

Human remains in the legal shadows – Issues of status, regime and repatriation

Marie-Sophie DE CLIPPELE

Abstract

To whom do human remains in museums belong? Are they objects that can be owned by the museum or does an impression of the deceased still remain on the skeleton, and do they only belong to the family, community or country of origin to where they should go back? The law is ill-equipped to answer these questions, caught between the categories of object and person. Human remains do not constitute a person, insofar as legal personality ceases with death, but at the same time they cannot be reduced to a simple thing, in so much as they are imprinted with the deceased person. This paper argues that, according to present law, human remains can be considered special property worthy of respect, giving substance to their sacredness. Therefore, the paper also recommends to integrate the special nature of human remains more clearly into Belgian civil law. Moreover, the legal regime for human remains is blurred and this paper argues that human remains should be clarified as out-of-commerce, or at least that they should not circulate for profit (sale...). Concerning the treatment of human remains by cultural heritage law, specific provisions should be added to insist on the special treatment of human remains in museum collections. Finally, an international or national framework for the repatriation of human remains which originate from abroad is still lacking. This paper proposes an inclusive heritage justice model for the repatriation of human remains in the realm of transitional justice.

Keywords: human remains, restitution, repatriation, ownership, dignity, object, person

Résumé

À qui appartiennent les restes humains conservés dans les musées? Sont-ils des objets dont le musée peut être propriétaire ou l'empreinte du défunt reste-t-elle sur le squelette, et n'appartiennent-ils qu'à leur famille, à leur communauté ou à leur pays d'origine où ils devraient retourner? La loi est mal équipée pour répondre à ces questions, coincée entre les catégories de chose et de personne. Les restes humains ne constituent pas une personne, dans la mesure où la personnalité juridique cesse avec la mort, mais en même temps, ils ne peuvent être réduits à une simple chose, tant ils sont empreints de la personne décédée. Dans cet article, je démontre que, selon le droit actuel, ils peuvent être considérés comme des biens particuliers dignes de respect, ce qui donne corps à leur caractère sacré. Par conséquent, l'article recommande également d'intégrer plus clairement la nature particulière des restes humains dans le droit civil belge. En outre, le régime juridique des restes humains est flou et je soutiens qu'il devrait être clarifié comme étant des choses hors commerce, ou au moins que les restes humains ne devraient pas circuler à des fins lucratives (vente...). En ce qui concerne le traitement des restes humains par le droit du patrimoine culturel, des dispositions spécifiques devraient être ajoutées pour insister sur le traitement spécial des restes humains dans les collections des musées. Enfin, il n'existe toujours pas de cadre international ou national pour le rapatriement des restes humains provenant de l'étranger. Cet article propose un modèle de justice patrimoniale inclusive pour le rapatriement des restes humains s'inscrivant dans le champ de la justice transitionnelle.

Mots-clés : restes humains, restitution, rapatriement, propriété, dignité, chose, personne

Samenvatting

Aan wie behoren menselijke resten in musea toe? Zijn het objecten die eigendom kunnen zijn van het museum of blijft er een afdruk van de overledene achter op het skelet en behoren ze alleen toe aan hun familie, gemeenschap of land van herkomst waar ze naar terug zouden moeten gaan? De wet is slecht toegerust om deze vragen te beantwoorden, gevangen tussen de categorieën van object en persoon. Menselijke resten vormen geen persoon, aangezien rechtspersoonlijkheid ophoudt met de dood, maar tegelijkertijd kunnen ze niet worden gereduceerd tot een simpel ding, zozeer zelfs dat ze zijn ingeprent met de overledene. In dit artikel wordt betoogd dat ze volgens het huidige recht kunnen worden beschouwd als speciale bezittingen die het waard zijn om te worden gerespecteerd, wat inhoud geeft aan hun heiligheid. Daarom beveelt de paper ook aan om het bijzondere karakter van menselijke resten duidelijker te integreren in het Belgische burgerlijk recht. Bovendien is het wettelijke regime voor menselijke resten vaag en deze paper stelt dat het moet worden verduidelijkt als niet-commercieel, of op zijn minst dat menselijke resten niet mogen circuleren met winstoogmerk (verkoop...). Wat betreft de behandeling van menselijke overblijfselen door de wetgeving inzake cultureel erfgoed, zouden specifieke bepalingen moeten worden toegevoegd om aan te dringen op de speciale behandeling van menselijke overblijfselen in museumcollecties. Ten slotte ontbreekt er nog steeds een internationaal of nationaal kader voor de repatriëring van menselijke overblijfselen uit het buitenland. In deze paper wordt een inclusief model voor erfgoed-drechtspraak voorgesteld voor de repatriëring van menselijke overblijfselen in het kader van overgangsrechtspraak.

Trefwoorden: menselijke resten, restitutie, repatriëring, eigendom, waardigheid, zaak, persoon

1. INTRODUCTION

The skull of a tribal chief from Congo, a Maori Toi Moko, a Peruvian mummy: to whom do these human remains currently housed in museums belong? Are they objects that can be owned by museums or does an impression of the deceased still remain on the skeleton, and do they only belong to the family, community or country of origin to where they should go back?

The law is ill-equipped to answer these questions, caught between the categories of object and person. Human remains do not constitute a person, insofar as legal personality ceases with death, but at the same time they cannot be reduced to a simple thing, in so much as that they are imprinted with the deceased person. This paper argues that, according to present law, they can be considered special objects worthy of respect, giving substance to their sacredness (1).

Human remains are not property like any other, nor are they cultural property like any other. Their specificity is nevertheless not explicit, neither in property law nor in cultural heritage law. This paper will explore the interaction of ownership and human remains: can they be owned and to what degree (2)? If so, can they be commodified and sold on the market, unlike ivory or endangered species? (3) And, finally, how should we think about repatriation of human remains from the perspective of heritage justice? (4)

Answers to these questions will follow a two-step methodology by firstly examining the existing legal framework and secondly shedding light on grey zones in the law and thinking about how we can bridge those gaps with ethical considerations.

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2. HUMAN REMAINS AS SPECIAL OBJECT WORTHY OF RESPECT

2.1. Human remains as property or object?

The categorization of human remains introduces a degree of complexity within the legal framework, which is traditionally built upon the

distinction between objects and persons. This distinction has somehow been challenged by the introduction of the category of 'animals' in the Belgian Civil Code. Following the Belgian reform of property law in the Civil Code in 2021, animals have been framed as sentient beings, distinct from other 'objects' in property law. Human remains occupy a unique position in this framework. They do not possess legal personhood, as it ceases upon death, yet they cannot be merely classified as inanimate objects, as they inherently bear the mark of the deceased individual. In civil law dualism, human remains falls into the broad category of objects, according to old case law, even into the subcategory of objects which can be owned.

It is, however, interesting to reflect on the continuum between objects and persons, proposed by Professor Gaële Gidrol-Mistral, rather than on a dual and outdated split in practice (Gidrol-Mistral, 2021). In my aforementioned book, I develop further the idea of a continuum, revealing new ways of understanding how we can refer to human remains in law.

To substantiate the traditional legal qualification of human remains as property, the decision of the Paris Court of Appeals, considered the decomposition of a corpse as a neighbourhood disturbance, this served to confirm the classification of the deceased's remains as part of an estate:

Par application de l'article 724 du code civil, la fille de la défunte a été saisie de plein droit des biens de sa mère dès le décès de celle-ci et dès lors sa responsabilité est engagée à raison des dommages anormaux qui ont été causés à l'appartement de la voisine (...)

The ownable nature can also be inferred from criminal law, which regards offenses against human remains as theft, and this

¹ 'By virtue of Article 724 of the Civil Code, the daughter of the deceased was automatically vested with her mother's property upon her death, and consequently, her liability is incurred for the abnormal damages that have been caused to the neighbor's apartment (...)' (free translation) CA Paris, 25th ch. A, 28 janvier 2009, D. Dutrieux, 'De la responsabilité de la fille d'un défunt du fait de la décomposition de la dépouille de sa mère', *Résonance* n° 53, 2009, p. 5. See also a case concerning the decomposition of a corpse in a hospital, analysed as a contract of deposit, Cass. 2e civ., 17 July 1991, RTD civ. 1992, p. 412 note P.-Y. Gautier.

traditionnally fell under the category of property offenses. The Dutch Supreme Council ruled as follows:

*dat de erven of nabestaanden van een overledene een zodanige zeggenschap over diens lijk hebben – zij het ook beperkt door wat de wet gebiedt en door wat voortvloeit uit godsdienstige en zedelijke opvattingen, alsmede door wat door de overledene zelf met inachtneming van een en ander is bepaald – dat van een toebehoren in de zin van art. 310 Strafwetboek moet worden gesproken*²

However, since that old case law, the Belgian Court of Cassation held very interestingly that human remains fall outside of the scope of ownable goods. They can be disposed of by relatives but they cannot be owned by them. As the Court very clearly put it:

La dépouille mortelle d'une personne ne relève pas des choses limitativement énumérées audit article [491] parce qu'elle ne peut être considérée comme un bien meuble dont la détention peut être transmise, ni comme un bien commercialisable et pour lequel peut valoir un droit de propriété, de sorte que les proches peuvent uniquement disposer en fait de la dépouille mortelle. L'infraction d'abus de confiance telle que prévue à l'article 491 du Code pénal punit essentiellement l'atteinte à la propriété de choses remises à titre précaire qui sont limitativement énumérées audit article. Il s'agit de choses mobilières qui peuvent être commercialisées et dont il peut être disposé en tant que propriétaire. Une dépouille mortelle ne constitue pas

une telle chose et ne peut, par conséquent, constituer l'objet de l'infraction visée"³

A specialized legal status and regime would therefore be perfectly conceivable for the particular case of human remains.

