

“THIS IS MY KIDNEY, I CAN DO WHAT I WANT WITH IT” – PROPERTY RIGHTS AND OWNERSHIP OF HUMAN ORGANS*

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SUMMARY

If I am not a slave, nobody else owns me and I therefore must own myself. This is but philosophical speculation and not the law. According to the legal view, not only does no one own me or my body parts, but neither do I. Legal conceptions of “property” do not extend to self-ownership. A vacuum in law concerning the ownership of body parts exists and the only responses to questions concerning this type of ownership remain philosophical and *obiter dicta* in reported cases. This article explores property rights in human bodies and body parts in order to establish the position in law of excised human organs removed for the use in transplantation. It is necessary to highlight the historical progression in determining property rights in human body parts, but it should be borne in mind that the majority of laws and court decisions took place in an era when organ transplants were still in an experimental phase. For the sake of brevity foreign legislation and court judgments in only two common law countries will be scrutinised and compared to the current position in South Africa. The reasons why ownership in human organs are important will also be indicated.

1 INTRODUCTION

How often do we hear: “It’s my body and I’ll do with it what I want to” or “leave me alone, you do not own me!” Some writers reason that if I am not a slave¹ nobody else owns my body, and therefore I must own myself.² This is but philosophical speculation and not the law. According to the legal

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¹ Slavery was outlawed in the 19th century, yet it is still continuing illegally in the Eastern World, Africa and South America. See Scott *The Body as Property* (1981) 26-27.

² Grubb “I, Me, Mine’: Bodies, Parts and Property” in Kennedy and Grubb (eds) *Medical Law* 3ed (2000) 1785; and see Harris “Who Owns My Body?” 1996 16 *Oxford Journal of Legal Studies* 62-65.

perspective, not only does no outsider own me or my body parts, but neither do I. Legal conceptions of “property” do not extend to self-ownership.³

Currently organs are transplanted, blood transfused or used for testing alcohol consumption, human cells are used by biotechnology companies in the production of cell lines, and donated sperm and ova are used for *in vitro* fertilisation, yet removed human tissue has no status in law – no proprietary rights apply.⁴ It seems as if “in the absence of specific empowering legislation, such tissue could not be gifted, bought or sold, stolen or converted, bailed or patented”.⁵ A vacuum in law concerning the ownership of body parts has thus developed and the only responses to questions concerning this type of ownership remain philosophical arguments and *obiter dicta*⁶ in reported cases.

“Without recognition of property rights, a vacuum exists in the law, whereby biological materials, once separated from a human body, are freely available to the first possessor. The law should insure that instead of such a vacuum, a remedy exists in respect of non-consensual detachment. The creation and subsequent protection of property rights offer such a remedy.”⁷

In this article property rights in human bodies and body parts are explored in order to establish the position in law of excised human organs⁸ removed for the use of transplantation. Both the “ownership” of an organ taken from a living person (a kidney)⁹ as well as organs removed from brain dead¹⁰ patients will be discussed. As there are very few specific cases addressing

³ Grubb 1785.

⁴ Magnusson “Proprietary Rights in Human Tissue” in Palmer and McKendrick (eds) *Interests in Goods* (1993) 237. See also Herring *Medical Law and Ethics* (2006) 391: “Are our bodies our property? – The legal position is far from clear. It is the safest to say that there are some respects in which the body can be treated as property and other respects where it cannot.” A property lawyer, Gray in “Property in Thin Air” 1991 252 *Cambridge Law Journal* 198, admits that property law does not apply in this context: “Amongst the challenges of the 21st century will be the question whether such ‘property’ claims are to be allowed in relation to ... human body parts and cells ...”

⁵ Magnusson 237.

⁶ Magnusson 242. See also Herring 392; and Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (2007) 26: “Despite the antiquity of the ‘no property’ principle, analysis of the early English authorities suggests that early juridical support for the principle primarily took the form of *obiter dicta*.”

⁷ Hardcastle 148.

⁸ Organs in this article refer to kidneys, a heart, a heart-lung, pancreas, and the liver, in other words vital organs without which a person cannot live. See s 1 of the National Health Act 61 of 2003.

⁹ Although parts of a liver lobe can also be used from a living donor, it is not yet common practice in South Africa.

¹⁰ For a discussion on the meaning and determining of brain death see Slabbert *Handeldryf met Menslike Organe en Weefsel vir Oorplantingsdoeleindes* (unpublished LLD dissertation UFS (2002)) 8-12. Note also that the Human Tissue Act 65 of 1983 does not recognise brain death as death, s 7(2) describes how death should be determined for the removal of organs for transplantation. S 1 of the National Health Act 61 of 2003 recognises death as brain death. See also Munson “Organ Transplantation” in Steinbock (ed) *The Oxford Handbook of Bioethics* (2007) 221: “the dead-donor rule ... the moral and social cornerstone of the practice of organ transplantation”.

the issue of ownership in removed human organs, the discussion will focus mainly on removed human tissue¹¹ in general.

In order to determine the status of ownership in human organs for transplantation it is necessary to highlight some historical landmarks in the progression in determining property rights in bodies and body parts. It should, however, be kept in mind that the majority of laws and the *ratio decidendi* of court cases come from an era when organ transplants were still experimental and transplants were not as common as they are today.¹² For brevity's sake foreign legislation and court judgments in only two other common law countries, England and the United States of America, will be scrutinised and compared to the current position in South Africa.

The possible misuse of removed human tissue will be highlighted and the importance of recognition of property rights in organs will be indicated. It is only after the vesting of property rights in an organ that such an organ can be an object to be bought or sold¹³ in relation to a transplant. It will also be shown that if organ sales could be legitimised it might help with the curbing of the ever increasing demand for transplantable organs.¹⁴

2 HISTORICAL DEVELOPMENTS

The common law defines a thing (*res*) in terms of its characteristics as a corporeal or tangible object external to persons and which is, as an independent entity, subject to juridical control by a legal subject to whom it is useful and of value.¹⁵ Therefore the body of a human being does not constitute a thing in the legal sense, as *res* was deemed to be external to

¹¹ See s 1 of the National Health Act 61 of 2003: “Tissue means human tissue and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete.”

¹² Gray 1991 252 *Cambridge Law Journal* 296 fn 2 introduces the notion of “relativity of property” which he says “is not merely a matter of relativity to time and place. The range of resources in respect of which ‘property’ may be asserted is variable with the advance of modern technology”.

