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ORGAN TRADING, TOURISM, AND TRAFFICKING WITHIN EUROPE

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Abstract: This article argues for a regulatory and institutional response towards organ trading, tourism and trafficking that differs from extant approaches. European countries have hitherto adopted blanket prohibitions on organ trading (i.e. the buying or selling of human organs). This article advances the view that policy makers have thereby overreacted to legitimate public health concerns and the evils of **organ trafficking** (i.e. organ trading and tourism involving coercion or deception). It argues for a trial of a very tightly regulated system of organ trading that could eventually lead to a limited system of organ tourism (i.e. organ trading involving more than one jurisdiction).

Keywords: Organ trading; organ tourism; **organ trafficking**

INTRODUCTION

Every day almost 10 people die in Europe while waiting for an organ. [FN1] Yet every day many organs are buried or cremated and every day many are prevented from "organ trading", i.e. from buying or selling human organs. Some argue that organ trading could help to address the scarcity of human organs or is at least an ethically acceptable option; others condemn organ trading as morally pernicious.

"Organ tourism" is an aspect of organ trading, if it is understood as involving travel to other jurisdictions for the purpose buying or selling organs. It is another instance of medical tourism whereby patients, healthcare professionals, and others travel in response to healthcare availability and demand in a globalised world. Modern healthcare is peppered with such instances of jurisdiction hoping to avoid domestic regulatory hurdles and prohibitions.

In this paper, I will argue that a European-wide regulatory and institutional response is required, but this should be based on a different approach to that hitherto adopted or officially proposed. This paper will be divided into two Parts. Part I will examine the prohibitive approaches adopted by European national legislatures, the European Union (EU), [FN2] and the Council of Europe. Part II will advance the view that policy makers have overreacted to legitimate public health concerns and the evils of "**organ trafficking",** understood as organ trading and tourism involving coercion or deception. [FN3] It will be argued that consideration should be given to the possibility of establishing a defensible system of organ trading and tourism.

Part I The European regulatory response

Organ trading and its related tourism is one of the few bioethical issues on which there is widespread political and regulatory agreement. This apparent consensus, like that for reproductive cloning and germ-line gene therapy, [FN4] favours prohibition. In a 2002 study of 24 countries (including the then 15 members States of the EU), I dis-

covered that all of those countries prohibited organ trading and in all but one this prohibition had legislative force. [FN5] The one country without legislation, Ireland, continues to subject organ trading to prohibitive professional regulation. [FN6] None of these countries has, in fact, subsequently moved towards a system of organ trading. [FN7]

Despite existing regulatory approaches, it was recognised by a recent report issued by the Parliamentary Assembly of the Council of Europe (PACE) that **organ trafficking** remains a highly profitable activity for international organised crime. [FN8] Illicit commercial activities, principally involving kidneys removed from living donors, have been reported in European countries such as Estonia, Moldova, and Turkey. [FN9] In 2005, it was reported that Romania had taken steps to bring its first **organ trafficking** trial under its own prohibitive legislation, [FN10] though the case never came to trial. Activities related to organ trading have even been reported in some of the richer European countries. In the UK, the General Medical Council (GMC) took disciplinary action against doctors found to have participated in organ trading both in the late 80s and, more recently, in 2002. [FN11]

European regulatory responses should be viewed in the light of the approaches of two important international bodies: the European Union (EU) and the Council of Europe.

The European Union

Article 3 of the EU Charter of Fundamental Rights states that everyone has the right to respect for his or her physical integrity and specifically prohibits making the human body and its parts a source of financial gain. Article 5 prohibits trafficking in human beings. Although the Charter itself is not legally binding, it represents a solemn commitment to ensure that future EU legislation is, at least, compatible with its provisions.

The EU has yet to enact legislation specifically addressing organ trading or tourism, though there are associated Directives on quality and safety standards for blood and for tissues and cells. While the Blood Safety Directive [FN12] does not prohibit payment for blood, Article 4 expressly permits Member States to do so and Article 20 states that,

> Member States shall take the necessary measures to encourage voluntary and unpaid blood donations with a view to ensuring that blood and blood components are in so far as possible provided from such donations.

