

Property Rights in Human Tissue – A Review of the Current Status of Hong Kong Law in Relation to Human Body Parts

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Abstract

Can human body parts be treated as property? This is a controversial issue attracting critiques from various scholars on the perspectives of morality, justice, economy and utility, etc. Yet the law is not unfamiliar with this issue. The advancement in biotechnology has triggered a proliferate demand on human tissues in researches and medical treatments, accompanying with an increasing trend of disputes between the tissue providers and recipients. This has led to judicial development recognising limited property rights in severed human tissues and legislative development regulating the interests of relevant stakeholders in some common law jurisdictions. It is therefore submitted that reform in this area of law should be undertaken to address such deficiencies.

Keywords:Property law on human tissues, morality, biotechnology.Introduction

Introduction

The trite law that there is no property in cadavers was developed from the eighteenth to nineteenth century.¹ Gradually a few exceptions to the *no-property rule* such as the ‘work and skill’ exception have evolved which affords limited proprietary rights to the possessor of cadavers or removed human parts from corpses.² Yet breakthroughs in bio-technology such as advancement of human organ transplants and stem cell researches have led to proliferate demands on human tissues and body parts such as organs, blood, cells, bone marrows, sperms and ova, etc. for both therapeutic and scientific research purposes,³ and such uses has reached a level that it necessitates to reconsider the rather out-of-date *no-property rule* in cadavers and human body parts. This argument of need to properly classify cadavers and human body parts with property rights is accompanied by a trend of increasing disputes between the providers of the cadavers and/or the living relatives of the deceased and the subsequent possessors of such human tissues and/or body parts, which have led to enactments of certain statutes in other jurisdictions such as the Human Tissue Act in the UK⁴ and the ruling of some famous cases to govern the rights between various stakeholders related to human tissues and body parts.⁵ In contrast, the Hong Kong Special Administrative Region (“Hong Kong”) has been lagging behind in both legislative and judicial developments in this area of law.

¹Please refer to the discussion in section 2.3 for details.

²Ibid.

³Hardcastle R. (2007). *Law and the Human Body: Property Rights, Ownership and Control* (p. 4). Oxford: Hart Publishing.

⁴Please refer to section 2.4 for details.

⁵Please refer to the exceptions to the *no-property rule* discussed in section 2.3.

With the emergence of local bio-banks⁶ following a similar footstep in other jurisdictions it is envisaged similar contentions on the ownership of those stored human tissues and body parts will arise sooner or later. It is thus imperative to review the current state of law on this area and assess if any reform should be made to address potential controversies in Hong Kong.

The purpose of this paper is to establish the need of development of the laws in Hong Kong. The Paper will first summarize the current laws relating to human body part property rights and followed by a jurisprudential debate on the justification of such claim. The above viewpoints are then applied back with an aim to highlight the implications for reform in this area of law in Hong Kong. It is then concluded by summarising the key findings and suggestions.

The concept of property right is not an absolute concept. Such property rights could include the right to have, the right to prohibit, right to utilize, right to exploit, right to get rid of, right to enjoy its benefits or profits as well as the right to demolish.⁷ It must be noted however, that it is not a requirement to fulfil all the above possibilities for the concept of property right to be established. The concept of property rights, due to its non-absolute nature are generally applicable to situation where one can exclude another from interfering with one's property rights over certain things.

Questionably, because a person can protect him/herself from being interfered by another,⁸ it is arguable that certain property rights or interests are given to a human body. However, the concept of 'property rights' as referred to and argued in this paper is not those related to the protection of one's body while it is still part of one's self, but more related to and attributed to the idea of property rights on things and chattels, though the paper will not refer to the human body parts as things or chattels as such.

State of Current Laws in Hong Kong

Since 1 July 1997, the sources of laws in Hong Kong are the Basic Law, the statutes and the common law.⁹ The Basic Law will prevail over statutes, which in turn will supersede common law.¹⁰ The relevant provisions in each category of laws are presented below:

2.1 Basic Law

Protection of private property is governed by Article 6 and Article 105. Yet there is no definition on the meaning of *property* in the Basic Law. Although such definition appears in some ordinances,¹¹ they are by no means exhaustive and do not give a clear guidance for our case. Hence if a person can establish a proprietary interest on his/her kidneys and the drugs (e.g. intellectual property) as derived from his/her original cells by interpretation of the legal meaning of property in the Basic Law, he/she may rely on such provisions to protect his constitutional rights and demand for compensation.¹²

2.2 Statutes

Only limited provisions related to the dealing of body parts have been found in the Hong Kong statutes. For example, a medical practitioner may remove the body parts of a dead person for therapeutic, medical research or education purposes under certain conditions.¹³

⁶ For a description on bio-banks, see e.g. Otlowski, M; Nicol, D & Stranger, M. (2009 – 2010). Biobanks Information Paper. 29(97) J Law, Info & Sci.

