

C. SPECIFIC TOPICS

C.1 Human Body and its Parts

The definition of human body and the basic principles of its handling might seem completely intuitive. However, there are many specific aspects that make the legal approach to the human body complex and sometimes uncertain.

There is no definition of the human body enshrined in any legal regulation, but the Transplantations Act does define organs, tissues, and cells. One can understand the body as a complex system of these parts,²³¹ while the respective legal regimes for the particular parts and for the whole may differ in some ways.

In order to understand the legal provisions governing the manner of handling the human body, we have to first analyse its nature in legal terms. What is important in this regard is the extra-commerciality of the human body. After dealing with this principal issue, we shall briefly introduce the basic rules for the extraction and use of human body parts.

C.1.1 Legal Status of the Human Body

Section 493 of the Civil Code explicitly defines the essential principle that the “[h]uman body and its parts, even if separated from the body, are not a thing”. While it might theoretically be argued that a body could be the subject of ownership *sui generis*, the law does not recognise this option. The deep and inevitable natural connection between a person and their body renders the very idea of ownership redundant²³² and, arguably, also impractical. There is a long tradition of understanding the protection of the human body as part of personality rights.²³³ This approach is also reflected in the Civil Code, which includes the right to mental and physical

²³¹ See ŠUSTEK, P. Právní status lidského těla a jeho části [The Legal Status of the Human Body and Its Parts]. In ŠUSTEK, P., HOLČAPEK, T. et al. *Zdravotnické právo [Health Law]*. Praha: Wolters Kluwer, 2016, pp. 742–744, or ŠOLC, M. *Právo, etika a kmenové buňky [Law, Ethics and Stem Cells]*. Praha: Wolters Kluwer, 2018, p. 388.

²³² Ibid., p. 390, or POLICAR, R. Lidské tělo [The Human Body]. In TĚŠINOVÁ, J., DOLEŽAL, T., POLICAR, R. *Medicinské právo [Medical Law]*. 2nd ed. Praha: C. H. Beck, 2019, pp. 260–261.

²³³ See ROUČEK, F., SEDLÁČEK, J. a kol. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Svazek I. Díl druhý (§§ 285 až 530) [Commentary on the Czechoslovak General Civil Code and Civil Law Applicable in Slovakia and Carpathian Ruthenia]*. Praha: Právnícké knihkupectví a nakladatelství V. Linhart v Praze, 1935, p. 7.

integrity²³⁴ among the personality rights of an individual. Life and health are also comprised in the demonstrative list of values protected within personality rights.²³⁵

Closely connected with its special legal status is the principle of extra-commerciality of the human body. Internationally, this is guaranteed by Article 21 of the Convention on Human Rights and Biomedicine which states that “[t]he human body and its parts shall not, as such, give rise to financial gain”. The same rule has been introduced in several Czech special laws, including the Transplantations Act.²³⁶

Since it is not possible to freely legally dispose of human body parts, individuals are only allowed to leave parts of their bodies to other persons under the conditions laid down by a special regulation.²³⁷ However, Section 112 of the Civil Code sets out an exemption from this rule as it lists two cumulative conditions under which the legal provisions governing movable objects can be applied to human body parts (even though they theoretically still are not movable things²³⁸); in this case, they may be relinquished to another person, even for consideration. Such a regime applies to body parts that can be “*painlessly removed without anaesthesia and that are*”, at the same time, “*naturally restored*”. The said provision in the Civil Code explicitly mentions human hair, which is regularly bought by wig manufacturers.

Strictly speaking, both these criteria also apply to sperm, although its legal classification arguably needs to reflect the crucial function it plays in human reproduction. The exclusion of sperm could also be supported by the Explanatory Report to Article 21 of the Convention on Biomedicine, according to which an exception very similar to the one enshrined in Section 112 of the Civil Code applies to “*such products as hair and nails, which are discarded tissues, and the sale of which is not an affront to human dignity*”.²³⁹ Human sperm intended for use in artificial reproduction procedures definitely does not represent a discarded tissue and its dignified handling is a much more complex issue than, for example, the treatment of hair or nails.

