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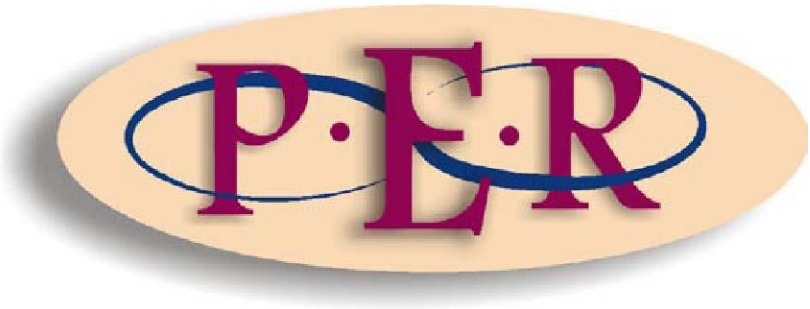

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ETHICS, JUSTICE AND THE SALE OF KIDNEYS FOR TRANSPLANTATION PURPOSES

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1 Introduction

Transplanting a kidney from a living,[2] unrelated[3] donor into another and both surviving afterwards has the capacity to fulfil all the central goals envisaged for the practice of medicine. Such transplantations can preserve life, alleviate suffering, cure diseases and restore function. However, the moral concerns raised by living kidney donor transplantations are complex,[4] because a healthy person is subjected to a surgical procedure by the transplant team with no medical benefit to him,[5] add to that financial compensation to the donor and one enters an ethical maze. In the last three decades, medical ethics came under the spotlight specifically because of the developments in medical technology and the growing acceptance of human rights with the emphasis on the autonomy of persons. These issues opened up debates concerning the ethical acceptability of unrelated, living kidney donors, as well as the possible compensation of donors – the donor being the only party to the transplant process who not only gains nothing,[6] but also stands a chance of eventually facing a health risk.

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2 See Garwood-Gowers *Living Donor* 37; Munson "Organ Transplantation" 214: "Easing the organ shortage is not the only reason for valuing living donors. Transplant surgery can be planned; organs are disconnected from their blood supply for a shorter time and thus remain in good condition; recipients may spend little or no time on the waiting list or undergoing dialysis, so their health does not deteriorate; organs from a living donor will be healthy and undamaged; and good immunological compatibility between donor and recipient can often be arranged." "Kidney recipients benefit significantly from a living donor. The one-year survival with a deceased-donor kidney is 94 per cent, but with a living-donor kidney, survival rises to 98 per cent. Five-year survival increases from 80 to 90 per cent."

3 It is with the discovery of effective immunosuppressive drugs that using kidneys from unrelated living donors became feasible, see Munson (n 2) 213.

4 Rhodes "Organ Transplantation" 329. For legislation concerning living transplantations, see Slabbert and Oosthuizen *Obiter* b 307–311.

5 Beauchamp and Childress *Principles* 50.

6 "That hospitals, surgeons, coordinators, laboratories, transport services, and organ procurement organisations make money from transplants is not a shameful truth, yet it is rarely mentioned in public. Inspiring stories of transplant miracles are the preferred sort of publicity" (Munson (n 2) 227).

Medical advances have resulted in a dramatic increase in the number of organ transplantations each year, but there is a limited supply of organs and the demand for kidneys in particular, far outnumbers the supply.[7] This shortage of transplantable kidneys prevents many critically ill patients from receiving kidney replacements that could either save their lives or improve the quality thereof, freeing them from dialysis machines.

Whether donors may be compensated or whether the sale of kidneys should be permitted[8] is influenced by ethical debates mainly amongst consequentialists, deontologists and virtue ethicists because most legal transplants take place in the Western world. This article explores these ethical approaches and indicates some shortcomings, as well as their relevance in today's world. The foundation for all bioethical judgments, beneficence, non-maleficence, autonomy and justice are also considered.

2 Ethics

> Ethical issues in medicine are as old as medicine itself, for once one asked, 'what is wrong?' and, 'what can be done?' one had also to ask, 'what should be done?'[9]

Before the ethical theories can be analysed, it is necessary to explain the term "ethics" and consider the origins of moral thinking. Although the philosophers of the

7 For statistics on organ shortages, see Cherry *Kidney* xi; Garwood-Gowers (n 2) 20–22, Munson (n 2) 212 "Every year nearly 10 000 people on the United State's Network for Organ Sharing (UNOS) national waiting list die without getting the organ they need to survive. They depart quietly, with little public notice. Yet the total of their deaths is roughly equivalent to *three times* the number of people who died in the 11 September 2001 terrorist attack on the World Trade Center."

8 The sale of human organs is forbidden in most countries. The *National Organ Transplant Act* of 1984 of the United States states:

> It shall be unlawful for any person to knowingly acquire, receive or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

Punishment includes fines up to $50 000 and/or five years in prison. The Ethics Committee of the Transplantation Society issued a supporting Policy Statement stating "no transplant surgeon/team shall be involved directly or indirectly in the buying or selling of organs/tissues or in any transplant activity aimed at commercial gain" (Friedman and Friedman '*Kidney International* 960).

9 Levinsky *Ethics* 24.

past could not foresee the developments in medical technology and the problems related thereto, it is worthwhile considering their way of finding an answer for an ethical question to serve as guidance for our ethical problems today. Socrates, Plato and Aristotle emphasised reason and rationality as the basis for human well-being and ethical decision-making. Aquinas added that one should have the freedom to choose. More often than not, people who oppose the sale of human organs base their arguments on emotional outcries of human dignity or religious grounds. Yet, if they were to consider arguments rationally, as the philosophers did, and reason about the pros and cons of the selling of human organs they might come to a different conclusion.