⁷ Wagner, D. M. (1994-1995). Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology. 33 Duq. L. Rev. 931 at p. 932.

⁸ Such concepts can be seen in the tort of trespass to the person in assault, battery, false imprisonment etc.

⁹ Basic Law art 18. Sources of laws in HK include also customary law which deals with the rights of the indigenous residents of the New Territories (see Basic Law art 8), but this is clearly irrelevant to our study; see also Dobinson, I & Roebuck, D. (2001). Introduction to Law in the Hong Kong SAR. (2nd ed). Hong Kong. Sweet & Maxwell. (pp.26-27).

¹⁰ Basic Law art 8. See also Dobinson & Roebuck, *ibid*, p.27.

¹¹ See e.g. Interpretation and General Clauses Ordinance (Cap 1) s3, Theft Ordinance (Cap 210) s5, Securities and Futures Ordinance (Cap 571) Sch 1 Part I, Estate Duty Ordinance (Cap 111) s3, Bankruptcy Ordinance (Cap 6) s2, etc.

¹² Basic Law art 105. For further illustration of this point, please refer to Part 2 of this article in Iss 12, Vol 2, IJHSS.

¹³ Medical (Therapy, Education and Research) Ordinance (Cap 278) ss2 & 3.

Other relevant statutes concern regulation on disposal of dead bodies,¹⁴ transplant of human organs for medical treatment where commercial dealings in human organs are strictly prohibited,¹⁵ and use of embryos and gametes in assisted reproduction.¹⁶ Nevertheless, there is no affirmative answer on whether there are property rights on human tissue or body parts as observed from such legislations.

2.3 Common Law

Before we proceed further it is useful to revisit the precedential effects of cases from local courts and other common law jurisdictions. Decisions made by Hong Kong courts which have not been overruled by subsequent court judgments will remain in force irrespective being made before or after 1 July 1997, provided that they are not inconsistent with the Basic Law or amended by legislature.¹⁷ For UK cases, only Privy Council cases on appeals from Hong Kong before 1 July 1997 continued to be binding on Hong Kong courts below the Court of Final Appeal.¹⁸ Cases from the UK other than the above category, and from other common law jurisdictions, are not binding on local courts even though they may be referred to in adjudication¹⁹ especially those judgments which are pervasive or highly pervasive.²⁰ The above principle will be noted when analysing cases from common law jurisdictions outside of Hong Kong.

Hong Kong

There is only one case in Hong Kong which touches upon the issue of property rights on the human tissues and/or organs. In *Ho Wai Yin and ors v Cheng Suet Yee*²¹ it was held that the remains of a late person including the ashes can be property under the Rules of the High Court (“RHC”) O29 r3 for the purpose of obtaining DNA samples of the deceased involved in a probate action.²² However, this case is relevant to remains of a deceased in the limited context of application under RHC O29 r3, and thus will be of little assistance in resolving the wider discussion of the issue of property rights on human tissues/organs.

UK (before 1 July 1997)

It is generally recognised under English law that there is no property in human body, commonly referred as the *no-property rule*.²³ The two oldest and mostly cited sources of the rule²⁴ are the *Haynes’s Case*²⁵ and *Handyside’s Case*.²⁶ In the first case Mr Haynes was charged for theft of the wrapping sheet for the buried bodies despite the judgment of no property in a dead body.²⁷ Magnusson has challenged the recorded judgment by arguing that it was likely due to mis-translation of the latin phrases deliberated and argued that the proper ruling ought to be ‘*dead body cannot own property in the wrapping sheet*’.²⁸ Ruling in the second case was reported as ‘*the action would not lie, as no person had any property in corpse*’,²⁹ whose authority was doubted as the case was settled before the jury returned and hence should not be binding on subsequent courts.³⁰ Prior to the nineteenth century, property interest in cadavers was indeed recognised by British courts.³¹ For example, a creditor could seize the body of a deceased debtor as collateral for debts owed.³²

¹⁴Public Health and Municipal Services Ordinance (Cap 132) ss122 & 124.

¹⁵Human Organ Transplant Ordinance (Cap 465) s4.

¹⁶Human Reproductive Technology Ordinance (Cap 561).

¹⁷Basic Law Art 8.

¹⁸As clarified by the CFA in *A Solicitor v Law Society of Hong Kong* [2008] 2 HKLRD 576 at paras 8 – 16.

¹⁹Basic Law Art 84.

²⁰Above n18, at para 17.

