The International Market for Illicit Organ Trading: Towards Regulation or Abolition?

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Table Contents

The International Market for Illicit Organ Trading: Towards Regulation or Abolition?

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Chapter One

Introduction

1. Introduction

Organ transplantation is a method used worldwide when a patient is suffering from organ failure. This method has saved a lot of lives and ensured a better lifestyle for the patient. The first successful kidney transplantation occurred in 1954 involving two twin boys – prior to this; attempts had been made but were never successful. [1] Medical technology has advanced since then and this method is applied more frequently now and with greater success. In 1993, the average waiting period for a heart-liver transplant was around 198 days.[2] This waiting period has, over time, rapidly increased.

Currently, according to the United Network for Organ Sharing (U.S), the average waiting period for a pancreas is about 300 to 400 days, and the combined 'kidney and pancreas is about 300 days' depending on the person's blood group and other factors.[3] Currently, in America, there are about 2,200 patients on the national waiting list for a kidney-pancreas transplant.[4] In addition to this, the procedure can cost around $141,000,

[1] First successful kidney transplant performed 1954 –
A Science Odyssey - http://www.pbs.org/wgbh/aso/databank/entries/dm54ki.html. –accessed on 25/10/2013.

[2] Anderson, M (1995) Health Matrix 250.

[3] National Kidney Foundation - http://www.kidney.org/atoz/content/kidpantx.cfm. - accessed on 25/10/2013.

[4] Ibid.

proving to be highly expensive and also not a guarantee as millions of people die awaiting these organs.[5]

In most cases, organs will be transplanted from deceased donors who had given their consent to have such a procedure performed.[6] There had, however, been a shortage of organs which became universal and this led to the development of a concept known as "transplant tourism" which involves a person travelling to another country in order to purchase or sell a kidney.[7] People tend to opt for this option because unlike most other organ transplantations, the kidney allows for living donor transplantations.

Transplant tourism is frowned upon and seen as unlawful in the international community. A World Health Assembly resolution urged member states to 'take measures to protect the poorest and vulnerable groups from 'transplant tourism' and the sale of tissues and organs."[8] Other than this, there are various conventions of the United Nations (UN) which govern the trafficking of organs such as, *inter alia*, the UN Trafficking Protocol, the Optional Protocol on the sale of children, child prostitution and child pornography (2000) to the UN Convention on the Rights of the Child (1989), as well as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

1.1 Background

Organ transplantation, particularly when a person is suffering from end-stage renal failure of the kidneys, has proven to be a better option for the patient than being kept on a dialysis machine for long periods of time. It was shown that undergoing kidney transplantation may prolong a person's life, be less pricey than using a dialysis machine, promote a patient's quality of life and furthermore provide less complications regarding

[5] Ibid.

[6] Bulletin of the World Health Organization 2007; 85 (12) page 955.

[7] Ibid.

[8] Resolution on human organ and tissue transplantation. Geneva: WHO; 2004 (WHA 57.18) adopted in 2004.

the lifelong use of immunosuppressive drugs when on a dialysis machine.[9] Because of these advantages associated with organ transplantation, patients tend to prefer this procedure and are either lucky to have a family member or friend agree to donate their kidney or are placed on a waiting list. However, as mentioned above, there has been a shortage of organs for transplantation and the waiting lists have increased rapidly. This in effect boosted the popularity of organ trafficking despite the fact that it is prohibited by the international community.

In determining the prevalence and persistence of organ trafficking, the World Health Organization (WHO) refers to 'organ-exporting countries' (such as India, China and Pakistan) where the transplanting of organs from local donors to foreign individuals are undertaken and 'organ-importing countries' (such as U.S.A, Australia and Canada) which are the countries of origin of the recipients who travel overseas to purchase organs from vulnerable people in poorer countries.[10]

Although frowned upon, this practice has persisted and is seen as an increasing problem within the international community. Kidneys, for instance, may even be sold over the internet. It poses an ethical issue for clinicians worldwide[11] as well as dire health problems for the donors who resort to these measures due to poverty. There have also been reported incidences of organs being obtained without the consent of the donors who are lured under fraudulent or false pretences.

Most countries have banned the trafficking of organs but this had the result of boosting the international market for illicit organ trading. Not all countries have followed this route however. Iran has attempted to regulate the purchase and sale of kidneys, and although the Iranian Model only caters for its citizens, the concept may be utilized for international purposes. Providing a financial incentive to encourage people to become

[9] Rosen et al. ' Organ Transplantation - Addressing the Shortage of Kidneys for Transplantation: Purchase and Allocation through Chain Auctions.' 2011 (36) *J. Health Pol. Pol'y & L*. 717.

[10] Bulletin of the WHO *supra* at page 957.

[11] Budiani-Saberi, D et al. 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' 2008 (8) *American Journal of Transplantation* 925.

donors and regulating these transactions and perhaps eliminating the 'brokers' may also be seen as a positive stimulus.

1.2 Research Questions

- Do the ethical issues surrounding organ trafficking outweigh the dire need of organs for transplantation?
- Is it possible to devise a scheme in which the purchase and sale of organs may be regulated rather than abolished completely?

1.3 Methodology of research

The main methodology to be adopted involves the use of desk research. Various internet sources are also utilized but mainly journal articles, a range of books, treaties, conventions, case law and reports from diverse international organizations are employed to bring about a comparative analysis of the issues surrounding organ trafficking.

1.4 Literature Review

Organ trafficking is a phenomena which is seen to have stemmed from an increasing need of organs for transplantation. Although it is illegal in the international community, patients often prefer to resort to this practice in order to enjoy a longer and more fruitful lifestyle.

(a) The Ethical debate surrounding organ trafficking.

Organ trafficking has been challenged on an ethical platform where transplant tourism is concerned but also with regards to internet solicitation: where recipients can 'shop online' for potential donors. It has been argued on the basis of the potential exploitation of organ donors as well as coercion of donors by use of, *inter alia,* financial incentives. It can also be questioned as to whether the poor should

provide for the health of the rich or whether poverty can compromise human dignity and health.[12] On the other hand, one may also revert to the reasons surrounding organ trafficking such as the fact that the shortage of organs for transplantation. This may also lead one to look into the principles of biomedical ethics as a means of determining whether there is a justified debate regarding this practice.

(i) The four principles of biomedical ethics.

Beauchamp and Childress[13] devised four principles which act as a working foundation for the modern American bioethics. These principles are referred to as

- autonomy,
- beneficence,
- non-maleficence, and
- justice.

The principle of autonomy refers to the right to self determination, where a person has the right to accept or refuse medical care; the principle of beneficence refers to the obligation placed on physicians to act in the best interests of the patient and also to the moral obligation to act towards the benefit of others; non-maleficence requires a physician not to harm a patient wherever possible and justice refers to obligations beyond the relationship between the doctor and the patient.[14]

These four principles may be utilized in such a way as to provide an analysis of organ transplantation from a bioethical perspective. The importance of this is that it

[12] "Trafficking in organs in Europe" – <assembly.coe.int/documents/workingdocuments/doc03/edoc9822.htm> accessed on 19/03/12.

[13] Beauchamp TL, Childress JF "Principles of Biomedical ethics", 5th Ed. New York: Oxford University Press;2001.

[14] Hippen et. Al. 'Saving lives is more important than abstract moral concerns: Financial Incentives should be used to increase organ donation' 2009 (88) *Ethics in Cardiothoracic Surg.* 1056.

discusses the inherent rights of individuals from an ethical and philosophical point of view.

(b) International and National legislation and regulations.

- **Organ trafficking as a violation of various treaties.**

Certain agreements which are aimed at the suppression of organ trafficking are the World Medical Authority, the World Health Organization's Guiding Principles on Human Organ Transplantation, the Council of Europe's Convention on Human Rights and Biomedicine and its Optional Protocol Concerning Transplantation of Organs and Tissues of Human Origin, and the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons.

- **Organ trade in different Nations.**

As previously mentioned, the WHO distinguishes between organ-exporting countries and organ-importing countries when making reference to transplant tourism. In most cases, the organ-exporting countries will be where the sellers of the organs originate and who are said to be 'exploited' for the gain of the rich.

Certain nations have implemented national legislation to curb the prevalence of organ trade such as South Africa, which endorsed the Human Tissue Act (which has been repealed by the National Health Act), and India which adopted the Transplantation of Human Tissue Act and others. This legislation has, however, proven to be ineffective in curbing organ trade. In South Africa, for example, despite the prevalence of the Human Tissue Act and National Health Act, there are still syndicates which operate in contravention of these Acts.[15] The system in place does

[15] A syndicate is defined as 'a group, combination, or association of gangsters controlling organized crime or one type of crime, especially in one region of the country'. Dictionary.com <http://dictionary.reference.com/browse/syndicate> accessed on 07/05/2013.

not require for the registration of transplantations, and this allows for transplantations to be done without any queries being conducted.[16]In addition to this, South African legislation only permits transplantations to be performed between blood relatives but it has been found that investigations into this is scarcely done and it is easy for persons to be coached to act like a recipient's relative.[17] This lack of direction or control of the legislation has labeled South Africa 'an ideal country for illegal transplants.'[18]

Also, India's adoption of the Transplantation of Human Organs Act in 1994 was met with much criticism and lacking in positive results. It has been stated that the Act's main constraints include various loop holes and vagueness within the Act itself which hinders its implementation, the capacity of the regulatory authorities, the interest of the 'middle men' or 'brokers' as well as other restrictions.[19]The implementation of legislation in these nations has thus proven to be ineffective and other measures need to be taken, for instance a regulatory system of organ trade.

Such a system may be challenging to initiate. China can be seen as an example where the country has adopted legislation which allows for organ procurement from prison cadavers. A lot of controversy surrounding this legislation has come to light in the international community as this practice has led to various infractions of the human rights of prisoners.

This is not to say that such regulation would be impossible. Iran is reportedly the only Nation where a regulated system has been endorsed. Iran has attempted to regulate the purchase and sale of kidneys, and although the Iranian Model only caters for its citizens, the concept may be utilized for international purposes. Providing a financial incentive to encourage people to become donors and regulating these transactions as well as

[16] Slabbert, M (2008) 73(1) *Koers* 84.

[17] Ibid.

[18] Ibid.

[19] Muraleedharan, V et al (2006) 1 *Health Economics, Policy and Law* 41.

eliminating the 'brokers' may also be seen as a positive stimulus and move towards change.

(c) Need for change – The prospect of regulating organ trade internationally.

It has become evident that despite incentives taken both nationally and internationally, transplant tourism still persists and it could be argued that these incentives have in fact boosted the international market for illicit organ trade rather than limiting it.

A solution which seems to be viable in this regard would be to find a means of regulating the trade in such a way as to try and harmonize the ethical issues surrounding this practice with the desperate need to uphold the sanctity of life; and finding a balance between the pros and cons of organ trafficking. Different authors have attempted to analyze the situation and have made various suggestions relating to this anomaly.

Matas, A[20] for instance, recommends a thorough screening of donors by a team of specialists including a transplant physician, donor advocate, social worker and different coordinators. It has also been suggested that in order to reduce on the chances of exploitation by the richer nations of the impoverished communities, an adoption of a system similar to that of UNOS (United Network for Organ Sharing) may be adopted in order to ensure that no person gains an unfair advantage over another.[21] The suggestions made by various authors can indicate that it may indeed be possible to structure a government-regulated system of live organ donation where donors are compensated for their generosity.

