

Zhao Zhiyong*

drpna1@yahoo.fr
orcid.org/0000-0002-8360-5368
East China University of Political Science and Law
555 Longyuan Road, Songjiang District
200261 Shanghai, People's Republic of China

The Human Body in the Regime of Chinese Cultural Heritage Law

Abstract: For a long time, the concept of the human body has been governed by civil law. Today, this way of treating it is no longer certain. The human body can also be understood as an integral part of cultural heritage. On one hand, this is a question of the holder of the element of the intangible cultural heritage (ICH). On the other hand, it concerns the human body beyond the living person, protected as tangible heritage or cultural property. This article analyses these diverse dimensions of the human body under Chinese legislation on the protection of cultural relics and for the safeguarding of intangible cultural heritage, taking into consideration the respect for human dignity. In this regard, it offers a cross-cutting overview of the ethical and legal challenges surrounding the management and regulation of human remains.

Keywords: human body, property rights, cultural heritage, cultural property, China

* **Zhao Zhiyong** is a Lecturer and Post-doc Fellow in History of Law at the East China University of Political Science and Law (ECUPL) in Shanghai, China. He holds a Ph.D. in history of law from the University of Auvergne (Clermont-I) in Clermont-Ferrand, France.

The author wishes to acknowledge that this article constitutes a stage research of two programmes: "Research on the harmonization of cultural heritage in the Yangtze River Delta", funded by ECUPL, No. 19HZK005, and "Translation, research and construction of databases of national legal texts along the Belt and Road", funded by the National Social Science Fund of China, No. 18ZDA157.

Introduction

Civil law is often considered as the only field with respect to discussions concerning the human body,¹ but today this vision should be re-assessed. The concept of the human body is in full evolution, and this evolution is more significant due to considerations of the techno-scientific progress made in legal science. Although these genetic, medical, or technical innovations are likely to transform the understanding of the human body in all its humanity and its specificity, there is another singular way of comprehending the body of human beings: i.e. by regarding it as an integral part of cultural heritage, the human body is seized by cultural heritage laws.

As we know, civil law regulates personal relationships and property relationships between natural persons and entities with equal status.² Both the holders of intangible cultural heritage (ICH) and human remains are the subject and object of civil law and governed thereby. Seen from the perspective of the public interest, the skills mastered by holders of elements of ICH or human remains have special historical and cultural value to an entire country's civilization, so they need to be treated taking into account the aspects of historical, cultural, and artistic value. This explains why cultural heritage laws give certain "heritage aspects" to the human body, but they do not disturb the civil principle that the human body is non-property,³ since these laws treat the human body only in its cultural and historical dimension.⁴ On the one hand there is the question of the holder of

¹ The human body has a broad meaning which encompasses not only the physical substance of the living human being, but also the remains of the dead person. For example, the General Provisions of the Civil Law of the People's Republic of China ("the General Provisions") in Article 110 (Chapter V Civil-law Rights) stipulate that: "A natural person shall enjoy the right to life and the rights to his/her body, health, name, portrait, reputation, honor, privacy, and marriage by choice" (中华人民共和国民法通则, Order of the President of the People's Republic of China No. 66, 15 March 2017, English translation: <http://www.npc.gov.cn/englishnpc/lawsofthepc/202001/c983fc8d3782438fa775a9d67d6e82d8.shtml> [accessed: 19.10.2020]). The human remains mean the bodies and parts of the bodies of dead people or of the human body beyond the living person.

² Article 2 of the General Provisions.

³ Article 3 of the General Provisions: "The personal rights, property rights and other lawful rights and interests of the persons of the civil law shall be protected by law and shall not be infringed by any organization or individual". Article 16-1 of the French Civil Code: "Everyone has the right to respect for his body. The human body is inviolable. The human body, its elements, and its products may not form the object of a patrimonial right" (*Code civil*, 15 March 1803, as amended, English translation: <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr512en.pdf> [accessed: 19.10.2020]).

⁴ Article 2 of the Law of the People's Republic of China on the Protection of Cultural Relics (中华人民共和国文物保护法, 19 November 1982, as amended, English translation: <http://www.china.org.cn/english/environment/34304.htm> [accessed: 19.10.2020]) only mentions the cultural and historical value of relics, such as ancient tombs, representative objects reflecting historical times, national social systems, social production, and social life, ancient vertebrate fossils and ancient human fossils with scientific value, etc. And Article L.1 of the French Heritage Code provides that: "all immovable or movable property, under public or private property, which has a historical, artistic, archaeological, aesthetic, scientific, or technical interest" (*Code du patrimoine*, 20 February 2004, as amended; own translation). Thus, on 4 July 2000, the Administrative Court of Appeal of Paris delivered its judgment and stated that "the heritage term

an element of ICH, and on the other hand the question of the body beyond the living person protected as tangible heritage.