²¹Unreported [2004] HKCFI 1211.

²²Ibid at paras 19 and 37.

²³Hardcastle, Rohan, above n3, at p.25.

²⁴Ibid, at p.26.

²⁵*Haynes’s Case* (1614) 12 Co. REP. 113.

²⁶*Exelby v Handyside* (1749) 2 East PC 652.

²⁷Atherton, R. (2000). Claims on the deceased: The Corpse as Property. 7 Journal of Law and Medicine 361 at 366.

²⁸ Magnusson, R. S. (1998). Proprietary Rights in Human Tissue. In N Palmer & E McKendrick. (Eds.), Possessory Title. (2nd ed.). (pp.27-28). LLP.

²⁹Matthews, P. (1983). Whose Body? People As Property. Current Legal Problems 193, 208.

³⁰Ibid, at 210.

³¹See e.g. *Quick v Copleton* (1803) 83 ER 349 and *R v Cheere* (1825) 107 ER 1294.

³²*Cheere*, ibid, at 1297.

Later on such practice was condemned as being ‘*contrary to every principle of law and moral feeling*’.³³ By the mid-nineteenth century, it was reasonably settled that there was no property in a dead body, rendering it incapable of confiscation for an alleged debt.³⁴ It is probably due to the dubious origin of the authority of the ‘no-property rule’ that over time several exceptions have been developed. These are briefly outlined below.

a) The Theft Exception

A strict application of the *no-property rule* would preclude the criminal offence of theft of a cadaver.³⁵ In response to public indignation the courts have developed an exception by holding grave robbing as a misdemeanour even though the wrongdoer could not be prosecuted for theft.³⁶ Note that this exception is based on criminal law and does not create a proprietary interest on corpses.

b) Work and Skill Exception

This exception was created in *Doodeward v Spence*,³⁷ where the court held that:

‘When a person has by the 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 acquires a right to retain possession of it.’³⁸

Doodeward v Spence has been applied in subsequent cases, for instance *R v Kelly*³⁹ which held that preserved body parts misappropriated from the Royal College of Surgeons were property capable of being stolen. In making this finding Rose LJ remarked that:

‘The common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property.... This may be so for example, where they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial.’⁴⁰

Yet in *Dobson v North Tyneside Health Authority*⁴¹ preservation alone was ruled to be an insufficient level of work and skill to render the sample property.⁴² Though this exception opens the Pandora’s Box of potential categories of exceptions that may be considered by the court in future cases, the extent remains to be ascertained.

c) Recognised Duty Exception

Some kind of persons, namely, executors, administrators, next of kin, and occupiers of buildings, are recognised by common law to have a duty to bury a deceased and are thereby conferred temporary possessory rights to the corpse until cremation.⁴³ This right is considered as a sort of ‘quasi-property right’ to control what to be done to a corpse.⁴⁴ Another example is a right to possession of a cadaver by a coroner where he is under a duty to conduct an inquest.⁴⁵

d) Regenerative Tissues Exception

Regenerative tissues refer to extra-body tissues such as fingernails, hair, urine, and intra-body tissues such as bone marrow, blood, and tissue samples, where removal from the body will not cause noticeable harm to the person and the human body can replenish them. In contrast, a complete human organ such as heart, liver, kidney, brain, cornea, eyeball and bone, etc. are non-regenerative tissues.

³³ *Jones v Ashburnham* (1804) 102 ER 905.

³⁴ *R v Fox* (1841) 114 ER 95 and *R v Francis Scott* (1842) 114 ER 97 (K.B. 1842).

³⁵ Taylor, R. (Dec 2002). Human Property: Threat or Saviour? 9(4) *Mur U eJLaw*, para 10.

³⁶ *R v Cundick* (1822) Dowl. & Ry N.P. 13 and *R v Sharpe* (1856) Dears & Bell 160.

³⁷ *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406.

³⁸ *Ibid*, at 414.

³⁹ [1998] 3 All ER 741.

⁴⁰ *Ibid*, at para 42.

⁴¹ [1996] 4 All ER 474.

⁴² *Ibid*, see the judgment by Peter Gibson L.J.

⁴³ *R v Stewart* (1840) 113 ER 1107.

⁴⁴ *Smith v Tamworth City Council* (1997) 41 NSWLR 680, Australian case.

⁴⁵ Halsbury’s law of Hong Kong, [120.024], fn4, citing *R v Bristol Coroner, ex p Kerr* [1974] QB 652, [1974] 2 All ER 719, DC (Eng).

Different sub-categories of this exception are discussed below.

