

# OWNERSHIP RIGHT FOR THE DEAD BODY AND ITS PARTS

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**Abstract.** *Today, the dead body is used almost all over the world both for its disposal (burial, cremation) and for other purposes. The jurisprudence inevitably faces the issue on the legal regime of these objects. Therefore, the author of the article attempts to study the general tendencies of recognizing the ownership right of the dead bodies and their separated parts within the framework of case law and international law.*

*As a result of the conducted study, the author has concluded that the courts of the leading case law countries have gradually begun to recognize the ownership right of the dead body and its separated parts since 1908. And the norms of international law from the second half of the XX century began to recognize the ownership right of the dead body and its separated parts, though not directly. Moreover, both for those parts that are separated for further transplantation and for those separated for another purpose. The ownership right also arises for the dead body, if it represents a cultural (historical) value. For example, these are mummies, embalmed bodies, their parts, relics of saints, etc. The generalization of the conclusions indicates that the dead body becomes the item of property from the moment of a person's death. At the same time, the dead body or its part retains personal intangible value, and therefore can be considered as objects of personal non-property rights, which, in fact, limits the fullness of the ownership right.*

**Key words:** *ownership right, dead body, part of the human body, organs removed (separated) from human body, item of property.*

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**Introduction.** It may sound unusual, but the dead body is used not only for its disposal (burial, cremation). Nowadays it is not a secret that it is widely used for other purposes. In particular, forensic examinations, pre-trial investigation agencies, and other interested parties consider it as a carrier of data (information) about the cause and manner of death. The dead bodies are used as a "source" of anatomical materials for transplantation and (or) production of bioimplants, genetic material for the implementation of reproductive technologies (artificial insemination, surrogacy, etc.). They are also widely used by scientific, medical or educational institutions for research, biomedical research and within the training process. The dead bodies or their parts often serve as objects of worship, such as relics of saints or embalmed bodies of Pirogov, Kotovskyi, Lenin, Mao Zedong, etc., or museum exhibits, such as mummies of Egyptian pharaohs, The Siberian Ice Maiden, etc. One of the brightest illustrations of the latter is the famous "the Kunstkamera" (Peter the Great Museum of Anthropology and Ethnography) in St. Petersburg. Centers where at the patient's request the corpse is frozen a few minutes after clinical death and then stored at low temperature in a hermetically sealed cylinder filled with liquid nitrogen have emerged in the United States, Britain, France, and other countries since the mid-1960s. It is done in order to wait until medicine is able to overcome the disease that caused the death. Moreover, the above-mentioned types of use are also connected with the preparation of the dead bodies,

their storage, transportation, separation of parts, etc.

Moreover, we can provide an example when the dead bodies or their parts are actively used for gaining profit. For example, the world-famous private exhibition "Body Worlds" has been operating around the world since 1995, which includes more than 19,000 dead bodies that have been donated since 1980. After the plastination (a special type of embalming and preservation of anatomical materials) the dead bodies or their parts are exhibited. As a result, more than 51 million people in 35 countries visited the "Body Worlds" exhibition and the founder of the exhibition, the German anatomist Gunther von Hagens, became a multimillionaire [1].

Such active use of the dead bodies is obviously the relevant issue of the dead bodies and their separated parts in terms of objective law or there are subjective rights to them. If there are subjective rights, then what are they?

Existing points of view in this regard can be divided into two groups. One part of the scholars claims that the principle – "there is no property in the human body", formulated in English law in the first half of the XIX century [2, 3, 4] and accepted almost throughout the civilized world, is applied both to the living body and to the deceased [5, 6]. Their position is based on the denial of the existence of the rights to the body after death. It can have sacred, spiritual, religious, cultural, scientific, social value, etc., but it is invaluable in the property sense [7]. Thus, it is not an object of law, and therefore there is no right to it. Another

part of scholars, analyzing the case law of the leading countries of the Anglo-Saxon legal system, international law and national law of the countries with the continental legal system, concludes that the dead body and its separated parts are the objects of law [8, 9, 10]. But supporters of this approach are again divided into several groups. Some of them believe that the fate of a dead body is determined only by the norms of administrative law (for example, determination of burial place, establishment of sanitary norms, etc.), criminal law (for example, establishment of liability for abuse of bodies and burial places, etc.) [11] or human rights norms (for example, the right to personal integrity, life and health, honor and dignity, security, etc.) [12]. Others claim that the dead body or its separated parts can be considered property and even things under certain conditions [13, 14, 15, 16], where the ownership right arises (quasi-ownership) [17, 18, 19]. Others are based on the dual nature of these objects [20]. They concluded that the dead body or its parts may have property value besides the personal intangible value, and therefore can be considered as objects of both personal non-property rights and property rights.

