

The person, the body and body parts

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Sandra Hotz / EPFL 2025

CÉCILE FABRE
Whose Body is it Anyway?
Justice and the Integrity of the Person



Plan

- 1) Introduction
- 2) Legal status of the human body and the human corps
- 3) Legal status of human body parts (separate)
- 4) Applications/exemples

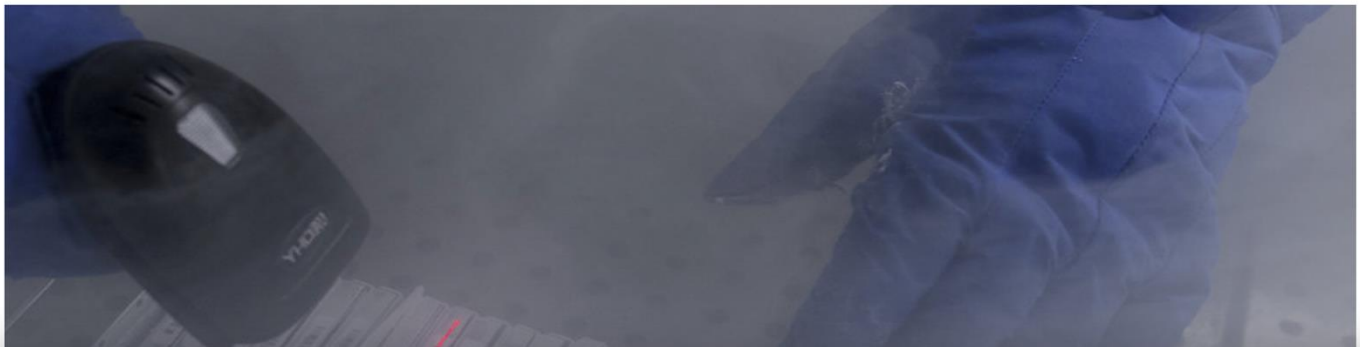
1. Introduction

ENQUÊTE

Affaire Cryo-Save: à la recherche des cellules souches disparues



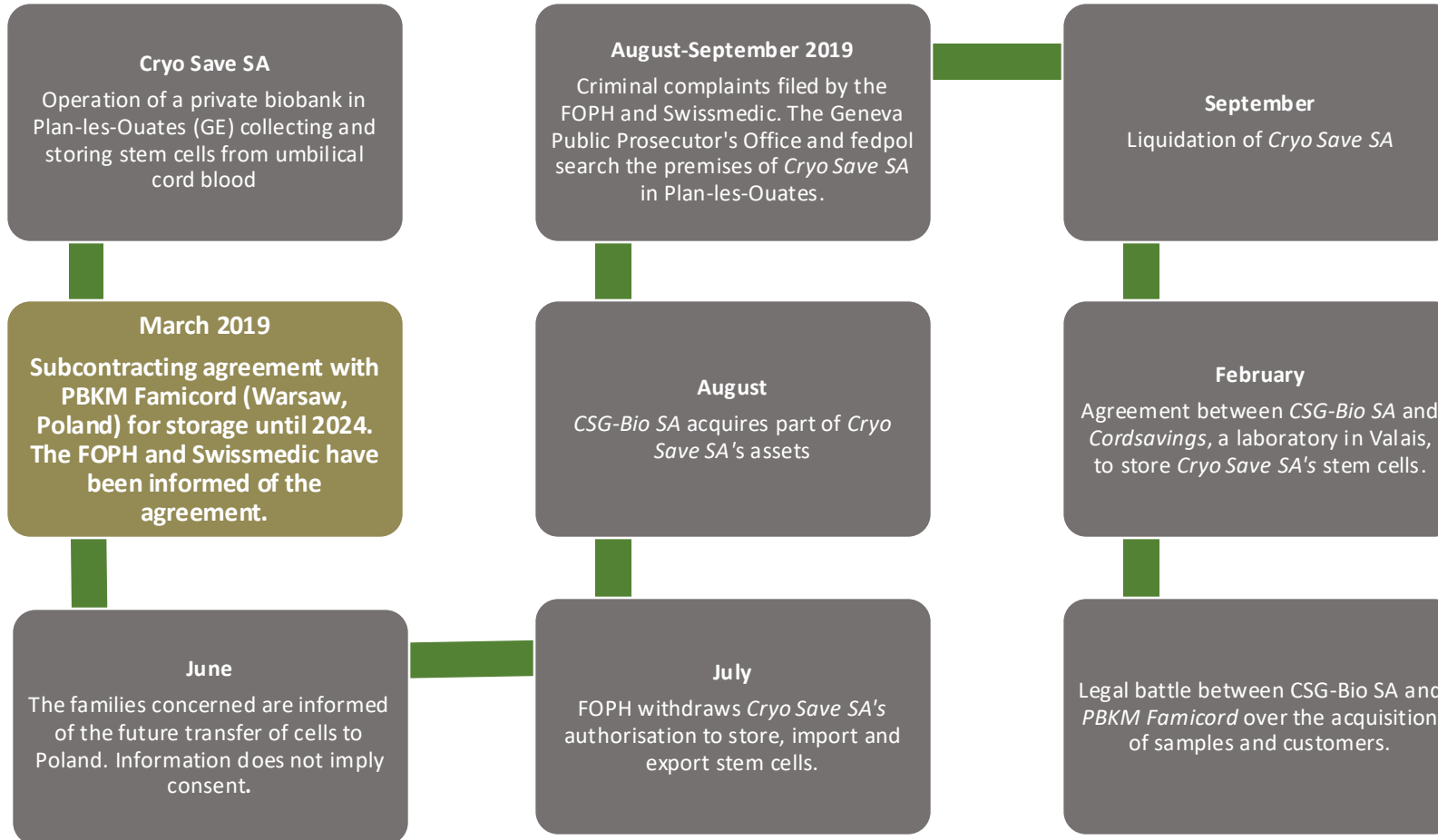
«Le Temps» est parti en Pologne sur la trace des échantillons de cellules souches confiés à la société Cryo-Save par plus de 250 000 familles à travers l'Europe. Une enquête au cœur d'intérêts financiers colossaux mêlant les leaders du secteur, les autorités sanitaires suisses et de lointains investisseurs dubaïotes