The Directive's stern discouragement of payment for donations of blood and blood components is grounded on the claim, in Recital 23, that "[v]oluntary and unpaid blood donations are a factor which can contribute to high safety standards for blood and blood components and therefore to the protection of human health". A similar view was seminally advanced nearly four decades ago by Titmuss. [FN13] He argued that "commercial markets are much more likely to distribute contaminated blood; the risks for the patient of disease and death are substantially greater", [FN14] because payment encourages sellers to conceal information and attracts "as donors drug addicts, alcoholics, and carriers of hepatitis, malaria and other diseases". [FN15] Counter evidence on paid blood donation has, however, been presented and whatever risks actually exist can be significantly reduced by elementary precautions. [FN16] This, along with simple pragmatism, would seem to explain why the Directive does not simply prohibit all commercial dealings in blood and blood products.

The EU Tissues and Cells Directive [FN17] is less reticent with regard to preventing payment for human tissues and cells intended for human application. Article 12 of this Directive requires Member States to ensure "voluntary and unpaid donations of tissues and cells", allowing donors to receive only such "compensation" that is "strictly limited to making good the expenses and inconveniences related to the donation". Recital 19 cites, as the ground for this prohibition, the same rationale advanced by the Blood Safety Directive for its less restrictive provisions, namely, the need to ensure high safety standards and thereby protect human health.

Neither the Blood Directive nor the Tissues and Cells Directive apply to human organs. The former is restricted to blood and blood components [FN18] and the latter specifically excludes from its ambit "organs or parts of organs if it is their function to be used for the same purpose as the entire organ in the human body". [FN19] A European Directive on quality and safety standards for organ donation is, however, expected to be proposed in 2008. It is anticipated that this Directive will seek the establishment of oversight authorities in Member States, a common set of quality and safety standards, and a system to ensure the traceability and the reporting of serious adverse events and reactions for human organs. The general tenor of the European Commission's communication to the European Parliament and the Council on this proposal suggests that the Directive will adopt a prohibitive approach towards at least "**organ trafficking".** [FN20]

The risk-to-recipients argument utilised as a justification for restricting payment for blood (in the Blood Safety Directive) and prohibiting payment for tissues and cells (in the Tissue and Cells Directive) is by no means a debate stopper if applied to payment for human organs. The risk of receiving a diseased organ must be weighed against the risk of the alternatives. It is likely that paying living organ providers could bring about access to otherwise unavailable organs without which some of those in need of an organ will die. As the European Commission recognises in the above mentioned document, "Owing to the organ shortage and the life threatening indications of organ transplants, the benefits of an organ transplantation are high and more risks can be accepted than with blood or most tissues and cells treatments". [FN21] Despite the European Commission's recognition of this point, it does not then go on to consider alternative regulatory approaches to the blanket prohibition of payment for organ providers.

Council of Europe

Another pan-European institution of importance in this context is the Council of Europe. While it is distinct from the EU, the 27 EU States are among the Member States of the Council of Europe. For our purposes, the key Council of Europe instruments are the Convention on Human Rights and Biomedicine (the Biomedicine Convention) and its Additional Protocol on the Transplantation of Organs and Tissues of Human Origin. The Biomedicine Convention opened for signature in Oviedo in 1997. Article 21 declares that "[t]he human body and its parts shall not, as such, give rise to financial gain". This is further developed in Article 21 and 22 of the above mentioned 2002 protocol. Article 21 of the protocol reiterates the Convention provision adding the additional words "or comparable advantage". Article 21 goes on to exclude "compensation" of living donors for loss or earnings and other justifiable expenses, payment of a justifiable fee for legitimate medical or related technical services rendered in connection with transplantation, and compensation for undue damage, and to prohibit associated advertising. Article 22 prohibits organ and tissue trafficking. The Protocol does not apply to reproductive organs and tissue, embryonic or foetal organs and tissues, or to blood and blood derivatives; [FN22] and only applies if the organs or tissue are to be used for the purposes of transplantation. [FN23]

The Biomedicine Convention and its Additional Protocol, therefore, prohibit all aspects of organ trading for the purposes of transplantation. The Convention has, however, been ratified by only 13 of the 27 EU countries. [FN24] In fact, six of the EU countries--Austria, Belgium, Germany, Ireland, Malta, and the UK--have not even signed the Convention. The Additional Protocol came into force in 2006, but, at present, only four EU countries have ratified it. These are all new member States of the EU: Bulgaria, Estonia, Hungary, and Slovenia. [FN25] These instruments therefore have legal force in only a minority of European countries.