We believe that there is no rationale behind excluding human blood and its components from the category of body parts. The law does not make any such distinction. The fact that blood is liquid should not be relevant in this regard; after all, the only liquid substance is actually blood plasma, while all other blood components are solid structures, even if very small. While some authors argue that

²³⁴ Sections 91 ff. of the Civil Code.

²³⁵ Section 81(2) of the Civil Code.

²³⁶ Section 28 of the Transplantations Act. Cf. also part C.5 below.

²³⁷ Section 112 of the Civil Code.

²³⁸ Nevertheless, “[p]robably in order not to disturb the general principle that even separated body parts are not ordinary property, the law maintains a fine distinction in stipulating that such objects are to be seen or considered as movable things, but not that they are such things. But the end result is much the same.” HOLČAPEK, T. Body Parts and Body Products: A Continuing Legal Debate. *Czech Yearbook of Public & Private International Law*, 2020, vol. 11, p. 406.

²³⁹ Explanatory Report to the Convention on Human Rights and Biomedicine; paragraph 133.

blood can be removed from the body,²⁴⁰ the same is true of solid tissues. Blood is crucial for the functioning of the human organism — the distribution of oxygen and other physiological functions, i.e. functions enabling the body to live, are the very purpose of its existence.²⁴¹

Human embryo (or foetus) is considered a part of the mother's body,²⁴² even though its legal protection increases with the foetal development and is very strong during childbirth.²⁴³

The regulation of human body parts also applies to objects originating in the human body,²⁴⁴ especially waste products. Perhaps most importantly, it is prohibited to use these in an unusual manner without the given person's explicit consent. Such consent is also required for their use for medical, research and scientific purposes.²⁴⁵ This can actually be a highly practical problem, especially in view of the growing use of faecal transplantation for the treatment of some antibiotic resistant bacterial infections or autoimmune diseases.²⁴⁶ The use of such body products represents an interference with the physical integrity of an individual.²⁴⁷ Any such action must respect the individual's autonomy of will as well as hygiene requirements²⁴⁸ and good morals.²⁴⁹

²⁴⁰ See Radek Polícar's thoughts on the matter, although he also conceives blood as part of the human body. POLICAR, R. Lidské tělo [The Human Body]. In TĚŠINOVÁ, J., DOLEŽAL, T., POLICAR, R. *Medicinské právo [Medical Law]*. 2nd ed. Praha: C. H. Beck, 2019, p. 260.

²⁴¹ Ibid., p. 260.

²⁴² See a *contrario* Section 23 of the Civil Code: "An individual has legal personality from birth to death."

²⁴³ See ŠUSTEK, P. Balancing the Interests of Pregnant Woman and Child During the Childbirth. *Czech Yearbook of Public & Private International Law*, 2020, vol. 11, pp. 379–388.

²⁴⁴ Section 111(3) of the Civil Code: "The same applies by analogy to what originates in the human body as for parts of the human body."

²⁴⁵ Section 111(2) of the Civil Code: "A removed part of a person's body may be used for medical, research or scientific purposes during his or her lifetime, provided that he or she has given his or her consent. The use of a removed part of a person's body in an unusual manner always requires their express consent."

²⁴⁶ See for example POLICAR, R. Lidské tělo [The Human Body]. In TĚŠINOVÁ, J., DOLEŽAL, T., POLICAR, R. *Medicinské právo [Medical Law]*. 2nd ed. Praha: C. H. Beck, 2019, pp. 260–261.

²⁴⁷ See DOLEŽAL, T. Komentář k § 112 [Commentary to Section 112]. In MELZER, F., TĚGL, P. et al. *Občanský zákoník – velký komentář. Svazek I. § 1–117 [Civil Code. Large Commentary. Volume I. Sections 1–117]*. Praha: Leges, 2013, p. 626.

