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Exploring Kant's Perspective on (Self-) Ownership and Property Rights in Human Body Parts: A Discussion on the Boundaries between Personhood and Thinghood

(Hic est locus) ubi mors gaudet succurrere vitae.
(This is the place) where death delights in helping life.
- Inscription in the classroom for the dissection of the human body, University of Padua, Italy

SUMMARY

The paper questions the normative framework of the designation of body parts as things in civil law doctrine and the possibility of legal disposal of body parts in the context of Kant's moral philosophy. Kant derives the formation of private legal (subjective) rights from the preliminary separation of things and persons and the second formulation of the categorical imperative. In discussing the concept of private law and property rights that are possible only concerning the human-thing relationship, Kant consequently talks about issues of self-ownership and property rights to one's body and its parts. Although he explicitly wrote about the impossibility of self-ownership of the body and, in principle, the impossibility of disposing of its parts, it must be remembered that Kant could not foresee all the possible achievements, perspectives, and trials of modern transplant medicine. In the paper, Kant's basic bioethical and private law concepts (primarily ownership and property rights) are placed in the context

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of (legal) disposal of body parts. In any exposition and discussion of the Kantian-based opinion on dispositions of body parts, we should not necessarily and exclusively be guided by Kant's explicit writings on actual legal dispositions of body parts. We should consider the broader framework of Kant's deontological ethics and Kant's understanding of persons and things. Such an interpretation can lead to the conclusion that there are no obstacles to basing property rights in body parts but limited property rights, with the classification of body parts as things restricted in legal circulation, which is the opinion that prevails in certain statutory private law provisions and writings of civil law doctrine.

Keywords: Kant, body parts, person, thing, transplantation, organs, property rights, ownership, private law.

PRELIMINARY CONSIDERATIONS – KANT'S RELEVANCE TO HUMAN BODY PARTS ISSUES

Although the procedure of transplanting body parts is often reduced to the achievements of medical technique and medical skill, the same issue brings numerous social and humanistic implications that manifest in various ethical, moral, and legal matters. One entity (cell, tissue, or organ) has the power to continue another's life, but care must be taken not to endanger the life of the person from whom the body part was taken. Taking and transplanting body parts contains a preliminary that questions the ontology of the human being and whether it is just a collection of tissues, cells, organs, or something more. Establishing the boundaries between moral and legal personhood and subjecthood and moral and legal thinghood and objecthood affects private law and numerous legal affairs that concern the human body partially or as a whole. One of the most important is certainly the legal transaction of donating body parts, which represents the basis of the system of taking and transplanting body parts and based on which every successful or unsuccessful organ transplant is done. However, the challenges of the concept of distributive justice and the lack of organs and other parts of the body for transplantation increasingly lead to the actualization of a phenomenon that, according to certain authors, could establish a balance in the circulation of organs and enable a sufficient number of organs for all those who need them. The legal transaction of buying and selling organs is proposed as a legally and ethically-normatively based solution to the growing shortage of organs and other body parts, and it stems precisely from the potential unlimited property rights to body parts. Due to the rapid development of medical technology, property rights in parts of the human body bring many interesting questions. Is an organ/tissue/cell a thing or part of a (legal and moral) personhood? If we designate them as things, can we consider them objects of property rights and legally dispose of them without limitation? What are the moral and ethical consequences of unlimited legal disposal of body parts?

Kant's (moral and legal) philosophy outlined the contours and fundamental determinants of bioethics and (bio)medical law. The separation of persons and things that Kant explicitly writes about is of great importance not only for the foundation of moral philosophy and the categorical imperative but also for the system of private legal (subjective) rights and the concept of private law. Although, at the time, the organ transplant procedure was not a well-founded medical achievement, Kant, as one of the few philosophical thinkers, explicitly wrote about property rights in human body parts. Kant's moral philosophy precisely *a priori* questions the boundaries between human being and legal personhood and subjecthood, as well as the boundaries of legal thinghood and the right of (self-)ownership. In the context of the question of whether the organ market should be legalized and the unlimited legal disposal of human body parts, the Kantian-based answer should perhaps not be too questionable. However, the various possibilities of medical technique could lead Kant himself to reconsider the morality of certain issues, not only of the potential buying and selling of organs but also of the critical determinants of transplantation medicine, such as the undirected transplantation of organs from a living donor. Kant's separation of persons and things, non-treatment of the person as a means but exclusively as an end, the concept of private law and property, and explicit writings on the disposal of body parts can provide key insights for contemporary private law and bioethics and their integration around this issue.

The development of a Kantian-based view of the disposition of parts of the human body is carried out in the form of four fundamental phases. In the first, the moral-philosophical one, the treatment of Kant's understanding and criteria for the separation of persons and things is presented as a preliminary to deriving the second formulation of the categorical imperative. The second phase, the (private)legal-philosophical one, refers to the formation of private legal/subjective rights, for this elaboration of which property rights and contract rights are fundamental, within the framework of which Kant clearly states that property rights are possible only in relation to things. In contrast, regarding private law, relationships between persons are only possible through contracts. In the third stage, the integration of these two perspectives in the context of the disposal of human body parts (especially buying and selling) is brought, with an explicit reference not only to Kant's opinion on the disposal of body parts but also to the opinions and elaborations of influential legal and moral philosophers and property theorists. The last, fourth phase, offers a comparison of all legal-philosophical and moral-philosophical thinking with current statutory private law provisions on the status of parts of the human body, as well as opinions on the criteria for designating body parts as things (restricted in circulation) emanating from (civil) legal doctrine.

The paper does not intend to question or provide a different theoretical framework for the Kantian concepts of autonomy, dignity, categorical imperative, ownership, and property rights. The concepts mentioned above are placed in the context of body parts and legal disposition. The compilation method, along with stating the explicit opinions about Kant and body parts of numerous authors from the fields of legal and moral philosophy, bioethics and property theory, tries to emphasize the plurality of the views and difficulties in finding Kantian-categorical guidelines for the intersectional action of transplant medicine and private law. It is stated that it is impossible to give an unequivocal answer as to whether the establishment of property rights and disposal of body parts is based on Kantian principles. A consistent interpretation of Kant and his writings can lead to the conclusion that no type of disposal of body parts is morally based and that even certain acts of donation, such as taking and donating organs from a living donor, do not even come into consideration. If the Kantian-moral-intelligible concept of a person is considered, perhaps taking organs from a deceased donor could also be questionable. However, whether certain dispositions are Kantian-deontologically conditioned depends on the part of the body involved, the legal transaction, and the specific situation. Although Kant's explicit writings on the disposal of body parts should be considered, in each specific case, it is necessary to take a broader deontological picture and consider the duty to follow the moral law. Kant's writings were written in a period of complete underdevelopment of transplant medicine, and that is precisely why Kant's thought should be interpreted concerning a broader view of deontological ethics. The writings of certain bioethicists and property theorists and the writings of the (civil) legal doctrine discuss the categorization of body parts as things, but things restricted in legal circulation, with the application of precisely defined restrictions when disposing of them, enabling only certain property rights (primarily the (restricted) right of ownership), but prohibiting their purchase and sale and allowing only the act of donation (from both a living and a deceased donor).

THE FIRST STAGE – KANT'S SEPARATION OF THINGS AND PERSONS AND THE DERIVATION OF THE (SECOND FORMULATION OF THE) CATEGORICAL IMPERATIVE

Issues that are in any ethical and legal way connected with the parts of the human body presuppose an elaboration related to the formation of person and thing. In the ethical sense, it is important because it precedes the derivation of the categorical imperative. In the legal sense, it is necessary to discern the limits of human legal personhood/subjecthood and to what extent these limits are transferred to the human body. The latter mainly refers to the vital question of what the human body is and

to what extent it is in the category of person and legal subjecthood, and where the above ends, that is, at what point the human body and its parts enter the category of things and legal objecthood.