¹³ For a proposal on how the sale of organs should take place see Slabbert and Oosthuizen “Establishing a Market for Human Organs in South Africa Part I: A Proposal” 2007 *Obiter* 44; Slabbert and Oosthuizen “Establishing a Market for Human Organs in South Africa Part II: Shortcomings in Legislation and the Current System of Organ Procurement” 2007 *Obiter* 304; and see also Blackbeard “Organ Donation for Profit” 2002 *Obiter* 52.

¹⁴ *Eg*, in the UK in 2004, 7 236 patients were on the waiting list for a kidney transplant. In 2003-2004, 426 people died while waiting for a transplant, 4% of those waiting – Herring 364. The WHO states in the Preamble to its Guiding Principles: “A feature of organ transplantation since its commencement has been the shortage of available organs. Supply has never satisfied demand ...”

¹⁵ Van der Walt and Pienaar *Introduction to the Law of Property* 2ed (1997) 19.

man.¹⁶ The human body and its parts were classified as *res extra commercium* (things outside the commercial sphere).¹⁷

The word “property” derives from the Latin *proprius* (one’s own) and is similar to the French word *propre* which means close or near, one’s own.¹⁸ The legal meaning of property is based on individual autonomy. It describes a relationship between a person and a thing, enabling the proprietor to exercise control over that thing against the rest of the world.¹⁹ Both the philosophers John Locke and Immanuel Kant were of the opinion that persons cannot be property.²⁰ Kant arguing from the notion that we cannot make use of our freedom except through the body, claims that it is impossible to be both a free person and a thing.²¹ Locke emphasised that a person as the true subject of rights and duties is free from possession by others but he believed in self-ownership of the person as a whole.²²

¹⁶ *D 9 2 13 pr.*, De Groot *Inleiding tot de Hollandsche Rechtgeleerdheid* 21 3. See also Gracia “Ownership of the Human Body: Some Historical Remarks” in Have and Welie (eds) *Ownership of the Human Body* (1998) 67. This view is controversial, see Radin “Property and Personhood” May 1982 *Stanford Law Review* 957. In the present article the issue of personhood and property and of the justification of property cannot be addressed. Here a rather pragmatic approach is followed by concentrating on the existing legal position with reference to the property position of human organs.

¹⁷ Van der Merwe *Sakereg* (1989) 22-29; and see also Blackbeard 2002 *Obiter* 62-63.

¹⁸ Slabbert “Human Bodies in Law: Arbitrary Discursive Constructions?” 2008 19 *Stellenbosch Law Review* 85. See also Gray 1991 252 *Cambridge Law Journal* 268 he talks of the “excludability” which for him is the criterion for property and which he develops into a tool to decide between property and “commons”.

¹⁹ Slabbert 2008 19 *Stellenbosch Law Review* 85.

²⁰ See also Cherry *Kidney for Sale by Owner: Human Organs, Transplantation, and the Market* (2005) Chapter 4. Cherry carefully examines arguments against a market for body parts based on the moral views of John Locke, Immanuel Kant and Thomas Aquinas and he shows their claims to be an oversimplification. This view boils down to the argument that parts of a person cannot be seen as property because that would imply being subject (proprietor) and object (property) at the same time. Slabbert 2008 19 *Stellenbosch Law Review* 85 outlines various different forms of this argument. The author cannot pursue this theme here, but has to point out that the argument is not as straightforward as it seems. The switching of perspectives by a person is part and parcel of being a person and of human relationships. A person as subject experiences, for example, an emotion. It is, however, possible for this subject to objectify him- or herself and to give a description of this emotional experience. For the doctor to be able to attend to a patient’s complaint, he or she has to objectify that patient, but the patient also has to objectify him- or herself not only to be able to report sick experiences and symptoms but also be able to make sense of the doctor’s evaluation and suggested procedures. The legal system cannot work without this phenomenon of self-objectification in testimony. In short, being both subject and object is not strange to a person. To objectify organs is a natural thing for any heart or kidney patient; for such patients talk about such an organ and talk about the wrist-watch recently bought, does not necessarily differ logically. Property talk in this context is, however, more in the vein of Gray’s 1991 252 *Cambridge Law Journal* exclusivity model than in terms of entitlements or the enjoyment of benefits.

²¹ “Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is, would be self-contradictory; for in so far as he is a person he is a subject in whom ownership of things can be vested, he would be a thing over which he could have ownership” Immanuel Kant *Lectures on Ethics* L Infield (trans) (1930) 165. See also Dreyer (transl) *Immanuel Kant: Fundering vir die metafisika van die sedelikheid* (1997). See also Slabbert 2008 19 *Stellenbosch Law Review* 85; and Freeman “Taking the Body Seriously” in Stern and Walsh (eds) *Property Rights in the Human Body* (1997) 13.

²² “Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. Locke *Two Treatises of*

Separated bodily materials are different from complete bodies. Common law has traditionally regarded separated bodily materials as *res nullius* and the first person who obtained physical control over it acquires exclusive legal control and possession of it by means of *occupatio*.²³

There is a difference between the common law and Roman law notion of ownership.²⁴ In Roman law a person exercised *dominium* over an item they were entitled to. They could claim the thing by means of *vindicatio*. This required the person to show that the thing was his and there was no necessity to name a defendant. The owner was the person who claimed a thing through this action; possession was a matter of fact.²⁵

In common law a distinction is made between ownership and possession. Possession is something less than ownership. Ownership is the largest “bundle of rights” known to property law.²⁶ These rights include the right to possess, the right to exclude, the right to use, the right to dispose, the right to enjoy fruits or profits and the right to destroy. A person does not need to possess all the rights in the “bundle” in order to have ownership of an object.²⁷ From this follows that if a person owns his or her body he or she may use it and manage it, or mismanage it by smoking or drinking excessively. The question arises whether the body as a whole, or parts thereof, could be bought or sold. People specifically opposed to property rights in the body base their arguments on the lack of this essential attribute of property, namely that it could *not* be bought or sold. However, as noted earlier, not all the rights in the “bundle” need to be possible in order to have ownership of an object.

More important than the possibility to buy and sell a body or a part thereof is the right to exclude others from it. This is generally present in relation to the complete human body; it can therefore be argued that on this basis property rights in a body by the look of it should exist²⁸ but unfortunately it is not the case.

The oldest authority for the “no property” rule is the 1614 United Kingdom’s case of *Haynes*.²⁹ Haynes was convicted of stealing burial sheets. The court noted that the corpse itself was not capable of having property rights in the sheets; this appears to have been misunderstood by later commentators to mean that a corpse itself was not capable of being

Government, Second Treatise, ch V par 27, 287-288. See also Slabbert 2008 19 *Stellenbosch Law Review* 85; and Resnik “The Commodification of Human Reproductive Materials” 1998 24 *Journal of Medical Ethics* 388-389.

