

## HUMAN REMAINS STORED IN MUSEUMS AS A LEGAL PROBLEM SZCZĄTKI LUDZKIE PRZECHOWYWANE W MUZEACH JAKO PROBLEM PRAWNY

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### Abstrakt

*Problemem szczątków ludzkich przechowywanych w muzeach, czyli m.in. mumii, zabytków archeologicznych czy też preparatów na wystawach antropologicznych, jest bardzo złożony pod względem prawnym. W ostatnich latach nabiera też nowego znaczenia w kontekście tzw. sprawiedliwości postkolonialnej. Żądania zwrotu szczątków ludzkich (np. mumii czy maoryskich mokomokai, tzn. głów wojowników) przez europejskie muzea i inne instytucje kultury przechowywanych, kierowane ze strony państw, których terytoria były dawniej koloniami czy tzw. terytoriami zamorskimi, stały się w ostatnich latach stosunkowo liczne. Takie żądania mogą zostać w przyszłości wysunięte w stosunku do niektórych eksponatów znajdujących się w polskich kolekcjach muzealnych (chodzi głównie o pozostałości zbiorów niemieckich sprzed II wojny światowej). W artykule konferencyjnym rozważymy status prawny szczątków ludzkich znajdujących się w muzeach (głównie z perspektywy prawa polskiego), a także przedstawimy sprawy związane ze zwrotem szczątków przywiezionych w czasach kolonialnych i sposoby ich rozwiązania w różnych państwach.*

### Słowa kluczowe

szczątki ludzkie, muzea, zabytki, sprawiedliwość postkolonialna

### Abstract

*The problem of human remains stored in museums, i.e. mummies, archaeological relics or preparations at anthropological exhibitions, it is very complex in legal terms. In recent years, it has also acquired a new meaning in the context of the so-called postcolonial justice. Requests from states whose territories were formerly colonies or the so-called overseas territories for the return of human remains (e.g. mummies and Maori mokomokai) stored in European and American museums and other cultural institutions have become relatively numerous in recent years. Such requests may be submitted in the future in relation to some of the exhibits in Polish museum collections (mainly the remains of German collections created before World War II). In the conference paper, we will consider the legal status of human remains in museums (mainly from the perspective of Polish law), as well as present cases related to the return of the remains brought in colonial times and ways of solving them in various jurisdictions.*

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**Keywords**

human remains, museums, monuments, postcolonial justice

**1. Introduction**

The protection of the image of the deceased dates back to the 19th century. It is connected with two court cases that shaped this scope of protection in France and Germany. After the death of the famous actress Rachel (1821–1858), her sister commissioned a drawing of the deceased on her deathbed. This drawing was then distributed without consent of the family. The Seine tribunal ruled in June 1858 that no one may disseminate an image of the deceased person on her deathbed without formal consent from the family of the deceased. The basis for this are the feelings of the family, especially the pain after the loss of a loved one. The court considered that the prohibition of disseminating such an image without the consent was absolute. Commentators on this ruling argued that in this respect the family continued the personality of the deceased.<sup>3</sup> The second judgment concerns the posthumous photograph of the former German chancellor, Otto von Bismarck, who died in 1898. Two photographers burst into the apartments and took a photo of his body, the view of which was far from the official image of the politician. The Reich Court in its judgment of December 28, 1899 ruled that the photo had been created in violation of the inviolability of the house and forbade its dissemination (it was published only in 1951). This case contributed to the introduction of the right to protect the image, as defined in the Copyright in Works of Art and Photography Act (Kunsturhebergesetz, KUG) of 1907. Moreover, this judgment also influenced the formation of the doctrine of the general right to personality, the essence of which is self-determination.<sup>4</sup>

Both cases described here concerned famous people and their families were labeled as legitimate to act on their behalf. It was completely different in the case of images of the

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<sup>3</sup> W. J. WAGNER: The Right To One's Own Likeness in French Law. *Indiana Law Journal*, 1970, Vol. 46, No. 1, pp. 19–20 (1–36). Cf. Justice Civile. Tribul Civil de la Seine. Présidence de M. Benoit-Champy. Audience du 9 Juin. *Gazette de Tribunaux*. 10.06.1858, pp. 559–560. Justice Civile. Tribul Civil de la Seine. Présidence de M. Benoit-Champy. Audience du 16 Juin. *Gazette de Tribunaux*. 17.06.1858, p. 584. On Rachel as an important figure in French nineteenth-century culture, cf. J. STOKES: Rachel's "Terrible Beauty": An Actress Among the Novelists. *ELH*, 1984, Vol. 54, No. 4, pp. 771–793.