Kant's moral and legal philosophy presupposes the separation and differentiation of persons from things, establishing clear criteria for which entity can be considered a person and a subject and which entity is a thing and an object, which must also be applied to parts of the human body. The above is very important to be able to formulate the categorical imperative, establishing the contours of moral agency towards persons, as well as the possibility of action towards things. Differentiation between persons and things is also essential in forming private legal rights, especially property rights, which, according to Kant, derive from (the second formulation of) the categorical imperative because only things can be owned, not persons. Because persons cannot be owned, it is necessary to investigate to what extent moral and legal personhood extends to the human body and its parts. Kant's division into things and persons is the first division of that kind in moral and legal philosophy, based on criteria that look for the characteristics of a person in mind, will, and freedom.

> The beings whose existence rests not on our will but on nature nevertheless have, if they are beings without reason, only a relative worth as means, and are called things; rational beings, by contrast, are called persons, because their nature already marks them out as ends in themselves, i.e., as something that may not be used merely as means, hence to that extent limits all arbitrary choice61 (and is an object of respect). (Kant, 2002, p. 46, 4:428).

A person is distinguished by all the mentioned criteria, which makes him a moral and legal entity that is distinguished by the ability to reason and make legally and morally binding decisions.

> A *person* is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is merely the capacity for being conscious of one's identity in different conditions of one's existence). From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others). (Kant, 1991, p. 50, Ak 223).

Any being that is not countable, that is not characterized by the ability to reason and make decisions, that does not contain the characteristics of mind, freedom, and will, cannot be called a person but is called a thing.

> A *thing* is that to which nothing can be imputed. Any object of free choice which itself lacks freedom is therefore called a thing (*res corporalis*). (Kant, 1991, p. 50, Ak 223).

Kant's moral, internal law establishes the foundations for the formation of duty (Greek Δέον, τὸ, = duty) in the form of following a categorical imperative that should be distinguished from the hypothetical one. The hypothetical imperative represents "the practical necessity of a possible action as a means to attain something else which one wills (or which it is possible that one might will)" (Kant, 2002, p. 31, 4:414). Such an imperative is often present in various forms of efforts to justify commercialization and the establishment of a free and legal organ market. On the other hand, the categorical imperative represents action "objectively necessary for itself" [1],, without relation to any other purpose" (Kant, 2002, p. 31, 4:414), which reflects the intrinsic[2] nature of deontology. As the origin of deontology, duty is determined by Kant as "the necessity of an action from respect for the law" (Kant, 2002, p. 16, 4:401). It is an indispensable foundation and precondition for the categorical imperative - the individual's autonomy and the assumption of absolute freedom. According to Kant, autonomy represents "the ground of the dignity of the human and of every rational nature" (Kant, 2002, p. 54, 4:436), and the autonomy of the will "is the property of the will through which it is a law to itself (independently of all properties of the objects of volition)" (Kant, 2002, p.58, 4:441). According to Kant, autonomy (opposed to heteronomy[3]) is the precondition of any moral action because a person who does not have it cannot make valid moral decisions, nor can he follow his own moral law.

THE SECOND STAGE – KANT'S DERIVATION OF PROPERTY AND PROPERTY RIGHTS OVER BODY PARTS

Although the first formulation of the categorical imperative[4] could unquestionably apply to the issue of property rights and the sale of human body parts, Kant's performance of the second formulation of the categorical imperative based on the differentiation of persons from things is of crucial importance in any discussion of the morality of property rights and the sale of human body parts.

[1] If imperative „is represented as good in itself, hence necessary, as the principle of the will," then it is called categorical (Kant, 2002, p. 31, 4:414).

[2] This intrinsicality manifests in the duty to follow one's moral principle without any external influences. The categorical imperative dictates what you must do, regardless of your goal (Guyer, 2006., p. 184).

[3] „If the will seeks that which should determine it anywhere else than in the suitability of its maxims for its own universal legislation, hence if it, insofar as it advances beyond itself, seeks the law in the constitution of any of its objects, then heteronomy always comes out of this" (Kant, 2002, p. 58, 4:441).

[4] "Act only following that maxim through which you can at the same time will that it become a universal law" and "act as if the maxim of your action were to become through your will a universal law of nature" (Kant, 2002, p. 37, 38, 4:421). On the entire explanation of the categorical imperative and the foundation and formulation of the moral law in Eterović (2017).

> Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means! (Kant, p. 47, 4:429).

The second formulation of the categorical imperative establishes the foundations of moral behaviour towards others and oneself. It is used in numerous scientific texts, which will be used and cited independently and as a sufficient source when discussing the morality of property rights and disposal of parts of one's own or another's body. Nevertheless, the categorical imperative is the foundation of Kant's formation of the philosophy of private law, more precisely, property and property rights, which represent the basis of every private law order. This is precisely why the discussion of Kant's view of the issue of property rights over parts of the human body must not be limited to the moral dimension of the categorical imperative but also to the (private) legal dimension that includes the essential question - what can be the object of ownership in the first place?

Kant, differentiating persons from things, concludes that private subjective rights derive from the second formulation of the categorical imperative because only things can be owned by someone. In contrast, relations with other persons are possible through contracts and status. According to Kant, the derivation of private legal rights, including property rights, derives from an ethical perspective that affirms the ethical foundation of private law because all private legal rights are based on the categorical imperative.[5] Kant categorizes private legal rights concerning three main categories[6] of the external object of "my choice": "substance, causality and community between myself and external objects in accordance with laws of freedom." (Kant, 1991, p. 69, 70, Ak 247): "a (corporeal) thing external to me" (according to the form of acquisition it refers to property rights), "another's choice to *perform* a specific deed" (according to the form of acquisition it refers to contractual (obligatory) rights) and to "another's status in relation to me" (which according to the form of acquisition refers to rights to persons akin to rights to things (Kant, 1991, p. 69, 70, Ak 247).

Regarding property rights, within which property is possible only over things and over what is external, Kant finally establishes the critical concept of property rights, which is the right of ownership. Limitation of ownership is opposed to the will. Therefore, the right of ownership is defined as a property right that fully empowers its holder to manage his property according to his will.

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[5] In a similar vein, compare: Kurk (2019, p. 38, 39)

[6] It is important to emphasize that this is about acquired derivative rights. However, for acquired rights to be acquired at all, they are preceded by two preliminaries: 0-1) Innate right of humanity - an original right that arises from the freedom of man and coexists with the freedom of others and which belongs to every man based on his humanity - my inner and yours; 0-2) Legal postulate of the practical mind - establishing and distinguishing the external mine and the external yours (Ripstein, 2009).

> An external object that in terms of its substance belongs to someone is his property (dominium), in which all rights in this thing inhere (as accidents of a substance) and which the owner (dominus) can, accordingly, dispose of as he pleases (ius disponendi de re sua). But from this, it follows that an object of this sort can be only a corporeal thing (to which one has no obligation). (Kant, 1991, p. 90, Ak 270).

If, as autonomous beings, we were prevented from using and possessing external objects of our own choice, we would limit our own freedom (Byrd & Hruschka, 2006). Under permissive law[7], we have the authority to use and own external objects as we choose, provided that this does not infringe on the freedom of others (Byrd & Hruschka, 2006). However, in the definition of property rights, Kant further emphasizes the aspect of the (impossibility) of ownership over oneself, which refers to our body and its parts.

> So, a man can be his own master (sui iuris) but cannot be the owner of himself (sui dominus) (cannot dispose of himself as he pleases) — still less can he dispose of other men as he pleases – since he is accountable to the humanity in his own person. (Kant, 1991, p. 90, Ak 270).

