

# Is a Mummy a Person or a Property: The Classification and Choice of Law of Cultural Objects in Private International Law

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## Abstract

In the Buddha Mummy Statue case, the Chinese village committees sued the Dutch defendants for the return of a stolen golden statue that contains a mummified Buddha. The parties had different opinions on the legal nature of the mummy contained in the statue. The Chinese court classified the statue as a cultural property and applied the choice of law over movable properties provided in Article 37 of the Chinese Private International Law Act (*lex rei sitae*). Based on a comparative study, this article argues that a mummy does not fall within the traditional dichotomy between a person and a property. Instead, a mummy should be classified as a transitional existence between a person and a property. If the classification of a mummy has to be confined to the traditional dichotomy, a mummy can be regarded as a quasi-person or a special kind of property. Following this new classification, a new choice-of-law rule should be established. In this regard, the Belgian Private International Law Act, which adopts the *lex originis* rule, supplemented by the *lex rei sitae* rule, is a forerunner. This article advocates that the adoption of the *lex originis* rule may help to stop the vicious circle of illegal possession of stolen cultural objects and facilitate the return of stolen cultural objects, especially those containing human remains, to their country of origin.

## Introduction

In the case *Chinese Village Committees v Oscar Van Overeem et al* (hereinafter as the *Buddha Mummy Statue* case), the Chinese claimants domiciled in China brought legal proceedings against the Dutch defendants domiciled in the Netherlands for the recovery of a stolen golden statue containing a mummified

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Buddha.<sup>1</sup> Specifically, two Chinese village committees of the Yangchun village and the Dongpu village of Fujian Province in China filed a lawsuit against Oscar Van Overeem, a Dutch collector with an occupation as an architect, and his companies for the return of the 1,000-year-old mummified Buddhist monk contained in the golden statue. The statue was claimed to be stolen on 14 December 1995 from the Puzhao temple, which was jointly owned by the two villages in Fujian Province.<sup>2</sup> The mummified Buddhist monk at issue is known as Zhanggong Zushi, or Master Zhang Gong, who has been worshipped, since his death at the age of 37, by the villagers ever since the Song Dynasty (11th century AD). For local villagers, Master Zhang Gong is their ancestor and has become the villagers' spiritual God with social, cultural, historical, and religious significance.<sup>3</sup> The villagers have been searching for their Master Zhang Gong contained in the stolen statue since 1995. The statue was on exhibition in the Hungarian Natural History Museum in 2015 and was recognized by one of the villagers in China while browsing the news on his smartphone.

The Dutch defendant claimed that he bought the statue in mid-1996 for 40,000 Dutch guilders (€18,152) from a now-deceased art dealer in Amsterdam, who acquired it in Hong Kong. He incidentally found out later that the statue contained a mummified Buddhist monk and loaned it to the Hungarian Nature Historical Museum, via the Drents Museum in Assen, for the exhibition themed 'Mummies of the World' in 2014. A great deal of convincing evidence showed that the Buddha mummy statue held by the Dutch collector was the stolen statue that contains the mummified Buddha Master Zhang Gong, who used to live in that Chinese village and had been worshiped by the villagers for over 1,000 years. In the beginning, the Dutch collector was willing to give it back to China but not to the villagers. The negotiation failed after several rounds because the Dutch collector asked for a compensation of €20 million, and the Chinese villagers, whose average annual income was approximately €1,000, could not afford such a large amount of money. Therefore, the two Chinese village committees who used to jointly own the Buddha mummy statue resorted to civil litigation and decided to initiate legal proceedings against the Dutch collector and his companies for the return of the stolen statue.<sup>4</sup>

The Chinese village committees first launched a lawsuit before a court in Fujian Province, China, on 11 December 2015, fearing that their case might be

<sup>1</sup> *Chinese Village Committees v Oscar Van Overeem et al*, Fujian Sanming Intermediate People's Court (2015) San Min Chu Zi No 626, Judgment of 4 December 2020.

<sup>2</sup> In fact, the mummification of a highly respected Buddha after their death was common in the Song Dynasty in Fujian province. There are still some mummified Buddhas worshiped in different Buddhist temples in Fujian province.

<sup>3</sup> In regard to how this Buddha mummy statue has shaped the identity of the villagers and become the collective memory and belief of the villagers in local community, see Zuozen Liu, 'Will the God Win?: The Case of the Buddhist Mummy' (2017) 24 Intl J Cultural Property 225.

<sup>4</sup> As to legal provisions of Chinese law that may justify such ownership, see Property Law of the People's Republic of China (2007) arts 4, 34, 107. The plaintiff asserted that the defendants' possession and disposition of the stolen Buddha statue was illegal because it was without acquiring consent of the owner and thus infringed the ownership of the plaintiffs.

barred by the statute of limitation.<sup>5</sup> In June 2016, a parallel legal proceeding was initiated before a court in Amsterdam.<sup>6</sup> The Dutch court dismissed the case on 12 December 2018 by refusing to recognize the qualification of the Chinese village committees as legitimate litigants under Dutch law.<sup>7</sup> By contrast, the judgment issued by the Chinese court under Chinese law on 4 December 2020 clearly recognized the qualification of the Chinese village committees as legitimate plaintiffs and upheld their claims for the return of the stolen Buddha mummy statue possessed by the Dutch collector. The question is how, and on what basis, the Chinese court issued such judgment that was in favour of the original owner rather than the current possessor.

This article will first briefly explain the jurisdiction and choice-of-law rules applied in the Chinese court with a focus on the interpretation of the *lex rei sitae* rule over movable properties set forth in Article 37 of the Chinese Private International Law Act.<sup>8</sup> Based on the classification of the mummy at issue and the law applicable under the Chinese Private International Law Act, the following part will address the controversial issue of the classification of mummies or human remains in a broader sense. In comparison with the legal nature of a fertilized embryo, this article argues that mummies need a new classification. Accordingly, disputes over cultural objects containing mummies or human remains need a new choice of law. In this regard, a comparative study is conducted to illustrate the necessity and plausibility of adopting a new choice-of-law rule in the field of private international law with regard to foreign-related cultural claims.

<sup>5</sup> In Chinese civil law, the maximum limitation for legal action is 20 years, which means the last day the villagers in this case can recover the stolen statue by litigation was 16 December 2015. Art 137 of General Principles of the Civil Law of the People's Republic of China (1986), replaced by art 188(2) of the Civil Code of the People's Republic of China (2021). In this regard, the Chinese villagers are lucky in the sense that they recognized the stolen Buddha mummy statue in the last year of the time limitation in accordance with Chinese law. If the villagers found out the whereabouts of this golden statue in 2016, they could not even launch legal proceedings in China in accordance with Chinese law.

<sup>6</sup> *Chinese Village Committees v Oscar Van Overeem et al*, C/13/609408/HA ZA 16-558, ECLI:NL:RBAMS:2018:8919, Court of Amsterdam, 12 December 2018.

<sup>7</sup> In this respect, the decision made by the Amsterdam District Court is debatable. The qualified claimant is not limited to natural persons and legal persons but also includes special organizations. The Chinese village committees could be considered as 'special organizations'. Art 3:171 of the Dutch Civil Code on the competence to start legal proceedings states that every co-proprietor is entitled to file legal claims and to lodge legal applications at the court in order to get a judicial decision on behalf of the community of property. Art 3:166 of the Dutch Civil Code provides the definition of a 'community of property', the village committees might be regarded as co-proprietors of a community of property.

