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CASE NOTE

A Māori Head: Public Domain?

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This case arose out of a controversy over the return of a Māori head from the collection of a city of Rouen museum to New Zealand.[1] The case raised the issue of whether the head was a French public good that required declassification before it could be returned or a body part (and not a work of art) that could be immediately returned for appropriate treatment in its place of origin.

On October 19, 2007, the municipal council of Rouen unanimously voted to adopt a resolution authorizing the return of the Māori head to New Zealand. Entered into the city museum's collection in 1875, the head exemplified the interest of Europeans in these kinds of relics that could be found in numerous *curiosity cabinets*. For Europeans, this was an ethnographic interest, even an artistic one; however, for the Māori tribes, the severing and preservation of heads was part of a traditional ancestral funeral. In returning the head, the city of Rouen intended

> to adopt an ethical approach. This symbolic act expresses the respect that we owe to the beliefs of people that refuse to allow their culture and identity to die. Furthermore, in the eyes of Māori people, the head has a sacred character: it will go back to the land from which it originates, and will receive a proper burial in accordance with its ancestral rites.[2]

On October 23, an official signing ceremony was organized authorizing the restitution of the head (the effective transfer of the head was planned for the middle of November).

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However, the minister of culture was publicly opposed to the return of the head. On October 22 the prefects of the Haute-Normandie region and the Seine-Maritime department petitioned the administrative tribunal of the city of Rouen for summary judgment to halt the execution of the city council resolution.

The prefects pointed to two sections of the Heritage Code, created pursuant to the law relating to French museums,[3] referring first to Article L 451–3: "the collections of the museums of France are inviolable"; and second to Article L 451–5: "goods constituting collections of the museums of France, and belonging to a legal person, are in the public domain and are hence inalienable. Any decision to declassify such goods cannot be made without the assent of a scientific body." These articles concern the application to museums of the principle of the inalienability of the public domain,[4] which notably includes chattels "presenting a public interest, from a historical, artistic, archaeological, scientific, or technical point of view" such as museum collections.[5] Thus, the prefects argued that the Māori head, being part of the collection of a museum classified as a "Museum of France,"[6] was a chattel in the public domain and needed to be declassified by the National Scientific Commission before its return.

According to the City of Rouen, however, the declassification proceedings were unnecessary, because the Māori head was not a part of the museum collection or part of the public domain. The municipal council resolution specified that "regarding human remains, Article 16–1 of the Civil Code, enacted pursuant to the Bioethics Bill of July 29, 1994, as modified, stipulates that they cannot be objects of proprietary rights: so the principle of inalienability of public collections cannot be applied to them."

This line of argument is reminiscent of the debate that occurred between 2001 and 2002 over the return to South Africa of the body of Saartjie Baartman, also known as the *Hottentote Venus*: an unfortunate circus sideshow and then an object of scientific research during the eighteenth century. Trying to satisfy the request of South Africa, some legislators were confronted by the problem of the inalienability of the collection of the National Museum of Natural History. According to the national secretary of heritage, "if the skeleton is to be transferred to Cape Town, a law should be enacted to allow this exceptional repatriation."[7] In this same debate, the application of Article 16–1 of the Civil Code was also evoked, stating that "the human body, its elements and its products, cannot be the object of proprietary rights."

A report[8] made on behalf of the Commission of Cultural, Familial, and Social Affairs, on the legislative bill adopted by the Senate regarding France's return of the body of Saartjie Baartman to South Africa, stated that there was "an absence of juridical difficulty." Furthermore, the inalienability principle was not considered something requiring the enactment of a law; rather, a simple declassification decision would suffice. However, the report concluded that "considering the political character of the actual request, a legislative bill appears to be the most appropriate response"; because after the undignified treatment suffered by the body

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of Saartjie Baartman, while she was living as well as after her death, it would have been improper to further subject her remains to examination before the scientific commission previous to approving her return. Nevertheless, the report specified that "in the hypothetical situation where other similar requests were presented, nothing would prevent the recourse to the actual declassification procedure currently in force." Concerning the application of Article 16–1 of the Civil Code, the report stated that it

> raised, in general, a number of questions about the status of Museum collections, many of which are composed of "human elements." It is the responsibility of the government to bring some much needed clarification on this point, notably to specify how the sections of the law of January 4, 2002, relating to French Museums and governing the status of public collections would apply to such collections containing human elements.

Finally, the law of March 6, 2002, regarding France's return of Saartjie Baartman's body to South Africa[9] was adopted. It affirmed that the bodily remains "ceased to be a part of the institutional public collections of the Museum of Natural History" and gave the administration two months to proceed with their return.

Concerning the Māori head, the minister of culture did not opt for a legal exemption justified by political reasons but rather for an ordinary request for declassification. The city of Rouen once again tried to launch the debate about the application of Article 16–1 of the Civil Code. The legislative report of 2002 foretold the inherent risks of this application, which rendered necessary a *clarification*, because several elements of public collections could be considered human remains and could not be the object of proprietary rights (of course, one immediately thinks of a large part of the collection of the Quai Branly Museum, inaugurated in 2006, which includes several Māori heads). Yet, the establishment of the Heritage Code in 2004[10] only addresses the question of the return of cultural goods within the European community.