2.1 What is ethics?

Ethics can be characterised as the systematic inquiry into human conduct with the purpose of discovering both the rules that govern or ought to govern human action, as well as the good that is worth seeking in human life.[10] Ethicists attempt to answer the question: "What is right (or wrong), good (or bad)?"[11] This view is as indicated later, not as straightforward as it may appear. Truth-telling always appears to be right and actually basic to morality. Sometimes, however, truth-telling becomes difficult, say for instance you were a German in the Second World War and a Jewish family was hiding in your cellar. If the Gestapo knocked on your door, asking if there were any Jews on the premises, you would most certainly tell a lie because in the specific circumstances it would be better to lie than to send a whole family to the gas chambers.[12] Ethics is thus not always about what is absolutely right or wrong, acceptable or unacceptable, ideal or less than ideal. It is more about what is the right decision (morally speaking), in particular circumstances, what is the lesser of two evils, what is the balance between doing good and causing harm.[13]

10 Strauss *S Afr J Cont Med Educ* 26. To give a fuller perspective, the following remark by Abelson and Nielsen "History of Ethics" 81 may be of value: "The term 'ethics' is used in three different but related ways, signifying (1) a general pattern or way of life, (2) a set of rules of conduct or 'moral code' and (3) inquiry about ways of life and rules of conduct. As examples they refer to Buddhist or Christian ethics for the first, professional ethics and unethical behaviour for the second. What we do here exemplifies the third".

11 Strauss (n 10) 26.

12 Bryant, Baggott la Velle and Searle *Introduction* 17.

13 Bryant, Baggott la Velle and Searle (n 12) 18.

A moralist will say what he thinks is good or right according to his preferred moral system, while an ethicist questions the underlying principles of what is good or bad, right or wrong.[14] Generally an action is unethical if it disregards or jeopardises the well-being of other people, breaks an agreement, conflicts with the moral norms of a person or a society, and if the action will result in harm to other persons, groups or the environment.

2.2 The development of ethical thinking

2.2.1 Greek philosophy

One should remember that Classic Greek philosophy is known today mostly through reconstructions from others and recorded memories. In many cases, the accounts consist of scattered fragments and only occasionally a complete manuscript, which has to be interpreted. Despite these scanty sources, it is apparent that they had much to offer from where they stood at the dawn of reflection on man and the world.

Socrates (470–399 BC) considered ethics in relation to personal character and morality in asking, "what sort of person ought one to be".[15] He emphasised self-control, which for him was the basis of real freedom. His emphasis on reason in moral discourse had a significant influence on Western ethics. For him, it was impossible to be good without recourse to reason, in other words providing reasons for the rules of conduct, instead of relying on the self-justifying claim of tradition. Thus, he believed in the examination of moral terms in an attempt to define them.[16]

Plato (427–374 BC) was a 'student' of Socrates and he answered the question of what sort of person one should be by stating that a good person was one who, to his mind, attended to and was guided by the form of the good.[17] "This was a divine and external reality only imperfectly seen in everyday human existence, but supremely

14 For a discussion on ethics and morality, see Beauchamp and Childress (n 5)1–23.
15 Campbell, Gillet and Jones *Medical Ethics* 2.
16 Abelson and Nielsen (n 10) 83–83.
17 Campbell, Gillet and Jones (n 15) 3.

disclosed by the calm contemplations of wise men".[18] Plato's disputatious method could not yield an ethical system. His ethics, because of its link with the theory of forms, had a metaphysical – other worldly – basis. The form of the good is for him analogous to our vision of sunlit objects and of the sun itself; it illuminates all aspects of life.[19]

He treats impulses and desires, pleasure and the passions with disdain; an ideal life would be purged from these anti-rational forces.[20] Although Plato's dialogues make interesting and challenging ethical reading it is difficult to reconstruct a Platonic ethical theory. Three threads in his work, which are important if we take the further development in ethical theories into consideration, are: his extreme rationalism (which he adopted from Socrates) with its accompanying disregard for the body and the passions; the metaphysical grounding of morality (the Good), in his case, linking it to the theory of forms; and lastly the psychological account of morality,[21] which became very important later on.

A student of Plato, **Aristotle** (384–322 BC) believed in the functionality of things. This determines the 'Good', which for man is what he seeks by nature – "Plato was the fountainhead of religion and idealistic ethics, while Aristotle engendered the naturalistic tradition" – and this he calls *eudaemonia,* happiness, or more correctly the fulfilment of his function.[22] He also relied on psychology to express his moral views. For him, desires were partly rational and the rational control of desires is moral virtue. Thus, the highest good can only be achieved through the exercise of reason.[23]

Aristotle and the 'father of medicine', Hippocrates, shared a methodology that began with observations of the actual world in which they lived, rather than beginning with

18 Campbell, Gillet and Jones (n 15) 3. The clearest formulation of the theory of forms is the discussion of the divided line, Plato *Republic* end of Bk 6.

19 Abelson and Nielsen (n 10) 83–85. Directly expressed by Plato (n 18) Bk 7 (The parable of the cave) Sect 3.

20 Plato *Protagoras* and Plato *Symposium*. Abelson and Nielsen (n 10) 84 "In the *Protagoras* and *Symposium,* Socrates argues for rational control over the body for the sake of greater pleasure in the long run … The image he [Plato] draws of Socrates is of a man who eats and drinks heartily and enjoys himself on all levels of experience but in rationally controlled proportions."

21 Abelson and Nielsen (n 10) 83–85.

22 Kerferd "Aristotle" 161; see also Abelson and Nielsen (n 10) 84–85.

23 Bryant, Baggott la Velle and Searle (n 12) 20.

theories about life, the universe and everything else.[24] Aristotle's interest in empirical matters made him a keen observer and classifier and made for a realistic approach in many ways. Reference is made to him again later when virtue ethics is discussed, from which it will be clear that in moral discourse it is important to take the full situation into consideration. A key concept in his moral reasoning is 'harmony', that is, striving to reach a balance.