²³ Roman-dutch writers were of the opinion that no man was master of his own bodily members (*dominus membrorum suorum*) Strauss *Toestemming tot Benadeling as Verweer in die Strafrege en Deliktereg* (unpublished LLD dissertation Unisa (1961)) 369.

²⁴ Griggs “The Ownership of Excised Body Parts: Does an Individual have the Right to Sell?” 1994 1 *Journal of Law and Medicine* 224.

²⁵ Griggs 1994 1 *Journal of Law and Medicine* 224.

²⁶ See *Brotherton v Cleveland* 923 F 2d 477,478 (6th Cir 1991). See also Griggs 1994 1 *Journal of Law and Medicine* 224.

²⁷ Wagner “Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology” 1995 33 *Duquesne Law Review* 933.

²⁸ Wagner 1995 33 *Duquesne Law Journal* 934.

²⁹ Magnusson 239, see also Blackbeard 2002 *Obiter* 56; and Price *Legal and Ethical Aspects of Organ Transplantation* (2000) 123.

property.³⁰ Coke³¹ reports the case correctly but goes further to state that the burial of a cadaver (*caro data vermibus* – flesh given to worms) is *nullius in bonis*, in other words it belongs to no one and therefore according to those times, belonged to the ecclesiastical jurisdiction (the church).³² The “no property” rule thus arose from inadequate reporting and misreading of early cases³³ but soon became the traditional common law view – there are no property rights in the human body.³⁴ The application of this view meant that cadavers could neither be owned nor stolen. Nowadays statutory intervention regulates the use of corpses but still legislation does not create property rights in bodies or part of it.³⁵

3 LEGISLATION AND CASE LAW IN OTHER COUNTRIES

3.1 United Kingdom

As mentioned above Britain has adopted the “no property” rule in bodies since the seventeenth century³⁶ and despite the enactment of the Human Tissue Act 2004, it remains uncertain what property rights could be claimed over bodies and body parts. Separated body parts though, could under certain circumstances, if skill and labour had been devoted thereto, be owned by an individual. This view was confirmed in 1998 in *R v Kelly*³⁷ and more recently in *Re Organ Retention Group Litigation*.³⁸ In the *Kelly* case a technician who worked at the Royal College of Surgeons removed body parts and gave them to an artist who used them for sculptures (moulds). They (both the technician and the artist) were charged with theft. They argued that parts of corpses are not property and could therefore not be stolen under the British Theft Act. The Court of Appeal held that “parts of a corpse are capable of being stolen ... if they have acquired different attributes by virtue of the application of skill”. In this case the body parts had been preserved and used as specimens. It therefore became fit for proprietary rights. The Court of Appeal went further and suggested that if

³⁰ Magnusson 239. See also Davies and Naffine *Are Persons Property?* (2001) 106-108.

³¹ Sir Edward Coke in his *Institutes* (3 Co. Inst. 203).

³² Magnusson 239 fn 21. See also Price 123, Mason and Laurie “Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey” 2001 *Modern Law Review* 713.

³³ Magnusson 242.

³⁴ *Doodeward v Spence* 1908 6 CLR 906, confirmed in *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644, [2004] 3 FCR 324.

³⁵ Hardcastle 27. In the United Kingdom the Anatomy Act 1832 was replaced by the Anatomy Act 1984.

³⁶ See *R v Lynn* (1788) 2 T.R. 733; 100 E.R. 394; *Williams v Williams* (1882) 20 Ch. D. 659; and *R v Prince* (1884) 12 Q.B. 247. See also Scott “The Human Body: Belonging and Control” 1990 22 *Transplantation Proceedings* 1002-1003.

³⁷ [1998] 3 All ER 714. See also Grubb “Theft of Body Parts: Property and Dead Bodies” 1998 6 *Medical Law Review* 247 for a discussion of the case.

³⁸ [2004] EWHC 644; [2005] QB 506.

parts became different beyond their mere existence, they could become property.³⁹

This view was underlined in *Dobson v Northern Tyneside Health Authority*.⁴⁰ In this case the family of a deceased woman, who died of a brain tumour, requested a sample of her brain in order to determine the real cause of her death. They were told that the brain had been removed and was disposed of. The family then went to court and claimed that the hospital had had no right to do that. The Court of Appeal found against them. The family, according to the judges, had no right of possession or ownership in respect of either the brain or the corpse. An executor or administrator has a limited right to a corpse but only possesses it with a view to the burial or disposal of the corpse. The brain in this instance was removed in an ordinary way as is medical practice. It was not preserved, no skill was applied to it and it therefore belonged to no one.⁴¹

The judge in the *Dobson* case referred to the 1908 Australian case of *Doodeward v Spence*⁴² in which Griffith CJ said: “When a person has by lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquired a right to retain possession of it, at least as against any person entitled to have it delivered to him for the purpose of burial”.⁴³ It was once again stressed that the body part should have been made “different” in order for it to be capable of being owned.

In the most recent case of *Re Organ Retention*⁴⁴ (above) several issues in the context of separated biological materials, including property rights to cadaveric specimens, were raised.⁴⁵ The litigation in the case arose following inquiries at the British Royal Infirmary and Alder Hey Hospital. The enquiries showed that there was a long-term practice at these hospitals to keep biological materials (including vital organs) from children who died in those hospitals.⁴⁶ Proceedings were instituted by aggrieved parents who claimed that the tissue and organs were removed from the children’s bodies and retained without their knowledge and consent. The central question in the case was thus whether the removal during post-mortems and retention of the organs from the deceased children were unlawful. The judge found that in the context of post-mortems removal was lawful; the remaining question of the retention of the organs was, however, more complicated. The statutory regimes concerning post-mortems did not address this issue.⁴⁷ The defendants thus claimed, on the basis of the *Kelly* case, that they had added

³⁹ See also Herring 392; Skene “Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws” 2002 22(1) *Legal Studies* 106.

⁴⁰ [1996] 4 All ER 474.

⁴¹ See also Herring 392.

⁴² [1908] 6 CLR 406. See also Hardcastle 28-33.

⁴³ [1908] 6 CLR 414.

⁴⁴ See fn 38.

⁴⁵ Hardcastle 34.

⁴⁶ *Ibid.* See also Brazier “Retained Organs: Ethics and Humanity” 2006 22 *Legal Studies* 551-555.