<sup>4</sup> T. SINODINOU: Image Right and Copyright Law in Europe: Divergences and Convergences. *Laws*, 2014, No. 3, p. 185 (181–207). ISSN 2075-471X. I. VON MÜNCH: Ogólne prawo do osobowości. *Przegląd Prawa i Administracji*, 1997, Vol. XXXIX, pp. 62–63. Cf. J. MAZURKIEWICZ, P. SZYMANIEC: „Nie wszystkim umrę, wiele ze mnie tu zostanie...”. Kulturowe i prawne aspekty pochówku, wizerunku zwłok oraz napisów nagrobnych. *Studia Prawnoustrojowe*, 2019, Vol. 46, p. 270 (261–276).

remains of anonymous people, e.g. of the victims of wars. Human remains that were kept in museums or exhibitions of curiosities being popular at that time were also treated differently. In the 19th century, museums became available to the general public, and museum collections were filled with exotic exhibits, arousing the curiosity of the masses. Egyptian mummies, mummified heads of Maori warriors (*mokomokai*) and other objects from countries colonized by Europeans were among these exhibits. In turn, in the curiosities, the remains of deformed people, suffering from various diseases, were often exposed to public view. Many such exhibits are still in museums today. Some of them, such as the Egyptian mummies, are not very controversial. Others are the subject of public debates and the subject of legal claims, often made by states that arose from former colonies. Therefore, questions arise about the legal status of objects taken from the colony and objects that are made of human remains or contain such remains. In this text, taking Polish law as an example, firstly we would like to indicate whether human remains can have the status of historical monument. Next, we would like to consider how objects containing human remains, stored in museum collections, should be treated. It must be pointed out that the right to burial is widely recognized in many legal cultures (although the concept of “burying” is understood very differently in particular cultures or civilization circles). It is worth mentioning that as early as in the 17th century, Grotius considered burying the dead to be one of the principles of the law of nature.<sup>5</sup> Another problem that we want to analyze is the treatment of objects that are human remains from former colonies, in the context of the so-called postcolonial justice.

## **2. Human remains as an element of historical monument**

Under international law, different definitions of “monument”, “cultural heritage” and “cultural property” are created to serve the specific purposes of a particular act of international law. In the context of the subject chosen here, two definitions could be significant. The International Convention concerning prohibiting and preventing the illicit import, export and transfer of ownership of cultural property<sup>6</sup> mentions, i.a., “rare collections

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<sup>5</sup> Cf. H. GROTIUS: *The Rights of War and Peace, Book I, edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac*. Indianapolis: Liberty Fund, 2005, pp. 925–948. ISBN: 0-86597-434-9

<sup>6</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in Paris, November 14, 1970, [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html).

and specimens of ... anatomy”, “products of archaeological excavations ... or of archaeological discoveries” and “objects of ethnological interest” among the categories of “cultural property” (Article 1 letters a), c), f)). The European Convention on the Protection of the Archaeological Heritage<sup>7</sup> states that archeological heritage consists in “all remains and objects and any other traces of mankind from past epochs” which at the same time are helpful to “retrace the history of mankind and its relation with the natural environment” (Article 1 clause 2), point i)). It is rather obvious that objects made of human remains or containing such remains in some cases may fall into these categories. Polish Act of July 23, 2003 on the protection and care of monuments<sup>8</sup> indicates that in order for a movable or immovable object to be considered a monument, it must meet four conditions. First, it must be made by a human being or related to human activity. Secondly, it is to be a testimony of a bygone era or a specific event. Third, it must be in the interest of society to protect this thing for the sake of its value. Fourth, and finally, the thing must have historical, scientific or artistic value (Article 3 point 1)). The act defines archaeological monument as an immovable monument in the form of a surface, underground or underwater remnant of “human existence and activity” which is composed of “cultural layers and products contained in them or their traces”. Products of such layers being movable objects are also recognized as an archaeological monuments (Article 3 point 4)). Since the manner of burying the remains is an expression of “human existence and activity” and can be a material from which far-reaching conclusions can be drawn as to the way of life of a given community, the grave with the remains, as well as the entire cemetery, may fulfill the definition of an archaeological monument. Differently than in case of the quoted definitions contained in international law, it seems that under Polish law, human remains cannot be considered monuments themselves.<sup>9</sup> However, because of their specific use, such remains may become an integral part of a monument or archaeological monument. Very peculiar Lower-Silesian monument, the Skull Chapel in Czeramna<sup>10</sup> serves as telling example. It was built in the late Baroque style in the years 1776–1804, and human bones