[20] Matas, A (2006) 1 *Clinical J of Am Soc Nephrology* 1129.

[21] Matas, A et al (2008) 13 *Current Opinion in Organ Transplantation* 379.

1.5 Overview of the Chapters

This thesis shall consist of five chapters. The first chapter shall be an introduction to the concept of organ trafficking as well as the issues surrounding this practice within the international community.

The second chapter shall contain an overview of the ethical issues surrounding this trade focusing also on the principles of biomedical ethics which have been devised by Beauchamp and shall, from this perspective, depict the pros, cons and acceptability of this practice.

The third chapter shall deal with organ trafficking from an international standpoint and discuss the different conventions which prohibit this trade and also focus on the national legislation of a number of countries worldwide which have tried to regulate and/or abolish it. The chapter shall deal with the issue of consent and distinguish between the practice on live donors and those who are deceased.

The fourth chapter shall comprise of different approaches which may be taken to try and regulate the occurrence of organ trafficking within the international community rather than a means of abolishing it as this has proven to be unsuccessful. The views of various authors shall in this instance be touched upon.

The final chapter shall be a conclusion which shall attempt to assemble all the issues surrounding this illicit trade and shall aim to finalize them and discuss possible regulation tactics which may be viable.

Chapter 2

The Ethical Debate Surrounding Organ Trafficking and Live Organ Donation

2.1. Introduction

- What is ethics?

Ethics can be described as the methodical inquest into the actions of human beings in order to discover the rules which would govern those actions, as well as the 'good that is worth seeking in human life.'[22] Slabbert provides that the inquisition into what ethics is, it not to question what is right and what is wrong, ideal or not, acceptable or unacceptable.[23] She provides that it is more about what is the correct moral decision in the particular circumstances - the 'lesser of two evils,' or the 'balance between doing good and causing harm.'[24] An action would generally be unethical if it were to harm others, the environment, or groups of people.[25]

The ethical debate against organ trafficking, with particular focus on kidney transplantations, tends to be regarding the 'commodification of live kidneys through their pricing'.[26] This refers to the purchase and sale of kidneys between a live donor (or vendor) and the recipient. One could further add that in this instance the body of the vendor becomes a commercial object in itself. The most straight forward definition has been provided as describing 'exchanges in which material goods and economic services are literally bought and sold'.[27] From such a definition it can be argued that the human being is literally reduced to a commodity, which could undermine the vendors' human dignity and thus supply an acceptable ethical argument against such a practice.

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[22] Slabbert, M (2010) 13:2 *PELJ* 80.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Rosen et al. ' Organ Transplantation - Addressing the Shortage of Kidneys for Transplantation: Purchase and Allocation through Chain Auctions.' 2011 (36) *J. Health Pol. Pol'y & L*.

[27] Ibid.

Rosen et al. discuss this concept of violating one's human dignity by referring to Immanuel Kant and Samuel Crowe who provide that human beings should be treated as 'ends in themselves, never as means.'[28] Kant is of the opinion that individuals should not be treated as 'means to end' nor should they or their bodies be 'treated as possessing an instrumental value, fixable in the terms of some price.' [29] Rosen is therefore of the opinion that the exchange of kidneys for a monetary value violates these restrictions and is thus 'morally impermissible'.[30]

Slabbert is of the same opinion. She defines Kant as a deontologist. [31],[32] This means that he believed in absolute 'rights and wrongs that are determined by way of reason,' so should a person be in a situation where one has a choice, the right or rational thing to do would be to 'follow the call of duty without reference to the result or outcome.' [33] However should there be a conflict between a person's rights and duties, 'there is no indication of the manner in which the call of duty in opposite directions is to be understood,' and this is a weakness in Kant's theory. [34] With regards to the sale of human organs, Kant is clearly against it as he states the following:

> …a human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger. If he were so entitled, he could sell all his limbs. We can dispose of things that have no freedom, but not of a being which has a free will. A man who sells himself makes of himself a thing and, as he has jettisoned his person, it is open to anyone to deal with him as he pleases.[35]

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[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Deontology is the study of the nature of duty and obligation. It is derived from the 19th century reek word 'deont' which means 'being needed or necessary.' The Oxford Dictionaries – <www.oxforddictionaries.com/definition/english/deontology > accessed on 26/10/2013.

[32] Slabbert, M (2010) 13:2 *PELJ* 85.

[33] Ibid.

[34] Ibid.

[35] Ibid at page 86.

While this may be true to a certain extent, Kant's views on human dignity may contradict such an opinion. His approach is such that 'liberty is an undeniable attribute of human dignity because it allows a person, through his or her choices, to reveal his or her uniqueness.'[36] This could mean that a person is allowed to express his or her own decisions and act upon them. Thus if a person consents to having his or her kidney donated or even sold, such an act should be permissible in this light as such a person would be choosing to express his or her freedom in this regard.[37] It can further be argued that in Kant's discussion on treating one as having a value fixed upon them, he was discussing the treatment of individuals with each other and not necessarily one's exercise of free choice.

Rosen furthermore provides a suggestion towards a possible circumvention of the ethical debates against the sale of kidneys from live donors. He recommends kidneys to be sold at 'administered prices by a non-profit organization and allocated to the transplant centers that can organize the longest chains of transplants involving willing-but-incompatible donor-patient dyads.'[38] In this way, it is hoped to curb most ethical debates against the creation of a model for organ transplantation using live donors.

In addition to this, Beauchamp and Childress have devised four main principles of biomedical ethics which should be seen as a guideline when dealing with situations of this nature. Biomedical ethics has been defined as encompassing the 'examination of the ethics of all biomedical research, medicine and healthcare.'[39] The principles relevant are; autonomy, non-maleficence, beneficence and justice which shall now be discussed in further detail.

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[36] Blondeau et al. (2004) 9 *Journal of Applied Biobehavioral Research* 231.

[37] Ibid.

[38] Above at note 26.

[39] Biomedical Ethics & Medical Humanities Scholarly Concentration (BEMH) <http://bioethics.stanford.edu/education/bemh/ > accessed on 25/07/12.

A. Respect for autonomy.

- *Definition and background*

Autonomy initially referred to the self-governance or even self-rule of independent city-states.[40] Autonomy is thus synonymous with self-determination which has been illustrated in international law as the right of a State to 'determine its future free from the interference of a colonizer.'[41] It used to denote the freedom of States from colonial rule and has since been expanded to include individuals in such a way that the 'autonomous individual acts freely in accordance with a self-chosen plan.'[42] It is thus the 'capacity of an individual to govern himself or herself and to make his or her own choices.'[43]

The definition of autonomy varies from author to author and a precise meaning is often disputed. Personal autonomy has been described as covering 'self-rule that is free from both controlling interference by others and from certain limitations such as an inadequate understanding that prevents meaningful choice.'[44] It has also been determined as being analogous to 'the way an independent government manages its territories and establishes its policies.'[45] In this light, it can be argued that the autonomous individual should have freedom to make his or her own decisions regarding him or herself without any interference from society. In contrast, Beauchamp and Childress do also provide that a person of diminished autonomy 'is in some respect controlled by others or incapable of deliberating or acting on the basis of his or her desires or plans.'[46]

Autonomous action, in this regard, is said to involve 'normal choosers who act (1) intentionally, (2) with understanding, and (3) without controlling influences that determine their action.'[47] Respect for autonomy is thus the acknowledgment of a person's

[40] Beauchamp & Childress (2009) 99.

[41] Kreuter, A (2010) 19:2 *Minnesota Journal of International Law* 368.

[42] Beauchamp & Childress above at page 99.

[43] Blondeau et al above at page 231.

[44] Beauchamp and Childress above at page 99.

[45] Ibid.

[46] Ibid.

[47] Ibid at 101.

right to 'hold views, to make choices, and to take actions based on their personal values and beliefs.'[48] The individual's right in this regard can be mustered from an analysis by two philosophers; Immanuel Kant and John Stuart Mill.

- *Philosophical oversight*

Immanuel Kant is of the view that a person's respect for autonomy flows from 'the recognition that all persons have unconditional worth, each having the capacity to determine his or her own moral destiny.'[49] He goes on to provide that a violation of this right would be to treat the person 'merely as a means; that is in accordance with others' goals without regard to that person's own goals.'[50] This interpretation focuses on a moral necessity towards a respectful treatment of persons as 'ends in them-selves.'[51] Mill on the other hand focuses on an active strengthening and non-interference of a person's autonomy. He is of the opinion that 'society should permit individuals to develop according to their own convictions, as long as they do not interfere with a like expression of freedom by others or unjustifiably harm others…'[52]

This illustrates that the principle of autonomy encompasses two obligations; a positive and negative obligation. It is negative in the sense that 'autonomous actions should not be subjected to controlling constraints by others.'[53] The principle of autonomy however needs specification to function as a guide regarding conduct which will affect rights and obligations of liberty, privacy, confidentiality, truthfulness, and informed consent.'[54]

The principle is positive in that it 'requires both respectful treatment in disclosing information and actions that foster autonomous decision making.'[55] Contemporary

[48] Ibid at 103.

[49] Ibid.

[50] Ibid.

[51] Ibid at 104.

[52] Ibid at 103.

[53] Ibid at 104.

[54] Ibid.

[55] Ibid.

Kantians incidentally believe that we should 'assist (others) in achieving their ends and foster their capacities as agents, not merely that we avoid treating them solely as means to our ends.'[56]

Thus, in adopting the view points of both philosophers, it can be argued that one has the inherent right to make a decision regarding one's own organs in that they may decide whether it is appropriate or not to sell their own kidney for example or purchase one. Indeed if it would better a person's lifestyle or aid another's health, this should be seen as an acceptable personal choice which should not be interfered with by society as this would result in an instance of diminished autonomy. Several factors do indeed have to be taken into account in such decision making. The decision should not, for instance, 'endanger the public health, potentially harm innocent others or require a scarce resource for which no funds are available'.[57]

- *Pros and Cons*

This is not to say that a person's right to respect for autonomy should be granted unhinged in the medical context. This is because, although a person should be allowed to sell their organs, they may not be aware of the implications and consequences of such an action. A study conducted revealed 'after locating 305 sellers of kidneys in India, that persons who sold their kidneys generally worsened rather than bettered their financial position as a result of the sale, that some men forced their wives to sell a kidney, and that many sellers suffered a decline in health status.'[58] A second study further showed that 'sales of kidneys generally do not occur as a planned passageway from poverty to security, but rather function as a way of raising money to pay off high interest loans.'[59] Beauchamp however does argue that the selling and purchasing of a kidney need not involve the disrespect of persons nor should it be in itself seen as justification for 'moral repulsion or indignation.'[60]

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[56] Ibid.

[57] Ibid at 105.

[58] Beauchamp (2003) 29 *J Med Ethics* 272.

[59] Ibid.

[60] Ibid.