⁴⁷ Hardcastle 35.

work and skill to the organs and they therefore had a right to keep them as property. The judge accepted their submission.⁴⁸

Brazier⁴⁹ made the following comment with reference to the above organ-retention controversies:⁵⁰

“The deceased did not own their body and could not bequeath it to their estate. The estate can claim the body for decent disposal, although not necessarily disposal as the deceased would have wished. Parts are taken from the body without either the deceaseds’ or their family’s approval. Put to uses of medicine, these body parts become as if by magic, property, but property owned by persons unknown, for purposes unforeseen by the deceased. If that represent the law, the law is an ass.”⁵¹

The court cases mentioned above address only ownership of body parts taken from cadavers. They tell us nothing about whether body parts, organs, tissue or fluids taken from a living person is “property”. In three other cases it was assumed that excised bodily materials are “property” and can be stolen; urine (*R v Welsh*),⁵² blood (*R v Rothery*)⁵³ and hair (*R v Herbert*).⁵⁴ Although these cases do not refer to removed organs for transplantation they do indicate the vagueness of the current position in England concerning ownership of excised body parts. There is also no specific stipulation in British legislation that addresses the issue of property rights in human organs.⁵⁵ The Human Tissue Act 2004 does not address the question of whether a person owns bodily material once it has been removed. The focus is on consent rather than property rights as the principle behind the Act.⁵⁶

A possible solution to the issue of property rights in human organs is given by Swain and Marusyk as quoted in Price: “for the purpose of transplantation, the legal system could deem those in possession of the excised tissue – physicians, nurses or tissue transporters – as being possessors “in trust” of the tissue until the transplant was completed. During this period the organ or tissue could be classified as *trust res nullius* – a thing owned by nobody but held in trust for the recipient”.⁵⁷ At the moment all organs are donated purely on the basis of consent, they belong to no one. Although the proposed solution seems acceptable, more legal clarity would

⁴⁸ *Ibid.*

⁴⁹ 2006 22 *Legal Studies* 563.

⁵⁰ The inquiry into the management of care of children receiving complex heart surgery at the Royal Infirmary (Known as the Bristol Royal Infirmary inquiry), chaired by Professor Kennedy www.bristol-enquiry.org.uk/index.htm May 2000. The Royal Liverpool Children’s Inquiry (Known as the Alder Hey inquiry) www.rlcinquiry.org.uk/ 30 Jan 2001. See also the report of the Independent Review Group on the retention of organs at post-mortem (Known as the McLean inquiry) www.show.scot.nhs.uk/scotorgrev/Final%20Report/ropm-00.htm Jan 2001. These inquiries highlight the unsatisfactory development of the common law with respect to rights concerning human bodies and separated biological materials.

⁵¹ Brazier 2006 22 *Legal Studies* 563.

⁵² [1994] R.T.R. 478 (C.A.).

⁵³ [1976 R.T.R 550 (C.A.)

⁵⁴ 1961 25 *Journal of Criminal Law* 163.

⁵⁵ Grubb 1998 6 *Medical Law Review* 251. The Human Tissue Act 2004 does not address property rights in body or body parts directly but it does prohibit the buying and selling of organs s 32 and the trafficking of organs for transplantation ss 33 and 34.

⁵⁶ Herring 360.

⁵⁷ Price 141-142.

be guaranteed if property rights were awarded to the person providing the organ.⁵⁸

3 2 United States of America

The courts in the United States of America have generally rejected the idea of absolute property rights in a human body.⁵⁹ But they realised that from time to time a corpse might need protection against misuse by hospital staff and they therefore adopted the “quasi-property” concept, especially for the purpose of burials.⁶⁰ The surviving spouse gets this type of property right in the corpse to bury it. If there is no surviving spouse the next-of-kin gets this right. In the case of *Pettigrew v Pettigrew*⁶¹ it was explicitly stated that when a person dies, public policy and regard for public health, as well as the universal sense of propriety, require that the body should be decently cared for and disposed of. The duty of disposition therefore devolves upon someone, and must carry with it the right to perform.⁶²

Concerning the status of biological material removed from a human body, the judgments by United States courts differ from English law in that “property rights” in these materials are not dependent on the application of work or skill to the tissue.⁶³ Instead, they rely on the Due Process Clause contained in the Fourteenth Amendment of their Constitution to rule on unauthorised removal of organs.⁶⁴ This clause protects an individual’s right to property against deprivation by the state without due process.⁶⁵ The US Court of Appeals confirmed the application of this clause in the context of removed biological material in the Sixth Circuit Court⁶⁶ case of *Brotherton v Cleveland*.⁶⁷ In this case the constitutional validity of an Ohio statute⁶⁸ was tested. A coroner removed the corneas of a deceased for transplantation. According to the relevant Ohio statute the coroner had the right to do it provided none of the next-of-kin of the deceased objected.⁶⁹ The wife of the deceased objected and the court subsequently held that the “aggregate of rights” given to a spouse under common law and the Uniform Anatomical Gift Act were sufficiently proprietary (these rights included the right to possess the body and to control its disposal) for constitutional purposes.⁷⁰

⁵⁸ Hardcastle 204.

⁵⁹ Blackbeard 2002 *Obiter* 54.

⁶⁰ See also Price 133.

⁶¹ 56 A 878 (1904) 879.

⁶² See *Siver v Rockingham Memorial Hospital* (1999) 48 F Supp 2d 608 612: The parents and siblings of a deceased have the right to possess, preserve and bury a body of a family member.

⁶³ Hardcastle 40.

⁶⁴ Hardcastle 40-42.

⁶⁵ Hardcastle 40.

⁶⁶ “The Ninth Circuit Court of Appeals and several US District Courts have adopted a similar approach to the Sixth Circuit” – this approach, however, has not been embraced by other circuit or state courts. See Hardcastle 41.

⁶⁷ 923 F 2nd 477 (6th Cir 1991). See also Hardcastle 41; and *Whaley v County of Tuscola* 58 F 3rd 1111 (6th Cir 1995).

⁶⁸ See Ohio Rev Code Ann § 2108-60 (B).

⁶⁹ Hardcastle 41.

⁷⁰ Hardcastle 41.

But despite the above ruling, the United States does not recognise property rights in separated biological materials from a dead body.

In *Colavito v New York Organ Donor Network Inc*⁷¹ a New York state judge decided one does not own one's kidney. Robert Colavito had a kidney donated to him by a dying friend. The kidney reserved to be transplanted into Colavito was found to be unusable but this was discovered only after the other kidney had already been transplanted into another patient.⁷² The plaintiff (Colavito), argued that upon the directed organ donation, both kidneys became his property and that the defendant acted wrongly in giving the second kidney to another patient. Judge Dora Irizarry came to the conclusion that Colavito did not have a cause of action because public policy discourages the treatment of organs as private property.⁷³ Consequently, not only is it illegal for you to sell your body parts, but you also cannot donate your organs to a specific individual. In other words, the judge rejected ownership of human organs donated by a living person. This raises certain questions considering the fact that Americans who choose to, may be paid for blood, semen and hair donations.⁷⁴ Certain body parts are therefore treated as "property" while other parts are not.

