Revista de Științe Politice. Revue des Sciences Politiques • No. 88 • 2025: 212 – 217

ORIGINAL PAPER

Philosophical hesitations on the nature and consequences of the human right over one's own body

Dan Claudiu Dănișor[1)]

Abstract:
Although the concept of human right over one's own body seems clear, the nature and consequences of this right are in reality particularly confusing, as there is no indisputable philosophical substantiation of them. Philosophical hesitations on the nature and consequences of this right make the option of constitutionalizing either the principle of the unavailability of the human body as such, or that of its complete availability impossible. The two principles weigh each other in a conjunctural manner. But the choice of the criterion of conjunctural balancing is not decided either, as it does not seem clear in this area whether liberal democracies are determined to stand firmly on the ground of neutrality towards moral doctrines, aiming only at the achievement of a just society, or are willing to give in to perfectionist temptations, aiming to achieve the good society in itself.

Keywords: *human rights, habeas corpus, unavailability of the human body.*

[1)] Professor, PhD, University of Craiova, Faculty of Law, Department of Public Law, Romania, Phone: 0040351177100, Email: dcdanisor@yahoo.fr, ORCID ID: 0009-0007-6095-3048.

Philosophical hesitations on the nature and consequences of the human right over one's own body

The notion of human body seems clear; everyone knows what a human body is. However, from a legal point of view, the notion is not at all transparent. The ambiguity stems, first of all, from the fact that there is no legal definition of the body. Secondly, from the fact that, if it seems natural that the life of a person is linked to the body, it is not at all necessary that the notion of body be linked to that of life. We must admit that in a way the human body appears before birth, which means, as a rule, from a legal point of view, before being alive and continues after death. This will raise particularly complex problems regarding the protection granted to the foetus, with regard to the right to terminate a pregnancy, the right to remove organs from corpses, etc.

The third difficulty, the one I am concerned with here, results from the different understanding of the human body, sometimes as a substratum of the soul, sometimes as a thing. The body hardly fits into the distinction Justinian made in the Institutes: *"Omne autem jus quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones"* (The whole of the law that we use concerns either persons, or things, or actions in justice). It is difficult to state that when we refer to the body we refer to the person, because the person is much more than this body, but the body is so linked to the person that it can only be seen as an extension of it, as a "substratum" of the human soul (Carbonnier, 1994). It is, therefore, sacred. Seen in this way, the human body, even if it remains somewhat a thing, is a separate thing, one that must be intangible and unavailable.

If, however, this sacred character of the human body is not accepted, is the right to the body, remaining a simple thing, a property right? In other words, can the body be the object of transactions, like things, or is it outside of commerce, of the civil circuit? Can the trade in one's own body be admitted, in the form of prostitution or giving birth for another, or the trade in body parts, in the form of the trade in organs for transplantation, or are such acts prohibited? And if the latter is the case, how and to what extent can the right to dispose of one's own body be limited?

We see that both the classification of the body outside the category of things and its removal from this category raise particularly complex, sometimes insurmountable problems. It is clear that the personal right to one's own body is far from being a property right as such, since it does not confer on each person a kind of "sovereignty" over the body. But it is equally clear that it implies a right of disposal that cannot be limited under the same conditions in which individual rights in general can be limited.

It is obvious that the body belongs to us, but it is equally obvious that we do not know very clearly how it belongs to us. From a legal perspective, this belonging can be conceived in terms of property. This is how some theories, which can be brought together under the category of "proprietary liberalism", support the existence of a property right that the individuals would have over themselves. Other theories "sweeten" this analysis by supporting only a freedom to dispose of one's own body, but it is obvious that the analysis is still within the scope of the legal category of property, yet introducing only one aspect of the right of property: the disposal. Many legal theories avoid generalizing the problem, treating each of its consequences as if it were a distinct problem, but the price is, if the philosophy that underpins the analysis is missing, incoherence, and if it is present but not disclosed, euphemism.

Treating the problem of the legal relationship between the subjects and their own bodies in terms of property rights has great symbolic force. First of all, because of history: the dependents of the feudal era did not have possession of their own bodies. Their bodies – not their souls – were owned by their lords. When they acquired it, they did so by referring to the patrimonial-senior conception of legal relations. Therefore, *habeas corpus*

is naturally constructed in the mirror of this, as a possession of what had been taken from them, so on the ground of regaining the right of ownership over the body. Secondly, the symbolic power of conceiving the relations of the persons with their own bodies in terms of property is due to the political function of property in the Middle Ages and, then, in societies that were configured by "fleeing" from this type of constitution. Being the owner of one's own body means in the modern era defining oneself as the holder of a political power. A man who has property of himself is a "master", i.e. a man who has political power. No one can touch your property rights, which are, in essence, all the rights you have because you rule yourself. There is no power separate from you that can rule you, at least politically, that is, on the level of physical existence, of corporeality, because, spiritually, God can (still) subsist.

