

Book Review

Bioequity - Property and the Human Body

Nils Hoppe

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BRITTA VAN BEERS¹

Do we own our bodies as legal property? Or, are our bodies rather part of who we are as a juristic person, capable of invoking legal rights and remedies under a legal system? To illustrate the complexities of this legal-philosophical puzzle, French legal historian Jean-Pierre Baud uses the following case of “*jurisprudence-fiction*”, a term he coined himself in his classic 1993 work *L'affaire de la main volée. Une histoire juridique du corps*.² Imagine your hand is cut off in a freak accident. During the accident, your worst enemy happens to be present. He manages to get hold of your severed hand and throws it into the central heating boiler. It is clear that you have been seriously wronged. But how can the actions of your enemy be qualified under criminal law?

A first possibility is assault and/or battery. Without your enemy’s intervention, it might have been possible surgically to reattach your hand. Therefore, by taking away your hand, your enemy has in fact removed the possibility of recovery and condemned you to a lifelong mutilation. However, a conviction for battery would be problematic in this case. After all, it was not your enemy that cut off your hand; he only made it disappear.

Would conviction for theft then be a better option? Your enemy has taken something away that rightfully belongs to you. Moreover, he has taken something so intimate, that one could even argue that it is part of who you are. Yet this legal solution is questionable too. It presupposes that you were the rightful owner of your hand before it was cut off. However, in most legal systems ownership of your own body parts is denied. The underlying thought is that exactly *because* your body is part of who you are, you cannot also own it. It is either *être* or *avoir*. More importantly, the fear is that once legal property in the body is accepted, human dignity may be compromised, and new forms of exploitation can be expected.

All in all, the existing legal system would leave the fictional judge no other option than acquittal. This shows, according to Baud, how the legal system has until recently protected the human body only indirectly, without truly ‘seeing’ the body in itself.³

Exotic as Baud’s example may be, developments in medicine and biotechnology have made the question of ownership and property in the human body more pressing than

ever. Almost 20 years after the publication of Baud's book, the legal situation remains as opaque as ever, even though the possibilities to transplant, isolate, conserve and transfer human body parts, tissues, gametes and genetic sequences have grown spectacularly. In fact, even hand transplants, such as in Baud's imaginary stolen hand case, have become a medical reality.⁴

The need for a coherent and effective legal approach is acute. Whatever direction policy makers may choose for biomedical regulation, these guidelines will have to be framed in legal language. The question is whether the existing legal framework can provide the tools and vocabulary for a fruitful approach to these issues. It is exactly towards this goal that legal scholar Nils Hoppe has devoted his book *Bioequity – Property and the Human Body*. To understand the goal, and the value of this book, a brief look at the current legal framework may be helpful.

What makes qualification of the human body within the current legal framework so difficult is a deeply rooted dualism that characterises both common and civil law systems: the *summa divisio* between persons and things, or between personal rights (such as the right to vote or human dignity) and property rights. As one both *is* and *has* one's body, the human body seems to escape these foundational categories. However, since the legal system does not allow for any other options, lawyers are forced to choose either side of the dichotomy. Traditionally, most legal systems have opted to classify the human body as part of the legal person rather than as the object of property rights. A very basic example is that a physical injury is not qualified as property damage but as a personal injury.

The underlying philosophy seems to be that qualification as part of the person can guarantee a certain inalienability of the human body as well as its special legal status among tangible objects. To place the body outside the realm of objects and property entitlement, is generally considered a good protection mechanism against the possible dangers of instrumentalisation and exploitation of persons and their bodies.

Yet this 'personalist' position seems to have become less convincing in an era in which possibilities to alienate parts and elements of the human body abound. Person and body are less interconnected than ever. Moreover, these novel biomedical practices and contexts require regulation of the human body in its most tangible aspects, such as guidelines for the conservation, use and transfer of human tissues and gametes. To a certain extent, the personalist approach can be helpful in this context too. Its influence is especially clear in the prevailing gift approach to the human body. As an expression of the interconnectedness between person and body and the body's special status, the transfer of human biological materials is to take place according to the rules of the gift, and not the rules of the market. This so called principle of non-commercialisation, which is recognised in most legal systems, allows individuals to only donate their biological materials.

