

The Commodification of Body Parts of the Living – Looking eastward to go westward?

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Abstract:

The philosophy on the procurement of body parts of the living for medical treatment purposes appears to be strengthened by altruism; or significantly rests on it. The other weak, and adjudged unethical, limb is pecuniary gains from their sales. These two - either profit making or altruism are apparently in sharp contrast. However opposed commercialisation may be to altruism, they are not entirely mutually exclusive. This paper explores the advancement in the thoughts to equate living human body parts with goods in commercial transactions. It seeks to suggest a framework for dealings in human body parts for return in cash and or other benevolent grounds, yet keeping altruism within reach. It points at the Iranian system to reinforce the way forward for the global community.

Keywords: human body parts, ethics, profit, altruism, Iran

Living Human Body Parts in the Advancement of Medical Science

Over the years medical science has developed and provided cures for diseases that were previously branded as incurable. Advanced therapeutic procedures, including the transplant of body parts from people who are either living or dead are some of the ways these cures have come about.¹ From surface skin transplant of disfigured soldiers in the 1800's, cornea transplant of blind patients in the 1900's, through to internal kidney transplant that took off in

¹ R Foran, *Organ Transplants*, (Essential Library, 2014), 8 – 13; J. Jeong, "Recent Advancements in Autologous Fat Grafting," *Archives of Aesthetic Plastic Surgery* (2014) 20.1, 3-7.

the 1950's. These procedures cut across the whole structure of the human frame, from skin, through blood vessels,² to extremely complex and internal human-to-human heart transplant.³

The demand for human body parts is usually met by supply from other humans – whether dead or living, though there are yet possibilities of manufactured parts being used to fit.⁴ And there is also the on-going attempts to harvest from animals organs that could be used to treat humans.⁵ Regenerative medicine, especially that involving the development of cell therapies whereby exogenous cells can be transplanted into tissues to help repair the damaged tissue or organs, has been promising a future of ready-made replacement organs - livers, kidneys, even hearts.⁶ But it has so far only delivered on bioartificial organs built in the laboratory using body's cells, like a new windpipe for a cancerous one.⁷ Besides, many diseases result in chronic organ and tissue damage that is unlikely to be solved through conventional pharmaceutical approaches. The need for human to human transplant remains, and continues to grow in the face of the above alternatives.

As not all parts may be manufactured as yet, nor harvested from animals, body parts are still sourced from family members as primary sources. Analysis of donor data suggests that family and patient's socio-demographics, particularly ethnicity, are significantly linked with

² E. Eger II, L Saidman, and R Westhorpe, "1860–1910: The Specialty of Anesthesia Develops Slowly" *The Wondrous Story of Anesthesia*. (New York: Springer, 2014) 37-49; B François, E Sternberg and E Fee, "The Lourdes Medical Cures Revisited", *Journal of the history of medicine and allied sciences* 69.1 (2014): 135-162.

³ Foran, *Organ Transplants*, 10 – 11; N. Sivkova, "Principles of plastic reconstruction for advanced carcinoma of eyelids discussed" *Physician Law Weekly* (Aug 24, 2005): 258.

⁴ V. Marx, "Tissue engineering: Organs from the lab," (2015): 373.

⁵ Sachs, David H. "The pig as a potential xenograft donor" *Veterinary immunology and immunopathology* 43, no. 1-3 (1994): 185-191; Cooper, David KC, and Robert Paul Lanza. *Xeno: the promise of transplanting animal organs into humans*, Oxford University Press on Demand, 2000.

⁶ "Printing body parts – making a bit of me" *The Economist*, February 18, 2010; A Selko, "The Next Wave of Manufacturing: Human Organs" *Industryweek*, June 6, 2013.

⁷ H. Fountain, "A First: Organs Tailor-Made With Body's Own Cells" *The New York Times*, September 15, 2012; S. Y. Rojahn, "Manufacturing Organs" *MIT Technology Review*, January 16, 2014. The problems and limitations of this other type of measure to treating patients could be gleaned from H. N. Chia and B. M. Wu, "Recent advances in 3D printing of biomaterials" *Journal of biological engineering* (2015) Dec;9(1):4.

the donation of body parts.⁸ This supports the normative transplant discourse in which gifting and altruism are assumed among kin.⁹

Members of the public may also donate to unknown donees. There may be calls for donation to which any persons could respond, particularly in cases where such donors suffer little or no remarkable consequences from the donation. A system whereby a bank of human body parts and reproductive materials are kept could also exist for those who might need them. It is in these and a variety of other ways that the altruistic donation of body parts of living persons operate.

The word is altruism. It is the pride of the ideal. The ultimate aspiration of ethical medical science – but, sadly, not an easy to attain state. It is the willingness to do things that bring advantages to others, even if it results in disadvantage for oneself. It is self-sacrifice, public-spiritedness, humanitarianism, just to mention a few of its equivalents.¹⁰ Suffices to say that in this context altruism is the gifting of one's body part to another without expecting something in return, especially money or its equivalent. This paper now turns to the possibility that any purpose other altruism informs the donation of body parts; and the ethical and or legal issues surrounding the alternative purposes.

⁸ L. Siminoff, *et al*, "Factors influencing families' consent for donation of solid organs for transplantation," *Journal of America Medical Association* 286.1 (2001): 71-77; S. H. Lee, *et al*. "Decision-related factors and attitudes toward donation in living related liver transplantation: ten-year experience," *Transplantation Proceedings*, Vol. 37. No. 2. Elsevier, 2005.

⁹ N. Scheper-Hughes, "The tyranny of the gift: sacrificial violence in living donor transplants," *American Journal of Transplantation* 7.3 (2007): 507-511. See Also D. Biro, *One hundred days: My unexpected journey from doctor to patient*, (New York: Vintage, 2001).

¹⁰ Its synonyms also include - unselfishness, selflessness, self-denial, consideration, compassion, kindness, goodwill, decency, nobility, generosity, magnanimity, liberality, open-handedness, free-handedness, big-heartedness, lavishness, benevolence, beneficence, philanthropy, charity, charitableness. This paper shall however stick with the limited meaning of self-sacrifice, unless the context otherwise suggests.