In the common law world today, the most important court case illustrating the value of excised bodily material is the case of *Moore v Regent of the University of California*.⁷⁵ In 1976 Moore had a spleen removed in order to treat leukaemia. During 1976 and 1983 many samples of blood, bone marrow and other substances were taken from his body as part of his medical treatment. At a stage Moore was requested to alter his hospital admission form to read that he consents to research being done on the excised body parts. It was later discovered that Moore's physician, Dr Golde and his research assistant, Shirley Quan, had established and patented the Mo-cell line using Moore's body materials. The potential profits of the cell line were nearly (US)\$3billion. Moore brought actions against the hospital and Quan because he felt he should also have benefitted.⁷⁶

The Californian Court of Appeal⁷⁷ and the US Supreme Court⁷⁸ confirmed that patients should have some rights over the fate of their bodily tissue. The Court of Appeal found there were property rights in body parts but the Supreme Court rejected this view and said that there was no precedent for

⁷¹ 356 F Supp 2d 237 (EDNY 2005), 438 F 3d 214 (2nd Cir 2006), 486 F 3d 78 (2d Cir 2007).

⁷² <http://www.divisionoflabour.com/archives/000839.php> (accessed 2008-08-20).

⁷³ *Ibid.*

⁷⁴ Hardcastle 84-87.

⁷⁵ 51 Cal 3d 120 (1990). See also Skene 2002 22 *Legal Studies* 107-108; Lupton "Advances in Medical Technology and the Ownership of Human Tissue" 2001 3 *TSAR* 573; Blackbeard 2002 *Obiter* 60-61; Mason and Laurie 2001 *Modern Law Review* 726; and Hardcastle 65-71 for a discussion of the case. Only two subsequent US cases have considered *Moore* in detail: *Greenberg v Miami Children's Hospital Research Institute* 264 F Supp 2d 1064 (US DC Florida 2003) and *Washington University v Catalona* 437 F Supp 2d 985 (US DC Ed Mo 2006). For a discussion of these cases see Hardcastle 78: "the leading US authority remains *Moore*, which rejected the proposition that a living person can claim property rights to separated biological materials".

⁷⁶ Griggs 1994 1 *Journal of Law and Medicine* 224.

⁷⁷ *Moore v Regents of the University of California* (1998 Court of Appeal) 249 Cal Rptr 494.

⁷⁸ *Moore v Regents of the University of California* (1990 Supreme Court) 793 P 2d 479.

finding property rights in the human body. Instead, the majority found that patients' rights are best protected by imposing fiduciary obligations on surgeons to get informed consent from their patients.⁷⁹ This kind of approach made Andrews⁸⁰ decide that it is the prohibition of the sale of organs for transplantation and the fact that bodily parts and products are gifts, not compensable items of property, which inadvertently supports researchers' use of a patient's tissue without permission or even consultation to produce potentially marketable products.⁸¹

It should be remembered that Moore was not left without a remedy although the case clearly shows that adherence to tradition and the fear of development and advancement can hinder the law to go forward.⁸² The Supreme Court found in his favour in respect of lack of informed consent and that he was not given full particulars of what was intended when he was asked to change his hospital admission form, and this was a breach of fiduciary duty. But he was still excluded from the property model.⁸³ His cells had become the subject of a patent that was ultimately owned by a pharmaceutical corporation. Moore received compensation as a result of his successful action in negligence but it fell a long way short of the several billions of commercial profits the company made with “his” cell-line.⁸⁴ Broussard J cogently summed up the injustice of this in his dissent: “the majority's analysis cannot rest on the broad proposition that a removed part is not property, but ... on the proposition that a patient retains no ownership interest in a body part once the body part has been removed”.⁸⁵ He remarked further that if another drug company should steal the cells in question, there would be no doubt but that a cause of action for conversion would properly lie against the thief.⁸⁶

Mason and Laurie highlights the bizarre situation that the one person who is least likely to have property rights in his or her body parts is the person from whom these parts were taken.⁸⁷ Not only is this an inconsistent position but they argue that it is a fundamental denial of the value attached to individuals and their autonomy.⁸⁸

Although courts in the United States do not accept property rights in human bodies or body parts, exceptions do exist. In *Hecht v Superior Court of California*⁸⁹ the court granted property rights to genetic material (sperm).⁹⁰ It thus seems as if ownership in renewable body parts has been accepted. A view enhanced by the fact that the sale of blood is allowed and the existence

⁷⁹ Griggs 1994 1 *Journal of Law and Medicine* 224. See also Devereux *Australian Medical Law* 2ed (2002) 428; Gold *Body Parts: Property Rights and the Ownership of Human Biological Materials* (1996) 23.

⁸⁰ Andrews “My Body, My Property” October 1986 *Hastings Center Report*.

⁸¹ Andrews October 1986 *Hastings Center Report* 28.

⁸² Wagner 1995 33 *Duquesne Law Review* 942.

⁸³ Mason and Laurie 2001 *Modern Law Review* 728.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ [1990] 271 *Cal Rptr* 146, 168.

⁸⁷ Mason and Laurie 2001 *Modern Law Review* 719.

⁸⁸ *Ibid.*

⁸⁹ (1993) 20 *Cal Rptr 2d* 275.

⁹⁰ Blackbeard 2002 *Obiter* 61.

of sperm banks all indicate that a person can exercise proprietary rights over certain biological material,⁹¹ however, the same recognition is not given to non-renewable body parts such as organs.

Lastly, organs for transplantation in the United States of America are obtained by donors giving consent (altruistically).⁹² These are then distributed by Organ Procurement Organisations (OPOs) which charge a standard acquisition fee to hospitals for the procurement of donor organs. The hospitals then mark up the charges on the organs and pass them on ("sell" them?) to organ recipients. Thus, the transplant process is financially lucrative to both hospital and OPOs. Yet the feeling arises that the financial incentives are misdirected to OPOs instead of to the donors or their families.⁹³ Should they have property rights in the organs, the situation could be vastly different.

