WHAT'S IN A NAME ?

Focus on…

The Human Body and its Parts in the Language of Law

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Without any doubt, the languages of medicine and law sometimes prove to be very different when it comes to the definition of common terms or specific notions they both aim at capturing. Almost omnipresent in any lexicon of medical terms, the 'body' is so consubstantial with the language of medicine that it would seem superfluous to enter into details about its meaning. When called on to practice his/her craft, the physician always examines – obviously we could be tempted to say – a body among so many others, which, within the context of specific factual circumstances, needs care because it is temporally or chronically ill, disabled or vulnerable in a way or another. Medicine is the science of studying the suffering body, its current disfunctions or the diseases it may be affected by. In the sphere of law, quite the contrary, the 'body' appeared in its most generic version, as a simply *human* body. It came into existence as a general concept alluding to the body in whatever state, form and appearance, as a general legal concept which can potentially apply to any of us. Whoever we are. It applies even to the symptomless, healthy body, in particular when it enters the biomedical setting so that a little of what it is made of (e.g. blood, cells and, to a lesser extent, non-vital organs) can be donated for the benefit of biologically compatible recipients.

The reason why the 'human body' will be focused on in the present article does not merely lie in this divergence of approaches, however. Actually, it can also be found in the conditions in which the concept of 'human body' emerged in the language of law, in particular within European legal systems. Noteworthy, indeed, the birth of that legal concept was scientifically contextualised.[1] It emerged during the last century, when human cells began to be cultured outside the body, on a large scale, and when their functions and structure began to be studied for the purposes of a then burgeoning discipline, namely, cell biology. Also noteworthy is that its emergence did not simply testify the adaptation of law to the evolutions of science, but above all it was the sign of a *malaise* arising from that new possibility to define us, as human beings, in our biological existence - and not exclusively in our social dimension. It emerged in the sphere of law because we had no choice but to recognise ourselves as mere beings made flesh, which the older, more classic legal concept of 'person' could not hide anymore. And which the traditional 'person/thing' dichotomy, in European civilian laws, did not suffice to apprehend.

Everyone both has and is 'a body'.[2] And just because everyone has a 'body' that can be physically present even without being alive (i.e. it develops before birth, it can be buried after death), the latter could not be assimilated to the concept of 'person'. Just because everyone is 'everybody' in the most literal sense, nor could it be treated as a mere 'thing', as an object of law that we would own, dispose of, or make use of as we would want. Recognising the 'human body' as a new legal concept in its own right, therefore, appeared at minimum as the least bad option among unsatisfying alternatives.

In France, for instance, the concept of 'human body' entered the language of law in 1994, after careful thought and in full awareness of the issues. The French lawmaker even innovated in granting it a legal status, and introduced into the civil code an entire chapter devoted to guaranteeing respect thereof ('*Du respect du corps humain*').[3] That option was not specific to civilian law systems in Europe, since, at the supranational level, the Oviedo Convention and the EU Charter of Fundamental Rights enshrined respectively in 1997 and in 2000 some of the principles that the French civil code already adopted a few years before.[4] With a slight difference nonetheless: while the latter granted a legal status to the 'human body' as one whole, the former referred more specifically to the 'human body and its parts'. This invites us to further develop the comparison between these texts and, at a time when the life sciences are considerably diversifying, to better delineate the contours of a legal concept that is, for sure, more complex than it is still too often perceived.

1 - The human body's 'partability' and the issue of integrity

The very existence of the 'human body' as a concept in law is the expression of a double paradox that European countries could overcome only with difficulty. The first one lies in the singular form of the term 'body' itself; while taking due account of the vulnerability of the human being seen in his/her biological dimension, and the need to protect everyone against abusive bodily harms, the language of law never served to chart a re-discovered corporeality in all its *physicality*. Just the opposite; it has been used to convey a rather abstract concept, which both contains and surpasses our individual, changing bodily experiences. It promotes

an almost *disembodied* concept, which actually points to nobody in particular, but which potentially may refer to any of us. Directly connected to this first paradox, the second one has to do with the 'person/thing' dichotomy and, more broadly, with the objectives of protection pursued by civilian laws and human rights law. It was, indeed, precisely to avoid the risk of reducing everyone to one's biological existence that the term 'body' emerged in the sphere of law. And here lies the second paradox: although the concept of 'human body' appears to be distinct from that of 'person', the former finds its main raison d'être in its close proximity, intimate relation with the latter. When recourse is made to the concept of 'human body', it is ultimately always one person in his/her full singularity who is aimed at, and thus deserves concern and respect.