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<sup>7</sup> Signed in Valletta on January 16, 1992, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143>. Cf. J. ARTYMIUK: Pojęcie i zakres ochrony prawnej zabytków archeologicznych w prawie polskim i w prawie międzynarodowym. *Przegląd Prawa i Administracji*, 2015, Vol. 100, No. 2, pp. 501–512.

<sup>8</sup> Journal of Laws of 2018, item 2067 as amended.

<sup>9</sup> It could be discussed whether, under Polish law, *mokomokai* can themselves be considered movable monuments. In this case, the way the head is tattooed makes it a cultural artifact, so it is related to human activity. Such a head may be regarded as a testimony to a bygone era. It also has a historical and scientific value (the issue of artistic value is debatable). However, the interpretation indicated here may be questioned.

<sup>10</sup> Czeramna was once a separate village, and now it is a district of Kudowa-Zdrój, a spa town located near the Czech border.

found in the surrounding fields, from the period from the Thirty Years' War to the Seven Years' War, are an integral part of its interior.<sup>11</sup>

### **3. Displaying human remains in museums and exhibitions**

There are no regulations in the Polish legal system that would define in detail how objects containing human remains should be displayed in museums and other exhibitions. Moreover, this issue is usually left to be decided not by the legislator, but by bodies composed of experts or by museum directors. The ruling of the Supreme Court, determining the complex status of human remains under Polish law, may, however, provide some guide in this regard. According to the Supreme Court, "... the legal status of a corpse – not amenable to classic legal qualifications – is exceptional. Although there are no regulations explicitly stipulating the obligation to respect human corpses and remains, it is commonly treated - also in social practice, full of dignity towards the body of a deceased person - as an axiomatic moral obligation, also derived from certain legal norms. This concerns, in particular, the provisions on the protection of personal rights in the form of the cult of the deceased and the right to a grave ... medical law ... as well as criminal law provisions providing for the offense of insulting (desecrating, robbing) corpses, human ashes and deceased persons' places of rest (Article 262 of the Penal Code)".<sup>12</sup> The Court, therefore, states that the treatment of the human body should be treated as a derivative of human dignity. Perhaps a specific dignity residuum can be considered to be contained in the remains of a deceased person.<sup>13</sup> It should be emphasized that human dignity has a very high position in the Polish legal system among constitutional values, as Article 30 of the Constitution of the Republic of Poland of April 2, 1997<sup>14</sup> treats dignity as the basis of all constitutional freedoms and rights. Moreover,

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<sup>11</sup> Cf. T. FITYCH: *Kaplica czaszek w Kudowie Czerwnej – pionierskie i mistrzowskie dzieło ks. Tomaschka*. Ziemia Kłodzka, 2016, No. 268–269, pp. 14–20.

<sup>12</sup> Resolution of the Supreme Court of 29 June 2016, file reference no. III CZP 24/16. The quoted resolution of the Supreme Court emphasizes the relationship between law and morality, or more precisely, the foundations of the dominant moral system in a given society. This resolution may be treated as a contribution to the issue of moral neutrality of the law. On the concept of moral neutrality, cf. M. BŁACHUT: *Postulat neutralności moralnej prawa a konstytucyjna zasada równości*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2005, chapter I and chapter II.

<sup>13</sup> Cf. A. TWORKOWSKA: *Określenie statusu ludzkich zwłok jako problem prawno-społeczny*. *Prawo i Medycyna*, 2015, Vol. 17, No. 2 (59), pp. 61–71. A. RYBAK: *Prawnokarna ochrona godności zwłok człowieka*. *Palestra*, 2004, Vol. 49, No. 1–2 (553–554), No. 1–2, s. 99–104.