<https://www.letemps.ch/sciences/affaire-cryosave-recherche-cellules-souches-disparues>

<https://pages.rts.ch/emissions/36-9/11552660-ou-sont-passees-les-cellules-souches-de-250000-bebes.html>

Cryo Save SA case



Civil law issues?

- 1) In which legal category does the human body or a biological sample fall?
 - Thing, or*
 - property of the person*

- 2) What rights does a person have over their body or biological samples taken from it?
 - Real rights (in particular, property rights), or*
 - Personal rights*

- 3) Who is the owner of a biological sample?
 - The source person, or
 - A third party

Concepts of the person – overview

Person = legal subject

Personality = All goods belonging to a person by virtue of their existence

➤ Personal **goods** = (in particular) physical and mental integrity, privacy, honour, image, voice, etc.

Personal / **personality rights include the** right to bodily integrity, right to privacy, etc.

Concept of a thing – overview

Thing = legal object

a defined and impersonal entity of the material that is susceptible to human control

characteristics:

- material object
- delimited object
- object susceptible to human control.
- Impersonal object
- an object different from an animal...

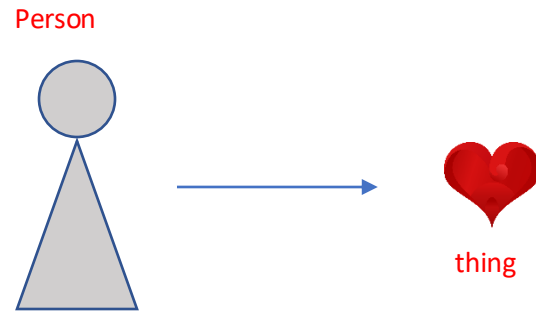
2. Legal status of the human body and corpse

Legal status of the human body (2)

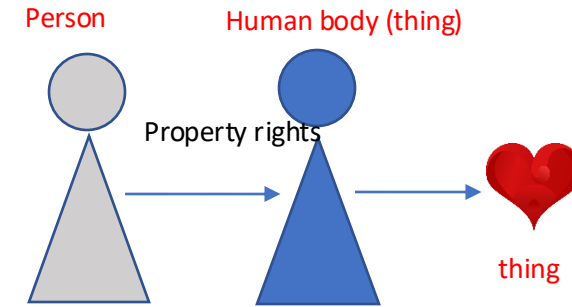
- 1) Legal nature: a person or a thing – «tertium non datur».
- 2) Monistic representation of the person:
 - a) Indivisibility of the person and the body;
 - b) Human body = substratum, necessary support for the person;
 - c) **Personal rights** such as **physical and psychological integrity**, relate to the **dignity, integrity, and personal autonomy of an individual**.
- 3) Dualistic representation of the person:
 - a) Dissociation of the person and the body;
 - b) Human body = an object / thing (however sacred, not for sale);
 - c) **Real rights** such as ownership or possession rights
- 4) Others: superimposition thesis ("Überlagerungsthese"), *de facto* universality.

Lefal status of the human body (3)

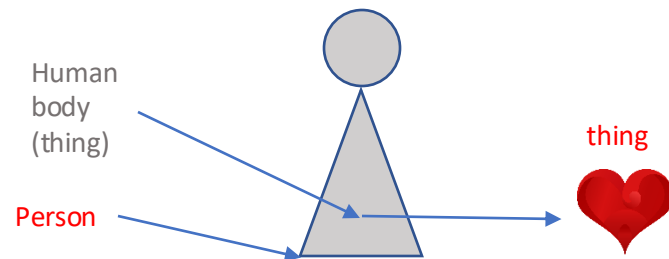
Monistic theory



Dualist theory



Superposition theory



Theory of factual universality



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Legal status of the human body (4)

1) Beginning of legal personality (Art. 31 para. 1 CC)

Three cumulative conditions:

- a) Birth completed,
- b) Child
- c) born alive (Art. 9 para. 2 Ordinance of civil state),

2) End of legal personality (Art. 31 para. 1 CC)

- a) Articles 9 of the **Organ Transplantation Act** and art. 7 of the Ordinance.
- b) **Concept of death**: SAMW medical-ethical guidelines on the diagnosis of death in the context of organ transplantation (ATF 123 I 112; ATF 98 Ia 508).