Thus, if one were to focus on the respect for autonomy solely as a foundation for allowing the devising of some sort of model for the regulation of kidney transplantation of live donors, it would appear that the only resistance towards it would be with regards to the issue of exploitation as viewed by Beauchamp. He is of the view that a market in kidneys would potentially 'produce a social situation in which virtually all kidney "donations" come from the poor, with the rich enjoying the availability of kidneys and escaping responsibility for donation (to relatives or to anyone).'[61] However, arguments based on these grounds and the grounds that vendors may be mistreated have been argued as being insufficient to warrant a complete prohibition in this regard. It has been stated that such a prohibition would result in a paternalistic treatment of people in society and would reduce the 'options available to potential kidney providers.'[62] This would thus impair one's autonomy in that one is hindered from participating freely in the exchange.[63]

Thus, it can be said that the moral arguments brought forward against organ trafficking can be said to hinder one's autonomy and as such, result in the treatment of people merely as means and not in accordance with their own choices, personal life plans and desires. It would be a blatant disregard of a person's right to self-determination and freedom. One should be permitted to make one's own decisions and not be hindered from choosing and realizing one's own moral fate.

B. Nonmaleficence and beneficence

- *Nonmaleficence*

Beauchamp and Childress define nonmaleficence as 'an obligation not to inflict harm on others.'[64] A physician's first obligation towards a patient has been said to be not to cause harm and thus an absolute reading of this principle would prohibit organ donations all together; including donations which may occur altruistically between family members. This

[61] Ibid.

[62] Rosen et al. above at page 12.

[63] Ibid.

[64] Beauchamp & Childress above at page149.

is because the removal of an organ from a healthy individual can lead such individual to the risk of 'acute complications due to surgery and anesthesia, as well as preoperative complications, and even possible long-term complications from the surgery itself.'[65] Beauchamp and Childress elaborate on this principle and provide examples of specific moral rules attached to it such as, '1) Do not kill; 2) Do not cause pain or suffering; 3) Do not incapacitate; 4) Do not cause offense; and 5) Do not deprive others of the goods of life.'[66]

- *Nonmaleficence vs. Beneficence*

The principle of nonmaleficence is, however, not absolute but rather 'only implies a *prima facie* obligation- one that can be overridden if there are compelling counter obligations.'[67] In this regard, it is important to mention the principle of beneficence which should coincide with nonmaleficence. This principle is defined as 'a statement of moral obligation to act for the benefit of others.'[68] Beneficence can therefore be seen as a positive obligation as opposed to nonmaleficence, which could be seen as a more negative obligation, as 'beneficence requires taking action to helping – preventing harm, removing harm, and promoting good – whereas nonmaleficence requires only intentionally refraining from actions that cause harm.'[69]

It is practically impossible to prevent all harm or to generate only benefits and thus it has been argued that there should be a principle of utility or proportionality adopted in such cases in that 'we produce a net balance of good effects over bad effects, including harms, burdens and costs.'[70] Put in another light; where the benefits that would be received by the donor, perhaps psychological and moral, outweigh the risks that would be encumbered unto the donor, perhaps physical and probably also psychological, then the donation

[65] Ross, L (2002) 30 *Journal of Law, Medicine & Ethics* 440.

[66] Beauchamp and Childress above at page153.

[67] Ross, L (ibid) at 440.

[68] Beauchamp and Childress above at page 197.

[69] Ibid at 151.

[70] Childress, F (1987) 85 *J. Contemporary Health L. & Pol'y* 87.

should be morally permissible.[71] The benefits to the donor need not be exclusively self-serving. Ross provides that 'It is reasonable and legitimate for a donor to include other-regarding interests in his or her calculation, as we are social beings.'[72] An adoption of this approach would suggest that there is no immorality in such an interest taking account of a monitory benefit.

The difficulty in using this approach would be in the determination of whether the benefits do indeed outweigh the risks. A suggested and appropriate method would be purely subjective in that the donor will determine for him or herself whether such a donation is worth the risk. This will depend on the donor's values and even life plan.[73] Thus, assuming that one is 'competent and thinking clearly, usually it is the potential donor herself who is best able to determine if the expected benefits are worth the risks.'[74] It also goes without saying that the donors need to be informed of all the risks involved in such a procedure. In addition to this, a physician's own judgment is also imperative in determining such an approach and he or she should not be coerced to perform such a procedure where he or she feels that they will be 'doing more harm than good.'[75]

Although providing a balance of the good and bad effects in determining the proportionality of the benefits adjacent to the risks is of great importance, it is not sufficient in this regard as 'a fair distribution of benefits and harms, burdens, and costs is required by the principle of justice.'[76]

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[71] Ross, L above at page 441.

[72] Ibid.

[73] Spital, A (2004) 13 *Cambridge Quarterly of Healthcare and Ethics* 108.

[74] Ibid at 109.

[75] Ibid.

[76] Childress above at page87.

C. Justice

- *Interpretation*

Beauchamp and Childress discuss, as a final principle of biomedical ethics, the notion of justice. Philosophers have explicated justice as including the terms '*fairness, desert* (what is deserved), and *entitlement*'.[77] Justice can thus be interpreted as;

'…fair, equitable and appropriate treatment in light of what is due or owed to persons. Standards of justice are needed whenever persons are due benefits or burdens because of their particular properties of circumstance, such as being productive or having been harmed by another person's acts. A holder of a valid claim based in justice has a right, and therefore is due something.'[78]

This analysis draws one to the conclusion that justice refers to the notion that one is entitled to something which is due to them but may only be received on a fair and equitable basis. This entitlement can also be interpreted and seen as a right which one holds in society. In determining the extent to which a person is a holder of such a right, the concept of 'distributive justice' is imperative in this instance.

- *Principles of Justice*

Justice has been said to comprise of two main principles; commutative justice (referred to also as the formal principle of justice) and the material principles of justice (also referred to as distributive justice).[79] In terms of commutative justice, an individual 'receives an equal share of resources based on the recognition that all humans are equal'; in this sense 'equals must be treated equally and unequal's must be treated unequally.'[80] This principle however lacks substance and is not relevant in this discussion.

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[77] Beauchamp & Childress above at page 241.

[78] Ibid.

[79] Ibid at 242. *Also see* Blondeau et al. above at page 232.

[80] Beauchamp & Childress above at page 241.

Distributive justice on the other hand is defined as 'fair, equitable, and appropriate distribution determined by justified norms that structure the terms of social cooperation.'[81] This principle 'distributes resources according to the needs of each person'[82] and is thus more relevant in this discussion than the formal principles of justice as it strives to rectify any 'social and natural imbalances and, consequently, to restore equality.'[83]

Certain principles have been determined to recognize the substantive properties for distribution.[84] These principles have been noted as being material and include the principle of need which is relevant in this particular discussion. The principle of need 'declares that social resources, including health care, should be distributed according to need (and) to say that a person needs something is to say that without it, the person will be harmed, or at least detrimentally affected.'[85] This notion can be applied to the case of organ transplantation. A person in a serious health predicament and in need of such an operation may be detrimentally affected, for instance he or she could die, if hindered from purchasing an organ from another who is voluntarily willing to bear the risks.

As stated earlier, there is a fear that a market in kidneys would result in an imbalance in that 'donations' would be received only from the impoverished individuals. This would inevitably lead to an inappropriate advantage where 'the purchase price would be set too high for low- and middle-income patients, allowing only the rich or very well-insured access to transplantation.'[86] This would result in an inequitable distribution and thus a failure of justice. One option of resolving such a problem could be argued as being to ban such sales altogether; however, 'a policy of banning sales may also cause us to neglect the

[81] Ibid.

[82] Blondeau et al. above at page 232.

[83] Ibid.

[84] Ibid at 242.

[85] Ibid.

[86] Rosen et al. above at page 11.

deepest concern of justice…, which is how to render the system of kidney procurement fair for all parties involved.'[87]

It is thus not accurate to say that a system of organ sales, allocation and procurement which is fair and equitable to all parties concerned is impossible to fathom as this would lead to an injustice. In addition to this, it would also not solve the problem of 'back-door transplantations' where people will go against the law and take it upon themselves to procure or sell organs when in a desperate situation. The more sensible thing to do which would be in the interest of both parties concerned would be to thus formulate such a system rather than try to curb it altogether as this would instead lead to more harm than good.

2.2 Conclusion

The ethical debate surrounding organ trafficking has been dealt with by various authors and can be said to centre on three main arguments; the issue of exploitation of impoverished individuals, the 'commodification of kidneys through their pricing' and an imbalance within society between the rich and the poor should such a system be structured.

These arguments are debatable as has been shown above. Looking into the principles of biomedical ethics, it has been shown that a regulation of a system of purchase and sales would be more beneficial than trying to eradicate it altogether. In terms of respect for autonomy, individuals have the right to be permitted to develop according to their own convictions provided that the rights of others are not interfered with.

Nonmaleficence and beneficence are two principles which go hand in hand. Nonmaleficence refers to an obligation not to do harm where as beneficence refers to the obligation to work for the benefit of others. Since it is impossible to do absolutely no harm or to produce only benefits, a balance has to be achieved in such a way that the benefits received by the donor outweigh the risks. Determining these risks are purely subjective

[87] Beauchamp above at page 273.

and are to be realized by the donor him or herself. Such benefits may include money or even just be of an altruistic nature.

In addition to this, the concept of justice, in particular distributive justice refers to an equitable and fair distribution of that which is due to an individual. Focus should be placed on the principle of need which provides that resources be allocated in accordance to the need of the individual. Thus if a person would be harmed or detrimentally affected should a resource not be allocated to him or her, he or she has a right to that resource. A refusal or hindrance of a person in dire health conditions, and in need of organ transplantation, from purchasing such an organ can thus be construed as an injustice.

Therefore it can be argued that, although there are many ethical arguments against organ trafficking, the inherent rights of individuals as discussed above need also to be taken into account. It should not be allowed that the ethical argument is sufficient enough to ban the sale of organs completely. A system of regulation which would benefit both the donor and recipient should first be attempted, tried and tested before a complete ban can be said to be justifiable.

Chapter 3

Organ Trafficking World-Wide: International and National Legislation

3.1 Introduction

The procurement of organs for transplantation is, in most societies around the world, condemned, in cases where the live donor does so for a pecuniary benefit. Various international conventions, as well as the specific legislation of certain countries, criticize this practice. In addition to this, the World Health Organization (WHO) has strict guidelines regarding the commercializing of human organs. The reason for this prohibition has been said to be that this trade, as discussed previously, may undermine one's dignity as well as reduce donors to being nothing more than mere objects or seen as commodities. These instruments may also in some cases go as far as to stipulate that the person's consent in the removal of such organs is not relevant in these circumstances.

To begin with, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime' of 2000 (hereinafter referred to as the UN Protocol), may be used as an example in this regard. Article 3 (a) of the Protocol includes 'the removal of organs' in its definition of 'trafficking in persons'. Article 3 (b) further goes on to provide that the 'consent of a victim' in this regard is irrelevant in these events.

A further international instrument which may be looked upon is the 'Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography' of 2000 (hereinafter referred to as the Optional Protocol to the CRC). This instrument explicitly provides that signatories thereof must ensure that their penal or criminal laws cover the 'offering, delivering or accepting, by whatever means, (of) a child for the purpose of … transfer of organs of the child for profit.'[88] This law specially caters for children and indirectly states that trafficking in organs of children should be considered as a criminal offence.

[88] Section 3 (1) (a) (i).

