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## Is My Body My Property?

The fundamental concept that we should explain in order to start reasoning about the ownership of one's body, is the very concept of ownership as a legal category. Ownership of what we physically are, is a colloquial version of the concept of the *right* to dispose of one's own organism, organs, tissues, cells and other *things* our bodies consist of, and what it produces in natural biological processes.

Using that set of wordings when defining and, primarily, classifying the body as a thing, is inconsistent with the facts, and especially with the law. Because ownership is in the realm of property law, it means that the existence of a property *on something* or being the owner of something can refer only to things. Article 45 of the Polish Civil Code issued in 1964 defines a *thing* as a material object with the exception of the body, tissues, cells and organs<sup>1</sup>. I deliberately presented the distinction between the facts and the legal situation because, in this case, the fact that the body is treated as something other than a *thing* can raise some doubts. With today's level of commercialization and objectification of the human body, this difference is harder and harder to accept.

In the light of the Polish law, a *thing* is made of a material, and there is a separation from nature. Although the organism and its derivatives or components are material and also separated from nature, there are exceptions which are excluded from the set of things. These include cells removed from the human body, tissues, organs and corpses. This analysis perfectly illustrates the disparity between the facts and the legal situation because, in fact, the legal *conditions* are met, and the problem arises on the basis of morality, ethics and social relations, which require that the legal regulation, by altering the real situation and facts, approves this exclusion for reasons of custom. While rejecting these circumstances it is difficult to specify how, in fact, the human body is different from other matter existing in the world, apart from in the realm of belief.

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1 Dz. U. 1964, No. 16, item 9.

From a physical point of view, the building material of the human body, like the building material of everything else that surrounds us, is made up of atoms. From the point of view of the law, organs, tissues and cells could constitute affiliation, a component, or even produce benefits, as well as things. This is, in fact, how it functions. What is a transplant, or a donation of blood or sperm? Although the essence of the regulation (whether in the Civil Code or in the Bioethics Convention - Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine<sup>2</sup>) is lofty in terms of prevention of the objective treatment of the human being and respect for the body, it is difficult to deny the fact that the body and its derivatives could be treated and recognized as material things. The public interest lies in how far that separation should be applied in the context of the legal situation.

We commonly refer corporeality to our being, personality and consciousness. Even by using the terms *my body*, *my hands*, *my hair* and so on, we signalize that these parts belong to us and only we have the right to them. So within what range do we have an impact on what is ours<sup>3</sup>? In some cases, it may turn out that we have no impact, or it is limited. Where are the borders of the freedom to dispose of our own bodies? To answer these questions, one should refer to the widely understood concept of human *nature*, which has been formed over millennia, and to the changing customs and beliefs of various cultures and societies which have established the way our mind and intuition relate to the flesh today.

There are many ways to treat the dead, starting from extreme piety, ending with extreme profanity<sup>4</sup>. However, there is probably no society that does not respect their own dead. This is due to the need to worship the dead, show them respect and affection. Depending on the cultural background, region, religion or social habits this has been done in different ways. Even Neanderthal man hid corpses in primitive graves<sup>5</sup>. Residents of the city of Jericho believed that the dead still had the same social functions and existed among living beings, so they modeled their faces after death<sup>6</sup>. In many other regions people believed that the dead remained on Earth and had a magic ability to affect the living world. In societies where bodies were mummified (the body was subjected to dehydration) people believed in the relationship between body and soul, and therefore they did not respect the natural processes of decay.

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2 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine: Convention on Human Rights and Biomedicine.

3 S. Blackburn, *Oksfordzki słownik filozoficzny*, Warszawa 2004, p. 435.

4 R. Tokarczyk, *Prawa Narodzin, Życia i Śmierci*, Warszawa 2009, p. 357.

5 L.V. Thomas, *Trup. Od biologii do antropologii*, Łódź 1991, p. 9–27.

6 H. Belting, *Antropologia obrazu. Szkice do nauki o obrazie*, Kraków 2007, p. 175.

This all shows that from the earliest times it was known how to deal with the dead body and what to do with a man after death. The subject of our interest is a less obvious problem, namely, how to take advantage of the human body and its elements to make them serve other people. Although it appears that the dilemma relates to the modern world in which different types of procedures are carried out such as transplants, and where the body is subjected to continuous and maximal usage, the reality is different.

