

BODY COMMODIFICATION AND HUMAN ORGAN TRANSFER IN THE BIOTECHNOLOGY AGE: PHILOSOPHICAL AND ETHICO-LEGAL PERSPECTIVES

MOUSOURAKIS George*

Introduction

In the past few decades biomedical science and technology has found many revolutionary lifesaving potentials of the body in medicine as new life is created through reproductive technologies, and lives are saved and sustained through organ and tissue transplanting. At the same time, however, the advances in medical science have given rise to a host of questions about the way in which the medical scientific community and biotechnology industry treat persons and their bodies. What is referred to as the 'commodification' of the human body, the notion that a person's body is a collection of parts that are separable and commercially transferable, is said to pose a major challenge to traditional intuitions and cherished beliefs about personhood, the sanctity of human life and the foundations of its moral dignity. As commentators have remarked, the primary danger of the shift from the 'body-as-self' to the 'body-as-property' is that it can lead to dehumanization and exploitation, especially of people at the margins of society. Indeed, whilst transplant procedures offer unquestionable benefits to patients, the

* Associate Professor, University of Auckland, New Zealand; Visiting Research Professor, Kansai University, Osaka. The author wishes to thank Professor Albin Eser of the Max Planck for his helpful comments on an earlier version of this paper.

growth of a worldwide market for human body organs has been received with concern by governments and professional bodies alike. These concerns are reinforced by reports that in some regions of the world, especially in developing countries, human body parts are being sourced coercively or fraudulently from poverty-stricken uneducated people, or from persons in captivity. The dramatic growth of human organ trade in recent years must be considered in the wider context of globalization, and in particular the extension and intensification of a system of unequal exchanges between the 'core' and 'periphery' of the contemporary capitalist world economic system. Following an overview of ethical issues concerning the commodification of the human body, this paper will consider some of the challenges the growing demand for transplantable organs poses for contemporary legal systems and comment on current or proposed legal responses to these challenges.

Bodies, Persons and the Commodification of Human Biological Material

One of the most commonly used arguments in support of establishing a commercial trade in body organs revolves around the liberal notion that free and autonomous individuals should be able to do as they please with their bodies. This argument hinges upon two interconnected assumptions: (a) that the human body and body parts can justifiably be objectified; and (b) that body organs can be treated as property.¹ This way of looking at the human body has roots in Cartesian philosophical dualism: the notion that the body and the mind (also referred to as thinking substance or soul) are two distinct and separate substances.²

1 See on this J. Kevorkian, "A Controlled Auction Market is a Practical Solution to the Shortage of Transplantable Organs", (1992) 11 (1-2) *Medicine and Law*, 47-55; J. Radcliffe-Richards, A. S. Daar, R. D. Guttman, R. Hoffenberg, I. Kennedy, M. Lock, R. A. Sells & N. Tilney, "The Case for Allowing Kidney Sales", (1998) 352 *Lancet*, 1950-52.

2 This kind of dualism is sometimes referred to as 'attributive' because it claims that there are two kinds of attributes and thus that all substances are of

By viewing the person as separable into body and mind and emphasizing the primacy of the mind over the body, dualism helped demystify the body making it a morally neutral secular object.³ The objectification of the human body also draws support from certain ideas associated with philosophical materialism, the view that all that exists is material in nature or is wholly dependent upon matter for its existence.⁴ This

just two ultimate kinds. Dualism is distinguished from monism, the philosophical theory that maintains that minds and bodies do not differ in their intrinsic nature; the difference between them lies in the way in which a common 'neutral' material is arranged. Descartes describes the human body as a machine, albeit a machine created by God, "incomparably better ordered, and [which] has in it more admirable movements than any of those which can be invented by men". *Discourse on Method*, (J. M. Dent, London, 1994) (originally published in 1637), 42.

The problem of the union of soul and body is central to Descartes' metaphysics. In his view, which represents the classical expression of dualism, there are in the realm of created beings two and only two fundamentally different kinds of substances or existing things: 'thinking' (mind, soul or consciousness), which is unextended and indivisible, and matter, which is extended and divisible. It follows that our physical bodies, including our brains, being part of the extended divisible world of matter, can have no part in our essence as thinking beings. This dualistic perspective was the heart of Descartes' attempt to reconcile the Catholic faith and the advantages of seventeenth century science. Although there was some causal interaction between souls and bodies, he thought that he had sufficiently isolated souls from matter, which alone was subject to the mechanical laws which science was developing. Natural science, Descartes believed, could ultimately complete a deductive theory of all mechanical changes in the material world, and so of all physical events; these would include all movements of human bodies which were not the product of free-will, but free-will and the soul itself would remain essentially outside the reach of scientific laws.

3 See on this M. T. Lysaught, "Body: Social Theories", in T. W. Reich (ed.), *Encyclopedia of Bioethics*, (Simon & Schuster Macmillan, New York, 1995), Vol. 1, 300-305.