Additionally, the World Health Organization (WHO) released 'Guiding principles on human cell, tissue and organ transplantation.'[89] These guidelines explicitly provide the following prohibition in guideline number 5:

> Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.

Regard may also be had to the Summit which was convened in Istanbul from 30th April to 1st May 2008, which resulted in the passing of the Istanbul Declaration on Organ Trafficking and Transplant Tourism (hereinafter referred to as the Istanbul Declaration).[90] This summit was convened by The Transplantation Society (TTS) as well as the International Society of Nephrology (ISN).[91] The summit commenced as a 'direction by the World Health Assembly in 2004 as it adopted resolution WHA57.18.'[92] This resolution urged member states to adopt certain measures for the protection of the poorest and most vulnerable groups from transplant tourism, amongst other things, as well as placing special focus on organ trafficking.[93]

The Istanbul Declaration distinguishes between travel for transplantation and transplant commercialism; the latter being a policy or practice, where organs are treated as a commodity; and the former depicting the 'movement of organs, donors, recipients or transplant professionals across jurisdictional borders for transplantation purposes.'[94] The declaration clearly states that travel for transplantation becomes transplant tourism, and thus an offence, where its purpose is for organ trafficking, travel commercialism, or where 'the resources (organs, professionals and transplant centers) devoted to providing

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[89] As endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22.

[90] Delmonico, F (2009) 14 *Current Opinion in Organ Transplantation* 116.

[91] Ibid.

[92] Ibid.

[93] Istanbul Declaration; Preamble.

[94] Istanbul Declaration; page 2 definitions.

transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population.'[95]

The above rules and principles clearly set out the attitude to which the international community adopts towards the commercialization of human organs. The implementation or non-implementation of these international standards, however, varies from country to country.

3.2 Deceased and live donors

Several states have incorporated these principles and guidelines into their national legislation and further distinguish between deceased donors and live donors. For instance, South Africa, Israel and India are signatories to the UN Protocol as well as the Optional Protocol to the CRC.[96] This nations, with reference to their national legislation, shall now be discussed briefly.

a) South Africa

South Africa may be cited as one of the countries where the market for organs is flourishing. In December 2003, it was reported that 'police in South Africa and in Brazil broke up an international ring trafficking in human kidneys. The racket also involved people in Israel—and possibly even further afield.'[97] Although it is said that this particular operation has been brought to a standstill,[98] the practice of trading in organs still persists within the Republic.

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[95] Ibid.

[96] UN Treaty Collection < http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en#EndDec> accessed on 20/02/13. See also <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en>

[97] National Geographic News <http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPLorgantraffic.html> accessed 20/02/13.

[98] Ibid.

There are two pieces of legislation which may be looked into in this regard; the Human Tissue Act and the National Health Act.[99] To begin with, the Human Tissue Act deals with the donation as well as the sale of human organs from both deceased persons as well as living donors.

With regards to donations, the Act provides for the donation by a person of his or her organs, provided that certain requirements are met, such as the fact that such person be competent to make a will and is in the presence of certain witnesses; and such donation is only regulated in terms of the Act if it is to be made to a relative or institution such as a university or hospital as authorized in terms of the Act.[100] This is the position regarding those persons who wish for their organs to be donated after they have died.

For living donors, with regards to the payment of tissue (or in this case, organs), the Act provides that no person may receive payment for the supply of organs save for authorized or prescribed institutions who are receiving such supply for the purpose of transplantation into another human body or 'for the production of therapeutic, diagnostic and prophylactic substance', or for medical/dental training.[101] The Act also states in section 18 that consent is required in this regard.

A further piece of legislation to be looked at is the National Health Act which provides for the same regulations as the Human Tissue Act, but it contains a further provision which states that 'it is an offence for a person to sell or trade in tissue, gametes, blood or blood products, except as provided for in this Chapter.'[102] The Act further stipulates in Section 61(3) that 'An organ may not be transplanted into a person who is not a South African citizen, or a permanent resident to the Republic, without the Minister's authorization in writing.' This provides for further regulation of transplant tourism within the Republic but

[99] The Human Tissue Act 65 of 1983; repealed b y the National Health Act 61 of 2003.

[100] Section 2 read together with section 3.

[101] Section 28 read with section 19 and section 4 (1).

[102] Section 60 (4) (b).

which has, however, not curbed the trade. Instead it could be said to have merely shed light on it as seen from the convictions made in court.

- *S v Netcare*

In the case of *S v Netcare*[103], Netcare Kwa-Zulu (Pty) Limited, which is a parent company to a medical facility in Durban South Africa namely; St Augustine's Hospital, pleaded guilty to 102 counts related to instances where it allowed its employees to conduct illegal kidney transplantations, and also to use its facilities to conduct these activities.[104] The CEO of Netcare, along with 8 others (a nephrologist, two transplant administrative coordinators, four transplant doctors, and an interpreter), as well as the St Augustine Hospital, were charged alongside each other.[105] In terms of this scheme, which took place between June 2001 and November 2003, Israeli citizens who were in need of kidneys would travel to South Africa and have the transplant surgery conducted at the said hospital.[106]

The kidneys were originally harvested from Israeli citizens, but after some time it became clear that they would be obtainable for a lower price from Romanian and Brazilian citizens who were consequently conscripted.[107] The broker who was in charge of recruiting the suppliers as well as the recipients, Ilan Perry, would charge a fee of between USD $100,000 and $120,000 to the recipients; the original Israeli donors receiving $20,000 and the later Romanian and Brazilian donors receiving an average of $6000.[108] The patients were accommodated, chaperoned and given falsified documents to sign which would indicate that they were all relatives.[109] Netcare was paid up-front for its contribution and the donors were paid in cash.[110]

[103] Case No 41/1804/2010.

[104] Ibid.

[105] Ibid.

[106] Ibid

[107] Ibid.

[108] Ibid.

[109] Ibid.

[110] Ibid.

The company was charged in terms of the South African Human Tissue Act and the Prevention of Organized Crime Act of 1998; to which they pleaded guilty and entered into an agreement with the National Director of Public Prosecutions.[111] In terms of this agreement, the penalty imposed was as follows:

> a confiscation order of 3,800,000 South African Rand amounting to the benefit the company derived from the offences, plus a sentence of 4,020,000 Rand (in Sterling, respectively, £380,000 and £402,000) amounting to fines for each of the counts to which Netcare Kwa-Zulu (Pty) Limited pleaded guilty.[112]

Slabbert further states that there is a vacuum in the law regarding the legal concept of 'property' in that it does not extend to self-ownership; yet removed human tissue such as sperm, blood and ova are not restricted by any proprietary rights. [113] She provides that should there be recognition of property rights in one's own body, as well as parts of the body, this could balance out all interests including:

> society's interest in the fair treatment of all its members; the researchers' interests in academic recognition; the patient's interest in obtaining the best treatment possible (a new organ) and the donor's interest to be rewarded for the 'gift.'[114]

b) India

In 1994, India enacted the Transplantation of Human Organs Act (hereinafter referred to as THOA), in order to regulate the removal, transplantation and storage of human organs, as well as to curb the commercial dealings of organs thereto.[115] The Act provides for the removal of organs after a person has died provided that the donor had, in the presence of two witnesses (one of whom should be a near relative) , and in writing, 'unequivocally

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[111] Ibid.

[112] State v Netcare Zulu Limited < http://www.unocdc.org/cld/en/case-law/zaf/2010/state v. netcare kwa-zulu limited.html > accessed on 20/02/2013.

[113] Slabbert, M (2009) *Obiter* 500.

[114] Ibid.

[115] The Transplantation of Human Organs Act 42 of 1994; Preamble.

authorised at any time before his death, the removal of any human organ of his body.'[116] A near relative is defined in the Act to include a 'spouse, son, daughter, father, mother, brother or sister.'[117] The Act also provides that the removal, storage and transplantation of organs shall only be conducted in a place which is registered under the Act, by a medical practitioner who is registered in terms of the Act and shall only be carried out for therapeutic reasons.[118] This applies for both deceased and live donors.

In order to regulate the aim and purpose of the THOA, the Act provides for the formation of two authorities in this regard; the 'Appropriate Authority' (AA) and the 'Authorization Committee' (AC). In terms of Chapter IV, the AA is to be nominated by the Central Government who shall make such nomination for each of the Union territories. The AA is tasked with the registration and renewal of registration for the purposes of the Act.[119] This includes the suspension and cancellation thereof.[120] They are also entrusted with enforcing the appropriate standards to be held by hospitals in terms of THOA, and conduct inspections, regulations as well as investigations regarding a breach of any provisions of THOA.[121] The AC, on the other hand, is tasked with granting prior approval for the removal and transplantation of organs.[122]

Section 9 (1) of THOA specifically provides further that in the case of live donors, transplantation of an organ from a donor to the recipient shall only be permitted where the donor is a near relative of the recipient. The only exception to this would be if the AC has given its approval for this to occur.[123] It has been estimated that about 5,000 cases have

[116] Section 3 (2).

[117] Section 2 (i).

[118] Section (10) (1) and Section 11.

[119] Section 13 (3).

[120] Ibid.

[121] Ibid.

[122] Section 9 (3).

[123] Section 9 (1).

been brought before the AC in Tamil Nadu between 1995 and 2002.[124] Also, between 'January 2000 and May 2002, the Tamil Nadu AC had received 1,868 applications from live unrelated donors for approval out of which 1,559 were approved.'[125]

Despite the introduction of the THOA, it has been found that the curbing or bringing about of a reduction in organ trafficking in India has been unsuccessful and that 'The Act has become useless because it has not helped stop the commercialization of organ donation. In fact, it has increased over the recent past.'[126] This phenomenon can be accredited to the 'middleman' or 'broker'. The broker is well versed in the questions posed by the AC to donors and thus coaches his potential clients accordingly. One patient, who was interviewed in a study conducted, stated the following;

'I was told by the middleman to talk confidently to the AC and deny that I ever received money for donating my kidney.'[127]

Another patient quoted the following;

> I paid my broker his due as I was wheeled into the operation theatre. He didn't move away from the stretcher until I paid because he was not sure of me coming back alive. He made sure of getting paid for arranging a donor for me.[128]

This reveals the inadequacy of the system which was brought about by the THOA. In theory, it would appear to be a viable solution to the problem facing the nation; however in practice it has proven to only worsen the circumstances. The lack of economic pressure as well as standards, leads people to 'cut corners'.[129]

The government of India has recently introduced an amendment to THOA in 2011.

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[124] Muraleedharan,V et al (ibid) at 43.

[125] Ibid.

[126] Ibid at 47.

[127] Ibid.

[128] Ibid.

[129] Ibid at 48.

This bill is known as the 'Transplantation of Human Organs Amendment Bill, 2011.' The bill was introduced to mainly regulate the transplantation of organs from the deceased but also includes provisions which provide for the detailed functionality of the AC, as well as the modification of transplantation related forms and the 'Accreditation of laboratories by the National Accreditation board for laboratories set up related to transplant by Quality Council of India.'[130] These amendments made to the THOA seem promising. However, the success or failure thereto is yet to be viewed over the following years.

c) The People's Republic of China

The laws in China regarding the transplantation of organs from live donors to patients in need, currently permit this practice provided that the donor and the recipient are relatives.[131] This however has not hindered cases of illegal organ transplants from live donors.[132] What is most troubling, however, regarding the laws for organ transplantation in China, is not what is illegal in the nation, but what constitutes law in terms of transplantation for deceased donors.