2.2. The special nature of human remains

The inevitable reification of human remains - if they are not a person, they are necessarily an object - does not prevent us from considering their special nature, even outside of ownership. Six different legal grounds help argue that there is a special, even sacred, nature for human remains, as shown in Figure 1.

First and foremost, funeral law establishes a genuine right for the deceased to freely decide on their funeral arrangements. In 1899, the Belgian Court of Cassation, in its Libert ruling, clarified that:

L'homme, maître de sa personne pendant sa vie, dispose librement de sa dépouille pour l'époque où il ne sera plus et règle ses funérailles comme il l'entend, à condition de respecter les lois et les bonnes mœurs ; (...) cette faculté, dont l'exercice n'entraîne pas par lui-même et nécessairement disposition de biens, ne dérive pas du droit de tester ; (...) elle découle de la personnalité et de la liberté humaine ; (...) bien qu'elle ne soit pas expressément réglée par la loi, elle a été de tous temps et universellement admise comme de droit naturel ; (...) le droit pour le défunt de régler le mode de ses funérailles constitue, en tant que manifestation de la liberté individuelle et de la liberté de conscience, non pas un simple intérêt moral, sans garantie et sans

² 'that the heirs or surviving relatives of a deceased person have such control over their body - albeit limited by what the law requires and by religious and moral beliefs, as well as by what the deceased person has determined in accordance with all of this - that it must be considered as belonging within the meaning of Article 310 of the Criminal Code.' (free translation), Hoge Raad, 25 juin 1946, NJ 1946, n° 503.

³ The mortal remains of a person are not included in the exhaustive list of items in Article [491] because they cannot be considered as movable property whose ownership can be transferred, nor as marketable property to which a right of ownership can apply, so that the relatives can only dispose of the mortal remains in practice. The offence of breach of trust as provided for in Article 491 of the Criminal Code essentially punishes the infringement of the ownership of items entrusted on a temporary basis, which are exhaustively listed in that article. These are movable items that can be marketed and disposed of as owner. Human remains do not constitute such property and cannot, therefore, be the subject of the offence in question (free translation) Court of cassation, decision of 28 February 2017, P.16.1015.N/1..

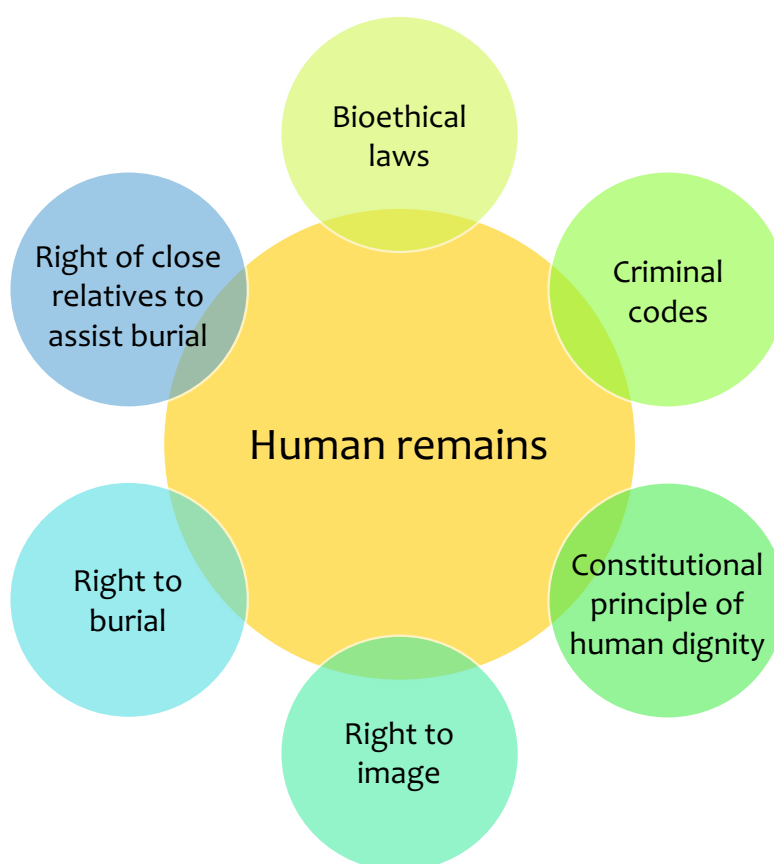


Fig. 1 – Mosaic of legislations applicable to human remains to underpin their special nature.

sanction, mais un véritable droit susceptible d'être poursuivi en justice (...)»⁴.

Mr. Libert had originally documented his desire for non-religious funerals in a legally binding will. However, during his final moments on his deathbed, he verbally expressed his wish for a Catholic burial in the presence of his loved ones. Surprisingly, it was this last verbal

declaration that the Court of Cassation deemed valid. Normally, an authentic will can only be revoked by a subsequent written will and not by spoken words. However, the Court reasoned that the formal requirements for expressing last wishes should not outweigh the true intent of the deceased, particularly when it pertains to non-property rights like burial preferences (Désir, 2012).

This groundbreaking decision, which relied on arguments rooted in natural law served to contradict the Attorney General's stance that rights cease after death, has been upheld in recent rulings⁵. It highlights the incorporation of burial rights into the realm of personality rights, as long as these burial rights represent 'the expression of the individual freedom and conscience' of the deceased (Désir, 2012: 264). The supremacy of the deceased's wishes was further solidified with the enactment of the July

4 'Man, the master of himself during his life, freely disposes of his remains for the time when he will no longer be and arranges his funeral as he wishes, provided he respects the laws and good morals; (...) this faculty, the exercise of which does not itself necessarily involve the disposition of property, does not stem from the right to make a will; (...) it derives from human personality and freedom; (...) although it is not expressly regulated by the law, it has been universally and at all times recognized as a natural right; (...) the right of the deceased to determine the manner of their funeral constitutes, as a manifestation of individual liberty and freedom of conscience, not just a mere moral interest without guarantee and without sanction, but a true right that can be pursued in court (...)'. (free translation) Cass., 3 juillet 1899, Pas., 1899, I, p. 318.

5 See Liège, 25 nov. 1994, Rev. trim. dr. fam., 1997, p. 202; Anvers, 14 dec. 1998, R.G.D.C., 2002, p. 251; Civ. Bruxelles (réf.), 26 January 2006, J.L.M.B., 2006/38, p. 1692.

20, 1971 law, which repealed various provisions, including the June 12, 1804 decree (23 Prairial, Year XII) concerning burials and was subsequently integrated into regional legislations.

These regional laws in funeral matters confirm that the deceased have the free will to choose their burial method (burial, scattering, or preservation of ashes after cremation), the handling of ashes following cremation, the religious or secular ceremony for the funeral, and the indication of a funeral contract's existence, often through a formal written declaration to the local municipality (refer to, for example, articles L1232-16, § 2, and L1232-21 of the Local Democracy and Decentralization Code) or via a testamentary statement. However, the exercise of burial rights has certain limitations; for instance, opting for cryomation or resomation as a burial method is not (yet) allowed, highlighting the delicate balance between individual autonomy (of the deceased) and the protection of human dignity and public order.

Second, burial law provides a right for the family or any other qualified person to 'arrange the funeral' (*pourvoir aux funérailles*). This means that the family has the power to make decisions and grant permissions regarding the funeral of the deceased person, for instance when the deceased did not formalize their choice of funeral arrangements. According to the Brussels legislation, the qualified person to arrange the funeral is defined as: 'the person designated by the deceased through a will or, in the absence thereof, one of their heirs or legal successors or, failing that, the person who during the deceased's last period of life maintained the closest and most frequent affectionate ties with them, such that they can know their last wishes regarding their burial method' (Article 2, 8°). The close relative is defined as 'the spouse, the legal cohabitant, parents, relatives, or friends' (Article 2, 9°) (free translation).