Indeed, the Chinese government quickly understood that one of the most important threats to the viability of its ICH was the decrease in the number of persons who practice music, dance, theater, or traditional crafts. One effective means for ensuring the safeguarding of ICH is to encourage the holders of the heritage element to continue to transmit their knowledge and know-how to subsequent generations. In fact, a physical vector, that is to say transmitted by a natural person, must transmit the ICH. The person is the integral element of the living human body. Seen in this perspective, the question of identification of such persons began to be considered in 2005, and culminated in 2011 with the adoption of the law for the safeguarding of ICH.

However, the question of human remains turns out to be significant. It is clear that the human body beyond the living person is probably an object of the law, so in this sense human remains occupy an important place in public collections of our archaeological and historical heritage. But human remains are an object of law with a very special status – they not only make a contribution to the public good, but they also have a personal, spiritual, or religious significance to individuals or groups. Therefore the heritagization of the body currently raises ethical and cultural questions and/or conflicting claims. In addition, Chinese law on cultural property remains somewhat silent on the question of the human remains, dealing with it only in a very obscure manner, as in China the question of the heritagization of human remains is only a customary practice or a practice linked to archeology. This therefore also limits the protection of cultural relics such as human remains.

Some scholars in China and other countries have also propagated a protection process and system of ICH and material cultural heritage in their own country; for example Wang Mingyue,⁵ Tian Yan,⁶ Gabriel Ballif,⁷ and Marie Cornu.⁸ However, few authors talk about the “person” as cultural heritage. Although Cornu’s article combines civil law and cultural heritage law to discuss the relationship between

appearing in the minister’s letter seems to us to refer only to artistic value” (own translation). See Administrative Court of Appeal of Paris, Judgment of 4 July 2000, Case No. 99PA02663, LPA 21.12.2000, No. 254, p. 17.

⁵ Wang Mingyue, 非物质文化遗产代表性传承人的制度设定与多元阐释 [The Regime of Holders of the Representative Element of the Intangible Cultural Heritage and Its Multi-Understanding], “Cultural Heritage” 2009, Vol. 5.

⁶ Tian Yan, 非物质文化遗产代表性传承人认定制度探究 [Study on the Identification of Representative Holders of Intangible Cultural Heritage], “Tribune of Political Science and Law: Journal of China University of Political Science and Law” 2013, Vol. 6.

⁷ G. Ballif, *Restitution des têtes maories et déclassement du domaine public des biens culturels*, “Revue administrative” 2011, Vol. 64(380).

⁸ See M. Cornu, *The Human Body in the Museum: From a Person to an Object?*, “Art Antiquity and Law” 2009, Vol. 14(3).

the human body and cultural heritage, she focuses on the discussion of human body from the perspective of museum protection. However, as a cultural relics exporting country, China needs to protect the human body in the care of museums, and the return of a human body that has become a cultural relic remains to be solved. This is also one of the research directions of this paper.

In apprehending the human body in a cultural heritage dimension, the purpose of this article is to outline the place of the human body in Chinese cultural heritage legislation. To carry out this task, we are interested firstly in the patrimonial legislation treating the human body of living persons, and then that treating the human body beyond life.

The Body of the Living Person: A Vector of Transmission in ICH Legislation

The Law of the People's Republic of China on the Intangible Cultural Heritage of 2011 ("the 2011 ICH law")⁹ constitutes the legal basis for the protection of ICH. In this context, the human being is at the heart of the protection of the ICH, because in the context and sense of ICH the human body guarantees the creation, interpretation, and transmission of its elements. Following the adoption of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in 2003 ("the 2003 UNESCO Convention"),¹⁰ it took the Chinese government eight years to put in place legislation that is a bit advanced compared to other countries. However, the identification system of holders of ICH seems to require certain improvements.

Human beings in the legislation on the ICH

Article 2 of the 2011 ICH law provides that:

For the purposes of this Law, intangible cultural heritage shall mean various traditional cultural manifestations which are handed down by the people of all ethnicities from generation to generation and regarded as a constituent part of their cultural heritage, and physical objects and premises related to the traditional cultural manifestations, including:

- (1) Traditional oral literature and language as a carrier thereof;
- (2) Traditional fine arts, calligraphy, music, dance, drama, folk art¹¹ and acrobatics;

⁹ 中华人民共和国非物质文化遗产法, Order of the President of the People's Republic of China No. 42, 25 February 2011, English translation: https://urbanlex.unhabitat.org/sites/default/files/urbanlex//intangible_cultural_heritage_law_of_the_peoples_republic_of_china_2011.pdf [accessed: 19.10.2020].

¹⁰ 17 October 2003, 2368 UNTS 3.

¹¹ Quyi – Chinese folk art forms, including ballad singing, storytelling, comic dialogues, clapper talks, cross talks, etc.

- (3) Traditional artistry, medicine and calendar;
- (4) Traditional rituals, festivals and other folk customs;
- (5) Traditional sports and entertainment; and
- (6) Other intangible cultural heritage.