<sup>8</sup> The Law of the PRC on Application of Laws to Foreign-Related Civil Relations, which was promulgated on October 28, 2010, took effect from April 1, 2011, also known as the Chinese Conflict Code, Chinese Conflicts Act, Chinese Choice of Law Act, Private International Law Act, Chinese Private International Law 2010, or Chinese PIL Statute.

## Jurisdiction and choice-of-law rules

When it comes to the restitution of stolen or illicitly exported cultural objects through international civil litigation, private international law comes into play, of which jurisdiction and applicable law issues are of paramount significance. In other words, when a case brought in domestic courts involves a foreign or international element,<sup>9</sup> it gives rise to the questions of which court is competent to hear the case and which law is applicable to solve the dispute. Once a country establishes jurisdiction over a foreign-related dispute, the law of that country (*forum law* or *lex fori*) will apply to determine the procedural matters, such as the qualification of the plaintiff and the statutes of limitations.<sup>10</sup> The establishment of jurisdiction in a country does not necessarily mean the forum law will govern the substantive issues; otherwise, the plaintiff can easily use this rule to select a court in a particular country for the application of the forum law, which would encourage forum shopping.

### *Grounds for jurisdiction*

In principle, the plaintiff should sue the defendant in the courts where the defendant is domiciled.<sup>11</sup> Since the Netherlands was the country where the defendants were domiciled and where the statue was located at the time of litigation, there was no dispute with regard to the legitimate jurisdiction of the Dutch courts. By contrast, China is the country where the plaintiffs were domiciled and the Dutch defendants had no domicile in China. Thus, the Chinese plaintiffs should sue the Dutch defendants in Dutch courts instead of Chinese courts. However, the Chinese court exercised jurisdiction over the Dutch defendants on the basis that the Dutch defendants entered an appearance before the Chinese court without raising an objection.<sup>12</sup> The appearance was not to contest jurisdiction and thus was a legitimate ground for Chinese courts to exercise jurisdiction over the Dutch defendants. Such jurisdiction ground is also accepted in the European Union (EU) under Article 26(1) of the Brussels Ibis Regulation.<sup>13</sup> Since both the Dutch court and the Chinese court justified their jurisdiction with globally accepted grounds provided in the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial

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<sup>9</sup> Ibid art 2.

<sup>10</sup> Ibid art 7.

<sup>11</sup> Civil Procedure Law of the People's Republic of China (1991) art 23; EU Regulation no 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L351, art 4 (Brussels Ibis Regulation).

<sup>12</sup> Civil Procedure Law (n 11) art 287.

<sup>13</sup> Brussels Ibis Regulation (n 11) art 26(1) (a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of art 24).

Matters,<sup>14</sup> there is no debate over jurisdiction issues in the *Buddha Mummy Statue* case.

### *Lex rei sitae or lex furti*

#### *Lex rei sitae at the time when the legal fact took place*

In regard to which law is applicable, the Chinese court first classified the statue containing a mummy as a cultural property. Yet the choice of law over movables in Article 37 of the Chinese Private International Law Act applies, according to which the parties may choose the laws applicable to the right over the movables by agreement; in the absence of a choice of law agreement, the laws of the country in which the movable was situated at the time when the legal fact took place shall apply.<sup>15</sup> Such choice of law rule is also known as the *lex rei sitae* or the *lex situs* rule, which means that the law where the property is situated governs the dispute over the title of a property. The dispute over a mummy is governed by the *lex rei sitae* in the end. This implies that the applicable law changes in accordance with the location of the property.

When it comes to stolen cultural objects, the *lex rei sitae* rule means that the country in favour of good faith acquisition of stolen objects might become a paradise for art thieves or criminals to do title laundering.<sup>16</sup> If an object was acquired in good faith, the good faith acquisition will be protected even if the location of the object changes in the future.<sup>17</sup> In this regard, the potential of private international law to prevent title laundering should not be neglected. Generally speaking, civil law systems tend to favour good faith purchasers, whereas common law systems are more in favour of original owners.<sup>18</sup> Given the differences of laws in different jurisdictions, it is crucial to determine the *situs* of a property in order to apply the *lex situs*. Under Article 37 of the Chinese Private International Law Act, party autonomy takes precedence over the *lex rei sitae*. In the *Buddha Mummy Statue* case, given that the Chinese plaintiffs and the Dutch

<sup>14</sup> The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>, arts 5(1)(a), art 5(1)(f).

<sup>15</sup> Although the parties may freely choose the law applicable to the right of movable properties, such choice is subject to mandatory provisions and public policy laid down in arts 4 and 5 of the Private International Law (n 8) respectively.

<sup>16</sup> *Winkworth v Christie, Manson & Woods Ltd*, [1980] 1 Ch 496, 498–514. This case involved Japanese artworks stolen from England and sold in Italy. The good faith purchaser argued that the original owner had no legal claim because the transaction executed in Italy was in good faith and Italian law recognized the good faith purchaser's superior title. The English court also held that the validity would be determined under Italian law, the law of the place where the goods were situated at the time of transfer.

<sup>17</sup> This rule arguably facilitates commercial convenience and predictability. Derek Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property' (2008) 32 *Columbia JL & Arts* 115.

<sup>18</sup> *Ibid* 121, 131.

defendants did not reach an agreement on the applicable law, the *lex rei sitae* at the time when the legal act occurred shall apply. The question is which place should be regarded as the place ‘where the movable was situated at the time when the legal fact took place’.

*Lex rei sitae at the time when the court is seized*

Since the market for cultural objects is increasingly international, with buyers and sellers situated in different jurisdictions, multiple locations might be involved in determining the *lex situs* of a stolen cultural object.<sup>19</sup> For instance, a cultural object illegally excavated, exported, or stolen from Country A (the supply State) may be transferred to Country B (a demand or transit State) in order to acquire good title there and then sold to an innocent good faith purchaser in Country B, C, or D.<sup>20</sup> It is argued that the validity of the transfer of a movable object is governed by the *lex situs* (the law of the place where the object was located at the time of transaction).<sup>21</sup> Such traditional *lex rei sitae* rule may facilitate the title laundering process since the party can easily choose a country that favours the good faith purchaser rather than the original owner.

In comparison with Article 37 of the Chinese Private International Law Act on property rights, not all countries limit the *lex rei sitae* rule with a phrase ‘when the legal fact took place’. For instance, although the Rome I Regulation fails to provide a choice of law rule over movable properties and cultural properties,<sup>22</sup> a specific jurisdiction rule over cultural objects is set forth in Article 7(4) of the Brussels Ibis Regulation, according to which the courts of the place where the cultural object is situated at the time when the court is seized shall have jurisdiction. The location of a cultural object is confined with the phrase ‘at the time when the court is seized’. Such jurisdiction rule, if transferred to choice of law issues,<sup>23</sup> indicates that the *lex situs* of a cultural object might also refer to the law of the *situs* of a cultural object ‘at the time when the court is seized’. This is the case in France where the French law applies the law of the place where the goods are located at the time of litigation.<sup>24</sup> By contrast, the English law applies the law of the place of last transaction of the property.<sup>25</sup>

<sup>19</sup> The same applies to jurisdiction issues in cross-border litigation. Lorna E Gillies, ‘The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects’ (2015) 11 J Private Intl L 299.

<sup>20</sup> Ibid.

<sup>21</sup> Fincham (n 17) 114–15; Christopher Staker, ‘Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations’ (1988) 58 British YB Intl L 151, 164.

<sup>22</sup> EC Regulation no 593/2008 on the Law Applicable to Contractual Obligations [2008] OJ L177 (Rome I Regulation).

<sup>23</sup> Rome I Regulation (n 22) Recital 7 states that the substantive scope and the provision of Rome I should be consistent with the Brussels Ibis Regulation (n 11).