The lack of a clear understanding of what the dead bodies and their separated parts are, their legal regime, creates not only legal uncertainty, but also complicates its elimination and the formation of high-quality consistent legislation.

In this regard, *the purpose of this research* is to determine the nature of the right to the dead bodies and their separated parts within the framework of case law and international law.

**Methods.** The author of the article studies the general tendencies of recognizing the ownership right of the dead body or its separated parts. To accomplish this, we used the historical method, which revealed that such recognition begins in common law countries, which is further anyhow perceived by the domestic law of continental law country through the acts of international law. Therefore, we first of all carry out the analysis of the development of the ownership right for the dead body and its parts in the leading case law countries. The next step is the comparative and legal method of studying the norms of international law to determine the legal regime for the indicated objects. The application of systemic, formal and legal methods of cognition to them allowed us to establish their interrelation, interdependence and mutual influence. Synthesis, deduction and induction allowed us to substantiate and reveal the conclusions made.

**Results.** Since 1908, the courts of the leading case law countries have gradually begun to recognize the ownership right for the dead body and its separated parts.

The norms of international law in the second half of the XX century began to recognize the ownership right for the dead body and its separated parts, although not directly. Moreover, both those parts that

are separated for further transplantation, and those for another purpose. There is also the ownership right for the dead body, if it represents a cultural (historical) value. For example, these are mummies, embalmed bodies, their parts, relics of saints, etc.

However, the dead body or its part retains personal intangible value, and therefore can be considered as objects of personal intangible rights.

**Analysis.** Previously, the author of this article has already substantiated the idea that the dead body [21] or its separated parts [22] are objects of civil legal relations (private law) [23]. At the same time, they have a dual nature, that is they represent both: intangible value (personal intangible good) and property value (property good) [23]. Human bodies of the deceased as property goods, or the separated parts of the bodies, are things that are in civil circulation [24]. Due to the fact that civil circulation is a lawful alienation or transfer of objects of civil law from one person to another [25, 26], and legitimacy is achieved by legal consolidation of the affiliation of any goods to certain entities (statics of legal relations) and the possibility of legalization of their further transfer, movement between the entities (dynamics of legal relations), then the establishment of the right that assists to enshrine certain objects to the entities, they acquire paramount importance for jurisprudence.

It is known that the most common way in the world to establish the absolute legal dominion of the entity over own things, is the ownership right. And if the dead body or its separated part has all the properties of things, then we will find out the ownership right for them.

#### **Development of the ownership right for the dead body and its part in the leading case law countries.**

The English court has formulated a rule at the beginning of the XIX century, which was later adopted through the whole world. The rule stipulated that the human body was not the item of property [2, 3, 4]. But an Australian court in 1908 ruled an exception to this rule for the first time, which gradually became the basis for further recognition of the dead body and its separated parts as objects of property rights and, in particular, the ownership right. The ruling stated that if there was a lawful possession of an unburied human body, the law had to protect such lawful possession in appropriate ways. There is no definition of property that would be so broad and would include such a right of permanent possession. Such a right exists and establishes property [27]. Thus, the essence of the exception was that the human body or its part could become the item of property, but certainly in terms of observing any positive law.

An English court in 1998, by hearing a case on the acquisition of embalmed parts of the human body by a group of persons, which were stored in the Royal College of Surgeons, had to decide the qualification of such actions. According to the national legislation

of England, a person is considered guilty of theft, if he or she dishonestly appropriates someone else's property with the intention of permanently depriving another person of this property. Despite the fact that the case was criminal, it was interesting for this research, because if one wanted to qualify the possession of embalmed parts of the human body as theft, it was necessary to recognize the latter as property, and the right to them – as the ownership right. If they were not property, then, accordingly, they could not be abducted, so there was no such crime as a theft. In resolving that case, the English court recognized that the dead body or its part might become property, if they had acquired features different from an ordinary corpse (its parts) intended for burial, and therefore could be stolen, which happened in fact [28]. Moreover, such features, indicated in the decision, arise as a result of certain manipulations or the impact of technologies that involve the manifestation of special skills and knowledge. Thus, deciding the criminal case, the court recognized the embalmed parts of the human body as property, and the right to them – as the ownership right.