Property Rights in Body Parts of Living Persons – Settled with much ado

Most research works on the place of the person vis-a-vis his body parts or organs is founded on the proprietary rights of the person from whom the organs are obtained. This paper does not intend to argue otherwise, treating that as considerably settled and marginal to the discourse here.¹¹ So organ donation, altruistic or otherwise, is proceeded on from the fact that the donor might do with his body parts whatsoever he wishes. It could be given to whomsoever he chooses.¹² These general positions regarding whatsoever and to whomsoever body parts may be given however have their practical and or medical, as well as legal limits - the potential donor might be constrained by both legal and real intricacies involved with donating human body parts. Hence his wish to do good might be controlled. Compatibility of body parts is a major consideration in matching donors and donees. The more closely related the donor is to the patient, the more chances of a smooth transplant. Consequently, skin grafts from family members seemed to survive longer than those from unrelated donors.¹³

Nonetheless, the preference for relatives in organ donation does not solve the legal problems, assuming there are no issues with medical compatibility between the donors and the

¹¹ On the proprietary rights of donors, the long held view of the common law is the old rule that “no one is to be regarded as the owner of his own limbs” - Ulpian, Edict D 9 2 13 pr. Or “a living human body is incapable of being owned”. This principle has its background in Roman law. According to a famous text of Ulpian, the body of a free man or woman was not susceptible to ownership - E Levy, “Natural law in the Roman period” (1949) Nat. L. Inst. Proc.; 2:43 at 53. But this settled common law rule has been qualified over time. Quite recently, in *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37 the court extensively reviewed the basis of that position and agreed that common law can respond to the ever-expanding frontiers of medical science. It thus held that there is property right in body samples like ejaculated sperm stored for the future benefit of the person who ejaculated it because by their bodies, they generated and ejaculated the sperm. Scholars have lashed on to this and taken the discourse further such that the *Yearworth case* seems to strengthen what had been the favoured position. Magnusson argued that human tissue may usefully be regarded as personal property to enforce possession, to prevent damage and destruction, for the purposes of criminal offences such as theft, and for the purposes of bailment. According to him, the view that human tissue has no status in law reflects a bygone era in which the uses to which human tissue could be put were not recognized. He calls for a fresh consideration of the common law authorities supporting the “no property” rule - R S Magnusson, "Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions, *The Melb. UL Rev.* 18 (1991): 601.

¹² J. Harris, "Who owns my body" *Oxford J. Legal Stud.* 16 (1996): 55; R. Hardcastle, *Law and the human body: property rights, ownership and control*, Bloomsbury Publishing, 2007; A. Grubb, "'I, me, mine': bodies, parts and property" *Medical Law International* 3, no. 4 (1998): 299-317; L. Skene, "Proprietary rights in human bodies, body parts and tissue: regulatory contexts and proposals for new laws" *Legal studies* 22, no. 1 (2002): 102-128.

¹³ J. E. Murray, "Human organ transplantation: background and consequences" *Science* 256.5062 (1992): 1411-1416.

receivers. There are often questions about the process of donation, obtaining informed consent – like the exercise of the right to donate in the event of an underage or one who is incapable of consenting to his organ being donated as a result of the state of the mind or body. Should the organ of such a person be used to facilitate the treatment of another family member? This raises another set of serious ethical concerns. What if the donor is motivated by anything but pure altruism? Where is the line drawn in the spectrum of altruism, what point on the continuum from the high end of pure to impure is acceptable, legal and ethical? When does altruism cease to be pure altruism and how does the law respond? For the benefit of undertaking a focused discussion of these points this paper shall consider the exact scope of the donation of body parts by living persons during their lives, with the ability to give informed consent. The only question sought to be resolved therefore is whether or not altruism could be placed side by side the seeking of pecuniary gain for the donation of body parts by a living person capable of giving the requisite consent.

Whether the body part was that of the living or dead made a difference because the proposition had always been that a body part, for so long as it is joined to a living body, is not susceptible of ownership; then when excised from the body it would be an ownerless thing.¹⁴ Thus the use of skills translates a body part to an item that is capable of being owned. Intuitively however it appears unfair to the source of that body part. A more realistic and just approach, which is supported by authorities in both the Common Law and modern Civil Law¹⁵ is that a part removed from a person's body, say in the course of an operation, is automatically owned by that person by operation of law. Since the dead donor is incapable of, at the very least,

¹⁴ See N. R. Whitty, "Rights of personality, property rights and the human body in Scots law", *Edin. L.R.* 2005, 9(2), 194-237; L.D. Rostill, "The ownership that wasn't meant to be: *Yearworth* and property rights in human tissue" *Journal of medical ethics*, 2014 Jan 1;40(1):14-8; G. Calabresi, "An introduction to legal thought: four approaches to law and to the allocation of body parts" *Stanford law review* (2003): 2113-2151.

¹⁵ J. V. M. Welie, and A. M. J. ten Have, "Ownership of the human body: the Dutch context" In *Ownership of the Human Body*, (Springer, Dordrecht), 1998, pp. 99-114.

feeling the pain or considering after-donation care, the scope here as to the role of altruism on the decision of the living is apt. While next of kin or other relatives may suffer emotionally and otherwise, they are unable to share in the physical circumstances of the donor for whom altruistic considerations are relevant.

The Different Shades of Altruism

Sometimes, the pervasiveness of a term gives the impression that its meaning is unequivocal, particularly when the term is one that fits into a variety of multi-disciplinary contexts. It might lack the precision, uniformity, and neutrality that academic terms are supposed to have.¹⁶ The term “altruism” seems to belong in this category as it broadly has both economic and psychological imports, in addition to a range of others. It is here intended to examine how the term may apply to organ donation, from the angle of what informs the decision to act altruistically.

When people make donations towards privately provided public goods, such as charity, there may be many factors influencing their decisions other than altruism. As Olson noted, people are sometimes motivated by a desire to win prestige, respect, friendship, or even to avoid scorn.¹⁷ Social pressure, guilt, sympathy, or simply a desire for a “warm glow” may also play important roles in the decisions to act charitably or altruistically. The question then is if the donor is motivated by any of these impulses that seem to likewise give the donor some benefit, however intangible that benefit may be, is it still purely altruistic? If the altruist is *ex*

¹⁶ D. S. Wilson and L. A. Dugatkin, “Altruism: contemporary debates” In E. R. Keller and E. A. Lloyd, (eds) *Keywords in Evolutionary Biology*, 1992, pg 29 – 33. See also B. Kerr, P. Godfrey-Smith and M. W. Feldman, “What is altruism?” in *Trends in ecology & evolution*, 19(3), 135-140.