From everything elaborated so far, it is evident that any being who can be considered a person cannot dispose of his own body or the body of another person in the form of property rights, as well as any other property right, because otherwise, he offends humanity both in his own and in another person taking it as a means, not as an end. However, what is further raised as a rather crucial question relates in general to the boundaries of personhood concerning human physicality. Suppose the personhood is attached to the (human) body itself in its own integrity. In that case, there are not too many doubts about how to apply the second formulation of the categorical imperative. But greater doubts arise at the moment when a part of the body separates from its own body matrix and thus becomes a separate entity. Kant himself explicitly wrote about such a situation. Here, of course, it is necessary to indicate that medical achievements in the form of transplanting body parts were reduced to a minimum during Kant's lifetime, considering that the first organ transplant procedures were performed only at the end of the 19th century. Kant takes the example of extracting and buying and selling human teeth, building also on the immorality of prostitution.

> Hence, a man cannot dispose over himself; he is not entitled to sell a tooth, or any of his members. But now, if a person allows himself to be used, for profit, as an object to satisfy the sexual impulse of another, if he makes himself the object of another's desire, then he is disposing over himself, as if over a thing, and thereby makes himself into a

[7] However, Tierney (2001) believes that Kant's understanding of the permissive law in the *Metaphysics of Morals* is not coherent precisely in the context of property rights and that, in this case, when interpreting this kind of Kant's presentation of the permissive law, it is necessary to take into account the wider historical context of Kant's complete creativity.

> thing by which the other satisfies his appetite, just as his hunger is satisfied on a roast of pork. Now, since the other's impulse is directed to sex and not to humanity, it is obvious that the person is in part surrendering his humanity, and is thereby at risk in regard to the ends of morality. (Kant, 1997, p. 157).

In the first sentence, in which he talks about the tooth, Kant actually says enough to conclude what his position is, in principle, on buying and selling body parts, which he further emphasizes and elaborates on.

> Humanity in his own person (homo noumenon) can so far restrict the right to make use of his body, that all use of it as a thing is forbidden to him. He is indeed the proprietarius of it, i.e., he governs and rules over it, but as over a person, i.e., insofar as he would dispose over it as a thing, the phenomenon appears restrained by the noumenon. He is therefore not the dominus of his body, since he may not treat it as res sua, or as the dominatio servi might do. He may therefore mutilate neither himself nor others, and may make no eunuchs… Or if someone were to sell his sound teeth as a replacement for the decayed dentition of somebody else. Thus, suicide violates the law of the noumenon, and respect for the latter. II. In regard to causality, or the personal capacity and power of a man to bring about effects. He cannot, to that extent, dispose unreservedly over his freedom, i.e., he can indeed make a definite use of his powers for others, and he can authorize the other to demand them from him in a purposive way, e.g., the manual worker; but he is forbidden by the right of humanity to make every use whatever of his powers, and to grant the other an unlimited disposition over them. (Kant, 1997, pp. 341–342).

Nevertheless, in the period of his creativity, Kant could not foresee the development of medical technology and the creation of transplant medicine in which buying and selling, at least in the vast majority of countries, does not exist (it is even expressly prohibited and is established as a principle in some countries[8]). Donations exist exclusively for the purpose of saving another person's life. Difficulties arise precisely because of the large shortage of organs, the disadvantages of distributive justice, and the impossibility of all sick people being able to get an organ for transplantation. The important question is whether we should establish organ donation (especially after death) as a legal obligation, and whether the unlimited disposal of human body parts is justified if the ultimate goal is to save endangered lives.

However, in the example of the amputated leg, it seems that arguments (altruistic in nature) about sacrificing the body to save a person's life can also be found in Kant's thought (*Cf.* Dickenson, 2019).

[8] This is also the case in Croatian transplant medical law. According to Art. 8 of the Act on Transplantation of Human Organs for the Purpose of Treatment (Official Gazette, No. 144/12) and Art. 7 of the Act on the Use of Tissues and Cells (Official Gazette, No. 144/12): "It is forbidden to give or receive any kind of financial compensation or another financial benefit for the taken organs (tissues and cells)".

> Thus, a man can have his foot amputated, for example, insofar as it impedes him in life. So to preserve our person, we have disposition over our body; but the man who takes his own life is not thereby preserving his person; for if he disposes over his person, but not over his condition, he robs himself of that very thing itself. This is contrary to the supreme self-regarding duty, for the condition of all other duties is thereby abolished. It transcends all limits on the use of free choice, for the latter is only possible insofar as the subject exists. (Kant, 1991, p. 219, Ak 423).

Likewise, Kant's example of the (sale) of hair as a part of the body, the separation of which does not affect physical integrity and health, is one of those examples that raises an additional controversy in any Kantian-deontological elaboration of the purchase and sale of body parts. Additionally, for specific authors, it is one of the arguments that the act of donation from a living donor, and even the purchase and sale of some parts of the body, those whose separation does not affect the fertility of the person's health, could be ethically based.

> To deprive oneself of an integral part or organ (to maim oneself)—for example, to give away or sell a tooth to be transplanted into another's mouth, or to have oneself castrated in order to get an easier livelihood as a singer, and so forth—are ways of partially murdering oneself. But to have a dead or diseased organ amputated when it endangers one's life, or to have something cut off that is a part but not an organ[9] of the body, for example, one's hair, cannot be counted as a crime against one's own person—although cutting one's hair in order to sell it is not altogether free from blame. (Kant, 1991, p. 217, Ak 423).[10]

One of the fundamental questions in this regard is what makes a person a person in the first place. Is personhood reduced exclusively to the body, or is it, especially in the Kantian view, connected with the mind, freedom, and free will? If the latter is true, then a part of the body (for example, hair or even a kidney), significantly if it does not disturb the integrity and health of the individual, cannot be associated with

[9] When he talks about sacrifice, Kant states that everything that is not an organ can be sacrificed to save the life of (another) person, which is somewhat inconsistent concerning the leg itself, which represents a set of organs, as well as to the previous part of the sentence where he says that "(deceased) organ" can be "amputated".

[10] However, in the last sentence of Kant's quote, it is pretty challenging to make a definite Kantian opinion about the purchase and sale of organs, so Dickenson states, „he (Kant) seems to make exceptions for separable and non-vital elements such as hair. But he is un-easy even about that, because I am not entitled to use my body merely as a tool" (Dickenson, 2019).

the status[11] of a person[12]. On this track, further, especially legal, analysis will show how parts of the body can be considered things with the fundamental question of limits and motivations for their disposal and the possibility of absolute ownership and other property rights in general.

THE SUM OF THE FIRST AND THE SECOND STAGE – MORALITY OF PROPERTY RIGHTS AND (NON-) DISPOSAL OF BODY PARTS

Organ donation and the duty to donate organs

When discussing the duty of donating[13] organs in general, the question arises as to whether donating organs is considered a moral duty. This aspect was discussed not only by philosophers and theoreticians of deontological ethics, but also by protagonists of moral-theological thought. Aramini, thus, on the deontological trail, emphasizes that donating organs can be considered a moral duty (but not a legal one) and that donating organs after death is certainly mandatory, while, concerning donating organs during a lifetime, one should be quite careful and carefully focused on the integrity of the donor (Aramini, 2009, p. 264). Specifically, when it comes to donation after death, Aramini points out that our reason should direct us to understand that after death, we no longer need organs nor bodily integrity (Aramini, 2009, p. 264).[14] Immediately after death, our body, including the organs, begins to break down and organically decay. However, we should rejoice in the fact that one of our organs can avoid the possibility of organic decay and continue to live, making it

[11] Chadwick thus emphasizes the questionability of the boundaries of personality and the human being, along with the essential question of to what extent bodily continuity is necessary for personal identity. The most credible version of bodily continuity is primarily related to the brain's work. If it is related exclusively to the brain and the work of the brain, then we can accept the loss of a body part without thinking that we have sacrificed something crucial for our personal identity. But if we were to believe that we have duties to our body as exclusively a body, then the question of proper treatment of a separate part of the body might be a real cause for concern. See: Chadwick, 1989.