Status of the human corpse = dead body (5)

- 1) Is it a matter of distinction between a thing and a person?
- 2) Can an individual, during their lifetime, determine the fate of their own corpse / remains?
- 3) Are relatives authorised to dispose of the deceased individual's body?
- 4) Is there a recognised right of ownership over a human corpse?

Is the monistic approach applicable to human corpses?

Nature of the corpse: **impersonal object** (ATF 127 I 115, c. 6b).

Nature of the right to dispose of a corpse:

Personal rights:

-Right of the **person concerned** to decide during their lifetime on the fate of their remains, e.g. the manner and place of burial, donation of their body for teaching purposes (ATF 127 I 115, c. 4; ATF 111 Ia 231, c. 3a));

-Personal rights of **relatives** to decide on the fate of the corpse, to oppose unlawful interference with the remains, etc.:

"The right to oppose unlawful interference with the body of a relative is an emanation of general personality rights, protected in civil law by Art. 28 ff. CC and comparable, from a private law perspective, to the right of ownership.

(...)

After death and the end of personality (Art. 31 CC), the latter is in principle no longer protected. However, the legal system allows for an extension of protection, out of respect for the dignity of the deceased and the feelings of piety of their loved ones" (ATF 127 I 115, c. 6); see also: 5A_906/2016, c. 3.3; ATF 111 Ia 231, c. 3b)).

Property rights?

Illustration of the rights of the deceased and their relatives regarding the remains

General information	810.21
This text is in force	English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.
Decision	October 8, 2004
In force	July 1, 2007
Source	AS 2007 1935
Publication language	DE FR IT EN

Federal Act on the Transplantation of Organs, Tissues and Cells (Transplantation Act)

of 8 October 2004 (Status as of 1 February 2021)

The Federal Assembly of the Swiss Confederation,
based on Article 119a paragraphs 1 and 2 of the Federal Constitution¹, and having considered the Dispatch of the Federal Council of 12 September 2001²;

decrees:

¹ SR 101

² BB 2002 29

Chapter 1 General Provisions

Art. 1 Aim

- Section 2 Removal of Organs, Tissues or Cells from Deceased Persons

- Art. 8 Preconditions for removal

¹ Organs, tissues or cells may be removed from a deceased person if:

- a. the person has consented before their death to the removal;
- b. death has been determined.

² If no documented consent or refusal by the deceased person is available, the next of kin must be asked whether they are aware of the person having declared an intention to donate.

³ If the next of kin are not aware of any such declaration, organs, tissues or cells may be removed if the next of kin give consent. The decision of the next of kin shall be guided by what they believe the deceased person would have wanted.

^{3bis} The request to the next of kin may be made and their consent obtained only once it has been decided to discontinue life support measures.⁶

⁴ If there are no next of kin, or they cannot be contacted, removal is not permitted.

⁵ The wishes of the deceased person take priority over those of the next of kin.

⁶ If the deceased person has demonstrably delegated the decision on the removal of organs, tissues or cells to a trusted person, this person shall be consulted instead of the next of kin.

⁷ Individuals who have reached the age of 16 may declare their intention to donate.

⁸ The next of kin shall be defined by the Federal Council.

Illustration of the rights of the deceased and their relatives with regard to the remains

Federal Act on Research Involving Human Beings (SR 810.30)

- Chapitre 5 Recherche sur des personnes décédées

- Art. 36 Consentement

¹ La recherche sur le corps d'une personne décédée peut être pratiquée si cette personne a, de son vivant, consenti à ce que son corps soit utilisé à des fins de recherche.

² En l'absence de document attestant le consentement ou le refus de la personne décédée, le corps ou des parties de celui-ci peuvent être utilisés à des fins de recherche avec le consentement des proches ou d'une personne de confiance désignée, de son vivant, par la personne décédée.

³ Le consentement donné par les proches ou la personne de confiance est régi par l'art. 8 de la loi du 8 octobre 2004 sur la transplantation¹⁰.

⁴ La recherche sur le corps d'une personne décédée plus de 70 ans auparavant peut être pratiquée sans le consentement visé à l'al. 2. Cependant, elle ne peut pas être pratiquée si des proches manifestent leur désaccord.

3. Legal status of separate parts of the human body

Legal status of separate body parts (2)

1) International law

Oviedo Convention and protocols

2) Federal Constitution

Fundamental rights (personal freedom, protection of privacy)

Art. 118 (health protection, in particular therapeutic products)

Art. 118b (research on human beings)

Art. 119 (Assisted reproduction and genetic engineering)

Art. 119a (transplantation)

3) Civil Code

Art. 27 ss. (CC protection of personality)

Art. 641 ss CC (property rights, concept of property)

4) Public law

LTransp / LPTTh / LPMA / LAGH / LRH / LProfils / LRCS

5) Soft law

Marketing authorisation guidelines, good practices, etc.

Legal status of human body parts (3)

General principles

- 1) Consent (realisation of personal rights) for the collection and use of biological material (e.g. Articles 8 and 12 OTA; Articles 7 and 16 ff. HRA; Article 18 ATR, etc.);
- 2) Significant restrictions on individual freedom with regard to possible acts of disposal (e.g. Art. 12(c) LTx; Art. 4 LPMA, etc.);
- 3) Donations must be free of charge (e.g. Art. 119 para. 2 let. e Cst./féd.; Art. 119a para. 3 Cst./féd.; Art. 9 LRH; Art. 6 LTx; Art. 21 LPMA);
- 4) Prohibition on commercialisation (e.g. Art. 119 para. 2 let. e Cst./féd.; Art. 119a para. 3 Cst./féd.; Article 9 LRH; Article 7 LTx).