¹⁷ M. Olson, Mancur. *The Logic of Collective Action: Public Goods and the Theory of Groups*, Second printing with new preface and appendix. Vol. 124. Harvard University Press, 2009. This is also consistent with the “socialization/culturalization account” of G. H. Mead in C. W. Morris (Ed.), *Mind, self and society*, Chicago: University of Chicago Press.

ante aware of the possibility that the recipient's need for clothes has been caused by the recipient's distaste for work, the act of altruism might be laced with condescending pity. Or might one then slide down the scale to another kind of altruism described as impure altruism? Andreoni who coined the term "warm glow", defines "impure" altruistic action as the act that is partially motivated by the "warm glow", and not purely motivated by the concern over the beneficiary's welfare. This is quite comparable to altruism for egoistic reasons.¹⁸ Andreoni introduced a generalisation of the standard public goods model that includes 'impurely altruistic' motives. In contrast to the impure altruism model, an important alternative approach was to consider moral or group-interested behaviour.¹⁹ Sugden, for instance, showed that public goods approach to philanthropy may flow from people who may adhere to "moral constraints" or a "principle of reciprocity".²⁰ It is also clear, needs to be said, from a review of these academic literatures that there must be a purpose for altruistic actions, whether positive or otherwise.

While altruism has been generally accepted as the ethical reason for organ donation, it has been defined in ways that allow various shades of the word to purport the ethical ground for donation of organs and body parts. In the UK for example, altruism has long been taken to be the guiding principle of ethical organ donation, and has been used as justification for rejecting or allowing certain types of donation. But despite this central role, altruism has been poorly defined in policy and position documents, and increasingly used confusingly and

¹⁸ J. Andreoni, "Impure altruism and donations to public goods: A theory of warm-glow giving" *The economic journal* 100, no. 401 (1990): 464-477

¹⁹ This has been done by A. K. Sen, 'Rational fools: a critique of the behavioral foundations of economic theory' *Journal of Philosophy and Public Affairs*, (1977) vol. 6, pp. 317-4; D. A. Collard, *Altruism and Economy, a Study in Nonselfish Economics*, Martin Robertson and Company, Ltd.; J. J. Laffont, 'Macroeconomic constraints, economic efficiency and ethics: an introduction to Kantian economics' *Economica*, (1975) vol. 42, pp. 430-7; H. Margolis, *Selfishness, Altruism and Rationality*, (Cambridge: Cambridge University, 1982); and R. Sugden, 'On the economics of philanthropy' *Economic Journal*, 1982 vol. 92, pp. 341-50; and R. Sugden, 'Reciprocity: the supply of public goods through voluntary contributions' *Economic Journal*, (1984) vol. 94, pp. 772-87.

²⁰ R. Sugden, 'Reciprocity: the supply of public goods through voluntary contributions' *Economic Journal*, (1984) vol. 94, pp. 772-87

inconsistently.²¹ The recent report from the Nuffield Council on Bioethics offered a clearer definition. This definition that altruism “entailing a selfless gift to others without expectation of remuneration”²² is however, more permissive than that of altruism previously seen in UK policy, and as a result allows some donations that previously have been considered unacceptable. These include conditional and directed donations by organ donors where a condition could serve to exclude certain recipients, or others are excluded because the organ is directed at a certain group, especially relatives – living-related donation.²³ Such limited delineation of altruism means that the Greg and others strongly argued for ethical purpose to go beyond altruism as narrowly defined. They suggest that it should not be insisted upon that altruism is a necessary as opposed to desirable component of ethical donation.

Self-determination at end of life – A Comparative Paradigm

The concept of the person is heavily bound up in the values of the culture in which one lives. This is also the case for the management of the affairs of the person. For example, the person may just be the body of the person in one society; and that person is solely responsible for his being, actions and decisions. But the person may yet be much more in other societies, like where necessarily the next of kin or significant others may have a say in how matters regarding the person are managed. The involvement of others may be on matters bothering on the day to day being of this person, to other occasions where the person is incapable of making certain types of decisions himself. This is apparent in contrasting the “independent self” common to Western cultures which is based on individual autonomy, with the “interdependent self” of

²¹ G. Moorlock, J. Ives, and H. Draper, “Altruism in organ donation: an unnecessary requirement?” 2014 *Journal of Medical Ethics*, 40(2), pp.134-138.

²² Nuffield Council on Bioethics, *Human bodies: donation for medicine and research*. (London: Nuffield Council on Bioethics, 2011).

²³ Department of Health, *An investigation into conditional organ donation* [report of the panel]. London: Department of Health, 2000.

Eastern cultures which includes significant others within the concept. The independent self is likely to activate motivation to be independent and to withstand social pressure, while the interdependent self may activate motivation to maintain harmony and conform to others' opinions.²⁴ The independent self will focus on internal attributes - ability, intelligence, personality, goals, preferences, rights. The interdependent self is characterised by the tendency to fit in and be part of a relevant ongoing relationship, will strive to meet and or create duties, obligations, and social responsibilities.

This construction of the self feeds into the legal framework for determining the rights of the person over his body parts. The concept of the self could be more properly seen in the view of William James who said that a man's self is the sum total of all that he could call his, not only his body and his psychic powers, but his clothes and his house, his wife and children, his ancestors and friends his reputation and works, his lands, and yacht and bank-account.²⁵ This is whether one looks at it as the Western independent self, or the interdependent self of the Eastern culture. But beyond the broad connotation, cross-cultural study revealed that, relative to Western cultures, East and Southeast Asian cultures are generally more collectivistic.²⁶ Collectivism provides social support and feelings of belonging, but also brings anxiety about not meeting social obligations. While individualists, on the other hand, see themselves as more differentiated and separate from other people, including family and friends.²⁷

²⁴ Torelli, C. J., "Individuality or conformity? The effect of independent and interdependent self-concepts on public judgments." *Journal of Consumer Psychology* 16.3 (2006): 240-248.