In 1984, China passed a directive known as the 'Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals (hereinafter referred to as the 1984 Temporary Rules).'[133] These rules allow for the procurement of organs for transplantation from the cadavers of executed prisoners.[134] This is to be conducted in one of three instances; where the body of the prisoner has not been claimed

[130] Agarwal et al (2012) *Lippincott Williams & Wilkins* < www.transplantjournal.com> accessed on 22/02/2013.

[131]'China's Organ Trafficking Crackdown Increases Forced Organ Harvesting' by Wang Liang <http://www.theepochtimes.com/n2/china-news/chinas-organ-trafficking-crackdown-increases-forced-organ-harvesting-288008.html> accessed on 26/02/13.

[132] Ibid.

[133] Hemphill, J (2007)16 *Pacific Rim Law & Policy Journal Association* 431.

[134] Ibid.

by the family, where the prisoner has volunteered to have his organs removed subsequent to his death, and where his or her family has consented to such donation.[135]

This practice has been cited as being inadequate for the protection of prisoners due to the lack of 'clear legal parameters and the absence of enforcement measures' which result in the misinterpretation and misapplication thereof, and which lead to the 'physical abuse of prisoners.'[136] The 'Provisions on the Administration of Entry and Exit of Cadavers and Treatment of Cadavers' was introduced in 2006 but was unsuccessful in providing a solution for the mistreatment of prisoners who were chosen to be donors.[137] Cases have been reported where the organs of these prisoners are removed even prior to the death of the donors and in some instances, the mishandling of the executions would be deliberate.[138]

Speculations surround the use of these organs so procured for sale by the Chinese government to other nations such as Hong Kong.[139] This is in effect due to the supply of organ donors in Hong Kong being faced with a great shortage thereof, and thus patients often opt to travel to mainland China in order to undergo the necessary transplantations, even though many have been said to experience 'serious medical problems after their operation.'[140]

The United Nations Committee against Torture reviewed comments made by China's delegation to the UN, which was led by Ambassador Jin Yongjian in 1993, as follows: 'Removal of organs without permission of either the person or his family was not standard practice. There were, however, cases in which permission had been given to remove organs

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[135] Owen, A (1994-1995) 5 *Ind. Int'l & Comp. L. Rev.*499 – 500.

[136] Hemphill, J above at page 431.

[137] Ibid.

[138] Ibid at 432. Also see Owen, A above at page 495.

[139] Owen, A above at page 496.

[140] Ibid.

from the bodies of the persons executed.'[141] In addition to this, various judges and doctors who attended the execution of prisoners, including members of the Communist Party in China, have confirmed certain reports of organ harvesting, and it has been conceded that in some cases, organs were removed from live prisoners.[142]

These practices are in direct violation of international law standards. The United Nations Charter, of which China is a signatory State, provides that the United Nations is to promote the 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion', and all members pledge to cooperate with the UN to achieve this purpose.[143] This implies that China is therefore bound by basic human rights standards and the practice of 'taking organs from prisoners without their consent is not consistent with the purposes and principles of the Charter.'[144] In addition to the UN Charter, China can also be said to be in violation of the International Covenant on Civil and Political Rights (ICCPR) of 1966 which prohibits against subjecting one to 'torture or to cruel, inhuman or degrading treatment or punishment.'[145] This article is recognized as a customary rule of international law and the provisions of the ICCPR are 'declaratory of the law laid down in the Charter' which thus binds China indirectly.[146]

- China's claim to end the use of executed prisoners as organ donors

Human rights groups have been pressing China to abolish the procurement of organs from prisoners' cadavers, and to also alter its penal system which assists this practice.[147] These groups rely on the fact that China adopted international instruments as well as ethical standards which should be reason enough to do away with this blatant violation of human

[141] United Nations GAOR Committee Against Torture, 48th Session, Supp. No. 44A, U.N. Document A/48/44/Add. 1 (1993).

[142] Owen, A above at page 496.

[143] Article 55 read together with article 56; United Nations, *Charter of the United Nations,* 24th October 1945.

[144] Owen, A above at page503.

[145] Article 7.

[146] Owen, A above at page 504.

[147] Hemphill, J above at page 441.

rights.[148] These groups may have made an impact as seen from the recent declarations from the Chinese government officials.

Wang Haibo, who was appointed in 2011 by China's health ministry to lead a research centre which is designing a fair and efficient system aimed at the allocation of organs to people in need.[149] He has been said to have acknowledged that the practice of using death-row inmates as a main source is 'neither ethical nor sustainable.'[150] In addition to this, the vice-minister of health, Huang Jiefu, has been cited as stipulating that China shall, within 5 years, abolish the act of transplanting organs from executed prisoners and effect means of encouraging more of its citizens to become donors.[151] The success or failure of these measures is, however, yet to be seen.

d) Iran

Iran can be seen as the only nation in the world which has an effective live donor program which facilitates the donation of organs from a live donor (related or not) to a recipient for a monetary reward. While this may seem unethical in the international community, the Iranian model has depicted great success and can be argued to have in fact saved more lives than what would have been the case without this model.

Iran's laws regarding the use of donors from cadavers are such that a donor will consent to this prior to his death, either by way of a written will or a signed donor card, or with the consent of the next of kin.[152] Once the brain death of the donor has been confirmed, 'cadaveric organs and tissues of the patient are used for transplantation.'[153] The difficulty associated with the use of this method is that there is a shortage of cadaveric donors; a

[148] Ibid.

[149] 'China to stop using organs from executed prisoners' – The Guardian <http://www.guardian.co.uk> accessed on 25/02/2013.

[150]Ibid.

[151] Ibid.

[152] Larijani, B et al. (2004) 36 *Transplantation Proceedings* 1242.

[153] Ibid.

study revealed that as of the year 2002, only 6% of donations for renal transplantations were made from cadavers.[154] The introduction of the law permitting the use of cadaver organs from brain dead patients (The Organ Transplantation and Brain Death Act of 2002) did see a slow increase in renal transplantations; however, it has not been sufficient enough to meet the rising demand.[155] Furthermore, it has been cited that the survival rate of the transplanting organs from living donors as opposed to cadavers has been said to be superior.[156]

Before 1988, with regards to donations made from live donors, these were allowed to only be conducted between relatives.[157] This changed drastically in 1988 when Iran introduced a controlled living unrelated donor (LURD) program which would exist alongside the already prevalent living related donor (LRD) program.[158] A lot of patients tend to rely on the LURD program because of either cultural reasons, or because they wish not to subject their families, particularly their wives and children, to any 'emotional or physical pressure.'[159] Studies have also shown that the patient and graft survival results between the LURD and LRD transplants are equivalent,[160] and the introduction of the LURD program has in fact been beneficial in this regard.

In terms of this model, a patient wishing to rely of the LURD program would be referred to the 'Iranian Patient's Kidney Foundation,' which is also known as the 'Dialysis and Transplant Patients Association,' for the purpose of registration.[161] This is an organization which was founded in 1978 and has over 100 branches country-wide.[162] It is a charity

[154] Ibid.

[155] Nejatisafa, A et al (2008) 86 *Transplantation* 937.

[156] Larijani, B et al above at page 1243.

[157] Ibid at 1242.

[158] Ibid.

[159] Ibid.

[160] Ibid.

[161] Mahdavi-Mazdeh, M (2012) 82 *Kidney International* (Public Forum) 629. Also see Nejatisafa et al. above at page 937.

[162] Mahdavi-Mahdeh, M above at page 629.

association whose members are often volunteering patients who themselves suffer from chronic renal diseases, or whose families have no financial incentive.[163] The registration is free for both the donors and the recipients, and will include an assessment done by physicians who work in the Patient's Kidney Foundation's clinics.[164]

The donor as well as a next of kin will then receive a national identification foundation card, an informed consent will be obtained and the recipient and donor are then introduced to each other.[165] The two are then referred to a nephrologist for further evaluations and should the donor have borderline laboratory data, he is barred from donating his organs.[166] The nephrologist also, during his evaluation, informs the patient that if he/she is feeling coerced or pressured into making the donation, an appropriate excuse regarding medical unsuitability of the donor would be given on his behalf and he or she would not have to undergo the surgery.[167] This is to ensure the protection of donors, women in particular, and it can be said that this has been quite successful as seen from results which have shown that the male to female ratio has varied from 3:1 to 9:1 from studies conducted in different cities.[168]

After the evaluation by the nephrologist, a negotiation is conducted between the recipient and the donor, where extra compensation will be discussed.[169] This takes place at the foundation and no records are kept in this regard.[170] Additionally, the foundation may introduce a new potential donor to the recipient should the donor ask for an extravagant

[163] Ibid. Also see Larijani, B et al above at page1242.

[164] Note 162 above.

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] Larijani, B above at page 1242.

[169] Note 162 above.

[170] Ibid.

amount of money.[171] Once agreements have been made in this regard, the operation can then be conducted.

After the operation, the donor 'presents the documents of the transplantation to the designated charity office called Charity Foundation for Special Diseases (CFSD) to get the 'gift of altruism' and 1 year of medical insurance.'[172] The CFSD is a nongovernmental organization and the reward which is reimbursed is done through this organization but allocated from governmental funds.[173] Transplantations are accordingly performed at university hospitals and its expenses thus paid by health insurance agencies and the Ministry of Health and Medical Education.[174]

The Iranian model is therefore structured in such a way that the dignity of the patients, women in particular, is protected and that they are safe guarded from the potential coercion which could be brought on from family members or others. This is done through the careful and scrupulous examination of donors beforehand. The model has also been a great success as seen from studies which have been conducted. For instance, the renal transplant waiting list was eliminated 11 years after the introduction of the LURD program.[175] It has also been said that the number of patients suffering from end-stage renal failure who await transplantations has been reduced significantly.[176]

This does not mean, however, that the system is flawless. Studies have shown that the quality of life of the Iranian LURDs 'may be low and they may be at risk of experiencing more stressful life events.'[177] In addition to this, it may also be difficult to refute the ethical issues surrounding the exploitation of the poor as studies have further revealed that all

[171] Ibid.

[172] Ibid.

[173] Ibid. Also see Larijani, B above at page 1242.

[174] Ibid.

[175] Larijani, B et al above at page1242.

[176] Nejatisafa, A above at page 937.

[177] Ibid at 942.

'LURDs have been from the low or middle class socioeconomic classes. In one study, 84% of LURDs were poor and 16% middleclass.'[178] Although this may be the case, the model is still to be commended for its successes thus far. Iran has been cited as having one of the most 'success transplantation programs in the Middle-East Region' and, due to the Islamic culture which prevails amongst the majority of people in Iran, it has been stated that there is no organ transplant commercialism in the country.[179]

3.3 Conclusion

The international standards surrounding organ trafficking are formulated with good reason; the dignity of persons is to be protected and the prevention of coercion of donors to sell their organs should indeed be avoided. However, when looking upon the regulations in place in certain nations, it can hardly be said that a solution towards the abolition of organ trafficking can be achieved successfully.

