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SPEAKING OF THE DEAD: HUMAN REMAINS AS HERITAGE IN THE SINGAPORE CONTEXT

Human remains are undoubtedly a unique form of heritage. Because they originate from human persons who were once alive, they are regarded by many as having a special, even metaphysical, nature. To some indigenous people such as the Māori, “the concept of possession of the deceased is troubling (...) in light of the sacredness in which they view the life and death continuum.”¹ Indigenous people from Australia and New Zealand have sought for the purpose of burial the return of human remains which were taken during colonial times and are now in museums and other institutions in countries such as the United Kingdom.

In earlier times, courts in several common-law jurisdictions recoiled against treating human remains as property in their judgments. Nonetheless, the issue of whether human remains may have such a legal status arises because other questions hinge on it. These range from whether body parts can be the subject of theft to whether compensation can be sought for negligent damage caused to human tissue samples. The issue arguably also arises when human remains are found during archaeological investigations, or are preserved in institutional collections.

In present-day Singapore, it has been noted that “[i]t is extremely rare to find any human remains from pre-modern archaeological sites in Singapore,”² possibly because the country’s tropical environment does not provide amenable conditions for preserving organic matter. It appears that an excavation of the bank of the

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DOI: 10.4467/23538724GS.24.009.19870

¹ Law Commission (New Zealand), “Resolving the Conflicts” in *Coroners* (NZLC R62), Law Commission, Wellington 2000, para. 217. For this reason, the Law Commission of New Zealand, which was reviewing the coronial system, recommended use of the terminology of “control” over a deceased person’s body and body parts by a coroner rather than “possession” (para. 218).

² C.S. Lim, “The Finds and Artefacts” [in:] *idem*, *Preliminary Report on the Archaeological Investigations at the Victoria Concert Hall* (Archaeology Report Series; 9), Archaeology Unit, Nalanda-Sriwijaya Centre, ISEAS-Yusof Ishak Institute, Singapore 2019, p. 72.

Singapore River at Empress Place in 1998 turned up part of a human skull, though it was not possible to determine how old it was. In 2010 during the excavation of a site at the Victoria Concert Hall prior to its renovation, at least 45 adult teeth were found scattered throughout the site, together with pieces of other materials which suggested that they all dated from the fourteenth century. Other bone fragments were also found, but it was not known whether they were of human or animal origin.³ Human remains are more likely to be found when cemeteries are exhumed, which occurs fairly frequently due to the need for reuse of land, particularly for public housing. However, there are also small quantities of human remains in institutional collections, which means that having policies for the sensitive treatment of these artefacts are essential.

Part 1 of this article considers the status of unburied remains. These might be in the form of a deceased person's corpse that has not been interred; or preserved remains, possibly in a museum or a private collection. Part 2 turns to an examination of the legal status of buried human remains, grave goods, and funerary monuments in cemeteries. Finally, Part 3 considers guidelines concerning the proper treatment of remains in a museum setting.

At the outset, it should be noted that most of the issues to be discussed in this article have not been brought before the Singapore courts. In such a situation, given the common-law legal system which Singapore inherited from the time it was a British colony, the courts would consider the common law – that is, legal rules laid down as precedents in court judgments – of England and Wales, and of other common-law jurisdictions such as those in Australia, Canada, Hong Kong, and New Zealand. However, the courts are not bound to follow such rules in developing Singapore's own common law, and they would always ensure that any new legal rules articulated would be in line with the Constitution, statute law, and existing common law rules (unless it is felt that the latter need to be revised).

1. The legal status of unburied human remains

1.1. Nineteenth- and twentieth-century cases

We begin by considering whether property exists in the remains of deceased human beings which are not yet buried, or have never been buried but have been preserved in some manner and, for example, enter the collection of a museum or a private collection. At the start, we may observe that at common law a living person is regarded as incapable of possessing their own body or any part of it, for “[o]ne cannot

³ *Ibidem.*

possess something which is not separate and distinct from oneself.”⁴ In line with this, there are some cases asserting that remains of deceased persons also cannot be considered as property,⁵ but it has been suggested that these cases are unsatisfactory.⁶

For example, *Williams v. Williams* involved a person who specified in his will that after his death his body should be given to a friend, W, to be dealt with as he had directed her to do so in a letter, and that his executors should pay W’s expenses. The testator had asked W to cremate his body and place the ashes in an urn, which W could then deal with as she deemed fit. However, the executors ignored the direction and buried the testator in a London cemetery. W, under the pretence that she wished to relocate the remains to another cemetery, obtained permission from the authorities to exhume the body, but then she took it to Italy and had it cremated. She then claimed the expenses for doing this from the testator’s executors and residuary beneficiaries.

W’s claim failed. One of the court’s reasons was that the testator’s direction was void, for if a deceased person has personal representatives it is their exclusive legal duty to dispose of the deceased’s body, and W was not one of the testator’s personal representatives. Moreover, since such a legal duty existed, a testator could not dispose of their own body by a will.⁷ To justify the latter point, the judge also said “the law of this country recognises no property in a corpse.”⁸ The view has been taken that this statement was unnecessary for the conclusion reached by the judge, and thus *obiter*.⁹

It is submitted that the statement was also somewhat inconsistent with the conclusion, since the judge clearly recognized that the testator’s personal representatives did have limited possessory rights over his remains for the purpose of properly disposing of them, which might be regarded as a form of property interest. An American decision is apposite here: in *Polbemus v. Daly*, the Missouri Court of Appeals held that “while there is no right of private property in a dead body in the

⁴ *R. v. Bentham* [2005] UKHL 18, [2005] 1 WLR 1057, p. 1061, para. 8 (House of Lords, United Kingdom) (defendant who positioned his hand inside a garment to make it appear as if he had a firearm during a robbery did not have in his possession an imitation firearm within the meaning of the Firearms Act 1968 (1968 c. 27; U.K., s. 17 subs. 2), applied in *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1, p. 13, para. 30 (Court of Appeal, England and Wales).