A. Hair, Urine, Toenails and Blood

Regenerative human tissues have been recognised as property. For instance, in the US a wig made from human hair was held to be property capable of being stolen.⁴⁶ Similarly in the UK, cutting and stealing hair from a person's heads have been convicted of thefts.⁴⁷ A number of cases have also exemplified urine,⁴⁸ blood samples⁴⁹ and toenails⁵⁰ as property in theft charges, despite the relevance of some cases have been subjected to academic debates.⁵¹ In Australia, blood products have been categorised as 'materials',⁵² and 'goods',⁵³ albeit in limited context of statutory interpretation of 'goods' and 'materials' under the Trade Practices Act 1974.⁵⁴

B. Dead Tissue Samples from a Deceased Person

There are instances that tissue samples of a deceased constituted property. In a request for paternity test tissue samples fixed in paraffin were held to fulfil the 'work and skill' exception.⁵⁵ This ratio was, nevertheless, challenged as inconsistent with the ruling in the *Dobson* case.⁵⁶ In *Roche v Douglas*⁵⁷ a broad exception was adopted in affirming property in body samples, which was subsequently restricted to samples taken when the concerned person was alive and not after his/her death.⁵⁸

C. Live Tissue Samples of a Deceased Person

A number of Australian cases have been raised concerning the possessory right of a deceased's sperm by his wife for in vitro fertilisation. The application usually comes on an urgent basis as sperms can retain their function only if taken and properly preserved within 24 hours of death.⁵⁹ In *AB v The A-G for the State of Victoria*⁶⁰ and *Re Gray*⁶¹ use of the removed sperms for pregnancy was held to be prohibited, whereas other similar applications received mixed responses.⁶² It was finally settled in *Re The Estate of the late Mark Edwards*,⁶³ where the Supreme Court of New South Wales affirmed that the stored sperms as the deceased's estate.⁶⁴

The Europe and UK courts have clearly regarded sperm as an intestacy property vested in the deceased's executor or next of kin. With strikingly similar circumstances as those leading Australian cases, the UK court in *R v Human Fertilisation and Embryology Authority*⁶⁵ upheld the right to possess the sperms despite prohibiting their use for in vitro fertilisation. Nevertheless it suffices to enable the sperms to be brought to Belgium where such operation was lawful.

⁴⁶*The State v Truesdale* (1972)13 NC App 622.

⁴⁷*R v Herbert*[1961] JPLGR 12.

⁴⁸*R v Welsh* [1974] RTR 478.

⁴⁹*R v Rothery* [1976] RTR 550.

⁵⁰*Venner v Maryland* 354 A. 2d 483 (1976).

⁵¹See critique of *R v Welsh* and *R v Rothery* in Mortimer, D. (1993)Property Rights in Body Parts: The relevance of Moore's Case in Australia. 19 Monash University Law Review 217 at pp. 244 – 245.

⁵²*PQ v Australian Red Cross Society* [1992] 1 VR 19.

⁵³*E v Australian Red Cross Society*(1991) 99 ALR 601.

⁵⁴Above n52, at pp 246 – 247.

⁵⁵(unreported) *Pecar v National Australia Trustees Ltd* (96002518) Number 2518 of 1996, 27 November 1996.

⁵⁶Taylor, R. (Dec 2002). Human Property: Threat or Saviour? 9(4) Mur U eJLaw, at para 33.

⁵⁷[2000] 22 WAR 331.

⁵⁸*AW v CW* [2002] NSWSC 301, at para 34.

⁵⁹Queensland Health Pathology & Scientific Services – Fact Sheet: Removal Of Sperm From A Deceased Person For IVF. [Online] Available: <http://www.health.qld.gov.au/qhcss/documents/sperm-removal.pdf> (Oct 23, 2011).

⁶⁰[2005] VSC 180.

⁶¹[2000] QSC 390.

⁶²Above n60, at p.2.

⁶³[2011] NSWSC 478

⁶⁴*Ibid*, at 82.

⁶⁵[1997] EWCA Civ 946.

D. Live Tissue Samples from a Living Person

The leading case in this sub-category is the decision in *Moore v Regents of University of California*.⁶⁶ This case involved the dispute on the ownership of a patented *cell line*⁶⁷ established by the defendant derived from the spleen cells of the plaintiff (Moore). Moore did permit the removal of his spleen cells for therapeutic and diagnosis purpose but not for other derivative use. Realising the potential market value of the *cell line* patent, Moore sued the defendants for, *inter alia*, conversion based on his property interest in the excised spleen cells. The plaintiff's claim on conversion was rejected but his claim on a breach of fiduciary duty was allowed.⁶⁸ *Moore* was followed in *Greenberg v Miami Children's Hospital*⁶⁹ in which property rights were held abandoned once tissue is voluntarily donated to a third party, implying existence of property right prior to making the gift⁷⁰. In *US v Arora*⁷¹, the defendant was convicted for conversion of a chattel, being the *cell line*.⁷²