[12] Even from a legal theoretical point of view, we could not classify body parts in the personhood category. If, for example, Kurki's gradation of legal personhood is observed as 1) purely passive legal personhood, 2) dependent legal personhood, 3) independent legal personhood, and 4) purely onerous personhood, it is clear that the status of body parts could be not be tied to any of the listed degrees. More about the gradation of legal personhood in Kurki (2019, p. 151).

[13] At this stage, it should be taken into account that gifts and sales are by their own (legal) nature contracts and that they are subject to the provisions of positive (private/civil) law legislation, which will be discussed later.

[14] The foundations of this elaboration are not only in Kant's deontological framework but also rely on Aristotle's understanding of human wholeness (integrity). However, difficulties arise with the Aristotelian understanding of things, because the organ ceases to be the same the moment it is separated from the body. The issue of identity manifests itself in the question of whether the transplanted organ is the same as the donor's? This question of identity comes to the fore, especially in the process of xenotransplantation. See more in Munzer (1993). About personhood in the xenotransplantation process in Pietrzykowski (2018).

possible to extend life, and in general to give life to another person (Aramini, 2009, p. 264). This also applies to our decision after death, as well as to the decision of our family, who may also make such a decision. Alpinar-Şencan (2016) is guided by a similar way of thinking, stating that after death, the moral capacity of a person as a being ends and that, in that case, there is no fear of violating the categorical imperative to treat a person as a means. Similar to Aramini's moral-theological conception of personhood, Altman (2011, p. 110) argues that the body has no value in itself but is morally relevant because it is central to our existence as moral agents.

Speaking about the duty to donate organs during the life of the donor, Aramini believes that such acts, such as donating bone marrow and double organs, belong to exceptional situations and do not represent a moral obligation but a "heroic" act (Aramini, 2009, p. 265). At the same time, the donor puts his physical and mental integrity at risk, and no one has the right to destroy another's integrity or commit acts that would not leave him at peace (Aramini, 2009, p. 265), which, one can say, is a Kantian-based opinion. In this way, Aramini (2009) clearly and precisely explains the reasons why, from a moral point of view, every individual should be an organ donor after death. Answering the question of whether we have a duty to donate organs is extremely demanding. Aramini (2009) rightly distinguishes between the legal and moral aspects of this issue. In a moral sense, it is justified to consider that organ donation after death is an obligation that should be fulfilled (Nedić, 2023). However, from a legal point of view, it is quite difficult to force a person to any activity related to his body and bodily integrity, even after death, because each individual decides to donate organs after death during his lifetime. Any legal coercion that would make donation mandatory (which would then no longer be a donation) would violate the basic principles of medical ethics and law, as well as the right to self-determination and autonomy of decisions related to one's own body. It is really questionable whether the state can impose the legal obligation to donate organs after death through certain public policy and legal measures. Such a system currently does not exist in the world, and in addition to the aforementioned principles of medical law and ethics, it is against the basic principles of private law.

From the Kantian-deontological point of view, the medically justified taking of organs from a deceased person does not offend his integrity because the person's personality is lost with death, especially in the legal sense.[15] Moral-ethical doubts

[15] Being a person means having dignity that is threatened by the moment of buying and selling body parts from a living person. However, it is also violated in the situation when the purchase and sale takes place by taking body parts from a deceased person. Personality and dignity, in a moral sense, do not end with the death of a person, nor is their existence conditioned by temporal causality. Speaking of the "Ideal Acquisition of an External Object of Choice", Kant writes about immortal merit and the right to a good reputation after one's death. It is ideal based on the idea of a pure mind, not on temporal causality: "Someone who, a hundred years from now, falsely repeats something evil about me injures me right now; for in a relation purely of rights, which is entirely intellectual,

can be sought in the case of living donors, where one must take into account the very intentions of the person[16] and the psycho-social-health condition of the person before and after transplantation, as well as in the case of altruistic, undirected donors, the so-called Samaritans (Petrini, 2018).[17]

Organ donation from a living donor should not represent a duty or a particular type of moral-legal obligation, but an exceptional, altruistic act. If there is a need for such cases, care should be taken to donate those organs that do not violate the physical, psychological, and spiritual integrity of the person. This opinion is shared by certain Croatian doctors in their scientific works, such as Medved and Batinica (2004), who advocate the point of view that living (relative) donors can donate regenerative organs and tissues: blood and bone marrow, but also organs without which they can live with equal quality: kidney, a liver segment, a lung segment, a part of the pancreas, and a part of the small intestine. This is an approach from an ethical and legal point of view because there is no violation of the integrity of the donor, which is important to point out, and which is the essentiality of certain private law provisions on the impossibility of absolute disposal of body parts.[18] However, undirected, Samaritan organ donation is a phenomenon that raises various ethical questions. Petrini emphasizes the three most common ones, which above all relate to the risk for the donor, concern about the psychological sensitivity of the "Samaritan", and the exact meaning of the word donation because, in this context, it

abstraction is made from any physical conditions (of time), and whoever robs me of my honour (a slanderer) is just as punishable as if he had done it during my lifetime" (Kant, 1991, p. 112, Ak 296); Taking organs from a deceased person for the purpose of transplantation does not offend a person's dignity because their body is not marked by a price, but is reflected in the value of life and the preciousness that a part of the body has for the continuation of another person's life. And in that situation, every explanation team must take care of the dignity of the person. According to Art. 9 of the Act on Transplantation of Human Organs for the Purpose of Treatment and Art. 5 of the Law on the Use of Human Tissues and Cells, the dignity of the person is stated as a fundamental principle: "When taking organs from a deceased person, it is necessary to act with due respect for the personal dignity of the deceased person and his family". Price (2000, p. 34) states that "the dignity of the human body is inseparable from the dignity of the person". Although he does not explicitly mention Kant, he states, "This nexus survives death" because "the body symbolizes the person who once lived".

16 A situation is not excluded in which a person is, only apparently and fictitiously, a (living) organ donor. Still, he is a seller of organs because he has secretly agreed on this with the recipient, that is, the buyer of that same organ. Such contracts, at least according to the Croatian Act on Civil Obligations (Official Gazette, no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23), are null and void because they are against compulsory regulations and the morals of society.

17 In the Republic of Croatia, this type of donation requires an a priori decision and the approval of professional bodies, as stipulated in Article 11. According to the Act on the Transplantation of Human Organs for the Purpose of Treatment, "receiving an organ from a living donor for the purpose of transplantation to a recipient is decided by the expert team of the transplant centre and the ethical committee of the transplant centre where the transplant will be performed" (paragraph 1). The decision of the expert team of the transplant centre and the ethical committee of the transplant centre is not required only in the situation when it is about taking an organ "from a living relative donor of the first line of blood kinship." See chapter 5.8 on the conceptual private law problems of the term "first line of blood kinship": "'First line of blood kinship' as an illegally established term in Croatian legislation – application of the maxim *summum ius summa iniuria* and teleological interpretation of law" (Nedić, 2023).

18 For example, the Italian Civil Code. See *infra.*

can also mean physical mutilation of the donor (Petrini, 2011), especially if it leaves certain psycho-social consequences on him. If the explanation does not represent a medical danger for the donor (on which the medical profession has the last word), who has the altruistic intention, then such a way could not offend the settings of the categorical imperative. However, further questionability is determined by the situation when a person receives a certain amount of material profit for a given organ. At that moment, he/she is no longer a giver, but a seller, where the questioning of the violation of the categorical imperative is directly invoked.

Property rights, *emptio venditio* and human body parts as an ethical issue

The issue of (im-)morality of buying and selling body parts in contemporary bioethics, legal philosophy, and property theory

According to Aramini, the buying and selling of organs violates two fundamental principles that are set as primary in the issue of taking body parts. The first is the principle of autonomy, according to which the human body, following Kant's footsteps, must be understood as non-disposable property, even though each of us can control our own body (*Cf.* Aramini, 2009, p. 264, 265). The second is the principle of the defence of physical life, according to which, a person, following the second formulation of the categorical imperative, is always an end in himself and cannot be a means (*Cf.* Aramini, 2009, p. 264, 265). The donor and recipient should be considered ends in themselves, never means for each other (*Cf.* Aramini, 2009, p. 264, 265).[19] However, a different view may emerge from the perspective of a person for whom material means are essential for basic existential needs. Such a person may decide to sacrifice his own kidney to meet basic existential needs with the obtained material and financial resources (Nedić, 2023).