4 LEGISLATION IN SOUTH AFRICA

4.1 The Human Tissue Act

The Human Tissue Act 65 of 1983⁹⁴ regulates organ transplants. The Act does not address property rights in human organs directly. Some sort of "reading in" of property rights is through section 18(bb) that addresses the removal of tissue from a living body sanctioned by the use thereof for the purposes designated in section 19. This section stipulates that removed tissue must be used for transplantation thereof in the body of another living person or for the production of a therapeutic, diagnostic or prophylactic substance.⁹⁵ If this section is read together with section 36 which grants any person who has acquired any tissue by virtue of any provision of the Act "exclusive rights in respect thereof" it is clear that the surgeon who removes the tissue acquires "exclusive rights" in the tissue excised from a patient's body.⁹⁶ Labuschagne interprets these "exclusive rights" as being none other than property rights.⁹⁷ But this is putting it only hypothetically as the general

⁹¹ "Besides blood, other human tissues are also treated as commodities analogous to property. For example a woman whose blood contained a rare antibody earned \$200 a week, together with \$25 000 cash, 1000 shares of stock, and the use of a car in exchange for regular extractions of the antibody. Sales have not been limited to regenerative tissue. A graduate student of the university of Pennsylvania reportedly received \$150 for supplying 10 grams of non-generative thigh muscle" see Hardiman "Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue" 1986 34 *UCLA Law Review* 221.

⁹² See the National Organ Transplant Act of 1984.

⁹³ Wagner 1995 33 *Duquesne Law Review* 944-945.

⁹⁴ The National Health Act 61 of 2003 came into effect on 2 May 2005. S 93(1) of the National Health Act repeals the Human Tissue Act in total, but it will only be done on a date fixed by the President in a *Government Gazette*. In the interim the Human Tissue Act and the Regulations issued in terms of this Act, remain in force. The expected date for Chapter 8 of the new Act to come into effect is unknown.

⁹⁵ S 19(a).

⁹⁶ Lupton 2001 3 *TSAR* 570.

⁹⁷ Labuschagne "Menseregte na Dood? Opmerkinge oor Lyk- en Graftskending" 1991 *De Jure* 145.

practice in hospitals is that a patient signs a consent form in which the hospital is authorised to dispose of surgically removed tissue.

A strict and technical interpretation of section 36 leads to a view that when a person has a limb severed in an accident, hence “losing” possession of it, and another person finds the limb, the aggrieved person may find his urgent need to have the body part surgically reattached compromised by a legal wrangle to retrieve it from the current possessor.⁹⁸

Strauss disagrees with the above interpretation by stating that if a portion of a patient’s anatomy is surgically removed in the course of an operation, that part is the property of the patient. If the patient does not claim the part so removed, it becomes *res nullius*.⁹⁹ Should the patient claim the body part, such as a gallstone or an appendix to keep in a bottle, there seems to be nothing in South African law to prohibit this; in other words there is nothing against possession of a body part.¹⁰⁰ Taking a foetus home in a bottle, may be seen as being *contra bonos mores*,¹⁰¹ but legally seems to be in order.

As is the case in the other common law countries, there is no clarity in legislation on the ownership of body parts, but section 28 of the Human Tissue Act prohibits the commerce in human organs. This appears to be a contradiction in terms as human organs need to be regarded as “things” before they could be bought or sold in violation of the law.

4 2 The National Health Act¹⁰²

The National Health Act also does not address the ownership in human organs directly. There is no section in this Act similar to section 36 of the Human Tissue Act discussed above, but commerce in human tissue is still forbidden.¹⁰³

Some regulations issued in terms of the Act regulate explicitly the issue of ownership of excess embryos, umbilical cord blood, aborted foetuses and stem cells.¹⁰⁴ The explicit reference to “ownership” of these biological materials indicates that these specifically mentioned severed tissue can be owned, in this instance either by the State, the donor or the parent. The question now is what the position is regarding ownership of removed organs. To accept ownership in only some human tissue can be tenuous.

In conclusion it seems as if the legal regimes in the United States of America, England and South Africa fail to provide clear or coherent legal principles for determining the legal status of, and rights pertaining to,

⁹⁸ Lupton 2001 3 TSAR 571. Labuschagne also indicates that “dit duidelik [is] dat ’n lyk(sdeel) ..., die objek van diefstal kan wees” in “Diefstal van ’n Lyk of Lyksdeel en die Rasionale Bruikbaarheid in die Strafreë van FJ van Zyl se Teorie oor die Regsubjektiwiteit ten aansien van die Bestorwe Boedel” 1999 *Obiter* 400-404.

⁹⁹ Strauss *Doctor, Patient and the Law* (1991) 161.

¹⁰⁰ Strauss 161.

¹⁰¹ *Ibid.*

¹⁰² 61 of 2003.

¹⁰³ S 60: “(4) It is an offence for a person – ... (b) to sell or trade in tissue, gametes, blood or blood products, ...”

¹⁰⁴ See GN R7 in GG 29526 of 2007-01-05, regulations 9 and 10.

biological materials separated from dead bodies as well as living persons. The issue to address now is: Why is it so important to have ownership of body parts?

5 THE IMPORTANCE OF OWNERSHIP IN BODY PARTS

A person can have basically two kinds of interests in his or her removed body parts as a living person or his or her body after death.¹⁰⁵ The first concerns the economic value of the excised bodily material (see *Moore* above) and the second concerns the control of separated body parts or the whole body. Control might refer to knowledge of what happens to biological material after it has been surgically removed from a body. The signing of a hospital form giving permission to the staff to get rid of such material is clearly not sufficient anymore as the human tissue might be used for research or other purposes. Control may also encompass the prevention of the violation of a body after death by hospital staff who may (mis)use the biological material taken from the corpse for personal benefit and economic gain.

What follows is firstly a discussion of the possible use/misuse of bodies or bodily parts for research. This has no direct relevance to the ownership of human organs for transplantation; yet, it explores the issue of proprietary rights in bodies or excised human tissue and highlights problems which arise because of the "no property" rule. Secondly, attention will be given to organ donation as it is argued that organ donations are premised on some form of ownership of the organ by the donor. Lastly, the commercialisation of human organs as a means to curb the ever increasing demand for transplantable organs is discussed. The preceding parts are specifically necessary to indicate the debate surrounding ownership of human tissue and because one can only sell one's organ or buy someone else's if one owns one's body.

5.1 Use of bodies or bodily parts for research

Some surgeons, being researchers as well, argue that there is no need to inform patients that body parts removed in the course of their treatment may be used for research (or ultimately commercial purposes), so long as the patient is not exposed to any additional physical risk due to the research or as long as the subjects from whom the specimens were taken could not be identified.¹⁰⁶ Andrews thinks this lack of consent for specific research and the failure to raise the issue of possible compensation for the specimens or what it may become, put patients at a distinct psychological and economic disadvantage (see also *Moore* above).¹⁰⁷ She points out that some researchers argue in this regard that the patient need not be told of the possibility of profit since the body part was not of commercial value to the patient anyway.¹⁰⁸ Currently it seems that researchers enjoy a free supply of

¹⁰⁵ Hardcastle 1-2.

