

## Legal Regime of Human Organs and Tissues as Objects of Civil Law in the Field of Transplantation

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**Abstract.** The article covers the issue of determining the legal regime of organs and tissues in the context of civil law in the field of transplantation. The issue of recognising organs and tissues as objects of civil law, given the gaps in the current civil legislation of Ukraine, is presumed. This situation is conditioned upon the need for national legislators to consider a range of moral and ethical aspects related to the civil circulation of human biomaterials. The publication attempts to define the legal regime of organs and tissues separated from the human body as specific objects. The study is based on a systematic approach; special legal and logical methods were used. The declared problem is studied considering the achievements of Ukrainian and foreign academic literature. A comprehensive analysis of special transplant legislation contributes to the understanding that organs and tissues are exceptional objects not removed from civil circulation, which are currently used for the purpose of providing medical services. Since the necessity of classifying such anatomical materials as separate independent objects of civil rights, limited in circulation, is substantiated, given their exceptional nature and specificity. Based on a comprehensive study of national legislation and doctrinal approaches, the need to apply to the organs and tissues used for transplantation, a special legal regime that considers the specific features of these objects

**Keywords:** anatomical materials, biomaterials, donation, objects of civil rights, property rights

### Introduction

The current possibilities of transplant medicine are impressive, but limited by the problem of shortage of donor material. Conditioned upon this, organs and tissues used for transplantation are of particular value. At the same time, the current civil legislation of Ukraine [1] does not contain proper regulation of the legal regime of organs and tissues. The problem is that at the legislative level the issue of classification of organs and tissues as objects of civil law has not been resolved.

I.V. Spasibo-Fateeva emphasises the possibility of the existence of organs and tissues outside the human body, which indicates that they are not tied to the subject and do not constitute its essence. The scientist believes that anatomical materials are medical, medical means and are the good that appears in the legal environment, and therefore can be attributed to the objects of law [2, p. 15]. O.V. Hubskyi notes that “human organs and other anatomical materials, acting as elements of the material base of intangible health and ultimately the good of life, in turn is a material phenomenon, and therefore they can legally be called objects of civil donation” [3, p. 144]. According to V. Dontsov, human organs and tissues have a tangible visible form, have value available for human domination and can have a monetary value, in connection with which the specifics of human organs and tissues are independent objects of civil law [4, p. 14].

There is no doubt that until the moment of separation, human organs and tissues are part of the whole organism, and therefore are protected based on personal non-property rights that ensure the integrity of the person. From the moment

of separation, these anatomical materials lose their connection with the donor of organs or tissues and become objects of the material world. However, the very fact of ratification should not lead to the idea that anatomical materials have become a thing within the meaning of Art. 179 of the Civil Code of Ukraine [1].

There is also an opinion in legal doctrine that, conditioned upon certain specifics, organs and tissues are independent objects of civil law, which, however, may be objects of property rights, but only for a limited period of time: from their removal from the human body, and until the moment of implantation in another organism (or until the moment of other use) [4, p. 9]. In the legal field, the controversy over the expediency of recognizing separate body parts as objects of property rights is quite lively and controversial. Yes, another philosopher J. Locke believed that “everyone has property in his own person” [5].

In view of the above, in the legal field there are heated debates about the feasibility of extending the legal regime of things to organs and tissues and the recognition of these objects as property. On the one hand, the application of the legal regime of things to these anatomical materials will bring legal certainty to the regulation of relations, the objects of which are organs and tissues. On the other hand, the recognition of human biomaterials as things is considered inappropriate, as it will promote the application of a kind of machine metaphor to the human body, where man is understood as a set of interchangeable parts. All this raises the question of

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understanding the legal regime of organs and tissues in a number of the most pressing issues of civilisation.

*The purpose of the article* is to study the problem of determining the legal regime of organs and tissues separated from the body as specific objects.

### Conceptual Approaches to the Definition of Organs and Tissues in the System of Objects of Civil Rights and the Extension of the Legal Regime of Things

In light of the progressive achievements of modern medicine, anatomical materials can be separated from the human body and still retain their useful properties, because they are a kind of tool to save lives when using such a method of treatment as transplantation.