However, one can wonder, as Hoppe does, if this approach offers real and adequate answers to all of the legal questions that are raised by biomedical practice. The overarching argument of Hoppe's book is that traditional legal approaches to the human body, in which property rights in one's own body are denied, have not resulted in sufficient protection of the individual against exploitation, but have, on the contrary, actually given rise to it. Moreover, property interests in the body have been rejected for the wrong reasons, Hoppe argues, mixing legal reasoning with emotions and ethics, and not differentiating between different sorts of tissue retention. Instead, to do justice to the complexities of biomedical reality and the novel ways in which human tissues are put to use, he argues for a reinvention of the concept of property through the law of equity, thereby giving rise to the intriguing concept of *bioequity*.

Hoppe's main criticism corresponds with Baud's objections against traditional legal approaches to the human body. The law's blind spot to excised body parts and tissues has left the individual unprotected against unauthorised use and exploitation of these materials by third parties. In fact, the case of the stolen hand shows many similarities with the *causa belli* of most advocates of a property approach to the human body: the well-known John Moore case.

Moore, an American patient being treated for a rare form of leukaemia, found out that huge profits were being made from the cell line that had been developed without his knowledge from his biological materials. Just as there were no criminal sanctions available to punish the thief of the severed hand, Moore could not claim conversion of 'his' biological materials, according to the California Supreme Court. This outcome points to a widely criticised paradox that is inherent to the double logic of the current system: one cannot have property in one's own body, since this could possibly lead to the objectification and exploitation of individuals. Yet after separation, human tissues, as if by miracle, suddenly become available for appropriation. However, the ensuing property rights in these tissues are not automatically granted to the source of the materials, but to the person who appropriated the materials. What's more, these third parties can exploit them commercially, since the principle of non-commercialisation does not apply to *further use* of donated biological materials. This means that the source is usually excluded from any profits made of his tissues.

This criticism is well known and has been voiced many times. The originality of the book lies in the alternative concept of property that Hoppe proposes, and the questions that the book raises about the methodology to follow when developing such constructions. To start with the last point, a central point of criticism in Hoppe's book is what he calls the "obfuscation of terminology and belief" (p. 9). According to him the discussion is too often influenced by emotional charges, philosophical presuppositions and ethical viewpoints. Instead, a clear terminology and systematic framework should precede any analysis in this legal field. It is for this reason that Hoppe offers the reader in part I of his book an elaborate matrix of different sorts of tissue retention. As there is indeed a tendency in debates on the commodification of

the human body to neglect essential differences between different types of tissue and procurement, this matrix is one of the most relevant and interesting parts of the book. According to Hoppe, a thorough analysis of the problem should at least take the following factors into account: the nature of the source; the type of consent; the impact of the medical intervention; the motive for the excision; the type of tissue; the question whether the appropriation was honest or dishonest; and lastly the pecuniarity. His matrix not only provides the reader with a tool to analyse these complex debates, but could also be helpful to policy makers when developing regulatory regimes for the ‘tissue economies’⁵ that have come into existence with the rise of biomedical technologies.

In the second part of his book, Hoppe uses this framework for an analysis and critical evaluation of the legal approaches that have so far been developed in response to this issue. Hoppe limits his analysis to the common law position. Although his account offers an interesting overview of the most important legislation and case law in this field, what really keeps one continuing to read is Hoppe’s early promise to develop a new “kind of property to capture the rights and entitlements attached to the human body and its parts” (p. 10). After his outspoken criticism on existing legal approaches to the human body in part II, one is desperate to know which alternative legal constructions he himself has to offer.