¹⁰⁶ Andrews October 1986 *Hastings Center Report* 30.

¹⁰⁷ Andrews October 1986 *Hastings Center Report* 31.

¹⁰⁸ *Ibid.*

patient tissue because the public is unaware of the economic value of the material.¹⁰⁹

Legislation in the three countries mentioned above provides protection for the whole living human body and such protection is enforceable generally against anyone. It seems inconsistent if the act of detachment changes biological materials from being fully protected by the law into material receiving no legal protection whatsoever.¹¹⁰

Concerning corpses the common law crime of violation of a dead body was recognised in Roman-Dutch law.¹¹¹ It still exists today.¹¹² Milton describes the crime of violating a corpse as “unlawful and intentional physical violation of a dead human body.”¹¹³ Physical violation includes cutting or dismembering the corpse.¹¹⁴ Milton states: “The sanctity of human life and the respect for the dignity and integrity of the person are compound to create a sense of respect for the bodily remains of dead persons.”¹¹⁵

The best example of the exploitation of dead bodies for the sake of research is the scandals at the Bristol Royal Infirmary and the Royal Liverpool Children’s Hospital (Alder Hey)¹¹⁶ (mentioned above). These scandals are discussed in detail in the reports of the Kennedy and Redfern Inquiries.¹¹⁷ According to these reports the retention of body parts and organs from children who died in those hospitals was common and widespread, often without the knowledge or consent of the parents.¹¹⁸ The parents did agree in many instances to post mortems but under certain conditions mainly to determine the cause of death. These conditions were never met as the bodies and the parts thereof were actually used for research purposes. “In some cases infants were literally stripped of all their organs and what was returned to their families was an ‘empty shell’”.¹¹⁹ The doctors saw no problem with their actions as they proclaimed they did it in the interest of education and research. The Kennedy Report named this attitude “institutional paternalism” as the surgeons argued that what the parents did not know could not hurt them.¹²⁰

If the patients or the parents of the children had property rights in the bodies or body parts, they could have had a vested interest in what happened to them. It could have provided a legal basis for a remedy as theories of privacy, autonomy or even assault do not provide for such

¹⁰⁹ Hardiman 1986 34 *UCLA Law Review* 227.

¹¹⁰ Hardcastle 147.

¹¹¹ See Voet *Commentarius ad Pandectas* (1707) 47.12; and Matthaëus *De Criminibus ad Lib XLVII et XLVIII Dig. Commentarius* (1644) 47.6.

¹¹² *S v Coetzee* 1993 2 SACR 191 (T). The heart and lungs of a deceased mineworker have been removed.

¹¹³ Milton *South African Criminal Law and Procedure* (Vol 2) *Common-law Crimes* 3ed (1996) 283.

¹¹⁴ Milton 284.

¹¹⁵ Milton 283.

¹¹⁶ See fn 38 above.

¹¹⁷ Herring 342. 54 000 retained organs and body parts of children and fetuses were discovered.

¹¹⁸ Herring 342.

¹¹⁹ *Ibid.*

¹²⁰ Herring 343. See also Brazier 2006 4 *Legal Studies* 555.

actions when inappropriate acts are taken concerning removed bodily materials.¹²¹ Researchers and hospitals have been profiting at the expense of patients. Equity demands that the profit be shared with the ones who make such valuable contributions.¹²² Had medical advances remained research-orientated in which incentives were academic stature, acquisition of grants and the aspiration to serve humanity – the issue of property rights in bodies and body parts might never have arisen. But commercial exploitation has altered science and provoked the issue.¹²³ Without characterizing the body or its parts as property, theft or other harms to dead bodies or the claiming of economical profits is difficult to prove.

5 2 Human Tissue donations

In terms of legislation in the United States of America¹²⁴, England¹²⁵ and South Africa¹²⁶ consent is required before a donor organ is used for transplantation. These different statutes recognise (in the transplantation context) that an individual has a right to control the use of organs once they are detached from the body. This statutory requirement is premised on the notion that a person has a right to control bodily parts (organs) once they are apart from the human body.¹²⁷ For Andrews this sounds very much like property treatment, but she asks the question why there is such a reluctance to label it as such.¹²⁸

Blackbeard perceives organ donations as the exercising of proprietary rights. She argues that one can only give away what one owns.¹²⁹ Childress supports her notion by saying: “[I]f we do not ‘own’ our bodies and thus cannot sell their parts, it is incumbent on the respondent, then to show how people can ‘give’ or ‘donate’ what they do not ‘own’. Indeed ... all the modes of transfer of human organs from one person to another pre-supposes some notion of property and property rights. Or at least they pre-suppose some cluster of rights associated with property.”¹³⁰

Mason and Laurie add to that “the reliance on the language of ‘gift’ implies property and ownership – for ‘gifting is simply one of a number of means of transferring property’”.¹³¹

¹²¹ Andrews October 1986 *Hastings Center Report* 29.

¹²² Wagner 1995 33 *Duquesne Law Review* 955.

¹²³ Hardiman 1986 34 *UCLA Law Review* 210.

¹²⁴ Uniform Anatomical Gift Act.

¹²⁵ Human Tissue Act 2004.

¹²⁶ Human Tissue Act 65 of 1983. See also Jordan “Africans’ DNA could be abused” <http://www.thetimes.co.za> published 14 February 2009 (accessed 2009-02-22). The article discusses an attempt to patent genetic material donated by rural Ju-speaking !Xun and Khoe. They gave written consent for blood samples to be taken from them but what remains unclear is whether the donors agreed to let the scientist use their genetic material for commercial gain.

¹²⁷ Hardcastle 147.

¹²⁸ Andrews October 1986 *Hastings Center Report* 29.

¹²⁹ Blackbeard 2002 *Obiter* 54.

¹³⁰ Childress “The Body as Property: Some Philosophical Reflection” 1992 24 *Transplantation Proceedings* 2144.

¹³¹ Mason and Laurie 2001 *Modern Law Review* 726.