⁵ *Exelby v. Handyside* (also known as *Dr Handyside’s Case*) (1749) 2 East PC 652; *Williams v. Williams* (1882) 20 Ch D 659, pp. 662–664 (High Court (Chancery Division), England and Wales).

⁶ P. Matthews, “Whose Body? People as Property”, *Current Legal Problems* 1983, vol. 36, no. 1, pp. 208–214; on the fascinating research carried out by the author to debunk the precedential value of *Handyside*, see: pp. 208–209.

⁷ *Williams v. Williams*, p. 665, summarized in: P. Matthews, “Whose Body?...”, pp. 210–212.

⁸ *Williams v. Williams*, p. 664, citing *R. v. Sharpe* (1857) Dears & Bell 160, 169 ER 959 (High Court, England and Wales), which, however, involved buried human remains.

⁹ P. Matthews, “Whose Body?...”, p. 212.

ordinary sense of the word, it is regarded as property so far as to entitle the next-of-kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial.”¹⁰ In *Smith v. Tamworth City Council*,¹¹ the Supreme Court of New South Wales said that the latter statement represented the law in the state.

The High Court of Australia’s decision in *Doodeward v. Spence*¹² is arguably more significant than *Williams v. Williams*, as it has been applied in numerous other cases.¹³ A doctor had obtained the body of a stillborn baby with two heads from its mother, and had preserved it with spirits in a bottle. Upon the doctor’s death his property was sold by auction and the human remains purchased by the appellant’s father and given to the appellant, a showman. The appellant began exhibiting the human remains for a fee, but was prosecuted for an indecent exhibition. The remains were confiscated by the police and given to a university museum, while the bottle and spirits were returned to the appellant. The appellant successfully sued the policeman for the return of the remains. Chief Justice Samuel Griffith accepted that “[a]n unburied corpse awaiting burial is *nullius in rebus* [a thing of no one’s].”¹⁴ However, he went on: “But it does not follow from the fact that an object is at one time *nullius in rebus* that it is incapable of becoming the subject of ownership. (...) [A] human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, *when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial*, but subject, of course, to any positive law which forbids its retention under the particular circumstances.”¹⁵

If this view is to be accepted, it would mean that an unburied human body, or parts of it, even if originally not property, can gain the status of property if some

¹⁰ *Polbemus v. Daly* 296 SW 442 (1927), p. 444 (Court of Appeals, Missouri). See also: *Pierce v. Proprietors of Swan Point Cemetery* 10 RI 227, pp. 242–243; 14 Am Rep 667, p. 681 (1872) (Supreme Court in Equity, Rhode Island).

¹¹ *Smith v. Tamworth City Council* (1997) 41 NSWLR 680, p. 691 (Supreme Court, Equity Division, New South Wales), citing both *Pierce v. Proprietors of Swan Point Cemetery* and *Polbemus v. Daly*.

¹² *Doodeward v. Spence* (1908) 6 CLR 406 (High Court, Australia).

¹³ See, for example, *Dobson v. North Tyneside Health Authority* [1996] EWCA Civ 1301, [1997] 1 WLR 596, pp. 600–602 (Court of Appeal, England and Wales); and *R. v. Kelly* [1998] EWCA Crim 1578, [1999] QB 621, pp. 630–631 (Court of Appeal, England and Wales). The judgment is binding on Australian state courts and so has been applied in *Re Edwards* [2011] NSWSC 478, (2011) 81 NSWLR 198 (Supreme Court, New South Wales); *Bazley v. Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207 (Supreme Court, Queensland); *Re H, AE (No. 2)* [2012] SASC 177 (Supreme Court, South Australia) and other cases.

¹⁴ *Doodeward v. Spence*, p. 411.

¹⁵ *Ibidem*, pp. 411–414. Italics added.

“lawful exercise of work or skill” is practised on it, such as some preservation treatment. In addition, the human remains become the property of the person who exercised the work or skill on them. This has been criticized. For one thing, in general if a person does unauthorized work on another person’s chattel, that does not give the first person any property interest in the chattel.¹⁶

Indeed, whether any work is done on the remains is irrelevant. At common law the right to possession of a chattel is relative – a person in possession of a chattel is entitled to retain it, so long as no one with a better right to possession comes along. In the case of unburied human remains, as we have seen, the courts recognize that the personal representatives of a deceased person have a legal right to possess the person’s remains for the purpose of properly disposing of them. In *Doodeward* Chief Justice Griffith noted that that the “work or skill exception” to the general “no property in a corpse” rule would be subject to the right of a person “entitled to have it [the remains] delivered to him for the purpose of burial.”¹⁷ But if they do not object to another person having possession of the remains, or are unidentified, then the person who has current possession has a right to protect that possession.¹⁸

It is worth noting Stephen Gallagher’s point that the *Doodeward* exception can only apply to human remains which a person lawfully possesses. Remains obtained by “theft from graves or in other dubious circumstances can never be property subject to this exception, as it is trite law to state *nemo dat quod non habet* (no one may give what he does not have).”¹⁹

1.2. Recent developments

In recent times, courts have declined to rely on the *Doodeward* work or skill exception as a sound basis for developing the common law. In *Yearworth v. North Bristol NHS Trust*,²⁰ the claimants were men who had undergone chemotherapy at one of the defendant’s hospitals. Before they did so, they were invited by the hospital’s clinicians to provide semen samples for storage by the hospital in case their fertility was affected by the treatment. The semen samples were frozen by the hospital for storage, but the liquid nitrogen used to keep the samples in this state fell below the required level, causing the semen to thaw. The claimants alleged that the hospital

¹⁶ See, for example, *Falcke v. Scottish Imperial Insurance Co* (1886) 34 Ch D 234 (Court of Appeal, England and Wales); *Greenwood v. Bennett* [1973] QB 195, pp. 202–203 (Court of Appeal, England and Wales).