In contrast, all the EU countries have ratified the European Convention on Human Rights and Fundamental Freedoms (hereafter the Human Rights Convention). While organ trading undoubtedly engages the right to respect for private and family life protected by Article 8(1) of that Convention, [FN26] interference with that right is permitted under Article 8(2) where it is in accordance with the law and necessary for, inter alia, the protection of health or moral, or the protection of the rights and freedoms of others. Any doubt that the prohibition of organ trading is, at the very least, compatible with the Human Rights Convention is surely removed by the European Court of Human

Rights' view that the provisions of the Human Rights Convention are to be interpreted in the light of the Biomedicine Convention. [FN27] It is also well-established that the Convention is a "living instrument" that is to be interpreted in the light of evolving conditions and social standards. [FN28]

Part II The ethics of paying living organ providers

The last section explored the broad prohibitions on organ trading and related activities adopted or endorsed by the European Union, Council of Europe, and national legislatures. Before exploring the ethical defensibility of these prohibitions, we need to address the role of rational argument in ethical debate. There are essentially three competing positions on the currency of reason in moral debate: no, some, and full justificatory currency.

At one extreme are those who hold that reason has no justificatory currency in the moral field. According to this position, reason simply cannot apply to moral judgments because they are little more than declarations of emotion. [FN29] By not even requiring that one's own moral judgments be non-contradictory, this position deprives morality of prescriptive force. It makes moral debate, beyond resolving matters of empirical facts, completely pointless.

At the other extreme are those who hold that reason has full justificatory currency. Reason can justify accepting one criterion of moral permissibility over others and, indeed, can justify acceptance of the moral point of view itself by rationally refuting amoralism. [FN30]

Between these two extremes are those positions holding that reason has some role but ultimately disputes over basic moral premises are, at some level, rationally irresolvable. [FN31] While my own view falls into the full justificatory currency camp, I do not intend to argue for or from that position here. [FN32] Instead I wish to stay within the middle position by drawing attention to two arguments from commonly accepted premises opposed to blanket prohibitions on paying living persons for their tissues and organs. [FN33] These arguments draw analogies with other permitted practices.

Two analogies

The first analogy, which I'll call the risky employment analogy, points out that people are frequently induced to engage in many menial or risky activities by the offer of payment. Paid activities that are widely regarded as legitimate include the work of a professional boxer, fire-fighter, soldier, racing car driver, and oil rig worker. The mere existence of a financial incentive to motivate someone to engage in a risky activity does not automatically render the activity or the payment impermissible, unless all such activities are impermissible. What is more, unlike many of these activities, organ trading has the potential to save lives as the acquired organs would otherwise be unavailable.

The second analogy, which I shall call the unpaid analogy, points out that unpaid donation faces many of the same risks as paid organ donation and unpaid living organ donation is not prohibited by European legislatures. This analogy has particular force against objections to organ trading that question the organ provider's voluntariness by glib reference to the coercive force of money because it reminds us that financial pressures are no more intrinsically coercive than social and emotional pressures.

For arguments of this type to be valid, the permitted practices must be analogous in the sense that they are said to be and the protagonists must accept that the permitted practices should remain permitted. The first of these conditions clearly does not hold if these analogies are applied to **organ trafficking,** as opposed to non-coercive, non-deceptive organ trading. Nor does it hold if the type of safeguards imposed to minimise the risks of dangerous jobs or unpaid donation are not applied with equal stringency to paid organ donation. These conditions also prevent these analogies being invoked as knock-down arguments, but they nonetheless suffice to place the burden of argument

upon those who wish to uphold blanket prohibitions on payment for acquisition.