Today's supposed commercialization and objective relationship with the body, which we strongly deny, were much more common phenomena in earlier periods of history and in different cultures. In ancient Egypt it was common practice to produce drugs from mummies which healed wounds and bruises. They were sold in pharmacies, and this habit even reached Europe and, what is more, it was legal<sup>7</sup>. It was also the case that the corpse (or its secretions) were attributed with healing properties. For example, in the sixteenth century, the sweat of the dead person was a cure for hemorrhoids, and dust from the bones (the human skull in the form of powder) was boiled and given to epileptics. This displays a kind of contradiction regarding the attitude of man towards the human body after death. On the one hand, there are the cults linked to religion, which were strong both in ancient Egypt and in the sixteenth-century societies of East and West, and on the other hand one can observe an acceptance of certain practices which are justified due to their important social purpose. This purpose is to help others, i.e. the sick and to relieve suffering. Such an approach seems reasonable as it allows for the use of matter in the form of the dead body, which would otherwise only feed the soil. The use of organs, tissues or body parts as a consumer product cannot be compared with the use of the body for therapeutic purposes.

The legislature itself should be rational and in every situation, not just sometimes, put other people's lives above unstable social beliefs, morality and ethics, which change according to needs, circumstances, religion and customs. A kind of universalism, something present in every community, regardless of time, is to honor the dead, to show respect for the body, and to hide the corpses. We should note, however, that the associated rituals and the way the body and its parts are perceived can be materially different. It is precisely the cultural diversity present in today's societies which reflects the ongoing discussions on topics related to the usage of the body.

In modern times, arguments for organ transplants from both living and dead donors are still controversial. In most countries, and in the dominant religions, transplants are not allowed. The position of the Catholic Church was described by John Paul II in 1991 and officially approved in 2005, at the Congress of the International Transplantation Society. In approximation, I would like to present a few different views of some of the religions in the world.

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<sup>7</sup> H. Belting, *op. cit.*, p. 172, 186.

For Christians (including Catholics) life is a gift from God, and the donation of organs is a supreme act of love for other people, but the decision remains free and conscious, which somehow undermines the concept of presumed consent functioning in Poland. Receiving money and other benefits is also prohibited<sup>8</sup>.

In the case of Islam, Muslims, depending on the country or region, have a different attitude towards not only transplants, but also paying for organs. For thousands of years, Arab medics used practices such as bone grafting. No objection was raised, even when drawing the necessary elements from animals<sup>9</sup>.

Today, in many Muslim countries, it is illegal to charge a fee<sup>10</sup>, with the exception of Iran, where the government pays the donor a specific amount of money and the recipient or their family may make additional voluntary donations. As a result of this legislation, almost a couple of years after the coming of these provisions into force, more than half of the patients needing organs had already received one<sup>11</sup>. A similar position was taken by the Israeli government. Although the principle of the inviolability of the body after death and the need to bury it in its entirety also functions in Judaism, a higher value is accorded to saving other human beings. Therefore, transplants are acceptable<sup>12</sup>. It is justified if it can save someone's life.

There are also religious and cultural circles which are completely opposed to transplants. Gypsies and Jehovah's Witnesses inextricably bind the body to the soul, and in Shintoism, taking a section of the body of the deceased breaks the bond that connects it with the family. It is easy to see that for as many beliefs, cultures and communities as there are, there are also as many different ways of understanding the body's meaning, and a diversity of understandings of respect for the dead or ethical reviews of such practices. In the mentality of Western Europeans, within which there are similarities and universal rules, reaping the benefits from the exploitation of others is unacceptable through the prism of ethics. We can also look at it from a purely practical perspective, with the example of Iran, where the number of people waiting for an organ was significantly reduced. Legalization of what had been common practice for a long time led to many sick people being rescued. What, in fact, is more valuable than life? Each of us says *nothing* as an answer to this question. This approach is ethical and altruistic. We put at stake someone's life and the side effect that leads to saving this life in the form of a benefit,

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8 G. Gac, Całkowity dar z siebie [online]. Dar życia [Access: 2013-10-20]. Available at: <http://twojdarzycia.pl/sample-page>.