Legal status of human body parts (4)

Concept






- 1) Separate body parties: what are we talking about?
- 2) Examples:
 - Organs, tissues, cells (Transplantation Act), biological material (HRB), etc.
 - What is meant by biological material?

Article 3(e) HRA: "Substances from the body of living persons".

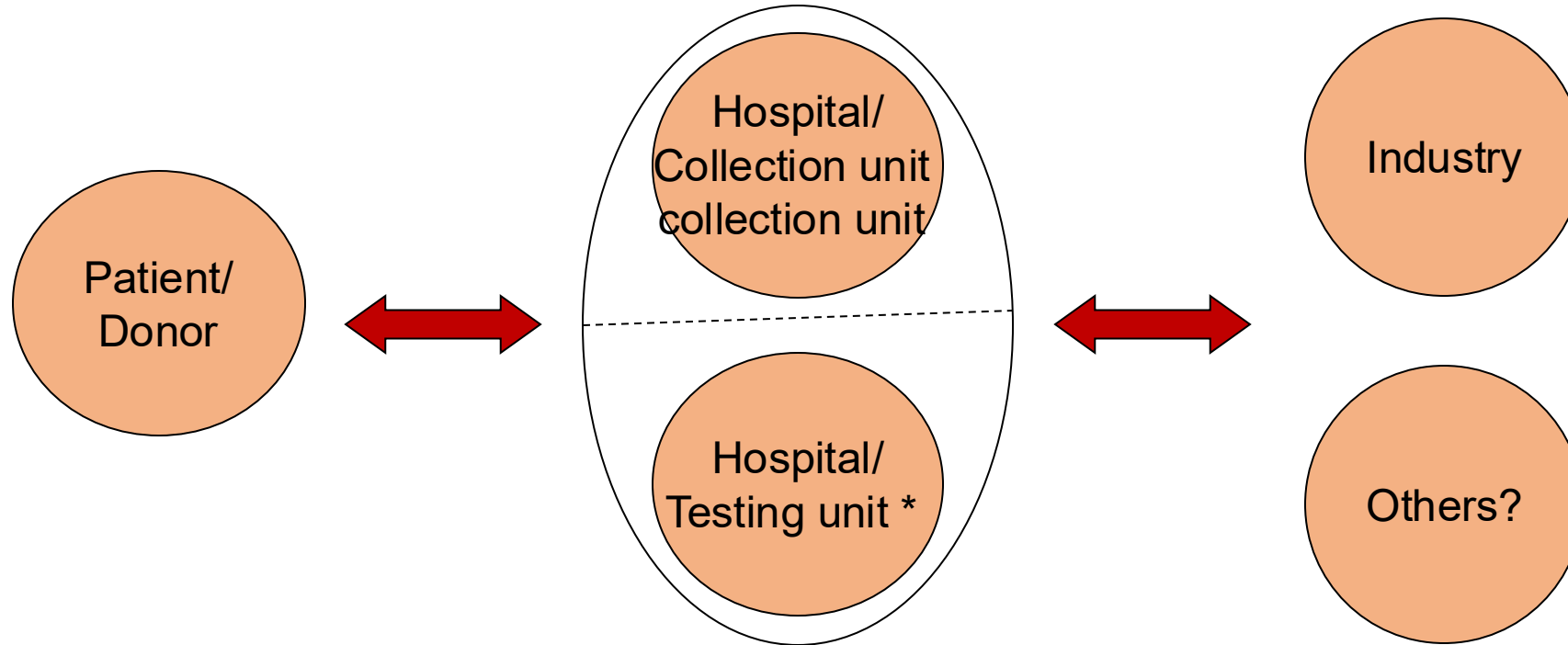
"Biological material of human origin refers in particular to organs, tissues, cells (including ova and sperm) and body fluids such as blood and urine that come from living persons" (Federal Council Message on the Federal Act on Research Involving Human Beings, 7310).

- 4) Distinction between material and informational aspects

Legal status of body parts (5)

Gametes		Medically Assisted Reproduction Act
Blood		Therapeutic Products Act
Cells, organs, tissues		Transplantation Act
Biological material		Human Research Act
Biological sample		Human Genetic Analysis Act

Legal status of body parts (5)



* Research, transplantation, preparation of derived products, anti-doping control, reproduction, etc.

Legal status of body parts (6)

Simple real approach

A spare part is a thing as soon as it is separated from the human body. Application of property rights.

Personal approach

Persistence of a personal link with the source person. A detached part is a personal asset. Application of personality rights as long as this corresponds to the will of the source person.

Modified real approach

Detached part is a thing. Parallel (not superimposed) application of property rights and personality rights.

Superimposition approach

Detached part is a thing. Applicable law depends not only on 1) separation from the body and 2) the will of the source person. This will takes the form of a waiver of personality rights.

Legal status of body parts (7)

Principle: Detached body parts are **legal objects/things**.