¹⁷ *Doodeward v. Spence*, p. 414.

¹⁸ P. Matthews, “Whose Body?...”, pp. 219–220.

¹⁹ S. Gallagher, “Museums and the Return of Human Remains: An Equitable Solution?”, *International Journal of Cultural Property* 2010, vol. 17, p. 72.

²⁰ *Yearworth v. North Bristol*, p. 13. See also the earlier case *Roche v. Douglas* (2000) 22 WAR 331, especially p. 335, para. 14, and pp. 338–339, para. 24 (Supreme Court, Western Australia).

had acted negligently in storing the semen samples. Among the issues in the case was whether the samples were the claimants' property, thus entitling them to claim for damage to the samples.

The Court of Appeal of England and Wales noted that developments in medical science required a re-analysis of how the common law approaches the ownership of parts or products of a living human body.²¹ Although the court could have simply applied the *Doodeward* work or skill exception to find that the claimants had a property interest in their sperm samples, the court was "not content to see the common law in this area founded upon the principle in the *Doodeward* case (...), which was devised as an exception to a principle, itself of an exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation."²² The exception was problematic – for example, it did not make sense for a surgeon who had carelessly damaged a finger accidentally amputated from a factory worker and intended to be reattached to escape liability simply because no work or skill had been applied to the finger.²³

The court thus held that the claimants did own their semen samples but on a "broader basis."²⁴ The semen had been produced by and from their bodies, for the sole purpose of potentially enabling them to father children through *in vitro* fertilization later on. Although the Human Fertilisation and Embryology Act 1990 (1990 c. 37; U.K.). limited what the claimants could do with the stored semen samples, other laws existed for public policy reasons to limit what people could do with their chattels (for instance, a pharmacist's ability to sell medicines) without destroying their property interest in the chattels. Significantly, the Act preserved the claimants' right to direct how the semen should *not* be used, and gave no other person such a right.²⁵

Kate Falconer has termed this modern approach to establishing whether human tissue may be the subject of property "guided discretion."²⁶ A court's discretion on the issue is said to be guided by three elements:

- (1) Has the human tissue been detached from the source individual, such that it can be possessed, transferred, and used?²⁷

²¹ *Yearworth v. North Bristol*, p. 19, para. 45(a).

²² *Ibidem*, p. 20, para. 45(d). The court's holding in *Yearworth v. North Bristol* was followed in *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731, paras. 82–83 (High Court, New Zealand).

²³ *Yearworth v. North Bristol*, p. 20, para. 45(d).

²⁴ *Ibidem*, p. 20, para. 45(e).

²⁵ *Ibidem* pp. 20–21, para. 45(f).

²⁶ K. Falconer, "Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material", *University of New South Wales Law Journal* 2019, vol. 42, no. 3, p. 900.

²⁷ *Ibidem*, pp. 906–909.

- (2) What are the practical results if the human tissue is regarded as property?²⁸ For example, in *Yearworth* the finding that the semen samples were the claimants' property enabled the court to find that they could claim damages against the defendant for improperly storing them.
- (3) Related to the second element, what is the factual and legal context of the dispute?²⁹ Again, *Yearworth* demonstrates that there may be strong legal reasons for a finding that human tissue should be regarded as property. However, depending on the context and concerns about the commodification of the human body, it may be the case that human tissue should be regarded as property in some situations but not in others.³⁰ A court may not, for instance, wish to recognize any property interest in human blood, gametes, organs, or other tissue that have been contracted for sale for valuable consideration when such a contract or arrangement is void under Singapore statutes such as the Human Organ Transplant Act 1987 (s. 13 subs. 1), the Human Cloning and Other Prohibited Practices Act 2004 (s. 13 subss. 1 and 2), and the Human Biomedical Research Act 2015 (s. 32 subs. 1), and constitutes a criminal offence.³¹ I do not, however, express a concluded view on this matter as it is beyond the scope of the article.

The *Yearworth* case involved the legal status of human tissue which had been obtained from living persons. Nonetheless, it is submitted that the guided discretion approach adopted in them is appropriately applied to cases involving buried and unburied human remains of heritage value, and that the Singapore courts should apply a similar approach should the issue arise before them.

As regards the first element set out above, in the case of part of a human body detachment from the source individual would clearly have occurred. Even if the remains are more or less in the form of an intact body – for instance, a mummified corpse or a skeleton – Falconer has suggested that the remains can be regarded as having been “conceptually detached” from the source individual: “the human biological material has so altered in perceptible form as to be conceptually distinct from the source.”³²

Where the second and third elements are concerned, the practical results and the factual and legal context also point towards recognition of human remains of heritage value being treated as property. Doing so would mean that human remains in the collection of the National Museum of Singapore (which is a collective name

²⁸ *Ibidem*, pp. 909–910.

²⁹ *Ibidem*, pp. 910–912.

³⁰ *Ibidem*, p. 911.

³¹ Human Organ Transplant Act, s. 13 subss. 2–3; Human Cloning and Other Prohibited Practices Act, s. 18; Human Biomedical Research Act 2015, s. 32 subss. 2–3.

³² K Falconer, “Dismantling *Doodeward*...”, p. 919 (emphasis omitted).

for all government-managed museums in Singapore)³³ are “objects” within the meaning of s. 2 of the National Heritage Board Act 1993,³⁴ and thus vested in the National Heritage Board (ss. 13–14), the government agency in charge of such museums. The Board is empowered by the Act to lend (s. 16 subss. 1–3) and dispose of (s. 15 subss. 3–6)³⁵ objects which it owns, as well as to acquire and borrow (s. 16 subs. 4) other objects.