<sup>14</sup> Journal of Laws of 1997, No. 78, item 483 as amended.

following the example of the German approach to human dignity, this dignity was defined as inherent, inalienable and inviolable. Thus, human dignity is protected within the entire legal order, both under public law and private law.<sup>15</sup> The decision to expose human remains (e.g. skeletons, whole graves or the so-called natural mummies) in museums, galleries and similar places always requires balancing between two goods of legal significance: respect for the corpse or remains on the one hand, and scientific or didactic (educational) benefits related to showing a given object to a wider audience on the other. In addition, the remains should be displayed in such a way that respect for the deceased and in a serious way.<sup>16</sup> It should be noted that the crime of profaning the human body, human ashes or deceased persons' places of rest, as defined in Art. 262 paragraph 1 of the Polish Criminal Code<sup>17</sup> can be committed anywhere, also outside the cemetery. Therefore, one can imagine a situation in which the organizer of an exhibition will be responsible for this crime, e.g. when the exhibition arrangement presented human remains in a grotesque way. However, it requires proving that this person (a perpetrator) acted with the intention of profaning human remains.

The use of corpses and human remains for scientific or teaching purposes is not in doubt.<sup>18</sup> It is also possible to display objects made of human remains to the public, if the persons whose remains are exposed publicly have consented to it.<sup>19</sup> However, reservations may arise when the educational purpose is mixed with a commercial purpose or even

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<sup>15</sup> Cf. L. BOSEK: *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*. Warszawa: Wydawnictwo Sejmowe, 2012, part II and part III. ISBN: 978-83-7666-196-4.

<sup>16</sup> A. TWORZOWSKA: *Implikacje prawne i społeczno-kulturowe śmierci człowieka, ze szczególnym uwzględnieniem problematyki ochrony dóbr osobistych*. Rozprawa doktorska napisana pod kierunkiem A. Malarewicz-Jakubów, Wydział Prawa Uniwersytetu w Białymstoku, Białystok 2013, pp. 127–130; <https://repozytorium.uwb.edu.pl/jspui/handle/11320/3746> [retrieved at: 14.05.2021].

<sup>17</sup> Act of June 6, 1997 – Criminal Code, consolidated text: Journal of Laws of 2020, item 1444, as amended.

<sup>18</sup> Corpses and remains, which will constitute material used for scientific or teaching purposes, may be transferred by means of a will or as a result of the application of the provision of art. 10 sec. 2 of the Act of January 31, 1959 on cemeteries and burying the dead (consolidated text: Journal of Laws of 2020, item 1947). According to this provision, corpses not buried by entities specified in this Act “may be transferred for teaching and research purposes to a medical university or other university conducting teaching and research activities in the field of medical sciences or a federation of entities of the higher education system and science conducting research in the field of medical science”.

<sup>19</sup> One of the most famous such objects is the skeleton of the founding father of utilitarianism, Jeremy Bentham (1748–1832), clad in his own clothes and stored at University College London (it is so-called Bentham's auto-icon). It was Bentham's will to be displayed like that after his death. Cf. P. SZYMANIEC: *Doczesne szczątki Jeremy'ego Benthama a zasada użyteczności*. Prawa osób zmarłych i stosunek do religii w Benthamowskim utylitarystycznym. In J. GOŁACZYŃSKI, J. MAZURKIEWICZ, J. TURŁUKOWSKI, D. KARKUT (eds.): *Non omnis moriar. Osobiste i majątkowe aspekty śmierci człowieka. Zagadnienia wybrane*. Wrocław: Oficyna Prawnicza, 2015, pp. 750–771. F. C. A. MARMOY: *The 'Auto-Icon' of Jeremy Bentham at University College, London*. *Medical History*, 1958, Vol. 2, No. 2, pp. 77–86. According to a contemporary scholar, Bentham's Auto-Icon was “a performance of self-consecration”; cf. C. HAFFENDEN: *Every Man His Own Monument. Self-Monumentalizing in Romantic Britain*. Uppsala: Acta Universitatis Upsaliensis, 2018, pp. 60–91.

dominated by the latter, i.e. the entity organizing exhibitions of human corpse or remains primarily aims to obtaining material benefits on this account (the famous Body Worlds exhibition by Gunther von Hagens could serve as a vital example<sup>20</sup>).