Exceptions:

❑ **Functional link**

- *Autologous use: Removal of a detached part in order to reintegrate it into the source person's body (autologous use). The functional unity between the source person's body and the detached parts is not broken. Application of personality rights;*
- *Stored detached part replaces a lost function of the source person (stored sperm from a person who subsequently became sterile).*

❑ **Human genetic material**

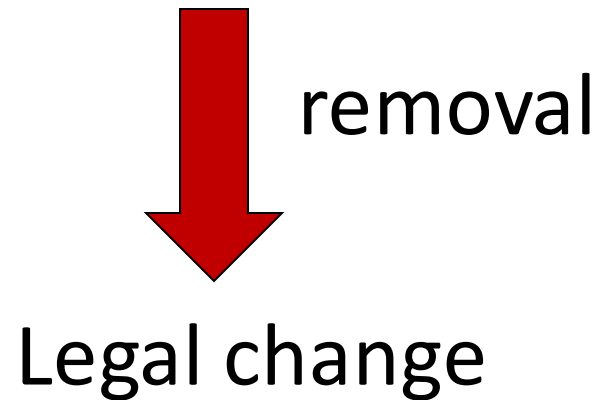
Possible distinction between the informational and material aspects of detached parts. The informational aspect relates to the private sphere and is a personal right. The material aspect is a thing.

❑ **Gametes**

A legal opinion is based mainly on the genetic link to the source person.

Legal status of body parts (8)

- Human body = subject; personal attribute



- Detached parts = objects

Legal status of body parts (8)

Acquisition of ownership

Principle of «engendrement» (majority doctrine):

Detached part = Natural fruit

A natural fruit within the meaning of Article 643 of the Civil Code is a product or yield derived directly from a fruit-bearing thing. This may be fruit, grain or milk from an animal. The fruit is derived from a principal thing, of which it is an integral part until it is separated.

Advantage: Allows the original ownership to be recognised as belonging to the source person.

Weakness: Incompatible with a monistic representation of the human body. The latter is not a thing. A detached part is therefore not a fruit derived from a thing.

Legal status of body parts (9)

Acquisition of property

1) Principle of occupation (minority doctrine):

- ❑ Detached part = Ownerless thing

An ownerless thing within the meaning of Article 718 CC is a thing over which no one has any right of ownership.

- ❑ Acquisition by taking possession of the thing with the actual intention of becoming its owner.

- ❑ **Advantage:** Compatibility with the monistic representation of the human body

- ❑ **Weakness:** Does not allow for the recognition of a prior real right to the

→ source person

Modified real approach allows the source person to be protected by recognising a personal link with the detached body part

Moore v Regents of the University of California

John Moore's story begins on 8 October 1976 when he first visited the University of California Los Angeles (UCLA) Medical Centre. There, he learned that he had hairy-cell leukaemia. After analysing Mr Moore's blood and bone marrow, Dr David W. Golde confirmed this diagnosis. At that time, Dr Golde was already aware of the great value of Mr Moore's blood and certain blood components.

Dr Golde suggested removing Mr Moore's spleen, to which Mr Moore consented. At the same time, the doctor arranged with Ms Shirley G. Quan, a researcher at UCLA, to preserve parts of Mr Moore's spleen and transfer them to a research unit at the university. Mr Moore was not informed of these arrangements. Following the operation, at Dr Golde's request, Mr Moore returned to UCLA several times between November 1976 and September 1983. During each visit, blood, skin, bone marrow and semen were taken from Mr Moore. Shortly before August 1979, Dr Golde established a cell line from John Moore's T lymphocytes. In January 1981, UCLA representatives ('Regents') applied for a patent on this cell line, naming Dr Golde and Ms Quan as inventors. This was followed by contracts signed between Dr Golde, UCLA representatives and companies such as Genetics Institute Inc. and Sandoz Pharmaceuticals Corporation. These contracts provided for the biological material and research to be made available to these companies in exchange for hundreds of thousands of dollars and shares.

When John Moore learned that the samples taken from his body had been used for research and resulted in a patent, he took legal action against the two researchers, UCLA representatives and the companies mentioned.

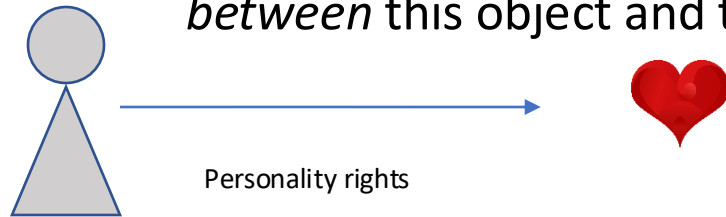
Moore v Regents of the University of California, 793 P.2d 479 (Cal 1990).

Legal status of body parts (9)

Status of detached parts – personal connection

Principle: A detached part is a movable object that maintains a personal connection with the source person.

- Application of property rights *to* the object + application of personality rights *between* this object and the source person



Basis for attachment:

1) Emotional link (psychological integrity)

*Despite the separation from the human body (and therefore from physical integrity), human origin creates an emotional attachment to the detached part. This link is protected by **psychological integrity***

2) Privacy

The informational part, in particular the genetic information, of a detached part may be linked to the private sphere of the source person, a personality right

Legal status of body parts (10)

Modified actual approach – personal attachment

1) **Bodily integrity:** Includes physical and mental integrity. Protects the human body, including everything permanently attached to it, and the 'spiritual' part of the person.

2) **Privacy**



Intimate sphere

Life events that should be kept from the knowledge of anyone other than those to whom the person concerned has specifically disclosed them. E.g.: Health data, physical disabilities that are not directly perceptible, etc.