In relation to human gametes, frozen sperms were held to be property of the claimant in *Yearworth & Ors v North Bristol NHS Trust*⁷³ and the action on breach of bailment and the tort of negligence were allowed.⁷⁴

In cases of human embryos, treating them as property may be inappropriate.⁷⁵ For example, embryos are generally regarded an intermediate category amid human and property deserving special respect in the US.⁷⁶ Yet there are cases where human embryos are treated property alike with the associated remedies to protect rights of control. In *York v Jones*⁷⁷ a couple was able to recover their embryos relying on the tort of detinue and bailment on the embryos.⁷⁸ In *Frisina v Women and Infants Hospital of Rhode Island*,⁷⁹ a claim for emotional distress following loss of embryos was allowed on the basis of loss of irreplaceable property.⁸⁰ Likewise, proceedings based on breach of bailment and breach of an undertaking to protect embryos was approved in *Jeter v Mayo Clinic Arizona*.⁸¹

2.4 Legislations in Other Common Law Jurisdictions

Although legislations in other Common Law jurisdictions bear no direct effect on the laws and decisions of the Hong Kong courts, they may serve useful references when the Hong Kong courts, in particular the higher Hong Kong courts, are faced with an unprecedented issue where no pre-existing law and a new case law has to be made (judge-made law).⁸² Some of the relevant statutes in the UK, Australia and the US are briefly outlined below.

UK

Trafficking in transplantable organs is prohibited by the Human Organ Transplants Act 1989.⁸³ Regulation on the in vitro creation of embryo, and the storage and use of gametes and embryos for assisted fertilisation are regulated by the Human Fertilisation and Embryology Act 1990.⁸⁴

⁶⁶51 Cal.3d 120 (Cal SC 1990).

⁶⁷A cell culture selected for uniformity from a cell population derived from a usually homogeneous tissue source (as an organ), and has value for medical researches and commercialisation.

⁶⁸*Moore*, above n66, at Part IV Disposition, p.19.

⁶⁹264 F Supp 2d 1064 (Fla DC, 2003)

⁷⁰*Ibid*, at 1075.

⁷¹806 F Supp 1091 (Md DC 1994).

⁷²*Ibid*, at 1099.

⁷³[2009] EWCA Civ 37

⁷⁴*Ibid*, at para 45, 46.

⁷⁵Bennett-Moses, L. B. (2008). The Applicability of Property Law in New Contexts: From Cells to Cyberspace. 30 Sydney Law Rev 639-662, 642 citing the conclusions reached by various committees having considered the issue.

⁷⁶*Davis v Davis* 842 SW 2d 588 (Tenn, 1992) at 597.

⁷⁷717 F. Supp. 421, 426-27 (E.D. Va. 1989).

⁷⁸*Ibid*, at pp. 426-427.

⁷⁹2002 WL 1288784 (Sup. Ct. R.I. 2002).

⁸⁰*Ibid*, at 10.

⁸¹121 P.3d 1256 (Ariz.App. Div. 1 2005).

⁸²See e.g. the CFI approach in interpreting the statutory meaning of 'gender' in the Marriage Ordinance in the case of *W v Reg of Marriages* [2009] HCAL 120/2009 (unreported).

⁸³Section 1.

⁸⁴Section 3 and s4.

Similar legislations have been enacted in Hong Kong.⁸⁵ The Human Tissue Act 2004 (“HTA 2004”) denotes a substantial development on the regulation of severed human tissues. It is primarily based on the doctrine of consent, which governed the lawfully permitted uses of such removed human tissues, including the right to reimburse individuals or institutions for supplying such materials,⁸⁶ and arguably indirectly recognising property interests on human tissues.⁸⁷ Yet as argued by Hardcastle, the HTA 2004 and the aforementioned English legislations are silent on the legal status or vesting of property rights on such materials.⁸⁸

Australia

Sale of human organs are also strictly banned in Australia, as provided for in Human Tissue Act 1983 (NSW) s32, Human Tissue Act (Vic) s38, Transplantation and Anatomy Act 1978 (ACT) s44, etc. Similar to UK Laws, legal status or property rights in biological materials are not determined by the Australia legislations, which instead required prior consent from the providers for removing and subsequent use of regenerative body tissue.⁸⁹ Yet the legislations do recognise one exception similar to the common law ‘work and skill’ exception.⁹⁰ In 2005, the Australian Federal Government accepted the recommendation from the Australian Law Reform Commission not to enact legislation which confer full property rights in human genetic sample but adopt a protection based on consent and privacy doctrines.⁹¹

US

Trafficking of human organs is also prohibited in law.⁹² Yet its stance on recognition of property rights on detached human tissues is somewhat different from that of the UK and Australia. For example, in 1995 a model statutory provision which purported to recognise such individual property rights was introduced to the Congress, though it was never enacted.⁹³ Thus although legislative attempts have been made in recognising property rights in human body parts, the current US legislation remain unclear on this issue.