²⁴⁸ Section 111(1) of the Civil Code: "A person whose body part has been taken away has the right to ascertain how it was treated. It is prohibited to dispose of a removed part of the human body in a way that is undignified for a human or in a way that endangers public health."

²⁴⁹ See ŠUSTEK, P., HOLČAPEK, T. Komentář k § 111 [Commentary on Section 111]. In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I [Civil Code. Commentary. Volume I]*. 2nd ed. Praha: Wolters Kluwer, 2020, p. 404.

C.1.2 Work and Skill Exception

The “work and skill exception” is a concept known originally in common law countries,²⁵⁰ which later expanded worldwide. It can be broadly defined as a principle that a person who lawfully applies their work and skill to a certain object will acquire property rights to the object created as a result of that work and skill, even though it would not otherwise constitute property.²⁵¹ In other words, if the human body or its part is processed through qualified work, its legal status changes and it becomes the object of property rights.

In the Czech Republic, the work and skill exception might be understood as principle of interpretation. It is not entirely clear to what extent the work and skill exception can be used in Czech law, but it is reasonably assumed that it applies at least to some results of technical processing.²⁵² Some authors claim that all such products are considered movable things.²⁵³

A principle similar to the work and skill exception is embodied in the Explanatory Report to Article 21 of the Convention on Biomedicine, which states: “*technical acts (sampling, testing, pasteurisation, fractionation, purification, storage, culture, transport, etc.) which are performed on the basis of these items may legitimately give rise to reasonable remuneration. For instance, this Article does not prohibit the sale of a medical device incorporating human tissue which has been subjected to a manufacturing process as long as the tissue is not sold as such. Further, this Article does not prevent a person from whom an organ or tissue has been taken from receiving compensation which, while not constituting remuneration, compensates that person equitably for expenses incurred or loss of income (for example as a result of hospitalisation).*”²⁵⁴ Rules for compensating the costs reasonably, economically and demonstrably incurred by the donor in connection with the donation are also encompassed in several Czech special laws.²⁵⁵

²⁵⁰ It was first developed in case law of the Australian Supreme Court in 1908. See TAYLOR, R. Human Property: Threat or Saviour? *Murdoch University Electronic Journal of Law*. 2002, Vol. 9, No. 4. Also available at: <<http://www.murdoch.edu.au/elaw/issues/v9n4/taylor94.html>>.

²⁵¹ See BENNETT MOSES, L. The Problem with Alternatives: The Importance of Property Law in Regulating Excised Human Tissue and In Vitro Human Embryos. In GOOLD, I., GREASLEY, K., HERRING, J., SKENE, L. et al. *Persons, Parts and Property. How Should We Regulate Human Tissue in the 21st Century?* Oxford, Portland: Hart Publishing, 2016, p. 203.

²⁵² See ŠOLC, M. Ōtzi, Irský obr a další ve svĕtle práva: právní povaha a standard důstojného zacházení se zemřelým lidským tělem [Ōtzi, Irish Giant, and Others in the Light of the Law: the Legal Status and Standard of Dignified Dealing with the Deceased Human Body]. *Časopis zdravotnického práva a bioetiky*. 2019, Vol. 9, No. 2, p. 56.

²⁵³ See VALUŠ, A. Komentář k § 112 [Commentary on Section 112]. In PETROV, J., VÝTISK, M., BERAN, V. et al. *Občanský zákoník. Komentář [The Civil Code. Commentary]*. 2nd ed. Praha: C. H. Beck, 2019, p. 188.

²⁵⁴ Explanatory Report to the Convention on Biomedicine; paragraph 132.

²⁵⁵ See Section 28b of the Transplantations Act (regarding organ donation), Section 7 (1)(b) of the Act No. 296/2008 Coll., on human tissues and cells, or Section 11 of the Specific Health Services Act (regarding gamete donation).