Subsequently, first the courts of the United States (2008) [29], England (2009) [30], and then the Australian court in 2010 ruled that the biomaterial (semen) submitted for cryopreservation is the item of property and can even be inherited [31]. Moreover, the Court of New North Wales (Australia) recognized the following year that the ownership right arises for such biomaterial even if it is obtained immediately after the death of a person [32]. Although these decisions are not fully covered by the subject matter of this research, but they are interesting by the fact that they recognize the ownership right for the part (material) of the body, separated even after the death of a person.

Parts separated from the body of the deceased were recognized as items of property by the courts of Canada in 2014 [33]. It is obvious that the given decisions indicate the general tendency to expand the list of cases (exceptions) of recognizing the body of the deceased person and its separated parts as property and recognizing the ownership right for them. Moreover, the court even accepted the motion for the compensation of property damage caused by the loss of deposited property in the case of "Yearworth and others v. North Bristol NHS Trust" [30].

#### **Analysis of international norms regarding the ownership right for the dead body and its part.**

It should be noted that international norms practically ignore the direct recognition of the ownership right for the dead body or its separated parts. But, as the legal literature rightly points out, this does not mean that they cannot be considered as items of property in general [34]. Thus, paragraph 8 of the Declaration on Human Organ Transplantation, adopted by the World Medical Assembly in 1987, states that the purchase and sale of human organs for their transplantation is condemned. However, the analysis

of the indicated norm allows us to draw a number of logical conclusions. First of all, the legal purpose of any purchase and sale agreement is the transfer of the ownership right from the seller to the buyer. Therefore, the very fact of its conviction demonstrates that the drafters of the Declaration on Human Organ Transplantation recognize the potential possibility for such a transfer. Secondly, if there is a potential possibility of the ownership right's transfer, the latter must already belong to the alienator. After all, it has been known since the Ancient Rome times that a person can transfer only the own right. Thirdly, purchase and sale is not the only agreement, the purpose of which is the transfer of the ownership right. And the literal interpretation of this norm allows us to state that the Declaration on Human Organ Transplantation condemns only the purchase and sale. This means that other agreements are not condemned and can be concluded, for example, donations, rent, lifetime maintenance, etc.

The World Health Assembly Resolution 44.25 (1991) also calls on countries to prevent the purchase and sale of donor organs for transplantation; and the Art. 22 of the Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin (2002) explicitly prohibits trade in organs and tissues. The need to ban trafficking in organs removed from the human body is established at the level of the Declaration of Istanbul on Organ Trafficking and Transplant Tourism adopted in 2008. The analysis of the content of the above Resolution, the Additional Protocol and the Declaration of Istanbul leads to the conclusion that they also provide the ownership right for separated parts of the body like in the Declaration on Human Organ Transplantation that can be transferred on grounds other than purchase and sale.

A similar approach is observed in the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, approved by the Sixty-third World Health Assembly (2010). Thus, the paragraph 1 of the Guiding Principle 3 states that "...adult living persons may donate organs...". The analysis of the given expression allows us to make a number of consecutive assumptions. First of all, it is obvious that it is about an organ already removed from the human body. Otherwise there is nothing to transfer. It does not exist as an object of law until the organ is separated from the human body, as mentioned earlier. Secondly, if such a transfer is possible, it is obvious that it is lawful, provided that the necessary conditions are met. Thirdly, if such a transfer is lawful, it is clear that the removed organ is lawfully owned by the person who transfers it. And, finally fourth, the monetary or free-of-charge basis implies the presence or absence of counter-provision [35]. If we talk about monetary basis, then one party transfers to the other own benefit and in return receives the benefit of the latter as payment. In case of free-of-charge basis, the party transfers own benefit to the other party, but

does not receive a counter-benefit [36. P. 384]. Since such a type of paid transfer of organs as purchase and sale is condemned and prohibited, as mentioned above, it is obvious that the donation referred to in paragraph 1 of Guiding Principle 3, should be carried out on the basis of the donation agreement. The latter, as we know, provides the transfer of the ownership right for the gift from a donor to a donee, and then the donor should already have such a right at the time of transfer.

The indicated assumptions are confirmed in the WHO Guiding Principle 5 on human cell, tissue and organ transplantation and its commentary. The free provision is opposed to the purchase and sale. And if the latter provides the transfer of the ownership right, then the former should be aimed at achieving the same purpose. Therefore, the ban on purchasing cells, tissues or organs removed from the body for transplantation, or their sale by living persons or by the next of kin for deceased person, but the permission for free provision (donation) indicates that the provider has the ownership right for those objects that are provided.