The relevant provisions of the Law of the People's Republic of China on the Protection of Cultural Relics shall apply to the physical objects and premises that are a constituent part of the intangible cultural heritage and falling under the category of cultural relics.¹²

ICH is different from material cultural heritage. Intangible heritage must be attached to the consciousness and practice of people or groups in order to survive. It belongs to a “dynamic” culture. ICH does not exist in a material form, but depends on people.¹³ Its transmission is passed on from generation to generation throughout the population, by the experience, practice, and performance. Therefore, the core of protecting ICH lies in the protection of a “person”. Only when the “persons” are protected can the inheritance of skills, knowledge, consciousness, and culture be realized.

To safeguard the ICH, one of the most effective and sustainable means would be to ensure that those who embody it continue to develop their knowledge and skills and pass them on to the generations that follow them. In this perspective the human being, through his/her body, serves as a vector to interpret or recreate specific elements of the ICH. These people who have a high level of knowledge and skills are called “Living Human Treasures” within the meaning of the UNESCO 2003 Convention, or “holders of the ICH” according to Chinese law.

¹² This definition refers to that of the 2003 UNESCO Convention to which China acceded in 2005. Article 2 of that Convention provides that: “For the purposes of this Convention, 1. The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The ‘intangible cultural heritage’, as defined in paragraph 1 above, is manifested inter alia in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship”.

¹³ Wang Yunxia (ed.), 文化遺產法 [Cultural Heritage Law], The Commercial Press, Beijing 2012, p. 210.

As an important measure for the safeguarding of ICH,¹⁴ the identification of Living Human Treasures¹⁵ in China has progressed step by step. Under the leadership of UNESCO, China has begun to establish its system of identifying its Living Human Treasures. To facilitate the work of identifying the holders thereof, local regulations first took into account the protection of holders, such as the regulation for the safeguarding of popular traditional and ethnic culture of the province of Yunnan, adopted on 26 May 2000.¹⁶ In 2008, the Ministry of Culture issued the first national measure. This is the provisional qualification regulation for holders of representative elements of the national ICH.¹⁷ The qualification criteria were finally set forth in the 2011 ICH law. To be qualified as a representative holder, three conditions must be met. First, the holder must master the heritage identified as China's ICH. This means that an element of the ICH can be practiced by several bearers, but the one who knows it best can be qualified as the representative holder, because only (s)he can correctly transmit it through his or her high competence. Secondly, the holder must be representative and renowned in a region, because this representativeness allows him/her to disseminate in an influential way the element of ICH which is held. Finally, the holder must pass on the heritage item. As we have already noted, the transmission of the ICH depends on persons. Therefore, the main aim of the qualification of the representative holder is to allow the diffusion and the transmission of the identified ICH.¹⁸

The selection of the candidates has demonstrated the will of the administrations to save China's ICH and to help the representative holders to transmit their knowledge and/or know-how. We can say that this regime (of the representative list) is basically a legislative safeguard led by the State. However, there are learning difficulties involved in this qualification, notably due to the physical evolution of the body.

Difficulties of qualification linked to the evolution of the human body

The creation of a national system of representative holders aims above all to preserve the elements of China's ICH which are of great historical, artistic, or cultural value, as well as to their representation, performance, or recreation. In order to allow holders to assume their responsibilities for the safeguarding of the ICH, certain

¹⁴ Wang Mingyue, op. cit., p. 17.

¹⁵ In China, we talk about the representative list of *Chuan chen ren*. *Chuan* signifies transmission; *cheng* marks the meaning of inheritance and returns to the notion of a human.

¹⁶ This is the first regulation for the safeguarding of popular traditional culture adopted at the local level.

¹⁷ It was adopted on 14 May 2008.

¹⁸ Article 29 of the 2011 ICH law stipulates that "[the] representative inheritors of the representative items of intangible cultural heritage shall meet the following conditions:

- (1) Familiarity with the intangible cultural heritage they inherit;
- (2) Be representative in the specific area and have more significant influence in certain areas;
- (3) Actively carry out inheritance activities".

measures are specified in the legislation. For example, Article 31 of the 2011 ICH law states that:

The representative inheritors of the representative items of intangible cultural heritage shall perform the following obligations:

- (1) Carry out inheritance activities and cultivate talented successors;
- (2) Properly keep the relevant physical objects and information;
- (3) Cooperate with the departments in charge of culture and other relevant departments in the investigations of intangible cultural heritage; and
- (4) Participate in public welfare publicity for intangible cultural heritage.