²⁵ W. James, *The Principles of Psychology*, Vol. 1, (New York: Henry Holt, 1890), pp. 291-292.

²⁶ D. L. Alden, & A. H. Cheung, "Organ donation and culture: A comparison of Asian American and European American beliefs, attitudes, and behaviors" *Journal of Applied Social Psychology*, 2000, 30(2), 293-314.

²⁷ C, L. Caldwell-Harris & A. Aycicegi, "When personality and culture clash: The psychological distress of allocentrics in an individualist culture and idiocentrics in a collectivist culture" *Transcultural psychiatry*, (2006) 43(3), 331-361.

An expression of self also is the exercise of the autonomy of choice which is an element in the dignity of the human person. This implies that one is entitled to make choices about how one is treated or how one's body is managed, to put it in the most general terms. It is generally understood as self-governance, self-regulation or self-direction and as the paramount principle that underlies refusal of medical treatment.²⁸ In most present-day societies a competent patient's refusal of life-prolonging medical treatment must be respected, and the right to self-determination thus challenges the arguments based on the sanctity of life.²⁹ The right of autonomy is protected under the European Convention on Human Rights. In *Pretty v United Kingdom*³⁰ the European Court of Human Rights affirmed that the right of autonomy came within the protection of Article 8 of the ECHR even to the extent of assisted suicide in certain circumstances.³¹

Autonomy is not without its limits. The sanctity of human life gives weight to the argument that "because all lives are intrinsically valuable, it is always wrong intentionally to kill an innocent human being"³² including the life of the killer, in some situations. Human dignity, it is further argued, does not reside in the freedom to choose to live or to die but is a condition of the freedom itself; individuals cannot give up their human dignity.³³ A more restricted conception of autonomy is that it is an exclusively negative freedom, no more than a right to a "natural" death. Thus, any rights amounting to "right to die", as broadly conceived,

²⁸ *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59 (HL), per Lord Millett at para 123 - the freedom to limit the size of one's family as an important aspect of personal autonomy. See also *Chester v. Afshar* [2005] 1 A.C. 134 (HL) for consideration of autonomy as involving making an adequately informed choice.

²⁹ D. Price, "What shape to euthanasia after Bland? Historical, contemporary and futuristic paradigms" *Law Quarterly Review* 2009, 125(Jan), 142-174. See Lord Donaldson M.R. in *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam. 95 CA (Civ Div) at 112E; *Secretary of State for the Home Department v Robb* [1995] Fam. 127 Fam Div and *Airedale NHS Trust v Bland* [1993] A.C. 789 HL.

³⁰ [2002] ECHR 2346/02.

³¹ This contrasts with the narrow view of Article 8 taken by Lord Bingham and Lord Steyn in *R (Pretty) v DPP* [2002] 1 AC 800. Both Lords regarded Article 8 as protecting autonomy in life but not in relation to the ending of life.

³² J. Keown, "Courting Euthanasia? Tony Bland and the Law Lords", *Ethics and Medicine*, Vol. 9, No. 3, 1993.

³³ CE, 27 Octobre 1995, *Commune de Morsang-sur-Orge*, Rec. Lebon, p. 372. See "France: debate over right to end life" *Public Law*, 2009, Apr, 401-402.

has been rejected by the tribunals in England,³⁴ America,³⁵ Canada,³⁶ France, Australia, Germany, and the list goes on.³⁷ It could be inferred that even in the liberal states, there is still some restriction on any exercise of the expression of the right to die. Thus, in the most unlikely of cases where death is debatably a valid option like in euthanasia, the person is still entitled to the control of his body and the parts thereof. More so when he is alive.

It is because of the moral import of body autonomy that informed consent must be obtained from a person before any organs are harvested from him. This practice is essential because a person cannot engage in autonomous decision-making if he cannot control what happens to his body. Now it is common in medical ethics to give the principle of respect for autonomy the highest priority. And this is why medical ethics generally takes informed consent to be a sacrosanct requirement: it is the guardian of patients' control over what happens to their own bodies.³⁸ By extension, it appears that body autonomy will also include the choice as to the destination of one's organs; a bit further than the consent to be a donor after death.³⁹

The Helplessness of the Criminal Law

The ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous

³⁴ *R. (on the application of Pretty) v DPP* [2001] UKHL 61; [2002] 1 A.C. 800.

³⁵ *Washington v Glucksberg* 117 S. Ct. 2258 (1997); *Vacco v Quill* 117 S. Ct. 2293 (1997).

³⁶ *Rodriguez v British Columbia* (Att Gen) [1993] 3 S.C.R. 519 Sup Ct (Can).

³⁷ J. Cohen, et al, "Trends in acceptance of euthanasia among the general public in 12 European countries (1981–1999)" *The European Journal of Public Health* 16.6 (2006): 663-669; O. Dyer, C. White, and A. G. Rada, "Assisted dying: law and practice around the world" *Bmj* 351 (2015): h4481.

³⁸ M. B. Gill, "Presumed consent, autonomy, and organ donation." *The Journal of medicine and philosophy* 29, no. 1 (2004): 37-59.

³⁹ V. English and A. Sommerville, "Presumed consent for transplantation: a dead issue after Alder Hey?" 2003 *Journal of Medical Ethics*, 29(3), pp.147-152; M. T. Hilhorst, "Directed altruistic living organ donation: partial but not unfair" *Ethical Theory and Moral Practice*, 2005 8(1-2), pp.197-215; M. Epstein and G. Danovitch, "Is altruistic-directed living unrelated organ donation a legal fiction?" *Nephrology Dialysis Transplantation*, 2009 24(2), p.357.

nature for the individual concerned. These are also an expression of the individual's right to private life. Thus the right to have one's body parts donated to another is squarely within one's right to private life, and regardless of cultural affiliations it ought to be within the individual's right to decide one way or the other. Yet the way and manner of conducting this expression of one's fundamental right might trigger the application of the criminal law.