4 This perspective drew support from the theory of organic evolution, which proposed that life and mind had evolved from inanimate matter. Advances in physiology reinforced this view, since it was claimed that the existence and scope of mental life depended upon the size and configuration of the brain.

view comprises the more specific thesis that human beings and other leaving creatures are not dual beings composed of a material body and an immaterial soul, but are fundamentally material in nature. A reductionist materialist approach to human nature (evident in popular views of human genetics),⁵ can result in the body being 'objectified' and in people treating their body parts as commercially transferable objects. In combination with dualistic or materialistic perceptions of the person, a narrowly defined conception of autonomy is taken to support the view that the human body and its parts can be objectified and commodified. However, strong views about the value of autonomy do not necessarily lend support to the objectification and commodification of the body. Indeed, a definition of personhood predicated on the intimate connection between autonomy and dignity lies at the heart of many anti-commodification arguments.⁶

In the twentieth century there have been two main forms of materialism: dialectical materialism and physicalism. Dialectical materialism (associated with Marxist thinking) sees matter not as something static on which change and development have to be imposed *ab extra*, but as containing within its own nature those tensions (or contradictions) which provide the motive force for change – a vision which, it is claimed, is lacking in earlier 'mechanistic materialism'. Physicalism rests on the view that all propositions asserting 'matters of fact and real existence' can be formulated as statements about publicly observable physical objects and activities. From this point of view it has been argued that the only meaningful statements about minds must refer to bodily behaviour of some sort, since there can be no genuine public verification of a statement purporting to state the private experiences of one individual. It is important to notice that materialists do not deny the existence of mind or consciousness; what they deny is that mind or consciousness are characteristics of immaterial souls.

5 The 'blueprint' metaphor for the human genome (the hereditary information encoded in the human DNA) has come to dominate public perception, and a growing number of people seem to believe that all forms of behaviour can be explained by reference to genetic causes. See on this D. Nelkin & M. S. Lindee, *The DNA Mystique: The Gene as a Cultural Icon*, (Freeman, New York, 1995).

6 Autonomy refers to the capacity of and the right to self-determination – the ability of formulating and following a life plan of one's own choosing. To have dignity is to have worth, to be worthy. To be treated with dignity is to have

Although many authors employ the concept of body commodification without explaining its theoretical basis, there is one point about which there is very little doubt: the concept is negatively charged. In the conceptual history of the West commodities acquired traits understood almost as the counter-image of emerging ideas about personhood: they were non-human, passive and, as such, in no need of respect. They were perceived as the natural means to the human person as an end – in other words, as objects satisfying human needs. The issue of body commodification is approached from different points of view. Radical legal theorists maintain that approaching the human body in market terms confirms the subordinate status of disadvantaged social groups.⁷ Anti-market conservatives equally reject monetary valuations placed on human biological resources, but for different reasons. Their concerns are sometimes grounded in the religious belief, traditional ethical thinking and moral considerations.⁸ Legal formalists, whose devoted adherence to

other act towards us in a manner that manifests respect for our worth and esteem. Dignity can be said to have an internal and an external aspect: it is closely linked with the ideas of self-worth, self-esteem and self-respect; it is also closely connected with the way others perceive and behave towards us. In crucial respects, an autonomous life that commands the respect of others is a life of dignity. Respect for autonomy derives from two fundamental principles associated with two distinct traditions in moral philosophy. The first is Immanuel Kant's principle of respect for persons as autonomous ends-in-themselves. The second principle is John Stuart Mill's principle of liberty, which says that a person is sovereign over his or her own body and mind.

Kant connected human dignity with the faculty of reason, and emphasized the duty to take care of one's own body. He specifically argued against trade in body parts, stating the person inhabits the body and cannot leave it, and therefore respect for the person must involve treating the body as an end and not as a means. Consider I. Kant, *Lectures on Ethics*, P. Heath & J. B. Schneewind (eds), P. Heath (trans), (Cambridge UP, Cambridge, 1997), 144, 151.

7 For a perspective from feminist legal theory consider e.g. C. A. MacKinnon, *Toward a Feminist Theory of the State*, (Harvard U. P. . Cambridge Mass., 1991).