Proprietary liberals make the most of this symbolic and political force of the idea of property. They use the concept of self-ownership to demand greater freedom and more rights for individuals and to require the limitation of political power, of the state, which must be minimal at most (Nozic, 1974; Nozic, 1991), but which can become ultra-minimal or even "null" (Rothbard, 1973). Ownership of oneself makes the individual, in the eyes of some libertarians, even "sovereign" (Lemieux, 1987). At the forefront of these contemporary conceptions are the ideas of John Locke: "Every man is [...] the *owner* of his own *person*. No one else but himself has any right over him." (Locke, 1690; Locke, 1990). Starting from this idea, which will constitute one of the pillars of modern liberalism, Locke will base not only private property on self-ownership, but also the identity of man on property: "[...] man has in himself the great foundation of property" (Locke, 1690; Locke, 1990: 79)

"A liberal proprietary theory defines a just society as a society that does not allow anyone to extort from an individual what is due to him in a predefined sense" (Van Parijs, 1991). This is what R. Nozick stated in the first lines of the preface to *Anarchy, State, and Utopia* (1974): "Individuals have rights and no one – person or group – can do certain things to them (without violating their rights). These rights are so strong and go so far that one can ask what role the state and its official representatives still have, if any? How much space does the state leave for the rights of individuals?" (Nozic, 1991: 35). The idea on which this position in favour of individual rights is based is that individuals "own them". It is the appropriation of rights that defines them as rights prior to any society, as "natural", and a society that "defeats" their natural character becomes one against nature, unjust. Any social redistribution finds its limits in this "defeat" of nature. It remains just if it is only the result of the voluntary trading of legitimate property rights, without any intervention of any redistributive power that could redefine their legitimacy. Everything therefore depends on the just "genealogy" of property rights. If they are initially constituted justly, individuals can freely negotiate their transaction and, if these two conditions are met, the society resulting from the contractual redistribution of rights is just.

The differences between the liberal proprietary theories concern, first, how the original irreproachable appropriation, the genealogy of rights, is conceived, and, secondly, how the just character of the subsequent transaction of rights is conceived. But they agree on the fact that, as Murray Rothbard argued, "the concept of Rights makes no sense unless we understand them as Property Rights. For not only are there no Human Rights that are not at the same time Property Rights, but Human Rights lose their precise and absolute character when they are not founded on the criterion of Property Rights. We say […] that Property Rights are identical with Human Rights […, because] The personal Right to

one's own body, personal freedom, is a Property Right […]" (Rothbard, 1982; Guillaumat, Lemieux, 1991: 148-149).

For a first category of liberal proprietary theories, for a society to be judged as just it is sufficient that the genealogy of rights is irreproachable and that their transaction is free. For a second, the redistribution resulting from the transaction must also be just. This requires the fulfilment of an additional clause, which is called the "Lockean" clause: "a society cannot be just if certain individuals have within it a worse fate than what would have been theirs in the state of nature. Injustice consists, again, in extorting the individuals from what is their due, now interpreted as the level of well-being they would have enjoyed in the absence of society. […] The exact implications of the theory depend, of course, on the interpretation given to the 'state of nature'." (Van Parijs, 1991)

When the right to one's own body is conceived in terms of *disposal*, as the right to dispose of one's own body, what changes is the *emphasis*. The theories summarized above emphasize the constitution of the right to one's own body, only then the freedom of transactions with it, and only sometimes the justice of the outcome of these transactions. In contrast, theories that affirm only the *disposal* of one's own body emphasize the latter aspect, demanding that the outcome of transactions with one's own body be just and apply the requirement of justice to the transactions themselves.

The differences are not only theoretical, but practical. The result of the proprietary theories of the first category - the one I am concerned with here - is that any transaction with one's own body is legitimate if it is free, since no one normally questions the irreproachable character of the proximity of one's own body, and the result cannot be unjust once the two conditions - irreproachable genealogy and freedom of transactions - are verified. Society cannot, as a consequence, adopt any rule that would limit free transactions with one's own body, for example, prohibit prostitution or the rental of the womb, or the sale of body products, etc.

The consequence of introducing the "Lockean" clause by the second category of liberal proprietary theories is that transactions with one's own body, even if made freely, can be judged as unjust if they do not achieve a just result, that is, some of those who transact are placed in a worse situation than in the state of nature. Society can, therefore, legitimately restrict the exercise of the rights to trade one's own body, but only to guarantee this minimum level of well-being. It can regulate prostitution or the rental of the womb or other such transactions to ensure minimal protection for the most vulnerable in such transactions, but it cannot prohibit transactions as long as they are free.