Hippocrates (460–370 BC) was an ancient Greek physician.[25] He separated the discipline of medicine from religion, believing and arguing that diseases was not a punishment inflicted by the gods but rather the product of environmental factors, diet and living habits.[26] He is best known for the Hippocratic Oath,[27] a document on the ethics of medical practice. This document is rarely used in its original form today, but it still serves as a foundation for medical practice and morals.[28] According to the Hippocratic Oath, the *sine qua non* of ethical problems in medicine is whether the individual concerned has acted in accordance with adequate standards of health-care practice and secondly whether he/she has acted in the best interest of the patient.[29] Yet, a growing number of doctors have come to feel that the oath is inadequate to address issues today in a world of legalised abortions, physician-assisted suicide and illnesses unheard of in Hippocrates' time.[30]

2.2.2 Western Christianity

During the reign of Emperor Constantine (306–377 AD), Christianity became the accepted religion of the Roman Empire.[31] The Church that preached that there were God-given absolutes on the manner in which individuals should conduct themselves thus moulded ethics.[32] Ethical reflection during this period thus boiled down to what the Scripture presented as interpreted by the Church. Ethics became a blend of the pursuit for earthly well-being and the preparation of the soul for eternal salvation.

24 Bryant, Baggott la Velle and Searle (n 12) 3.
25 Hippocrates is included because this article adopts a medical perspective, see Strong and Cook www.manipal.edu.
26 Garrison *Introduction* 93–94.
27 See the original Oath in Campbell, Gillet and Jones (n 15) 277.
28 Jones *Hippocrates* 217.
29 Campbell, Gillet and Jones (n 15) 9–10.
30 Tyson www.pbs.org.
31 Bryant, Baggott la Velle and Searle (n 12) 20.
32 Bryant, Baggott la Velle and Searle (n 12) 20.

Many of the old Greek ethical systems and considerations disappeared during this time, yet Hippocratic ethics was elevated because of its similarities to Christian ethics.[33]

Thomas Aquinas (1225–1274 AD) was a religious thinker who incorporated Aristotelian ideas into the Church. He mixed Greek ideas with ideas from the Christian faith. His tendency to seek a middle way to solve problems originated from Aristotle. He, like Aristotle, believed that each body part had a specific function. Aristotle and Aquinas developed a totality principle that forbade the distortion of the physical completeness of a human being. The removal of a healthy organ cannot, according to this view, be justified as every organ fulfils a natural purpose as a part of the body as a whole and only in this set-up can their separate and common functions be fulfilled. Once removed from the organism the separate organ has no function; it needs to belong.[34]

Next to the body, man has a soul – which is immaterial, understands and makes free decisions.[35] As far as his ethical ideas are concerned, Aquinas believed rationality controls activities and goals, and they are judged good or bad in terms of goal attainment and the means by which they attain these goals. Good and evil in human conduct have a function in terms of ultimate happiness. Whenever an action proceeds to its end in accordance with reason and eternal law, it is right. A person is thus required to govern his actions as reasonably as he can, in other words making him more fit for ultimate happiness, in short, his theory was a self-perfectionist moral theory. Accordingly, conscience is not considered a special power or moral sense, but a concrete intellectual judgment whereby an individual decides that a given action is good or bad, right or wrong.[36] Accordingly, people function best if they have good health and the freedom to choose – "to deny someone the freedom to choose is immoral".[37]

2.2.3 Science

33 Veatch *Medical Ethics* 9.
34 Schreiber "Legal Implications of the Principle *Primum Nihil Nocere* as it Applies to Live Donors" 13.
35 Bourke "St Thomas Aquinas" 112.
36 Bourke (n 35) 113.
37 Bryant, Baggott la Velle and Searle (n 12) 21–22.

The era of the religious thinkers was followed by an era of science during which metaphysical assumptions were rejected in view of scientific methods. Amongst others, Copernicus (1473–1543), Galileo (1564–1642) and Newton (1642–1727) made the most significant contributions to science. Before them, the universe was seen as described in biblical terms, the heaven above and the Earth with water beneath it. The Earth was regarded as the middle of the universe.[38] The scientists revealed that this was not the truth, that the sun is in actual fact the centre of the universe. A consequence of scientific progress was that people started questioning what the Church taught and what the scientists proved. The religious basis for ethics was also questioned. People wanted to know whether God or human beings determine morality.[39]

The scientific era with its accompanying technological progress had a marked effect on ethical concerns. Not only did people realise the inability to prove an ethical belief in contrast to the ability to prove factual scientific claims, but they also became aware of differences of opinion and the importance of settling ethical disputes. The ground was prepared for an attitude of individualism and independence of authority on the one hand and a secular and humanistic ethic on the other.[40]

The difference between ethics and science is not that ethics has a monopoly on disagreement – there are plenty of disagreements, even in science; however, scientists agree at least in principle on what kind of evidence will settle a dispute. There is no such agreement in ethics.[41] Moreover, disagreements may be at different levels, within the same framework or view of life (two Christians may differ on organ sales) or as a clash between views of life (a Christian and a communist may differ on profit). In order to answer difficult ethical questions within the same world-views, a framework is needed within which an individual can reflect on the acceptability of actions and can evaluate moral judgments and moral character. Such a framework is termed an ethical theory.[42]

38 Bryant, Baggott la Velle and Searle (n 12) 22.
39 Bryant, Baggott la Velle and Searle (n 12) 22.
40 Abelson and Nielsen (n 10) 90.
41 Arras and Steinbock *Ethical Issues* 7.
42 Arras and Steinbock (n 41) 9.