#### 4. Postcolonial justice and human remains

“Postcolonial justice” is a concept that encompasses all demands for compensation for harm caused during the colonial period by former colonial metropolises. It is a notion a bit similar to “transitional justice”, concerning claims to compensate for the harm done under the previous, undemocratic regime.<sup>21</sup> Regarding the topic discussed here, “postcolonial justice” refers to the treatment of the corpses and remains of representatives of non-Western cultures that found their way into museum collections in the 19th and early 20th centuries.<sup>22</sup> We raise this issue because it shows the changing approach to human corpses and remains, and besides, it may also be important in the future for objects in Polish museum collections, mainly those based on former German collections.<sup>23</sup>

The first expression of “postcolonial justice” in our area of interest<sup>24</sup> was the U.S. Native American Graves Protection Repatriation and Repatriation Act, adopted in 1990.<sup>25</sup>

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<sup>20</sup> Cf. O. LUCHTERHANDT, R. BRUSCHKE: *Godność człowieka – aktualne kwestie sporne w niemieckim prawie państwowym. Państwo i Prawo*, 2005, No. 2, p. 47 (34–48). ISSN: 0031-0980.

<sup>21</sup> Cf. R.G. TEITEL: *Transitional Justice*. Oxford: Oxford University Press, 2000, pp. 69–118, 213–228. ISBN: 0195151267. N.J. KRITZ (ed.): *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume 1: *General Considerations*. Washington D.C.: United States Institute of Peace Press, 1995, pp. 121–222. ISBN 1878379437. M. NEWMAN: *Transitional Justice: Contending with the Past*. Hoboken, NJ: Wiley, 2019, chapter 1. ISBN: 978-1-509-52116-6. M. KROTOSZYŃSKI: *Modele sprawiedliwości tranzycyjnej*. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza, 2017, pp. 35–70, 153–203. ISBN: 978-83-232-3143-1

<sup>22</sup> This concept begins to appear in the literature in the context discussed here; cf. L. ECKSTEIN, D. WIEMANN, N. WALLER, A. BARTELS: *Postcolonial Justice. An Introduction*. Potsdam: Universität Potsdam, 2017, pp. 1–7, [https://publishup.uni-potsdam.de/files/10322/eckstein\\_postcolonial\\_justice.pdf](https://publishup.uni-potsdam.de/files/10322/eckstein_postcolonial_justice.pdf) [1.06.2021]. Cf. also: D. TURNBULL: *Postcolonial Injustice: Rationality, Knowledge, and Law in the Face of Multiple Epistemologies and Ontologies A Spacial Performative Approach*. In A. BARTELS, L. ECKSTEIN, N. WALLER, D. WIEMANN (eds.): *Postcolonial Justice*. Leiden: Brill, 2017, pp. 3–13.

<sup>23</sup> In Germany, more and more is being said and written about colonial-era objects in museums and other public collections. The Volkswagen Foundation is funding a major research project entitled “PAESE – Provenance Research in Non-European Collection and Ethnography in Lower Saxony” (“PAESE – Provenienzforschung in außereuropäischen Sammlungen und der Ethnologie in Niedersachsen”). It is divided into seven subprojects, encompassing wide range of topics, from history of colonial acquisitions in different colonies, including Cameroon, through the teaching of colonialism, to historical and contemporary legal issues. The research team includes such scholars as Rebekka Habermas, Katja Lembke, Stephan Meder and Christoph-Eric Mecke. Cf. <https://www.postcolonial-provenance-research.com/paese/teilprojekte/>.

<sup>24</sup> The first international law legal act which referred to the issue of human remain’s return was the Peace Treaty between the Allied Powers and Germany signed at Versailles on June 28, 1919 (Poland: *Journal of Laws of*

Section 7 the Act states that the Federal agency or museum has to return human remains and “associated funerary objects”, possessed or controlled by this entity, “upon the request of a known lineal descendant of the Native American”, or the given Indian tribe, or Native Hawaiian organization (letter a), point 1)).<sup>26</sup> The act has introduced the concept of “repatriation” of the remains of persons belonging to indigenous peoples into the legal language. If it is not possible to prove the cultural affiliation of the remains or funeral object in other way, the requesting tribe or Native Hawaiian organization has to show the affiliation “by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion” (letter a), point 4)). As it is pointed out, this legislation defines contemporary Indian tribes in a basically political way, so it is difficult to prove on the basis of archaeological data the cultural relationship between a specific modern tribe and given human remains or funeral objects.<sup>27</sup> One of the most famous cases concerning the remains of Indians is the case of the so-called man from Kennewick, i.e. remains from the eighth millennium BC discovered in 1996. In this, largely publicized, case the States Court of Appeals for the Ninth Circuit ruled in 2004 that it was impossible to establish a direct cultural link between these remains and the Native American people of today.<sup>28</sup> Later (2005–2015) studies conducted, inter alia, on at the University of Copenhagen, testified, however, that there is a linkage between the “man of Kennewick” and today’s indigenous tribes.<sup>29</sup> The