Private sphere

Facts that a person wishes to share with a limited circle of people relatively close to them (relatives, friends, acquaintances, etc.).

Public sphere

Anything that does not relate to the intimate or private sphere, i.e. events that are accessible to a person's knowledge and that can be disclosed.

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Legal status of body parts (11)

Exceptions to personal affiliation:

1) Absence of personal connection:

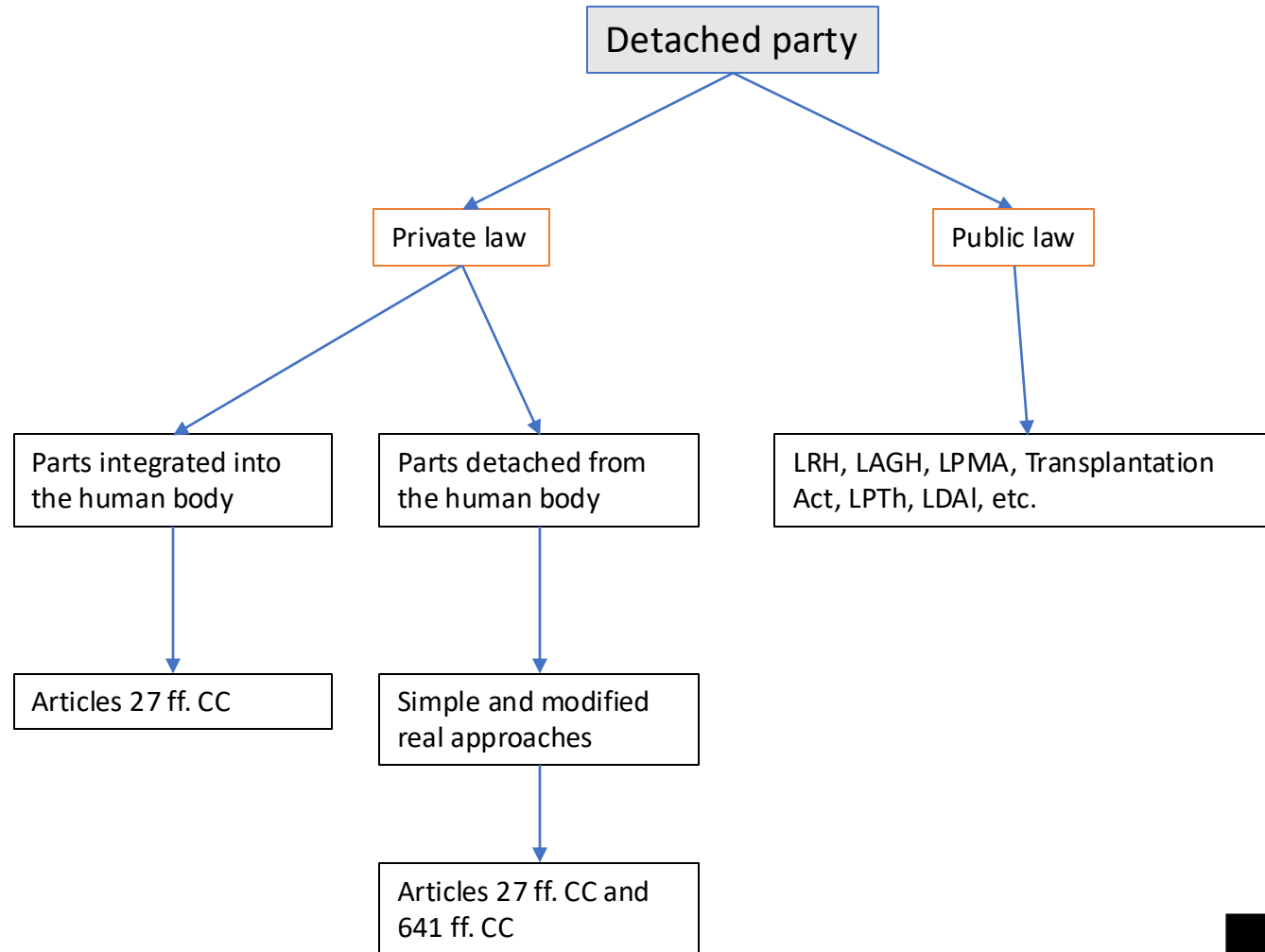
- *Regenerative parts (nails, hair),*
- *Parts intended to separate naturally from the body (faeces, sweat, saliva, etc.), and*
- *Medical waste.*

2) Breach of personal connection:

- *Handling of detached parts – 'industrialised', 'extremely manufactured' parts – and*
- *Anonymous or anonymised detached parts*