2.3 Ethical theories

2.3.1 Rule-based ethics

Differences between religious thinkers and scientists led Immanuel Kant (1724–1804) to develop an ethical theory. He emphasised the duties of rational beings – he moved away from tradition and authority to individual reason in the sense not of practical intelligence in pursuit of happiness, but as the intellectual recognition of abstract truths, which took the shape of an internal sense of moral obligation when he worked out an ethical theory.[43] He taught that human beings should treat others never only as a means, but also as an end.[44] In other words, rational persons should act only on universally applicable principles, for example one should help people in need because one has a duty to assist one's fellow men. This he termed the categorical imperative.[45]

Kant was a deontologist[46] who believed in absolute rights and wrongs that are determined by way of reason, for example the only rational thing to do in a situation in which one has a choice, is to follow the call of duty without reference to the result or outcome.[47] The greatest weakness of Kant's theory is that rights and duties can conflict,[48] and there is no indication of the manner in which the call of duty in opposite directions is to be understood.

A rule that formed part of his theory concerned bodily integrity. Applied to organ transplants, it becomes clear that he was against organ donation and the sale of human organs: "To give away or sell a tooth so that it can be planted in the jawbone of another [is] partial self murder."[49] He said:

43 Abelson and Nielsen (n 10) 95.
44 Bryant, Baggott la Velle and Searle (n 12) 22. See also Campbell, Gillet and Jones (n 15) 4–5. Kant (*Fundamental principles* 62) says, "For all rational beings come under the law that each of them must treat itself and all others never merely as a means, but in every case at the same time as ends in themselves".
45 Bryant, Baggott la Velle and Searle (n 12) 22.
46 "*Deon*" (Greek) = "duty", "*logos*" (Greek) = "science", thus "deontology" = "science of duty".
47 Kant (n 44) 62.
48 Campbell, Gillet and Jones (n 15) 5.
49 Engelhardt *Foundations* 314.

> … a human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger. If he were so entitled, he could sell all his limbs. We can dispose of things that have no freedom, but not of a being which has a free will. A man who sells himself makes of himself a thing and, as he has jettisoned his person, it is open to anyone to deal with him as he pleases.[50]

Kant's basis for his extreme view was that a person may never be a means to an end. According to him, one's body parts define one's freedom as a human being. Freedom presupposes rationality, which in turn presupposes morality. Therefore, relinquishing a part of one's body would be irrational and immoral, in other words 'to cease to be human' – it is partly suicide.[51] This argument seems in order but what if one should lose a limb in an accident, would one then no longer be free? Donating a kidney is a free choice and as such does not deprive one of any freedom; the same applies to the sale of a kidney. In our society, monetary values are already attached to body parts, for example, the diva insures her voice, or the tennis player insures his arm, even the Road Accident Fund determines the 'value' of a limb to be paid out after an accident. Does this make such people less of a person?

Gill and Sade also reject Kant's claim on the ground that it is not persuasive to consider one's humanity as dependent on a kidney. One's humanity should rather be viewed as dependent on personal autonomy. Selling a kidney should therefore not have destructive effects on one's humanity; they also point out that:

> … even if the Kantian argument that selling one's kidney violates the categorical imperative, because it involves treating oneself as a means only, were correct, it would not follow that paying a donor should be against the law. We do not base our laws on the Kantian duty to respect humanity by respecting oneself. The laws we make aim, rather, at protecting the (non Kantian) autonomy of individuals. We protect their freedom to make personal decisions about self-regarding acts, and, if the decision they make is to follow their understanding of a rational moral law (Kantian autonomy), they are free to do that as well. No one need sell a kidney.[52]

2.3.2 Utilitarianism[53]

Deontological ethical theories are contrasted with teleological[54] theories. In other words, here the purpose or the result determines whether a decision or action is

50 Freeman "Taking the Body Seriously?" 13.
51 Engelhardt (49) 313–315. See also Abelson and Nielsen (n 10) 95.
52 Gill and Sade *KIEJ* 25–26.
53 See Mill *Utilitarianism* 1–95.
54 "*Telos*" (Greek) = "goal or purpose".

good and therefore right or bad and therefore wrong. This theory is also labelled the consequentialist ethical theory.

Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873) taught that the rightness or wrongness of an action depended on its consequences. Right actions are those that produce the greatest amount of good for the greatest number of those affected by its consequences.[55] Utilitarians are wary of the fact that the greatest good may also cause pain, for example, mass vaccination against an epidemic. Mill introduced the factor of the quality of a good outcome. The good of the prevention of an illness is superior to that of immediate bodily pleasure of painlessness.[56]

The utilitarian argument can be used to prove too much. Rachels refers to the following: Baby Theresa was born in Florida in 1992 without the parts of the brain above the cortex (anencephaly).[57] Her parents knew and understood that she would die or not have a conscious life. They therefore volunteered her organs for transplantation in order to benefit other children. Legislation in Florida did not allow it. Baby Theresa died after nine days but by then her organs had deteriorated too much to be transplanted. The babies who would have received a transplant died as well, but no one thinks of them.[58] Reaction to the above, according to the rule-based theory of Kant, was that it is horrifying to use people as a means to another's end or it is unethical to kill in order to save.[59] But, according to the utilitarian theory, it should have been allowed, because a number of babies would have benefited. This view seems simple if one argues that Baby Theresa was 'brain dead' in any event.