Interestingly enough, affectionate bonds seem to prevail in the recognition of non-property rights to arrange funerals, more so than blood ties. This openness to close individuals who have an emotional relationship with the deceased, even if they are not part of the family, allows for a subtle departure from the sole logic of filial genealogy to exercise rights over the remains. Still, the acceptance of nonblood relationships remains strict: the affective ties with the deceased must have been frequent and developed towards the end of life. Regarding the

right of close individuals, Vansweevelt believes it grants real decision-making power: 'Whether it is called ownership or control is not so relevant; the successors have decision-making authority over the body' (Vansweevelt, 2014: 1574).

Third, in addition to funeral law, other provisions also specifically regulate human remains. Criminal law punishes offenses against funeral laws (Article 315 of the Belgian Criminal Code), the violation of tombs or burial sites (Article 453 of the Criminal Code), and the concealment of a corpse (Article 340 of the Criminal Code), regardless of the existence of descendants (Giacometti, 2013). However, despite the criminalization of certain acts committed with regards to the deceased, others escape criminal law.

Some authors, such as Ruben Vilain, are calling for a specific offense to be introduced for the violation of a corpse, alongside offenses for grave desecration (Vilain, 2017). According to Vilain, current law does not allow for the prosecution of a person who takes photographs or commits other unworthy acts against a corpse before burial (for example, in the mortuary or ambulance). Could such a lacuna be linked to the old Libert ruling of the Court of Cassation, in which the judge asserted that the corpse belongs to the head of the family from their last breath until burial? This is as if the 'right of ownership' were sufficient to protect against any violation of the corpse during this interval. It seems the call from scholars has been heard as the lawmaker adopted a new provision, within the general reform of the Criminal Code, where violation of the corpse is a specific offense, separate from the violation of burial sites. The new article 369 of the Criminal Code, which will enter into force on April 8, 2026, contains the following:

La profanation de cadavres est l'atteinte, faite délibérément, à l'intégrité du cadavre, de sorte à offenser ou à blesser la mémoire du défunt. Cette infraction est punie d'une peine de niveau 2:

Fourth, intellectual property law contains a right to the image of a person up to twenty years after their death, thus contributing to a certain posthumous personality:

Ni l'auteur, ni le propriétaire d'un portrait, ni tout autre possesseur ou détenteur d'un portrait n'a le droit de le reproduire

*ou de le communiquer au public sans l'assentiment de la personne représentée ou celui de ses ayants droit pendant vingt ans à partir de son décès.*⁶

The legal ability to commercialize the memory of the deceased is permissible whilst safeguarding against any unauthorized commercial exploitation. This posthumous right to the image stands in contrast to captured images captured of the deceased's remains. In such instances, disrespectful actions could also be considered a severe act of desecration, even though it might not be readily apparent, given the absence of laws in Belgian criminal code concerning the violation of a corpse (Arnou, 2000). Additionally, it's essential to acknowledge that this right to the image belongs to the deceased's heirs; they must demonstrate that any infringement upon the image of the deceased adversely affects them.

Fifth, several bioethical legislations have been adopted to address the issue of the human body, both during its lifetime and after death. For instance, the law of June 13, 1986⁷, on organ removal and transplantation, states in article 12 that 'The removal of organs, tissues, and cells and the suturing of the body must be carried out with respect for the deceased and while taking into consideration the feelings of the family', explicitly emphasizing the respect for the deceased. The law of December 19, 2008⁸, concerning the procurement and use of human body material for medical applications or scientific research, refers to this provision for the use of body material from a deceased person. Scientific research authorized within this framework is strictly limited to medical purposes and does not allow for historical or archaeological research. Nevertheless, discussions have taken place about the creation of 'biobanks'⁹, which could potentially include human remains found in

an archaeological context. If they can be considered as 'human body material', these remains can only be processed for medical research purposes.

Sixth and finally, the protection of human dignity by Article 23 of the Belgian Constitution, constitutionally anchors the numerous specific provisions regarding human remains. The principle of human dignity, a 'legal axiom' according to Muriel Fabre-Magnan (Fabre-Magnan, 2007), would justify the special measures regarding burials, criminal provisions, the right to posthumous image, and so on. However, it is not clear to what extent the dignity principle applies after death.

To summarize, various legislations accord distinct recognition to human remains, thereby categorizing them as exceptional entities deserving of reverence, thereby emphasizing the sanctity attached to these remains. Despite the presence of these various indicators within the current legal framework in Belgium, there lacks a comprehensive provision explicitly acknowledging this classification. This is in contrast to French law which incorporates specific provisions relating to the human body and human remains twice within its Civil Code. In 1994, bioethical laws inserted Article 16-1 into the French Civil Code:

*Chacun a droit au respect de son corps. Le corps humain est inviolable. Le corps humain, ses éléments et ses produits ne peuvent faire l'objet d'un droit patrimonial.*¹⁰

And in December 2008, an additional paragraph was added to Article 16-1-1 of the French Civil Code, this time based on funeral law:

*Le respect dû au corps humain ne cesse pas avec la mort. Les restes des personnes décédées, y compris les cendres de celles dont le corps a donné lieu à crémation, doivent être traités avec respect, dignité et décence.*¹¹

6 Neither the author, nor the owner of a portrait, nor any other possessor or holder of a portrait has the right to reproduce it or communicate it to the public without the consent of the person represented or their heirs for twenty years from their death', Article XI. 174 of the Code of Economic Law, free translation.

7 Moniteur belge, 14 Feb 1987.

8 Moniteur belge, 30 Dec 2008.

9 Arrêté royal du 9 janvier 2018 relatif aux biobanques, Moniteur belge, 15 février 2018.

10 Everyone has the right to respect for their body. The human body is inviolable. The human body, its elements, and its products may not be subject to ownership. (free translation), Art. 16-1 Civ. fr. (inséré par la loi du 30 juillet 1994 relative au respect du corps humain).

11 'The respect owed to the human body does not cease with death. The remains of deceased persons, including the ashes of those whose bodies have been cremated, must be treated with respect, dignity, and decency.' (free translation), Loi n° 2008-1350 du 19 décembre 2008 relative à la législation funéraire, JORF n° 0296 du 20 décembre 2008.

None of these provisions are to be found in Belgian law, although I argue in favour of adopting similar provisions. It will clarify the special status of human remains marked by human dignity.

2.3. Human remains as special cultural objects

The classification of human remains as a unique form of property does not directly resolve the issue of how they should be categorized within museum collections. Should they be regarded as cultural artefacts falling under cultural heritage, or even considered as a distinct form of cultural object? As discussed earlier, under current law, human remains are considered objects and therefore can be legally part of heritage collections. However, the seamless integration of human remains into the realm of heritage is not always straightforward. The complexity arises because cultural heritage legislation lacks a specific category for human remains, with the exception of the federal law pertaining to underwater heritage¹². In legislation governing cultural artefacts, human remains are notably absent. In light of this absence, one could examine whether human remains can be included within the existing categories of cultural artefacts outlined in relevant legislation. To be recognized as part of cultural heritage and thus eligible for inclusion in public or private collections, human remains must possess a certain degree of heritage value.

Concretely, human remains can belong to several heritage categories:

- scientific (i.e. anatomy collections, university collections);
- archaeological (i.e. excavations of human remains);
- religious (i.e. relics);
- or occasionally aesthetic interest (i.e. Art objects containing human remains such as hair).

Human remains can be protected as treasures (*trésors*) or masterpieces (*topstuk*), provided they meet additional qualitative criteria (rarity, essentiality, etc.) laid down in one of the four movable heritage legislations in Belgium. For the moment, only a few human remains are protected under these legislations. In Flanders, the few classifications of human remains are based either on the historical interest of a movable property or the artistic or historico-cultural interest of a collection, in addition to criteria of rarity and indispensability. In the French Community, only the skull of a Neanderthal child from Engis is classified as a treasure due to its exceptional archaeological value. The two other competent federated entities, the German-speaking Community and the Brussels-Capital Region¹³, have not yet taken any classification measures for human remains.

Even if Belgian law does not explicitly specify it, human remains can therefore be considered to be movable cultural heritage.