In deed both human rights and penal law feature significantly in regulating this aspect of law. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion.⁴⁰ The interference of state law is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. Even where a given practice poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the United Nations institutions regards the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8 § 1 and requiring justification.⁴¹

Furthermore, if self-ownership of parts of one's body is a settled norm of law, to what extent does the criminal law interfere in the exercise of proprietary rights by such owners over these properties? Various legal systems will have their diverse approach to the ownership and consequent dealings in human body parts. Thus the use of property rhetoric in the context of human body parts may be wholly proper, or at least explainable. But such analysis of property rights in human body parts could not be similarly applied when reproductive parts are in issue. On sperm or eggs as property, few judicial decisions that have arisen have largely been

⁴⁰ D. Parfit, *Reasons and Persons*, (Oxford: OUP, 1984); H. L. A. Hart & H. L. A. Hart, *Law, liberty, and morality*. (Stanford University Press. 1963); R Johns and A. Sedgwick "Protecting People from Themselves" in *Law for Social Work Practice* (London: Palgrave, 1999).

⁴¹ A. Mowbray, "The European Convention on Human Rights: The Abolition of Capital Punishment and Recent Cases" (2002) *Hum. Rts. L. Rev.*, 2, 311; G. Arruego, "End of life decisions in the case of incompetent and terminally ill children under Spanish Law" *Biolaw Journal-Rivista Di Biodiritto*, (2016) (3), 167-183.

confined to requests for posthumous conception in circumstances where the widow of a deceased man has claimed that her husband had a right of property in respect of his sperm, and was thus entitled to dispose of it to his wife in order that she may become pregnant after his death.⁴² In the U.S., it has been held that the rights of the donors of genetic material is akin to ownership, in that the donors should have decision-making authority in respect of the use to which the material is to be put. In *Davis v. Davis*,⁴³ the Tennessee Supreme Court held that the embryos, which were the subject of a custody dispute between a divorced couple, occupied an interim category between persons and property, which entitled them to special respect due to their potential for human life.

In the broader scope of human body parts generally, the common law has been shaped by the decision in *Yearworth v North Bristol NHS Trust*⁴⁴ which held that the sperm that had been banked at a fertility unit amounted to property that was owned by the producer of it.⁴⁵ The Australian case of *Doodeward v Spence*⁴⁶ in 1908 had ruled that there was property in a human body, or part of a human body, with the property right being that of one who had done work or exercised skill that conferred on it a different attribute. This position was not accepted in *Yearworth* in its holding that the sperm was owned by the producer of it, rather than the establishment that had preserved it. *Yearworth* was in itself not conclusive on the bundle of rights owned in body parts, and being on reproductive parts, but by its explicit recognition that parts and products of the human body may be the subject of property without the acquisition

⁴² *Paraplaix v. CECOS* Trib.Gr.Inst. Creteil, 16-17 September, 1984, Gazette du Palais (2e sem.); *Hecht v. Superior Court* 20 Cal Repr. 2d 275 (Ct. App. 1993), 16 Cal App, 4th 836 (1993). See Madden, D., "Recent developments in assisted human reproduction: legal and ethical issues" *Medico-Legal Journal of Ireland* 2001, 7(2), 53-62.

⁴³ 842 S. W. 2d 588 (Tenn. 1992).

⁴⁴ [2010] Q.B. 1

⁴⁵ See also *R. v Kelly (Anthony Noel)* [1999] Q.B. 621; [1999] 2 W.L.R. 384.

⁴⁶ 6 C.L.R. 406.

of different attributes by the application of skill, “it has potentially cleared away a piece of legal artifice that has bemused commentators for some time.”⁴⁷

The property dimension to body parts thus means that the control of property might be imported into the dynamics in dealings in body parts. The next question is how valid then is the state control of how one deals in one’s property? Clearly, a statutory enactment on dealings in private property will be what it is – the law. But how valid is this law, and how consistent is it with the expectations of the society it governs? A survey of such laws coupled with ethical and moral values will give a cursory view.

In the science of Law and rationality, it has often been propounded that “a human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger”.⁴⁸ But this belongs to the discourse when there was no property right in body parts. Although the debate has moved beyond property rights, the bases for no right to deal in one’s body parts remain just as valid – the self-respect, humanity and dignity reasons.⁴⁹ These have been backed up by a number of national laws outlawing trading in body parts.

The Human Tissue Act 2004⁵⁰, which applies in England, Wales, Northern Ireland, Section 33 provides for the offence and consequent penalties related to the removal and transplantation of organs and other material from living donors in circumstances other than those provided for in regulations made under this section. These include circumstances where the Act is satisfied that no reward has been given in relation to the transplant. The National Organ Transplant Act of the United States imposes imprisonment and criminal fines for the

⁴⁷ H. E. H. Shawn and T. L. Graeme, “*Yearworth v North Bristol NHS Trust*: property, principles, precedents and paradigms” C.L.J. 2010, 69(3), 476, 484.

⁴⁸ I. Kant, “The metaphysical principles of virtue” (1964).

⁴⁹ S. R. Munzer, “Kant and property rights in body parts” *Canadian Journal of Law & Jurisprudence* 6, no. 2 (1993): 319-341.

⁵⁰ c. 30.

knowing purchase or sale of human organs, including kidneys, livers, hearts, and bone marrow, for use in human transplantation.⁵¹

The criminal law in Israel prohibits doing grievous harm to another or wounding him, even if such harm was done with his consent, unless it has been for his own treatment.⁵² Thus an operation for the removal of an organ from a healthy person for transplantation, which is not for the person's treatment, is illegal. Israel's system for organ donation has been based, since its inception in 1968, on a model in which organs for transplantation are retrieved from brain-dead donors only after consent has been obtained from the appropriate first-degree relatives. This consent is needed even if the potential donor has expressed a wish for posthumous organ donation by signing a donor card, a government form that allows people to voluntarily indicate their wish to donate specified organs after their death.⁵³ It was rather significant that in a case the Supreme Court refused an application to remove a kidney from a retarded person in order to transplant it into his father's body, even without touching on the question of whether it would have been permitted if the son had been an intellectually able adult.⁵⁴ It can be argued that this decision was founded on the fact that the son could not give the required consent, as against what his father might have wished for. As regards incapable persons, minors, and anyone under guardianship, the Legal Capability and Guardianship Law 1962⁵⁵ of Israel states that a court is not allowed to order any surgery or any other medical measures unless the court has been convinced by medical opinion that these measures are needed to maintain the physical or mental well-being of the minor, incapable person, or person under guardianship. Removal of organs from such a person for transplant is, therefore, illegal.