The utilitarian answer to the above issue thus seems to be 'yes', it should have been done, but the 'yes' evokes many uncomfortable feelings, especially if it is considered from another angle, for example if any one of the 'normal' babies were to be used as a source of organs for the other suffering babies, the effect in utilitarian terms would be almost the same, but it is more difficult to view this option as right or morally defensible. Put differently, utilitarians do not explain the reason that public interest

55 Bryant, Baggott la Velle and Searle (n 12) 23. See also Campbell, Gillet and Jones (n 15) 5–8.
56 Abelson and Nielsen (n 10) 97.
57 Approximately 1 000 babies are born with this disorder in the United States each year. See Rachels "Ethical Theory and Bioethics" 16. See also Campbell, Gillet and Jones (n 15) 137–138.
58 Rachels (n 57) 16.
59 Rachels (n 57) 16.

should always be placed above private interest. Apart from this being factually untrue, it leads to the contradiction that each of us has reason to approve of self-sacrifice in others but not in ourselves.[60]

Arguments concerning the sale of human organs tend to fall in this category, as proponents of the legalisation of commerce in kidneys argue that it will benefit all the relevant role-players. The patient will receive a kidney and thus a better quality of life. The seller is rewarded for giving up a healthy kidney; the hospital and pharmaceutical companies make a profit – thus those most involved in the circumstances are rewarded.[61]

Utilitarian and Kantian theories place too much emphasis on questions regarding what one ought to do, instead of what sort of person one ought to be.[62] Moreover, each highlights only one aspect of a wide spectrum of ethical decisions.

2.3.3 Virtue ethics[63]

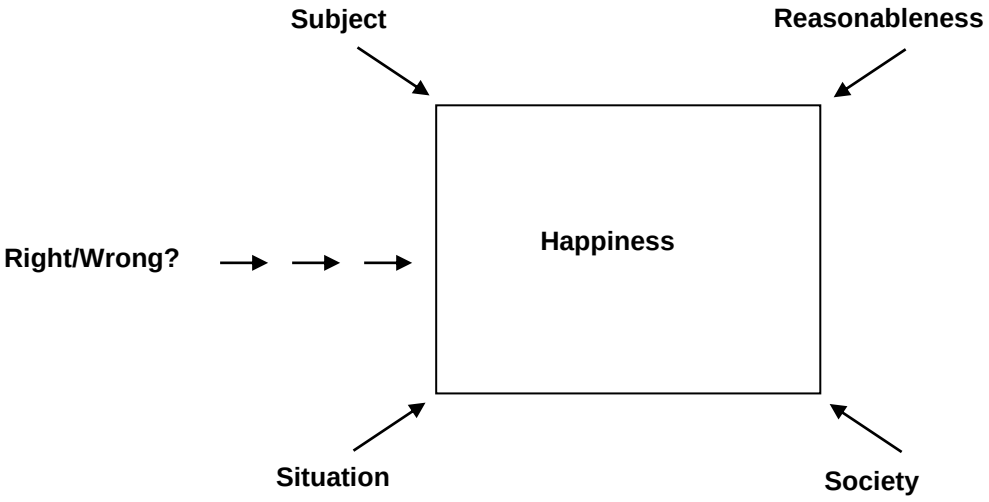
In criticising rule- and consequence-based ethical systems, it is sometimes argued that moral situations and good conduct cannot be codified in rules or principles meant to apply to all individuals in all kinds of situations and at all times. These rules and principles also cannot always provide 'correct answers' to moral questions. In place of such rule-based theories, virtue ethics with its emphasis on a virtuous character is proposed but in full realisation of the truth, to be virtuous is to *act* virtuously.

Virtue ethics originated from Aristotle[64] and was revived in recent times by MacIntyre in his controversial book *After Virtue*.[65] They agree that various substantive virtues (Aristotle also speaks of "excellences") such as benevolence, honesty, justice, truth-telling, empathy, knowledge, health, friendship, security, beauty, and others need to be practised, be part of your character, if one wishes to flourish and live well. How?

60 Abelson and Nielsen (n 10) 97.
61 See also Friedlaender *Lancet*, in which he argues he is a utilitarian, but also a humanitarian.
62 Oakley "A Virtue Ethics Approach" 86.
63 Campbell, Gillet and Jones (n 15) 8–9. See also Oakley (n 62).
64 Aristotle "The aim of human activity. *The Nicomacheon Ethics*" 159–173.
65 MacIntyre *After Virtue*.

One will be able to make the appropriate moral decisions in practical situations of moral choices if one possesses the virtue of practical wisdom, which will guide one in putting the relevant virtue into practice.[66] Oakley[67] refers to the example of abortion, which, according to him, has nothing to do with the competing rights of a woman and a child. The decision to have an abortion should depend solely on the character of the woman who has to decide on having an abortion within her particular circumstances. This sounds a bit naïve and a little more is needed to understand this approach, particularly in the context of applied ethics, in which the emphasis is on *doing* the right thing.

In order to seek to understand the idea of virtue ethics, imagine a square representing moral decisions.



The overall goal is happiness or to flourish and live well – but as an objective desire, chosen because it is in itself desirable and choice-worthy. The four corners are four sets of considerations *en route* to a moral choice.

Human and therefore the subject's happiness can be neither egotistical nor paternalistic – one can only be in charge of one's own good and can only seek to contribute to another's ability to flourish. For example, with reference to the selling of a kidney: Am I physically/emotionally/socially ready to give up a healthy kidney? Virtues such as knowledge, security and health come into play. The choice/action

66 Aristotle (n 64) 163.
67 Oakley (n 62) 92.

should also be reasonable, in other words properly substantiated and underpinned by the right motives; and should itself be reasonable and reasonably executed. For example: Why sell a kidney? Why not? Why legally? Why not on the black market? Is the procedure to remove a kidney scientific/acceptable/the best manner of doing so? Virtues such as honesty, truth-telling and justice should be considered.

Society is also something to reckon with – no human being exists on its own; other persons and their situations or requirements have to be taken into account. As Aristotle realised, a person needs 'external goods' to flourish and be virtuous, but these other people in their turn also have the desire to flourish. Human beings depend on each other to realise their goals, and they are an essential part of your context in making moral decisions. For example: What are my parents'/my family's/my church's/my peers' views on selling a kidney? Again, virtues such as honesty, benevolence, justice and friendship are important.