3. TOWARD AN EVOLVING, VARYING AND GRADUAL INTERPRETATION OF THE STATUS OF HUMAN REMAINS?

The current legal framework suffers from loopholes regarding the status of human remains, especially in heritage collections. I argue there is room for a gradual and evolving interpretation of the status of human remains. Human remains are not ordinary objects. Yet their special status could evolve over time (1) or remain the same

¹² Human remains are mentioned in the Law of April 4, 2014, relating to the protection of underwater heritage, which transposes the 2001 Convention on the Protection of the Underwater Cultural Heritage and provides in its Article 5, § 3: 'Discoveries of human remains shall be treated with respect.' This law was subsequently repealed by the Law of April 23, 2021, relating to the implementation of the UNESCO Convention of November 2, 2001, on the Protection of the Underwater Cultural Heritage and the Protection of Wrecks of Value, published in the *Moniteur belge* on May 25, 2021, which includes the same provision: 'Human remains are treated with respect.' Since the transposition into Belgian law, 11 wrecks have been recognized as underwater cultural heritage, with the majority being warships. Furthermore, a provision stipulates that all wrecks over 100 years old are automatically classified as underwater cultural heritage. There have been a total of 55 such wrecks recognized so far. Most of these wrecks contain human remains and are considered the burial sites of sailors. (*Épaves reconnues en mer du Nord*, no date).

¹³ Note that the competence of the Brussels region for movable cultural heritage is not complete and is limited to the cultural objects of regional interest, as laid down in article 135bis of the Belgian Constitution and in article 4bis, 3° and 4° of the Special law of 12 January 1989 for the Brussels institutions, inserted in 2014. For more on this, see Peiffer, 2019.

according to different cultural interpretations (2). Furthermore, qualifying human remains in heritage collections as worthy of respect may also vary depending on other factors, such as the type of human remain or the strength of the human dignity principle (3).

3.1. Does the legal status of human remains evolve over time?

The distinctive nature of human remains can change over time. The French concept of *affectation* which could be translated by assignment or allocation means that a good is assigned to a specific function, for instance to public domain (*affecté au domaine public*) and therefore assigned to a public service and to the use of all. This assignment function can help establish a timeline for the status of human remains. Initially, there is a period of family memory (remains are assigned to the family), followed by a phase of oblivion (remains are assigned to public domain for instance, as for a museum artefact).

During the initial timeframe, human remains are closely associated with the family, and their rights to the remains should take precedence over any other (property) rights. Current legislation already acknowledges several burial rights and, for example, the posthumous right to an image.

In the subsequent period, when family connections have faded, human remains may slip into obscurity and might be regarded more as property, available for ownership by anyone without family members having a prior claim. However, they are still imbued with a sense of human dignity and sanctity.

An old decision from the Belgian Court of Cassation, as observed by the advocate-general Faider, appears to introduce an additional transitional phase between the moment of passing and the burial¹⁴. During this interval, the head of the family is granted ownership rights over the remains. Yet this old case is bypassed by the aforementioned Court of Cassation decision of 28 February 2017 recognising no ownership rights can be held on human remains.

Nonetheless, this timeline presupposes the identification of distinct chronological segments: at what point do we transition from the realm of family ties to a more collective, perhaps even universal perspective on these human remains?

It is worth noting the variations in Belgian legislation regarding the designated timeline for post-mortem treatment, which serve as an indicator to establish a temporal threshold:

- 20 years *post-mortem* to exercise a right to the image of the deceased (Article XI. 174 of the CRC);
- 50 years *post mortem* for a concession in the case of a burial of a corpse (but with possible renewals); after which the municipality 'decides on the destination to be given to the mortal remains discovered in the cemetery enclosure'¹⁵; in Brussels it is specified moreover that 'the mortal remains are either deposited in an ossuary, or incinerated and the ashes are either dispersed on the plot reserved for this purpose, or deposited in an ossuary'¹⁶;
- 100 years to recognize an object of archaeological interest (see next point on human remains as cultural property)
- 1000 years to allow for repatriation of human remains under the UK *Human Tissue Act*;

There are no limits for bringing a criminal action in case of violation of graves and tombs, except for the time lapse which is 5 years from the facts committed.

Within these diverse legal frameworks, the responsibility for ensuring the respect and dignity of a deceased person's body or image primarily rests with families, and sometimes close relatives (except in criminal matters, where the public prosecutor's office may intervene with the possibility of becoming a civil party). This underscores the strong connection between the system of filiation (family lineage) and the oversight of how a corpse should be treated. Nevertheless, Belgian law appears to set rather constrained timeframes for family

¹⁴ Faider, conclusions to Cass. 2 November 1868, Pas. 1869, I, p. 14 : https://cass.justitie.belgium.be/cass/pas/1869_Pasicrisie.pdf.

¹⁵ Article L1232-20 Code wallon de la démocratie locale et de la décentralisation.

¹⁶ À Bruxelles, il est question d'ossuaires, c'est-à-dire d'un 'monument mémoriel fermé, situé dans le cimetière, où sont rassemblés les ossements ou cendres des défunts après qu'il a été mis fin à la concession de sépulture' (article 2, 3° de l'ordonnance de 2018).

rights in this regard: either a 'short' duration (20 years) to protect the image of the deceased, with the condition that these rights can only be invoked if heirs can prove they were themselves harmed by the infringement on the deceased's image; or two generations (50 years) to maintain human remains in a cemetery, after which the municipality may take steps to remove them (either by placing them in an ossuary or by cremating them). This is as if family connections are assumed to weaken or even dissipate after half a century. The burial period can be extended through requests for 50-year renewals, contingent on demonstrating the financial capability to maintain the gravesite. Renewals have no predefined limit, but they no longer adhere to the principle of perpetuity, as was the case prior to the 1971 law. However, this temporal restriction for concessions does not apply to cremated remains. It's important to note that municipalities are obligated to manage ossuaries diligently and prevent the dispersal of bones or soil contamination. The end of a concession would therefore signify the absence of material protection for the human remains and the tomb. Thierry Vansweevelt suggests that descendants can still keep the memory of the deceased alive through the exercise of their right to the person's memory (Vansweevelt, 2014: 1571).

The above shows that family ties are counted in terms of both years and generations: one generation, so to speak, for the right to the image, and two generations to have the privilege of paying respects at the designated burial site. But the question arises: how many generations must pass to genuinely erase the memory of the deceased and the associated rights? Naturally, the answer to this question hinges on social and cultural practices, which can vary significantly. Consequently, alongside the 50-year timeframe for burial concessions or the 20-year period to safeguard the image of the deceased, the existence of the emphyteutic lease (*bail emphytéotique*)¹⁷ could serve as an intriguing temporal indicator. Such an emphyteutic lease has a duration of 99 years, which corresponds to the passage of three generations. This three-generation threshold, as suggested by legal anthropologist Jacques

Phytilis, would establish a 'symbolic essential boundary' between the era of human memory and that of humanity, the realm of ancestors (Perrot, 2018: 153). In a similar temporal context, it's worth noting that the 100-year threshold is recognized in texts safeguarding cultural property to determine when an object holds archaeological significance.

The array of timeframes considered for acknowledging post-mortem rights over human remains (including their image) underscores the challenge of establishing a clear temporal demarcation. It also highlights the intricate interplay between the law and ethical considerations linked to the concept of life after death.

3.2. Cultural interpretations of human remains

Human remains originating from non-Western cultures underscore the significance of recognizing the shifting temporal boundary that moves the corpse from being associated with the family towards the realm of oblivion, a transition described as 'neither systematic nor definitive' (Perrot, 2018). In other words, the time of family memory might be much longer according to certain cultural interpretations and impossibly fall into oblivion. Crossing this binary temporal divide, spanning from family memory to oblivion, introduces another temporal aspect: one characterized by collective scientific, cultural, and even identity-related interests that converge around human remains. This third dimension, rooted in the acknowledgment of cultural diversity and stemming from cultural rights, further substantiates calls for repatriation or bans on a public display of human remains.

An illustrative instance of this cultural perspective on family ties can be observed in the case of Francis Hopu and Tepoaitu Bessert v. France (Case No. 549/1993, A/53/40 of 29 July 1997) before the UN Human Rights Committee (Dhommeaux, 1998). This case involved Tahitians who believed that they had been deprived of a 4.5-hectare parcel of land containing a pre-European cemetery, which held great cultural significance for them. The land was acquired by the territory of Polynesia with intentions to build a hotel. The primary dispute revolved around the connection between the bones discovered during the excavation and the applicants. France contended that the respect for the deceased did

¹⁷ The emphyteutic lease, or emphyteusis, is a contract for land that allows the holder the right to the enjoyment of a property, often for a very long time (maximum 99 years), on condition of proper care, payment of tax and rent.

Elements of human remains	Categories of human remains	Age
Corpse	Medical collections	Immediately after death
Skeleton	Archaeological finds	20 years (right to image)
Skull	Ethnological collections	50 years (burial concession)
Bones	Relics	100 years (cultural good archaeological artefact)
Bone or teeth fragments		1000 years (UK Human Tissue Act)
Soft tissue (hair, skin, nails...)		
Traces of human remains in artefacts		

Tab. 1 – Categories of human remains varying according to elements, use and age.

not apply to buried individuals whose memory had faded over centuries. The Committee's interpretation of the right to privacy and family life (as outlined in Articles 17 and 23 of the ICCPR) in this context is particularly noteworthy:

The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life (...)