If the representative holder/inheritor does not fulfill the above-mentioned obligations without a legitimate reason, the department in charge of culture can revoke their qualification and reclassify someone else as the new holder. Among the obligations imposed on the representative holder, the first and the last such obligations are linked to the human body; more precisely to the physical condition of the human being. However, the law does not distinguish between cases of intentional non-transmission and of unintentional non-transmission, which is a question related to the physical evolution of the human body. In fact, most of the holders are old.¹⁹ Their health is diminished by aging, which in turn diminishes their capacity for creation and transmission.²⁰ However, in the ICH texts the State does not recognize any specific rights for holders, such as free medical care and other privileges.

In addition, if the State recognizes a human being through his or her body as an integral part of the ICH, it must be able to provide for a special quality maintenance regime in the event of loss of transmission capacity. For example, the Korean Cultural Heritage Law in its Article 24 provides for a regime of emeritus holder.²¹ This means that in the event of a loss of capacity, the State will rename another holder, while the former qualified holder may be recognized as an emeritus holder.

The 2011 ICH law regime does not seem especially relevant from the point of view of the protection of ICH linked to the human body,²² but it certainly does not present cultural and ethnic problems, since the human body should not be – from the point of view of cultural heritage law – an intermediary for recreation and transmission. However, the question of the human body beyond life changes the picture.

¹⁹ Among the 1,448 persons qualified as holders in 2012, those under 65 years old represent only 46%. See Liu Xiufeng, Liu Zhaohui, 非物质文化遗产与代表性传承人制度 [Intangible Cultural Heritage and the Representative Inheritor System], “Journal of Zhejiang Normal University” 2012, Vol. 5, pp. 68-69.

²⁰ Zhao Zhiyong, *Legal Protection of Cultural Heritage in China*, Toulouse 1 Capitole University Press, Toulouse 2016, pp. 301-302.

²¹ Tian Yan, *op. cit.*, p. 86.

²² We can see that in the law, the State defines only the obligations that regulators must fulfil, without mentioning the rights which they must enjoy. See Cui Can, 非物质文化遗产传承人权利的法律保护 [Legal Protection of Inheritor’s Right to Intangible Cultural Heritage], “Journal of Shenyang University of Technology” 2014, Vol. 7(3), pp. 212-215.

The Body Beyond the Living Person: A Special Category of Cultural Heritage?

Human remains seem to have long fascinated the archaeological and museum sciences. It is certain that they fall outside the status of a “person” or an ordinary “good”. They have a cultural status, but this recognition is implicit. Undoubtedly the human body and human remains have acquired the status of cultural heritage, but with a link to a living person in the past these “goods” deserve special respect due to the body. In addition, having a bond between the person and the community where he/she lived, these “goods” represent a memory and a collective feeling. Therefore, they are a specific type of cultural heritage.

The human body beyond the living person or human remains forming part of cultural heritage in Chinese law

At the end of life, the human body, or rather the corpse, according to the definition given by the Chinese professor Liang Huixing, constitutes “the human remains preserved by the regime or the funeral customs of a State and representing the deceased. It can be the lifeless body, the remains of the body, or ashes”.²³ Although in civil law, the legal status of the human body involves discussion on its nature, i.e. whether it is an object or not, cultural heritage law remains simple in its specificity. It provides that the human body beyond the living person could be a cultural relic, although this qualification is nevertheless very obscure in the Chinese heritage law.

The last paragraph of Article 2 of the Law of the People’s Republic of China on the Protection of Cultural Relics recognizes the human body beyond the living person or human remains as a cultural relic: “Fossils of paleovertebrates and paleoanthropoids of scientific value shall be protected by the state in the same way as cultural relics”.²⁴ In addition, the articles which protect ancient tombs also implicitly recognize the human body as having the status of a cultural relic.²⁵

It should be noted that while the above legislation does not explicitly give cultural status to the human body or human remains, it provides that under certain conditions and through archaeological and museum practices the human body or human remains in certain scientific, anthropological, cultural approaches can be a cultural heritage.

²³ Liang Huixing, 中國物權法研究 [Studies on Chinese Property Law], Beijing University Press, Beijing 1998, p. 62.

²⁴ In some civil systems, the depersonalized human body, such as a mummy or bones, are a separate thing. See D. Medicus, 德國民法總論 [General Introduction to German Civil Law], transl. by Shao Jiandong, Law Press, Beijing 2000, p. 876.

²⁵ See also Articles 2, 3, 5, etc.

First, human bones or the human remains resulting from archaeological excavations constitute an important source of knowledge of the past, such as the history of disease and of medicine, the diversity of cultural practices in which the body and its parts were used, past demographics and health, etc. This gives them a historical, cultural, archaeological, and scientific value, which are the inherent interests underlying cultural relics.

Secondly, Fujian Buddha constitutes a typical example of giving the human body of a deceased person or human remains the status of cultural relics. Although Chinese cultural heritage law does not expressly recognize human remains as cultural relics, and the remains of Buddha are not classified by the administration as cultural relics,²⁶ they are undoubtedly property relics. The Buddha has been treated and kept as a mummy by the local population for centuries and the most important thing is that the local population treat him as its ancestor by celebrating his birthday; which constitutes the spiritual substance of the local population.²⁷ It is obvious that the Buddha mummy is a cultural relic by virtue of its historical, scientific, and religious value and its cultural and spiritual bond with the local population.