Lastly, what are the merits of the situation at hand (right action)? For example: Does the situation merit the selling of a kidney? The virtues of justice, benevolence, honesty and knowledge are relevant. Thus, "there is no single, neutral model to which each person's pattern of weighing of these goods and virtues must conform".[68] As indicated above, both the complete situation and the possibilities and weaknesses of the subject have a place in a moral decision; the focus is on providing situation-specific and local solutions to moral problems – this is referred to as the *uncodifiability thesis*. "The virtue ethicist … denies that there are any absolute principles … to which we can appeal in cases of moral conflict. Instead, we should carefully consider all morally relevant aspects of the situation and seek to balance or reach a compromise between various moral claims".[69]

The discussion of virtue ethics focused on the patient or the kidney seller and not so much on the doctor. The position of the doctor will be discussed in the next section. Here, it suffices to say that while money exchanges hands this should not influence the doctor, as his responsibility lies with his patient, regardless of whether that person received a donated kidney or bought one from a willing seller.

68 Van Zyl *S Afr J Philos* 137.
69 Van Zyl (n 69) 138.

Criticism against virtue ethics is that it rejects universalisation (deriving a general rule for future action from a particular decision), which is regarded as a necessary condition for an ethical decision to be rational.[70] Van Zyl argues that virtue ethicists make use of general principles to help them decide; they are also in principle not opposed to attempts at deriving guidelines for future assistance from the way in which a particular situation was handled, should a similar situation re-occur.[71] However, "we cannot expect rules to do all the moral work for us …". Van Zyl concludes, "the focus on character rather than the rules of right action is a response to a practical problem, which does not … require us to reject the principle of universalisability."[72]

The three historical ethical theories provide only little guidance regarding the justification of organ sales. According to Kant and the followers of the rule-based approach, organ sales should never be allowed because these affect freedom and thus limit humanness, but this seems unconvincing as Kant clearly also valued human autonomy. The utilitarians might be able to justify commerce in kidneys ethically because of the greatest reward to all those involved in the transplant process. This seems as a clear 'yes' in favour of organ sales, but once again it is unconvincing, because of the confusion between inclination and obligation, and no clear convincing argument for the dominance of public satisfaction over self-satisfaction. If virtue or character is analysed as an ethical basis for the justification of selling a kidney, it appears that it will depend on each individual involved – the doctor, the patient and the seller. There can be no clear 'yes' or 'no' for organ sales, because these ethicists refrain from offering universal guidelines – each case has to be judged on its own. This position resembles bioethics, which advocates that morality cannot be codified in rules and each situation should be approached differently.

It appears that the old philosophers and existing ethical theories offer some assistance, but are not yet convincing in justifying the practice of buying and selling

70 Van Zyl (n 69) 136.
71 Van Zyl (n 69) 138.
72 Van Zyl (n 69) 139.

kidneys for transplantation. It is thus necessary to consider current debates in applied ethics concerning organ sales.

3 Bioethics[73]

The Twentieth Century saw a decline in Western paternalism as societies became more egalitarian. Questions were asked on the manner in which religious absolutes could be applied to issues about which texts such as the Bible or the Koran knew nothing.[74] It is during this time that the term "bioethics" was developed in the United States. According to bioethicists, instead of relying on the old scriptures or ethical theories, one has to determine the appropriate use of new developments and technologies in medicine.[75] Whereas ethics deals with general standards and principles of moral reasoning and is therefore a starting point, bioethics deals with moral issues in particular cases. Bioethicists want to know what the best is for a patient, not merely what this or that theory enunciates.[76]

Bioethicists take cognisance of medicine, law, economics and public policy,[77] and they doubt whether there can be one satisfactory ethical theory, as they believe morality cannot be codified in rules.[78] Medical situations differ too much; one rule cannot be applied to all situations. A major impetus to the development of bioethics was technological developments in medical treatment, such as the respirator in 1950, dialysis machine in 1960, the first heart transplant in 1967, followed by the possibility of transplanting organs from unrelated donors with the help of immunosuppressant medicine.[79]

"Bioethical controversies are too complicated to be resolved by the simple application of a [specific] theory: Theories are general and abstract, while real life is messy and detailed".[80] Rachels[81] therefore advocates mid-level principles or

73 "*Bio*" (Greek) = "life", "bioethics" = "ethics of life".
74 Bryant, Baggott la Velle and Searle (n 12) 24–25.
75 Bryant, Baggott la Velle and Searle (n 12) 25.
76 Rachels (n 57) 15.
77 Kuhse and Singer "What is Bioethics? A Historical Introduction" 10.
78 Kuhse and Singer “What is bioethics? A historical introduction” 15.
79 Trzepacz and DiMartini *Transplant Patient*.
80 Rachels (n 57) 11.
81 Rachels (n 57) 17.

everyday moral rules as expressed in common sense, which is nearer to our hearts than general philosophical theories or higher-level principles. According to her, bioethicists doubt the value of ethical theories because there are too many different theories that sometimes conflict with each other and these theories were developed in the context of a specific historical tradition that was not able to foresee the medical developments of today.[82]

3.1 The four pillars of bioethics

3.1.1 Beneficence

The principle of beneficence means that a doctor should act in the best interest of a patient[83] or as the Hippocratic writings determine "at least do no harm".[84] By applying this principle, one may be confronted by the doctrine of double effect, meaning that a certain course of action with an overall benefit may be ethical even if it causes some harm.[85] By transplanting a kidney into a patient, regardless of whether the kidney is paid for, the doctor is improving the patient's quality of life. However, by removing a kidney from a healthy person's body, beneficence cannot be applied alone except for the double effect. The second principle, namely non-maleficence should therefore be considered simultaneously as beneficence cannot directly be applied to non-therapeutic interventions.