The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti.¹⁸

This decision underscores the contrast in how family connections are interpreted across different cultures. The Western concept of family memory may differ from that found in other cultural contexts. The filiation system, rooted in Roman legal traditions and based on blood or lineage, may not be universally applicable, as

family and cultural identity in some cases depend more on 'belonging to a social structure (clan, tribe, community) or to a territory, independently of individual identity' (Perrot, 2018: 155). In certain communities, particularly those practicing ancestor worship, the bonds of memory are secular, diverse, and profound, ensuring the continued vitality of these human remains through their contemporary custodians, with the remains staying embedded in social life. For instance, in sub-Saharan Africa, the veneration of ancestors 'presupposes that the deceased exert a real influence on the living' (Bonhomme, 2008), to whom the ancestors have passed down their heritage. The recent case of the Buddha mummy, stolen in 1995 from a Chinese village and held by a Dutch antiquarian, illustrates the millennia-old ties that remain very much alive between a community and its deceased: 'the human remains of Master Zhang Gong contained inside the statue are a person to the Chinese villagers and have been worshipped as their ancestor or religious deity for a thousand years' (Chen, 2022), rendering the assertion of objectification over time more intricate, if not impossible.

For these communities then, it proves challenging to accept that their ancestors are included in museum collections alongside other cultural artefacts or even put on public display. The numerous requests for repatriation made by these communities in recent decades underscore the tension with museum institutions, pitting the identity concerns of the original communities against the scientific and memorial interests of museums, whose mission encompasses the dissemination of knowledge about humanity.

¹⁸ Hopu & Bessert v. France, Comm. No. 549/1993, adopted 29 July 1997, https://ccprcentre.org/files/decisions/549_1993_Hopu_Bessert_v_France_.pdf, para 10.3.

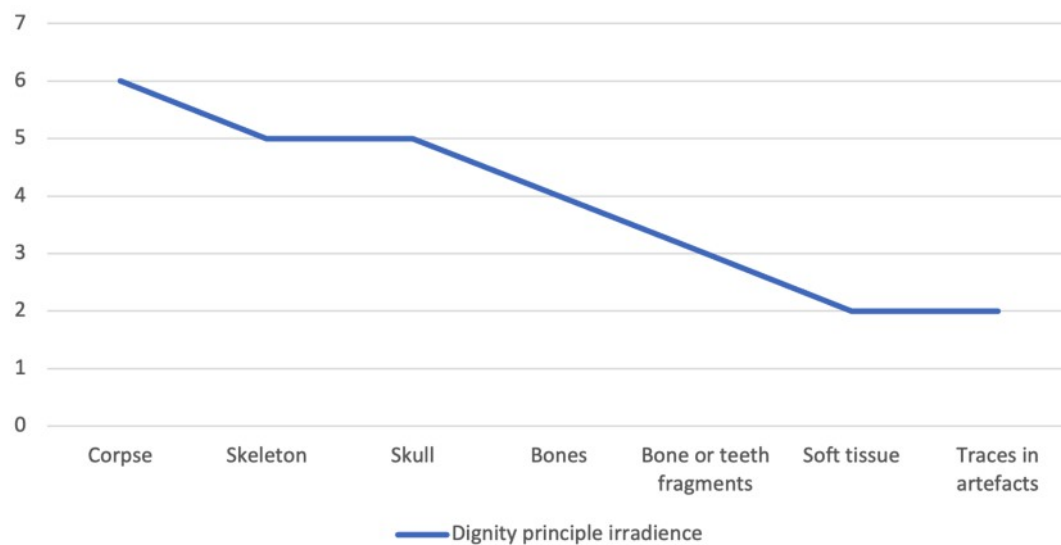


Fig. 2 – Gradual irradiance of the human dignity principle according to elements of human remains.

In other words, time alone is not the sole criterion to consider when addressing issues related to memory and dignity; cultural considerations, particularly those of the communities of origin when it comes to human remains from other cultures, are equally vital.

3.3. Gradual interpretation of the status of human remains in heritage collections

In an effort to balance the various interests associated with human remains, including those of families, cultures, and heritage, a multi-tiered approach could be developed. It could be argued that the principle of dignity varies according to different factors related to human remains, such as their constituent elements, categories, and age. The more representative a set of human remains is of the overall human condition (if such a criterion could be established), the more crucial it becomes to uphold the dignity of those remains. Additionally, the individuality of the deceased might influence the importance of the cultural heritage interest; for example, the human remains of someone like René Descartes could be seen to hold a greater cultural heritage significance than the unidentified remains of a soldier who perished in battle. This distinction, however, does not diminish the dignity attached to the latter; rather, it underscores its importance.

Regarding the age criterion, more recently preserved remains are accorded greater dignity. These criteria should also intersect with other

viewpoints on respect for human remains and the sanctity attached to them from various cultures and communities, thereby recognizing and valuing cultural identity and, consequently, cultural rights (Tab. 1).

Elements of human remains (Fig. 2):

- Corpse;
- Skeleton;
- Skull;
- Bones;
- Bone or teeth fragments;
- Soft tissue (hair, skin, nails...);
- Traces of human remains in artefacts.

Age thresholds (Fig. 3):

- Immediately after death;
- 20 years (right to image);
- 50 years (burial concession);
- 100 years (cultural good archaeological artefact);
- 1000 years (UK Human Tissue Act).

The gradual interpretation I propose doesn't diminish the classification of human remains as objects worthy of respect; instead, it refines the purpose assigned (*affectation*) to them. The degree of assignment varies depending on the particular human remains and their age. In essence, the possessor of human remains wields a varying degree of authority based on these criteria, but this never reaches a point where the unique assignment of these human remains is entirely diminished. Their

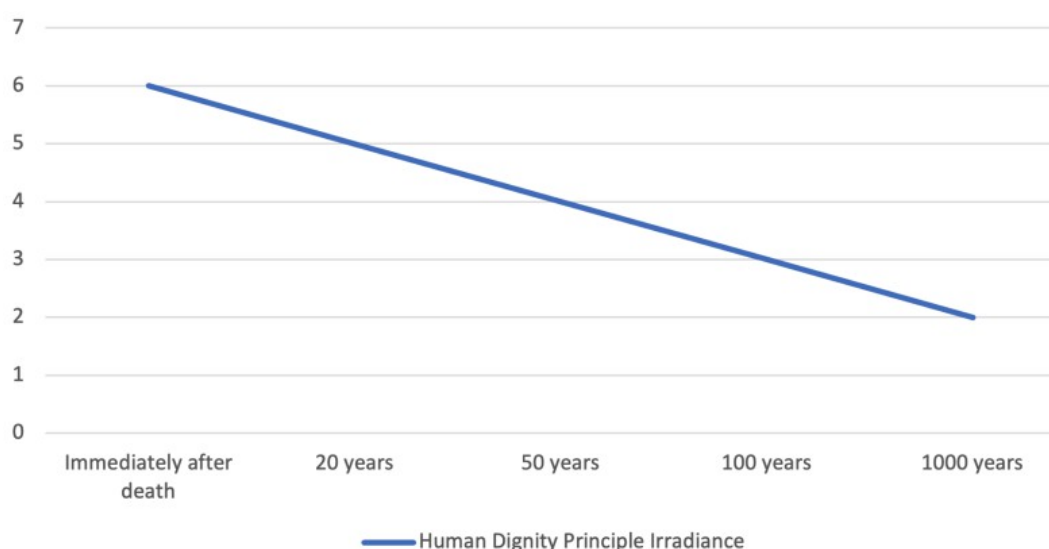


Fig. 3 – Gradual irradiance of the human dignity principle according to age.

special character remains intact, but the intensity of this assignment may diminish depending on the outlined criteria.

4. THE BLURRY LEGAL REGIME OF HUMAN REMAINS

Similar to its status, the legal regime attached to human remains is in a legal blur, especially concerning their commodification (1). Furthermore, the regime is plural, depending on the category of collections in which human remains are found, even though these regimes can overlap: public domain for public collections (2), specific treatment in the case of archaeological excavations, and specific issues for digitized human remains. The present section only goes over the first two points. Please refer to de Clippele (2023) for an extended analysis.

4.1. Indications of a relative out-of-commerce regime

Human remains are not property like any other, nor are they cultural property like any other. Their specificity is nevertheless not explicit, neither in property law nor in cultural heritage law. What is clear, however, is the need to work on a specific legal regime that would make it possible to mirror the special nature of human remains.