8 See, e.g., S. Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade*, (Routledge, London, 2003), 210 – 11.

judicial or legislative precedent entails an inflexibility to the introduction of exogenous values in the law, also tend to deny the notion of property in the body.⁹

As commentators have pointed out, if the body were to be redefined as tradeable property, it would be transformed into something of a lower moral standing.¹⁰ Radin argues that to determine the significance of a person's relationship with an object one needs to consider the type and level of pain suffered by the loss of the object. If the object is loosely held (e.g. one's bicycle), then it can be easily exchanged or replaced. On the other hand, if a person's relationship to the object is close and personal (e.g. a family heirloom – a valued possession passed down in a family through succeeding generations), the loss of the object cannot be alleviated by its replacement. This leads to a hierarchy of entitlements, so that the closer the connection of an object to personhood, the stronger the entitlement. From this viewpoint, Radin asserts that some items, such as bodily organs, cannot be regarded as property at all.¹¹ To treat organs as fully alienable would, in the words of Bourianoff Bray, “encourage a perception of body parts as interchangeable commodities and undermine the recognition of the human body as the physical embodiment of the personality.”¹² Anticommodification scholars argue that placing

9 In other words, if the law never granted a property status to the body, why do it now? See on this G. Calabresi, “An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts”, (2003) 55 *Stanford Law Review*, 2113 (describing a range of inherent conservatism in traditional formalist thinking) .

10 According to S. Holland, “commodification contributes to a diminishing sense of human personhood”. “Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues”, (2001) 11 *Kennedy Institute of Ethics Journal*, 263.

11 M. J. Radin, “Property and Personhood”, (1982) 34 *Stanford Law Review*, 957; “Market-Inalienability”, (1987) 100 *Harvard Law Review*, 1849.

12 M. Bourianoff Bray, “Personalizing Personalities: Toward a Property Right in Human Bodies”, (1990) 69 *Texas Law Review*, 209-244, at 241.

According to Wilkinson, commodification involves an attitude to human beings and body parts which (a) denies their subjectivity, (b) prescribes

monetary value on the body is unjustified, for it diminishes personhood and undermines our otherwise homogenous understanding of its social, moral and legal status.¹³ To many of these scholars, the human body is a sacred entity and its status as such is threatened by any associations with financial assessments and market terms and conditions.¹⁴ As Radin has pointed out, “the characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life”.¹⁵ With respect to DNA in particular, it is argued that a person’s genetic code is a unique identifier of the individual and, as such, is fundamentally private.¹⁶ It is submitted that treating DNA as little different from the blood or tissue in which it is contained and thus as equally commodifiable tends to devalue personhood.

A number of anti-commodification scholars have added a political dimension to the infringement of personality by emphasizing the exploitative character of the alienation of body parts.¹⁷ These scholars argue that deliberation on the human body in market terms contributes to the subordination of disadvantaged groups in society and reinforces vertical power relationships.¹⁸ Some commentators have invoked the scourge of human slavery in the past and present to buttress their

instrumentality and (c) facilitates exchangeability.

See S. Wilkinson, “Commodification Arguments for the Legal Prohibition of Organ Sale”, (2000) 8 *Health Care Analysis*, 189–201.

13 See e.g. L. A. Sharp, *Bodies, Commodities, and Biotechnologies: Death, Mourning, and Scientific Desire in the Realm of Human Organ Transfer*, (Columbia UP, New York, 2007) .

14 See M. J. Radin, “Market-Inalienability”, (1987) 100 *Harvard Law Review*.

15 M. J. Radin, “Market-Inalienability”, (1987) 100 *Harvard Law Review*, 1851.

16 Of course, a person’s physical and psychological characteristics are not fully determined by their DNA – it is in conjunction with environmental and socio-cultural factors that DNA makes a person unique.

17 N., Scheper-Hughes, “The Global Traffic in Human Organs”, (2000) 41 *Current Anthropology*, 191–224; “Commodity Fetishism in Organ Trafficking”, (2001) 7 *Body & Society*, 31–62.

18 See, e.g. C. A. MacKinnon, *Toward a Feminist Theory of the State*, (Harvard U. P., Cambridge Mass., 1991).

arguments and to demonstrate in stark terms the possibly grave consequences of placing monetary value on human beings.¹⁹ It is pointed out that the widespread acceptance of a reductionist view of the person, in conjunction with an increased emphasis on a narrow conception of personal autonomy, can lead to a situation where individuals no longer care about their personhood or physical integrity. At a societal level, this encourages the development of a huge market for body parts and genetic material that can readily lead to exploitation of poor and disenfranchised individuals and groups regarded as potential 'donor populations'. As most transplanted organs originate from people living in poverty, it is unsurprising that the main donor countries are countries with very low socio-economic standards and high unemployment rates. Commentators observe that the growing demand for human body parts has exacerbated older divisions between developed and developing countries, between wealthy and poor, generating a new form of commodity fetishism in demands by medical consumers for 'healthy' body organs purchased from living bodies.²⁰ At the same time, the emergence of an worldwide organ market, has stimulated the growth of a lucrative international transplant tourism, much of it illegal and clandestine, and also contributed to a rise in organized crime and corruption.

Organ Procurement for Transplantation: Addressing Problems of Legal Regulation

When body commodification is described as posing a moral problem, the proposed solution appears to be a world in which the use and exchange of products derived from human bodies involve no monetary aspects. This is a most unlikely scenario, and one that would probably give rise to a number of other social and moral concerns in terms of denied access

19 See R. Arnold, S. Bartlett, J. Bernat et al., "Financial Incentives for Cadaver Organ Donation: An Ethical Reappraisal", (2002) 73 *Transplantation*, 1361.