<sup>24</sup> *Stroganoff-Scerbatoff v Bensimon*, (1967) 56 Rev crit De dr int.privé.

<sup>25</sup> *Winkworth v Christie’s Ltd*, [1980] 1 Ch 496.

*Lex furti (the law of the place of theft)*

Neither the Chinese Private International Law Act nor the judicial interpretation of the Supreme People's Court of the People's Republic of China has specifically elaborated on the meaning of the phrase 'when the legal fact took place' laid down in Article 37 of the Chinese Private International Law Act. Thus, the meaning of the conflicts rule *lex rei sitae* remains unclarified and open for discussion. In the *Buddha Mummy Statue* case, the Chinese court held that the so-called 'legal act' included the theft, and, accordingly, the place where the theft took place, should be regarded as the place where the legal act occurred. Since the place of theft was in Fujian Province (China), the Chinese court applied Chinese law by interpreting the *lex rei sitae* in Article 37 of the Chinese Private International Law Act as the law of the place of theft (*lex furti*). Based on Chinese law, the court concluded that the Dutch defendants should return the statue to the Chinese plaintiffs.

The judgment was in favour of the original owners rather than the current possessors. Despite the fact that the interpretation of *lex rei sitae* as *lex furti* is favourable to the restitution of stolen cultural objects in this case, the application of *lex furti* in cross-border cultural claims might be problematic for several reasons. First, the *situs* of a moveable property is usually deemed as the place where it is currently located. As mentioned above, the *lex rei sitae* was construed as the law of the place where the property is situated at the time of litigation or last transaction. The interpretation of *lex rei sitae* as *lex furti* in China might be at odds with many other countries. Second, the place of theft in the *Buddha Mummy Statue* case happens to be the place of origin where the cultural object was stolen. Hence, the construction of *lex rei sitae* as *lex furti* in the *Buddha Mummy Statue* case essentially refers to the law of the place of origin and is equivalent to the *lex originis*. However, not all thefts take place in the country of origin of the cultural object or the country of origin *per se* is in dispute. For instance, when the place of theft is in a random third country during the exhibition or transportation of the cultural object, the *lex furti* might be the law of a third country that has a tenuous and fortuitous link with the dispute. This will inevitably increase legal uncertainty and legal unpredictability.

Moreover, the *lex rei sitae* rule does not distinguish cultural properties from general properties. It is debatable that the dispute over the Buddha mummy contained in the golden statue was subject to choice-of-law rules over movable properties in the end, as it overlooks the particularity of a mummy as a dead person and fails to distinguish such type from other kinds of cultural objects. Cultural objects containing human remains, such as a mummy, should be distinguished from other cultural objects and movable properties.

## The classification of mummies or human remains

There is no universally agreed definition of cultural property or cultural heritage since each multilateral agreement gives its own definition in order to determine

its scope of application.<sup>26</sup> It is argued that these concepts can be regarded as equivalent since they are all incomplete and must rely upon other disciplines, such as art, history, ethnography, and archaeology.<sup>27</sup> Such argument is not entirely correct since the notion of cultural heritage, which includes both tangible and intangible heritage assets, is clearly broader than the notion of cultural property, which is limited to physical and tangible cultural heritage such as movables and immovables. The concept of cultural heritage is more abstract and the concept of cultural property is more concrete; and only through the protection of concrete cultural properties can the goal of protecting cultural heritage be achieved.<sup>28</sup> Since this article argues that a mummy is not a property, the notion of cultural object will be used instead to distinguish cultural objects containing human remains from other cultural objects.

### *Classification under the lex fori: God or gold?*

The characterization is the first step before determining the applicable law. The determination of the legal nature of a civil relation or an object is usually subject to the *lex fori*.<sup>29</sup> Yet classification is not that easy in certain circumstances. For instance, in regard to the distinction between movables and immovables in the context of the restitution of cultural properties, it is controversial whether a movable property that used to be part of an immovable property, such as a detached wet mural from a wall of a church<sup>30</sup> or a fragment of a limestone relief carved from a monument,<sup>31</sup> can be regarded as an immovable property. Different classifications may lead to the application of different laws.

As to the legal nature of the Buddha mummy statue in dispute, from the Chinese villagers' perspective, the mummy contained in the golden statue is a person, not a property. Specifically, the mummified Buddhist Master Zhang Gong was their ancestor, who used to live in their village and has been worshipped as their spiritual and religious God for over 1,000 years. Master Zhang Gong was preserved in a statue moulded with gold to prevent decomposition and to maintain his immortality. The villagers celebrated Master Zhang Gong's birthday every year with a feast, music, and dance performances, which has become their collective memory and shared belief. In contrast, from the Dutch art collector's perspective, the golden statue containing a mummy is a property, not a person. It is merely a cultural property with great economic value and worthy of collection or investment.

The cause of action chosen by the Chinese plaintiffs was tort liability in the Dutch court, and the ownership of property in the Chinese court. The Chinese village committees asserted that the mummified Master Zhang Gong contained

<sup>26</sup> Manlio Frigo, 'Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?' (2004) 86 Intl Rev Red Cross 375.

<sup>27</sup> Ibid 376.

<sup>28</sup> Ibid 377.

<sup>29</sup> Private International Law (n 8) art 8.

<sup>30</sup> *Fondation Abegg c Ville de Geneve et autres*, [1988] D 325.

<sup>31</sup> *Iran v Berend*, [2007] EWHC 132 (QB).



in the statue was a corpse within the meaning of the Dutch Liability Decree, and the ownership thereof was excluded under the Dutch law.<sup>32</sup> The claimants as the trustees or the agents had the right of disposal.<sup>33</sup> The Dutch art collector argued that the mummified monk contained in the golden statue was not a corpse, as the organs of the monk were missing. The Dutch court did not touch upon the issue of classification of the Buddha mummy statue, as the case was dismissed on the basis that the Chinese village committees had no legal standing or legal personality in the legal proceedings.<sup>34</sup>

### *Is a mummy a property or a person—neither or both?*

The Chinese court classified the Buddha mummy statue as a cultural property and applied the law of the country where the theft occurred—namely, Chinese law—by virtue of Article 37 of the Chinese Private International Law Act. Such classification is not satisfactory, as the mummy in dispute was essentially considered as a property. Chinese law was applied because the place of theft was in China and the *lex situs* was construed by the Chinese court as the *lex furti*. However, what if the mummy was stolen in a third country during transportation or exhibition? The *lex furti* does not necessarily happen to be the *lex originis* in all cases involving stolen cultural objects. Moreover, a property is more a piece of economic value, whereas a cultural property is more a piece of artistic, historical, cultural, or religious value.<sup>35</sup> Furthermore, cultural objects containing human remains are special in comparison with other cultural objects without human remains, as human remains contain biological information of a person and may involve human dignity. Thus, cultural objects containing human remains, such as the Egyptian mummy or the Chinese Buddhist mummy, have more spiritual and religious values, although they also contain economic, historical, and cultural values. Based on such unique values, cultural objects containing human remains should be considered differently and distinguished from other types of cultural objects.

It may be argued that the characterization of the mummy in dispute as a property by the Chinese court is based on the strict dichotomy between a person and a property. This article argues that the distinction between a person and a property is not crystal clear in certain circumstances. The concepts of a person and a property seem to be mutually exclusive. Nevertheless, due to the inherent limitation of legal concepts, they do have an overlap zone, or a grey zone, in which the distinction line becomes blurred and one object can be considered as both of them or neither of them at the same time. A mummy might just not fit in the box of the traditional dichotomy between a person and a property. For instance, a mummified animal is neither a person nor a property, but an animal. Likewise,

<sup>32</sup> *Chinese Village Committees v Oscar Van Overeem*, ECLI:NL:RBAMS:2018:8919, point 3.1.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* point 4.2.5.

