benin Bronzes on a "punitive expedition" to Nigeria in 1897. Thereafter the Bronzes came to be held by a number of US and European museums and private collectors. <https://www.theartnewspaper.com/2021/04/29/global-survey-where-in-the-world-are-the-benin-bronzes>.

Restitution. Hundreds of Bronzes are held by major US collecting museums. These include the Smithsonian, the Metropolitan Museum, the Museum of Fine Arts Boston, the Fowler, the Art Institute of Chicago, etc. As reported in the media, certain US museums are now in discussion with the Nigerian Government to restitute all or part of their holdings to Nigeria. The US Museums are taking various approaches. For example, the Smithsonian has already agreed to a global settlement to restitute its holdings to Nigeria, while the Metropolitan Museum has been more circumspect and retained most of its Bronzes. Other US museums may be waiting for guidance on policy from the Association of American Museum Directors. On the Nigerian side, negotiations involve the Nigerian Federal government, the State of Edo (which encompasses the former Kingdom of Benin), and the Nigerian federal and Edo state cultural authorities.

Reparations. Deadrea Farmer-Paellmann organized the Restitution Study Group to pursue a claim against the Benin Bronzes on behalf of a trust to be formed for the benefit of the US DNA Descendants. As I understand it, RSG's perspective is that, as between the US Museums and Nigeria, Nigeria is the victim; but as between Nigeria and the US Descendants, the US Descendants are the victim and ought to participate in any proceeds generated by Nigeria after the restitution of the Bronzes, from their sale,

exhibition and commercial exploitation. The US Museums see themselves as acting in good faith by negotiating the restitution of some or all of their Bronzes to Nigeria, which they cast in the role of victim. However, RSG believes that any resolution needs to address the equities between the US Descendants, who are the heirs of the victims, and Nigeria, which is the successor to the Kingdom of Benin and the African wrongdoers.

Issue-Spotting. We provided some preliminary consultation to RSG but we have not represented RSG for many months. We did not and do not represent RSG in connection with their litigation against the Smithsonian and I have not reviewed the pleadings, other than to note that RSG lost a motion for injunctive relief after pleading that the Smithsonian breached a fiduciary duty to the claimants. Without betraying any client confidences, I can make some observations that seem to inform the three-way dynamic between Nigeria, US Museums and the DNA Descendants. These observations are subject to historical critique, legal research and analysis and the acid test of litigation. They do not amount to actionable legal advice.

- First, the US Museums appear to have only void or voidable title to their Bronzes and the rightful owner would have a superior title claim. This is because at common law no-one can take title from a thief and the Bronzes are stolen property. In addition, the US Museums lack “clean hands” because they knew the Bronzes were stolen when they acquired them by gift or purchase. On the other hand, in general the US Museums have exhibited or published their Bronzes since accession and ought to be credited for their transparency.
- Second, Nigeria, as successor to the Kingdom of Benin from which the British stole the Bronzes, seems to have a superior title claim to the US Museums. On the other hand, US Museums might be able to defend a title claim on grounds of statute of limitations or laches, which are issues governed by the state law governing the claim or argue that they took good title under the laws of an intermediate jurisdiction through which the Bronzes passed prior to accession.
- Third, is the question of who has superior title as between the US DNA Descendants and Nigeria. The US DNA Descendants never had a possessory interest in the Bronzes or the manillas. Thus, although Nigeria could frame a traditional, though remote, stolen property claim, the DNA Descendants could not. Further, although the Bronzes are the proceeds of the Atlantic Slave Trade, the slave trade itself was legal at the time and sanctioned by the laws of the various European slaving nations and the Kingdom of Benin. On the other hand, there may be an argument that a good portion of the slave trade was illegally conducted within the terms of the national laws that governed that trade, which suggests that the Bronzes are the proceeds of a crime to which the DNA Descendants have a claim despite the passage of time.
- Fourth, a number of threshold legal issues could complicate any litigation by the US Descendants against Nigeria and/or the US Museums. These include standing, jurisdiction, the Foreign Sovereign Immunities Act (which might bar a US court from hearing a claim against Nigeria), statute of limitations and laches, and other defenses and counterclaims that may be available to different defendants in different jurisdictions.

Potential Legislative Solution. These high-level considerations suggest to me that, regardless of the outcome, litigation may not be the best answer. But neither is bilateral restitution between Nigeria and any one or more of the US Museums, although that is the path of least resistance for US Museums. Instead, it would be best if Congress were to step in, sort through the issues and the equities, and mandate a global solution that balances the interests of the various stakeholders. But that raises the question of whether the RSG, the US DNA Descendants or some other domestic constituency can persuade its Congressional representatives to address these issues.