⁵¹ 42 U.S.C.A. S 274 (W).

⁵² D. A. Frenkel, "The Israeli law on transplantation, autopsy, dissection, and inquest of death" *Medico-Legal Journal of Ireland*, 1998, 4(2), 67-68.

⁵³ J. Lavee, T. Ashkenazi, G. Gurman, & D. Steinberg, "A new law for allocation of donor organs in Israel" *The Lancet*, (2010) 375(9720), 1131-1133.

⁵⁴ L. to App. 698/86, 184/87 X. v. A.G. [1988] 42(2) P.D. 661 at 701 (per Elon, Dep. C-J.) (in Hebrew).

⁵⁵ D. A. Frenkel, "The Israeli law on transplantation, autopsy, dissection, and inquest of death" at 67.

In China, in 1995 the Human Organ Transplant Ordinance was first enacted by the Ministry of Health together with other related ministries in the People's Republic of China to prohibit commercial dealings in human organs intended for transplant, as well as to regulate the transplantation of human organs between living persons.⁵⁶ Further, Human Transplantation Act that bans commercialism was adopted in May 2007.

By the provisions of the Charter of Fundamental Rights of the European Union,⁵⁷ notably the principle set out in Article 3(2)(c) thereof – “In the fields of medicine and biology, the following must be respected in particular: the prohibition on making the human body and its parts as such a source of financial gain.” That principle is also enshrined in Article 21 of the Convention on Human Rights and Biomedicine of the Council of Europe,⁵⁸ which many Member States have ratified – “The human body and its parts shall not, as such, give rise to financial gain.”

No less important is the *World Health Organization Guiding Principles on Human Cell, Tissue and Organ Transplantation*.⁵⁹ It provides that cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value.⁶⁰ According to the commentary to the Guiding Principles - The basis for this strict non commercialisation position is that payment for cells, tissues and organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermining altruistic donation, and leading to profiteering and human trafficking. Such payment, it reasons, conveys the idea that some

⁵⁶ J. Huang, “Ethical and legislative perspectives on liver transplantation in the People's Republic of China” *Liver transplantation*, 13(2), 193-196.

⁵⁷ 2000/C 364/01.

⁵⁸ Oviedo, 4.IV.1997.

⁵⁹ Sixty-Third World Health Assembly, "WHO guiding principles on human cell, tissue and organ transplantation" Guiding Principle 5.

⁶⁰ Sixty-Third World Health Assembly, "WHO guiding principles on human cell, tissue and organ transplantation" (2010): 413-419.

persons lack dignity, that they are mere objects to be used by others. This ensures there can be no trafficking in human materials.

Even from religious and cultural shared values, the marketization of human body parts poses a problem. For example, in the Islamic faith and practices, as organ transplantation has not been explicitly dealt with in the Koran, there is a mix of opinions among Muslim jurists. While those from the Arab countries appear to consider it allowable, scholars from the Indian subcontinent believe that organ transplantation is not permissible because human life is sacred; the human body is entrusted to an individual and thus does not belong to him or her; and transplantation can lead to illegal trade in organs and the poor would suffer.⁶¹ Addressing the participants at the Third International Congress of the Middle East Society for Organ Transplantation in 1992, Sheick M.M. Sellami, Grand Mufti of the Republic of Tunisia said “... according to Islam a human being is not the owner of a part or the whole of his body. In any case, organs should not be traded, but donated.” But to the contrary, much earlier in 1952, the supreme head of the Islamic School of Jurisprudence in Egypt stated that if anything was of good for mankind then “necessity allows what is prohibited.” Such rulings allow transplants of organs as long as certain conditions are satisfied: a transplant is the only form of treatment available; the likelihood of success of the transplant is high; the consent of the donor or next of kin is obtained; death of the donor has been fully established by a Muslim doctor of repute, or there is no imminent danger to the life of a living donor; and the recipient has been informed of the operation and its implications.⁶² The conditions do not go as far as considering any form of compensation or remuneration to the donor. In similar vein, while speaking at the XVIII

⁶¹ A. R. Gatrud, “Muslim customs surrounding death, bereavement, postmortem examinations, and organ transplants” (1994) *BMJ: British Medical Journal*, 309(6953), 521.

⁶² A. F. M. Ebrahim and A. A. Haffejee. *The Shari'ah and organ transplant*, (Johannesburg: Islamic Medical Association of South Africa, 1989).

International Congress of the Transplantation Society in 2000, Pope John Paul II⁶³ said "... any procedure which tends to commercialize human organs or to consider them as items of exchange or trade must be considered morally unacceptable, because to use the body as an 'object' is to violate the dignity of the human person."⁶⁴ So the popular and main stream view is really – no commercial gains from organ donation. Any money involved should be such as to facilitate the process, making up for pains on either side, especially the donor. Cash for organs, in the core commercial sense, is prohibited because, as has been shown already, a line of laws criminalise it in most parts of the world.

Clearly, outright commercial dealings in human body parts is illegal and usually treated as repugnant from a wide range of sources. But is there a chance that the option of compensating donors for the act of donating is taken a bit too far? Is there the likelihood of some being in it for the reward, even if not in monetary value? And what would the ethical and legal consequences of that be?

A Market for Human Body Parts?

The possibility for commercialisation of human body parts gains strength from the subtle language with which the non-commercialisation nevertheless allows some form of reward for organ donation. For example, the *World Health Organization Guiding Principles on Human Cell, Tissue and Organ Transplantation* provides that the prohibition on sale or purchase of cells, tissues and organs does not preclude reimbursing reasonable and verifiable expenses

⁶³ The Pope represents the custodian of the values, ethics and teaching of the Catholic Church, one of the largest sectors of the Christian faith. See J. Mahoney, "The making of moral theology: A study of the Roman Catholic tradition" (Oxford University Press, 1987); R. F. Costigan, *The Consensus of the Church and Papal Infallibility: a study in the background of Vatican I.* (CUA Press, 2005).