Thus, the analysis of international norms allows us to state that the separated parts of the human body, including the deceased person are items of property. But all the above acts are functionally aimed at streamlining relations and establishing a legal regime concerning the parts of the human body separated for transplantation. Therefore, it is important to establish the nature of the right to those parts that were separated for a purpose other than their further disposal. To eliminate the indicated gap, we turn to the content of the Convention for the Protection of Human Rights and Dignity in relation to the application of biology and medicine: the Convention on Human Rights and Biomedicine (1997). It is more general and adopted in order to protect the dignity and identity of all human beings and to guarantee to every person – without discrimination – the respect for his or her inviolability and other rights and fundamental freedoms with regard to the application of biology and medicine. Therefore, it is applied not only to organs, cells and tissues removed for transplantation, but also to other cases.

The Article 22 of the Convention on Human Rights and Biomedicine states: “when in the course of an intervention any part of a human body is removed, it may be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures”. The analysis of the given norm allows us to assert that it also assumes the existence of the ownership right to the removed parts, including from a body of the deceased person. In particular, this conclusion is based on the following considerations.

If an organ is removed from a person's body for transplantation, then, as noted before, the ownership right for this organ arises either from a living donor or from a next of kin of the deceased person. Upon its

free-of-charge transfer, the ownership right passes to the person whom this organ is transferred. However, its further use is limited to the intended purpose of this object (for transplantation). At the same time, the Art. 22 of the Convention on Human Rights and Biomedicine allows changing the purpose of further preservation and use of the removed (separated) part of the body, including the deceased person, in terms of observing the appropriate procedures for informing and providing consent to change the purpose. For example, organs were removed (separated) and transferred for transplantation, but later there was a need (expediency) to preserve and use them for research, medical and biological experiments, in the educational process or the production of genetic material for reproductive technologies, etc. Obviously, the change of purpose should not affect the ownership right that has already arisen. Another situation is possible. For example, parts of the body, including of the deceased person, were removed (separated) for the purpose of making bioimplants, conducting scientific research, but in the future there was a need and opportunity to transfer them and use for transplantation. And as mentioned above, the ownership right for them, in the course of transferring organs for transplantation, passes from a donor to a recipient. At the same time, one does not need to explain that the fact of lawful removal, separation and transfer of removed (separated) parts of the human body is the basis for the emergence, transfer and even termination of the ownership right, but not changing the purpose of preservation and use of those parts.

The above suggests that there is the emergence and transfer of the ownership right in other cases. For example, parts of the human body removed (separated) for the purpose of forensic examination or pre-trial investigation are further stored and used as exhibits in forensic museums or in the educational process.

Regarding the definition of the legal status of the body of the deceased person, it is advisable to refer to such international acts as: UN Recommendation “On the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property” (1964), the UN Convention “On the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property” (1970), the UN Recommendation “On the Protection of Movable Cultural Property” (1978). In accordance with paragraph I.1.(a) II of the UN Recommendation “On the Protection of Movable Cultural Property” (1978), movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including such categories of antiquities as funerary remains, mummies. Thus, the human mummy, as well as its part can be attributed to the movable cultural value, but provided that they are the subject of burial.



For example, mummified relics of saints buried in the caves of the Kyiv Pechersk Lavra, mummies of Egyptian pharaohs, etc. It is obvious that not mummified relics are also the objects of burial, and therefore historical (cultural) property. Similar movable cultural property, in accordance with paragraph I.1.(a) V of the same UN Recommendation (1978), are items relating to history, including to the life of peoples and national leaders, thinkers, scientists and artists. That allows us to regard as cultural property not only the mummies which were in burial places, but also in other places. For example, the body of the "Iceman", who lived more than 5,300 years ago, found near the modern Austrian-Italian border North of Bolzano in the Alps. It was not buried, but left at the place of the death. Or the so-called "swamp people", whose bodies were once drowned and then found in peat bogs. Both the "Iceman" and the "swamp people" were mummified as a result of natural processes, but they represent historical property relating to the life of peoples who lived in the area where the bodies were found. Obviously, they are of value from the scientific point of view.

The embalmed bodies of leaders can be also referred to the historical property relating to the life of national leaders and important national events. For example, Lenin for the Russians, Ho Chi Minh for the Vietnamese, Mao Zedong for the Chinese, Kim Il Sung and Kim Jong Il for the North Koreans, and so on. The embalmed body of the world-class scientist and surgeon M. I. Pirogov, in accordance with paragraph I.1.(a)V of the UN Recommendation (1978) is of a historical value relating to the history of natural sciences, as well as with the life of a prominent scientist. The cultural property stated in paragraph A.12. (a) of the Council Regulation (EEC) No.3911 / 92 "On the Export of Cultural Goods" (1992) include samples and exhibits of anatomical collections. For example, the collection "Body Worlds", which is exhibited by German anatomist Gunther von Hagens.