2.5 Conclusions

In this chapter the status quo of the laws, namely statutes and common laws have been examined on the issue whether human tissue can be regarded as property. It is cleared that the present law in Hong Kong offered limited guidance, except in one case that the court recognised remains of a deceased person can be property under RHC O29 r3 for the purpose of obtaining DNA samples for paternity test. Outside this limited context, the position of the law in Hong Kong is unclear.

In such scenario the court will usually refer to other common law jurisdictions to formulate its own view. Based on a comprehensive review of the relevant decisions in other common law jurisdictions, it can be concluded that there exists a general *no-property* rule in human body or tissues, subjects to a few recognised categories of exceptions, namely the Work and Skill Exception, Recognised Duty Exception and the Regenerative Tissue Exception. Legislation in other common law countries have offered better protection to individual rights on separated human tissues and the UK Human Tissue Act 2004 has indirectly recognised property rights in severed body tissues,⁹⁴ yet there is still lack of clarity in the allocation of such proprietary interest.

Should there be general property in human body parts

When a court, in particular the higher court encounters an unprecedented situation, or believes that the previous binding precedents should be revamped in light of the socio-technological changes, it may create a new binding precedent through judicial activism.

⁸⁵Human Organ Transplant Ordinance (Cap 465) and Human Reproductive Technology Ordinance (Cap 561) respectively.

⁸⁶HTA 2004, ss 32(6), 32(7).

⁸⁷HTA 2004, ss 29(9)(d), 32(9)(c).

⁸⁸Hardcastle, above n3, at p.79.

⁸⁹See. E.g. Human Tissue Act 1983 (NSW) ss7, 9, 12; Transplantation and Anatomy Act 1983 (SA) ss9, 15; Human Tissue Transplant Act 1979 (NT) ss8, 10, 11.

⁹⁰See e.g. Human Tissue Transplant act 1979 (NT) s24(4); Transplantation and Anatomy Act 1983 (SA), Human Tissue Act 1983 (NSW) s32(2).

⁹¹*Essentially Yours: The Protection of Human Genetic Information* (Commonwealth Government, Canberra, 2005) 23.

⁹²National Organ Transplant Act 1984.

⁹³Genetic Non Discrimination and Confidentiality Bill (Bill No S422, introduced 11 Mar 1997).

⁹⁴Above, n87.

In doing so it will often take into consideration principles of morality, economic consideration, justice, and floodgate effect, etc. and frame its decisions under the label of policy consideration.⁹⁵ In this part the authors will critique the prevalent policy considerations on the issue whether there should be general property in human body parts. Particular emphasis will focus on whether a person should be entitled to own tissues removed from his/her own body.

3.1 Morality

Human dignity

It has been asserted that permitting people to enjoy right to income and right to capital over their severed body tissues might be viewed as permission to commoditisation of human body. This may challenge traditional social values on human bodies and denigrate dignity upon life persons and dead bodies.⁹⁶ Also, this also triggers resentment linking to metaphor of the human slavery in the early, uncivilised history of mankind. While this concern is legitimate to a certain extent, there is also counter arguments that a property regime would actually enhance respect over living human beings and the dead. For instance, it would promote better record-keeping and best practice since researchers will be under a duty to exercise good control over donated body parts in accordance with the law and the conditions from the providers, and dismay such as preserved human bodies being negligently dumped to landfill will be greatly reduced.⁹⁷ Prohibition over sale of body organs and in vitro embryos can still be achieved via legislation while enjoying the associated protection available from the property regime.⁹⁸

3.2 Economic analysis

Effect on medical research and treatment

It is postulated that granting people's rights to capital and income might be a disincentive to altruistic donation of body tissue.⁹⁹ Sale of body tissues would then increase the costs of medical researches which are considered detrimental to the society at large. The authors would consider this as a myth by considering the analogy of voluntary social service (e.g. cleaning the beaches) versus paid service (i.e. paid cleaning workers). Based on conventional wisdom, one would expect that the net economic effect of providing monetary reward to people's service (cleaning) actually increase the total supply of cleaning workforce. By the same token of argument, rewarding the providers of human tissues would in theory increase the supply of the much needed organs and tissues, as evidenced from the existence of the black-market for such things.¹⁰⁰