⁶⁴ P. Bruzzone, "Religious aspects of organ transplantation" In *Transplantation proceedings*, 2008 (Vol. 40, No. 4, pp. 1064-1067). Elsevier.

incurred by the donor, including loss of income, or paying the costs of recovering, processing, preserving and supplying human cells, tissues or organs for transplantation. It allows for circumstances where it is customary to provide donors with tokens of gratitude that cannot be assigned a value in monetary terms. The principle nevertheless loses sight of the fact that incentives in the form of “rewards” with monetary value that can be transferred to third parties are not different from monetary payments. Such incentives can be monetised and indeed could form the basis of a trade.

In the same vein Section 32 of the United Kingdom Human Tissue Act 2004 allows for the possibility of commercial tissue banks by allowing licence-holders to receive more than just expenses in relation to these activities. This section also allows for costs incurred by others to be passed along a chain of suppliers; including allowing for the reimbursement for expenses or loss of earning connected with transporting, removing, preparing, preserving or storing the body of a deceased person or relevant human material. Even a California statute which prohibits a person from knowingly acquiring, receiving, selling, or promoting the transfer or otherwise transferring any organ for transplantation for valuable consideration, is directed against brokering organs rather than the direct selling from a donor to a recipient. This is because there is an exception to the ban on selling and buying for "the person from whom the organ is removed, [or] ... the person who receives the transplant, or those persons' next-of-kin who assisted in obtaining the organ for purposes of transplantation."⁶⁵

The argument for altruism, regardless of what type of altruism, as the only decent motivation for donation is flawed on many fronts. The considerations for being a willing donor vary from person to person. Besides there may be medical implications for a donor even if the donee's need is greater than the donor's.⁶⁶ Commercial transactions are not always lacking in

⁶⁵ Cal. Penal Code S. 367f(e)

⁶⁶ *McFall v Schimp*, 10 Pa. D. & C. 3d 90 (1978); *Curran v. Bosze*, 566 NE 2d 1319 – 1990.

ethics. This is as correct as suggesting that all practices in the medical profession are strictly and solely underscored by ethical considerations. They are not mutually exclusive for the practising medical practitioner has as much interest in affording a decent life as he has in giving his patient the services that give them the best chance for a decent life. The altruistic position glosses over the inherent nature of man as one interested in cost-benefit analysis.⁶⁷ But Bentham thinks that nature has placed mankind under the governance of two separate concepts, pain and pleasure; and these two govern humans in all they do.⁶⁸ Indeed, even the most basic human action could be justified on economic grounds of opportunity cost. Although individuals may be mistaken in this calculation process, the human nature automatically uses opportunity cost as the criterion in making choices and preferences because generally individuals aim to maximise their self-interest.⁶⁹ The role of regulation then should be in helping with the evaluation of the risk and benefit balance with consideration for the same calculation for others who might be affected by the actions. Getting this balance right, again will steer most actions to donate in the direction of being ethical, but not necessarily altruistic.

Where a system allows for reasonable compensation, it permits reimbursement for the costs of making donations, including medical expenses and lost earnings for live donors. This is because such costs could act as disincentive even to donors with no interests in the compensation other than to donate to save lives. Payments to cover legitimate costs of procurement and of ensuring the safety, quality and efficacy of human cell and tissue products and organs for transplantation are also accepted as long as the human body and its parts are not a source of financial gain. Incentives may also be by way of money to purchase essential items

⁶⁷ R. A. Posner, *Economic Analysis of Law*, 8th ed. (2010), at 3; P. J. Held, and others, "A cost-benefit analysis of government compensation of kidney donors" *American Journal of Transplantation*, 16(3), 877-885.

⁶⁸ Bentham, *An Introduction to the Principles of Morals and Legislation*, ch. 1.

⁶⁹ A. Moazed, "Posner in pursuit of wealth: taking rights seriously", *UCL Juris. Rev.* 1997, 4, 1-24, 5.

which donors would otherwise be unable to afford, such as medical care or health insurance cover.

The argument that is made for payments made for human cells used for research are also valid here. Freeman argued that "... The notion that the person whose cells bring profit to others is him or herself neglected is not consonant with our intuitive ideas of fairness and justice."⁷⁰ The court's failure in *Moore v. Regents of the University of California*⁷¹ to make a moral judgment in favour of Moore sends out the wrong message. A compulsory-purchase scheme advocated by Erin and Harris⁷² may provide a solution. This acknowledges the patient's status as owner and compensates him for the appropriation of his excised body materials.⁷³ The argument then should be that it is not absolutely non-commercialisation that is ethical, but not to commercialise the process such that the profits are unconnected with the wellbeing and or welfare of the parties involved, especially the donor.

Emerging Markets and the Iranian Model Example

Across the countries and legal systems one finds various shades of the changing attitudes towards the commercialisation of body parts. They range from extreme cases of absolute ban through to where the exchange of body parts for non-monetary rewards are allowed; down to

⁷⁰ M.D.A.Freeman "Biotechnology, patients and profits: how is the law to respond?" in I.Robinson, at p 126. Robinson (ed) *Life and death under high technology medicine* vol.15 Fulbright Papers (Manchester, 1994)

⁷¹ 51 Cal. 3d 120, 271 Cal. Rptr. 146, 793 P.2d 479, cert. denied 499 U.S. 936 (1991). John Moore was treated for hairy cell leukemia by physician David Golde, a cancer researcher at the UCLA Medical Center. Moore's cancer cells were later developed into a cell line that was commercialized by Golde and UCLA. The California Supreme Court ruled that a hospital patient's discarded blood and tissue samples are not his personal property and that individuals do not have rights to a share in the profits earned from commercial products or research derived from their cells.

⁷² C.A.Erin & J.Harris 'A monopsonistic market: or how to buy and sell human organs, tissues and cells ethically' in I.Robinson, 146.

⁷³ Sophie Mills, "Owning my "self": a reconciliation of perspectives on the body" UCL Juris. Rev. 1999, 6, 191-219, 215.

where a system covertly or otherwise allows one to claim a fee for his or her body part. As the cursory survey above shows.