Therefore, the bodies of the deceased people or their parts represent a cultural value under certain circumstances, and in accordance with paragraph II. 3. of the UN Recommendation (1978) such objects may belong both to the state and public law agencies, as well as to individuals and legal entities of private law. Whereas paragraphs III.12.(a), III.13, III.15, III.18, III.19.(a) of the UN Recommendation (1978) provide measures to prevent risks and to control movable cultural property from theft and robberies; since theft and robberies are crimes against property, it is logical to conclude that such cultural property is owned by those to whom it belongs. Another confirmation of the accomplished conclusions is found in paragraph III.14.(c) of the UN Recommendation (1978), which states that Member States should facilitate the protection of collections belonging to individuals by studying the possibility of granting fiscal benefits to those who donate or bequeath cultural property to museums or similar institutions. And if an individual

can bequeath own cultural property to museums or similar institutions, it is obvious that it belongs to the testator on the ownership right.

A more clear position in this regard is expressed in the UN Recommendation "On the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property" (1964). In particular, paragraph II.5 of the UN Recommendation (1964) states that each Member State should take appropriate steps to prevent the illicit transfer of ownership of cultural property. And if such a transfer effected contrary to the rules adopted by each Member State in accordance with paragraph II.7 of the UN Recommendation (1964) should be regarded as legal. Moreover, paragraph III.10 of the UN Recommendation (1964) explicitly states that cultural property may be privately owned, and the next paragraph III. 11. (ii) deals with the transfer of ownership.

Finally, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted at the UN General Conference (1970), also provides the existence of the ownership right to cultural property. Moreover, paragraphs (d) and (e) of the Art. 4 of the Convention explicitly provide the possibility of their freely agreed exchange, gift or lawful purchase, which also indicates the recognition of cultural values as items of property. Thus, if mummies, embalmed bodies, their parts, relics are cultural property, then they belong beneficially owned to persons.

**Discussion.** The accomplished analysis makes it possible to agree with those researchers who believe that there may be the ownership right to the dead body or its separated part [37, 17, 18, 38, 39, 19]. However, some proponents of this point of view assume that the dead bodies or parts separated from them become the items of property only if they have been subjected to some manipulation or the influence of technology that involves the manifestation of special knowledge. For example, such are bony frames, mummies prepared for experimental or scientific purposes, as well as relatively preserved human bodies for exhibition purposes [38], exhibits in anatomical museums [39], etc. One could agree with such an opinion, because most of those objects appear as a result of certain human activities. In particular, these are: the removal of organs for transplantation or for scientific research, medical and biological experiments and for the educational process, artificial embalming or mummification of bodies, etc. At the same time, there is a rather fair and reasonable opinion that the items of property are things "given by the nature" [40. P. 14, 41. P. 54]. And the body of a dead person is the exactly item. Moreover, its mummification can also occur naturally. For example, "Iceman" – as a result of the action of the glacier, "swamp people" – due to the ability of peat to preserve human bodies, etc. And they, as noted above, are cultural values and are owned by those to whom they belong. Obviously, the relics (remains) of saints are such objects.

Thus, there is every reason to believe that the ownership right arises for the dead body and its separated parts. Moreover, they become items of property not only as a result of being subjected to certain manipulations or the influence of technologies that involve the manifestation of special knowledge, but also in cases when they have become suitable for storage and use as a result of natural processes.

The above also suggests that the body of a deceased person becomes the item of property from the moment of death. This assumption is based on the following considerations.

The WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation of 2010 (Principle 5) provide the donation of cells, tissues or organs removed from the deceased body for transplantation by the next of kin. If such a transfer indicates that the grantor has the ownership right for the objects provided, it is logical to assume that the body itself, as the material, and new objects that are formed (removed) from the body, belong to the next of kin for deceased person. Since, the ownership right to a part of the whole indicates the existence of the ownership right to the whole. This explanation allows us to understand the nature of the consent to the removal of an organ from the dead body, the decision to mummify, embalm, cremate, bury or transfer the body for research, medical and biological examinations and use in the educational process.

Obviously, the body of a deceased person or its part is not ordinary things. Therefore, the ownership right for them is limited to: the intended use, terms, the right of relatives to demand respect for the body of the deceased and his burial place, the prohibition of mocking attitude, etc. All these and other restrictions are the motivation for further restriction of this object in circulation or even withdrawal from circulation. But it seems that they do not affect the ownership rights.

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