3.1.2 Non-maleficence

With regard to the living donor, non-maleficence (to do no harm) as a principle is to a measured extent breached since the surgery and the loss of an organ do carry some risks for the donor.[86] A study done in the United States of America showed that the risks are however small, as only 0,03 per cent of kidney donors died in a four-year

82 Rachels (n 57) 19–20.
83 See Garwood-Gowers (n 2) 41–46.
84 Garwood-Gowers 2.
85 Garwood-Gowers 2.
86 Gutmann and Land *Langenbeck's Arch Surg*. .

cycle after the donation and life-threatening or permanent complications occurred in only about a quarter of a per cent of donors.[87]

It would be narrow-minded to focus only on the donor, as the doctor has two patients to consider, both the donor and the recipient.[88] This is a unique problem with living donations: the combination of, on the one hand, the healing of a human being and, on the other hand, the strain and endangering of another.[89]

Since the donor consented[90] to the donation and it is for the physical benefit of the recipient, the infringement of this principle to do no harm is outweighed by the respect for the donor's autonomy and the principle of beneficence, in other words, by the overall increasing of the harm-benefit relation with regard to both donor and recipient.

Schreiber[91] lists four essential preconditions for the admissibility of living donors, the last being questionable:

- the risks to the donor must be compared with the needs of the recipient;
- the donor must be extensively informed about risks and dangers before the operation can take place;
- the agreement must be made willingly and with no form of pressure and, lastly;
- the organ donation may not be made in connection with monetary reimbursement.

The significance of the last precondition is not clear. That money is exchanged does not influence the informed consent requirement, nor does it increase the risks to the donor (seller); is monetary reimbursement any more pressurising than the situation

87 Munson (n 2) 215.
88 Schreiber (n 34) 14.
89 Schreiber (n 34) 14.
90 See S 18 of the *Human Tissue Act* 65 of 1983. See also S 55 of the National Health Act 61 of 2003. The *National Health Act* with the exception of several chapters (including Chap 8 on organ transplants) came into effect on 2 May 2005. S 93(1) of the Act repeals the *Human Tissue Act* in total, but this will only be effected on a date fixed by the President as publicised in the *Government Gazette*. In the interim, the *Human Tissue Act* and its regulations remain in force.
91 Schreiber (n 34) 14.

in which a family member feels pressurised to donate an organ if he or she is an only match?

Schreiber goes on to say the donor must be extensively informed before consenting to the operation, so that the donor is not dealt with as a mere object. Again, what difference will rewarding the donor make? To argue that economic motives may hinder or exclude a voluntary decision does not carry weight.[92]

3.1.3 Autonomy

The word "autonomy"[93] was first used in correlation with states that were self-governed. Philosophers adapted this term to be applicable to the rights and interests of individuals. Kant taught that a person has free will and can therefore decide what should be done in specific circumstances, and by implication, he is also responsible for his own actions. "For Kant, autonomy requires acting in accordance with one's true self – that is, one's rational will."[94] In other words, being autonomous means doing as one ought to, as a rational being.

In bioethics, the right to self-determination[95] and the giving of informed consent[96] are closely linked to the principle of autonomy. In the liberal tradition of ethical thought, respect for a person's autonomy means respect for his/her voluntary choices and can be summarised as follows:

> I wish my life and decisions depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody: a doer – deciding, not being decided for, self-directed and not acted upon by external nature or

92 Schreiber (n 34) 16.
93 "*Autos*" (Greek) = "self", "*nomos*" (Greek) = "rule".
94 Morgan *Medical Law* 87–88.
95 S 12(2) *Constitution of the Republic of South Africa*, 1996. Section 12(2)(b) reads as follows: "Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body." The common law also recognises the right to self-determination.
96 Consent as ground for justification is based on the maxim *volenti non fit injuria* (to him who consents, no injury occurs). Giving informed consent as an ethical requirement is now statutorily laid down in the *National Health Act* S 6, 7 and 8. See also Oosthuizen and Verschoor *SA Fam Pract*.

> by other men as if I were a thing, or an animal or a slave … I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes.[97]

Should a person wish to sell his/her organs, he/she should be permitted to do so,[98] unless there is clear evidence that harm will follow. As Radcliffe Richards[99] argues, if the rich are free to engage in dangerous sport, or people are allowed to do dangerous work for high pay, it is difficult to understand the reason the person taking a lesser risk of kidney selling should be protected against himself. It seems that it is only those who have resources and can indulge in refined moral sensibilities who oppose the option of selling a kidney. These same sceptics are quite willing to let the poor do other life-threatening activities, such as working in coalmines or cleaning windows of skyscrapers.[100]

To be autonomous means to give informed consent. In order to give informed consent in a therapeutic setting, the nature of the procedure must be explained to the prospective patient[101] (seller): the effects of the operation and the part of the body affected; the duration of the operation; information regarding the anaesthetic, X-rays or scans; and the risks in connection with the operation, the likelihood that the risks will eventuate and the effect of such risks should they eventuate.