The reasons for which that specific concept came into existence are not less apparently contradictory. A few decades ago, indeed, the 'human body', as a whole, imposed itself as a necessary legal concept in reaction to the then new scientific ability to isolate corporeal substances, and to culture them in vitro, in the laboratory setting. In other words, the phrase entered the language of law when it became technically possible to remove from the whole its 'parts' in order to use them, once made available, for biological and/or medical purposes. And, as a result, the 'human body' cannot actually be considered, in the texts mentioned earlier, without its 'parts'; it even makes sense therein only when viewed as the source from which they originate.

On closer inspection, not so much that biologisation of the human body as its 'partability' motivated the intervention of law, both at national and supranational levels.[5] And, for the sake of precision, it is interesting to note that the French text, too, albeit in a slightly different wording, makes mention of the 'human body, its elements and its products' ('*le corps humain, ses éléments et ses produits*').[6] Interestingly, and perhaps more importantly, this specific wording provides useful indication about the main reason that, among all others, crucially encouraged the lawmakers to go a step further in the formation of the rules aimed at ensuring respect for the human body.

During the discussion of the aforesaid legislative provision, in 1994, some members of the French Parliamentary proposed to replace the term 'elements' with the term 'parts', but the choice was finally made not to amend the initial wording.[7] And to keep, within the civil code,

the semantic distinction between 'products' and 'elements', that is, between bodily fluids like blood, on one side, cells, tissues and organs on the other. The legal nuance was far from being insignificant. Sill less if it is here recalled that some decades earlier the French lawmakers had, in reality, already adopted specific rules on the collection and use of human blood – without finding it necessary to grant a special legal status to the 'human body' in its wholeness.[8]

Not all parts of the human body but only some of them would veritably justify its legal acknowledgement. And, as the emphasis on the term 'elements' implicitly tends to suggest, the reference to the 'body' appeared as necessary when it became – to be precise – possible to remove from it, and to handle outside it, what was until then believed to be inherently constitutive thereof. Hence, it is in reality the scientific ability to remove the constituent parts of the human body (and the fact that some of those parts cannot replenish themselves) that decisively prompted French lawmakers to intervene more radically on the matter. In other words, more than the issue of body's 'partability', the issue of bodily integrity motivated the intervention of law, and justified that semantic evolution in the legal reasoning.[9]

The legal recognition of the 'human body' went together with the firm conviction that biologists had definitely redrawn the limits of bodily integrity; the conviction that everybody was then exposed to the possibility of being asked to provide cells, tissues or even organs for the benefit of others, and that every 'body' might be considered in the darkest scenarios just as a potential biological reserve. In European legal systems, the language of law thus came into play in order to counterbalance the applications of biology and to impose another sense of physical integrity. Not simply the incision with a scalpel in the skin, but the fact that this occurs after individual consent has been obtained is now determining to interpret bodily integrity.

Since the skin as a biological barrier, as the fleshly sheath could not naturally - or even automatically - suffice to ensure a role of protection for the body, then the language of law acted as a shield for the donor entering the biomedical setting. It served to inscribe in inerasable letters that any intervention upon one person's body should be carried out only after this person has given free, autonomous and informed individual consent to it. As far as interventions upon the living 'body' are concerned.[10] And it served to inscribe with the same

legal strength that higher protection must be ensured when the implicated 'person' is too vulnerable or incapable to give her/his consent in legally usual conditions.[11]

The concept of 'human body' was given specific attention in law language because, as regards the content of the rule, new requirements had to be achieved in order to consider the 'person' better. Its recognition enabled the lawmaker to underline that the 'person', who could from then on be seen in her biological dimension, also needed to be regarded, and protected, from that new viewpoint. In the relevant applicable legal provisions, the same objective became prominent, namely: to ensure the primacy of the human being, and where appropriate, to reconcile the general interests of science and medicine with, notably, the fundamental 'right to the integrity of the person'.[12] The French civil code is even a little more explicit on that point. It states not only that the human body is inviolable ('*le corps humain est inviolable*'), but also that everyone has the right to respect for one's own body ('*chacun a droit au respect de son corps*').[13] It has thus enshrined the right to require from others not to violate the integrity of one's own body, and from public authorities not to unjustifiably interfere with the exercise of this right. It has recognised a subjective right vis-à-vis others.