For almost 20 years, New Zealand has sought the return of Māori heads held by various European museums. It does not consider these heads pieces of art, but rather as human remains requiring proper burial. It follows that it will support the action and justification thereof of the city of Rouen, but without being directly involved in the procedure, because it is a matter concerning the internal affairs between French institutions. Indeed, the request for an interstate return is a complex and sensitive topic. Regarding this, André Malraux, former minister of culture (1959–1969), having been informed of the presence of portraits of Jean de la Fontaine (by Hyacinthe Rigaud) and his spouse (attributed to Nicolas de Largillière) in the Museum of Montserrat Abbey (Barcelona Province), proposed to the Benedictine community the exchange of these portraits for one of their missing pieces of artwork located in Paris. In response he received a list several pages long of paintings *borrowed* by the Napoleonic Army under the command of Maréchal Suchet. Moreover, in this domain, where the will of the state

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is still a considerable force, UNESCO is content with having a consultative role, without exercising any jurisdictional or constraining function, notably through the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Cases of Illicit Appropriation.[11] This committee is in charge of facilitating bilateral negotiations and informing the public about the paramount importance of these restitutions, but in this case the committee was not seized with the question.

The summary court judge considered "that in the current state of preparatory investigation and notably the legal submissions tendered by the parties it is not established that the human remains that constitute the Māori head are within the scope of application of the foregoing sections of Article 16–1 of the Civil Code," and pronounced the suspension of the execution of the resolution adopted by the Municipal Council of Rouen. In its decision of December 27, 2007, the third chamber of the Administrative Tribunal of Rouen, interpreting Article 16–1 of the Civil Code, further considered the following:

> These provisions constitute only one aspect of the superior principle of the protection of human dignity, and have as their object the prohibition of the appropriation or utilization of the human body and its elements and products, for the purposes of monetary gain; the present circumstances under which the Māori head is conserved as a part of the municipal collection of the museum are not contrary, either in principle or in practice, to Article 16–1 of the Civil Code.

In addition, the judge stated that the Māori head was subject to the provisions of the Heritage Code; to return it required a declassification following the assent of the National Scientific Commission of Museum Collections of France; and the resolution of the Municipal Council of the City of Rouen was void, marred by a procedural error.

In its press release of January 3, 2008, the city of Rouen announced that "Catherine Morin-Desailly, Deputy Mayor in Charge of Culture and Senator, is preparing a bill which will allow the authorization of the return of Māori human remains," expressing the choice of a legislative solution similar to the one in the *Saartjie Baartman* case—an exceptional solution that did not consider the entire problem posed by the return of certain human remains that are considered collectibles.

This problem is reminiscent of a lawsuit that occurred from 1927 to 1928, between the sculptor Constantin Brancusi and the U.S. Customs Service. A work by the artist (*Bird in Flight*) was being transported to New York to be exhibited there. Customs refused to exempt the sculpture from import duty on the basis that it was a work of art, and instead applied the relevant duty attached to utilitarian objects. Lying behind this customs dispute was the general debate over modern abstract art. The judge, in considering that this new form of artistic expression should be recognized, ruled against U.S. Customs. Nathalie Heinich states,

> Thus the borders of art, after twenty years, were found to be officially broadened, in a way to integrate modern practice and, notably, abstrac-

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> tion. That this broadening had to be legally recognized through judicial means, and not solely legitimated through expert opinion, the interest of collectors, or museum procurement policy, says a great deal about the profoundly disturbing nature of these new artistic practices. In effect, they engage not only aesthetic considerations that are a question of taste—which interests amateurs—but also cognitive considerations that concern the entire set of a "culture," of a given society—mental borders—which determine the indispensable consensus on the definition itself of objects and the values that they represent.[12]

The return of the Māori head concerns these same "cognitive considerations" that define certain objects. By contrast, however, the path is inverted here, because in this case the question was whether an object in a collection could lose its artistic qualifications and become simply human remains. The evolution of society allows the progressive acceptance of abstract art and, conversely, often ceases to consider human remains as *things*, but instead as coming from living beings and therefore worth a dignified burial—an evolution of *mental frontiers* that has not yet taken root in French law.

ENDNOTES

1. An English translation of the text of the decision by the Administrative Tribunal of Rouen in the case appears in the *International Journal of Cultural Property* 15 (2008): 223–26.
2. Municipal Council of Rouen, resolution nos. 2–8, October 19, 2007.
3. Law No. 2002–5, Official Journal January 18, 2002.
4. CGPPP, Article L. 3111–1.
5. CGPPP Article L. 2112–1.
6. Minister of Youth and Minister of Culture, A. September 17, 2003: Official Journal October 1, 2003.
7. Official Journal of the Senate Q, November 7, 2001, p. 4659.
8. No. 3563, January 30, 2002.
9. Law No. 2002–323: Official Journal March 7, 2002.
10. Ordinance No. 2004–178, February 20, 2004, regarding the legislative part of the Heritage Code: Official Journal February 24, 2004.
11. 20th Session, UNESCO General Session, Resolution 4/7.6/5, Oct. 24–Nov. 28, 1978.
12. Heinich, « C'est un oiseau! », 671.

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Heinich, Nathalie. « C'est un oiseau! » Brancusi vs États-Unis, ou quand la loi définit l'art. *Droit et Société* 34 (1996), 649–672.

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