One of the cases where such costs are compensable is that of a donation of blood for the purpose of manufacturing blood derivatives or use in humans. The compensation is limited to 5% of the minimum wage for each donation (in 2022, 5% of the minimum wage was CZK 810, which is approximately EUR 32). Blood plasma donations are very common in the Czech Republic and the collection centres generally automatically provide the highest possible compensation. Since blood plasma may be donated every two weeks, the donor can “earn” up to 10% of the minimum wage every month. It could be argued that the practice effectively constitutes dissimulated trade with blood plasma, even though it technically takes place in line with the law. Once the plasma is processed, it can be sold for further processing, especially in the pharmaceutical industry.

The level of technical processing sufficient to change the legal status of its result is not defined in any legal or other document. It is probably not possible to provide an exact definition in view of all the potential modalities of processing. It might thus be difficult to determine in individual cases whether a certain processed body part should be considered a movable thing. For example, there exist tissue catalogues (e.g. one issued by the National Cell and Tissue Centre in Brno) that offer various processed human body parts for research and pharmaceutical purposes for set prices. The legality of such a practice fully depends on whether the processing is significant enough to change the legal status of the body parts or whether it represents a technical act within the meaning of the above Explanatory Report to the Convention on Biomedicine.²⁵⁶

Nevertheless, the work and skill exception does not completely rule out that personality rights might be vested in the person from whom the original body part was taken. If the result of technical processing were used to the detriment of such a person, for example to ridicule them or to expose their privacy, they might be able to sue for the infringement of their general personality right.²⁵⁷

C.1.3 Exception for Deceased Bodies: the Criterion of Individual Person

The Civil Code makes it clear in Section 92(1) that “[t]he human body remains under legal protection even after the death of the individual. It is prohibited to deal with the human corpse or human remains in a manner undignified for the deceased person”. The protection of the deceased human body, along with the prohibition

²⁵⁶ See ŠUSTEK, P., ŠOLC, M. Selling and Owning Human Body Parts in the Light of Human Rights: the Ideal and the Current Practice in the Czech Republic. In ŠTURMA, P., MOZETIC, V. A. et al. *Business and Human Rights*. Passau, Berlin, Praha: rw&w Science & New Media, 2018, pp. 202–203.

²⁵⁷ See HOLČAPEK, T. Body Parts and Body Products: A Continuing Legal Debate. *Czech Yearbook of Public & Private International Law*, 2020, vol. 11, pp. 406–407.

of any interference with physical integrity of another person without their consent and the prohibition of any financial gain received for dealing with the human body, represent the basic principles of the inviolability of a person as guaranteed by Section 91 of the Civil Code.²⁵⁸

The actual meaning of undignified dealing with a body depends on the contemporary cultural and social understanding of this concept and might evolve in time. For example, certain new methods of burial, including human body composting, have become increasingly popular in recent years. The deceased person may have opted for such an unorthodox disposal of their body or such a decision may have been made by their close ones if the deceased did not express their wish in this regard.²⁵⁹ Every burial must comply with a relatively strict public law regulation, mainly that encompassed in the Funeral Services Act. For example, a body may only be buried in a public burial ground, or in a non-public burial ground of religious orders or other private societies. Any burial must naturally also comply with hygiene standards. Nevertheless, provided that these public law requirements are met, many new forms of burial can arguably be considered to be in line with good morals and the public order, even if their morality might have been seriously questioned in the past. On the other hand, cannibalism and other forms of body disposal contrary to some of the core moral beliefs of contemporary society would be illegal in view of their contradiction with good morals, and perhaps even public order. A problem arises in cases where there is no consensus in society regarding a certain practice, such as public exhibitions of real human bodies conserved through the plastination technique²⁶⁰ or some other highly controversial practices.

However, not all human body parts are excluded from the category of things. This would, in fact, be highly impractical: among other consequences, the total exemption of all human bodies would make it impossible to maintain certain widespread practices such as loans or donations of many archaeological exhibits among research and educational institutions, museums and similar entities. Moreover, the fact that their theft may constitute a criminal offence is actually beneficial in terms of their

²⁵⁸ See Explanatory Report to the Civil Code, Special Part, on Sections 91 to 103.