20 See, e.g., N. Scheper-Hughes, "Rotten Trade: Millennial Capitalism, Human Values and Global Justice in Organs Trafficking", (2003) 2 (2) *Journal of Human Rights*, 197.

to treatment. I am not here saying that anti-commodification theorists are wrong, but that there is a need for scholars, especially legal experts, to engage in more detail with the intricacies of the exchange systems that are established and to explore which are the organizational, political and proprietary structures that can warrant the entitlements of those in need. To restrict ourselves to the ways in which the objectification/commodification of the body is already occurring and thus limit our critique to moral denunciation of inevitable practices seems to me a greater danger than engaging in close scrutiny of their implications. Every year millions of people around the world undergo surgeries involving soft-tissues, skin, bones and tendons acquired from living donors or cadavers. Human tissue and organs suitable for burial at death or disposed of after medical procedures are given new life and value in research laboratories, biotechnology supply companies and human beings. Human samples are not only an indispensable part of the biomedical research process, but they are now used in the production of many commercial products ranging from drugs and vaccines to pregnancy test kits. Market realities in the body already exist²¹ and our failure to take account of this entails its own set of adverse consequences. These include an inadequate nomenclature, an increased risk of exploitation²² and continued abuse of human subjects, and a loosely monitored and unregulated but robust market in buying and selling human body parts. In a rapidly expanding biotechnological age it is important that the law evolves, both at a domestic and international level, to address problems that the increased demand and uses for human body parts entail. In

21 For example, medical researchers partake in the market of human body parts when they are granted authorization for medical tests that later result in patenting of cell lines or other similar financially beneficial medical products. Furthermore, a rather vigorous market in human eggs exists and is well-publicized and documented. See K. Baum, "Golden Eggs: Towards the Rational Regulation of Oocyte Donation", (2001) *Brigham Young University Law Review*, 107-66.

22 For an in-depth discussion of the problem of exploitation of disadvantaged populations both in the developing world and First World countries see D. Dickenson, "Consent, Commodification and Benefit-Sharing in Genetic Research", (2004) 4 (2) *Developing World Bioethics* 109.

addition to legislative reform, it is important that the judiciary take a leading role in bringing the relevant legal rules up to date, especially though clarification of the body's legal status. As commentators have remarked, the judges' hesitance to tamper with entrenched notions of the body by introducing new meaning to the law, recognizing alternative paradigms and solutions, constitutes an obstacle to legal development.²³ As a result, the law relating to body parts, instead of being a robust representation of nuanced thinking on an extremely complex issue, appears feeble and incomplete.

Many of the problems surrounding organ and tissue transplantation are due to a lack or inadequacy of domestic laws and other regulatory regimes, the discrepancies between legal systems and the inability of legal systems to consistently and enforce the relevant legislative enactments when violations occur. Indeed, while organ trade is illegal according to the laws of virtually all countries where transplant is practiced, very rarely are the renegade doctors, organ brokers, sellers and buyers pursued by the law, let alone prosecuted. The illegal practice of transplant tourism, in particular, relying on an extensive and complex network of competitive markets in patients, bodies and body organs is viewed as a public secret and one that involves many distinguished medical professionals and prestigious hospitals and medical centers around the world. This failure on the part of legal systems to block the activities of transplant outlaws is often explained as an intentional oversight allegedly based on compassionate grounds: as organ demand cannot be met through lawful means only, the actions of those desperate individuals who decide to look to the black market for organs, the organ suppliers and the doctors involved are tolerated by the authorities.²⁴

23 See on this G. Calabresi, "An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts", (2003) 55 *Stan. L. Rev.*, 2113, 2115-2116.

24 But the impunity of transplant outlaws involves more than governmental apathy and professional corruption, though these exist. To a large extent the doctors concerned are protected by the extraordinary control they are perceived as having over matters of life and death and their patients and by the

Such a stance, however, unavoidably perpetuates the vicious circle of illegality, corruption and abuse.

In so far as that saving lives is the ultimate goal of any organ procurement and transplantation program, it is desirable that states enact uniform legislation allowing for the supply of as many organs as possible from cadavers and the potential pool of appropriate willing donors. Other things being equal, a legal organ procurement system would lead to the eventual elimination of many of the abuses connected with the organ black market. A diversity of organ procurement systems has been adopted or experimented upon by different states, seeking to strike a balance between the need to maximize the number of organs procured and the ethical and other constraints imposed by the socio-cultural environment on legislatures.²⁵

According to one approach, preference is given to the importation of body organs or to traveling to other countries to obtain the organs needed over domestic organ procurement. Such an approach has been adopted by a small number of countries, partly because organ procurement domestically has been prevented by deeply established cultural norms forbidding the removal of organs.²⁶

charisma that accompanies their seemingly miraculous powers.