Hoppe does not come to this synthesis until the third and last part of the book, also entitled ‘Bioequity’. Here Hoppe claims that a new and adequate approach to the human body can be derived from the law of equity. When no appropriate remedies are available within common law, equity can function as a correction mechanism to provide the John Moores of this world with an equitable entitlement to their biological material. This entitlement cannot be equated with a conventional property right, but constitutes in Hoppe’s words “a new property class for human material” - which makes one wonder about the exact nature, scope and basis of this equitable entitlement. Unfortunately, at this crucial point of the book the author leaves the reader practically empty-handed, as he only devotes four pages to his centerpiece concept. Even though Hoppe claims that equity can be used to establish a new property class for human material, the application of bioequity to his test case (John Moore) furthers the impression that equity is used here more or less as a synonym for justice and fairness.

Furthermore, in the end, the different parts of the analysis are not tied together. For instance, it seems a missed opportunity that Hoppe does not fall back on his analytical matrix to suggest an alternative class of property. More specifically, because of the vagueness of his concept of bioequity, one is left with the impression that the different types of tissue retention are thrown together in a big legal heap after all. However, the concept of bioequity is innovative, and could after further elaboration offer an important contribution to future debates on this growing problem.

A last point of criticism concerns Hoppe's normative presuppositions. As was mentioned before, in the first part of his book Hoppe expresses his concern about the tendency to mingle legal arguments with ethics and emotions. To my relief, this concern has not prevented him from producing a passionately written and outspoken work of legal scholarship. However, Hoppe does not seem to have completely been able to rid himself of certain moral assumptions. As a reader one gets the impression that some important dimensions of the legal debate on property in the human body were neglected or disqualified beforehand. For instance, it does not become clear why exactly it would be unacceptable to apply traditional property approaches to the human body. Perhaps this is a consequence of Hoppe's rejection of terms such as 'exploitation' and 'commodification', which he disqualifies from the debate as too "negatively connotated" (p. 5-6). It is in this vein that he also writes the following: "Whilst there is sufficient empirical evidence that the human body is valuable, its sacred status or even 'pricelessness' are products of subjective or religious views." (p. 6) Later on, Hoppe jeers at Kantian-inspired refusals to perceive the human body as one's property (p. 75-77).

The disqualification of these 'negative' terms and viewpoints from the legal discussion seems unnecessary and even undesirable. Although it would be wrong to project one's own ethical beliefs onto an analysis of the legal debate, it also seems a distortion of legal reality to neglect completely certain ethical dimensions of the existing legal framework. For example, without reference to Kantian approaches, in which the pricelessness of the human body dominates, it seems almost impossible to explain why the human body has a special status among all objects of law.

Furthermore, this is exactly what makes these matters so complicated. Both a purely libertarian, property oriented approach and a purely conservative, Kantian or Christian inspired personalist approach seem too simplistic. As Hoppe himself writes: "A marriage of the two views [...] appears eminently persuasive." (p. 8-9) The human body forces one to look beyond the existing dichotomy. Unfortunately, Hoppe is not completely successful in removing the impression that his own ethical orientation is towards the libertarian philosophy. If this is true, an explication of his own ethical position would have been desirable. More importantly, in that case Hoppe has not been able to truly go beyond the dualism of the current debates. Nonetheless, *Bioequity* is a well-written criticism of traditional approaches to the human body, and contains some sharp observations on existing regulatory regimes. The analytical matrix from part I, especially, could be of enormous value for both researchers and policy makers in this complex field.

¹ Department of Legal Theory, Faculty of Law, VU University Amsterdam, Amsterdam.

b.c.van.beers@vu.nl

² J.-P. Baud. 1993. *L’Affaire de la Main Volée: Une Histoire Juridique du Corps*. Paris. Éditions du Seuil.

³ *Ibid*, p. 12: “Les rédacteurs du Code pénal [...] protégeaient le corps sans le voir.”

⁴ See for a fascinating account: D. Dickenson. 2009. *Body Shopping: Converting Body Parts to Profit*, Oxford. One World: 144-149.

⁵ C. Waldby and R. Mitchell. 2006. *Tissue Economies: Blood, Organs and Cell Lines in Late Capitalism*. Durham and London. Duke University Press.