

# [A the right-duty concept. this implies that](https://assignbuster.com/a-the-right-duty-concept-this-implies-that/)

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A “ person” in a non-legal way is understood as any human being who possesses a certainkind of personality. This personality is nothing but the cumulation of certaincharacteristics like, power of speech, thought and choice that belong to themankind. Thus, going by the same logic, all those who are not endowed with suchattributes and are deprived of the power of reason and choice may be describedas being less than persons. In a legal perspective, everything concerns itself withthe establishment of the right-duty concept. This implies that since rights andduties involve exercising of the liberty to choose and since human beings areinherently capable of choosing, hence they can be called as persons.  Yet, there exists an exception of slaves.

Theywere not considered as persons but mere property, implying that any actionagainst the slaves would be considered as an action against the property. Therefore, an important question that arises here is that, who decides the “ capability” ofholding rights and duties? It is often regarded that, law assumes such aposition in the society thus, laying down that whatever law deems capable ofholding rights, attributes it to be a person, becomes a person. This could meanthat if law, wanted to personify a river per se, it could do so by attributingcertain personal characteristics to it and thereby making rivers, persons inthe eyes of law. If slavesbeing humans were considered to be less than persons, then the question of deadpeople becomes very obvious. Hence, it becomes necessary to analyse the legalstatus of dead men, as to what happens to their legal personality that theypossess when they are alive, once dead. Then comes another important questionof dead men.

If personality i. e., having certain characteristics such as thepower to think and reason, becomes an important aspect of identifying any humanbeing as a person, where do dead people come under this broad categorization ofpersons and non-persons. And if law is concerned with rights and duties (bothof which involve a notion of choice), very evidently and given that dead peoplecannot choose for the very obvious reason of not being alive, hence not having thepower to reason.

Does this render them incapable of having a legal status? All ofthis directly implies in the simplest of terms that because dead people do notpossess the power of speech, thought and choice and legally they do not haveany rights or duties (due to absence of choice), they are no longer persons inthe eyes of law. The understanding behind dead men not being persons in theeyes of law can be simplified by stating that the personality of a human being commencesat the time of birth and ceases to exist at the time of death. Hence, in legalperspective, the legal personality of a person dies with the person therebydepriving him of his rights as well as his liabilities. Dead men, under the laware given no rights because it is presumed that they no longer have an interest.

Thisthrows light on the concept of “ interest theory”. According to Wesley Hohfeldrights must belong to persons and not things. But due to his failure to discussthe necessary and sufficient characteristics of right-holders, it remainsunclear as to whether a Hohfeldian right-holder was concerned about moral rights, legal rights, or both. Thus, the Will and Interest Theory emerged. Will theorystates that the essence of a right consists in opportunities for the right-holderto make normatively significant choices relating to the behavior of someoneelse.

More specifically, a will theorist asserts that the function of a rightis to give its holder control over another’s duty. In Hohfeldian terms, willtheorists assert that every right includes a Hohfeldian power over a claim. Inother words, will theorists believe that all rights confer control over others’duties to act in particular ways. Because the dead are incapable of makingsignificant choices and lack the ability to form interests, a Will Theoristwould argue that the dead cannot be right-holders. According to a WillTheorist, laws appearing to grant the dead posthumous rights are really aimedat controlling the behavior of living persons. Hence, it can be said thataccording to Will Theory, all the rights of a dead person like, the right to adecent burial, rights granted for reputation and estate are granted not becauseof any heed to the interests of the dead but keeping in mind the interest ofthe society at large and especially that of the living heirs.

InterestTheory on the other hand states that a person can be a legal right holder if hehas interest even though he is unable to express it. Interest theoristsmaintain that the function of a right is to further the right-holder’sinterests. An owner has a right, according to the interest theorist, notbecause owners have choices, but because the ownership makes owners better off. Hence, according to this theory, even the dead must have legal rights and mustn’tbe deprived of their rights just because of their inability to express thesame. Theoreticallysomeone could die with a certain set of interests written in a document, perhaps a will. Interest Theorists make few suggestions about which survivinginterests should be recognized as posthumous legal rights.

The law, even thoughdoes not confer rights upon the dead, it does take into account his desires andinterest expressed while he was still alive. The law takes notice of thesethree things belonging to a dead person, namely, his body, his reputation andhis estate. Within the will theory there can be no suchthing as an unwaivable right: a right over which its holder has no power. Withinthe will theory it is impossible for incompetents like infants, animals, andcomatose adults to have rights. The interest theory is more capacious than thewill theory.

It can accept as rights both unwaivable rights (the possession ofwhich may be good for their holders) and the rights of incompetents (who haveinterests that rights can protect). The interest theory also taps into thedeeply plausible connection between holding rights and being better off. A corpse is a property of nobody. Eventhough a corpse cannot be disposed-off through a will or even mishandling thebody does not amount to any offence but there exists a law that gives a legalright to burial of a dead body. Hence, the law does touch upon certaininterests of the dead if not entirely granting them their right.

When it comesto the reputation of a dead person, it seems as though law provides adequateprotection against libel of a dead person. But upon a closer look at thelegislation, it becomes evident that, the law protecting a dead man’sreputation is in fact for the living heirs of the person and can be used as adefense only if it proves to be an attack on the living people. While dwellingupon the aspect of inheritance of a dead man’s property, there can be two waysi. e., testamentary and intestate succession. The law interferes in both ofthese aspects as, in testamentary succession the will that is made by the deadperson is required to be followed to devolve his property and in intestatesuccession, where there exists no will, the law interferes to take care of theproperty of the deceased.  The interest in a dead person’s bodyhas long been recognized as a duty of the living although the nature of thisinterest.

In modern times this duty is present if for no other reason than theprotection of the living. However, the duty to bury is imposed by law. If thereis such a duty to bury the dead that duty must be placed upon someone. We must, therefore, assume, that where there is a duty to bury the dead there also mustbe a right to take possession of the body for the execution of the duty andthat any interference with this right might be redressed by an action at law. Thefact that whoever has dominion over a dead person’s body should have somerights-and if he has exclusive rights for purposes of burial and protection ofthe body, these rights should be protected even if by a quasi-property right.

Therefore, since the dead body is not real estate, as yet, nor attached to it, we musttreat it as personal property. Now that it is definitely established that aright to burial exists and is a legal right protected by the courts. It is afundamental legal concept that where there is a right there is a correspondingduty; the quasi-property right which- entitles the heirs and survivors to thepossession of the dead body is limited to the extent of the duty arising fromsentiment and reverence to the memory of the deceased. Therefore the heirs orsurvivors entitled to possession of the dead body are responsible for a decentburial, and an action will lie against the heir or survivor, to whom a deadbody is delivered for safekeeping, who fails to perform his duty. Now, that we have established the nature of the interest in the dead human body andfound that those who are his legitimate heirs inherit duties and theiraccompanying legal rights, insofar as burial is concerned, we are faced withthe problem that the deceased may have affected these interests and rights byhis action prior to death, as to the disposition of his remains.