Requiring informed consent[102] is a way to ensure that a potential seller understands all the risks of a kidney being removed; this is not to protect the person from the consequences of his/her actions but rather to ensure that he/she knows the nature and result of each course of action before making a decision.[103] The decision whether to take the risk of removing a kidney should be that of the donor or the seller, not the doctor. "Those who want organs want them now because life is finite. The paternalistic role of doctors in which they make all the decisions for patients is

97 Isaiah Berlin as quoted in Young "Informed Consent and Patient Autonomy" 441.
98 S 28 *Human Tissue Act* and S 60(4) *National Health Act* prohibit payment for human organs. See also n 89.
99 Radcliffe Richards "From Him that Hath Not" 191.
100 Trzepacz and DiMartini (n 80) 248.
101 For the legal requirements regarding consent in a therapeutic environment, see Young (n 102) 441–451. See also *Castell v De Greef* 1994 4 SA 408 (C) and Van Oosten *De Jure* 1995 165–179.
102 See S 7 *National Health Act*.
103 Munson (n 2) 218.

long outdated. With improved communication and access to information through the Internet, for example, patients are now well informed and they usually ask doctors for advice, not decisions."[104]

3.1.4 Justice[105]

Harris argues that any commercial scheme concerning human organs for transplantation should include safeguards against wrongful exploitation of vulnerable people.[106] He continues by saying that considerations of justice and equity should be taken into account. If all of this can be complied with, he feels strongly that the selling of human organs will not *prima facie* be unethical. He also feels it is fair to protect the most vulnerable – the desperate patients – by permitting another group to choose the option of selling; by doing so, they do not only benefit their fellow being, but they also benefit themselves financially.[107]

Section 27 of the *Constitution* gives everyone the right to access to health care. *In Soobramoney v Minister of Health (KwaZulu-Natal)*,[108] the Constitutional Court had to interpret the scope and content of the right to access to health care under Section 27. The appellant was a diabetic suffering from a heart disease, vascular disease and irreversible renal failure whose life could be prolonged by means of regular dialysis.[109] He was not admitted to the dialysis programme at the Addington Hospital in Durban because the hospital did not have sufficient resources to provide dialysis to all patients suffering from renal failure. The primary requirement of the hospital for admission of a patient on dialysis was his eligibility for a kidney transplant. Because of his other illnesses, he was not a candidate for a transplant and therefore also not allowed on the dialysis programme. He applied to the local division of the High Court to direct the hospital to provide him with dialysis but the application was dismissed. He then appealed to the Constitutional Court.[110]

104 Friedlaender (n 61) 972.
105 For a discussion on legislation concerning organ transplants, see Slabbert *Handeldryf*; Slabbert and Oosthuizen *Obiter* a 44–64; Slabbert and Oosthuizen b 304–323.
106 Harris "Clones, Genes and Immortality: Ethics and the Genetic Revolution" 1772–1774.
107 Harris (n 113) 1774.
108 1997 12 BCLR 1696 (CC).
109 Dialysis is a procedure to preserve or extend a person's life when his/her kidneys have stopped functioning.
110 For a discussion of the case, see Moellendorf *SAJHR* 327.

In summary, the Court held that the obligation imposed on the State under Section 27 was dependent upon the resources available. Owing to budgetary constraints, there were not enough dialysis machines available at the hospital to treat all patients. Were all the people in South Africa who suffer from chronic renal failure to be provided with dialysis treatment, the cost of doing so would substantially affect the health budget allocated.[111] It is thus submitted that in view of the above, the State should allow a patient an alternative by permitting him to buy a kidney from a living donor (seller) and thereby be removed from the dialysis programme and no longer be a financial burden to the State.[112]

4 Conclusion

Concerns about the availability of organs for transplantation should not blind one to the dignity and importance of each human being. We should also allow ourselves to view things in a different light to the one that immediately comes to mind.[113] This article has focused on whether there are ethical arguments that render payment to kidney donors inherently wrong. My conclusion is there are no convincing arguments. I agree with Munson that if the requirements of beneficence, non-maleficence, autonomy and justice are met, donations are morally acceptable, but then it should also be legitimate to sell a kidney, as both acts – donating and selling – are the result of a decision made voluntarily. In the case of donation, the individual is altruistic; in the case of selling, the individual desires to be remunerated financially.[114]

> Once we have agreed that autonomy is the ground for legitimising an individual's decision to donate a kidney we must also acknowledge it is legitimising his decision to sell a kidney.[115]

111 For criticism of this point, see Van Oosten *De Jure* 1999 13–14.
112 According to the Discovery Health Medical Aid Fund, dialysis can cost up to R85,000.00 per annum. It is more cost effective to transplant a kidney, as the operation is paid for once-off. Friedman and Friedman (n 8) argue that money saved by decreasing the number of dialysis patients might fund additional kidney transplants.
113 Trzepacz and DiMartini (n 80) 253.
114 Munson (n 2) 226.
115 Munson (n 2) 226.

The *boni mores* of society change constantly. Behaviour that used to be regarded as unacceptable a few years ago, such as performing abortions, having children without being married or even transplantations from dead bodies, are now regarded as 'normal'. Thus, a future in which persons have the autonomy to buy and sell a kidney is not unimaginable.[116] A legal trade can be regulated, whereas the black market and present practices cannot – bad legislation can kill people.[117] Friedman and Friedman ask why it is regarded as so ethically wrong to sell a kidney. Why is it worse than selling one's sperm or ova, transactions that are legal in the United States? Commercialisation of sperm and ova should be morally more questionable than selling a kidney because those cells can create entirely new human beings.[118]

Debates on the selling and buying of human organs have in the past focused on ethical discourse rather than the law and the debates were mainly against the commercialisation, but change is now imperative. Ethics is not something for philosophers only. The general public is more aware than ever of their rights and demands regarding individual autonomy; they also see ethics in a wider context. Should the legislator not change the law in such a way as to allow each individual the freedom to choose according to his/her belief and his/her rational reasoning whether to sell a kidney?

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116 Friedlaender (n 61) 973.
117 Friedlaender (n 61) 973.
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118 Friedman and Friedman (n 8) 961–962.

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List of abbreviations

KIEJ	Kennedy Institute of Ethics Journal
Langenbeck's Arch Surg	Langenbeck's Archives of Surgery
SA Fam Pract	South African Family Practice
S Afr J Cont Med Educ	South African Journal of Continuing Medical Education
S Afr J Philos	South African Journal of Philosophy
SAJHR	South African Journal on Human Rights