Besides the diverse positions and attitudes seen in the laws academic and professional views have not stood static in these areas. At the American Transplantation Congress, Arthur Matas of the University of Minnesota transplant team, noting that a wait time of over 5 years, induces death on the waiting list of 7% annually, called for a regulated system of living kidney sales.⁷⁴ This Matas' proposal includes careful donor medical and psychosocial evaluations with a fixed tax-free payment to the donor plus an option of short- or long-term health and life insurance. Matas pointed out that surrogate mothers are individuals who benefit others without losing their dignity or becoming victims. Similarly, paid organ donors are not victims who are unable to determine what happens to their body. A more positive endorsement for legalizing human organ sales was provided by Robert Berman of the Orthodox Jewish Halachic⁷⁵ Organ Donor Society writing in the Jerusalem Post of 9 August 2005: "The choice before us is not between buying or not buying organs. This is happening regardless of the law. The choice is whether transplant operations and the sale of organs will be regulated or not."

In Iran, the system of organ donation was designed with the intention of providing treatment and organs for those in need, by encouraging organ donation through the use of financial incentives. Another intention was to eliminate the black market in organs by creating a government-sponsored and regulated organization in charge of coordinating donors and recipients. In these transactions, money is given to the donor by both the government and by the recipients as compensation for their time and sacrifice. The system in Iran is the first of its

⁷⁴ A. Matas, "Living kidney donation: controversies and realities. The case for a regulated system of living kidney sales" (2005) Program and abstracts of the American Transplant Congress 2005: 6th Annual Joint Meeting of the American Society of Transplant Surgeons and the American Society of Transplantation; May 21–25, Seattle, Washington.

⁷⁵ The body of Jewish law supplementing the scriptural law and forming especially the legal part of the Talmud, interpreted by orthodox rabbis.

kind, with the apparent intention of assisting the sick and the impoverished, as well as providing appropriate financial compensation to the poor. This system of using a government-sponsored agency to recruit donors has been successful in eliminating waiting lists for kidney patients; however, it is not without controversy. Within Iran, the ethical debates surrounding this system continue among both physicians and scholars. Economists, including Nobel-laureate Gary Becker, and professionals within the transplant industry worldwide, suggest that a system of financial compensation for kidney donors will increase the supply of much-needed organs, thereby reducing the death and suffering of dialysis patients. In this regard, Iran is often looked to as a model for other countries.⁷⁶

The problem of the exploitation of donors is controlled by creating an official mechanism that controls and supervises transplants, and looks after the interests of the vendors. According to Hippen, insofar as the kidney procurement system in Iran can be characterized as a “market,” it is a highly standardized and regulated market with only modest room for negotiation. Vendors are paid in two ways. First, the Iranian government provides a fixed compensation to the vendor, plus limited health insurance cover. This cover currently extends to one year after the procedure, and covers only conditions deemed related to the surgery. Second, the vendor receives separate remuneration either from the recipient or, if the recipient is impoverished, from one of a series of designated charitable organizations.⁷⁷

The most contentious disagreements in the literature regarding kidney vending in Iran have to do with the personal, physical, and financial consequences for vendors themselves. This issue is compounded by the absence of any routine follow-up. A crucial moral failing of the Iranian system is that there is not a similarly structured system for the post operation

⁷⁶ D. M. Tober, “Kidneys and controversies in the Islamic Republic of Iran: The case of organ sale” 2007 *Body & Society*, 13(3), 151-170.

⁷⁷ B. E. Hippen, “Organ sales and moral travails: lessons from the living kidney vendor program in Iran”, *Policy Analysis* No. 614.

management of vendors as there is for the process leading up to the sale of organs. The available data show that the quality of life organ vendors live after the procedure is relatively less than that of non-organ vendors.⁷⁸ Although the reasons for this reduced quality of life is diverse, there are certainly psycho-social complications that the vendor is left with, too many for the system to control as it currently stands. It is not only a moral failure, but a systemic and an institutional one, capable of being corrected.

There is a proposal in the neighbouring Israel which could be copied. A live donor whose organ is incompatible with a particular recipient may be able to trade his organ for a suitable match.⁷⁹ Alternatively, the donors could be given priority for themselves or their family when a future medical need might arise. Moreover, one could be allowed to trade in return of particular social benefits relating to education, health and family needs.⁸⁰ Although no money is involved in this method, it does mirror the proposal of Matas involving tax-free payment to donors in support of aftercare.⁸¹

Conclusion

Current practices and thinking challenge the World Health Organisation 1991 Guiding Principles as well as what might be described as the traditional view on sale of body parts. It has become imperative that the WHO updates its guidance to Member States, and to align with the direction of most viewpoints today – to give more room for both monetary and non-monetary rewards for organ donors. The WHO should also evaluate practice and validate

⁷⁸ J. Zargooshi, "Quality of life of Iranian kidney "donors"" *The Journal of urology* 166, no. 5 (2001): 1790-1799.

⁷⁹ S. Yelinek, *Payment for Organ Donations: The Future Market of Organ Trade* (Tel-Aviv: Perlstein-Genosar; 2004) [Hebrew].

⁸⁰ P. Comminos, "A radical solution to a problematic situation: inter vivos transplant and sale of kidneys," *UCL Juris. Rev.* 1995, 2, 81-110, 84.

⁸¹ A. Matas, "Living kidney donation: controversies and realities. The case for a regulated system of living kidney sales" (2005)

potential model transplantation programmes most of which are based on the various proposals above which seat on different points on the altruism spectrum. Besides working with Member States to gather data and review practices and values, WHO should explore opportunities to cooperate with international scientific bodies on the same grounds.

The dealings in human body parts should be opened up further and seen in the dim light of commerce, yet where ethics are also relevant. It should not be the absolute altruistic as it demonises other ethical but non-altruistic conducts in this sphere. The suggestion that the slightest introduction of money to the organ donation equation is unethical is extreme and old fashioned. That view needs rethinking. The notion of the buyer/receiver being able to compensate the seller/vendor with health care credits of some kind should be a significant achievement of any system. Moreso in countries where such health care credits are unaffordable and a donor goes on to donate or sell with the aim of acquiring that health care credit, or perhaps seeks the highest bidder not the one in the greatest need. Some price and exchange control should be the direction of policy, not absolute ban on the practice. If policy and lawmakers are still stuck in the past, the horse has long bolted while they struggle to close the stable door – see the booming black market.