In the context of autonomy, Altman (2011, p. 109) states that according to Kant, freedom is not so simple and unequivocal; our autonomy is stronger when our choices are limited in the right ways. To be autonomous, we must act correctly, guided by reason rather than our own inclinations (Altman, 2011, p. 109). Aramini (*Cf.* 2009) bases his claim on autonomy precisely on Kant's idea of autonomy, which is significantly different from the various claims that a person can do whatever he wants as long as it only affects him. Regarding the defence of corporeal life, Aramini also bases his principle on Kant's postulate that we should not use persons as means to our own ends (*Cf.* Aramini, 2009, p. 110). The categorical imperative imposes the conclusion that buying and selling organs is an act that cannot be considered

[19] As a strong proponent of the legal organ market, Taylor (2005a, 2005b) considers that it may be questionable whether the commercialization of organs is genuinely an immoral act, especially concerning the principle of individual autonomy.

morally correct because it violates the physical and psychological integrity of a person, following Aramini's thinking. [20] Because, deontologically speaking, acting out of duty means acting with an internal rational compulsion, motivated solely by the thought of following a moral law, as well as the fact that a person is taken as an end, never as a means. In this regard, and according to Kerstein (2013, p. 181), the buying and selling of organs in the world of political-economic and distributive-economic injustice cannot be called justified, especially considering the fact that most of such organs will arrive from poor countries. Certain property theorists, such as Radin, in addition to stressing the problem of economic inequality that ultimately conditions the (illegal) purchase and sale of organs, advocates, admittedly, the categorization of certain parts of the body as things (the so-called concept of incomplete commodification), but their purchase and sale should take place within a strictly limited regulatory framework, precisely because of the importance of "nonmarket value to personhood" (Radin, 1996).

Other theorists of property have a similar point of view. Munzer (2000, p. 42) states that persons do not have ownership of their own bodies but have limited property rights over their own bodies. Munzer (2000, p. 42) understands persons in a non-dualistic sense as unique-complex beings, but in which, integratively, physical and mental[21] predicates prevail. Extreme views should be rejected because it is pointless to say that *no* body right is a property right, just as it is meaningless to say that *all* body rights are property rights (Munzer, 2000, p. 45). *Some* body rights are property rights because body rights can be divided into *body property rights* and *body personal rights* (Munzer, 2000, p. 47, 48).[22] In the context of Kant, Munzer (1993) states that

[20] "...no one has the power to destroy another's integrity or to commit acts that would not leave him alone..." (Aramini, 2009, p. 265). This deontological approach is present in civil/private law in the so-called "usurious contracts". Thus, according to Art. 329 of the (Croatian) Civil Obligations Act "is a void contract by which someone, taking advantage of the state of emergency or the difficult financial condition of another, his insufficient experience, recklessness or dependence, contracts for himself or for a third party a benefit that is disproportionate to what he is to the other gave or did, or undertook to give or do." The difficulty is reflected in the economic and material condition of the person forced to enter such an unfavourable contract. This would mean that this kind of deontological approach is the basis of mandatory law, which would mean that, even if the trade in organs were allowed, a situation where someone takes advantage of the (material) need and difficulty of another to buy a specific organ or body part from them, is against the legal provisions of mandatory law and such an act *eo ipso* leads to nullity.

[21] The mental aspect is crucial in the formation of personality, which is exactly why Munzer states that the human corpse is not a person, but that it is only the dead body of a former person. Munzer, 2000, p. 42

[22] This Munzer's distinction is very important. Self-ownership can be completely misunderstood as a concept that refers to our complete ownership of ourselves. Penner calls the above, precisely in the context of self-ownership, "fetishization of property" because property, understood as a *bundle of rights,* is misused for numerous inapplicable social constructs. Thus, for example, we could wrongly conclude and say that autonomy stems from our ownership of ourselves, so it can imply complete freedom of disposal of all our actions, for example, the desire for euthanasia because we are the ones who decide what and how to do with our own body. The latter thinking is entirely wrong, and the issue of ownership of body parts should be reduced to the question of which body rights are *property rights* and which are *personal rights* (Penner, 2009).

at least three non-consequentialist arguments can be found in Kant against property rights in body parts. He believes that even two of them, the argument for human freedom and the arguments of humanity and dignity, are quite problematic and even useless (Munzer, 1993). However, the argument for self-respect, understood as a state or feeling of intrinsic moral worth arising from acting on principles rationally derived from the moral law, has considerable force and excludes *some* dispositions of body parts (Munzer, 1993). However, Munzer (1993) states that all three arguments cannot wholly exclude (all) property rights in body parts because it is precisely in the context of the self-respect argument that examples could be found where certain disposals of body parts can be marked as morally permissible[23] as well as morally impermissible (for example, buying and selling reproductive cells). Although Munzer (2000, p. 42) tries to perceive a person in a non-Cartesian way as an integrative set of mental and physical, using the corpse example, he, however, probably unintentionally, does distinguish the body from the mental element: "A corpse is not peculiarly inert person; it is not a person at all; it is only the dead body of a former person".

Precisely in a dualistic direction, it can be argued that there are those body rights which are exclusively property rights (the body element) and which are personal rights (the mental element). The concept of a person is reflected in moral agency, in the elements of mind, will, and freedom, which cannot be the subject of property rights at all.[24] Although Kant himself tries the same, to understand the person as an integrative unity by forbidding any part of the person to be considered a thing for sale, such an attempt is not coherent in relation to his preliminary definition of persons and things. Namely, in Kant's footsteps, a separated organ cannot be considered a person. If persons are entities characterized by mind, freedom, and will, then a separate organ can only be considered a thing. Property rights are possible if body parts can be considered things. However, a further question arises: to what extent are property rights possible, and how far do the possibilities of disposing of body parts reach? This is precisely why Munzer claims that *some* body rights are property rights. Quigley (2019, p. 299) states that transferability (as one of the main features of property rights) and income rights are analytically separable. By this alone, we can accept that people have ownership rights to their biomaterials but are not allowed to receive income to respect themselves (Quigley, 2019, p. 299).

[23] In addition to the example of a kidney donor, Munzer gives an interesting example here of a cornea seller who sells his own cornea so that he can pay for his health insurance to cover a kidney transplant operation, given the chronic failure of his two kidneys. Such action is, from a Kantian point of view, morally permissible because Kant's examples of prohibited sales do not include situations in which the proceeds are used to save someone's life (Kant's example of the amputated leg) (Munzer, 1993).

[24] An opposite approach of owning agency and personality is present in Locke's thought. See infra footnote no. 25.

However, it is necessary to highlight inevitable disagreements with this attitude. In his reply to Munzer, Gerrand (1999) emphasizes that Kant's position is clear: no buying and selling of body parts is morally based under any conditions because the same act offends the personhood of a specific person. Alpınar-Şencan (2016), on the other hand, emphasizes that in Kant, there is no valid argument for prohibiting the buying and selling body parts and synchronously advocating for the donation and transplantation of organs from a living donor. Donating, buying, and selling are not separable and differentiated in any way in Kant's writings. Each disposition and commodification transform a part of the body, which carries dignity, into a thing (Alpınar-Şencan, 2016). He adds that followers of Kant should agree that there is no difference between donating and selling by a living donor/seller in the Kantian framework (Alpınar-Şencan, 2016). Therefore, greater emphasis should be placed on organ donation from a deceased donor, more specifically on the opt-out system, considering that in Kant's framework, there is no moral delict in taking organs from a deceased person (Alpınar-Şencan, 2016). However, Alpınar-Şencan excludes a complete and much broader deontological framework, as well as Kant's examples of the amputated leg and the cut hair, which, although not fully crystallized by Kant himself, must not be ignored.