²⁵⁹ See Section 114(1) of the Civil Code: “*An individual may decide on the form of their funeral. In the absence of an individual’s express decision, the form of funeral shall be decided by the spouse of the deceased, and in the absence of a spouse, by the children of the deceased; in the absence of children, the decision shall be made by the parents and, in their absence, by the siblings of the deceased; if they are not alive, the decision shall be made by their children and, in the absence of their children, by any close person; in the absence of any of these persons, it shall be made by the municipality in whose territory the individual died.*”

²⁶⁰ See ŠUSTEK, P., HOLČAPEK, T. Komentář k § 92 [Commentary on Section 92]. In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I [Civil Code. Commentary. Volume I]*. 2nd ed. Praha: Wolters Kluwer, 2020, p. 338, or ŠOLC, M. *Ötzi, Irský obr a další ve světle práva: právní povaha a standard důstojného zacházení se zemřelým lidským tělem [Ötzi, Irish Giant, and Others in the Light of Law: the Legal Status and Standard of Dignified Dealing with the Deceased Human Body]*. *Časopis zdravotnického práva a bioetiky*. 2019, Vol. 9, No. 2, pp. 47–48, 61–62.

protection. In these instances, certain human bodies and their parts are *de facto* dealt with as things.²⁶¹

A crucial line of interpretation in this context comes from the influential commentary on the then-applicable Civil Code, written by professors František Rouček a Jaromír Sedláček in the 1930s: “*the human body, even as a corpse, is not a thing where it is appropriate to see in it a body of a certain deceased person (to this extent, the heirs are vested with a personality right). Where this is not the case, even a corpse is a thing (for example, corpses from ancient times, such as mummies and prehistoric finds, as well as a corpse donated to an anatomical institute, a skeleton and other anatomical preparations)*”.²⁶² The same criterion was later adopted by the Supreme Court in its decision of 15 December 2005, 22 Cdo 2773/2004. It can be assumed that it still continues to apply today.²⁶³

The criterion is admittedly quite vague: an assessment of whether “*it is appropriate to see in [the corpse] a body of a certain deceased person*” will always be somewhat arbitrary. The solution is easier in terms of civil law, since after an individual’s death, the protection of their personality rights may be claimed by any of their close persons.²⁶⁴ If there is nobody who could be considered a person close to the deceased — and who would reasonably consider themselves such — then no one can claim this right.

However, the problem is much more complicated in terms of protection under public law. The wide scope of possible interpretations of the criterion cited above opens a number of critical questions. Should this problem always be decided intuitively, or should more detailed criteria be defined? If the latter is true, what should these criteria be?

One of the most important issues in this regard is the importance that should be attached to the time elapsed from the person’s death. Should the mere fact that the

²⁶¹ See ŠOLC, M. Ötzi, Irský obr a další ve světle práva: právní povaha a standard důstojného zacházení se zemřelým lidským tělem [Ötzi, Irish Giant, and Others in the Light of Law: the Legal Status and Standard of Dignified Dealing with the Deceased Human Body]. *Časopis zdravotnického práva a bioetiky*. 2019, Vol. 9, No. 2, p. 50, or KINDL, T., DAVID, O. Komentář k § 493 [Commentary on Section 493]. In ŠVESTKA, J., DVORÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I [Civil Code. Commentary. Volume I]*. Praha: Wolters Kluwer, 2014, p. 1165.

²⁶² ROUČEK, F. Komentář k § 285 [Commentary on Section 285]. In ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Svazek I. Díl druhý (§§ 285 až 530) [Commentary on the Czechoslovak General Civil Code and Civil Law Applicable in Slovakia and in Subcarpathian Ruthenia. Book I. Second Part (Sections 285 to 530)]*. Praha: Právnické knihkupectví a nakladatelství V. Linhart v Praze, 1935, p. 7.