<sup>35</sup> Zhengxin Huo and Ruida Chen, 'The Cross-border Restitution of Cultural Property: Challenges and Solutions of Private International Law' (2021) 3 *Chinese Rev Intl L* 111.

a mummified human being is neither a person with civil rights and obligations nor a property with the right merely to be possessed, used, or disposed by someone. The question arises as to how to classify objects falling within the overlap zone or even falling outside the scope of traditional categories of dichotomy. In a broader sense, given the special nature of human remains, when a clear line has to be drawn between a person and a property, the question is whether a mummy should be classified as a property or as a person.

*The classification of human remains as properties under Dutch law*

Disputes over stolen cultural objects are often classified as questions of title to goods or movable properties.<sup>36</sup> Since cultural objects are valuable to our collective human history, allowing the law to treat them in the same way as ordinary goods would run counter to the notion of cultural heritage.<sup>37</sup> However, under Dutch Law, human remains can easily be seen as assets or properties rather than human remains themselves—thus, the trade of the Buddha mummy statue, which contains human remains, would be regarded as the trade of a property.<sup>38</sup> The nature of a mummy as an archaeological find seems to overshadow the fact that a mummy is a dead person, but it is highly controversial whether a dead body is a property.<sup>39</sup> It is much easier to consider objects made from human remains as properties than human remains themselves, such as a beaker made from a skull or a diamond composed with ashes of a cremated corpse.<sup>40</sup>

Despite the fact that the Netherlands has not yet developed any legislation concerning the collection, exhibition, or repatriation of human remains,<sup>41</sup> there are already several cases in favour of the return of human remains to their country of origin. In 2005, the Ethnographic Museum of Leiden returned a Maori head to New Zealand, which marks the first official restitution of human remains to their country of origin in the Netherlands.<sup>42</sup> Since museums have been increasingly confronted with these complex issues, the Ethical Committee of the Netherlands Museums Association adopted the Code of Ethics on Collecting and Exhibiting Human Remains, a guideline for all associated Dutch museums in 2007,<sup>43</sup> according to which human remains, in principle, may only be exhibited for educational, scientific, or research purposes. This indicates that there is a

<sup>36</sup> Fincham (n 17) 128–30.

<sup>37</sup> Ibid 148.

<sup>38</sup> Liu (n 3) 229.

<sup>39</sup> Lars van Vliet, 'The Boundaries of Property Rights: Netherlands National Report 2006' in Sjeff van Erp and Lars van Vliet (eds), *Netherlands Reports to the Seventeenth International Congress of Comparative Law: The Principles of the Law of Restitution* (OUP 2006) 112.

<sup>40</sup> Ibid.

<sup>41</sup> Daniël van der Maas, 'Debating the Restitution of Human Remains from Dutch Museum Collections: The Case of the Skulls from Urk' in Louise Tythacott and Kostas Arvantis (eds), *Museums and Restitution: New Practices, New Approaches* (Routledge 2016) 143.

<sup>42</sup> Ibid 144.

<sup>43</sup> Ibid 141; Code of Ethics on Collecting and Exhibiting Human Remains (2007).

tendency to treat human remains differently from other kinds of cultural objects in the Netherlands.

*The classification of human remains as cultural properties under Chinese law*

The Chinese court classified the Buddha mummy statue as a cultural property since it belongs to a special kind of human remains that has significant historical and religious values.<sup>44</sup> Yet there are no specific jurisdiction and applicable law rules on cultural properties in China; the court referred to choice-of-law rules on movable properties in the end to determine the applicable law. The Buddha mummy statue, in essence, was addressed as a property, although it contained a mummified monk, and the Chinese court admitted that it was a special kind of human remains. It was classified as a cultural property but not treated as a special cultural object. The application of the traditional *lex rei sitae* rule to all cultural objects, including those containing human remains, is far from satisfactory.

In general, the law on dead human bodies takes precedence over the sale of corpses, and no person, including a good faith purchaser, can own somebody else's corpse, both in civil law and common law systems.<sup>45</sup> A corpse must not be downgraded to the status of a property.<sup>46</sup> The characterization of human remains as properties objectifies human remains and thus may derogate human dignity.<sup>47</sup> However, some human remains are treated as cultural objects and are subject to laws on cultural heritage—for instance, the Maori head was held by the French judge to be subject to French cultural heritage law rather than civil law.<sup>48</sup>

*Treat cultural objects containing human remains differently*

A mummy, by definition, is a dead human being or an animal whose soft tissues and organs have been preserved in a special way so that the body does not decay.<sup>49</sup> The Chinese court held that the Buddhist mummy contained in the statue was a special type of human remains with significant historical and

<sup>44</sup> Private International Law (n 8) art 8 stipulates that the *lex fori* shall apply to the determination of the nature of foreign-related civil relations.

<sup>45</sup> Jie Huang, 'Protecting Non-indigenous Human Remains under Cultural Heritage Law' (2015) 14 CJIL 724.

<sup>46</sup> Edward H Ayau and Honor Keeler, 'Injustice, Human Rights, and Intellectual Savagery in Human Remains in Museums and Collections', 91 <<https://doi.org/10.18452/19383>> accessed 13 January 2022.

<sup>47</sup> *Ibid.*

<sup>48</sup> Liu (n 3) 229. On 9 May 2011, the Maori head from the Rouen Museum was handed back to New Zealand. As the first repatriation of Maori human remains from France, it signifies the change of attitude towards the repatriation of human remains in French museums. See 'First Repatriation of Maori remains from Rouen Museum, France' *Museum of New Zealand* (2011) <<https://www.tepapa.govt.nz/about/press-and-media/press-releases/2011-news-and-media-releases/first-repatriation-maori-remains>> accessed 13 January 2022.

<sup>49</sup> 'Mummy' *Wikipedia* <<https://en.wikipedia.org/wiki/Mummy>> accessed 13 January 2022.

religious importance and thus should be classified as a cultural property. However, the court did not specify which legal provisions it relied upon to reach such a conclusion. In China, a State may take appropriate measures to dispose a dead body, but such disposition should consider the descendant's will and the heirs' feelings as well as comply with public interests and humanitarianism.<sup>50</sup> A dead body shall not be disposed as a commodity for profit.<sup>51</sup> Human remains discovered in ancient tombs or enshrined in religious sites are protected as cultural relics under the Cultural Relics Protection Law of China.<sup>52</sup> However, this law does not distinguish cultural relics containing human remains from other kinds of cultural relics.<sup>53</sup> In this sense, it is not surprising that the Chinese court merely classified the Buddha mummy statue as a cultural property in accordance with the Cultural Relics Protection Law. Cultural relics are merchantable goods with certain limitations under Chinese law, the circulation of which is subject to administrative regulations. As a general rule, only privately owned cultural relics are subject to trade, and the exportation of all cultural relics has to be authorized by the Chinese custom authority.<sup>54</sup> Clearly, the Buddha mummy statue at issue was illegally exported to the Netherlands without acquiring authorization from the Chinese custom authority.

### ***Property, cultural property, and cultural object containing human remains***

A cultural property is a special kind of property. Likewise, a cultural object containing human remains is a special kind of cultural object. Cultural objects are classified as goods mainly because of their economic value since they can be commercialized for profit, whereas cultural objects containing human remains, such as a mummy, should not be characterized merely based on their economic value. On the one hand, the legal nature of a mummy as a cultural object because of the attached cultural, historical, and religious values may overshadow the fact that a mummy is a dead person. On the other hand, the classification of a mummy as a cultural object should not overlook the fact that a mummy is a dead person who carries emotional, spiritual, religious, cultural, and historical value for the local community.