In addition to various antinomies in Kant's understanding of the (im-)morality of property rights and the disposal of body parts[25], it is also necessary to emphasize that the analytical imperfection of property rights in the Hohfeld-Honore[26] analysis and the excessive discretion in the understanding of the ontology of property and the

[25] This is precisely why specific medical law and property theoreticians believe that the justification for the disposal of some parts of the body should not be sought in Kant's concept of property but in Locke's concept, which is based on the so-called labour theory. Locke states that the work of man's body and hands are rightfully his and that work is undoubtedly the property of him who works. When he says that man possesses his own person, Locke means the person as an agent endowed with reason and free will, thus strictly separating person and body. According to the labour property theory, people cannot have ownership of themselves because „for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by his order, and about his business; they are his property, whose workmanship they are." Therefore, man cannot have ownership of his own body, but he does have ownership of his own personality, activity, or work, more specifically, his own agency. (Self)ownership of (one's) body can also be considered when we have invested a certain amount of labour in something. Thus, in legal transactions, organs are treated as things and products owned by healthcare institutions precisely because certain healthcare institutions have invested significant previous actions so that the organ or any other part of the body (for example, blood) could be validly released into legal circulation and thus be available for donating to a specific recipient who needs it. Although Locke's labour theory, the separation of a person's mind and body, and, consequently, the conclusion that processed parts of the body in which certain labour has been invested can be the object of property rights, it is necessary to point out that the mental element could not be considered the property of a person. In the modern concept of property rights, they are possible only on things. Any violation of the mental part of a person is derived from personality rights, exactly as Munzer emphasizes, strictly separating body property rights and body personal rights. See in: Locke, 2003, p. 102 (II, 2, 6); p. 111 and 112 (II, 5, 27); p. 119 (II, 5, 44); on arguments about the Lockean way of thinking about property rights in body parts in: Dickenson, 2019; Waldron, 1988, p. 177–181; on Locke's arguments on property rights in reproductive cells see footnote no. 28.

[26] About the mentioned in: Penner, 2020.

possibility of disposing of body parts have led certain theorists and medical lawyers (e.g. Herring, 2014) to believe that the disposal of body parts should not be reduced to property-regime regulation and general provisions of property law but should enjoy a particular statutory legal determination and arrangement that will explicitly determine which disposal actions are legally permitted.[27]

If saving one life endangers another to the full extent and plurality of the threat itself, then the above cannot be marked as an ethically and morally valid solution. In this respect, the possibilities of property rights in body parts should be limited. Paying donors represents a forced, coerced, and accelerated system of solving the issue of organ shortage, where one human life is saved, and possibly endangers another, and in which people serve as means. Even though there are conflicting opinions (see: Fabre, 2006), Aramini (2009, p. 266) and Berlinguer and Garrafa (1996) believe that selling parts of one's own body cannot be morally acceptable and that buying and selling organs should not be allowed. The main reasons are related to the fact that buying and selling organs (as well as other parts of the body) cannot solve the problem of organ shortage, but, to a certain extent, it can even worsen it. Wall (2015, p. 219) emphasizes that when establishing property rights (over parts of the body), one must consider the dignity and respect for the human being, its integrity, and the physical subjecthood of each of us. In terms of the autonomy of each individual, from a Kantian point of view, there must be moral, as well as legal, restrictions on what a person can do with his own body, and the state should structure our choices to discourage morally unacceptable actions (Altman, 2011, p. 110).

The (im)morality of buying and selling other parts of the human body – the problem of reproductive cells

The discussion about buying and selling body parts is not reserved for organs and tissues only. Donating and buying and selling reproductive cells is undoubtedly one of the most controversial topics within this issue. However, the analysis showed that it can also be quite contentious in the Kantian framework. One of the biggest arguments, apart from the violation of humanity and dignity, both when donating and when buying and selling organs by a living donor/seller, is the possible violation of a person's physical and psychological integrity. The mentioned element is one of the main criteria when taking an organ from a living donor, and it is the non-deterioration of his previous health condition. However, what about the situation when giving or buying does not disturb the health of the giver/seller at all? How to morally evaluate the buying and selling of reproductive cells?

[27] However, the main problem of the above is reflected precisely in the *a priori* nature of such a question, which is of a moral-ethical nature and which preliminarily requires a thorough ethical-moral elaboration to be part of the statutory-legal sphere.

Precisely on this topic, even certain theorists, who state that the property rights over *some* parts of the body are in Kantian-ethical frameworks (e.g., Munzer, 1993), clearly indicate that the buying and selling of gametes is completely non-Kantian based. In Kant's view, no argument can be found that would in any way justify the act of buying and selling reproductive cells. One of the strongest arguments of those who state that it is Kantian to talk about some property rights in body parts was Kant's example with the amputated leg, noting that it is moral to sacrifice a body part to save a person's life. However, this argument is inapplicable to reproductive cells. A person whose body part has its price, who agrees to be part of the reproductive cell seller's catalogue and whose body part is instrumentally used to create a new person, in the Kantian view, insults his dignity and self-respect and uses himself as a tool. So far, none of the arguments support the Kantian justification for buying and selling gametes.[28]

Apart from the example of the amputated leg, some might also use Kant's example of selling hair. Even though Kant's point of view here is quite uncertain and questionable, what would it mean if the sale of hair "is not altogether free from blame"? The sale of hair is not comparable to the example of gametes. Concerning hair, the sale of reproductive cells in its foundations contains a somewhat controversial ethical and moral context that encompasses numerous problems of surrogacy. Suppose person X sells his reproductive cells that person Y will ultimately use to obtain offspring. In that case, X becomes a parent without any responsibility[29], with the widespread occurrence that the offspring does not even know that person X is his parent. Unlike

[28] If one wants to look for a philosophical argument in the buying and selling of gametes, then Locke's concept of ownership and property rights is a much more grateful address, although Locke's conception of property does not offer a valid argument for absolutely all dispositions of gametes. Locke's labour theory of property justifies property as a product of labour. We can only have property rights over those entities that have emerged as a product of our work. What is a product of work not belonging to God as (our) creator? Dickenson thus cites an interesting court case of a man who suffered from leukaemia and whose spleen samples were taken for therapeutic purposes during a splenectomy. His active immune cells were used for further production of immortal cell lines, and he was asked to come to the hospital several times to donate cells. Considering that the donor soon discovered that the market value of such cells was about 3 million dollars, he decided to file a lawsuit against the health institution, which the court ultimately did not accept. Dickenson states that the donor does not have property rights in the said cells and, therefore, does not benefit from the said property rights precisely because they did not arise as a product of his work. It was given to him in the form of him as a person, and persons belong exclusively to the "Creator". The mentioned health institution can only acquire property rights of these cells because they have invested considerable effort (work) for his immune cells to reach the mentioned therapeutic properties. A similar position was taken by the Supreme Court of the Republic of Croatia in the case Rev 804/2021-6, dated November 28, 2023 (see *infra*). Characterizing body parts as products is essential because many preliminary actions need to be done to release them into (legal) circulation. See: John Moore, Plaintiff and Appellant, v. The Regents of the University of California et al., Defendants and Respondents, 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479; Dickenson, 2019.

[29] Here, it could be said that being a parent is not at all relevant to the discussion within the framework of Kant's deontology, however, even an isolated view of the act of selling reproductive cells would hardly find a deontologically conditioned justification for such an act.

hair, the sale of reproductive cells can have numerous further implications, the ethical and moral nature of which is not Kantian-based.