Safeguards

While blanket prohibition has been offered as a safeguard against abuse, it uses a sledgehammer to crack a potentially valuable nut. To be clear, I am arguing only for a very limited relaxation of current regulatory prohibitions in those countries that are capable of implementing and upholding the protective mechanisms presupposed by, inter alia, the risky employment and unpaid donation analogies.

Permitting individuals to purchase and self-allocate organs or permitting the involvement of commercially-motivated middlemen is a recipe for abuse by the rich and powerful over the poor and weak. To protect the vulnerable and attract public confidence and support, the acquisition and allocation of organs must be open, fair, and compliant with best practice. This means that the purchaser must, as others have argued, be a non-commercial body operating within a limited geographical area. [FN34] It also requires that the allocation be anonymous and needs-based, as is current practice in many European countries for the allocation of organs from dead persons. Such a system will need be properly trialled first.

A properly regulated system of organ trading will cost money to operate, though it might become self-financing if the organ donor is the only additional category of person being paid beyond standard living donation, as it is well-recognised that organ transplantation is significantly cheaper than long-term treatment alternatives for protracted kidney or liver failure. The UK Transplant website, for example, states that the "cost benefit of kidney transplantation compared to dialysis over a period of ten years...is £241,000 [over <<EURO>>347,000] or £24,100 [over <<EURO>>30,800] per year for each year that the patient has a functioning transplanted kidney". [FN35]

CONCLUSION

Organ trafficking is unequivocally a great evil. Illicit supply follows demand and will continue to do so whether organ trading is prohibited or permitted in the very limited, highly regulated circumstances suggested here. The current tendency towards prohibitive regulation, however, is inconsistent with the regulation of other potentially dangerous practices and results in the loss of potentially salvable lives. While recognising the need to start with a small scale trial in a country in which human rights abuses are not commonplace and best regulatory practice can be maintained, this paper has argued that some organ trading should be permitted. If, in time, such conditions could be maintained in more than one jurisdiction, this argument would support a limited system of organ tourism. To be clear, I am suggesting allowing regulated payment by a non-commercial entity (or non-commercial entities) to individuals ensured of the benefit of proper healthcare, where the allocation of the organ is to be anonymous and equitable. Even this limited proposal is contrary to existing regulatory tendencies and, for EU countries, it will require moves to ensure that it is not ruled out by the new EU Directive on the quality and safety of organ transplantations.

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[FN1]. See European Commission, Communication from the Commission to the European Parliament and the Council: Organ Donation and Transplantation: Policy Actions at EU Level. COM(2007) 275 final. Brussels, 30.5.2007, 3.

[FN2]. For the purposes of this paper, I will ignore the distinction between the EC (European Community) and the EU (European Union).

[FN3]. Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) defines "human trafficking" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". Exploitation is said to include "the removal of organs".

[FN4]. See S. D. Pattinson, "Regulating Germ-Line Gene Therapy to Avoid Sliding Down the Slippery Slope." (2000) 4 Medical Law International 213-222 and (2002) "Reproductive Cloning: Can Cloning Harm the Clone?" 10 Medical Law Review 295-307; respectively.

[FN5]. See S. D. Pattinson, "Paying Living Organ Providers." (2003) 3 Web Journal of Current Legal Issues.

[FN6]. See Medical Council, A Guide to Ethical Conduct and Behaviour, 6th ed. (Dublin: Medical Council), 2004, para. 21.2: "Payment of any sort, apart from incidental expenses, should not be a factor in the ultimate decision made about organ donation".

[FN7]. The new UK legislation, the Human Tissue Act 2004, has actually adopted an even broader prohibition on commercial activities involving human material (s.32). There is, however, now a provision empowering the regulatory authority to designate a person as one who may lawfully engage in a prohibited activity (s.32(3)).

[FN8]. See Council of Europe, Recommendation 1611 (2003) Trafficking in Organs in Europe (http://assembly.coe.int/Main.asp?link=/ Documents/AdoptedText/ta03/EREC1611.htm) and the report of the Social, Health and Family Affairs Committee, rapporteur: Mrs Vermont-Mangold (http:// assembly.coe.int/documents/workingdocs/doc03/edoc9822.htm) (sites last visited 7.9.07).