South Africa, for instance, has promulgated clear and concise laws which criminalize this trade but the enactment of this legislation has seen limited success. The laws are insufficient to bring about a complete abolition thereof. India is a further example of this failure. The structure which has been put in place by the government appears on the surface to be thorough and with the potential to yield promising results. This system has, however, only worsened the situation. The committees which were put in place follow guidelines and set rules that have been mastered by the 'brokers' or 'middlemen' who have adopted ways of bypassing and eluding the system altogether.

The shortage of organs for transplantation can also lead to instances of extremity. An example of this situation can be seen in China, where the government itself has enacted laws which have led to the mistreatment of prisoners on death-row. These laws amount to a direct violation of the basic principles of human rights such as the right not to be tortured.

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[178] Note 175 above.

[179] Ibid at 1241 – 1242.

These instances reveal that even with laws put in place and abolitions made apparent, the practice of organ trafficking will still persist against all odds and lead to the mistreatment and even death of donors. Iran's laws have revealed the benefits of having a system in place which not only eradicates the broker during these practices, which is the main problem in India, but also saves the lives of thousands by disposing of the waiting completely after only eleven years of having this law in place. Even though the law is not perfect and still contains certain flaws which need to be ironed out, the success rate is more prominent than would be the case if the government had opted to abolish the practice of the transplantation of organs for a reward completely as seen in other nations.

Chapter 4

Proposals for the regulation of organ transplantation

4.1 Introduction

As has been surveyed previously, the occurrence of organ trafficking worldwide is not something which can be eradicated completely. The previous chapter's discussion on the laws of various nations regarding the banning of organ trafficking is evidence as to how the adoption of legislation which is aimed at dissolving transplant tourism has been unsuccessful, if not in fact detrimental. India's adoption of the Transplantation of Human Organs Act, for instance, has shown a change for the worse and South Africa's legislation has also been unsuccessful in this regard. The situation in China also leaves much to be desired and can be seen as an example of how the desperation for organs can lead to extremities, and how nations themselves can take advantage of this desperation to the detriment of individuals.

Inclusions of laws which are able to balance the respect for the dignity of human beings and the sanctity of life is needed in order to overcome the problems associated with an illegal sale of organs on the black market. An absolute abolition is not the solution, however, but a government regulated system which can not only dispose of the 'middleman' or 'broker', but which can also cater for the health of donors post surgery may encourage more people to donate and perhaps even assist them financially. While it is true that most vendors are frivolous with their payment and may end up in worse off situations financially, this is a practice which can also be worked upon through counseling and other measures taken.

It should be emphasized, also, that having a regulated system in place reduces the risk of donors being deceived during this trade. The 'broker' or 'middleman' is not often truthful in relaying the true outcome or circumstances involved with the removal of a kidney. In addition to this, the price at which a kidney is sold for is often determined by these middlemen, more often than not, at a great disadvantage to the donor. If a regulated system

of donation were in place, this practice could be eradicated or at the very least monitored in a more effective manner.

4.2 Monetary value of a kidney

There has been no specific value for human organs which has been documented as most countries world-wide have abolished the practice of selling one's organ for a monetary profit.[180] Media and other reports have, however, given an indication of what a kidney may cost on the black market. In South Africa, for instance, the price of a kidney has been seen to go for between USD $100,000 to $120,000; where the donor receives only about USD $6,000 to $20,000.[181] It has also been reported that a syndicate which was operating in South Africa would offer donors about USD $10,000 for a kidney and would subsequently sell this kidney for about $120,000.[182]

It has been further reported by the British Broadcasting Corporation, which did a report on impoverished people in Madras who were targeted for their organs, that individuals could sell an organ for as low as $750; which organ would thus be sold for up to $37,000 and most of this amount would go to the broker.[183] In Bosnia, a kidney can be priced for up to $6,800; where as in the United States, an illegal kidney transplant can go for up to $100,000.[184] Furthermore, in certain parts of Kenya, a kidney can be worth up to $1,800.[185]

This is an unfair practice and the sale of one's kidney in this manner also does not allow one to determine what would be helpful or beneficial to them in the long run. It is logical to assume that donors would sell their kidneys at a price that they deem fair and equitable. If the government were to intervene in the form of a regulated system and set a price which is already pre-determined, it may allow for a fair value determination for all the parties

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[180] Slabbert, M (2008) 73(1) *Koers* 80.

[181] S v Netcare, Netcare Kwa – Zulu Natal (PTY) Limited; Case No 41/1804/2010.

[182] Note 180 above.

[183] Ibid.

[184] Watson, C (2006), *The Organized Crime of Organ Trafficking,* LLM Thesis, University of the Free State. Pages 63 and 66.

[185] Ibid.

involved.[186] Should participants feel that they are selling or buying a kidney at a fair price, it may prevent them from seeking other options through the black market.[187]

Chandis[188] suggests that such a practice may even occur in an open market setting. In the determination of the price of a kidney, she suggests that the market forces could determine the price based on the supply and demand;

'The scarcer a resource, such as a kidney, the higher the price; a higher price leads to more incentive to supply the kidney. The more kidneys exist in the market, the less valuable the organ becomes, and the price naturally lowers.'[189]

Nevertheless, determining the value of a kidney will always be a challenge. Regarding a monetary form of compensation, a 'market price' for a kidney has been predetermined by Nobel laureates, Gary Becker and co-worker, by analyzing certain variables such as; the value of a person's life, the amount earned annually by such person, as well as the risk of the person's death (in percentage) from the nephrectomy (the surgical procedure performed to remove one's kidney).[190] This could be one of the guidelines taken in the formulation of a regulated governmental system of organ trade and specialists could be hired in this regard.

There is, however, always the risk of the poor person being exploited in an open market. The 'living provider organ market system may result in a disproportionate number of poor people selling their nonviable organs, such as kidneys, to benefit a disproportionate number of rich organ purchasers.'[191] The result of this could be more poor people living in worse off physical states because of an economical disadvantage.[192]

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[186] Chandis, V (2006) 27 *University of Pennsylvania Journal of Int'l Econ Law* 233.

[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Slabbert, M above at page80.

[191] Chandis, V above at page 229.

[192] Ibid.

A possible solution for this could be the inclusion of health insurance with every nephrectomy, which could cover the recovery stage and medical follow-ups which would be needed in insuring better health care for donors who cannot afford it financially. Within the Iranian model, health insurance is provided.[193] This insurance has been noted as being insufficient and it has been suggested that as an added incentive to donate one's kidney, there could be an inclusion of various forms of compensation such as 'health insurance, life insurance, disability coverage or social benefits.'[194]

Matas[195] is also of the opinion that a regulated system can be to the benefit of all participants. They suggest the following principles; 'compensation to the donor by the government or insurance companies; allocation of kidneys by a predefined algorithm [similar to the United Network for Organ Sharing (UNOS) algorithm] so that everyone on the list has an opportunity for a transplant, regardless of geography or socioeconomic status; full donor evaluation; informed consent; oversight; long-term follow-up; and treatment of the donor with dignity and appreciation for saving a life.'[196],[197] With regards to long-term follow-up and health care involved, the authors recognize that such a regulated system would not be practicable in most countries, but could be realistic in countries where long-term follow-ups and healthcare could be guaranteed.[198] For this reason, they suggest that the donors should be limited to geographical areas where this would be feasible.[199]

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[193] Jafar, T (2009) 54 *American Journal of Kidney Diseases* 1151.

[194] Ibid.

[195] Matas, A et al (2008) 13 *Current Opinion in Organ Transplantation* 379.

[196] Ibid at 380.

[197] UNOS (United Network for Organ Sharing) is a private non-profit organization which manages the organ transplant system in the United States of America, under contract with the federal government. 'UNOS - About Us' <http://www.unos.org/about/> accessed on 22/04/2013.

[198]Matas, A et al above at page 380.

[199] Ibid.

Another suggestion was made by Reddy and Radcliffe- Richards who stated that poor post operative care can be prevented with a carefully monitored regulated system.[200] They suggest that prior to the transplantation, the donor would be counseled and information provided to him or her by an NGO in order to ensure informed consent as well as 'a high standard of post-operative care.'[201]

An interesting number of suggestions have been broached by Kwitowski.[202] He devises to a two-part test which should be considered in the development of a system in this regard. The first part of the test would be to satisfy the minimum ethical requirement which is the respect for autonomy; and the second part of the test would be to meet the demand for transplantable organs.[203] In terms of this method, the first question would be whether the system meets the 'minimum level of respect for autonomy' and if it does, in order for it to be implemented; one must determine how well it meets the demand for transplantable organs.[204] Kwitowski is of the opinion that only a minimum level of respect for autonomy needs to be met because a system with the maximum 'net satisfaction of these requirements' is not essentially the most appropriate system.[205] In addition to this, Kwitowski essentially appears to be more in favor of a system which would lead to an increase in the supply of transplantable organs.[206] In light of the circumstances, he emphasizes that the situation is dire, and rightly so because people are indeed dying and this fact should be kept in mind at all times.[207]

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[200] Radcliffe – Richards, J et al (1998) 351 *The Lancet* 1951 – As quoted in: Pearson, E (2004) 'Coercion in the kidney trade? A background study on trafficking in human organs worldwide.' <http://www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf> pg 15. Accessed on 22/04/2013.

[201] Ibid.

[202] Kwitowski, B (2005) 9 *Journal of Medicine and Law* 141.

[203] Ibid at 143 – 144.

[204] Ibid.

[205] Ibid.

[206] Ibid.

[207] Ibid at page 143.

He also analyses suggestions made by various authors who refer to 'indirect incentives' such as paying for funeral costs (with regards to deceased donors), covering travel expenses, providing tax credits, presenting donors with certain plaques or medals, or awarding prisoners with a lesser sentence.[208]

Coleman also refers to non-cash payments or rewards such as the donor and their family being given priority if they would subsequently require transplantation of organs, or 'intra family donors.'[209] In terms of this plan, if a donor's organ is unsuitable for a family member, this donor could 'trade' his kidney for the organ of another donor who is a suitable, compatible match. [210]

4.3 Pre-screening of recipients and donors

Pre-screening both the recipient and the donor should take place in the first instance before any surgical procedures are done. This screening should consist of a number of different interviews conducted by various specialists. Matas, A[211] suggests that national criteria regarding tests and results required in the donor evaluation can be established and the evaluation coordinated by a regional organ procurement organization (OPO) before being reviewed at the OPO by a panel consisting of 'a transplant surgeon, a transplant physician, a social worker, an OPO coordinator, and a donor advocate.'[212] An extensive evaluation of the donor would ensure the health care of both patient and donor.

It is also noted that in certain parts of the world, women and children may be coerced into donating their kidneys against their will.[213] In order to ensure the protection of donors from this form of coercion into donating a kidney and to ensure that donors, as well as patients, have been informed fully and understand the consequences of proceeding further,

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[208] Ibid at page 149.

[209] Coleman, P (1996) 31 Valparaiso *University Law Review* 17.

[210] Ibid.

[211] Matas, J (2006) 1 *Clinical J of Am Soc of Nephrology* 1129.

[212] Ibid.