THE THIRD STAGE – REGULATION OF PROPERTY RIGHTS IN BODY PARTS IN PRIVATE LAW LEGISLATION

Regulation of the status of body parts in statutory private law regulations

In certain legal systems, special regulations completely or partially limit ownership and other property rights over the human body. Thus, in the countries of the common law system, the so-called *no property rule*[30] applies, according to which the human body and its parts cannot be considered objects of ownership and other property rights[31], so the body and its parts cannot be disposed of by will, regardless of the testamentary freedom and autonomy of the testator (Hardcastle, 2007; Mimnagh, 2017). However, according to some authors, a system that completely prohibits access to the market, i.e., the buying and selling of parts of the human body, is outside the legal principles of compulsory and property law, where such restrictions do not exist (Dunham, 2008). This very fact can be confusing when it comes to the property rights in the body and its parts because it would mean that if someone is the absolute owner of his body, organs, tissues, and cells, he can absolutely dispose of them, and buy them or sell them. However, in the vast majority of countries, this act is prohibited. The aforementioned prohibition can be prescribed either by transplantation medical legal regulations (such as the Croatian regulation in the aforementioned Article 8.1 of the Act on the Transplantation of Human Organs for the Purpose of Treatment and Article 7.1 of the Act on the Use of Human Tissues and Cells) or else within the framework of civil legislation. Although there are not many countries whose civil codes even mention the disposition of body parts, the Italian Civil Code (Regio Decreto 16 marzo 1942, n. 262, ult. D.Lgs. 10 ottobre 2022, n. 149.) in Art. 5. states that "acts of disposing of one's own body are prohibited if they cause a permanent reduction of bodily integrity or if they are otherwise contrary to the law, public order, or morality."

[30] Namely, common law legal systems during the 17th century gave birth to the rule that there can be no property concerning the human body ("*no property in the human body*"). The rule initially comes from Coke's Institutes of the Laws of England from 1664, where it is prescribed that "the burial of the deceased... is no one's property" (lat. *nullius in bonis*) and that it falls under the church's jurisdiction. However, the Anglo-Saxon courts have since made exceptions to the so-called non-ownership rule (e.g., Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118), which has brought further uncertainty to the resolution of the question. Wall emphasizes that the result of all this is that the legal status of parts of the human body is still undefined and unclear; Wall, 2015; Nedić, 2023.

[31] Although specific authors write about the "unfounded origin" of the so-called no property rule and its unsustainability (Quigley, 2018, p. 56).

Human beings cannot be considered things but persons with a certain moral and legal status. In a certain way, the human body can be viewed through the glasses of objecthood as a collection of its parts (organs, tissues, and cells). However, the personhood of human beings, especially viewed from the Kantian approach, is primarily reflected in the mental and spiritual-mind dimension. A separate part of the body, by itself, has no personhood significance. With regard to the mentioned provision of the Italian civil legislation, it should be pointed out that the disposal of body parts does not refer exclusively to the contract of sale. It, especially in the practice of those countries that prohibit the purchase and sale of organs, relates to something else and is the basis of every transplantation system. It is the donation contract. If we were to observe body parts exclusively in the context of legal and moral subjecthood and personhood, as observed by Kant himself, then donating organs, especially from a legal point of view, would not be possible. Moreover, in order for a person to be able to donate something at all (even an organ or any other part of the body), it must first be assumed that the same person has certain ownership rights over that object. As previously stated, the establishment of property rights in human body parts should not be disputed, as much as the extent to which these property rights should be applied.

Although the legal status of parts of the human body is not recognized in many countries' statutory civil law provisions, the opinion on this was given by legal doctrine as a source of law in the continental legal system. Thus, in the writings of German (Finkenauer, 2020, p. 29, 30; Neuner, 2023, p. 305, 306), Austrian (Koziol, Bydlinski, Bollenberger, 2010, p. 267; § 285, 2), and Croatian (Klasiček, Nedić, 2023; Vedriš, Klarić, 2013, p. 72, 73) civil law doctrine, the so-called criterion of separability, whereby a part of the body, while an integral part of one human person, is viewed as part of the legal subjecthood of that same person. At the moment when the organ is separated from the body, and as long as it is in that state, it is considered a thing limited in legal circulation, which can be disposed of in the form of a donation, but by no means bought and sold. When a part of the body is transplanted into the body of another human person, it becomes part of the subjecthood of the person into whose body it is transplanted. This kind of legal regulation and thinking about the status of parts of the human body enables a legitimate system of taking, allocating, donating, and transplanting organs, but not buying and selling.

However, the consequence of treating body parts as things and enabling the existence of the transplantation system also has certain consequences for other branches of civil law, such as tort law. According to Directive 85/374/EEC and the European model of liability for a defective product, any movable item is to be considered a product, regardless of whether it is industrially processed or not, without the possibility of privileging any product (Klarić, Baretić & Nikšić, 2022, pp. 180–181; Pichler &

Nedić, 2023). This leads to the conclusion that according to the European system of responsibility, blood products, organs, and all other body parts should be considered products.[32] Liability for a defective product belongs to the category of objective liability for damage, where the fault of the harming party is not sought but only objectively fulfilled criteria, which for medical and health workers can represent a much stricter approach.[33]

CONCLUSION - ALTERNATIVES TO BUYING AND SELLING ORGANS AND KANT'S INFLUENCE IN ESTABLISHING FUNDAMENTAL GUIDELINES IN THE INTERACTION OF BIOETHICS AND PRIVATE LAW

A literal and consistent interpretation of Kant's opinion on the disposal of body parts can lead to the conclusion that absolutely no form of disposal of one's own body is morally based. According to specific interpretations, this could include the buying and selling of organs and any organ donation, especially if it is a donation from a living donor.[34] A consistent interpretation of Kant could lead to moral questions in various transplantation procedures in modern biomedicine. However, this is precisely why we have ethics. Deontological ethics, as Kant's most significant legacy, should aim not at a literal understanding of what Kant wrote about (especially in the

[32] The opinion above was also adopted by the Court of Justice of the European Union in the judgment of May 10, 2001, Henning Veedfald v Århus Amtskommune, C-203/99, ECLI:EU:C:2001:258.

[33] In the case of the Supreme Court of the Republic of Croatia, Rev 804/2021-6, dated November 28, 2023, a man received a blood transfusion during maxillofacial surgery. The operation was successful. However, during the transfusion, the man became infected with hepatitis C. The plaintiff claimed that the defendant is the Croatian Institute of Transfusion Medicine. The Institute, as the person responsible, announced that they had performed all the tests required by law and that the virus had not been detected in blood doses. For the first time in the history of Croatian medical tort law, the Supreme Court determined that body parts are things, that is, if they are treated and put into legal circulation – products. The Supreme Court states that "human blood and human organs are certainly not and cannot be considered things while they are in the human body, but the question arises whether blood, as well as human organs, tissues, and other reproductive material, can be considered things after they are separated from the human body. This court considers that blood and blood products collected from donors and processed in special health institutions established for this purpose represent an independent thing that can be considered a product by Art's provisions. 2. Paragraph 2 of the Ownership and Other Property Rights Act ("Official Gazette", No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/ 06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15 and 94/17). Therefore, by separating from the human body, blood and human organs, tissues, and reproductive material become things and can have all the elements of a product, i.e., a defective product with a defect for which damages are liable according to objective criteria." The above shows that the responsible person is liable according to objective criteria for damage (defective product liability) where no fault is claimed. The Supreme Court sent the case back to the court of first instance for a decision, with the mandatory application of objective responsibility, which means that the Institute can potentially be held responsible, although they took all the legally prescribed conditions for blood testing, and the virus was not found during the same tests. The aforementioned judgment shows the consequence of treating body parts as things/products, which obviously not only has an impact on property law but is also very applicable to tort law.