See N. Scheper-Hughes, "Rotten Trade: Millennial Capitalism, Human Values and Global Justice in Organs Trafficking", (2003) 2 (2) *Journal of Human Rights*, 205-206.

25 See on this H. Hansmann, "The Economics and Ethics of Markets for Human Organs", (1989) 14 *J. Health, Pol. Pol'y & L* 57, 79.

26 For instance, until not so long ago Japan sought to meet demand for kidneys and other organs to a large extent through travel abroad to reportedly buy or otherwise obtain organs from donors in India, Sri Lanka, the Philippines, China and elsewhere. This was partly due to the fact that a large number of Japanese people rejected the idea of brain death on the grounds that a brain dead patient whose body is warm cannot be seen as a corpse because the essence of human beings exists not only in one's mind, self-consciousness or rationality, but also in one's body. Nevertheless, in 1997 Japan's Organ Transplantation Law was finally passed. The law established criteria for brain death and the rights of

The second model places the emphasis on the voluntary and non-pecuniary donation of body organs as the principal means of organ procurement. A distinction is drawn between voluntary inter-vivos donations and voluntary cadaveric organ donations. Although there are country-specific variations, this model is based on the principle that organ donors freely give prior consent to remove and allocate the requisite organs. No monetary compensation is given to donors except to cover expenses incurred as a result of organ harvesting process.²⁷ Altruism and the fulfillment of a moral obligation towards fellow human beings are said to be the principal motivations behind this model.²⁸ It is argued that the voluntary donation system avoids the commodification of human organs – an act that many regard as being contrary to fundamental societal values. As a number of commentators have noted, however, this system alone is in most cases proven insufficient to meet the demand for transplantable organs. Thus, other supplementary methods, such as family consent or mandated choice,²⁹ have been

individual citizens to declare their wishes with respect to organ donation; at the same time, however, it recognizes a family's right to refuse the donation of their deceased relatives' organs. In 1999 surgeons performed the first 'lawful' heart, kidney and liver transplant procedures using organs obtained from a brain-dead donor.

27 See L. R. Cohen, "Increasing the Supply of Transplant Organs: The Virtues of a Futures Market", (1989) 58 *George Washington L. R.*, 12.

28 See, e.g., A. McIntosh, "Regulating the 'Gift of Life' The 1987 Uniform Anatomical Gift Act", (1990) 65 *Washington L. R.*, 171, 178; D. Peters, "A Unified Approach to Organ Donor Recruitment, Organ Procurement, and Distribution", (1990) 3 *J. L. & Health* 157, 167-77.

Altruism was the guiding principle used by lawmakers in the United States in formulating the National Organ Transplant Act (1984). It was believed that commercial sales might lead to the collapse of the voluntary organ donor system, and result in an overall decrease in available organs.

29 Thus it may be mandated by law that the attendant doctor or nurse ask the next of kin of a viable organ donor if the patient's organs may be donated. See L. R. Cohen, "Increasing the Supply of Transplant Organs: The Virtues of a Futures Market", (1989) 58 *George Washington L. R.*, 21.

employed in some countries to bolster the voluntary donation system.³⁰ Whilst such methods have had the effect of increasing organ donation in some countries, organ donation rates remain too low and fall well short of meeting demand.

Another type of system that has received wide attention and support, especially in European countries, is the so-called 'opt-out' system of organ donation. This system permits body organs to be posthumously removed for transplantation on the presumption that the donor wishes to donate organs, unless an appropriate objection was made. A distinction is drawn between systems that recognize objections only from the deceased individual prior to his death (narrow opt-out systems) and systems that recognize the objections of the individual's relatives after his death (broad opt-out systems). Moreover, opt out systems differ with respect to the degree of formality needed for registering an objection as well as with respect to the grounds for a valid objection.³¹ A large number of countries, including Great Britain, France, Spain, Portugal, Austria, Belgium Italy, Sweden and Greece, have sought to increase organ donation rates by introducing a presumed consent approach

30 Countries that permit donations by living individuals tend to limit the potential donors to family members, on the assumption that a non-family member has no real incentive to donate. Such an approach, however, ignores the incentives a person would have in donating to a friend. Countries desiring to avoid commodification of body organs which that have not introduced a brain-death law find themselves in the awkward position of permitting only voluntary inter-vivos donations. Such an approach to organ procurement, however, results in few organs and encourages abuse through surreptitious organ procurement practices.