At the present stage of development of civil doctrine there is no single concept of theoretical determination of the place of organs and tissues in the existing system of objects of civil law regulation. Article 177 of the Civil Code (hereinafter – CC) of Ukraine to the objects of civil rights includes things, including money and securities, other property, property rights, results of works, services, results of intellectual, creative activity, information, and other material and intangible benefits [1]. In accordance with Part 1 of Art. 178 of the CC of Ukraine, “objects of civil rights may be freely alienated or transferred from one person to another by succession or inheritance or otherwise, if they are not withdrawn from civil circulation, or not limited in circulation, or are not integral to natural or legal person” [1].

However, the CC of Ukraine does not explicitly state that organs, tissues or other anatomical materials are separate objects of civil rights. Along with this, in accordance with Part 3 of Art. 290 of the CC of Ukraine, “an individual may give written consent to the donation of its organs and other anatomical materials in case of death or prohibit it” [1]. That is, the current civil law provides for the ability to dispose of their anatomical materials in case of death. In addition, in Ukraine relations in the field of transplantation are regulated by special legislation, in particular the Law of Ukraine “On the Use of Transplantation of Anatomical Materials to Humans” [6], which regulates transplantation and transplant activities, and allows managing organs and tissues in the case of posthumous and in the case of lifelong donation of organs and tissues for their use as grafts.

A systematic analysis of special legislation in the field of transplantation [6] suggests that organs and tissues are independent objects not removed from civil circulation, can be physically separated from a person and used as transplants in the provision of medical services for organ transplantation or fabrics. In view of this, the prevailing approach in modern civilisation is that donor organs and tissues are independent objects of civil law.

At the same time, some scholars believe that the application of the concept of things to the legal regime of organs and tissues intended for transplantation is unjustified. For example, V.L. Skrypyuk notes that donor organs and other anatomical materials cannot be recognised as objects under any circumstances; they are specific independent subjects of civil law agreements, limited in civil turnover [7, p. 66]. A separate argument in favor of this view is the statement that human organs and tissues are of special origin, and therefore such anatomical materials can not be identified with things, because “they are directly the highest human values associated

with his right to life, and health, which must be inviolable in any case” [8, p. 174].

Other scientists, on the contrary, argue that organs and tissues as a result of separation acquire the legal regime of things and their dynamics is based on property law [9, p. 385]. The right position in the field of civil studies is that it is unjustified to say that organs and tissues or other anatomical materials become things automatically on the basis of separation from the person, because the current civil Law of Ukraine [1] clearly does not answer this question. Therefore, this aspect needs its legislative regulation and the best in this case, according to some scholars, is the way of recognising organs removed from the human body as things, property, but with certain limits and restrictions on their civil circulation [10, p. 111].

In addition, it is debatable whether the separated organs and tissues are objects of property rights from the moment of their separation until direct transplantation into the recipient's body. In civil doctrine, it is traditional to understand property as a kind of set of rights, which in the classical sense includes the right of possession, the right of use and the right of disposal. In this context, D.M. Wagner believes that a person has the rights of the owner in relation to his body, because the rights that exist in relation to the human body are similar to those rights that are traditionally included in the set of property rights [11, p. 934]. Proponents of this position emphasise that the right of ownership as a defined and well-known legal structure should apply to such specific objects as organs and tissues. This design is the most attractive for the judicial system [12, p. 25]. The main argument is that the institution of property law provides relatively clear and established principles that could be applied in cases of damage to anatomical materials, their theft or other illegal actions against them. Ultimately, the recognition of anatomical materials as objects of property rights would give the rightful owner the right to require the use of property rights, such as vindication.

However, despite some practical advantages, this approach in the context of civil law in the field of transplantation is not without its drawbacks. For example, in the scientific literature [13, p. 250] there is an opinion that separate organs and tissues are newly created things. According to the provisions of Art. 331 of the CC of Ukraine, “the right of ownership of a new thing that is made (created) by a person is acquired by him, unless otherwise provided by contract or law” [1]. However, if we agree with this statement, then the question arises as to who should be considered the legal first owner: the person who is the source of these tissues or organs, the surgeon who performs the operation to separate organs and tissues or the health care facility where transplantation. In addition, if in the case of lifelong organ or tissue donation for transplantation it would be fair to consider the source of the anatomical material to be the source of the material, in the case of *ex mortuo* donation it is unlikely to be the owner of the deceased donor or heirs, who are legally authorised to consent to the removal of anatomical materials for transplantation. This would lead to the misconception that organs and tissues can be inherited.