Belgian law does not have a general article in the Civil Code on treating human remains with respect and dignity. However, since the federal law of February 8, 2001 (taken up in most regional texts), all funeral legislation specify that:

*Les cendres du défunt sont traitées avec respect et dignité et ne peuvent faire l'objet d'aucune activité commerciale, à l'exception des activités afférentes à la dispersion ou à l'inhumation des cendres, ou à leur translation à l'endroit où elles seront conservées.*¹⁹

This effectively represents a formal acknowledgment of the non-commercial nature of human ashes, even though there exists no precise legal definition for items that are 'out-of-commerce' (Van de Voorde, 2023). This legislation could serve as the foundation for recognizing human remains as exceptional and sacred entities that are beyond commercial transactions. While it's true that ashes do not encompass all forms of human remains, subsequent legislation could potentially expand upon this principle, as allowed by Article 3.2 of the new Civil Code. Furthermore,

¹⁹ The ashes of the deceased shall be treated with respect and dignity and may not be the object of any commercial activity, with the exception of activities relating to the scattering or burial of the ashes, or their translation to the place where they will be kept. (free translation), article 24, al. 3 of the Funerary Law of 1971 taken over by article L1232-26 CDLD and article 30, § 1^{er} al. 3 of the Brussels legislation.

conventional doctrine, especially in the realm of biomedical matters, also regards human remains as non-commercial.

Nonetheless, the non-commercial nature of human remains would be relative, as it would only be prohibited if the intent was unlawful or contrary to public order and morality. Vansweevelt connects this restricted commercial aspect to the notion of appropriating human remains: if human remains can be subject to property rights, they can circulate legally (Vansweevelt, 2014: 1573).

I believe that this limited commercial aspect would imply that human remains could circulate, including for repatriation purposes, but they could not be bought or sold for profit. It would essentially establish a principle of non-profit (*principe de non vénalité*) rather than an absolute out-of-commerce principle (Gidrol-Mistral, 2021: 54). Thus, a distinction could be drawn between legitimate trade and commercial transactions. The relevance of employing this principle of non-profit could be derived from the French court ruling that criticized the 'Our Body' exhibition precisely on the grounds of profiteering from the commercial exhibition of human remains²⁰.

Regarding the non-commercial character of human remains, the Belgian Advisory Committee for Bioethics unequivocally states in its March 2023 opinion that 'the trade in human remains is not acceptable, even for scientific purposes', and it takes note of China and India having banned the export of human remains (*Avis n°82 concernant le statut des restes humains dans les collections muséales, scientifiques et privées*, 2023). Consequently, the Committee recommends that 'the European Union should establish regulations aimed at prohibiting the trade in human remains both within the Union and with third countries, and permit those in possession of human remains to dispose of them anonymously through an official body, similar to the procedures for handling ivory.'

4.2. Human remains in the public domain

If human remains are part of public museum collections, they are essentially considered part of the public domain. Consequently, they are inalienable, imprescriptible, and immune from seizure,

in accordance with Article 3.45 of the new Civil Code. This implies that specific procedures must be followed in the case of repatriation.

Concerning their inalienable nature, this signifies that any sale, transfer, or donation of a cultural artefact from the public domain is deemed as irregular unless prior disaffiliation from the public domain has been officially sanctioned. This can be seen with works of art located in churches which cannot be transferred unless they have been disaffiliated by the competent authority or even deconsecrated by the relevant religious authorities. The same principle applies to objects that are part of museum collections.

Human remains held in public collections are thus rendered non-commercial due to their inclusion in the public domain. Marie Cornu perceives a 'protected sanctuary' for human remains in the framework of the public domain, particularly within the context of the *Musées de France*, (Cornu, 2022: 50). Their belonging to public collections removes them from the market and creates 'an 'enclave' particularly suited to accommodate these non-negotiable entities' (Cornu, 2022: 50). The cultural assignment substantially fortifies the dimension of the sacred inherent in human remains, thereby connecting the sacred (associated with human dignity) with the public (designation to the public domain) (Cornu, 2022: 50). Simultaneously, the public domain regime takes precedence over the family assignment, the public entity over the sacred entity. Anne-Blandine Caire also relies on the concept of assignment, whether religious or museal, to remove relics from the commercial sphere and justify the prohibition of individual sales while allowing for their transfer from one church to another (Caire, 2019).

If we consider the public domain as a suitable realm for safeguarding human remains from commodification, as if their status as public property permits dignified treatment, or at the very least isolates them from commercial activity, then this necessitates a robust public domain regime. This is notably the case in France, which likely explains the strong alliance between the public entity and the sacred entity, and consequently, the profound attachment and the challenge of disassociation from the public domain.

Nevertheless, neither the assignment to the public domain nor the inalienability regime are absolute. Under Belgian law, they hinge solely on the decision of assignment

²⁰ Court of appeal in Paris, 30 April 2009, n° 09/09315, Dalloz, 2009, p. 2019.

(whether explicit or implicit) by the public authority that possesses the property. In other words, the assignment criterion places decision-making with the public authority holding the property. Only this authority can unilaterally decide, through an administrative act, whether a property enters or exits the public domain. The same prerogative applies to the decision to disaffiliate public property, removing it from the public domain and returning it to the commercial realm, where it can be freely transferred. This signifies that the public owner of human remains in a museum collection may opt to deaccession them and return them to the community of origin, for instance.

5. THE MORAL OR LEGAL DUTY TO REPATRIATE HUMAN REMAINS?

The presence of human remains in museums originates from various sources: they may have been preserved immediately after death, excavated as part of archaeological endeavours, or collected in foreign countries, often under contentious circumstances during colonial periods. What justifies the presence of these human remains in collections? Do they not rightfully belong to their place of origin, in the sense of their indigenous community, whether within Belgium or abroad? The concept of belonging is especially delicate when it concerns human remains, as it extends to the position of the deceased within the living community.

Some legal measures can be noted, such as humanitarian law regulating the repatriation of soldiers' bodies from battlefields or French law which grants families the right to recover the remains of their deceased in the context of criminal proceedings²¹. Nevertheless, there is currently no (international) right to repatriate human remains preserved in collections located in a country other than their country of origin. This section primarily focuses on the international aspect

of repatriating human remains present in heritage collections, even though pertinent elements may apply domestically.

In contemporary discussions regarding the international restitution of cultural property, human remains are often treated separately to underscore their distinctiveness, even their sacredness. The term 'repatriation' is frequently employed to emphasize this specificity, distinguishing it from the concept of 'restitution'. The concept of 'repatriation' is also the one used in the soft law instruments examined below in relation to human remains, making it an appropriate choice.

However, this selection of a specific term is not without scrutiny, as it prompts questioning of the uniqueness of human remains compared to other sacred objects and whether they should be considered collectively as sacred. Additionally, while widely used in relevant circles, it is not universally accepted. Finally, the utilization of terms like 'repatriation', 'restitution' or 'return', with their distinct connotations, is also justified and would not alter the substance under consideration. Consequently, these terms can, to some extent, be used interchangeably.

5.1. Legal shortcomings and recent developments

International law does not offer a satisfying solution to the issue of repatriating human remains. Few international conventions address the issue, as they are not retroactive (Zian & de Clippele, 2021). The majority of acquisitions of human remains outside Belgium took place before the entry into force of these international treaties in Belgian law, mostly during colonial times. The former colonial powers did not rush to enact specific provisions to address this gap, taking refuge behind the principle of the intertemporality of law, which states that: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'²². Since colonial acquisitions were legal at the time – but not necessarily so (von Arnould, 2021; Le Gall & Machona, 2022) – the property title could

²¹ Article 230-30 of French Code of Criminal. Procedure: ' Lorsque les prélèvements biologiques réalisés au cours d'une autopsie judiciaire ne sont plus nécessaires à la manifestation de la vérité, l'autorité judiciaire compétente peut ordonner leur destruction. (...). Toutefois, sous réserve des contraintes de santé publique et lorsque ces prélèvements constituent les seuls éléments ayant permis l'identification du défunt, l'autorité judiciaire compétente peut autoriser leur restitution en vue d'une inhumation ou d'une crémation. '

²² Permanent Court of Arbitration 4 avril 1929, Island of Palmas case (United States of America v. The Netherlands), <https://pcacases.com/web/sendAttach/714>.

not be questioned. It is sufficient to rely on common civil law to reinforce the rights of the possessor (Demarsin, 2019).

Yet, although there is no overarching framework for repatriation of human remains at the international level, such as international conventions, resolutions, or the establishment of common principles, most repatriation efforts now operate within a more rigorous legal framework at the national and subnational level, which includes national laws and guidelines from public authorities (Stahn, 2022).