It would also enable civil claims and criminal proceedings to be brought if such remains are removed from archaeological sites or museums without authorization. In addition, human remains would be safeguarded by international treaties, as they would be regarded as “cultural property” within the meaning of the 1954 Hague Convention³⁶ and the 1970 UNESCO Convention,³⁷ and “cultural objects” under the 1995 UNIDROIT Convention.³⁸ Although Singapore is not currently a state party to these conventions, as the NHB is a member of the International Council of Museums (ICOM), the museums under its purview are required to comply with the *ICOM Code of Ethics for Museums*, which sets minimum standards of professional practice and performance for museums and includes provisions relating specifically to the acquisition and management of cultural objects.³⁹ Clause 7.2 of the Code requires that museum policy acknowledge relevant international conventions,

³³ National Heritage Board Act 1993, s. 11 subs. 3.

³⁴ An “object” is defined as including “any work of art and any artefact”; *ibidem*, s. 2.

³⁵ An object of significant national or historical value may not be disposed of unless it is “(a) a duplicate of another object the property in which is so vested [in the Board] and which is so comprised [in the Board’s collections]; or (b) in the Board’s opinion unsuitable for retention in its collections, and the disposal is done with the prior approval of the Minister [for Culture, Community and Youth] and by way of sale, exchange or gift” (*ibidem*, s. 15 subs. 3). Objects which have “become useless for the purposes of its [*i.e.*, the Board’s] collections by reason of damage, physical deterioration or infestation by destructive organisms” may be disposed of by any means, including destruction (s. 15 subs. 4).

³⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in Hague on 14 May 1954, together with its implementing regulations; the Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The human remains would arguably be “movable (...) property of great importance to the cultural heritage of every people, such as (...) objects of (...) historical or archaeological interest” within the meaning of art. 1(a).

³⁷ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris on 14 November 1970. The human remains would arguably be “specimens of (...) anatomy, and objects of palaeontological interest”, “products of archaeological excavations (...) or of archaeological discoveries”, and/or “objects of ethnological interest” within the meaning of arts. 1(a), (c) and (f).

³⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted in Rome on 24 June 1995, art. 2 read with the Annex, paras. (a), (c) and (f); the latter are identically worded to the 1970 UNESCO Convention, arts. 1(a), (c) and (f).

³⁹ *ICOM Code of Ethics for Museums*, International Council of Museums, Paris 2017, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> (accessed: 15.05. 2023).

including the 1954 Hague Convention and its two protocols, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention.

As a member country of the Association of Southeast Asian Nations (ASEAN), Singapore is also a party to two cultural heritage declarations, the ASEAN Declaration on Cultural Heritage, adopted on 25 July 2000 (hereinafter: 2000 ASEAN Declaration) and the Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN, adopted on 6 September 2016 (hereinafter: 2016 Vientiane Declaration). While these declarations are not legally binding, they establish a framework for protecting cultural heritage, including movable heritage. “Cultural heritage” is defined in art. 1(b) of the ASEAN 2000 Declaration to include “artefacts (...) that are of a historical, aesthetic, or scientific significance,” and ASEAN member countries are to “cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site, or similar repositories” and are “urged to take measures to control the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions” (art. 10 of the ASEAN 2000 Declaration). Under art. 1.1 of the 2016 Vientiane Declaration, ASEAN governments agreed to “[c]ontinue to ensure the effectiveness of laws and policies protecting cultural heritage from illicit trade and trafficking,” to “[s]trengthen efforts to exchange information on stolen or trafficked cultural artefacts,” and to “[c]ooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that have been stolen from a museum, site, or similar repositories.” Thus, recognizing human remains as property would enable them to be safeguarded within this regional framework.

1.3. Is commercial trading in human remains of heritage value prohibited?

If human remains of heritage value do have the legal status of property, this raises the question of whether Singapore law prohibits commercial trading of this species of property. Section 32 subs. 1 of the Human Biomedical Research Act 2015 states that “a contract or arrangement under which a person agrees, for valuable consideration, (...) to the sale or supply of any human tissue (...) from the body of another person, whether before or after (...) the death of the other person (...) is void.”

Section 2 defines “human tissue” as any human biological material, except those excluded by the First Schedule of the Act. “Human biological material” is “any biological material obtained from the human body that consists of, or includes, human cells.” Under the First Schedule to the Act, para. 4(1) excludes from the definition of “human biological material” any material “that is not individually-identifiable and has been processed in such a manner that its functional, structural and biological characteristics are substantially manipulated as compared to the time of collection.” Paragraph 4(2) contains a list of processing methods – which does not limit the scope of the term “substantially manipulated” – not deemed to be substantial

manipulation of human biological material; they include cutting, shaping, soaking in antibiotic or antimicrobial solutions, sterilization, and vitrification.

The statutory provisions detailed above appear to have the following implications. First, the remains of individually identifiable persons fall under the prohibition. However, even if human remains are not individually identifiable, if the “functional, structural and biological characteristics” have not been “substantially manipulated,” then the remains also cannot be commercially traded. At present, it is not entirely clear how this provision should be interpreted where heritage objects are concerned. It would appear, though, that commercial trading of naturally mummified or skeletonized remains is disallowed by the Act, because preservation techniques such as soaking the remains in a preservative fluid and sterilization are deemed not to be substantial manipulation. Even more radical treatment – for instance, the severing of a deceased person’s head, followed by defleshing and carving ritual designs on the skull⁴⁰ – may not amount to substantially manipulating the remains, as this only involves cutting, shaping and preservation.

As the name of the Act indicates, the Human Biomedical Research Act was not passed with human remains having heritage value in mind.⁴¹ Nonetheless, the Minister for Health is empowered by the Act to exempt any human biological material or human tissue, or any class of such material, from the prohibition against commercial trading (s. 57 subss. 1(f) and (g) of the Human Biomedical Research Act). As an illustration, the Minister could grant an exemption to enable a museum to acquire human remains for display or research. On the other hand, if a private owner of human remains wishes to put them up for auction, and this is opposed by an indigenous community seeking the return of the remains for burial – as was the case with a preserved tattooed head or *mokomokai* of a nineteenth-century Māori warrior which an attempt was made to auction in London⁴² – it might be

⁴⁰ This may have been how the Dayak skull in the collection of the Asian Civilisations Museum was treated: see footnote 75.