We can say that human remains, especially those of a great personality or constituting a collective memory, become cultural relics in the eyes of Chinese heritage law as soon as they have a cultural value.

In addition to the national context,²⁸ which very implicitly recognizes human remains as cultural property, certain international contexts recognize more expressly their cultural status. The UNESCO Recommendation for the Protection of Movable Cultural Property²⁹ in its Article 1 provides that:

For the purposes of this Recommendation:

- (a) “movable cultural property” shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including items in the following categories: [...]
- (ii) antiquities such as tools, pottery, inscriptions, coins, seals, jewelry, weapons and funerary remains, including mummies; [...]
- (iv) material of anthropological and ethnological interest.

²⁶ Tie Yonggong, “肉身坐佛”背后的文物追索路 [The Claim of the Buddha], “Xinhua Daily Telecommunications”, 7 April 2015, p. 9.

²⁷ Li Xingjian, 荷兰法院驳回中国福建村民追讨章公祖师肉身坐佛案起诉 [Dutch Court Dismisses Action Against Buddha Claim from Chinese Villagers in Fujian], 13 December 2018, http://m.cnr.cn/news/20181213/t20181213_524448240.html [accessed: 06.05.2020].

²⁸ Indeed, the French Heritage Code in its Article L.510-1 implicitly also recognizes the human body as a cultural relic: “Elements of archaeological heritage, including all the vestiges, goods and other traces of the existence of humanity and the context in which they are inscribed and their safeguarding and study, in particular by excavations or discoveries, allow us to trace the development of the history of humanity and its relationship with the natural environment”.

²⁹ 28 November 1978, <https://unesdoc.unesco.org/ark:/48223/pf0000114032.page=176> [accessed: 18.11.2019].

It is very clear that the heritagization of the human body occupies an important position in the cultural and scientific field, but this involves an interesting and important question: How long does it take for the body of a deceased person to become heritagized? Can it be immediate, or is there a temporal factor involved? In fact, although a person's corpse becomes a "thing" immediately after his or her death, in principle it cannot become a cultural relic immediately, because the link between the corpse and the deceased's family still exists.³⁰ Due to the protection of family interests, during this time it can only belong to the special property of his or her family. Only after the disappearance of family ties can the corpse become a cultural relic. The condition is that he/she was a great personality and constitutes part of the national history and civilization or collective memory. On the other hand, in terms of the Administrative Measures for the Entry-Exit Examination and Verification of Cultural Relics, in principle only those objects that were before the foundation of China in 1949 may be cultural relics.³¹ Therefore, in terms of the above two points the body of a deceased is subject to the triple restrictions of time, the link with family spirit, and national cultural spirit.

The legal vacuum of the regime for the protection of human remains or of the lifeless human body in heritage constitutes an obstacle to their protection and/or conservation. However, human remains or the lifeless human body are not ordinary cultural relics. By linking them with an ethnic/national value, their protection and conservation present certain peculiarities which can be raised in some cases involving claims to them.

A special status of protection articulated between respect for the human body and claims for a human body, which is considered as a cultural relic

The lifeless human body in the form of the corpse may, over time – in the form of bones or mummies – become an item of heritage. But it is not a simple good defined by heritage norms. Instead it is a sensitive good, because it has a certain personality or dignity which must be respected.³² Consequently human bodies which are considered as cultural relics must be kept in a dignified state, with proper regard to good conservation habits and customs. This respect for dignity is referred to in the principle announced by the ICOM Code of Ethics for Museums.³³

³⁰ See M. Cornu, *op. cit.*, p. 219.

³¹ 文物進出境審核管理辦法, Order of the Minister of Culture No. 42, 13 July 2007, art. 8.

³² Yang Lixin, 论尸体的法律属性及其处置规则 [The Legal Status of the Corpse and Rules of Its Disposal], "Jurist" 2005, Vol. 1(4), p. 80.

³³ Article 2.5 states that: "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,

In addition, Article 4.4 of the same Code specifies that requests for return by the countries of origin of these objects will be treated with diligence, respect, and sensitivity.³⁴ However, inasmuch as this text has no imperative character it poses a problem for originating countries requesting a claim of these sensitive objects which constitute their collective memory via their historical and sentimental values.

As for the restitution of pieces owned by museums, a distinction should probably be made between cultural property and human remains. Although the texts of many countries, as well as international texts, recognize the human body as cultural property in conformity with the principle of unavailability and inalienability, there is always however a conflict between defending the total respect due to human remains and their restitution, which constitutes a form of alienation. Despite this inherent conflict, Chinese legislative texts and practices remain silent on the matter.³⁵ Today, the French solution granted to the Maori heads seems to affirm the idea of restitution by going in the direction that the human body is not an ordinary cultural good, and that it is defined by the principle of respect for the human body contained in the civil law.