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1920, No. 35, item 199). Art. 246 para. 2 of the treaty ordered Germany to return to Great Britain the skull of “Sultan Makaoua”, or Mkwawa (1855–1898), who, as the leader of the Hehe people, opposed German colonization in German East Africa. However, since the skull was to be returned to the British government, this case can be read mainly in the context of colonial settlements. Cf. A. REDMAYNE: Mkwawa and the Hehe Wars. *The Journal of African History*, 1968, Vol. 9, No. 3, pp. 409–436. Cf. J. MAZURKIEWICZ: *Non omnis moriar. Ochrona dóbr osobistych zmarłego w prawie polskim*. Wrocław: Wydział Prawa, Administracji Ekonomii Uniwersytetu Wrocławskiego, 2010, p. 644, footnote 2494.

<sup>25</sup> 104 Stat. 3048, Public Law 101-60, November 16, 1990.

<sup>26</sup> Implementing regulation was also issued to this act: 43 CFR 10 of December 4, 1995 (Federal Register: December 4, 1995, vol. 60, no. 232, Rules and Regulations, s. 62133–62169).

<sup>27</sup> D.H. THOMAS: *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity*. New York: Basic Books, 2000, pp. 225–238.

<sup>28</sup> Cf. *Bonnichsen et al. v. United States*, 357 F.3d 962.

<sup>29</sup> Cf. V. OIKKONEN: Kennewick Man and the Evolutionary Origins of the Nation. *Journal of American Studies*, 2014, Vol. 48, No. 1, pp. 275–290. M. RASMUSSEN, M. SIKORA, A. ALBRECHTSEN, T. KORNELUSSEN *et al.*: The ancestry and affiliations of Kennewick Man. *Nature*, 2015, no. 523 (7561), pp. 455–458. L.J. ZIMMERMAN, R.N. CLINTON: Kennewick Man and Native American Graves Protection and Repatriation Act Woes. *International Journal of Cultural Property*, 1999, Vol. 8, No. 1, pp. 212–228. L.J. ZIMMERMAN: Public Heritage, a Desire for a “White” History for America, and Some Impacts of the Kennewick Man/ Ancient One Decision. *International Journal of Cultural Property*, 2005, No. 12, pp. 265–274. R.M. SEIDEMANN: Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries. *Louisiana Law Review*, 2004, Vol. 64, No. 3, pp. 545–588.



Kennewick Man case gained such prominence because it was used in the contemporary debate over the identity of native Americans.<sup>30</sup>

Several cases of such “repatriation” deserve attention, especially since they say a lot about the approach to “exotic” human remains in the nineteenth century. The case of Sarah Baartman’s remains is significant from legal point of view. Baartman (ca. 1775 or 1789–1815) was a member of South Africa’s Khoikhoi people. Between 1810 and 1815, she was shown as a peculiarity in Great Britain and France, where – due to the prominent backside of her body – she was given a nickname “Hottentot Venus”.<sup>31</sup> Her remains and the cast of her body were on display at the anatomical exhibition located in the Botanical Garden, then in the Ethnographic Museum at the Trocadéro Palace (until 1937) and finally in Museum of Man (until 1974). In 2002, at the request of Republic of South Africa’s President Nelson Mandela, they were transported to South Africa and buried there, but the consent to export them from France required a change of legislation.<sup>32</sup> The regulation adopted at that time requires that the decision to withdraw items from public collections should be preceded by the opinion of the scientific commission on the return of exhibits from public national collections.<sup>33</sup> Another case concerns the Julia Pastrana. A native of Mexico, Pastrana performed in circuses in America and all over Europe, being one of the most famous “bearded woman” of the time (she was also called a “ape woman”). When she died in Moscow in 1860, her “impresario” and husband, Theodore Lent, commissioned the mummification of the corpse, after which her remains,<sup>34</sup> dressed in her dress and closed in a glass capsule, were exhibited in the curiosities’ exhibitions for the next ten decades. Last time they were shown in 1972. Finally – together

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<sup>30</sup> Government agencies, scientists and Native American organizations were involved in the dispute over the remains. Cf. J.C. CHATTERS: *Ancient Encounters: Kennewick Man and the First Americans*. New York: Touchstone: Simon & Schuster, 2001. pp. 103–118.