It may be argued that human remains of persons who died a long time ago are tradable items and rights of ownership may exist.<sup>55</sup> Such an argument is questionable. What is the legal ground to justify that the older human remains are, the less protection they are afforded as human beings?<sup>56</sup> For people from the country of origin or the community where the human remains of a person are

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<sup>50</sup> Huang (n 45) 709.

<sup>51</sup> Liu (n 3) 229.

<sup>52</sup> Law on the Protection of Cultural Relics of the People's Republic of China (recently amended on 29 June 2013).

<sup>53</sup> Liu (n 3) 229.

<sup>54</sup> *Ibid* 232.

<sup>55</sup> Ayau and Keeler (n 46) 91.

<sup>56</sup> *Ibid*.

culturally or religiously affiliated, the older an ancestor is, the higher level of care and respect should be given.<sup>57</sup> For instance, the human remains of Master Zhang Gong contained in the statue is a person to the Chinese villagers and has been worshiped as their ancestor or religious God for thousand years. Moreover, for moral and ethical concerns, human remains should not be objectified as properties. If human remains have to be characterized between the category of a person and a property, from the perspective of indigenous or local people, human remains of a person are a representation of their ancestors and should be regarded as persons rather than properties. In this sense, stolen human remains are stolen persons or missing persons for their country of origin or culturally and religiously affiliated community.

Moreover, the special value attached to human remains, including but not limited to mummies, implies that it is necessary to distinguish cultural objects containing human remains from other types of cultural objects. The question is how to draw a distinction, and what is the legal nature of a cultural object containing human remains, such as a mummy. If a mummy does not fall within the scope of the traditional category of a person nor a property, does it mean a new category need to be created? In this regard, the classification of the legal nature of a fertilized embryo in *Mr and Mrs Shen v Mr and Mrs Liu (Shen v Liu)* may be relevant since the judge addressed the issue by thinking out of the box and provided a new solution.<sup>58</sup>

## Is a fertilized embryo a property or a person?

In regard to the distinction between a person and a property, the judgment of *Shen v Liu* shows that the Chinese court was not confined to the traditional dichotomy between a person and a property. *Shen v Liu* was the first case in China that involved the ownership of frozen embryos. Specifically, Shen and Liu, who got married in 2010 and died in 2013 in a car accident, left four frozen fertilized embryos in a local hospital. The parents of Shen (Mr. and Mrs. Shen) sued the parents of Liu (Mr. and Mrs. Liu), who also lost their only child, claiming the inheritance of the four frozen fertilized embryos of the deceased young couple.<sup>59</sup> The local hospital where the embryos were preserved was a third party in this case.

### *A property, a special property, or ‘a transitional existence between person and property’?*

The third party, Gulou Hospital, argued that the frozen embryos do not have the nature of a property. Since Mr. and Mrs. Shen had passed away, the expired

<sup>57</sup> Ibid.

<sup>58</sup> *Mr and Mrs Shen v Mr and Mrs Liu*, Jiangsu Province Yixing Municipality People’s Court, (2013) Yi Min Chu Zi No 2729; Jiangsu Province Wuxi Municipality Intermediate People’s Court, (2014) Xi Min Zhong Zi No 01235.

<sup>59</sup> Ibid.

embryos should be discarded. Neither the plaintiffs nor the defendants should inherit the embryos.<sup>60</sup> The first instance court held that fertilized embryos had the potential to develop into life and thus are special properties that contain biological characteristics of a future life. Unlike normal properties, fertilized embryos cannot be the subject of succession, nor can they be bought or sold.<sup>61</sup>

Nevertheless, the appellate court took the view that the embryos were ‘a transitional existence between people and properties’. Therefore, embryos have a higher moral status than non-living properties and deserve special respect and protection. The embryo ethically contains the genetic information of the two families and is closely related to the parents of the deceased couple. Emotionally speaking, the embryo carries personal rights and interests, such as the grief and spiritual comfort for the elderly. The court held that the supervision and disposal of the embryos by the parents from these two families was in line with human ethics and can also relieve the pain of bereavement for both parties.<sup>62</sup> Clearly, the court did not classify the fertilized embryos as people or properties. Instead, the embargo was considered as ‘a transitional existence between a person and a property’ since it is not biotic or abiotic but, rather, a third type in-between.

In the USA, it is also debatable as to whether embryos are legal subjects or legal objects. It may be argued that a fertilized embryo is: (i) a person and enjoys the civil subject status of ordinary natural persons; (ii) an object and does not enjoy the status of a civil subject; or (iii) a transition from an object to a person and needs more protection than ordinary objects.<sup>63</sup> Neither *Davis v Davis*<sup>64</sup> nor *Parrillo v Italy*<sup>65</sup> refer to legal subjects or legal objects; rather, the terminology used refers to ‘personhood’ or ‘property’.<sup>66</sup> *Davis* concluded that embryos fall somewhere on a continuum between a person and a property, whereas *Parrillo*

<sup>60</sup> Ibid. The third party also stated that after the embryos are taken out, the only way to keep the embryos alive is surrogacy, which is illegal in China, thus both parties have no right to dispose the embryos.

<sup>61</sup> Ibid. Since the first instance court held that embryos cannot be transferred or inherited, the case was dismissed in accordance with the 1987 General Principle of Civil Law of the PRC art 5 and the 1985 Inheritance Law of the People’s Republic of China art3. These two laws have been replaced by the Civil Code of the PRC since 1 January 2021.

<sup>62</sup> Ibid. The appellate court analysed that after the death of Shen and Liu, their parents were the only subjects and most-related parties that care about the fate of these embryos. Thus, it was appropriate to rule that the parents of Shen and Liu have the right to supervise and dispose the embryos. However, such supervision and disposal should abide by the law and must not violate public order and good morals nor infringe the interests of other people.

<sup>63</sup> Shiguo Liu, ‘Analysis and Legislative Suggestions on the First Case of Chinese Embryo Litigation’ (2016) 2 J Contemporary L 8; Da Belova, ‘Legal Nature of the Embryo in Vitro’ (2019) 6 Lex Russica 122, <<https://doi.org/10.17803/1729-5920.2019.151.6.122-130>> accessed 13 January 2022; Albin Eser, ‘The Legal Status of the Embryo in Comparative Perspective’ (1992) 11 Intl J Medicine & L 579.

<sup>64</sup> *Davis v Davis*, 842 SW 2d, No E-14496, 1989 WL 140495 (Tenn Cir Ct, 21 September 1989), 1990 WL 130807 (Tenn Ct App, 1990).

<sup>65</sup> ECtHR, *Parrillo v Italy*, Application no 46470/11 (27 August 2015).

<sup>66</sup> Robbie Robinson, ‘The Legal Nature of the Embryo: Legal Subject or Legal Object?’ (2018) 21 Potchefstroom Electronic LJ 25.

simply conveyed that such embryos are not properties.<sup>67</sup> The classification of embryos in *Davis* in the USA as ‘a continuum between a person and a property’ is similar to that in *Shen v Liu* in China as ‘a transitional existence between a person and a property’. The cases over the legal nature of embryos reveal the inherent limits of legal concepts and the necessity to expand or create a new concept in certain circumstances.