[FN9]. See ibid. and A. Roxburgh, "Trafficking Troubles Poor Moldova." BBC News, Friday 7 November 2003.

[FN10]. See C. Ionescu, "Donor Charged in Romania's First **Organ Trafficking** Trial." (2005) 365 The Lancet 1918.

[FN11]. G. Parry, "Struck-off Specialist Defends Kidney Sale" The Guardian, 5 April 1990; and R. Allison, "Doctor in Organ Sale Scandal Struck Off" The Guardian, 31 August 2002.

[FN12]. Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC.

[FN13]. R. M. Titmuss, The Gift Relationship: From Human Blood to Social Policy. (London: George Allen & Unwin, 1970).

[FN14]. Ibid., 246.

[FN15]. Ibid., 76.

[FN16]. See D. Price, Legal and Ethical Aspects of Organ Transplantation. (Cambridge: Cambridge University Press, 2000), 400.

[FN17]. Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

[FN18]. Art. 2, Directive 2002/98/EC.

[FN19]. Art. 1(2)(c), Directive 2004/23/EC.

[FN20]. See European Commission, supra n.1, 4 and 8.

[FN21]. See European Commission, supra n.1, 10.

[FN22]. Art. 2(3).

[FN23]. Art. 1.

[FN24]. http://conventions.coe.int (visited on 1.9.07).

[FN25]. http://conventions.coe.int (visited on 1.9.07).

[FN26]. Article 8 has been held to protect personal autonomy: Pretty v UK (No. 2346/02, 29 April 2002) (2002) 35 E.C.H.R. 1.

[FN27]. See Glass v UK (No. 61827/00, 9 March 2004) (2004) 39 E.H.R.R. 15, para. 58. There must, however, be limits on the power of the Court to interpret a binding Convention in the light of a non-binding Convention: see S. D. Pattinson, Medical Law and Ethics (London: Sweet & Maxwell, 2006), 23.

[FN28]. Tyrer v UK (No. 5856/72, 25 April 1978).

[FN29]. See e.g. A. J. Ayer, Language, Trust and Logic (London: Penguin Books), ch. 6.

[FN30]. See e.g. I. Kant, The Groundwork to the Metaphysic of Morals: translated by H. J. Paton as The Moral Law (London: Rutledge, 1948) and A. Gewirth, Reason and Morality (Chicago: Chicago University Press, 1978).

[FN31]. See e.g. J. Rawls, A Theory of Justice (Oxford: Oxford University Press, 1971) and R. M. Hare, Moral Thinking: Its Levels, Method and Point (Oxford: Clarendon Press, 1981).

[FN32]. See S. D Pattinson Medical Law and Ethics (London: Sweet & Maxwell, 2006), ch. 16.

[FN33]. Many consider payment for cadveric organs to be easier to justify: M. J. Lysaght and J. Mason, "The Case for Financial Incentives to Encourage Organ Donation" (2000) 46 Asaio Journal 253, 255; and C. A. Erin and J. Harris, "A Monopsonic Market: or How to Buy and Sell Human Organs, Tissues and Cells Ethically" (1994) 15 Fulbright Papers 134, 135. The arguments presented in this paper do not, however, apply to payment for organs from deceased persons and I would argue for a moral duty to donate than is antithetical to demands for payment for donation of organs after death. Moreover, paying for cadveric organs is likely to interfere with current supply and

non-commercial acquisition systems in a way that paying living donors (in a system that has the safeguards argued for below) would not.

[FN34]. See C. A. Erin and J. Harris, ibid. See also D. E. Jefferies, "The Body as Commodity: The Use of Markets to Cure the Organ Deficit" (1998) 5 Indian Journal of Global Legal Studies 621, 648; and

[FN35]. www.uktransplant.org.uk/ukt/newsroom/fact_sheet/cost_effectiveness_ of_transplantation.isp (site visited on 20.9.07).

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