Indeed, in 2007, in response to New Zealand's request, the municipal council of Rouen authorized the restitution of Maori heads held by its natural history museum, on the principle announced by Article 16-1 of the Civil Code, introduced by the Law of 29 July 1994 on the Respect for the Human Body, which provides for the unavailability of the human body: "The human body, its elements and products cannot be the subject of an economic right".³⁶ After the annulment of this decision by the city's administrative court and its confirmation by the Administrative Court of Appeal of Douai,³⁷ a law was passed in 2010 by the National

ethnic or religious groups from which the objects originated, where these are known". See also Articles 3.7 and 4.2.

³⁴ "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".

³⁵ The question of the mummified Buddha displayed in the Netherlands and claimed by China is a sensitive topic in this matter. The claim is undergirded by principle of good faith, which is an important principle for its return. See Ge Jiangqiu, 追索在荷“肉身坐佛”之私法路径:以荷蘭民法為視角 [The Claim of the Mummified Buddha: From the Perspective of Dutch Civil Law], "Oriental Law" 2015, Vol. 3, pp. 98-111; Zhang Dan, 肉身坐佛非国家文物, 村民担心封建迷信未申报 [The Mystery of the Mummified Buddha: The Question of the Non-Qualification of Cultural Property], "Journal of Canton", 27 March 2015.

³⁶ *Loi n° 94-653 du 29 juillet 1994 relative au respect du corps humain*, Journal officiel de la République française 175, 30 July 1994.

³⁷ Recognizing that by deliberation of 19 October 2007, the municipal council of Rouen decided to authorize, with a view to his burial according to ancestral rites, the restitution of the Maori head to New Zealand as well as the signature of the agreement formalizing the conditions of this restitution between the city of Rouen and the Te Papa museum in Wellington responsible for identifying the tribe of origin and, failing this, for burial in the sacred area specially arranged for this purpose within this museum; that

Assembly and it was up to it to decide on restitution.³⁸ In this sense, it seems that the body has an irreplaceable spiritual value for loved ones or their people.³⁹

In this conflict between the principle of respecting the human body and the principle of inalienability, it seems that the human body can be a cultural relic and protected by the latter principle, but for works stolen, looted, or acquired under conditions deemed doubtful in the eyes of a contemporary observer, it is the civil principle of respect which prevails, in which case “the unavailability of the human body does not prevent that human remains from public collections can be objects of property and belong to the public domain”.⁴⁰

This is why a division should be made between cultural relics and human remains. This is part of a game played out by museums based on the conflict between the museum collection principle and the human body inviolability principle. Human remains can be cultural relics, which are collected for scientific research and exhibitions, however only in accordance with the principle of ensuring that the human body is inviolable. Thus if the source of the human remains in the collection is illegal, and the human remains are the only spiritual link with its people or the only evidence of the cultural identity of a certain ethnic group, then the human remains shall be returned after research on them. Even though the museum collection principle includes the principle of public interest, the principle of the inviolability of the human body should supersede in such a case, because the principle of human rights and humanity is superior to the principle of the inalienability of collections.

it is common ground that this property, for which the assent of the national scientific commission of the collections of the museums of France had neither been obtained nor even requested, had, moreover, prior to the deliberation, subject to any downgrade, contrary to the provisions of Article L.451-5 of the French Heritage Code.

Recognizing that however, the abovementioned provisions of the Heritage Code, which make the property of a public person constituting a collection of museums in France inalienable, place these properties under a special protection regime distinct from the property law set out in Article 16-1 of the Civil Code; that, consequently, said article having neither had the object nor the effect of obstructing the exercise of a public domain system over a human remains in application of the provisions of the Heritage Code and not implying, in remaining, by itself, the return of the Maori head to New Zealand, the city of Rouen is not justified in claiming that it could authorize the return of this property without respecting the decommissioning procedure provided for by Article L.451-5 of the Heritage Code. See Administrative Court of Appeal of Douai, Decision of 24 July 2008, “Actualité juridique de droit administratif” 2008.

³⁸ *Loi n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections* [Law No. 2010-501 of 18 May 2010 to Authorise the Return of Maori Heads to New Zealand by France and Relating to the Management of Collections], *Journal officiel de la République française*, 19 May 2010.

³⁹ Zheng Xin, 浅议尸体的物权属性 [The Real Nature of the Corpse], “Legal System and Society” 2008, Vol. 12, p. 108.

⁴⁰ G. Ballif, *op. cit.*, pp. 149-153.

Conclusions

It is clear that the cultural heritage laws adopt a very particular understanding of the human body. The body of the living person in cultural heritage legislation seems to contain few difficulties, since the human body serves only as a vector of transmission. However, the body beyond the living person is often a source of difficulties, and in this aspect it is necessary in the cultural heritage laws and texts to envisage a particular protection, while combining some civil principles.