[213] Radcliffe- Richards, J et al. (1998) 351 *The Lancet* 4.

a pre-screening of both participants can achieve this. The system in Iran provides for such a thing. Participants are first required to register with the government and what follows is a thorough course or process of informed consent as well as a rigorous evaluation of donors.[214] In addition to this, no 'middlemen' are involved in this process.[215] After this has been conducted, participants may be interviewed by a nephrologist to ensure that the pair is a suitable match; and it can also be ensured that persons are not coerced into selling their organ.[216] This is done in such a way that the nephrologist would have a private screening with the donor and advise them that the excuse can always be made that she or he is not medically suitable for the procedure; in which case the process will be stopped.[217]

4.4 Change in legislation

As stated previously, most nations world-wide are against the idea of having donors rewarded financially for donating their kidneys. There are also various international conventions which are strictly against this practice such as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, as well as various guiding principles released by the World Health Organization. These instruments, including national legislation, set the tone for organ transplantation in terms of what is acceptable and what may not be in this regard and for good reason as there have been many instances of abuse related to organ trafficking. However, it has already been shown that this stance taken has been ineffective and perhaps even made situations worse for various poverty stricken areas worldwide. It has to be remembered that as long as there is a high demand for organs, there shall always be operations in place, whether legal or not, to try to meet this demand.

In a democratic nation, public opinion is an aspect taken into account in the development of legislation. In this light, studies have shown that the public tends to be amenable to the idea

[214] Jafar, T above at page 1150.

[215] Ibid.

[216] Mahdavi-Mazdeh, M (2012) 82 *Kidney International* (Public Forum) 629.

[217] Ibid.

of purchasing an organ in order to save their life.[218] 56% of participants in a survey conducted stated that they would purchase a necessary organ or tissue in order to save their life or the life of a relative with a fatal disease and who is in need of such tissue in order to be cured.[219] In addition to this, various studies have yielded almost similar results in this regard. A survey which was conducted in 1992 jointly by UNOS and the National Kidney Federation retrieved results showing that 48% of respondents were in favor of some type of financial or nonfinancial reimbursement being offered in order to raise the number of deceased donors; of these respondents, 65% of those aged between 18-24 were in favor.[220] Furthermore, medical journals published surveys which yielded results showing that between 50% and 75% were in favor of incentives being put as policy.[221] A more recent survey conducted in 2006 by the John Hopkins School of Public Health evaluated the attitudes of different ethnic groups towards the acceptability of introducing incentives and received the following results:

'Among individuals already willing to become living donors, 50–70% of African Americans and about 50% of Hispanics endorsed tax breaks or payments from government or employers to living donors.'[222]Also, in the Netherlands, a recent poll showed 62% in favor of 'a system based in compensation for donors.'[223]

These results are indicative of a more positive attitude having been adopted towards compensation being offered to donors for their organs. It can also be stated that such an attitude may also indicate that there are in fact more people willing to engage in an illegal trade of organs where their lives or the lives of a loved one are at stake. This may subsequently lead to more harm being done to donors and recipients than would be the case within a regulated system. It is therefore rational to deduce from this that, logically

[218] Matas, A et al. (2008) above at page 381.

[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] Ibid.

[223] Ibid.

speaking, a system which can provide for the needs of both parties provides for a safer alternative and is more likely to reduce the risk of exploitation of the poor if properly set up. Taking the public's opinion into account, it can be assumed from the results of various surveys and studies conducted that the majority of the public would most likely be in favor of such a system within the legislation.

4.5 Religion

Live organ donation cannot be seen as a concept which would be freely welcomed in all societies. There are a number of impediments without even beginning to discuss the idea of offering organ donation for a reward or other form of compensation in order to encourage members of society to donate their organs with more frequency. One of these impediments can be said to be religion. Different religion scholars have different views on what specific religions dictate on the subject of organ donation. It has been found that 'No religion formally obliges one to donate or refuse organs.'[224] In addition to this, there is no religion which formally forbids the practice of living organ donation.[225] Despite this view, people of different religions as well as religious leaders may also have their own religious opinions regarding this topic which could either be in favor of organ donation or against it completely.

It has been estimated, based on an analysis of more than 2500 censuses, population registers and surveys, that 32% of the world's population are Christian (2.2 billion people), 23% are Muslim (1.6 billion people), 15% are Hindus (1 billion), 7% are Buddhists (500 million), and the remaining 6% (400 million) practice various traditional or folk religions; including Chinese folk religions, African traditional beliefs, Australian aboriginal religions and American Indian religions.[226] For this reason, an analysis of the beliefs of Christians, Muslims and Hindus (the top 3 most followed religions) will be conducted in order to

[224] Bruzzone, P (2008)40 *Transplantation Proceedings* 1064.

[225] Ibid.

[226] The Washington Times – '84% of the world population has faith; a third are Christian' <http://www.washingtontimes.com/blog/watercooler/2012/dec/23/84-percent-world-population-has-faith-third-are-ch/> accessed on 04/05/2013.

gather a further understanding on where these religious beliefs lie regarding organ donation. It will also be revealed that interpretation plays a big role in this regard.

4.5.1 Christianity

As has already been gathered, 32% of the world's population belongs to the Christian faith.[227] This means that Christianity holds the largest number of believers in the world. There are various denominations of Christianity including but not limited to Anglicans, Catholics, Methodists, Orthodoxies and others. Most Anglican, Protestant and Catholic scholars are of the view that organ donation is 'an act of selflessness' and accordingly, they approve of transplantation. [228] Support for this is found in a declaration from the previous Pope Benedict XVI when he announced that he carries a donor card with him at all times.[229] In addition to this, his predecessor Pope John Paul II also publicly acknowledged his support for organ donation and declared it 'a praiseworthy example of Christian love.'[230] In 2007, the Church of England went further to announce that organ donation is a Christian duty.[231] Furthermore, the book of John in Chapter 15 verses 12-13 states the following; 'This is my commandment, that you love one another as I have loved you. Greater love has no one than this, that someone lay down his life for his friends.'[232]

In 1990, a declaration was made jointly by the Catholic and Protestant Church in Germany in which they also encouraged organ donation.[233] Accordingly, it is also reported that major protestant denominations, including the Pentecostal and Presbyterians, either support organ donation or do not object to it being practiced.[234] In 2005, 'the head of the Greek Orthodox Church, Archbishop of Athens and All Greece Christodoulos announced that he

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[227] Ibid.

[228] Oliver, M et al (2011) 26 *Nephrol Dial Transplant* 438-439.

[229] Ibid.

[230] Ibid.

[231] Ibid.

[232] The Holy Bible; English Standard Version.

[233] Oliver, M above at page 439.

[234] Ibid.

and the members of the Holy Synod had all signed organ donor forms.[235] Neither the Anabaptists, for instance the Amish, nor the Mennonite or Brethren Churches have any particular objections towards organ donation either.[236]

There exists a slight difference in beliefs regarding the Mormon Church and Quakers, but only in so far they regard such a practice to be left to the decision of the individual.[237] Jehovah's Witnesses are also distinct in this regard. From the 1960's, transplantation was not allowed as they believed that such operations resulted in a cannibalistic act in that one would be 'living off the flesh of another human.'[238] This view was revised in 1980, however, and now transplantation is permitted provided that it is the individual's choice and no blood is transplanted during this process.[239] The Jesus Christians, which is a small group of Christians who practice communal living, strongly encourage living organ donation.[240] Fifteen out of twenty eight of this group's members have in fact already donated a kidney.[241]

From this analysis, it is clear that organ donation, amongst a majority of Christians, is not particularly an issue in the sense that it would appear to in fact be praised rather than shunned. The concern would come where the suggestion of providing a reward or compensation for donating an organ is put forward. There are split views in this regard. In 1991, in his address to the First International Congress of the Society for Organ Sharing, Pope John Paul II stated the following;

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[235] Ibid.

[236] Ibid.

[237] Ibid.

[238] Ibid.

[239] Ibid.

[240] Ibid. Also see Bruzzone, P above at page 1064.

[241] Ibid.

"In effect, the human body is always a personal body, the body of a person. The body cannot be treated as a merely physical or biological entity, nor can its organs and tissues ever be used as item for sale or exchange."[242]

This statement clearly reveals the beliefs of the pope regarding a religious outlook on organ sale. However, if one were to look back at a statement made by Pope Pius XII to a group of ophalmologists which concerned the donation of one's cornea;

"Moreover, must one, as is often done, refuse on principle all compensation? This question remains unanswered. It cannot be doubted that grave abuses could occur if payment is demanded. But it would be going too far to declare immoral every acceptance or every demand of payment. The case is similar to blood transfusions. It is commendable for the donor to refuse (compensate); it is not necessarily a fault to accept it." [243]

Pope John Paul II who succeeded Pope Pius XII did go on later to state that using an organ as a commodity would violate one's dignity and should be seen as immoral,[244] but it cannot be said that his predecessor was wrong in stating the opposite to an extent. Pope Pius stated that it would be going too far to condemn every acceptance or demand for compensation. The question is indeed unanswered because it is unclear as to what extent one would state that it is immoral to receive any form of compensation for one's organs where we live in a world where it is acceptable for people to sell their sperm, ovaries and even blood for money. Agreeing to compensation would be a choice; God gave man free will and as a Christian myself, I see no fault in allowing man to exercise his or her own free will especially where it would save a life.

This then leaves the issue regarding the violation of one's dignity and also the possibility for other grave abuses. In a system where organ donation is regulated, it may be possible to

[242] Bruzzone P above at page 1065.

[243] Ibid at 1066.

[244] Ibid.

fashion it in such a way as to prevent these violations. This is not to say that one's religious beliefs should be done with all together, but instead to provide people with a safe option which could also in the process end up saving millions of lives. Interpretation of the different scriptures is usually a great deciding factor and guidance can always be sought from religious leaders before any decision is made.

4.5.2 Islam

The Islamic faith encapsulates 23% of the world's population, making it the second highest followed religion worldwide. It is prohibited, in terms of this religion, to violate the human body whether the person is alive or dead.[245] However, the principle of *al-darurat tubih al-mahzurat* (necessity overrides prohibition) is an important and often deciding factor in cases of uncertainty.[246] This is of particular significance to this discussion because altruism is an essential principle on its own and placed highly in the Quran;
'Whosoever saves the life of one person it would be as if he saved the life of man-kind.'[247]
Violating the human body in order to save a life could then possibly be seen as a necessary outcome where this principle could be applied.

The principle of necessity overriding prohibition has indeed been used in the past to support the usage of pork insulin and porcine bone grafts.[248] In addition to this, the UK Muslim Law Council in 1996 released a religious ruling proclaiming organ transplantation to be in keeping with the Islamic faith.[249]Donor cards being held by Muslims in the UK was subsequently accepted and live donation viewed as 'an act of merit.'[250] Although this concept was endorsed by other Muslim countries including Egypt, Iran and Pakistan, there is still reluctance to accept this norm amongst the individuals themselves; particularly

[245] Oliver, M above at page 438.

[246] Ibid.

[247] The Quran; Chapter 5:32.

[248] Oliver, M above at page 438.

[249] Ibid.