<sup>31</sup> In London Baartman was exhibited three years after the adoption of Slave Trade Act 1807 (47 Geo III Sess. 1 c. 36). Consequently, controversy arose as to whether Baartman was performing voluntarily. However, a court case in 1811 did not show that she was under coercion. In France, Baartman was treated almost like an animal. Cf. C. CRAIS, P. SCULLY: *Sara Baartman and the Hottentot Venus. A Ghost Story and A Biography*. Princeton and Oxford: Princeton University Press, 2009, pp. 82–102, 116–141.

<sup>32</sup> J. PARKINSON: The significance of Sarah Baartman, BBC Magazine, <https://www.bbc.com/news/magazine-35240987> [21.05.2021]; Loi no. 2002-323 du 6 mars 2002 relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l’Afrique du Sud, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000776900/>.

<sup>33</sup> J. MAZURKIEWICZ: *Non omnis moriar. Ochrona dóbr osobistych zmarłego w prawie polskim*, p. 644, footnote 2494.

<sup>34</sup> The process was not a mummification in a strict sense, but rather the body was “stuffed”, as it is done for animals exhibited in nature museums or biological cabinets.

with the collection similar items – they found their way to the University Museum in Oslo.<sup>35</sup> As late as in 2013, her remains were taken to Mexico and buried there.<sup>36</sup>

British museums returned to New Zealand the mummified and tattooed Maori heads (*mokomokai*) that were previously in their collection.<sup>37</sup> The French attitude to similar cases is a bit different. To use an example, we focus on the case the of the head of a Maori commander, acquired in unknown circumstances, which was in the possession of the Museum of Rouen since 1875. The first request to its return was made by the Museum of New Zealand (Te Papa Tongarewa) in 1992 and was based on the argument that the heads were taken against the wishes of those warriors who refused to travel to another continent. According to French provisions on museums, such items as Maori heads were considered the objects of art and therefore it was impossible to withdraw them from public museum collections. In 2007, after the case of Sarah Baartman's remains, the museum tried to return the exhibits to the government of New Zealand, but the "repatriation" was blocked by the French Ministry of Culture, as human remains stored in museums are considered part of the cultural or scientific heritage in France.<sup>38</sup> The decision was upheld by the court in Rouen in its judgment of 27 December 2007.<sup>39</sup> In 2010, a special law was issued that allowed all Maori heads in French museums to be returned to New Zealand.<sup>40</sup> Ultimately, in 2011, the head from Rouen was placed in a museum in New Zealand's Wellington.<sup>41</sup> In sum, France returned 19 heads of Maori warriors to New Zealand, which were carefully examined by anthropologists before being handed over.<sup>42</sup> However, the French ministry of culture has been wary of the return of

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<sup>35</sup> Cf. C. H. GYLSETH, L.O. TOVERUD: *Julia Pastrana: The Tragic Story of the Victorian Ape Woman*. Thrupp: Sutton Publishing Limited, 2003, pp. 224. ISBN: 0750933127.

<sup>36</sup> Mexican "ape woman" buried 150 years after her death, 13.02.2013, <https://www.theguardian.com/world/2013/feb/13/mexican-ape-woman-buried> [21.05.2021]; Julia Pastrana's Long Journey Home: A Conversation with Laura Anderson Barbata, <http://www.orderofthegooddeath.com/julia-pastranas-long-journey-home-conversation-laura-anderson-barbata> [21.05.2021].

<sup>37</sup> Maori mummy head to be sent back to New Zealand, <https://www.liverpoolecho.co.uk/news/liverpool-news/mummified-maori-head-return-new-5588862> [21.05.2021].

<sup>38</sup> P. CHARLIER, I. HUYNH-CHARLIER, L. BRUN, J. CHAMPAGNA, L. LAQUAY, C. HERVÉ: Maori heads (*mokomokai*): the usefulness of a complete forensic analysis procedure. *Forensic Science, Medicine, and Pathology*, 2014, Vol. 10, No. 2, pp. 371–372 (371–379). ISSN: 1547-769X.