Taking the above arguments into consideration, especially the fact that a donor has to consent to an organ donation, it seems clearly logical to recognise some form of ownership in donated human organs for the purpose of transplantation. By giving recognition to property rights in donated organs, one can move one step further and legalise the buying and selling of human organs despite the fact that Andrews asserts that it does not follow that property rights should necessarily implicate alienability. She refers for example to items made of fur or feathers of endangered species that may only be given as gifts but not sold, or holdings of a person who is bankrupt that may be sold, but not given as gifts.¹³² Authority to decide whether to sell or to gift should belong to the individual who provided the body part. She adds though, that donors, recipients, buyers or sellers and society in general will benefit from a market in body parts as long as the owners and no one else retain control over their bodies.¹³³

5.3 Commercialisation

The large number of patients awaiting a transplant and the high cost of technology, such as dialysis, compels one once again to consider the issue of property rights in body parts and the commercialisation of human organs very critically.¹³⁴

Any system of commerce in human body parts presupposes that we hold property rights in those parts and products.¹³⁵ It seems though, that it is the potential of commercial buying and selling of organs that is the main impediment to adopting property rights in body parts.¹³⁶

But what had no value in the eighteenth century when the “no property” rule originated has considerable value today.¹³⁷ Many people would readily buy a transplantable cadaver kidney or a kidney from a willing seller if they were allowed to do so; unfortunately legislation generally prohibits these options.¹³⁸ Mason and Laurie correctly ask if there is no market for human organs, why it is criminalised in legislation. “Is it the fact that there *is* an existing market?” According to them to say that there *is no market* is to perpetuate a fiction – “yet that is what the law persists in doing”.¹³⁹

Currently organ trading is condemned nearly world wide.¹⁴⁰ The World Medical Association resolved that the buying and selling of human organs

¹³² Andrews October 1986 *Hastings Center Report* 29.

¹³³ Andrews October 1986 *Hastings Center Report* 28.

¹³⁴ Guttman and Guttman “Sale of Kidneys for Transplantation. Attitudes of the Health Care Profession and the Public” 1992 24 *Transplantation Proceedings* 2108.

¹³⁵ Erin and Harris “A Monopsonistic Market: Or How to Buy and Sell Human Organs, Tissue and Cells Ethically” in Robinson (ed) *Life and Death under High Technology Medicine* (1994) 134.

¹³⁶ Blackbeard 2002 *Obiter* 62.

¹³⁷ Mason and Laurie 2001 *Modern Law Review* 715.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ See a table of legislation banning organ sales in other countries in Garwood-Gowers *Living Donor Organ Transplantation: Key Legal and Ethical Issues* (1999) ix. See also Taylor *Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative* (2005) 12. The kidney trade is legal and regulated in Iran. The trade is organised and controlled by two

for transplantation is condemned.¹⁴¹ In 1991 the World Health Organisation's Guiding Principles on Organ Transplantation declared as follows: "The human body and its parts cannot be the subject of commercial transactions". Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited.¹⁴² Trade is "inconsistent with the most basic human values and contravenes the Universal Declaration of Human Rights and the spirit of the World Health Organisation's constitution".¹⁴³

It is no longer true that the body and parts taken from it are valueless. They have medical value – giving new life – whether taken from the dead or the living for use in transplantation. Unfortunately there is a world-wide shortage in transplantable organs and this shortage thereof has led to a black market in organs.¹⁴⁴

The shortfall in transplant organs could be remedied in part, at least for kidneys, by adopting a property model.¹⁴⁵ As Judith Thomson states: "It will of course be said that commercialisation of body parts leads to the prospect of exploitation. This is undoubtedly true. But, merely because we face that prospect is no reason *in se* to refuse to recognise property rights as a matter of principle. Moreover, exploitation can be guarded against through regulation. Indeed, the non-recognition of property rights arguably perpetuates exploitation; it has, for example, done little, to date, to prevent a thriving global black market in organs and tissue."¹⁴⁶

Cohen remarks that "against the saving of innocent lives, poetic statements about the dignity of human life being degraded by commercialism would stand revealed as the empty moral pieties of armchair philosophers incapable of a reasonable balancing of human needs".¹⁴⁷

6 CONCLUSION

Arguments against the body as property, however high minded and noble, are out of touch with reality.¹⁴⁸

The "no property" rule was adopted in an era that could not foresee the possibilities brought to us by medical science.¹⁴⁹ At the same time there has

government-endorsed NGOs. Regulations have also been put into place to prevent transplant tourism Ram <http://www.hinduonnet.com/fline/fl1907/1907030.htm> (accessed 2007-02-22). See also <http://www.edition.cnn.com> (accessed 2007-02-26) "Pakistan's lucrative kidney trade" – unlike the rest of the world there are no laws restricting the sale of organs in Pakistan and no regulations requiring informed consent from potential donors.

¹⁴¹ Price 375.

¹⁴² Guiding Principle 5.

¹⁴³ Resolution WHO 40.13

¹⁴⁴ See Slabbert "Combat Organ Trafficking – Reward the Donor or Regulate Sales" 2008 73(1) *Koers*; and see also Mason and Laurie 2001 *Modern Law Review* 712.

¹⁴⁵ Mason and Laurie 2001 *Modern Law Review* 727.

¹⁴⁶ *Ibid.*

¹⁴⁷ Cohen "A Future Market in Cadaveric Organs: Would it Work?" 1993 25 *Transplantation Proceedings* 60.

¹⁴⁸ Herring 394.

¹⁴⁹ Griggs 1994 1 *Journal of Law and Medicine* 228.

been a shift in sentiment – the public is more than ever aware of and interested in medical practices. There is an increased respect and demand for individual autonomy.¹⁵⁰ The time has come for an individual to claim and retain ownership (and thus property rights) in his or her own body.¹⁵¹ If the buying and selling of human organs is a stumbling block in the recognition of property rights in body parts, then it is up to legislators to regulate it.¹⁵² The legislature must address this issue before organ donors realise that their charity is lining the pockets of hospitals and biotechnology companies and they rebel and cease to donate.¹⁵³

Debates on the ownership of bodies and bodily materials have in the past focused on ethical discourse rather than the law. Change is imperative. The law has to keep up with new developments which did not exist years ago. The traditional approach of *de minimis non curat lex* can no longer be mentioned when excised human tissue is involved because, as indicated, body parts can no longer be seen as valueless.¹⁵⁴

Recognition of property rights in a body as well as in the parts of a body could balance all interests at stake; society's interest in the fair treatment of all its members; the researchers' interests in academic recognition; the patient's interest in obtaining the best treatment possible (a new organ) and the donor's interest to be rewarded for the "gift".¹⁵⁵

¹⁵⁰ Mason and Laurie 2001 *Modern Law Review* 710-711.

¹⁵¹ For a different view see Skene "Arguments Against People Legally 'Owning' Their Own Bodies, Body Parts and Tissue" 2002 7 *Macquarie Law Journal* <http://www.austlii.edu.au/au/journals/MqLJ/2007/7.html> (accessed 2008-08-20).

¹⁵² Griggs 1994 1 *Journal of Law and Medicine* 228.

¹⁵³ Wagner 1995 33 *Duquesne Law Review* 958.

¹⁵⁴ Lupton 2001 3 *TSAR* 569.

¹⁵⁵ Hardiman 1986 34 *UCLA Law Review* 232.