### *Mummies as ‘a continuum between a person and a property’*

The legal nature of fertilized embryos is highly controversial. The same goes for the classification of the legal nature of mummies in the field of cultural heritage law and private international law.<sup>68</sup> Meanwhile, embryos and mummies have something in common as they are two different kinds of life forms. Whereas the embryo in *Shen v Liu* is the form of life that exists before the birth of a human being, the mummy in the *Buddha Mummy Statue* case is another form of life that exists after the death of a human being. An embryo is an unborn animal or human being in the very early stages of development and embryo freezing is an assisted reproduction technique that preserves fertilized eggs and can help people achieve pregnancy in the future.<sup>69</sup> A mummy is a dead animal or human being preserved through mummification, a process that occurs after death to interrupt the normal process of decomposition.<sup>70</sup> Embryos and mummies, as the pre-birth transition and after-death extension of life forms of a human being, involve morality and ‘human dignity’.<sup>71</sup> Such transitional existence or continuum of life forms contain personal rights and interests for related parties, which may justify the adoption of a new classification of embryos or mummies.<sup>72</sup>

<sup>67</sup> *Ibid.* The *Davis* judgments (n 64) have been followed in other states of the USA; see also *In re Marriage of Witten*, 672 NW 2d 768 (Iowa 2003); *AZ v BZ*, 725 NE 2d (Mass 2000); *JB v MB*, 783 A 2d 707 (NJ 2001); *Kass v Kass*, 696 NE 2d 174 (NY 1998); *Litowitz v Litowitz*, 48 P3d 261 (Wash 2002).

<sup>68</sup> However, in comparison with the abundance of literature on the legal status or legal nature of embryos, the study on the legal nature of mummies is quite few. Robinson (n 66) 26 (embryos are not legal subjects nor legal objects, the bio-ethical nature of the parent-child relationship simply indicates that they are included in their parents’ legal subjectivity).

<sup>69</sup> ‘Frozen Embryo’ *Collins* <<https://www.collinsdictionary.com/dictionary/english/frozen-embryo>> accessed 13 January 2022.

<sup>70</sup> Mummification is a process where some of the soft tissue of bodies, such as skin, muscle, internal organs, hair, and nails, that usually decay soon after death, are preserved. Yet preserved bones and teeth without soft tissue are not mummified remains <<https://www.slsc.org/exhibits-attractions/mummies-of-the-world-the-exhibition/>> accessed 13 January 2022.

<sup>71</sup> While birth means a definite initiation into human society, death indicates a final termination of a natural person, both of which involve the dignity of an individual human or even humankind. Hans G Koch, ‘The Legal Status of the Human Embryo’ in Elisabeth Hildt and Dietmar Mieth (eds), *Vitro Fertilisation in the 1990s* (Routledge 1998) 3.

<sup>72</sup> The Chinese village committees claimed that they are the legally fictional relatives of the mummified Buddha contained in the statue. They celebrated Master Zhang Gong’s birthday every year and Master Zhang Gong has been regarded as their relative with sacred and prime place in their heart. Their belief that Master Zhang Gong has been deeply rooted in every villager’s mind in that community and has gradually formed a tradition, culture and public order in

As a special form of life, embryos and mummies should not be considered as merely a property or a person. The strict distinction between people and properties does not apply very well in embryos and mummies. Instead, they should be regarded as ‘a transitional existence between a person and a property’ or ‘a continuum between a person and a property’. If it is not plausible to create a third type for the purpose of classification, they should be regarded, at least, as a quasi-person or a special property with personal rights and interests. Specifically, an embryo is a transitional existence from a property to a person, while a mummy is a transitional existence from a person to a property. In this sense, an embryo and a mummy could be regarded as a quasi-person. Thus, an embryo and a mummy cannot be owned by someone as a property. Rather, a person can be a custodian of an embryo and a mummy. This is also the reason why cultural relics containing human remains should be treated differently. What are the merits for a different classification? First and foremost, such distinction justifies the establishment of a specific choice-of-law rule for cultural objects containing mummies or human remains in general.

## A new classification requires a new choice-of-law rule

### *Adopting the lex originis rule*

The traditional *lex situs* rule is based on the location of a property and does not take cultural relics protection into consideration. Courts resolving cultural object disputes consistently fail to swiftly and fairly administer justice, and much of the blame can be put on the predominant *lex situs* rule.<sup>73</sup> The *lex situs* rule allows parties to choose more favourable countries and strongly weakens attempts to protect cultural objects.<sup>74</sup> The policy considerations of commercial convenience, predictability, and security behind the *lex situs* rule are not applicable in cultural heritage disputes.<sup>75</sup> Since the *lex situs* rule does not lead to uniformity of result or work well to prohibit illicit trade in cultural objects, alternatively, the law that has the closest connection with the cultural object in dispute shall apply.<sup>76</sup> In order to determine which law has the closest connection with a cultural object, it is necessary to identify the legal nature of a cultural object. Cultural relics containing human remains are not properties. Human remains, as ‘a continuum between a person and a property’, a quasi-person, or a special object with personal rights and interests, deserve a special choice-of-law rule to facilitate the return of human remains to their culturally affiliated community, ethnic, or religious groups.

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local community. They believe that their God should be worshiped in their local community rather than exhibited in museums. The X-ray scanning and exhibition of their spiritual God has caused tremendous spiritual pain to the villagers. Thus, the villagers also claimed for mental damage compensation.

<sup>73</sup> Fincham (n 17) 116.

<sup>74</sup> Ibid 130.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 116, 130.



However, many jurisdictions still have no specific choice-of-law rules over cultural objects, let alone a special rule on cultural objects containing human remains. This is also the case in China. Thus, it is not a surprise that Article 37 of the Chinese Private International Law on movable properties applies to the *Buddha Mummy Statue* case. In order to distinguish cultural objects containing human remains from other cultural objects, or more generally, to distinguish cultural properties from other properties in the field of private international law, a new choice-of-law rule needs to be established. In this regard, the 2004 Belgian Private International Law might be the forerunner and serve as a model for not only other EU countries but also non-EU countries.<sup>77</sup>

#### *The lex originis overrides the lex situs*

In Belgium, as a general rule, the restitution of illicitly exported cultural objects is subject to the *lex originis*, rather than the *lex rei sitae*. Article 90 of the 2004 Belgian Private International Law stipulates that if one object that has been recorded in a national list of cultural heritage is delivered outside this country in a way that against its law, the lawsuit filed in this country for the return of that particular object shall apply the law of the requesting country. This provision designates the law of the country of origin, also known as the *lex originis* rule. In comparison with the *lex rei sitae* or the *lex furti* rule, the *lex originis* rule is more favourable to the original owners, since, apart from theft, a cultural object might be looted or excavated and illegally exported to a foreign country. The theft of cultural objects is only one of many ways to deprive the ownership of the original owners. Moreover, the location of theft of movable cultural objects might be fortuitous in some cases and unpredictable for both original owners and current possessors.

#### *Exceptional application of the lex rei sitae*

Meanwhile, the *lex originis* rule in 2004 Belgian Private International Law also endeavours to strike a balance between the protection of original owners and good faith purchasers. When both parties are relative innocents and the dispute involves competing claims of two innocent parties, the countries involved may have rules that reflect different policy references.<sup>78</sup> Article 90 of the Belgian Private International Law provides that if the law of the State of origin does not grant any protection to the good faith possessor, the latter may invoke the protection attributed to him by the law of the State where the cultural item is

<sup>77</sup> Tamás Szabados, 'In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications' (2020) 27 *Intl J Cultural Property* 335. Code of Private International Law (2004).