[34] It is still necessary to emphasize that Kant's label of immorality when disposing of body parts primarily refers to the purchase and sale concerning which a person receives a particular material (financial) benefit.

context of those phenomena that were not present in Kant's period, such as the case of organ transplantation), but at the adaptation of Kantian-based ethical thinking to the contemporary challenges of society and, in this case, biomedicine. Deontological ethics and the citations of various Kantians and deontological ethicists in the text tell us exactly how the legal buying and selling of organs cannot be considered a solution to the significant shortage of organs because the unrightfulness of such an act is reflected in the violation of the dignity of a human being and the use of a person as a means. This is precisely why organ donation is the basis of any transplantation system, especially by deceased donors, while in many legal systems, it is forbidden to receive financial benefits for donated organs and tissues.

Using the compilation method and the great plurality of opinions, the possibility of reaching for Kantian perspectives in any arrangement of body parts is somewhat ungrateful. Not only with regard to the plurality of the Kantian understanding of the disposition of body parts but also with regard to the numerous needs of modern transplant medicine and the fact that organ donation is one of the fundamental legal tasks and legal dispositions of body parts that save human lives. Especially if one takes the "extreme" Kantian approach that forbids any disposal of body parts. In Kant's view, certain authors still advocate a modified form of disposal of body parts, considering that only certain disposals of body parts are morally impermissible in Kant's moral-ethical framework. Such an approach is applicable; more precisely, it finds its place in the contemporary achievements of transplantation medicine and in private law. This does not affect the establishment of property rights in the parts of the body that may exist, but the range of legal disposal arising from them should be limited.

In the context of donation by a deceased donor, one of the solutions to the great shortage of organs could be an opt-out (presumed) system of organ donation. In this system, the body parts of a deceased person are taken only if the person did not expressly object to organ donation during life in the manner prescribed by law. Most EU countries' legislative regulations on organ transplantation accept this model (e.g., Italy, France, Spain, Belgium, Netherlands, Poland, Austria, Switzerland, Sweden, Norway, Croatia, Slovenia). A person who, during his lifetime, was expressly opposed to organ donation after death is entered into a special register of non-donors. The mentioned system greatly increases the number of possible organ donors. It is precisely because of this fact that the mentioned system is the most represented, and many countries in which the opt-in system is present have transitioned to the opt-out system of organ transplantation. However, it is necessary to respect the patient's autonomy in implementing the opt-out system.

When disposing of body parts by a living donor, the analysis of various legal and professional-ethical regulations, as well as the writings of certain legal and moral philosophers on the disposal of body parts, show that two essential criteria should be taken into account, the basis of which is precisely Kant's categorical imperative. Those two criteria represent a generalization of the ethically acceptable disposal of body parts. If they are met, the disposal of body parts by a living donor can be labelled as morally and ethically based. The first criterion is reflected in the fact that everything that does not offend the psychophysical integrity of a person is ethically acceptable. However, buying and selling reproductive cells may not be dangerous for the donor's health. But, different medical possibilities, such as synthetic biology and choosing potential parents from a catalogue in surrogacy and various modifications of surrogacy, lead to different deviations of morals and ethics (see, e.g. Dickenson, 2017). This is precisely why the second criterion is reflected in the foundation that everything that is not the buying and selling of body parts is ethically and deontologically acceptable.[35] However, the latter criterion will certainly experience certain re-examinations in parallel with the development of medical techniques and the disposal of bio-materials, and it should be left open to various polemics. In the writings of Kant, only (altruistic) dispositions are allowed in which a part of the body is sacrificed for the salvation of another person (in Kant's example of an amputated leg), not the buying and selling of body parts because even the sale of hair, the separation of which does not harm the integrity of the person, is "not free from blame".

Considering all the above, the designation of organs as things in the civil law doctrine does not represent a moral obstacle. However, such a label should not be objectionable in Kant's framework. As an entity, the organ does not correspond to Kant's view and definition of a person. The designation of organs as things is necessary for the legitimate legal circulation of organs, precisely in the context of organ donation. The morality and justification of such a label should be sought in the further conceptualization within which organs are considered things but things restricted in circulation/use. This means that their legal disposition is limited, primarily about the sale of organs, which is illegal. This is precisely why the prohibition of receiving financial benefits is stated as one of the fundamental principles of organ transplantation in the Croatian transplantation legislation.[36]

It should also be emphasized that the problems with the disposal of body parts could not be the same in European and American economic-health-capitalist frameworks.

[35] If, within this criterion, we take the example of gametes, when donating them, any potential "designing" of children is avoided because when donating, only that donor is available, not many different sellers of gametes.

[36] Art. 8 of the Act on Transplantation of Human Organs for the Purpose of Treatment (Official Gazette, No. 144/12) and Art. 7 of the Act on the Use of Tissues and Cells (Official Gazette, No. 144/12).

The American health insurance system and the opt-in system of donating body parts can significantly challenge the Kantian-based moral-ethical framework for disposing of body parts and very often come close to the contours of consequentialism/utilitarianism, unlike the European one, which within the opt-out system (which is broadly accepted in most member states) and health insurance, provides much more effective protection and a more considerable amount of available body parts. This is precisely why the issue of property rights and absolute disposal of body parts is much more relevant in the American health framework than in the European one. Specific hypothetical examples from Anglo-Saxon moral and legal philosophers and property theorists are often inapplicable in European health settings.

Considering Kant's definition of person and thing, there is no obstacle in designating body parts as things and basing (limited) property rights in body parts. The disposal of body parts and the range of ownership rights may be questionable. Organ donation, which is the basis of any transplantation system, assumes that the person who donates has certain property rights in human body parts. Statutory prohibition of the purchase and sale of body parts and enabling exclusively donation in order to save another person's life (Kant's example of an amputated leg), especially in European private law frameworks, follows the contours of Kant's deontological ethics.

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Izučavajući Kantovu perspektivu o (samo)vlasništvu i stvarnim pravima nad dijelovima ljudskog tijela: rasprava o granicama između osoba i stvari

SAŽETAK

U radu se propituje normativni okvir designacije dijelova tijela kao stvari u građanskopravnoj doktrini, kao i mogućnosti pravnog raspolaganja dijelovima tijela u kontekstu Kantove moralne filozofije. Formiranje privatnih (subjektivnih) prava Kant izvodi iz preliminarne razdvojbe stvari i osoba te druge formulacije kategoričkog imperativa. U razložbi koncepta privatnog prava, i stvarnih prava koja su moguća samo u odnosu na relaciju čovjek-stvar, Kant posljedično progovara i o pitanjima samovlasništva te stvarnim pravima nad vlastitim tijelom i njegovim dijelovima. Premda je izričito pisao o nemogućnosti samovlasništva na

tijelu i, načelnoj, nemogućnosti raspolaganja njegovim dijelovima, potrebno je imati na umu da Kant onomad nije mogao predvidjeti sva moguća dostignuća, perspektive i iskušenja suvremene transplantacijske medicine. U radu se temeljni Kantovi bioetički i privatnopravni koncepti (prije svega koncept vlasništva i stvarnih prava) stavljaju u kontekst (pravnog) raspolaganja dijelovima tijela. U bilo kojoj izložbi i razložbi kantijanski utemeljenog mišljenja o raspolaganjima dijelovima tijela ne bismo se nužno i isključivo trebali voditi izričitim Kantovim pisanjima o stvarnim pravnim i raspolaganjima dijelovima tijela, već bismo u obzir trebali uzeti interpretativni širi okvir Kantove deontološke etike i Kantovo poimanje osobe i stvari. Takvo tumačenje može dovesti do zaključka kako nema prepreka da se na dijelovima tijela zasnivaju stvarna prava, ali da se radi o ograničenim stvarnim pravima, uz klasifikaciju dijelova tijela kao stvari ograničenih u prometu, što je mišljenje koje prevladava u određenim statutornim privatnopravnim odredbama i pisanjima građanskopravne doktrine.

Ključne riječi: Kant, dijelovi tijela, osoba, stvar, presađivanje, organi, stvarna prava, vlasništvo, privatno pravo.