2 - The 'human body' under law: human before being a body

In the last century, the evolutions of cell biology encouraged lawmakers to admit the 'human body' as a new, specific concept in both national and European texts. But it would be a mistake to believe that this was a mere response to a simple question of bodily integrity. It was more than that. There was something more than a mere dimension of corporeality, something ineluctably human.

The irreducible human nature of the body, actually, shaped the intervention of law. It gave the latter scope and meaning. Before all, it had to be respected and protected in its full humanness, in accordance with a certain, high idea of human dignity.[14] This has had two consequences, at least. At first, indeed, no need to be defined as a 'person' in the language of law to be granted protection in the name of human dignity. Even in its embryonic form,

the 'human body' deserves respect under law. And, in practice, national legislations that allow research on the human embryo available for in vitro use strictly frame that activity.

Secondly, because it is concerned with protecting the very essence of our humanness, the principle of human dignity both concerns each of us individually and all of us collectively. It gives lawmakers the possibility to enact provisions in pursuance of objectives transcending our individual considerations.

The earlier-mentioned texts have objectified our relation to our own bodies, with the affirmation of various superior principles aimed at framing interventions on them. Among which, the principle that only the therapeutic interest of the recipient can justify donations for allogeneic uses. Then, the more general principle that the 'human body' must be kept away from the flows of money, and that an individual may lawfully consent to the removal of cells, tissues or organs, only if the act he or she consents to is a donation. Despite the crucial role played by individual consent, these texts define the legally permissible interventions upon the 'human body', in the name of a certain idea of human dignity that imposes itself to the individual. The latter is, therefore, not free to make whatever use of his/her own body that he/she would wish.

Let us dwell a moment on the wording of the above-mentioned principles. Interestingly, indeed, the Oviedo Convention provides that 'the human body and its parts shall not, as such, give rise to financial gain'.[15] With almost the same wording, the EU Charter introduced into an article, which is yet devoted to the right to the integrity of the person, the prohibition on making the human body and its parts, as such, a source of financial gain.[16] In sum, two negatively formulated principles that actually correspond to obligations not to do… within two instruments aimed at primarily guaranteeing human rights with regard to the evolutions of science and medicine.

This is, once again, worth noting.

To continue with respect to the EU Charter, the above principle complements a list of diverse principles with no other common feature but their insertion in one paragraph of Article 3, dedicated to medicine and biology, which reads as follows:

> 2. In the fields of medicine and biology, the following must be respected in particular:
>
> . the free and informed consent of the person concerned, according to the procedures laid down by law,
>
> . the prohibition of eugenic practices, in particular those aiming at the selection of persons,
>
> . the prohibition on making the human body and its parts as such a source of financial gain,
>
> . the prohibition of the reproductive cloning of human beings.[17]

Like its European counterpart, the aforesaid principle is directed towards agents using human body parts in the course of their various activities, not towards their donors. They both reveal an agent-centred approach rather than a traditional recipient-centred approach, which would have insisted upon the beneficiaries of human rights made actionable in that medical context.[18] Both texts might have well recognised a right for everyone to refuse the removal of one's body parts against payment. But this is not what they did. They actually – and implicitly – went further. The two texts enshrined as a fundamental right the right not to be abusively solicited for this, to never be even asked to accept the removal of one's body parts against payment. Through the prism of a prohibition, they sought to create the conditions for the realisation of unquestionably autonomous donation acts. They sought to avoid every potential donor facing demeaning situations where economic constraints and psychological pressure would dictate action. Through that specific prism, they guaranteed peace of mind to all potential donors, whatever their social and economic conditions.