An argument against extending ownership to organs and tissues is also the fact that such anatomical materials cannot be objects of sale or other commercial relations. N.M. Kvit notes that it is impossible to speak unequivocally about the emergence of property rights in the person from whom such anatomical material originates. In this situation “it is worth remembering the principle of prohibition of commercialisation

of the human body and its parts, and property rights also allow to benefit from the disposal of objects of such law, which in this case is debatable” [14, p. 52]. In addition, some scientists [15, p. 89] tend to believe that the recognition of organs and tissues as property is equivalent to slavery and violates Art. 4 of the Universal Declaration of Human Rights [16].

In fact, the norms of international legal documents establish the principle of prohibition of commercialisation of relations in the field of donation and transplantation. In particular, the Convention for the Protection of Human Rights and Dignity of Biology and Medicine: The Convention on Human Rights and Biomedicine [17] stipulates that the human body and its parts as such should not in themselves be a source of financial gain (Article 21). The legislation of the European Union is also consistent and categorical in this sense [18]. European standards in the field of research relations [19; 20] establish that programmes for the use of organs and tissues should be based on the principles of gratuitousness. The European Community condemns any financial incentives in the context of human organ and tissue transplantation relations. Finally, the philosophy of altruism and the understanding of donor organs and tissues as a “gift of life” is central to the practice of donation and transplantation around the world.

The concept of donor organs and tissues as a “gift of life” implies that such a philosophy denies the application of property construction to anatomical materials. The point is that human biomaterials should be seen as a gift, but not as property. However, in the foreign academic literature there is a denial of this opinion, which appeals that the legal gift implies the exercise of property rights. Therefore, a person must have the right to a thing to present it [13, p. 252; 21, p. 627].

Interesting is the position of scholars, who argue that understanding the body and its parts as objects not covered by the legal regime of property is not the only way to maintain the altruistic spirit of donation in the context of transplantation and withdraw them from business. According to the supporters of this standpoint, the recognition of organs and tissues as property does not prevent the general recognition of commercial transactions with the body illegal [22, p. 27]. Obvious examples of objects that are owned but cannot be sold, or where the authority to sell is limited, are prescription drugs or weapons [13, p. 259]. However, it is difficult to agree with this, because human anatomical material cannot be compared with objects such as weapons or medicine. Organs and tissues are a source of genetic information. The special nature and exceptional value of these objects is also indicated by their identification as sacred in religious doctrines. Thus, the conceptualisation of personal attributes of man, such as human biomaterials, as interchangeable goods, certainly levels the human personality and the conceptualisation of what man is.

### Justification of Expediency of Application of Special Legal Regime to Organs and Tissues

Analysing the relationship in the field of transplantation, it is necessary to consider the fact that organs and tissues are removed for a specific purpose, which is to further transplant into the recipient’s body. It is this goal that defines their legal nature as transplants. Therefore, these anatomical materials are special objects, the specificity of which is conditioned upon their purpose – to become part of another organism. The use of such organs and tissues is carried out according to the rules of the special legal regime in accordance with the

norms of transplantation legislation [6]. It is stated that such anatomical materials are used only for medical purposes in the presence of medical indications for the use of this method of treatment and based on informed consent, considering the principles of voluntariness, anonymity, humanity and other norms of this legislation.

The above considerations indicate that organs and tissues are specific objects of civil rights, and therefore the assertion that they should be classified as items in the existing system of civil rights objects is incorrect. The proposal to extend the legal regime of property to organs and tissues in its traditional sense is also contradictory, as it generates a number of ambiguous and debatable aspects. In this situation it is necessary to proceed from the position that the range of objects of civil rights is not constant [7, p. 64]. Therefore, organs and tissues and other anatomical materials, given their specificity, should be classified as independent objects of civil rights, limited in circulation. Given the significant social value of these objects, it is necessary to apply a special legal regime of organs and tissues, which will take into account their specifics.

It is important that such a regime must be differentiated, because organs and tissues can be of more than human origin. In particular, xenotransplantation is used in medical practice, which involves the transplantation of an organ or tissue from a human to an animal. Today, this type of transplantation remains largely an experimental activity [23]. However, it is obvious that the legal regime of organs and tissues of an animal removed for human transplantation must be different from the legal regime of organs and tissues of human origin. After all, anatomical materials can be artificially created with the modern possibilities of genetic engineering, which also requires a differentiated approach in the context of establishing a legal regime.