9 I. Kaczyńska, *Medycyna a prawa człowieka: normy i zasady prawa międzynarodowego, etyki oraz moralności katolickiej, protestanckiej, żydowskiej, muzułmańskiej i buddyjskiej*, Warszawa 1996, p. 47–48, 53–54.

10 M. Karolkiewicz, *Nerka na sprzedaż*, Tygodnik Przegląd 2006-03-20.

11 S. Zagórski, *Nie zabieraj nerek do nieba*, Gazeta Wyborcza 2005-07-10.

12 I. Kaczyńska, *Medycyna a prawa*, p. 41–43.

because no doubt what the statistics show, the advantage has an impact on the number of transplants performed.

Based on the great advances in medicine and modern medical technology as well as the significant enhancement of knowledge and improving practices that have been seen during last few years, Polish and European legislation was formed. One of the areas that has developed at a rapid pace is transplantation. The first transplants of organs, tissues or cells from one body to another, or within a single body were made in the world only 60 years ago. In Poland, it only happened as recently as in 1980. One can say that the development of this field in some way forced the creation of legal regulations which was quite a challenge for the legislators.

Nowadays, in Poland, the law on the procurement, storage and transplantation of cells, tissues and organs of 1 July 2005 is currently valid and it regulates the complex problems associated with post-mortem organ donation, transplants between family members, obtaining organs from persons in partnership relations, renewable tissue donation, principles of transplantation, creating banks of tissues and cord blood.

The regulations of this Law shall also apply to the acquisition of organs for medical, diagnostic, treatment, research and teaching purposes<sup>13</sup>.

Regulations (which are not a source of law) related to the attitude of a doctor to a patient are in the Code of Medical Ethics<sup>14</sup> which shows how the human body should be treated by a doctor. The key regulations are found in article 33, 35 and 36 (statement 2) of KEL. Article 33 provides that the doctor can retrieve the cells, tissues and organs for transplantation if the deceased presented no objections in life.

A similar regulation can be found in article 5 pt 1 of the Law on procurement, storage and transplantation of cells, tissues and organs. To paraphrase, the cited articles show that we have an impact on what happens to our bodies after death, but we should make a declaration of will when it comes to negative content<sup>15</sup>. This constitutes a lack of acceptance of the donation of selected elements of the body. But if we do not do it, the doctor has the right to use what is needed without the consent of the family. It means that each of us has an impact on whether our bodies will be preserved after death in their entirety or whether some parts will be collected, but we are deprived of the possibility to decide on the matter. So, in some way, the freedom for people to decide about their bodies is limited. Besides, a lot of people would willingly donate their organs to save the lives of

13 Dz.U. 2009, No. 141, item 1149.

14 Code of Medical Ethic, Act of 2 January 2004.

15 There are two main methods for determining voluntary consent: *opt in* (consent expressed directly) practiced in a few countries like e.g. the Netherlands, the United States, England and Denmark and also supported by the Roman Catholic Church, where individuals who wish to donate their organs need to give their consent. There are also countries with a national database of donors instead of a donor card. The second one is *opt out* (presumed consent) which means that anyone who has not refused could be a donor.

others, but not necessarily for them to be used for educational purposes, research, etc., which the law does not distinguish.

By expressing opposition or passive consent, someone selects all (with no limitations on the scope) or nothing. This is contrary to article 31 of the Polish Constitution of 1997, which points to the freedom of deciding about one's own body<sup>16</sup>. Although transplantation activities, in this case, arise only after death, the consent or objection should be expressed during a person's life, so there is no reason to restrict this freedom.

Does presumed consent<sup>17</sup> not lead to the expansion of the state's rights at the expense of human rights and does this not result in an appropriation of the body by the state? The presumed consent is not only an easier way to increase transplants because most people will not make negative decisions, but also in some sense it directs our intuition on who is the owner of the body after death. With the concept of family consent for organ donation, it seems that the family itself is the owner of the body, which certainly could reduce the number of performed transplants. Therefore, the transfer of control to the state would have a practical sense, as with that gained by the concept of presumed consent, which multiplies the maximum use of organs. Following any of these paths, one cannot fail to notice how *the body* is objectified. The property of the dead person is transferred to any of the parties. We use the terms for things (from property law), from which, theoretically, the corpse is excluded, yet we think about their use, we appreciate their usability.