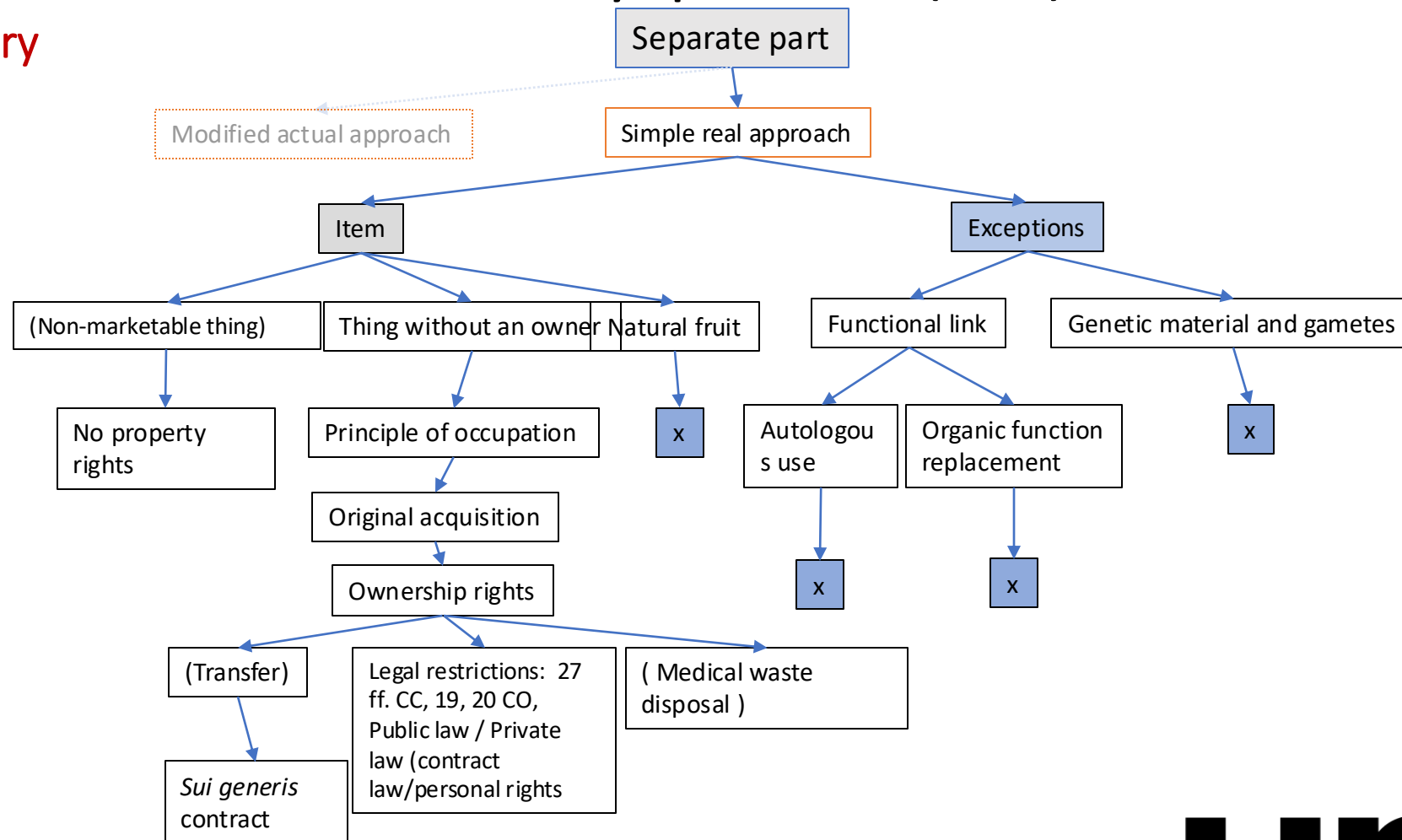
Legal status of body parts (11)

summary



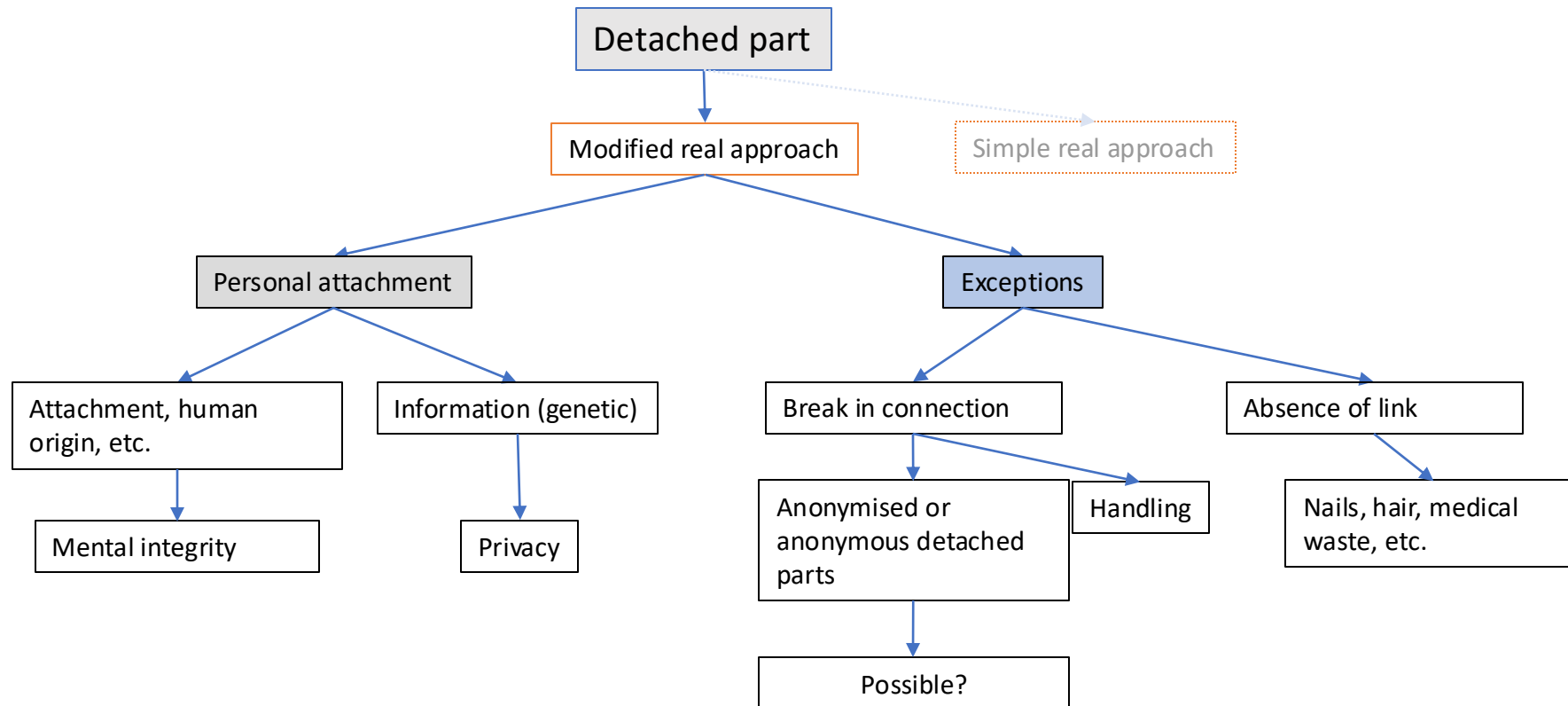
Legal status of body parts (12)