At the national level, certain countries like the United States, Australia, New Zealand, and Canada have enacted specific legislation primarily focused on the internal repatriation of human remains belonging to their indigenous populations. Similarly, the United Kingdom and France have introduced legislative measures, both general and *ad hoc*, to facilitate repatriation (Vigneron, 2020). Belgium adopted, on July 3, 2022, a general law for the restitution of colonial collections in its federal museums²³, a pioneering framework, which however explicitly excludes human remains (de Clippele & Demarsin, 2022). Therefore, in Belgium, common civil law still applies to human remains, despite some special considerations for human remains I advocated for in the first part of this paper. In addition to common civil law, specific rules apply for human remains in the public domain, with regards to their relative inalienability (Romainville, 2009; Zian & de Clippele, 2021). I believe it would be necessary and coherent to adopt a repatriation framework for human remains, especially those from the colonial context, as they are excluded from the federal law of 3 July 2022 but are requested by the countries and communities of origin²⁴.

In contrast, some countries, such as The Netherlands (van Beurden, 2022a) or Switzerland (Renold, 2020b; Kuprecht, 2022), adhere to museum-related policies at the local level, encompassing recommendations from museums and academia, which can equally be effective in guiding repatriation efforts (Stahn, 2022).

The international landscape has also evolved significantly in recent decades. Indigenous peoples' fundamental rights, such as the right to self-determination and the repatriation of their cultural heritage and ancestral remains, recognized in the United Nations Declaration on the Rights of Indigenous People (2007), are now partly considered customary law (Lenzerini, 2012; Francioni & Vrdoljak, 2020). Additionally, their basic right to cultural heritage has gained acknowledgment from bodies like the Inter-American Court of Human Rights²⁵ and the European Court of Human Rights²⁶, and to some extent, the International Court of Justice²⁷. This collective right to cultural heritage, also laid down in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), is progressively extended to all people, according to the former UN special rapporteur on cultural rights, Farida Shaheed (Shaheed, 2011), as well as the scholars (Jakubowski, 2016; Chechi & Renold, 2022). Discussions surrounding the legality of acquiring human remains in the context of colonial history further present arguments supporting repatriation (Campfens & Ranganathan, 2022). Lastly, the collective impact of non-binding international legal instruments taken as a whole contributes to the development of a global ethical framework for repatriation (van Beurden, 2022b).

23 Loi du 3 juillet 2022 reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour, Moniteur belge, 28 September 2022.

24 See for instance the Congolese initiative who has set up a Commission for the restitution of cultural objects but also of human remains, without dissociating both like the Belgian lawmaker has done, Compte-rendu de la 76e réunion du Conseil des ministres du gouvernement de la République démocratique du Congo, 11 novembre 2022, <https://www.primature.gouv.cd/wp-content/uploads/2022/11/COMPTE-RENDU-DE-LA-SOIXANTE-SEIZIEME-REUNION-DU-CONSEIL-DESMINISTRES-DU-11-NOVEMBRE-2022.pdf> (Accessed on 18 August 2023).

25 Interamerican Court of Human Rights, 15 June 2005, *Moiwana Community v. Suriname*, Serie C, n° 124: https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf (Accessed on 15 September 2023).

26 European Court of Human Rights, decision *Ahunbay and others v. Turkey*, 29 January 2019.

27 'Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, landmarks, cemeteries and artefacts' (§ 98), International Court of Justice, Order of 7 December 2021, application of the International Convention on the elimination of all forms of racial discrimination, *Armenia v. Azerbaijan*, request for the indication of provisional measures: <https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf> (Accessed on 15 September 2023).

5.2. Toward a model of inclusive heritage justice?

When examining current practices of repatriations in various countries, it is also interesting to note that diplomatic channels are primarily favoured over judicial avenues. Demanding repatriation before a judge remains fraught with risks (burden of proof, time lapse, black and white solutions...) (Cornu & Renold, 2012). Alternative dispute resolution methods, encompassing various possibilities, often occur outside the realm of judicial intervention (Renold, 2020a). These methods may be unilateral, such as the adoption of specific laws, unilateral administrative decisions, or bilateral through negotiations, conventions, mediation, conciliation, and arbitration. The diplomatic approach thus offers multiple avenues for achieving repatriation without the need for binding judicial decisions, effectively sidestepping the inherent challenges of court proceedings. However, the diplomatic route often has a more political dimension, especially when initiated by state authorities, and can be instrumentalized within the context of cultural diplomacy with objectives that extend beyond restitution.

We advocated for a diplomatic approach in the context of the restitution of colonial collections and proposed an agreement of scientific and cultural cooperation between states (Demarsin & de Clippele, 2021; de Clippele & Demarsin, 2021; Demarsin & de Clippele, 2022). Together with Bert Demarsin, I championed this pragmatic perspective through several proposals, some of which found their way into the law of July 3, 2022, although with a narrower scope in terms of time, geography, and materials (de Clippele & Demarsin, 2022). One of the proposals not adopted suggested the recognition for a cultural community of origin to submit a repatriation request, contingent upon the support of the official authorities of the State of origin. This innovative proposal aimed to include communities in the repatriation process, enabling them to exercise their fundamental right to access their cultural heritage while avoiding undue interference by Belgian authorities in the sovereignty of the State of origin. The proposal addressed the challenge of determining the legitimacy of the requesting community(s).

Despite its inclusion in the initial draft law²⁸, this proposal did not make it into the final version.

When it comes to human remains, I believe the involvement of non-state actors is however even more critical. The concept of a 'moral burden' (Martinet, 2019) associated with human remains is particularly relevant here. It is essential to begin with the connection between the living and the deceased and to assume a heightened ethical responsibility (Négri, 2016). Repatriating human remains or ancestral remains, along with related objects, should be viewed as a restoration of this connection after remains were taken away. Families and communities must be central to the process, ensuring that repatriation holds meaning and contributes to inclusive heritage justice.

In this regard, transitional justice mechanisms appear pertinent, supplementing the judicial and diplomatic avenues, especially for addressing repatriation procedures involving human remains acquired within a colonial context. Transitional justice rests on four key principles: the quest for truth, the assertion of the right to justice while rejecting impunity, the implementation of reparations for victims, and ensuring that similar atrocities do not recur in a reformed future. When applied to human remains, as suggested by Alessandro Chechi, this entails (1) in terms of seeking the truth, acknowledging the circumstances and context that led to the illegitimate acquisition of human remains and the connected crimes; (2) concerning the right to justice, fostering a dialogue between the descendants of deceased individuals whose bodies were exhumed or taken as trophies and the institutions that

28 ' La commission scientifique mixte peut être saisie d'un dossier de restitution d'un bien restituable respectivement par:

- l'État belge, à l'initiative du gestionnaire, qui en informe le ministre ou le Secrétaire d'État ayant la politique scientifique dans ses attributions;
- l'État d'origine;
- toute personne physique ou morale démontrant un intérêt à la restitution dudit bien au profit de l'État d'origine. '

Article 6 de l'avant-projet de loi, Chambre des représentants de Belgique, Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour, 25 April 2022, Doc. 55 2646/001, <https://www.lachambre.be/FLWB/PDF/55/2646/55K2646001.pdf>, p. 22.

received these remains from those responsible for such actions; (3) in relation to reparations, planning for the physical return of the remains and other forms of symbolic compensation; (4) with regard to non-recurrence and reconciliation, bringing about reconciliation between the involved parties through dialogue, apologies, and forgiveness, thereby enabling the descendants of victims to move forward and attain a sense of closure (Chechi, 2023).

Various models have been developed and/or suggested to address the legal frameworks for repatriation, both at the intergovernmental and international levels (Stahn, 2022; Tümsmeyer, 2022).

Building upon the reflections further analysed in the book, I believe the emergence of a model of inclusive heritage justice could involve the interplay of several elements (also shown in the figure below (Fig. 4) and extensively discussed in my book):

- International legal standards (heritage conventions, if applicable despite their non-retroactive nature) or national-level standards (laws addressing the repatriation of human remains, either in a general sense or through *ad hoc* legislation).
- Human rights, particularly the collective and individual right to cultural heritage, cultural rights, and the right to self-determination of indigenous peoples.
- Ethical principles, including the principle of dignity recognized in the Belgian Constitution and the sacredness of human remains, as addressed in soft law guidelines concerning human remains, along with considerations regarding the legitimacy of their acquisition.
- Institutional practices that promote the repatriation of human remains, encompassing manuals, museum and academic recommendations, and case-specific practices.
- Transitional justice mechanisms designed to comprehensively support repatriation processes, ensuring that they hold significance, especially for the originating community.

In the repatriation process, the time factor is sometimes overlooked and yet it is an important element to be considered as repatriation does not happen overnight. Almost all the cases studied demonstrate that discussions and negotiations, even without involving a judge,

take time. During his hearing before the Special Commission on the Colonial Past, anthropologist Maarten Couttenier 'calls for a form of humility on this matter'; the rapporteurs also note that '[t]hinking that the repatriation of human remains will solve all problems in two years is a very Western idea'²⁹.