<sup>78</sup> Fincham (n 17) 113–14.

situated at the time of revindication. The same applies to stolen goods. Pursuant to Article 92 of the Belgian Private International Law, the law applicable to the restitution claim of a stolen property is at the choice of the original owner between the law of the State where the object was located at the time of disappearance and the law of the State where the property is located at the time when the restitution is claimed.<sup>79</sup> Nevertheless, if the law of the State where the theft took place does not grant any protection to the good faith possessor, the good faith purchaser may invoke the protection granted by the law of the State where the property is located at the time when the restitution is claimed. This is also in line with Article 4(1) of the UNIDROIT Convention, according to which the good faith purchaser who has exercised due diligence when acquiring a stolen cultural object is entitled to reasonable compensation.<sup>80</sup>

In other words, according to Belgian law, the law of the State of origin is applied preferentially when addressing cross-border disputes over the ownership of cultural relics.<sup>81</sup> At the same time, the *lex rei sitae* will be applied under two circumstances: (i) at the request of the requesting state and (ii) the lack of protection of the bona fide purchaser in the State of origin (the requesting State). This means that, on the one hand, the *lex originis* rule takes precedence over the *lex rei sitae* unless the original owner chooses to apply the *lex rei sitae*. On the other hand, the protection of the original owner of a cultural object is not absolute since the *lex rei sitae* applies if the *lex originis* fails to protect the bona fide purchaser. By combining the *lex rei sitae* and the *lex originis* rules while providing room for party autonomy, this approach actually achieves a better balance of the interests between the original owner and the bona fide purchaser. Similarly, the 2017 Hungarian Private International Law (Article 47 on things removed from the possession of the original owner illegally) and Article 94 of the 2017 Monegasque Private International Law also adopt the *lex originis* rule, instead of the *lex rei sitae*, as a default rule.<sup>82</sup> In fact, the Institut de Droit International already advocated for the adoption of the *lex originis* rule in 1991 and also proposed that the law of the country with which the cultural object is most closely linked from the cultural point of view should apply, provided that the country of origin is unknown.<sup>83</sup>

### *Facilitating the return of human remains to their country of origin*

The establishment of a new choice-of-law rule for cultural relics containing human remains or cultural objects in general is in line with the national and international efforts of facilitating the return of stolen or illicitly cultural objects to their country of

<sup>79</sup> Szabados (n 77) 336.

<sup>80</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, 2421 UNTS 457).

<sup>81</sup> Szabados (n 77) 336.

<sup>82</sup> Ibid. The new Hungarian Private International Law Act (Act XXVIII of 2017), adopted earlier by the Hungarian Parliament, was promulgated on 11 April 2017 and entered into force on 1 January 2018. The new Monegasque Private International Law Act, Law No. 1.448 of 28 June 2017 on private international law, was enacted by the National Council.

<sup>83</sup> Fincham (n 17) 146.

origin. For instance, mummies exist not only in China but also in many other countries, such as Japan, Egypt, Germany, Hungary, the USA, Russia, and Italy.<sup>84</sup> Regardless of whether human remains qualified as cultural relics are classified as a quasi-person, ‘a transitional existence between a person and a property’, or a special kind of property, cultural objects containing human remains should be regarded differently from other types of cultural properties. Such distinction could facilitate the return of stolen or illicitly exported cultural objects that contain human remains to their country of origin or culturally affiliated place. This objective is shared in many international conventions and national legislations.

*Culturally affiliated community, ethnic, or religious groups*

The 2006 International Council on Museums Code of Ethics for Museums<sup>85</sup> defines human remains as ‘sensitive materials’; accordingly, the research, acquisition, and exhibition of such sensitive materials shall 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’.<sup>86</sup> In the USA, the 1990 Native American Graves Protection and Repatriation Act (NAGPRA) requires federal agencies and institutions that receive federal funding to return ‘cultural items’ of Native Americans to their lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations.<sup>87</sup> In the United Kingdom, the Department for Media, Culture and Sport provides a non-statutory guidance on the implementation of the Human Tissue Act 2001 relating to the return of human remains. It aims to ensure that future treatment of indigenous remains in museums strikes a balance between the need to respect the culture and wishes of indigenous communities and the need for scientific research.<sup>88</sup> It also endeavours to make sure that decisions in response to requests for the return of human remains are made equitably and transparently.<sup>89</sup>

The Netherlands Museums Association also facilitated the return of human remains to their culturally or religiously affiliated community.<sup>90</sup> In 2009, a restitution claim of six human skulls of Urk, a town in Flevoland in the central part

<sup>84</sup> A list of mummies is given at <[https://en.wikipedia.org/wiki/List\\_of\\_mummies](https://en.wikipedia.org/wiki/List_of_mummies)> accessed 13 January 2022. Some mummies are the legendary leaders of their country.

<sup>85</sup> ‘The International Council on Museums is an international organization of museums and museum professionals which is committed to the research, conservation, continuation and communication to society of the world’s natural and cultural heritage, present and future, tangible and intangible’. International Council on Museums <<https://icom.museum/en/about-us/missions-and-objectives/>> accessed 13 January 2022.

<sup>86</sup> Code of Ethics for Museums (2006) ss 2.5, 3.7, 4.3.

<sup>87</sup> Native American Graves Protection and Repatriation Act (16 November 1990, 104 Stat 3048).

<sup>88</sup> Department for Culture, Media and Sport, *Guidance for the Care of Human Remains in Museums* (2005).

<sup>89</sup> Ibid.

<sup>90</sup> It is notable that museums can be a good faith purchaser, an original owner or a recipient of a stolen art in different contexts. Fincham (n 17) 132.

of the Netherlands, from the collection of the University Museum of Utrecht was presented to the Ethical Committee of the Netherlands Museums Association. The Ethical Committee advised the University Museum of Utrecht to return the skulls to the people of Urk and acknowledged the important role of human remains as the performative embodiment of local culture and religion. On 5 June 2010, the Urker skulls were officially returned to the people of Urk.<sup>91</sup> Although it is a purely domestic case, the return of the Urker skulls to their culturally and religiously affiliated community reflects that the Dutch museum's adherence to the Code of Ethics and demonstrates that it is in favour of the restitution of human remains if they are of cultural or religious importance for a cultural group.<sup>92</sup> Nevertheless, in the *Buddha Mummy Statue* case, Oscar van Overeem is a private person, not a museum, thus the Code of Ethics for associated Dutch museums is not binding on him.<sup>93</sup>

Despite this, there is a tendency to treat human remains differently from other types of cultural objects and to protect the interests and beliefs of the local community, ethnic, or religious groups from whom the objects originated. Following this tendency, the Cultural Relics Protection Law of China should also distinguish cultural relics containing human remains from other kinds of cultural relics. Likewise, in the field of Chinese private international law, it is necessary to draw a distinction between cultural objects containing human remains and other types of cultural objects. More importantly, it could also justify the adoption and application of the *lex originis* in the restitution of stolen or illicitly exported cultural objects via cross-border litigation.<sup>94</sup>

### *Public policy consideration*

During the COVID-19 pandemic, despite lockdown measures put in place in many countries, the theft, illicit excavation, and illicit traffic of cultural properties have surged.<sup>95</sup> The international public policy for fighting against art crimes calls for the establishment of a special 'choice-of-law' law over cultural objects. The adoption of the *lex originis* rule may impede the flow of stolen or illicitly exported cultural objects. The objective of facilitating the return of stolen or illicitly exported cultural objects has gradually become almost internationally accepted public policy. The adoption of the *lex originis* rule also corresponds to national and international public policy. For instance, although no international convention regarding cultural objects applies in the *Buddha Mummy Statue*

<sup>91</sup> Maas (n 41) 149.

<sup>92</sup> Liu (n 3) 231.

<sup>93</sup> Ibid.