The contradiction that characterizes the modern world is, on the one hand, the cult of physicality (the beauty of the body), absurdly opposed to the lowering of its value when understood through the realm of the sacred. For example, we have the right of consent to interventions, modifications or beautification of the body when understood individually and moreover, taking care of the outer shell is characteristic of the twenty-first century. On the other hand, we treat our bodies as a mass composed of individual elements, and it is possible to do many things with them - replace worn out or *broken* parts, upgrade or tune them, like in a car or in different devices. The body is stripped of piety, it is *sacred out*. It is detached from the soul, the consciousness, the exterior does not connect so strongly with the interior, and its spiritual value decreases. It is difficult to relate to the body in a different way, when society leads people to treat it as a raw material or a workshop, an item for processing when subjected to unnecessary treatments which aim to temporarily fix it up. It would be more unreasonable to treat organs as something completely separate, when the easier way, being additionally supported by common practice, is to recognize them in the category of exceptional things, distinguished by their very nature, but still things.

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16 Dz.U. 1997, No. 78, item 483.

17 J. Duda, *Cywilnoprawna problematyka transplantacji medycznej*, Warszawa 2011, p.86–99.

In the law itself, one can discern trends objectifying the body and putting it into the realm of the profane. Being previously in force in Poland, the Penal Code of 1969<sup>18</sup>, places the provision for the protection of the body in the chapter *Crimes against freedom of conscience and religion*. In the new Penal Code of 1997<sup>19</sup> the same provision has been moved to *Crimes against public order*. This indicates that the body has been nationalized and *sacred out*.

Art. 12 paragraph 1 of the Act on retrieval, storage and transplantation of cells, tissues and organs also represents a very serious limitation. It applies to living donors, and the group of persons to whom they may give their organs. This limitation, which admits into the group of recipients only cousins, siblings, assimilated persons, spouses, and other persons, unless justified by exceptional personal reasons, deprives the donor the possibility of deciding about their own body. They cannot offer their organs for altruistic reasons or even to a sick friend, because such an act is penalized. This legislation is aimed at improving society. It aims to prevent the selling of organs on the so-called *black market*<sup>20</sup>. The *black market* is understood not strictly within the meaning of underground criminal activity, but as an act of trade, because Polish and European legislation prohibits such practices<sup>21</sup>. Article 35 of KEL prohibits a physician from gaining any financial or personal benefit. Article 21 of the Bioethics Convention prohibits dealing with the human body and its parts as a source of profit. This statement is the most general, because it sanctions any beneficiary, regardless of the form of this benefit. Similar content is included in art. 3 par. 1 of the Law on transplantation.

What considerations lie behind the limiting of the free disposal of parts of ourselves, even if an additional stimulus is profit or advantage? It seems that all kinds of freedoms (including free disposal of the body) exist under the law of freedom, which is one of the basic human rights. Freedom can be limited for various reasons but, in fact, property received for an organ is unacceptable to the public even if there is a limitation on the law of freedom, also on the free disposal of the body. I think that the activities of criminal groups play a very important role here. These groups kidnap people and sell their organs. Public opinion, shaped by the media, is concerned with the development of organ trafficking, and thus the organized crime groups acting in this field<sup>22</sup>. However, in this context, the objectification of the dead body (in the legal sense), is not a problem.

18 Dz. U. 1969, No. 13, item 94.

19 Dz. U. 1997, No. 88, item 553.

20 E. M. Guzik-Makurak, *Transplantacja organów, tkanek i komórek w ujęciu prawnym i kryminologicznym*, Białystok 2008, p. 225- 230.

21 In accordance with Polish law also art. 43 and art. 44 of the Act on retrieval, storage and transplantation of cells, tissues and organs.

22 Wydział Wsparcia Zwalczania Cyberprzestępczości Biura Kryminalnego Komendy Głównej Policji, Handel organami ludzkimi w Internecie [online]. Policja [Access: 2013-05-20]. Available at: <http://www.policja.pl/pol/kgp/biuroszluzbykryminaln/cyberprzestepczosc/73662>.