In view of the above considerations, *the legal regime of human organs and tissues must meet at least four requirements:*

- 1) recognition of the special nature and value of human anatomical materials;
- 2) recognition of the ban on profit and ensuring non-commercialisation of relations in the field of transplantation;
- 3) ensuring the use of these anatomical materials only for therapeutic purposes due to transplantation legislation;
- 4) ensuring legal certainty.

*The special nature* of these materials is conditioned upon the fact that the source of their origin, given the current state of transplant medicine, is mostly human. Human anatomical materials are not just random things, because even when separated from the human body, their nature is “human” and their purpose is to become part of another human body for therapeutic purposes. Therefore, organs and tissues can be considered as “vital assets” that have a special nature.

*Prohibition of profit and non-commercialisation of transplant relations.* Despite the fact that this issue is debatable in legal doctrine, generally accepted international standards [17; 18] in the field of regulation of transplantation relations are categorical. Therefore, the legal regime for the use of organs and tissues must prevent their commercial circulation or commercialisation. Instead, one of the characteristics of the institution of property is the free disposal of goods. In a market economy, the most common ways of disposing of things are undoubtedly those that allow getting economic profit from them or by buying and selling, or through other transactions. Therefore, the extension of the legal regime of property to

organs and tissues does not correlate with the principle of prohibition of commercialisation in the field of the studied relations.

*Ensuring the use of these anatomical materials only for therapeutic purposes due to transplantation legislation.* The authority to use human biomaterials should be limited explained by their special nature. In the field of civil law, transplants should be used exclusively to promote health and be used for medical therapy.

*Legal certainty.* Legal regulation of anatomical materials should guarantee legal certainty. In this context, it is a technical or instrumental requirement, without which no legal regulation will meet the purpose for which it is aimed.

### Conclusions

The analysis contributes to the conclusion that organs and tissues, explained by their special nature, should be classified

as independent objects of civil rights, limited in circulation. Given the significant social value of these facilities, the issue of determining the legal regime of organs and tissues is quite acute and needs to be addressed in the regulatory field of special transplant legislation. It is important that the legal regime of organs and tissues used for transplantation should be differentiated according to their source. At the same time, the legal regime of human organs and tissues must consider: 1) the special nature and value of human anatomical materials; 2) prohibition of profit and non-commercialisation of relations in the field of transplantation; 3) the need to use these anatomical materials only for therapeutic purposes, conditioned upon transplantation legislation; 4) the requirement of legal certainty. It is expedient to mediate the legal regime of organs and tissues separated from the human body, not through the legal structure of property, but through the powers established under special legislation to make decisions regarding such objects.

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## Правовий режим органів і тканин людини як об'єктів цивільних правовідносин у сфері трансплантації

**Андріана Євгенівна Дзюба**

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**Анотація.** У статті висвітлюється питання визначення правового режиму органів і тканин у контексті цивільних правовідносин у сфері трансплантації. Проблематика визнання органів і тканин об'єктами цивільного права, з огляду на наявність прогалів в чинному цивільному законодавстві України, є презюмованою. Означена ситуація зумовлена необхідністю врахування національним законодавцем цілого комплексу морально-етичних аспектів, пов'язаних із цивільним обігом людських біоматеріалів. У публікації зроблено спробу визначити правовий режим органів і тканин, відокремлених від тіла людини, як специфічних об'єктів. Проведене дослідження ґрунтується на системному підході; використано спеціально-юридичні та логічні методи. Задекларована проблема досліджується з урахуванням напрацьовань української та зарубіжної академічної літератури. Комплексний аналіз спеціального трансплантаційного законодавства сприяє розумінню, що органи і тканини є винятковими об'єктами, не вилученими з цивільного обігу, які сьогодні застосовуються у цілях надання медичних послуг. Позаяк обґрунтовується необхідність віднесення таких анатомічних матеріалів до окремих самостійних об'єктів цивільних прав, обмежених в обороті, з огляду на їхню виняткову природу та специфіку. На основі комплексного дослідження національного законодавства та доктринальних підходів обґрунтовується необхідність застосування щодо органів і тканин, які використовуються у цілях трансплантації, спеціального правового режиму, який максимально враховуватиме специфіку цих об'єктів

**Ключові слова:** анатомічні матеріали, біоматеріали, донорство, об'єкти цивільних прав, право власності