31 The opt-out system is distinguished from what is know as a 'conscription system', under which body organs can be removed after death for transplantation purposes, irrespective of any consent or objection by the individual or individuals concerned. Supporters of this system employ the notion that dead bodies and their parts constitute public property either indefinitely or for a specific period of time. Such an approach, however, would give rise to serious legal, ethical and political problems in most countries.

to organ donation.³² In some of these countries, such as Belgium and Spain, the adoption of such an approach appears to have had a positive effect, bringing about a sharp rise in the number of organ donors.³³ Despite the fact that, when properly applied, the relevant system has proven to be a very efficient means of procuring organs, it has been subjected to criticism on various grounds. It has been argued that a system based on presumed consent pays little attention to individual autonomy, privacy and the right to choose how one's body will be used after death. Presumed consent has also been criticized on the grounds that it can lead to a situation where vulnerable sections of society might bear a disproportionate burden, as only the most advantaged groups, whose member would be aware of their right to opt-out, would be able to exercise autonomy.³⁴ Furthermore, it has been argued that presumed consent legislation wrongly assumes body organs belong to society or the

32 It should be noted, however, that laws in these countries vary in important respects. For example, the French and the Belgian systems of presumed consent allow the removal of organs from the cadavers of individuals who have not, during their lifetime, indicated their refusal to permit such a procedure, with exceptions for the cadavers of minors and the incompetent. Both these countries allow due regard to the wishes of the deceased person's relatives. By contrast, the model adopted in Austria is not hindered by deference to the relatives' wishes. It is thus unsurprising that Austria has had much more success in procuring organs, as compared with the United States and other European countries. Brazil's experiment with the presumed consent model is indicative of some of the drawbacks of this model. The relevant Brazilian law had to be abandoned due to lack of awareness among people, hesitation of doctors in removing organs without the consent of the family, and the debilitating effect of certain bureaucratic procedures. See in general A. J. Hughes. "You get what you pay for? ; Rethinking US procurement policy in the light of foreign models", (2000) *V and J Transnat'l L.* 42, 351.

33 See A Spital, "Conscription of Cadaveric Organs for Transplantation: a Stimulating Idea Whose Time has not yet Come" (2005) 14 *Cambridge Q. Healthc Ethics*, 107-12; R. Matesanz, "Organ procurement in Spain", (1992) Sep. 19, *Lancet*, 340 (8821), 733

34 See M. F. Anderson "The future of organ transplantation: from where will new donors come, to whom will their organs go?" (1995) Summer, 5 (2), *Health Matrix Clevel*, 249-310; D. Lamb, *Organ Transplants and Ethics* (1990), 142.

state rather than to individuals or the families concerned. This is a weak criticism, however, as the relevant enactments could be regarded as presuming donation rather than assuming state ownership of the bodies.

The fourth and perhaps most controversial of all the organ procurement systems allows for legalized organ trade and sales. A variety of approaches to organ sale have been proposed, from live organ brokerage and organ futures markets to an income tax deduction or health insurance reduction incentive.³⁵ This organ procurement model is based on the assumption that as a person has a property right in his/her body,³⁶ it is wrong for the government to restrict this right by forbidding the sale of body organs.³⁷ Supporters of the organ sale system argue that financial remuneration furnishes the needed incentive for providing transplantable organs and thus reducing the organ deficit.³⁸ As previously noted, however, no properly regulated organ market currently exists. In fact, some of the worst cases of human rights violations and exploitation of the socially disadvantaged occur in countries where organ sales are legal or legally tolerated.³⁹ It is argued, however, that the problem lies not with the particular commercial system as such, but with the socio-economic conditions in the countries concerned. It is submitted that, under the right conditions, an effectively regulated

35 See in general S. Hankin Denise, "Regulating the Sale of Human Organs", (1985) 71 Va. L. Rev. 1015; R. D. Blair & D. Kaserman, "The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies", (1991) 8 Yale J. on Reg. 403; H. Hansmann, "The Economics and Ethics of Markets for Human Organs", (1989) 14 J. *Health Pol. Pol'y & L.* 57.

36 Consider P. A. Gerike, "Human Biological Material: A Proprietary Interest or Part of the Monistic Being?", (1991) 17 *Ohio N.U. L. Rev.* 805, 812.

37 See, e.g., K. L. Johnson, "The Sale of Human Organs: Implicating a Privacy Right", (1987) 21 *Val. U. L. Rev.* 741, 751-755.

38 Consider C. K. Hawley, "Antitrust Problems and Solutions to Meet the Demand for Transplantable Organs", (1991) *U. Ill. L. Rev.* 1101, 1102; L. R. Cohen, "Increasing the Supply of Transplant Organs: The Virtues of a Futures Market", (1989) 58 *Geo. Wash. L. Rev.* 1, 39.