Article 31 of the 2011 ICH law sets out the obligations that a holder must fulfill. In the event of non-fulfilment, the competent authority may revoke the title. If the holder voluntarily refuses to transmit or disseminate an element of ICH, or in the dissemination or transmission thereof willfully disregards its form and connotation, this revocation of title seems to constitute a legal sanction which allows ICH to be respected and transmitted. However, this non-fulfilment may be involuntary, related to the physical evolution of the holder, that is to say related to his or her state of health or age. In such a case, the revocation cannot be regarded as a proper sanction. Unfortunately, Chinese law does not provide for such a distinction. This poses the problem of the legality of the treatment of the holder, who is an essential core of the protection of the ICH. It seems that the legislator must clarify this issue. UNESCO has noted that the revocation of one's status as a Living Human Treasure because of a problem with one's age or memory loss is unclear.⁴¹ For the Chinese government, establishing a legal regime for aging holders seems necessary, rather than revoking the title for those who do not fulfill their legal obligations because of their health or age. A regime of "distinguished holder" or "emeritus holder" – which reduces their funding while keeping their honor – would constitute a measure of recognition of their efforts in the transmission and dissemination of the ICH.

With regard to lifeless human bodies or human remains, the Chinese legislator must also strengthen their protection while giving them a special place in the existing legislation. This specific regime is necessary for both their protection and conservation – as reflected in the status of many of Sharipu Sarira Buddha's relics, the mummy of the Buddha, or other archaeological finds – as well as for claims for their return.

Therefore the Chinese cultural heritage legal texts must explicitly recognize that human bodies or human remains may be a part of cultural property, as soon as they are of historical, cultural, archaeological, or scientific interest. For example, these human bodies or remains can be those discovered by archaeological excavations or those treated and preserved as a collective memory by a community. This legal recognition of human remains is the essential basis for establishing a protection regime.

⁴¹ UNESCO, *Guidelines for the Establishment of National "Living Human Treasures" Systems*, art. 37, <https://ich.unesco.org/doc/src/00031-EN.pdf> [accessed: 19.10.2020].

If the law firmly establishes a *summa divisio* between things and persons, lifeless human bodies or human remains are things under the law. However, they are not an ordinary thing, since lifeless human corpses or human remains embody the essence of the legal personality of the deceased. As a result, lifeless human bodies or human remains entering the cultural heritage family are not ordinary cultural relics; they must be given a special status. Chinese laws protect the human dignity of persons⁴² and forbid insulting, stealing, or using a corpse against public order. This protection is based on a fundamental value, i.e. that of human dignity.⁴³ Therefore, the protection of lifeless human bodies or human remains as cultural heritage not only concerns the principles of ordinary cultural heritage law, it is also necessary to combine them with the inviolability of the human body, reflecting human dignity,⁴⁴ which today is already acknowledged in the international legal texts previously mentioned. Therefore it is necessary for Chinese law to establish a specific regime for their protection, in which the human remains of great personalities or those constituting a collective memory must be preserved, protected, and exposed for others with dignity, and similarly must be buried with respect.

There is no doubt that the human body lies, by its specificity, at the core of protection by Chinese laws on cultural property and the ICH. Living persons are also protected by the 2011 ICH law, inasmuch as the transmission of ICH depends on the person of the representative inheritor/holder. The corpse and remains of the deceased are protected under certain conditions by the law on cultural relics, which today must be reinforced by the principle of human dignity.

References

Administrative Court of Appeal of Douai, Decision of 24 July 2008, “Actualité juridique de droit administratif” 2008.

Administrative Court of Appeal of Paris, Judgment of 4 July 2000, Case No. 99PA02663, LPA 21.12.2000, No. 254, p. 17.

Ballif G., *Restitution des têtes maories et déclassement du domaine public des biens culturels*, “Revue administrative” 2011, Vol. 64(380).

Chen Guojun, 死者有形人身遗存的法律属性辨析 [The Legal Nature of the Remains of the Deceased], “Politics and Law” 2015, Vol. 11.

Code civil [French Civil Code], 15 March 1803, as amended, English translation: <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr512en.pdf> [accessed: 19.10.2020].

Code du patrimoine [French Heritage Code], 20 February 2004, as amended.

⁴² Article 109 of the General Provisions.

⁴³ Chen Guojun, 死者有形人身遗存的法律属性辨析 [The Legal Nature of the Remains of the Deceased], “Politics and Law” 2015, Vol. 11, p. 119.

⁴⁴ For illustration, Article 16-1-1 of the French Civil Code stipulates that: “The respect owed to the human body does not end with death. The remains of a deceased person, including the ashes of one whose body has been cremated, must be treated with respect, dignity, and decency”.

- Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.
- Cornu M., *The Human Body in the Museum: From a Person to an Object?*, "Art Antiquity and Law" 2009, Vol. 14(3).
- Cui Can, 非物质文化遗产传承人权利的法律保护 [Legal Protection of an Inheritor's Right to Intangible Cultural Heritage], "Journal of Shenyang University of Technology" 2014, Vol. 7(3).
- Ge Jiangqiu, 追索在荷“肉身坐佛”之私法路徑: 以荷蘭民法為視角 [The Claim of the Mummified Buddha: From the Perspective of Dutch Civil Law], "Oriental Law" 2015, Vol. 3.
- ICOM, *Code of Ethics for Museums*, 2017.
- Li Xingjian, 荷兰法院驳回中国福建村民追讨章公祖师肉身坐佛案起诉 [Dutch Court Dismisses Action Against Buddha Claim from Chinese Villagers in Fujian], 13 December 2018, http://m.cnr.cn/news/20181213/t20181213_524448240.html [accessed: 06.05.2020].
- Liang Huixing, 中國物權法研究 [Studies on Chinese Property Law], Beijing University Press, Beijing 1998.
- Liu Xiufeng, Liu Zhaohui, 非物质文化遗产与代表性传承人制度 [Intangible Cultural Heritage and the Representative Inheritor System], "Journal of Zhejiang Normal University" 2012, Vol. 5.
- Loi n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections* [Law No. 2010-501 of 18 May 2010 to Authorise the Return of Maori Heads to New Zealand by France and Relating to the Management of Collections], Journal officiel de la République française, 19 May 2010.
- Loi n° 94-653 du 29 juillet 1994 relative au respect du corps humain* [Law No. 94-653 of 29 July 1994 on the Respect for the Human Body], Journal officiel de la République française 175, 30 July 1994.
- Medicus D., 德国民法总论 [General Introduction to German Civil Law], transl. by Shao Jiandong, Law Press, Beijing 2000.
- Tian Yan, 非物质文化遗产代表性传承人认定制度探究 [Study on the Identification of Representative Holders of Intangible Cultural Heritage], "Political Science and Law Forum" 2013, Vol. 6.
- Tie Yonggong, "肉身坐佛"背后的文物追索路 [The Claim of the Buddha], "Xinhua Daily Telecommunications", 7 April 2015, p. 9.
- UNESCO, *Guidelines for the Establishment of National "Living Human Treasures" Systems*, <https://ich.unesco.org/doc/src/00031-EN.pdf> [accessed: 19.10.2020].
- UNESCO, *Recommendation for the Protection of Movable Cultural Property*, 28 November 1978, <https://unesdoc.unesco.org/ark:/48223/pf0000114032.page=176> [accessed: 18.11.2019].
- Wang Mingyue, 非物质文化遗产代表性传承人的制度设定与多元阐释 [The Regime of Holders of the Representative Element of the Intangible Cultural Heritage and Its Multi-Understanding], "Cultural Heritage" 2009, Vol. 5.
- Wang Yunxia (ed.), 文化遺產法 [Cultural Heritage Law], The Commercial Press, Beijing 2012.
- Yang Lixin, 论尸体的法律属性及其处置规则 [The Legal Status of the Corpse and Rules governing Its Disposal], "Jurist" 2005, Vol. 1(4).

Zhang Dan, 肉身坐佛非国家文物, 村民担心封建迷信未申报 [The Mystery of the Mummified Buddha: The Question of the Non-Qualification of Cultural Property], "Journal of Canton", 27 March 2015.

Zhao Zhiyong, *Legal Protection of Cultural Heritage in China*, Toulouse 1 Capitole University Press, Toulouse 2016.

Zheng Xin, 浅议尸体的物权属性 [The Real Nature of the Corpse], "Legal System and Society" 2008, Vol. 12.

中华人民共和国文物保护法 [Law of the People's Republic of China on the Protection of Cultural Relics], 19 November 1982, as amended, English translation: <http://www.china.org.cn/english/environment/34304.htm> [accessed: 19.10.2020].

中华人民共和国民法通则 [General Provisions of the Civil Law of the People's Republic of China], Order of the President of the People's Republic of China No. 66, 15 March 2017, English translation: <http://www.npc.gov.cn/englishnpc/lawsofthepc/202001/c983fc8d3782438fa775a9d67d6e82d8.shtml> [accessed: 19.10.2020].

中华人民共和国非物质文化遗产法 [Law of the People's Republic of China on the Intangible Cultural Heritage], Order of the President of the People's Republic of China No. 42, 25 February 2011, English translation: https://urbanlex.unhabitat.org/sites/default/files/urbanlex/intangible_cultural_heritage_law_of_the_peoples_republic_of_china_2011.pdf [accessed: 19.10.2020].

文物進出境審核管理辦法 [Administrative Measures for the Entry-Exit Examination and Verification of Cultural Relics], Order of the Minister of Culture No. 42, 13 July 2007.