There is a need to create a comprehensive, robust set of controls which could explicitly determine the legal nature of the dead body and globally recognize principles of transplantation. In particular, it could require express consent and agreement between the parties, indicating the amount of the payment for the donation, as well as a clarification of the list of medical centers where one can make legal transplants. The criminals' activities would be greatly hampered. In addition, please note that banning anything seems to be conducive to the development of crime, the most famous case being the example of American Prohibition.

We are more afraid of mediating, excusing that with the possibility of unethical enrichment at the expense of one person and the tragic position of the other. Using the situation of a person with no possibilities, who is suffering or dying is unethical. We disapprove less the direct *exchange*, although it also raises negative opinions. But why? Does everyone have to be *passionate* altruists? Human nature is selfish and we will never change it. Since ancient times we have used the maxim *do ut des*. Saving another person by donating our organ and getting money should not surprise anyone. Finally, we need to function without this organ and this has an impact on our health, our future way of life, or our state of mind. The payment seems to be a fair solution with benefits all. Why do I have to give something precious without getting anything in return?

One can ask oneself the question whether the phenomenon described above leads to an erosion of human dignity. First of all, people should try to define this axiom. There is no legal definition of the concept, which is a basis of modern systems and focuses on the human being. With multiple ethical problems the definition of dignity as *an absolute value that characterizes the essence of humanity* seems to be incomplete, and even fragmentary. One cannot deny that *dignity*, as a value is intrinsic and inalienable, but it also seems relative so its meaning is different for every human being. It is characterized by a certain variability in perception, depending on the circumstances.

It is transformed with the changing of customs, with time passing, or with progress. Indisputably, we find that it is the absolute in itself, placed on the top in the hierarchy of human rights and at the same time a certain inner confidence of every individual about their own essence, existence, and about a kind of pride for humanity. In my opinion the actual manifestation of violating dignity is to prohibit the implementation of basic constitutional rights etc. such as the freedom to dispose of one's own body<sup>23</sup>. However, at the same time, invalid treatment of the dead body causes the violation of the dignity of the deceased. When people decide to sell their organs after death, they do not deprive themselves of dignity, because dignity lies in the inner sphere, such as feeling respect

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23 Preamble of the Universal Declaration of Human Rights, Act of 10 December 1948 includes the following statement: *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*

etc. With specific, informed, unforced consent for something there is no deprivation of dignity because there is no violation of the inside and the psychological relationship with oneself is not changed in any way.

Problems or discrepancies always arise where we encounter ethical or moral layers, because each person perceives reality in a different way, and assesses it in a different way. So the matter of treating one's own body is still controversial.

Reality enforces some actions from the legislator but it is impossible to satisfy each individual's expectations. Starting from the historical background, showing human attitudes towards the dead body through religious references and also discussing the concept of human dignity and humans' rights to dispose of their own bodies, having regard for the actual legal status, shows that treating individual elements of the body, such as cells, tissues or organs in the category of things and applying property law to them has practical sense, without taking away man's dignity and humanity.

Issues affecting the difficult existential problems associated with life and death, faith, cultural influences, traditions and communities always raise controversies and reasonable doubts, and questions that are impossible to answer unequivocally and according to the moral assessments and beliefs of all people, especially when new technologies and achievements of civilization enforce specific mental and philosophical changes. The law is an instrument which has to preserve justice and regulate, in a unique way, what people consider valuable and, above all, respond to people's needs.

### **Biographical reference:**

Marta Nawrocka - student of Law at the Adam Mickiewicz University in Poznań (Poland). She actively takes part in projects of the scientific circle of medical law *Lege Artis*. Her main academic interests include civil law, especially the widely understood medical law and forensic medicine. In her free time she enjoys learning foreign languages. She is an enthusiast of eastern languages, in particular Chinese and Russian.

### SUMMARY

#### **Is my body my property?**

The aim of the study is to evaluate human body law protection system. The author analyse selected issues related to the human body in order to evaluate it in its legal and ethical perspective. Presenting the topic the author refers to the Convention on Human Rights and Biomedicine and the Convention for the Protection of Human Rights and Dignity of the Human Being.

**KEYWORDS:** human body, Convention on Human Rights and Biomedicine and the Convention, Convention for the Protection of Human Rights and Dignity of the Human Being