⁴¹ There was no mention of the heritage value of human tissue in the parliamentary debates during the Second and Third Readings of the bill which preceded the Act: “Human Biomedical Research Bill”, *Singapore Parliamentary Debates, Official Report*, 17–18 August 2015, vol. 93.

⁴² In *Estate of Tupuna Maori, Warrior* (unreported, 19 May 1988), the High Court of New Zealand granted letters of administration of the estate of a Maori warrior who had died around 1820 to the President of the New Zealand Maori Council. The deceased’s *mokomokai* had come up for auction in London, and the applicant sought to be appointed his personal representative so that legal proceedings could be brought in the United Kingdom to reclaim the remains for, in the words of Grieg J., “a proper burial according to Maori law and custom and to prevent further indignity being visited upon him.” Despite the deceased having no assets in his estate, the court granted the application. The applicant then applied for an injunction in the UK to halt the sale of the *mokomokai*. It was subsequently agreed that the *mokomokai* would be returned to New Zealand, where it was buried; see: P.J. O’Keefe, “Maoris Claim Head”, *International Journal of Cultural Property* 1992, vol. 1, no. 2, p. 393; see also: *Re Tasmanian Aboriginal Centre* (2007) 16 Tas R 139; [2007] TASSC 5 (Supreme Court, Tasmania), a later case with strikingly similar facts.

appropriate for the Minister to deny the owner's application for an exemption. It is submitted that the Minister should establish an advisory committee including representatives from the National Heritage Board, non-governmental organizations involved with heritage, and academia, whom the Minister can consult before reaching a decision (s. 5 subs. 1 of the Human Biomedical Research Act 2015).⁴³

2. The legal status of buried human remains

We next turn to consider the legal status of buried human remains. Such remains might be found by chance while an archaeological excavation is in progress, and would probably also be uncovered during the clearance of a cemetery, or construction work on a religious building the land of which is known to have been used as a burial ground.

2.1. Is there property in buried human remains?

As has been mentioned, a number of English cases claim that at common law a human corpse cannot be the subject of property,⁴⁴ though Paul Matthews has pointed out that the assertions were not based on any authority or proper reasoning.⁴⁵

This point is relevant because it is well established that when an object is found attached to land or embedded in land, between the owner or lawful possessor of the land and a finder of the object, the landowner or lawful possessor has a better title to the object. If the object is found unattached on the surface of the land, the landowner or lawful possessor only has a better title if they exercised "such manifest control over the land as to indicate an intention to control the land and anything that might be found on it."⁴⁶ If evidence of such manifest control is absent, the finder has a better title to the object, subject to the finder's obligation to take reasonable steps to locate the true owner of the object and to care for it in the meantime.⁴⁷

⁴³ The Minister may consult any advisory committee, but is not bound by the consultation: Human Biomedical Research Act, s. 57 subs. 2.

⁴⁴ See also: *R. v. Sharpe* Dears & Bell at 169, 169 ER at 960 *per* Erle J. (*obiter dictum*); *Foster v. Dodd* (1867) LR 3 QB 67, 77 *per* Byles J. (High Court (Exchequer Chamber), England and Wales) (*obiter dictum*); *R. v. Price* (1884) 12 QBD 247, p. 252 (High Court (Queen's Bench Division), England and Wales).

⁴⁵ P. Matthews, "Whose Body?..." pp. 198–200.

⁴⁶ *Waverley Borough Council v. Fletcher* [1995] QB 334, pp. 343–344 and 346 (Court of Appeal, England and Wales), applying *Elwes v. Brigg Gas Co* (1886) 33 Ch D 562, p. 568 (High Court (Chancery Division), England and Wales), and *Parker v. British Airways Board* [1982] QB 1004, pp. 1017–1018 (Court of Appeal, England and Wales).

⁴⁷ *Parker v. British Airways Board*, p. 1017.

The cases which established these rules, often known as the law of finders, involved the finding of a prehistoric boat,⁴⁸ a modern gold bracelet,⁴⁹ and a medieval gold brooch,⁵⁰ not human remains. Nonetheless, if a corpse can be regarded as property, then presumably the law of finders would apply to it.⁵¹ In *Doodeward v. Spence*, the High Court of Australia suggested *obiter* that “after burial a corpse forms part of the land in which it is buried, and the right of possession goes with the land,”⁵² while in *Kwan Chun Investments v. Sik Tak Kwong* the High Court of Hong Kong said that “[f]ollowing well-established principles of property law, a corpse which is buried in land becomes part and parcel of the land by reason of the degree of annexation and purpose for which it is annexed.”⁵³

Arguably, there are good reasons to reject a blanket rule stating that buried human remains can never be the subject of property. For example, if the latter were true, it might not be possible to bring civil proceedings against a person who takes such remains from an archaeological site without consent for the torts of detinue (wrongful detention and refusal to deliver up another person’s chattel),⁵⁴ trespass to goods (direct and intentional wrongful interference with a chattel in another person’s possession),⁵⁵ or conversion (wrongful interference with a person’s chattel inconsistent with that person’s superior possessory title in the chattel).⁵⁶ It would also not be possible to charge such a person with theft, which is defined by the Penal Code as the moving of movable property in order to dishonestly take the property out of the possession of any person.⁵⁷

Finally, if buried human remains have disintegrated to the extent that they are no longer distinguishable from earth, it would be reasonable to regard them as no longer capable of being the subject of property. As the defence counsel in *R. v. Jacobson* put it: “A time may come when the bones are not recognisable as human remains, when the bones have become dust and the ground might be built

⁴⁸ *Elves v. Brigg Gas Co.*

⁴⁹ *Parker v. British Airways Board.*

⁵⁰ *Waverley Borough Council v. Fletcher.*

⁵¹ See: P. Matthews, “Whose Body?...”, pp. 203–204.