summary



Legal status of body parts (13)

summary



Protection of personality rights – Overview

- Art. 28²⁴

¹ Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe.

² Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi.

1) **Principle:** any infringement is unlawful

2) Infringement is lawful if **justified** by:

- the *consent of the victim*;
- an *overriding private or public interest*;
- the *law* (e.g. Art. 34 LRH).

3) **Implementation:**

- *Defensive actions:* actions to prevent infringement, to cease infringement, to establish a right (Art. 28a para. 1 CC)
- *Remedial actions:* action for damages, action for compensation for moral harm, action for restitution of gains (Article 28a para. 3 CC)

Consent of the source person – example

- Art. 7 Consentement

¹ La recherche sur l'être humain peut être pratiquée uniquement si la personne concernée a donné son consentement éclairé ou si elle n'a pas exercé son droit d'opposition après avoir été informée conformément à la présente loi.

² La personne concernée peut en tout temps refuser de participer à un projet de recherche ou révoquer son consentement sans avoir à justifier sa décision.

- Section 2 Information et consentement

- Art. 16 Consentement éclairé

¹ Une personne ne peut être associée à un projet de recherche que si elle y a consenti après avoir été suffisamment informée (consentement éclairé). Elle doit donner son consentement par écrit; le Conseil fédéral peut prévoir des exceptions.

² Les informations suivantes doivent être fournies à la personne concernée par oral et par écrit, sous une forme compréhensible:

- a. la nature, le but, la durée et le déroulement du projet de recherche;
- b. les risques et les contraintes prévisibles;
- c. le bénéfice escompté du projet de recherche, notamment pour elle-même ou d'autres personnes;
- d. les mesures destinées à assurer la protection de ses données personnelles;
- e. ses droits.

³ Un délai de réflexion raisonnable doit être accordé à la personne concernée avant qu'elle ne se prononce sur son consentement.

⁴ Le Conseil fédéral peut déterminer d'autres éléments à fournir dans le cadre de l'information.

Consent of the source person – example

- 📄 Chapitre 4

Réutilisation de matériel biologique et de données personnelles liées à la santé

- 📄 Art. 32 Réutilisation de matériel biologique et de données génétiques

¹ Le matériel biologique et les données génétiques peuvent être réutilisés pour un projet de recherche sous une forme non codée lorsque la personne concernée ou, le cas échéant, son représentant légal ou ses proches ont donné leur consentement éclairé. Les art. 16 et 22 à 24 s'appliquent par analogie au consentement.

² Le matériel biologique et les données génétiques peuvent être réutilisés à des fins de recherche sous une forme codée lorsque la personne concernée ou, le cas échéant, son représentant légal ou ses proches ont donné leur consentement éclairé. Les art. 16 et 22 à 24 s'appliquent par analogie au consentement.

³ Le matériel biologique et les données génétiques peuvent être anonymisés à des fins de recherche lorsque la personne concernée ou, le cas échéant, son représentant légal ou ses proches ne s'y sont pas opposés après avoir été informés. Les art. 22 à 24 s'appliquent par analogie au droit d'opposition.

Bundesgerichtshof (DE) – "Sperma Entscheidung"

Due to an operation he had to undergo for bladder cancer, which he knew would render him infertile, Marc decided to cryopreserve his sperm at a biobank in 1987. In January 1989, due to limited space available at the bank, the bank contacted Marc to confirm that he still wished to store his sperm; if no response was received within four weeks of receipt of the letter, the sperm would be destroyed. Marc replied within the time limit and his letter reached the bank, which did not dispute this. For unexplained reasons, his reply was not added to Marc's file. Believing, wrongly, that he had not replied, the stored sperm was destroyed.

BGH, Urteil vom 9. November 1993 – VI ZR 62/93

Thank you for your attention