Floodgate Effect

Floodgate effect is a common policy reason adopted by a court to deny a person's claim despite sound justifications. Allowing the recognition of property over one's tissue samples may, theoretically, create a floodgate of possible litigations since there are numerous scenarios where one person may interfere with another person's right to possess his/her tissue samples, irrespective of any meaningful use, e.g. hair removed in a salon. I would regard such concern as overly pessimistic, as the law has already been prepared to deal with such challenge such as by treating the owner as abandoning his/her property right over the removed hair.¹⁰¹

Enhance Legal Certainty

Adopting a property regime will clarify the legal relationship between a provider and recipient researcher (donee) by defining what rights and the term and conditions have been transferred. Any violation of such rights or conditions will entitle the sufferer to bring a legal action for the necessary remedy. This will promote and regulate the transferability of tissues samples, in a market-like setting, and will arguably enhance the supply of human tissues including organs for medical treatment and research purposes¹⁰².

⁹⁵Dworkin, R. M. (1967-1968). The Model of Rules, 35 (14) U. Chi. L. Rev., sections (IV) and (V).

⁹⁶*Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003), at 20.21.

⁹⁷The University of Hong Kong. (22 Apr 2003), *Report of the Investigation Panel on the Discovery of Human Body Parts at the Tseung Kwan O Landfill Site* [Online] http://www0.hku.hk/cpaonweb/human_parts_report.doc. (Nov 18, 2011).

⁹⁸Bennett- Moses, above n74, at p.657.

⁹⁹George, A. (2005). Should We Allow The Sale Of Human Body Parts? 7(11) UTS Law Rev, pp.24-25.

¹⁰⁰*Ibid*, at p.2.

¹⁰¹See e.g. *United States v Cox*, 428 F.2d 683 (7th Cir 1970), at p.688.

¹⁰²Potts, W. 'Increasing The Supply Of Transplant Organs By Way of Financial Incentives, 31(5) Monash U Law Rev, at p.235.

3.3 Justice

Balancing the provider's right and possessor's right

The current law grants property rights to universities and medical institutes on body tissues taken from a person, e.g. based on the 'work and skill' exception to the *no-property rule*, but not the provider. It can be argued as an affront to justice. By recognising the property nature of human tissues, others are prevented from unlawful interference with the provider's right over the tissues. Justice can be served by granting necessary remedies to any breach of the provider's right, such as compensation to loss of stored gametes,¹⁰³ return of the stored gametes of the beloved dead to the spouse for in vitro fertilisation,¹⁰⁴ or a fair share of the profits generated from research on the non-consensually removed human tissue.¹⁰⁵

Prevent exploitation of the vulnerable

There has been concern that the liability to execution associated with property right might be exploited against the improvised such as debtors to extract human tissues e.g. blood, or even kidneys from them. This is not necessary true as the current criminal law and constitutional law on human rights¹⁰⁶ already afford good protection against such invasion of the human body. On the other hand, some poor people may choose to sell blood or other regenerative body tissue in a non-health threatening manner so as to improve their family economic condition. In some countries the provider is often rewarded in the form of service fee rather than the sale price without recognising such body parts as goods.¹⁰⁷ Thus if the transaction is via an intermediary which has sold the body parts to a hospital and then went astray without paying the transferee, that poor fellow will have no recourse against the ultimate hospitals. If however, body parts are recognised as property, the victim can sue for conversion and claim compensation from the hospitals. Even though the hospital may still raise the defence of bona fide purchaser for value without notice, the legislative body can overcome this loophole by imposing a mandatory duty to inquire the consent of the actual provider if it sources from an intermediary instead of directly from the provider.

3.4 Utility

Self dominion

Allowing a person to transfer rights over their removed body tissues to another person, as someone suggests, might deprive that person remaining rights of control over the body tissues¹⁰⁸. This problem can be resolved by defining the residual control over the body tissues, in the form of covenant on the recipient¹⁰⁹. In contrast, a property approach overcomes a limitation of the consent-based approach in the US on the use of donated genetic materials, namely the lack of ongoing control since the consent-based approach only permit a personal action against the original transferee (right *in personam*), whereas a property approach allows the owner to sue any subsequent transferee (right *in rem*), except possibly the bona fide purchaser for value without notice.

Applicability over genetic materials

It has also been argued that it may be difficult to attach proprietary interest over genetic material or information, which can be easily reproduced and modified. The authors' views are that even that this apparent difficulty can be surmounted by utilising the notion of intellectual property.

Other legal framework

Some writers argued that the protection available from property law are also available in other areas of law and it

¹⁰³ *Yearworth v North Bristol NHS Trust*, above n73.