39 See, e.g., D. E. Jeffries, "The Body as Commodity: The Use of Markets to Cure the Organ Deficit", (1998) 5 *Ind. J. Global Legal Stud.* 621, 642.

and correctly functioning organ market system would eventually lead to the elimination of the black market organ trade. This approach to the matter, however, does not address the objections of those critics who regard the commodification and commercialization of the human body and its parts as unethical, immoral or against religious beliefs and cultural values. Although, as some commentators claim, ethical objections may be damaging to the goal of maximizing organ procurement, they cannot be ignored by the legislator as they constitute part of a society's value system. In so far as the law has an important symbolic function in reaffirming certain cherished values in society, utilitarian considerations alone cannot provide a sufficient basis for the legislative endorsement of an organ market system. In general, it may be said that, like with other organ procurement systems, the enactment of legislation introducing an organ sales system would presuppose a clear understanding of society's perception of and response to this approach and the introduction of safeguards to ensure the protection of individuals from potential abuses of their rights.

An interesting legislative attempt at striking a balance between different approaches to the problem of organ procurement is offered by New Zealand's Human Tissue Act 2008.⁴⁰ The new consent arrangements for post-death organ donation set out in this Act permit transplantation where the deceased either opts on to an organ donation register before death, or consents via a nominated representative after death. The family will no longer have a right of veto in such cases. Where the deceased does not consent in either of these ways, consent from a family member, and normally the family as a whole, will still be required. A number of commentators have expressed support for the general direction of the new law and the view that the family should not be allowed to over-ride an individual's desire to donate. They add, however, that the reforms do not go far enough, for the new law still includes a strong consent requirement: organs will be taken only if consent is obtained from either

40 Human Tissue Act 2008 (New Zealand), No. 28, 18 April 2008. Available from: <http://www.legislation.govt.nz/act/public/2008/0028/25.0/DLM1152940.html>

the deceased or the family. But lack of consent is not necessarily a good justification for retaining organs. Of course, in some cases, individuals and their families will refuse to consent because they have a strong preference for non-donation, perhaps based on deeply held religious, cultural or moral beliefs or on strong emotional aversions.⁴¹ It is argued, however, that lack of consent does not always reflect such strong views. Recent studies in the US indicate that, in that country at least, a substantial proportion of those who have not consented to post-death organ removal would be willing for their organs to be removed.⁴² This suggests that many individuals remain off the organ donation register because (i) though they would like to become donors, they lack the motivation to formally record this wish; (ii) they have no well-thought-out position on whether they would like to become donors (perhaps because they are reluctant to contemplate this rather morbid question) ; or (iii) they have a mild preference against becoming a donor. It is submitted that lack of motivation, reluctance to contemplate death, or mild preferences against becoming a donor should not be allowed to prevent life-saving transplants. Organs should be transplanted in the absence of consent from either the deceased or the family, provided that there is also no significant dissent – provided, that is, that there is no more than a mild preference against organ retrieval.

41 For example, some Māori believe that removing parts of a dead body affects the wellbeing both of the tū pāpaku (dead body) and the whānau (extended family). Burial is often regarded as a way of returning a person to their ancestors or tūrangawaewae (‘place to stand’), and failing to bury a body whole may thus be seen as breaking a natural and sacred cycle of life. Some Māori may therefore be strongly opposed to retrieval of organs.

42 The Gallup Organization. 2005 *National survey of organ tissue donation attitudes and behaviors*. Washington, DC: Gallup Organization; 2005; Conesa C, Ríos A, Ramírez P, Rodríguez MM, Rivas P, Canteras M, Parrilla P. Psychosocial profile in favor of organ donation. *Transplant Proc.* 2003;35:1276-81.

Organ Procurement: Some International Dimensions

At a time when world society is increasingly mobile and social and economic life is internationalized, the development of legislation adequately addressing organ procurement and organ trafficking issues at a domestic level alone would not be sufficient. Ideally, every national legal system should operate in a similar, efficient fashion, and discrepancies or inconsistencies between systems should be reduced or eradicated through the adoption of uniform legal standards so that international problems and abuses could be averted. States must be aware that failure to address the relevant problems locally will have adverse international ramifications.⁴³ However, the considerable differences that exist between countries with respect to culture, social and economic development and, in particular, the availability of medical resources gives rise to a great deal of skepticism regarding the feasibility of this ideal. Nevertheless, attempts have been made at an international or regional level to bring about a degree of harmonization as regards the legal responses to organ procurement and organ trafficking issues.

For example, the Council of Europe has introduced a convention and a number of additional protocols and recommendations in recent years. The *Convention on Human Rights and Biomedicine*⁴⁴, adopted in 1996, besides dealing with a number of issues in the area of biomedicine, contains guidelines on organ and tissue removal and transplantations. Reference should be made in this connection to Chapter VI, Articles 19 & 20, which prohibit organ and tissue removal without express consent, and Chapter VII, Article 21, which prohibits financial gain through organ and tissue donation. The Convention was supplemented by *Additional Protocol*

43 Consider, for example, the spread of disease through foreign organ transplantation and the higher percentage of unnecessary organ recipient deaths due to the lax medical standards which often accompany lax legal standards.