Jos van Beurden concludes his study on colonial heritage by proposing seven phases of negotiations to address the issue of restitution, emphasizing the importance of taking the time to listen to others, even multiple parties, and to carefully develop a decision that makes sense for everyone and enables the addressing of (in) equality (van Beurden, 2017). In a later work, van Beurden highlights the dimensions of trust (unlearning to distrust former colonial powers and vice versa), equality between the holder of colonial collections and the dispossessed, and justice (undoing injustice through restitution) (van Beurden, 2022b).

Finally, I draw attention to the statement issued by the G20 culture ministers on August 26, 2023, which adds a global political dimension to our discourse. Convened in the ancient city of Varanasi, India, these ministers represent the 20 most influential countries globally, collectively accounting for 80 % of the world's GDP, including China, the United States, Brazil, Russia, India, South Africa, Canada, the European Union, Turkey, Egypt, Argentina, Mexico, Indonesia, Japan, South Korea, and Saudi Arabia. They state that strides have been taken at national, regional, and international levels to tackle the challenges surrounding the return and restitution of cultural assets to their countries and communities of origin.

29 'Reconnecter les restes humains avec les familles concernées est un travail de longue haleine (pour lequel l'histoire orale est décisive). Comme tous les témoignages récoltés lors de la mission de la délégation parlementaire de septembre 2022 le confirment, les restes humains ne sont pas seulement des pièces scientifiques mais aussi et surtout des éléments permettant de se relier aux ancêtres et en quelque sorte de 'restaurer l'âme congolaise, burundaise et rwandaise'. Comme l'expliquaient deux étudiants de l'Université de Kinshasa, '[ces ancêtres] habitent en nous'; '[leurs] tortures sont encore fraîches dans nos mémoires', Commission spéciale passé colonial, Introduction et constats des experts, p. 90-91: [https://www.lachambre.be/kvvcr/pdf_sections/pri/congo/20221122%20Constats%20experts%20\(002\).pdf](https://www.lachambre.be/kvvcr/pdf_sections/pri/congo/20221122%20Constats%20experts%20(002).pdf)

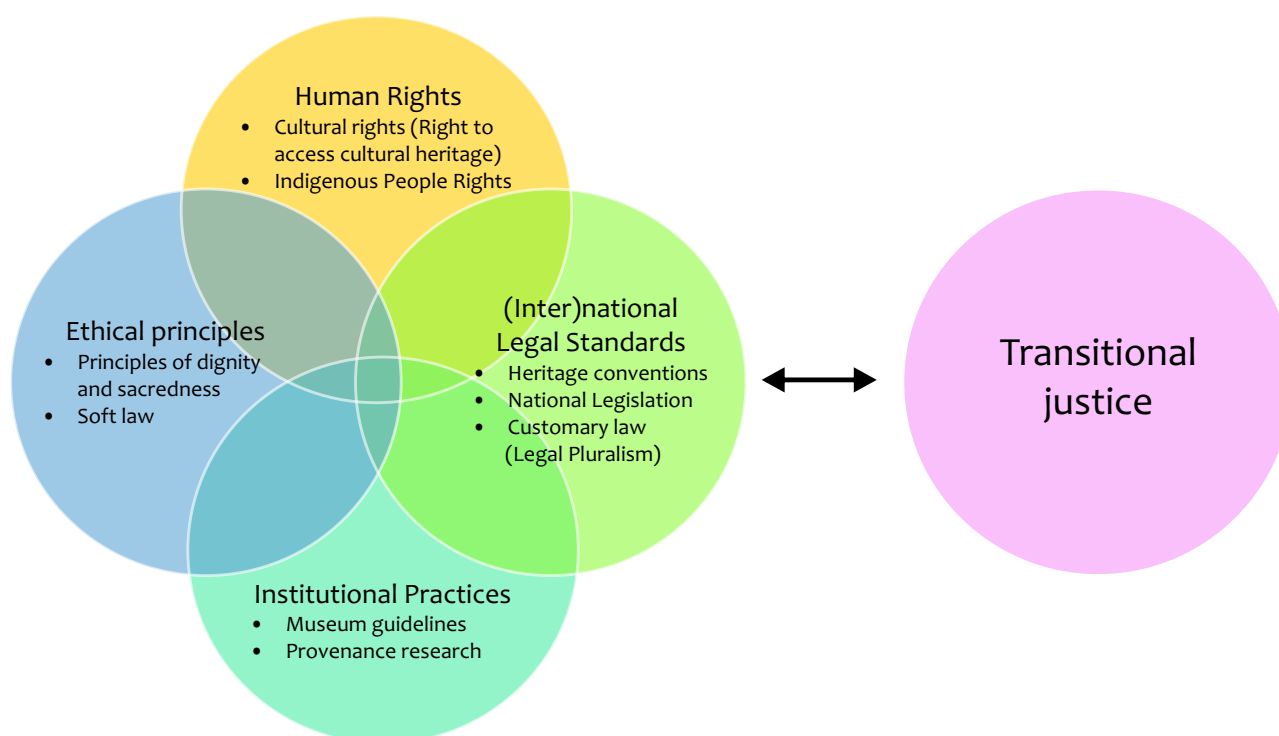


Fig. 4 – Inclusive heritage justice model.

These countries call for 'an open and inclusive dialogue on the return and restitution of cultural property, building on a broad historical perspective that renews relationships between countries, while also enabling alternate dispute resolution mechanisms'³⁰. Additionally, they call for enhancements in 'knowledge on provenance, on claims of cultural property, as well as on good practices of return and restitution.'

Furthermore, the culture ministers underscore the importance of strengthening online tools and digital technologies to encourage compatibility between existing inventories and databases. They emphasize the necessity to bolster the capabilities of cultural institutions and organizations, including those in developing nations, through technical assistance measures

and the exchange of expertise, especially in areas such as provenance research, due diligence, effective management, and the preservation of cultural assets. While these declarations are primarily of a political nature, they nonetheless send a resounding message in support of enhanced cultural heritage justice.

This signals to me that change could be on the horizon. The international community regards the return of objects and the repatriation of human remains as significant aspects of diplomatic relations, and as a result, these processes may occur more swiftly, although the possibility of these actions being used for ulterior motives cannot be ruled out (Opoku, 2023).

Furthermore, there has been a shift in collective sensitivity regarding the display of human remains. It is now less socially acceptable to openly display human remains in museum exhibitions without providing appropriate context, especially when these remains originate from other countries abroad (Chechi, 2023; Dungca et al., 2023). More research initiatives have emerged to address the management of human remains, such as projects like HOME and MEMOR, as well as conferences like FARO and GUM (*Studiedag over menselijke resten*). There is a growing consensus that human remains

³⁰ G20 Culture Minister's Meeting, Kashi Culture Pathway, Outcome Document and Chair's Summary, Varanasi, 26 August 2023: https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/2--new/G20_Culture_Ministers_Meeting_Outcome_Document_and_Chairs_summary.pdf (Accessed on 15 Sept 2023). See also the preparatory report : G20 CULTURE, Ministry of Culture, India, Shaping the Global Narrative for Inclusive Growth: https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20_Thematic_Webinars_Report_2023_India_REVISED.pdf (Accessed on 15 Sept 2023).

are not mere objects and should be treated with respect, a sentiment that should find now expression in legal frameworks.

I contend that the Belgian Civil Code, currently undergoing reform, should incorporate a comprehensive provision emphasizing the respect for the human body, extending this respect beyond death. Additionally, the same Code should clarify the legal status of human remains as out-of-commerce, or at the very least, prohibit their commercialization for profit. This would mean that human remains can only be possessed, as in the case of museum collections eligible for repatriation, but not bought or sold for monetary gain. In November 2023, a draft bill was discussed in Parliament precisely on this aspect, seeking to forbid marketing human remains³¹. It was unfortunately not enacted by the former legislature. The current legislature might pick that up and clarify some provisions from the former draft bill (as one provision stated that human remains could not be sold, except when the law provides so, which could eventually overturn the principle).

Additional provisions in digital law could be established with the specific intent to establish digital rights that extend beyond death (*post mortem* rights).

Lastly, within the domain of cultural heritage law, there is room for the implementation of particular regulations. For instance, one approach could involve incorporating elements from the ICOM Code of Ethics to substantiate the rationale for treating cultural artefacts differently, particularly in terms of their preservation, digitization, and repatriation. I assert that achieving the repatriation of human remains, particularly those with colonial historical contexts, could be most effective if approached within the framework of transitional justice, thereby facilitating the application of an inclusive heritage justice model.

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³¹ Proposition de loi visant à interdire le commerce des restes humains, Doc. Parl, Ch., 22 November 2023, nr.3702/001.

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Author's address:

Marie-Sophie de Clippele
UCLouvain Saint-Louis – Bruxelles
Boulevard du Jardin botanique, 43
1000 Brussels
Belgium

Marie-sophie.declippele@uclouvain.be