¹⁰⁴ *Re The Estate of the late Mark Edwards*, above n.63.

¹⁰⁵ See e.g. one of the original claims by the plaintiff in *Moore*, above, n66.

¹⁰⁶ E.g. Offence Against The Person Ordinance (Cap 212) ss19, 39 and 40; Basic Law articles 28 and 389; Bill of Rights Ordinance (Cap 383).

¹⁰⁷ E.g. Pennsylvania in the US pays up to \$3000 medical expenses, funeral expenses and incidental expenses incurred by the donor or the donor's family in making a vital organ donation: see Veatch, R. M. (2003). Why Liberals Should Accept Financial Incentives for Organ Procurement. 13(1) *Kennedy Institute of Ethics Journal* 19, 22.

¹⁰⁸ Katsikis, D. (2009). A philosophical justification of the individual's proprietary right to sell her body parts. *UCL Iris. Rev.* 72, pp.87-88.

¹⁰⁹ See discussion under 'The Core Bundle of Right Test'.

For example, Skene argued that battery under tort law (or criminal law) can protect a person from unauthorised trespass to his/her body, and non-discrimination and privacy law can guard against unlawful use of genetic information.¹¹⁰ It has also been suggested non-legal framework can be utilised in achieving similar purposes, such as the Human Research Ethics Committee (“HREC”) currently adopted in Australia.

The authors’ views on this issue are that the non-proprietary framework has limitations in their protection towards the provider compare with the property law. For example, battery under tort law can only protect the act of trespass to the body. Once the body tissue has been consensually or lawfully removed and subsequently misappropriated, battery can offer no remedy. Similarly, ethical framework such as the one currently adopted in Australia do provide certain regulation over the research institutes and medical personnel in the handling of human tissues under their possession, but the remedy available to the owner is limited, such as when the stored cord blood was transferred to another bio-bank without the owner’s consent and the original bio-bank has gone bankrupt. Under such situation, a property framework can assist the owner to demanding the return of the cord blood through the action of detinue¹¹¹ or title tracing. Such remedies will not be available under non-discrimination or privacy framework which primarily can only provide a personal but not proprietary remedy.

3.5 Conclusions

In this chapter the authors have examined the various policy considerations on whether property should be recognised in human tissue. There are obvious reasons of pros and cons on this controversial issue, and the majority obstacles against adopting such concept arise from an ethical origin on the human dignity, as it will trigger a link to the human slavery centuries ago. By confining property rights to only excised body tissues and corpses this will avoid the negative association with the slavery history, and it is argued that the property framework can actually raise the respect over such body parts as the bailee for such body parts, e.g. university researchers and medical institutes will be imposed upon the corresponding duty to keep good care of them.

Concerns over the use of property regime on human tissues also exist in other perspectives based on economic analysis, utility and justice. These have been analysed carefully and none of them are considered as show stoppers. The remaining benefits are therefore considered to outweigh the drawbacks and as such the authors conclude that there should be property in human body parts.

Conclusions

The advancement in biotechnology has generated new demand on human tissues, such as assisted reproduction technologies, DNA researches and bio-banks, in addition to the transplant of human organs for medical treatment. This has created disputes on the rights over such human tissues between the providers and the recipients, and between the first recipient and subsequent recipients such as the researchers. Such rights are akin to property rights and it is therefore worthwhile to consider a proprietary analysis on human body parts.

Traditionally the common law regards no property in the human corpse, which is often referred as the *no-property rule*. Though established over 150 years ago with a dubious origin, this has been accepted as the default rule. Gradually the common law has developed exceptions to this rule to affix property to severed body parts in limited circumstances for specific purposes, such as cremation of the cadaver, protection of the medical institutes’ possessory rights, etc. With reference to recent cases on this topic in other common law jurisdictions, and adopting property tests commonly used by the mainstream researchers the authors have conducted a legal analysis which purports the recognition of property in human body parts.

In addition to legal analysis, the authors have also embarked on the journey of policy analysis. Various policy consideration with basis on ethical, economic, justice and utility have been examined. An overall balance was tipped towards favouring the cognisance of property regime over human tissues.

Deficiencies in the existing laws in Hong Kong are identified through this exercise, which give rise to insights for law reform consideration. The authors recommend for recognition of the property rights on human tissues upon society consensus through proper consultation with various stakeholders.

¹¹⁰Skene, L. (2002). Arguments against People Legally'Owning' their Own Bodies, Body Parts and Tissue.2 Macquarie Law Journal 165, under discussion of “*Self-dominion*”.

¹¹¹The tort action of detinue has been abolished in the UK, but it is still available in Hong Kong.