44 Council of Europe, *Convention on Human Rights and Biomedicine*, URL: <<http://conventions.coe.int/treaty/en/treaties/html/164.htm>> (1996).

to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, which was adopted in 2002.⁴⁵ In Chapter II, Article 3 states:

“Parties shall guarantee that a system exists to provide equitable access to transplantation services for patients.

… [O]rgans and, where appropriate, tissues shall be allocated only among patients on an official waiting list, in conformity with transparent, objective and duly justified rules according to medical criteria…

In case of international organ exchange arrangements, the procedures must also ensure justified, effective distribution across the participating countries in a manner that takes into account the solidarity principle within each country.

The transplantation system shall ensure the collection and recording of the information required to ensure traceability of organs and tissues.”

In the same Chapter, Article 5 provides for the right of recipients to be given adequate information on “the purpose and nature of the implantation, its consequences and risks, as well as on the alternatives to the intervention,” while Article 7 stipulates that “appropriate medical follow-up shall be offered to living donors and recipients after transplantation.” Furthermore, Chapter III, Article 10 of the Protocol provides that “organ removal from a living donor may be carried out for the benefit of a recipient with whom the donor has a close personal relationship as defined by law, or, in the absence of such relationship, only under the conditions defined by law and with the approval of an appropriate independent body”.

Although the provisions of the Convention and the Additional Protocol point in the right direction, there is still along way to go before real

45 See Council of Europe, *Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin*.

ULR:<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=186&CL=ENG>> (2002) .

progress is achieved in addressing the issues of organ procurement and organ trafficking at a transnational or domestic level.⁴⁶ The present problems caused by the shortage of transplantable organs will most likely persist in the foreseeable future, unless biomedical sciences develops technologies that would make possible the broad application of ‘xenotransplantation’ (the interspecies transplantation of cells, tissues, and organs, or ex vivo interspecies exchange between cells, tissues, and organ).⁴⁷ Awareness-raising campaigns disseminating information about improvements in medical technology that lower the risks for living donors might not have an immediate effect on the supply of organs, but may increase people’s willingness to donate in the long run. As previously noted, although it remains morally controversial and difficult to implement in practice, the legalization of payment for transplants may also lead to an increase in the number of available organs. The standardization of domestic transplant laws from express consent to presumed consent may also augment the supply of transplantable organs but it appears hard to realize at present.⁴⁸

46 A number of recommendations have been directed at the Committee of Ministers by the Parliamentary Assembly of the *COE*, pointing out the deplorable state of affairs in some European countries. Consider, e.g., Recommendation 1611, which points out the alarming situation in Eastern Europe.

47 Xenotransplantation raises a host of cultural, ethical and legal issues that need to be addressed. Consider in general, S. McLean & L. Williamson, *Xenotransplantation: Law and Ethics*, Ashgate, (2005) ; M. Anderson, “Xenotransplantation: a Bioethical Evaluation”, (2006) 32 (4) *J. of Medical Ethics*, 205.

48 About half of the European countries, such as Denmark, Germany, Ireland, Iceland, Malta, The Netherlands, Romania, UK and former Yugoslavia, still operate on expressed consent principle, according to which organs can only be removed from deceased persons if those have expressed their consent while still alive or if the next of kin agree on a donation in case the deceased person has neither expressed consent nor objection during his or her lifetime. A number of other European have adopted the presumed consent principle, according to which organs can be removed from a deceased person, unless he or she objected during his or her lifetime. In some of these countries, such as Cyprus,

Concluding Remarks

In an expansive biotechnology age moral discourse is faced with the formidable task of articulating fundamental intuitions about human worth and the moral status of persons within a new framework of thought that can neither completely ignore nor fully endorse the assumptions and beliefs of the cultural tradition within which the concept of personhood originated. This calls, among other things, for conceptual clarification of the relationship between personhood and the human body and its different usages in moral discourse before its normative and legal implications can be explored. Anti-commodification scholars are right to suggest that by introducing financial considerations to the body we transgress traditional ethical norms and settled legal doctrine. However, a logic of exchange involving the distribution of body parts inside a system based on donation and extended rights of disposal by individual donors does not necessarily exclude the commodification of certain body parts within a clearly defined normative-legal framework that would meet society's expectations. The failure on the part of legal systems to be proactive in light of an ever-increasing demand for body parts has produced nefarious systems that often result in unequal treatment, exploitation of the vulnerable, and lack of resources for the aggrieved. These problems will persist unless states act domestically to enact legislation designed to maximize and adequately regulate organ procurement while paying due regard to the challenges that the globalized world has created.

END

Liechtenstein, Lithuania, Norway, Sweden, the presumed consent is restricted, as the next of kin have to be informed and asked about a possible donation or multi-organ-explantation (the removal of all transplantable and usable organs).