3 – The human body, its parts and its genetic constitution

The strength of the texts under consideration here has much to do with how the used words resonate and echo each other. However, the Oviedo Convention went further than the other texts, by setting up – in parallel to the above-mentioned provisions – additional principles

applying to the post-removal phases, inside a separate article that is entitled 'disposal of a removed part of the human body'. The article indicates that the 'removed part' may:

> be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures.[19]

This provision, and the article not least in its title, are useful to better examine the concept of 'human body' when viewed through its 'parts'. It is the 'removed part' that is focused on. To be more precise, it is the part capable of being 'removed' from the human body, and hence of being 'stored' and handled outside it, which is brought under the application of the aforesaid provision. If we were tempted to have a literal reading of it, then we would logically think: what is not capable of being removed cannot be subject to this provision. What cannot be physically removed from the human body, hence materially tangible and handleable, should not fall within its scope. And, then, it could be tempting to deduce: when it is viewed through its 'parts', the 'human body' deserves legal protection in its material dimension but not in its genetic, informational dimension. The temptation could even be greater because the Convention makes express reference to the 'human genome' only when dealing with interventions seeking to modify it.[20]

This is not, however, what transpires from the explanatory report to the Convention. It indeed appears that that provision has, quite the contrary, its roots in the 'necessity to ensure the protection of individuals' with regard to the possibility to derive 'much information from any part of the body, however small'.[21] The above-mentioned consent procedures even seemed to the drafters of the Convention especially important in situations 'where sensitive information [would be] collected about identifiable individuals', thus leaving no doubt on the real scope of the relevant provision.[22] Between the lines, therefore, we can make the following inferences: attention was given to the fact that human body parts, inevitably, always both have a material and an informational dimension. And, in practice, it is not possible to accept their removal without accepting, as well, the processability of the information carried by the genes expressed in the specialised cells forming every removed part. Even if they are given

anonymously, all 'removed parts', when analysed, may always yield information about the individual(s) they come from.

With this in mind, the drafters of the Oviedo Convention also required that the purpose(s) for any body part removal be clearly defined and made known to the donor before the act of donation. In particular, it would not legally be permissible to collect and to further process, without individual consent, genetic data for research or any other scientific purposes before preparing the removed part for transplantation use.

This being said, however, neither the aforementioned provision nor the explanatory report directly addresses the issue of whether the genome shall also be set apart from the flows of money. And, this may seem disturbing since the earlier-mentioned prohibition of financial gain, as laid out in the Oviedo Convention, might actually well have been written in another way.

In 1994, the French lawmakers explicitly favoured a broad approach to what should be covered by the prohibition of financial gain. Although they did not insert the word into the relevant legal provisions, they started from the idea that the 'genome' was also an 'element' constitutive of the human body in order to justify its treatment like any other 'elements' in preparatory documents.[23] In an ever more explicit way, though without referring to the human body, the UNESCO stated in a 1997 Declaration that 'the human genome in its natural state shall not give rise to financial gains'.[24] It is, therefore, reasonable to wonder why the Council of Europe did not take position on that point, and, more fundamentally, why the ways of exploiting knowledge gained from research on the genome never really emerged as a legal issue in its own right, and in all its facets, in its sphere of competence.

Yet, that issue is one that has complex legal ramifications – as the controversial debate about the patentability of living matter explicitly showed before the turn of the century. In the 1990s, the French lawmaker insisted upon the idea that the 'human body' in all respects should be regarded as inviolable, and, at a time when biotechnological inventions began to raise controversy, the idea that the protection of human dignity should be guaranteed in relation to patentability claims, too. But, at that time, that extensive interpretation of the concept of 'human dignity' would not find much echo in other European countries, nor at the

EU level. The Directive on biotechnological inventions established that 'an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention', and it even polarized still more a debate that quickly proved to be emotionally charged.[25] Still today, the real scope of the concept of 'human body' slightly differs among these legal systems.

4 – The parts of a whole, one part without the whole: from the corporeal to the decorporated

Whether in explicit terms or in more indirect ways, both the European texts and the French civil code aim to ensure respect for the 'human body'. As seen in all the foregoing, they pursue that aim not only through recognising the right to respect for the physical integrity of the body – and the related right to prior informed consent – but also through adopting, in the name of human dignity, various principles designed to avoid 'improper use of scientific developments' and to ensure that all individuals benefit from the same ethical standards.[26] As was suggested earlier, nonetheless, the body of the donor entering the biomedical setting is only what the aforementioned texts intend to legally consider and protect. Likewise, not all body parts, but only those that have their origin or are produced naturally by the human body are regulated by their respective provisions. In particular, the heart valves transplanted into a patient suffering from cardiac disease will not count as human body 'parts' under the relevant provisions, although they will also become 'integrated component[s] of' the patient's body, in practice.[27] To be still more nuanced on this last point, even what comes from, or is produced by, the human body is not given the same ethical attention as the latter. Once a 'part' is fully detached from the body, hence decorporated, it can be turned into a 'transplant' for use in its original state or turned into an 'active substance' capable of having a specific therapeutic effect. Not only will that 'part' shift into other semantic fields, but it will also trigger the application of additional, maybe complementary, layers of regulation having no other goal but to ensure it is safe for patients in need.