⁵² *Doodeward v. Spence*, p. 412.

⁵³ *Kwan Chun Investments v. Sik Tak Kwong* [2021] HKCFI 714, para. 87 (High Court (Court of First Instance), Hong Kong), citing *Elitestone v. Morris* [1997] 1 WLR 687 (House of Lords, U.K.).

⁵⁴ P.W. Lee, “Interference with Goods” [in:] G.K.Y. Chan, P.W. Lee, *The Law of Torts in Singapore*, 2nd ed., Academy Publishing, Singapore 2016, p. 496.

⁵⁵ *Ibidem*, pp. 496–497.

⁵⁶ *Ibidem*, pp. 459–464.

⁵⁷ Penal Code 1871, s. 378. It is an offence to exhume a corpse without proper authorization under the Environmental Public Health Act 1987, s. 76, but this only applies to corpses buried in cemeteries.

upon. To disturb remains of Druids who had been buried on Salisbury Plain, for instance would not be indictable. This must always be a question of degree (...).⁵⁸

In this scenario, it would be more apposite to proceed against a person who carries out an unauthorized excavation of a burial site in civil proceedings for trespass to land,⁵⁹ or in criminal proceedings for criminal trespass (s. 441 of the Penal Code) or wilfully trespassing on property.⁶⁰

2.2. The legal status of buried human remains and funerary monuments in cemeteries

Given that it is uncommon to find human remains during archaeological excavations in Singapore, I propose to touch on the legal status of buried remains in cemeteries, which form the bulk of human remains dealt with, and as a corollary any goods buried together with human remains, and funerary monuments – grave sculptures, tombstones and the like.

Due to the scarcity of land in Singapore – the island-nation has a land area of 734.3 square kilometres as of December 2022⁶¹ – from the 1950s cremation of the dead was promoted,⁶² and in 1964 legislation relating to the compulsory acquisition of land for public purposes⁶³ was amended⁶⁴ to enable the government to compensate landowners for acquired land at below the prevailing market value. Many Chinese burial grounds were then compulsorily acquired and cleared for reuse as public housing estates.⁶⁵ In 1978 the government announced in Parliament that as “land in Singapore is scarce and valuable” and that the “needs and pace of development have necessitated the acquisition of private lands (including a number of private cemeteries) for various public projects (...) Over the next few years, all private cemeteries, including Chinese clan or privately owned cemeteries and Muslim cemeteries

⁵⁸ *R. v. Jacobson* (1880) 14 Cox CC 522, pp. 526–527 (High Court (Queen’s Bench Division), England and Wales).

⁵⁹ P. Matthews, “Whose Body?..”, pp. 204–205.

⁶⁰ Miscellaneous Offences (Public Order and Nuisance) Act 1906, s. 21 (applicable if nominal or no damage is caused).

⁶¹ “Environment”, *Department of Statistics Singapore*, 31 January 2023, <https://www.singstat.gov.sg/find-data/search-by-theme/society/environment/latest-data> (accessed: 15.05.2023).

⁶² K.Y.L. Tan, “Introduction: The Death of Cemeteries in Singapore” [in:] *Spaces of the Dead: A Case from the Living*, ed. K.Y.L. Tan, Singapore Heritage Society, Ethos Books, Singapore 2011, pp. 16–17.

⁶³ Land Acquisition Ordinance (Cap. 248, 1955 Rev. Ed.), now the Land Acquisition Act 1966.

⁶⁴ By the Land Acquisition (Amendment) Ordinance 1964 (No. 1 of 1964).

⁶⁵ K.Y.L. Tan, “Introduction: The Death of Cemeteries...”, p. 17.

on wakaff lands,⁶⁶ which have been closed for burials, will be acquired as and when required for development.”⁶⁷

It is thus believed that today most if not all cemeteries in Singapore are situated on state land. Assuming that is the case, as previously discussed, human remains which are buried in cemeteries and which have not completely disintegrated, and any objects interred with them, would be the property of the government. Similarly, since funerary monuments in cemeteries are affixed to the realty to mark the graves of deceased persons and are not intended to be enjoyed as chattels, they most likely also belong to the government as the landowner.⁶⁸

Defunct cemeteries are regularly exhumed and the land put to other purposes, particularly housing. The government’s policy is to issue a public call for the next-of-kin of deceased persons to claim the remains. A claimant may either opt for the remains to be cremated, or reburied in another cemetery if cremation is not permitted by their religious belief. Cremated remains may be placed in a government columbarium at no charge to the claimant, a private columbarium at the claimant’s own expense, or scattered at sea. Unclaimed remains are cremated and kept for a few years; if the ashes still remain unclaimed they are scattered at sea.⁶⁹ It appears that claimants are free to retain objects found in graves and funerary monuments if they wish to do so.⁷⁰ No mention is made about their property status or who owns them.

⁶⁶ A *wakaf* is a “permanent dedication by a Muslim of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable” (s. 2 of the Administration of Muslim Law Act 1966).

⁶⁷ E.W. Barker, “Acquisition of Private Cemeteries (Statement by the Minister for Law, the Environment and Science and Technology)”, *Singapore Parliamentary Debates, Official Report*, 7 April 1978, col. 1491.

⁶⁸ *HSBC Institutional Trust Services (Singapore) Ltd v. Chief Assessor* [2019] SGHC 95, [2020] 3 SLR 510, p. 535, para. 68 (High Court, Singapore), see also: *HSBC Institutional Trust Services (Singapore) Ltd v. Chief Assessor* [2020] SGCA 10, [2020] 1 SLR 621, p. 623, para. 4 (Court of Appeal, Singapore), where the court stated: “The established common law position is that fixtures are part of the land.”