<sup>94</sup> Yujun Guo, 'Who Owns the Rat Head and Rabbit Head of Yuanmingyuan' (2010) 63 Wuhan UJ (Philosophy & Social Science) 22; Fincham (n 16) 111.

<sup>95</sup> In total, 854,742 cultural property objects were seized globally in 2020, including numismatic items (coins, money or medals), paintings, sculptures, archaeological items and library materials. 'Cultural property crime thrives throughout pandemic says new INTERPOL survey' (2021) INTERPOL <<https://www.interpol.int/en/News-and-Events/News/2021/Cultural-property-crime-thrives-throughout-pandemic-says-new-INTERPOL-survey>> accessed 13 January 2022.

case,<sup>96</sup> both the Chinese court and the Dutch court referred to international conventions in their reasoning. The Netherlands ratified the 1970 United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention) in 2009.<sup>97</sup> When submitting the implementation of this convention, the Netherlands stated that it will take into account the law of the country of origin of cultural properties in action for the restitution of illicitly-exported cultural properties. The analysis of the Dutch court on Article 96 of the Chinese General Rule of Civil Law also indicates that Chinese law has been taken into consideration in determining the legal personality of Chinese plaintiffs.<sup>98</sup> Meanwhile, the Chinese court referred to international conventions when interpreting the *lex situs* in Article 37 of the Chinese Private International Law Act. In particular, the court highlighted the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects (the UNIDROIT Convention).<sup>99</sup> These two conventions are devoted to prohibiting the illicit trafficking of cultural properties and facilitating the return of cultural properties to their country of origin. In line with the objective of these two international conventions, the Chinese court construed the *lex situs* as *lex furti*.

Apart from the UNIDROIT Convention and the UNESCO Convention, one EU Regulation,<sup>100</sup> and two EU Directives<sup>101</sup> also introduced particular public law measures. These international or interregional documents have demonstrated a tendency of providing ‘transnational policy of protection of cultural property’.<sup>102</sup> For the last four decades, both private international law and public international law have endeavoured to facilitate the ‘restitution of cultural objects to their country of origin’.<sup>103</sup> The 1995 UNIDROIT Convention provides a minimum level of

<sup>96</sup> The Netherlands and China are contracting parties to the 1970 United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention). China acceded to the convention on 28 November 1989, but the Netherlands acceded to this convention on 17 July 2009, and the convention is of no retroactive effect. The Netherlands signed the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in 1996, but it has not ratified it. This means that this convention is not legally binding on the Netherlands. Moreover, the 1995 Convention was enacted before the theft of the Buddha mummy statue.

<sup>97</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970, 823 UNTS 231).

<sup>98</sup> General Principles of the Civil Law of the People’s Republic of China (12 April 1986).

<sup>99</sup> Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995, 2421 UNTS 457).

<sup>100</sup> EU Regulation no 1024/2012 on Administrative Cooperation through the Internal Market Information System, [2012] OJ L316.

<sup>101</sup> EEC Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, [1993] OJ L74, which has been replaced by EU Directive 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.

<sup>102</sup> Gillies (n 19) 297; Adeline S Chong, ‘Transnational Public Policy in Civil and Commercial Matters’ (2012) 88 LQ Rev 106.

<sup>103</sup> Janeen M Carruthers, *The Transfer of Property in the Conflict of Laws* (OUP 2005) 132, 137, 143; Ana F Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (CUP 2006) 202, 204.

substantive and procedural rules to facilitate private claims for the return of stolen cultural objects (Chapter II) or illegally exported cultural objects (Chapter III).

At the national level, the fact that the Ethical Committee of the Netherlands Museums Association adopted the Code of Ethics on Collecting and Exhibiting Human Remains, and the Ethnographic Museum of Leiden returned a Maori head to New Zealand as well as the return of six human skulls of Urk from the University Museum of Utrecht to the people of Urk, also indicate a tendency to support the return of cultural objects containing human remains to their original culturally affiliated community. In a recent case, the Ukrainian State and four Crimean museums both claimed the title to the Crimean Treasures, a collection of archaeological objects that the Allard Pierson Museum (APM) obtained on loan from the Crimean museums for an exhibition in 2014.<sup>104</sup> It was unclear to the APM to whom the objects should be returned, since the objects were in Amsterdam when Crimea separated from Ukraine via referendum and joined Russia in 2014. The Dutch court held that the Dutch Heritage Act does not apply. The public interests at stake are of great weight and this case is closely connected to the Ukrainian State.<sup>105</sup> The court ruled that the APM has to hand over the Crimean treasures to the Ukrainian State. Similarly, three major North American museums all agreed to return a significant number of antiquities to their countries of origin.<sup>106</sup> The objective of facilitating the return of cultural objects is also shown in Articles 8, 11, and 12 of the 2007 UN Declaration on the Rights of Indigenous Peoples, the United Kingdom's Human Tissue Act 2004, and the 1990 NAGPRA.<sup>107</sup> Such national and international practices indicate that, on the one hand, the adoption of the *lex originis* rule is consistent with international efforts of facilitating stolen, looted, or illicitly exported cultural objects to their country of origin or culturally affiliated community. On the other hand, the public policy of the protection of cultural objects calls for the establishment of a choice-of-law rule in private international law.

## Concluding remarks

The mummy Master Zhanggong has not yet been returned to the Chinese village committees, since the Dutch defendants have lodged an appeal. In addition, during the hearing held in the Dutch court, the Dutch collector stated that the statue was exchanged with a third party for other cultural objects and that he was no longer in possession of it. This shows that the restitution of stolen

<sup>104</sup> 'Allard Pierson Museum Has to Hand Over the Crimean Treasures to the Ukrainian State' *Rechtspraak* <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Amsterdam/Nieuws/Paginas/Allan-Pierson-Museum-has-to-hand-over-the-Crimean-Treasures-to-the-Ukrainian-State.aspx>> accessed 13 January 2022.

<sup>105</sup> Amsterdam Court of Appeal, *Crimean Treasures*, ECLI:NL:GHAMS:2021:3201, C/13/577586 / HA ZA 14-1179.

<sup>106</sup> David Gill and Christopher Chippindale, 'From Malibu to Rome: Further Developments on the Return of Antiquities' (2007) 14 *Intl J Cultural Property* 205.

<sup>107</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, UN Doc. A/RES/61/295, 13 September 2007;

cultural objects via civil litigation is complicated and time-consuming. Meanwhile, the *Buddha Mummy Statue* case reveals the limitation of traditional dichotomy between person and property. Given the historical, cultural, religious, and spiritual values of mummies, they should not be regarded as properties but cultural objects containing human remains in order to distinguish them from other cultural objects. In light of the classification of frozen embryos in *Shen v Liu*, mummies should be classified as ‘a transitional existence between a person and a property’. If the characterization has to be confined to the category of person and property, a mummy can be regarded as a quasi-person or a special kind of property.

A new classification calls for a new choice-of-law rule. In this regard, the 2004 Belgian Private International Law might serve as a model, according to which the *lex originis* rule prevails over the traditional *lex situs* rule, unless the original owner chooses the application of the traditional *lex situs* or the *lex originis* rule does not provide protection to the good faith purchaser. The Chinese Private International Law Act should embrace such approach, since the application of the *lex originis* may facilitate the return of cultural relics, including but not limited to those containing human remains, such as mummies, to their culturally affiliated community, ethnic or religious groups. Such application also corresponds to the international efforts of facilitating the return of stolen or illicitly exported cultural objects to their country of origin. In short, cultural objects, including but not limited to those containing human remains, need a new classification and a new choice-of-law rule. The adoption of the *lex originis* rule is advisable since it may prevent the flow of stolen or illicitly exported cultural objects.