Rooted in ethical considerations, the relevant applicable rules then revolve around more common, safety-related objectives in order to prosaically address contamination risks that

are associated with activities performed on human cells, tissues and their derivatives – after being transformed in strict laboratory conditions, far away the source they come from.

From the 'human body' to its 'parts', from the corporeal to the decorporated, law adapts to what it is aimed at regulating. It dissects the issues surrounding them. The language of law, as much through its creativity as its categorisation methods, is just a reflection of this. Small wonder then that, in the studied legal systems, the references to the 'human body and its parts' are made in very circumscribed legal settings, in singular texts that are remarkable by their originality… and by their specificity.

References

[1] About the history of tissue culture and the practice of growing living cells outside the body in the laboratory, see: Landecker H., *Culturing Life: How Cells Became Technologies* (Harvard University Press, 2009).

[2] Translated from the French language: « *Nous sommes notre corps tout en l'ayant*. » In Marzano M., *Penser le corps* (Presses Universitaires de France, 2002).

[3] French civil code, Art 16 to Art 16-9.

[4] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (adopted in April 1997, entered into force in December 1999) ('Oviedo Convention');
Charter of Fundamental Rights of the European Union [2000] OJ C364 ('EU Charter').

[5] On 'partability': Landecker H., *Culturing Life: How Cells Became Technologies* (Harvard University Press, 2009).

[6] Ibid.

[7] For more details, see the report written in French: Rapport n°230 (1993-1994) au nom de la Commission des lois sur la loi relative au respect du corps humain (Sénat), pp 53-54. Available via: https://www.senat.fr/rap/1993-1994/i1993_1994_0230.pdf

[8] French law n°52-854 of 21 July 1952 on the therapeutic use of human blood, plasma and their derivatives (from the French: *loi n°52-854 du 21 juillet 1952 sur l'utilisation thérapeutique du sang, du plasma et de leurs dérivés, JORF 22 juillet* 1952), p 7357.

[9] Although the term 'parts' covers 'organs and tissues proper, including blood', as the European Council of Human Rights unambiguously noted, the Oviedo Convention did not so explicitly highlight the scientific evolution that makes it necessary to think legally about the 'human body' in itself, and about the issue of its physical integrity in particular.

[10] This paper does not address the specific issue of deceased organ donation.

[11] Both national and international laws impose stricter conditions for consent when a person is legally incapable to consent alone.

[12] EU Charter, Art 3.

[13] French civil code, Art 16-1.

[14] The importance given to the notion of human dignity came in reaction to the atrocities of World War II.

[15] Oviedo Convention, Art 21.

[16] The prohibition does not concern 'products such as hair and nails' (discarded tissues), the sale of which is not an affront to human dignity.

[17] EU Charter, Art 3.

[18] On the use of these terms, see: Yechiel Michael Barilan, *Human dignity, human rights, and responsibility: The New Language of Global Bioethics and Biolaw* (MIT Press, 2012), p 174.

[19] Oviedo Convention, Art 22. Emphasis added.

[20] Oviedo Convention, Art 13.

[21] Explanatory Report to the Oviedo Convention, Art 22, p 20.

[22] Ibid.

[23] For more details, see the report written in French: Rapport n°230 (1993-1994) au nom de la Commission des lois sur la loi relative au respect du corps humain (Sénat, déposé en janvier 1994), p 132.
Available via: https://www.senat.fr/rap/1993-1994/i1993_1994_0230.pdf

[24] UNSECO Declaration on the human genome (1997), Art 4.

[25] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13 (Biopatent Directive), Recital (17).

[26] Oviedo Convention, Preamble.

[27] Edited by Henk A. M. J. Ten Have, and Jos V. M. Welie, *Ownership of the human body – philosophical considerations on the use of the human body and its parts in healthcare* (Springer, 2013), pp 50-51.