⁶⁹ See, for example, M. Teo-Jacob, “Singapore War Dead under Eviction Orders”, *The Australian*, Surry Hills, N.S.W. 19 April 2001, p. 14; “Singapore’s History to be Scattered at Sea”, *The Sydney Morning Herald*, Sydney, N.S.W. 21 August 2004, <https://www.smh.com.au/world/singapores-history-to-be-scattered-at-sea-20040821-gdjlef.html> (accessed 01.05.2024), both referring to the clearance of Bidadari Cemetery which was used for burials between 1907 and 1972, then exhumed between 2001 and 2006. See: K.Y.L. Tan, “Introduction: The Death of Cemeteries...”, p. 11.

⁷⁰ See, for example, A. Olesen, “Singapore Digs Up the Dead – 58,000 of Them – to Make Room for the Living”, *Associated Press Newswires*, 12 May 2002 (referring to monuments).

3. Care of human remains in museums

Apart from the question of the property status of human remains, the way museums and similar institutions acquire, safeguard and display human remains is a matter of contemporary concern. We have already seen indigenous peoples requesting with increasing frequency the return of the remains of persons from their communities, which are often in the hands of institutions in Western countries. The issue is fraught because these remains were chiefly taken during colonial times “without regard to the feelings of indigenous people who at the time were judged to be less than human.”⁷¹

The quantity of human remains in Singapore museums appears to be small. There are, for example, anatomical specimens used for research in the National University of Singapore’s Department of Anatomy Museum; and the Asian Civilisations Museum (“ACM”) has a human skull with designs carved on it, originating from the Dayak people of Borneo.⁷² It does not appear that there have been calls from Dayaks for this artefact to be returned to its source community.

The National Heritage Board has not made publicly available any guidelines or policies it may have formulated concerning the care and treatment of human remains in the museums it manages. As a member of ICOM, the Board’s museums are required to adhere to the *ICOM Code of Ethics for Museums*, including the following broad principles:

Clause 2.5 (Culturally Sensitive Material): Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known.

Clause 3.7 (Human Remains and Materials of Sacred Significance): Research on human remains and materials of sacred significance must be accomplished in a manner consistent with professional standards and take into account the interests and beliefs of the community, ethnic or religious groups from whom the objects originated, where these are known.

⁷¹ D. Shariatmadari, “‘They’re Not Property’: The People who Want Their Ancestors back from British Museums”, *The Guardian*, 23 April 2019, <https://www.theguardian.com/culture/2019/apr/23/theyre-not-property-the-people-who-want-their-ancestors-back-from-british-museums>, (accessed: 1.05.2024).

⁷² I.Y.K. Tan, “Dignity after Death: Treating Human Remains with Respect”, *BeMuse* 2014, vol. 7, no. 4, pp. 4, 6, https://www.academia.edu/24477910/Dignity_After_Death_Treating_Human_Remains_with_Respect_in_Singapore_Museums (accessed: 1.05.2024).

Clause 4.3 (Exhibition of Sensitive Materials): Human remains and materials of sacred significance must be displayed in a manner consistent with professional standards and, where known, taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated. They must be presented with great tact and respect for the feelings of human dignity held by all peoples.

Clause 4.4 (Removal from Public Display): Requests for removal from public display of human remains or material of sacred significance from the originating communities must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests.

Heritage agencies and museums in other jurisdictions have developed detailed policies for dealing with human remains.⁷³ These are likely to be useful guides for the Board in refining its own policy on the issue.

The Dayak skull in the ACM provides an interesting case in point. In 2008 the skull was featured as one of the artefacts which volunteers from the Singapore Paranormal Investigators, a non-governmental organization of paranormal enthusiasts, “dressed in their spooky best” would “give visitors a thrilling spin” on during a Halloween event called *Fright Night!*⁷⁴ An anonymously written academic essay posted on a personal online blog in 2010 also commented that the ACM’s display on Dayak culture, particularly the objects relating to headhunting which included decorated knives, wooden shields and the carved skull, tended to “stereotype the Dayak Natives as a society of primitive people which headhunts and worships Nature.” This was accentuated by the commentary given by a docent during a tour of the display, which the author characterized as “playing up the primitivism and ostensible brutality of the Dayaks” which, “[i]nstead of promoting ‘awareness and appreciation’ of other cultures, as stated in the museum’s corporate mission, (...) paradoxically perpetuated the Dayaks being the exotic ‘other’.”⁷⁵

⁷³ See, for example, *Guidance for the Care of Human Remains in Museums*, Department of Culture, Media and Sport, London 2005, <https://assets.publishing.service.gov.uk/media/5f291770e-90e0732e4bd8b76/GuidanceHumanRemains11Oct.pdf> (accessed: 1.05.2024); *Human Remains Policy*, National Museum of Ireland, Dublin 2019, <https://www.museum.ie/getmedia/80bd1b97-7ffb-4bac-adf9-c45f71041611/NMI-Human-Remains-Policy-2019-2023-FINAL.pdf> (accessed: 1.05.2024).

⁷⁴ “Media Advisory: Fright Night Descends on the Asian Civilisations Museum”, *Asian Civilisations Museum*, 24 October 2008, <https://www.nhb.gov.sg/acm/-/media/acm/document/about-us/media/press-releases/2008-3.ashx> (accessed: 1.05.2024).

⁷⁵ TXY [pseudonym], “Re-presenting Native Culture”, *Artxy*, 10 December 2010, <http://www.art-xy.com/2010/12/re-presenting-native-culture.html> (accessed: 1.05.2024).

In contrast, Ian Tan has noted that the ACM has “framed its curation of the Dayak human skull within an anthropological understanding of the Dayak tribe” by going to “great lengths to assure visitors that headhunting was not a form of brutal tribal behaviour” but “an honourable means to ‘improve the community’s well-being’ as human heads were ‘believed to contain a powerful beneficial spiritual essence’.” Such heads were treated as revered artefacts by the Dayaks.⁷⁶

This difference in views highlights the challenge which museums face in ensuring that human remains have been “presented with great tact and respect for the feelings of human dignity held by all peoples” as required by clause 4.3 of the *ICOM Code of Ethics for Museums*. While some curators may have taken pains to present human remains contextually and respectfully, unfortunately this can be undone by well-meaning but improperly briefed staff and volunteers who present the remains as exotic and sensational.