The consequence of the theory that reduces the right to one's own body to a right of disposal is that society can prohibit certain forms of trading the right to one's own body if they are in themselves unjust, even if they are freely consented and do not place one of the parties in a position of diminishing the natural well-being. This time, prostitution or the rental of the womb, or the like, can be prohibited in order to guarantee the just character of the society in which we are placed. The prohibition can be pushed further if instead of the justice of society, the restriction of the right to dispose of one's own body is made with a view to achieving a good society. This time, society can impose *moral* limits on the market for transactions with one's own body.

Current positive law is not decided on the choice of the philosophical foundations of the right that people have over their own bodies and, consequently, is not coherent regarding the limits that society can impose, through legal norms, on the right that persons have over their own bodies. Some limits on the state's power to restrict the exercise of this right are less debatable than others, but it is clear that liberal democracies do not agree

on the legal treatment of the use of one's own body parts, the use of its functions, or the use of its products. The only aspect that seems consistent is the prohibition of slavery, conceived in terms of ownership of the body.

The body is therefore inviolable, a consequence resulting from its sacralization, which implies that man has the right to life and the right to physical integrity and the right to physical security, that is, a security understood in a narrow sense, as the security of bodies. But it is not clear whether it is available or unavailable. The principle of the unavailability of the human body is not regulated at a supra-legislative level except in terms of the prohibition of slavery and servitude. The rest of the issues involved in unavailability are decided at the legislative level. In most systems, the norms that regulate issues related to the unavailability of the body are in principle civil, with criminal norms intervening only to guarantee absolute prohibitions, such as, for example, slavery, servitude or forced labour. But even in terms of the choice of the type of norm, current legal systems are not always convergent, since there are still many systems that penalize some acts of disposal over the body, for example attempted suicide or abortion, or some transactions with the body, for example prostitution. The Romanian legal system has for the time being abandoned the penalization of certain acts of disposal or transaction of the body, regulating the prohibition of certain patrimonial acts concerning the body, in art. 66 of the Civil Code: "Any acts that seek to confer a patrimonial value on the human body, its elements or products shall be affected by absolute nullity, unless otherwise provided by law". But this norm does not limit the power to legislate, because the Code is an ordinary law, which can be modified at any time by the legislature. It has a symbolic superiority, but it is not a privileged and protected norm.

It seems, therefore, that philosophical hesitations over the nature and consequences of the human right to one's own body make the option of constitutionalizing either the principle of the unavailability of the human body as such or that of its complete availability impossible. The two principles weigh each other in a conjunctural manner. But the choice of the criterion of conjunctural balancing is not decided either, because it does not seem clear in this area whether liberal democracies are determined to stand firmly on the ground of neutrality towards moral doctrines, aiming only at achieving a just society, or are willing to give in to perfectionist temptations, aiming to achieve a society that is good in itself. This is the reason why it was proposed to abandon any claim to constitutionalize the principle of the unavailability of the human body (Lemennicier, 1991: 111).

References:

Carbonnier J. (1994). *Droit civil, Les personnes*, Ed. P.U.F., Thémis, no. 4.

Nozick R. (1974). *Anarchy, State and Utopia*, Oxford, Ed. Basil Blackwell, translation into Romanian Nozick R. (1991), Anarhie, stat si utopie, Bucuresti, Ed. Humanitas.

Rothbard M. (1973). *For a New Liberty: the Libertarian Manifesto*, New York: Ed. Libertarian Review Foundation.

Friedman D. (1973). *The Machinery of Freedom*, New York: Ed. Harper & Row.

Lemieux P. (1987), *La souveraineté de l'individu. Essai sur les fondements et les conséquences du nouveau libéralisme*, Paris: Ed. Presses Universitaires de France.

Locke J. (1690), Second Treatise of Government, 1690, par. 27; translation into Romanian, Locke J. (1990), Al doilea tratat despre cârmuire – Scrisoare despre toleranță, București: Ed. Nemira.
Van Parijs Ph. (1991), *Qu'est-ce qu'une société juste?*, Paris: Ed. Seuil.
Rothbard M. (1982), *Ethics of Liberty*, Atlantic Highlands, N.J, Ed. Humanities Press, quoted from the French translation by Guillaumat Fr., Lemieux P. (1991), L'éthique de la liberté, Paris, Ed. Les Belles Letres.
Lemennicier B. (1991), *Le corps humain, propriété de soi, propriété de l'Etat*, Paris: Ed. Droits, 1991, no. 13.

Article Info

Received: November 07 2025
Accepted: November 18 2025

How to cite this article:
Dănișor, D. C. (2025). Philosophical hesitations on the nature and consequences of the human right over one's own body. *Revista de Științe Politice. Revue des Sciences Politiques,* no. 88, pp. 212-217.