[250] Ibid.

regarding deceased organ donation.[251] Indo-Asian Muslim scholars, for instance, are more often than not less approving of organ donation than are the Arab Muslim scholars.[252]

One may also take into account a statement made by Sheick M.M Sellami, Grand Mufti of the Republic of Tunisia at the Third International Congress of the Middle East Society for Organ Transplantation in 1992 as follows; '… according to Islam a human being is not the owner of a part of the whole of his body. In any case, organs should not be traded, but donated' and later on 'I am afraid that these drug gangs cold use their network overseas to start trading in human organs.'[253]

Therefore, as stated earlier, there is no religion which strictly forbids organ donation, and in the Muslim faith, it seems to conclude on an interpretation of the Quran and various principles depicted therein. The question which stands would be to what extent does the principle which depicts that any prohibition may be overridden by necessity allow for people to donate their organs and receive compensation for doing so? This notion has been endorsed by various Muslim regions as seem in Iran which has even developed a model for organ donation in this respect. Perhaps there should be certainty brought forward on the topic by religious scholars and perhaps even religious leaders in order to educate the public on what the religious implications would be in this regard.

4.5.3 Hinduism

Hinduism is the third most followed religion in the world, with over 1 billion followers predominantly in South Asia.[254] Hindus believe in reincarnation and also that the acts of a person in this life will depict or determine what they reincarnate to in the next life.[255] They also believe that helping those who are suffering as well as selfless giving is third placed in

[251] Ibid.

[252] Ibid.

[253] Bruzzone, P above at page1066.

[254] Oliver, M above at page 440.

[255] Ibid.

the ranking of virtuous acts (*Niyamas*).[256] Therefore, it can be said that there is no rejection per se of organ donation in general. In fact, it has been stated that the concept of using one's body parts to benefit others is deeply embedded in the mythology of Hinduism; an early portrayal of xenotransplantation being depicted by the deity, Ganesha who is portrayed with the head of an elephant.[257]

The concept of Dharma (righteous living) may also be seen as supporting the concept of organ donation. In terms of this, 'that which sustains is accepted and promoted' and this could be used to support organ donation.[258]The only restraint would be that the organ donation should be imposed as the very nature of Dharma.[259] Every act and intention should be Dharmik, so an organ may only be donated if it has beneficial results.[260] A literal interpretation of this concept could lead one to the assumption that endorsing a model where organ donation is accepted with the added incentive of compensation or reward would not be entirely rejected in terms of the Hindu religion.

With regards to cadaveric organ donation, however, it may be a different situation altogether. This is because of the rites observed after death which include the burning of the body of the deceased whilst in the presence of the family.[261] Religious Hindu individuals are thus unlikely to donate organs from cadavers. [262] However, it is important to keep in mind that it all falls on interpretation and perhaps even guidance from religious leaders on the matter.

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[256] Ibid.

[257] Ibid.

[258] BBC Religions – Hinduism and Organ Donation. <http://www.bbc.co.uk/religion/religions/hinduism/hinduethics/organdonation.shtml> accessed on 05/05/2013.

[259] Ibid.

[260] Ibid.

[261] Slabbert, M & Mnyongani, F (2011) 76:2 *Koers* 271.

[262] Ibid.

4.6 Conclusion

Determining the possibility of a regulated system for organ trade which would benefit both the donor and recipient without putting either in harm's way and also respecting the dignity of the donor is not an easy task but should be seen as one which is possible. As has been shown above, the value of a kidney, for instance, fluctuates but in most cases the recipient would pay an exuberant amount of money and the donor would see an exceptionally less amount in this regard. This is not only unfair to the donor but there is also a likelihood that the amount received by him or her is insufficient to cover post-operative care and other medical follow-ups which are necessary for a person who has gone through this procedure; leaving the donor in a worse situation than before.

If there were a regulated system of organ trade, this could all be avoided or at the very least monitored. The government, in geographical regions where this would be feasible, could devise a system where there would be health or other forms of insurance which would guarantee a donor's health care after the procedure and perhaps even some form of a reward to express appreciation to the donor for saving a life. This could even be something as simple as a tax break and does not necessarily have to be in the form of money. There are various mechanisms which could be set up in place which would also prevent the possibility of exploitation of impoverished people. As mentioned above, a system similar to that of UNOS could be constructed in order to ensure that no one person gains an unfair advantage over another and that the organs are allocated according to that system.

In addition to this, there are other important considerations to take into account such as ensuring that a donor has given his informed consent and has not been coerced into donating his or her kidney. A donor needs to be advised of the possible harmful consequences of a nephrectomy and also certainty must be gathered from both parties regarding their medical history and other important information. This can all be acquired from a thorough pre-screening of both parties by a team of medical and social experts which would ensure the well-being of both parties and which would also abolish of the middle-man who is used in the black market to the disadvantage of both parties.

Since there are already laws in place worldwide which abolish organ trafficking completely and leave no room for such a system to be formulated, there would have to be a change in the country's legislation effected which would make room for this model. Public opinion is a factor considered in the promulgation of legislation and thus, a nation could conduct a survey to that effect. Several studies and surveys have already been conducted which have yielded results showing a more positive attitude in the direction towards offering compensation to donors.

Another factor hindering the possibility of such a system can be said to be religion. It has already been gathered that 84% of the world's population is a member to a particular faith and more often than not, their beliefs may affect the question as to whether they would be willing to donate an organ or not. Most religions appear to be in support of organ donation as such but there appears to be confusion as to whether it would still be accepted should there be an added incentive such as compensation. It all falls on interpretation and perhaps there is certainty needed and guidance to be given by religious leaders and scholars on the matter.

Chapter 5

Conclusion

The shortage of kidneys for transplantation has left a gaping demand, with patients at the last stage of renal failure placed on the waiting list whilst on dialysis. Despite being on dialysis, many of these patients die before being allocated an organ due to the constant increase in the number of people being placed on the waiting list. This fact, coupled with an insufficient supply of kidney donors, has led to the rise of different illegal syndicates and practices aimed at meeting this demand, thus putting donors in a more precarious situation than expected. Organ trafficking is a dilemma faced by most nations worldwide and amounts to various violations of national and international legal instruments put in place by Governments, the indignity of human beings, as well as the exploitation of poverty stricken nations by the more wealthy communities. Focus has been placed on the transplantation of kidneys from live donors to recipients in the end-stage of renal failure, rather than deceased donor transplants.

Where there is a demand for resources, there will always be individuals willing to break the law in order to meet this demand. The black market is usually the option to which people turn to when they are desperate for a life changing and fast solution. As a result, it is highly unlikely that such an illegal system can be shut down in its entirety. An alternative in this matter would be to devise a government-regulated system that would not only give people a safer option but also preserve their dignity, in the process saving a lot of lives. Such a system does pose a number of challenges, both ethically and technically; however, it should not be seen as an impossible task. There may be a way to find a balance between these hindrances and the growing need to save lives.

The ethical debate surrounding organ trafficking is that the commodification of kidneys would result in a violation of the dignity of human beings as they would thus be reduced to mere commercial items. Beauchamp and Childress[263]devised four main principles of biomedical ethics that should be seen as a guideline when dealing with the ethical debate

[263] Beauchamp & Childress (2009) 99.

surrounding organ trafficking as it covers the examination of the ethics of all biomedical research, medicine and healthcare. The principles relevant are; autonomy, non-maleficence, beneficence and justice.

The right to autonomy, which is possessed by every individual who is acting intentionally, without any controlling agents and with understanding, to make ones' own decisions and determine their own moral fate. In this regard, one should be permitted to come to a decision regarding ones' own well-being without being hindered in any way.

The principle of non-maleficence works together with the principle of beneficence. The former refers to a negative obligation not to inflict harm on others and the latter refers to a positive moral obligation to work to the benefit of others. Non-maleficence is not an absolute norm and may be overridden by compelling counter obligations. An adoption of a method of proportionality is necessary which in this instance would mean that where the benefits to the donor outweigh the risks involved, then it can be said to be morally permissible. Benefits in this regard can include a monetary benefit and not just psychological benefits or a sense of moral satisfaction.

The principle of justice, in particular distributive justice, refers to an equitable and fair distribution of that which is due to an individual. If an individual is harmed in any manner because he or she has been denied a resource, then this individual has a right to that resource. This principle can be adopted in this discussion to provide that should an individual in end stage of renal failure be declined an opportunity to compensate another for a kidney (the resource), it can be said that this can result in an injustice.

The principles devised by Beauchamp and Childress[264] are not to be taken as the only factors to be taken into account as the ethical debate holds a vast series of arguments against the trade in organs. However, they should also not be regarded as holding no ground or be ignored in anyway because the inherent rights of an individual are perhaps one of the most important factors to take into consideration.

[264] Ibid.

International instruments such as the UN Protocol, the Istanbul Declaration and WHO guidelines set a very clear indication of the attitude taken towards organ trafficking; and rightly so as the trafficking in organs does result in multitudes of infractions worldwide as well as place the lives of individuals in danger. However, an absolute abolition of the trade in organs has not been successful, in fact in some regions, such as India, the placement of national legislation which is aimed at an abolition of any form of organ trade has worsened the situation all together. South African legislation has also been ineffective. The People's Republic of China made an attempt to regulate the sale of organs regarding deceased incarcerated criminals but this only led to a blatant violation of their human rights, with reported incidences of organs being removed before prisoners had died or executions being tampered with.

The only nation which has seen some success in the regulation of organ trade can be said to be Iran, which has devised a model that allows for donors to be compensated with a reward for donating their organs. This system has shown success, not only in abolishing the 'middle-man' but also in curbing the occurrence of coercion of donors to donate their organs. Their system has revealed a significant reduction in the number of patients on the waiting list and can be seen as an example nations should strive for in this regard.

A system could be formulated which would include intensive screening in order to ensure that the informed consent of the donors has been acquired, as well as to guard against the likelihood of coercion. In terms of determining a reward, this could range from anything from tax breaks, a financial reward, or even medical or other forms of insurance. There would be no broker in this system and this would lessen the chances of recipients not being fully informed of possible outcomes and consequences, and would also provide for a more fair and equitable distribution of kidneys. Matas also suggested incorporating the technique used by UNOS in order to provide for a fair distribution system and lessen the chances of exploitation by the richer nations over the impoverished ones[265]. A change of legislation would also be necessary and studies have shown that it is possible that this would not be met with much disapproval from citizens worldwide.

[265] Matas, A et al (2008) 13 *Current Opinion in Organ Transplantation* 380.

Religion also plays a major deciding factor as there is about 84% of the world's population following some or other belief, with the three main religions being Hinduism, Islam and Christianity.[266] These three religions teach that selfless giving and altruistic acts are considered to be of great virtue. However, there may be a hindrance regarding the receipt of a reward or a form of compensation for such an act. It would thus depend on the individual himself and his decision as well as interpretation of religious scriptures and guidance from religious leaders. Clarity, of course, would have to be gathered on the matter regarding each different belief.

Therefore, despite both ethical and technical considerations towards the chance of a regulated system of organ trade being devised, it is not fair to say that this would be an impossible task. The demand for organs rises every day and a complete abolition has been proven to be ineffective. It can thus be said that measures should be considered towards finding alternative means of meeting this demand, and a regulated system may be a fruitful substitute.

[266] The Washington Times – '84% of the world population has faith; a third are Christian' <http://www.washingtontimes.com/blog/watercooler/2012/dec/23/84-percent-world-population-has-faith-third-are-ch/> accessed on 04/05/2013.

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