²⁶³ See ŠUSTEK, P. Právní status lidského těla a jeho částí [The Legal Status of the Human Body and Its Parts]. In ŠUSTEK, P., HOLČAPEK, T. et al. *Zdravotnické právo [Health Law]*. Praha: Wolters Kluwer, 2016, p. 393, or ŠOLC, M. Ötzi, Irský obr a další ve světle práva: právní povaha a standard důstojného zacházení se zemřelým lidským tělem [Ötzi, Irish Giant, and Others in the Light of Law: the Legal Status and Standard of Dignified Dealing with the Deceased Human Body]. *Časopis zdravotnického práva a bioetiky*. 2019, Vol. 9, No. 2, pp. 50–51.

²⁶⁴ See Section 82(2) of the Civil Code.

person died long time ago result in a lower level of protection of their body? Can this protection actually wane with time?

Another fundamental question is that of the relevance of our knowledge — or lack of knowledge — of the person's identity. This arguably should not be necessary as such a requirement would exclude the protection of unidentified bodies. On the other hand, the reason why some corpses are handled is **precisely that we know** to whom they belonged: for example, the bodies of famous historical figures, or relics in a very specific religious context. How should the law approach these cases? Should it aim at what is considered a dignified treatment today, or rather at what these persons might have probably wished for during their lifetime?²⁶⁵

These and other questions are very difficult (if not impossible) to answer and individual decisions can only be made by the court; however, these questions are no easier for a judge.²⁶⁶ Nevertheless, the individual person criterion represents a useful and arguably fair normative framework for dealing with deceased human bodies.

C.1.4 Procurement and Use of Human Body Parts

The Health Services Act regulates the procurement and use of human body parts in general.²⁶⁷ The requirements on the procurement of human body parts (including organs, tissues and cells) are set out in Section 80(1) of the Health Services Act. This measure can only be taken for the purposes of providing health care and for scientific, research or teaching purposes in health care. Alternatively, body parts may be collected for another purpose where this is permitted by another legal regulation. Be it as it may, this can only be carried out by a health service provider in a health facility. Furthermore, such procurement is not allowed in cases where it could prevent an autopsy from serving its purpose, especially where the death is suspected to have been the result of an a criminal offense or suicide.²⁶⁸

Technical procedures must comply with special rules,²⁶⁹ where the Transplantations Act and the Human Tissues and Cells Act are especially important in this regard.

²⁶⁵ For an analysis and proposal of answers to these questions, cf. ŠOLC, M. *Ötzi, Irský obr a další ve světle práva: právní povaha a standard důstojného zacházení se zemřelým lidským tělem [Ötzi, Irish Giant, and Others in the Light of Law: the Legal Status and Standard of Dignified Dealing with the Deceased Human Body]*. *Časopis zdravotnického práva a bioetiky*. 2019, Vol. 9, No. 2, pp. 45–67.

²⁶⁶ See ŠUSTEK, P., HOLČAPEK, T. *Komentář k § 92 [Commentary on Section 92]*. In ŠVESTKA, J., DVOŘÁK, J., FIALA, J. et al. *Občanský zákoník. Komentář. Svazek I [Civil Code. Commentary. Volume I]*. 2nd ed. Praha: Wolters Kluwer, 2020, p. 338.

²⁶⁷ For a more detailed overview of the relevant regulation in the Health Services Act, cf. ŠOLC, M. *Odběr a použití části lidského těla [Procurement and Use of a Human Body Part]*. In ŠUSTEK, P., HOLČAPEK, T. et al. *Zdravotnické právo [Health Law]*. Praha: Wolters Kluwer, 2016, pp. 395–401.

²⁶⁸ Section 81(2)(b)(3) of the Health Services Act.

²⁶⁹ Section 80(2) of the Health Services Act: “*The procedure in collecting parts of a deceased body and their use shall respect the aim of their use in accordance with this Act or other legal regulations governing the manner of handling human organs, tissues or cells.*”