<sup>39</sup> M. BEL, M. BERGER, R. K. PATERSON: Administrative Tribunal of Rouen, Decision No. 702737, December 27, 2007 (Maori Head case). *International Journal of Cultural Property*, 2008, Vol 15, No. 2, pp. 223–226. ISSN: 0940-7391.

<sup>40</sup> Loi no. 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, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT00002227321/>.

<sup>41</sup> French museum returns mummified Maori head, <https://www.dailymirror.com/french-museum-returns-mummified-maori-head-133605-May2011/> [21.05.2021].

<sup>42</sup> P. CHARLIER, I. HUYNH-CHARLIER, L. BRUN, J. CHAMPAGNA, L. LAQUAY, C. HERVÉ: Maori heads (*mokomokai*): the usefulness of a complete forensic analysis procedure, pp. 372–379 (371–379).

colonial-era museum exhibits, recognizing that they could trigger an avalanche of requests from many countries.<sup>43</sup> In this context, it should be noted that Sweden has probably the most consistent museum policy and – although it was not a colonial power – usually returns the remains of representatives of indigenous peoples, which were included in museum collections in this country in the nineteenth and early twentieth centuries.<sup>44</sup>

## **5. Conclusion**

Objects containing human remains, if further criteria are met, can be considered monuments both under Polish and international law, as well as the legal orders of many other European countries (e.g. French law). In addition, “objects of ethnological interest,” which may be human remains, could also be recognized as monuments under the International Convention concerning prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Such objects will, therefore, be subject to legal protection provided for monuments. However, both the sale<sup>45</sup> and the public display of such items at exhibitions raises a number of concerns. It must be acknowledged that such a display is permissible, but it requires a great deal of sensitivity on the part of exhibition organizers or museum management. Until the second half of the twentieth century, the display of “exotic” human remains (such as *mokomokai*) or the remains of people affected by various deformations to the public did not arouse much controversy. This situation has changed over the past thirty years, mainly due to the “postcolonial justice” tendency. In this regard, the case of Sarah Baartman’s remains, which was publicized by President Nelson Mandela, was very

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<sup>43</sup> Cf. . J. MAZURKIEWICZ: *Non omnis moriar. Ochrona dóbr osobistych zmarłego w prawie polskim*, p. 644 footnote 2494.

<sup>44</sup> *Ibid.*

<sup>45</sup> The Act of November 21, 1996 on museums (consolidated text: Journal of Laws of 2019, item 917) allows, in justified cases, state or local government museums to make, in accordance with Art. 23 sec. 1, “exchange, sale or donation of museum objects, after obtaining the permission of the minister responsible for culture and protection of national heritage”. There is a loophole in this provision concerning the admissibility of the disposal of a monument containing human corpses or remains. While the donation or exchange of such objects in certain cases may be justified, the possibility of selling them seems doubtful. In support of this view, the norm of Art. 1 of the Act on Museums, indicating the goals of the museum and stating that it is an organizational unit that is not profit-oriented. Therefore, a situation in which the sale of the above-mentioned objects would be a source of funds for financing a specific aspect of the museum's activity, including the purchase of other monuments, is excluded. In Polish scholarly literature, Anna Tworkowska writes about the discussed issue in a somewhat different and ambiguous way. Cf. A. Tworkowska, *Implikacje prawne i społeczno-kulturowe śmierci człowieka, ze szczególnym uwzględnieniem problematyki ochrony dóbr osobistych*, p. 130

significant. Claims to “repatriate” human remains taken in colonial times are based more on moral arguments about the wrongs done in colonial times, and much less on legal grounds. It should be pointed out that, even if it was considered that these objects were unlawfully taken, the institution of acquisitive prescription present in many European legal systems can be used in such cases. These claims may be directed also to Polish museums and scientific institutions.<sup>46</sup> Thus, the appropriate legal mechanisms to deal with them should be developed. The attitude of the Swedish authorities could be instructive how this issue could be resolved. Since the Polish case-law treats the protection of human remains as a residue of the protection of human dignity, it is not unlikely that the approach of withdrawing certain human remains from museum collections would find approval in jurisprudence and legal doctrine in Poland.

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<sup>46</sup> For instance, the collections of the Human Museum at the University of Wrocław are based largely on the pre-war collection gathered by the German anthropologist prof. Egon von Eickstedt.

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