4. Conclusions

Although older common-law cases took the position that a human corpse, whether buried or unburied, could not have the status of property, commentators have noted that this position was not properly justified by precedent or reason. Exceptions to the rule were also formulated, notably the statement in *Doodeward v. Spence* that if a person has exercised work or skill on human remains, the person can assert a property interest in the remains.

More recent cases have declined to apply the *Doodeward* exception as the basis for developing the law, instead applying an approach which has been termed “guided discretion” by Kate Falconer. Although the cases which have used guided discretion did so in the context of human tissue obtained from living human beings, if this issue comes before the Singapore courts it is submitted that this approach should be applied, and that it should be determined that human remains should be regarded as having the status of property. This would, among other things, enable civil and criminal proceedings to be pursued in domestic law if such remains are removed from archaeological sites or museums without authorization, and for international frameworks facilitating the return of illicitly exported cultural objects such as those established by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention to apply.

It would seem that Singapore’s Human Biomedical Research Act 2015 prohibits commercial trading in human remains, even those regarded as having heritage value. This may have been an unforeseen consequence of the Act, which aims at

⁷⁶ I.Y.H. Tan, “Dignity after Death...”, p. 6. At the time the article was written, the author was working with the NHB.

regulating biomedical research involving human tissues. Notwithstanding this, in appropriate cases the Minister for Health might exempt certain human remains from the restriction by exercising a power granted under the Act, and it is suggested that the Minister should appoint an advisory committee to consult on such matters.

Recognizing that buried human remains are property implies that legal title to them is vested in the owner of the land in which they are found. Thus, if remains are found in the course of an archaeological excavation, it is the landowner who owns them. In Singapore, where it is believed that practically all cemeteries are on state land, this means that interred corpses and any objects buried with them, and funerary monuments affixed to the land, belong to the state. Due to the scarcity of land in Singapore, cemeteries are frequently cleared to enable the land to be reused, chiefly for public housing. The government does not publicly assert any property interest in buried remains and monuments in such cemeteries, instead inviting the next-of-kin of deceased persons to claim their relatives' remains and monuments if they wish.

As regards preserved human remains held as part of institutional collections such as museums managed by the National Heritage Board, there are no published policies on how such remains are treated. However, as a member of the International Council of Museums (ICOM), the Board's museums are required to comply with the *ICOM Code of Ethics for Museums*, which generally requires human remains to be treated with great tact and respect. Museums should therefore ensure that all staff and volunteers are aware of the need to treat human remains respectfully and not to exoticize or sensationalize them for the sake of generating public interest.

Provided that the interests and beliefs of the community, ethnic or religious groups from whom human remains originated are considered, it is submitted that research into human remains and their sensitive display in museums are important ways for us to learn more about our origins and ourselves.

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SUMMARY

Jack Tsen-Ta Lee

SPEAKING OF THE DEAD: HUMAN REMAINS AS HERITAGE IN THE SINGAPORE CONTEXT

This article considers, in the Singapore context, the legal status of unburied human remains having heritage value, which might be in the form of a deceased person’s corpse that has not been interred; or preserved remains, possibly in a museum or a private collection. It is submitted that, following the guided discretion approach adopted in recent cases concerning human tissue obtained from living human beings, such human remains should be regarded as having the status of property. This would, among other things, enable civil and criminal proceedings to be pursued in domestic law if such remains are removed from archaeological sites or museums without authorization, and for international frameworks facilitating the return of illicitly exported cultural objects to apply. The article also looks at the status of buried human remains, grave goods and funerary monuments, and guidelines concerning the proper treatment of remains in a museum setting. Provided that the interests and beliefs

of the community, ethnic or religious groups from whom human remains originated are considered, research into human remains and their sensitive display in museums are important ways for us to learn more about our origins and ourselves.

Keywords: commercial trading in human remains, human remains as property, Singapore, treatment of human remains in museums

STRESZCZENIE

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MÓWIĄC O ZMARŁYCH: SZCZĄTKI LUDZKIE JAKO DZIEDZICTWO W KONTEKŚCIE SINGAPURU

W artykule poddano refleksji, w kontekście Singapuru, status prawny niepochowanych szczątków ludzkich o wartości dziedzictwa. Mogą one mieć postać zwłok osoby zmarłej, która nie została pochowana; lub zachowanych szczątków, ewentualnie znajdujących się w zasobach muzeum lub w prywatnej kolekcji. Twierdzi się, że zgodnie z podejściem opartym na uznaniowości przyjętym w niedawnych sprawach dotyczących tkanek ludzkich uzyskanych od żywych istot ludzkich takie szczątki ludzkie powinny być uważane za mające status własności. Umożliwiłoby to, między innymi, prowadzenie postępowań cywilnych i karnych w prawie krajowym w przypadku usunięcia takich szczątków ze stanowisk archeologicznych lub muzeów bez zezwolenia, a także zastosowanie międzynarodowych ram ułatwiających zwrot nielegalnie wywiezionych dóbr kultury. Analizie poddano również status pochowanych szczątków ludzkich, dóbr grobowych i nagrobków, a także wytyczne dotyczące właściwego traktowania szczątków w warunkach muzealnych. Badania nad ludzkimi szczątkami i ich delikatna ekspozycja w muzeach są ważnymi sposobami, dzięki którym możemy dowiedzieć się więcej o naszym pochodzeniu i nas samych, jednak niezbędnym warunkiem ich wykorzystania jest uwzględnienie interesów i przekonań społeczności, grup etnicznych lub religijnych, z których pochodzą ludzkie szczątki.

Słowa kluczowe: komercyjny obrót szczątkami ludzkimi, Singapur, traktowanie szczątków ludzkich w muzeach, szczątki ludzkie jako własność